Operationalizing the Third Prong of the Federal Trade Commission's 2015 Statement Regarding "Unfair Methods of Competition"

HARRIS S. ROTHMAN*

Courts have long held that the Federal Trade Commission's authority to prohibit "unfair methods of competition" embraces not only the enforcement of the prohibitions of the Sherman and Clayton Acts, but also a "standalone" mandate to challenge practices that violate the spirit but not the letter of these laws. In a 2015 Statement, the Commission announced that it "is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman Act or Clayton Act is sufficient to address the competitive harm arising from the act or practice." The meaning of the "sufficient to address" condition is not immediately obvious, and the statement's critics have pointed to it as just one respect in which the statement is unhelpfully vague. Despite a recent surge in scholarship arguing that the Clayton and Sherman Acts as applied are insufficient to promote the original goals of antitrust law, scholars have not devoted extensive analysis to the interpretation of the third prong's language.

This Note argues that the third prong reflects the Commission's determination that the most appropriate use of standalone authority is to fill gaps in the "traditional" antitrust regime of the Sherman and Clayton Acts. The Note proceeds to propose a decision-making framework that the Commission could use to actuate that interpretation. Part II introduces the basic policies of the antitrust laws and the provisions of the Sherman, Clayton, and Federal Trade Commission Acts. Part III reviews the scope of the Commission's standalone authority under Section 5 of the FTC Act.

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* Articles Editor, Colum. J.L. & Soc. Probs., 2018–2019. J.D. Candidate 2019, Columbia Law School. The author is deeply grateful to Professor Tim Wu, who not only provided invaluable encouragement, insight, and feedback, but also recommended Section 5 of the Federal Trade Commission Act as an exciting frontier in antitrust enforcement and scholarship. The author would also like to thank the editors of the *Columbia Journal of Law and Social Problems* for their thoughtful comments and hard work throughout the development of this Note.

Part IV analyzes the third prong of the Commission's 2015 Statement, and argues that it is best interpreted as favoring gap-filling uses of standalone authority relative to other applications. It then develops a framework to guide the Commission in identifying legitimate gaps in the antitrust regime, identifies circumstances in which standalone enforcement may be most appropriate outside of such gaps, and demonstrates how the Commission might apply the framework in weighing a standalone complaint against Google's allegedly anticompetitive implementation of "Universal Search."

I. INTRODUCTION

Section 5 of the Federal Trade Commission Act of 1914 (the "FTC Act" or "Act") authorizes the Federal Trade Commission (the "FTC" or "Commission") to investigate and challenge "unfair methods of competition" (UMCs).[1] Commentators, courts, and FTC commissioners have widely agreed that the Commission's Section 5 authority enables it to challenge violations of the Sherman[2] and Clayton[3] Acts. The Commission may also proscribe and enjoin conduct on a "standalone" basis — that is, on the grounds that the conduct constitutes a form of unfair competition even if it does not violate the letter of either the Sherman or Clayton Acts.[4] In alleging a standalone violation of Section 5, the Commission need not prove a Sherman or Clayton Act violation, and thus need not satisfy all of the evidentiary burdens the government bears in other antitrust cases.[5]

For over a century after the FTC Act's passage, the Commission did not explain under what circumstances it would bring enforcement actions on a standalone basis.[6] Then, in

1. 15 U.S.C. § 45 (2012).
2. 15 U.S.C. §§ 1–7 (2012).
3. 15 U.S.C. §§ 12–27 (2012).
4. *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons." (citations omitted)); Intel Corp., No. 9341, 2009 WL 4999728, at *22 (F.T.C. Dec. 16, 2009) (statement of Chairman Jon Leibowitz and Commissioner Rosch defining a standalone violation as "an unfair method of competition independent of the Sherman Act"), https://www.ftc.gov/public-statements/2009/12/statement-chairman-leibowitz-commissioner-rosch-matter-intel-corporation [https://perma.cc/QYL5-ERXX].
5. Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement*, ANTITRUST SOURCE, Oct. 2015, at 12.
6. *See, e.g.*, *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 2 (2016) (statement of Joshua D. Wright, Professor, Antonin Scalia School of Law at George Mason

August 2015, the Commission issued a "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (the "UMC Statement" or "Statement").[7] The Statement announced that, in enforcing the UMC prohibition, the Commission would follow three principles, which are set forth in the Statement's three "prongs."[8] First, "the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[9] Second, "the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[10] Finally, the third prong, which is the subject of this Note, provides that the Commission will be "less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."[11]

Commentators concerned about the unpredictability of the Commission's use or potential use of standalone authority have argued that, because the Commission enjoys greater deference in identifying "unfairness" than it does in asserting a Sherman Act violation, the Commission has incentives to bring standalone actions against practices that are properly putative Sherman Act violations.[12] On this view, unrestrained use of standalone

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University), https://www.judiciary.senate.gov/download/04-05-16-wright-testimony [https://perma.cc/B9EE-JXL7] [hereinafter "Wright Statement"].

7. Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 80 Fed. Reg. 57, 056 (Sept. 21, 2015) [hereinafter "UMC Statement"].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 11 (2016) (statement of A. Douglas Melamed, Professor, Stanford Law School), https://www.judiciary.senate.gov/download/04-05-16-melamed-testimony [https://perma.cc/6X5F-WGBE] [hereinafter "Melamed Statement"] ("Broad standalone Section 5 authority threatens to diminish the FTC's contribution to the development of the antitrust laws. If the FTC has such authority, it will be sorely tempted from time to time to bring hard, uncertain, cutting edge cases in administrative proceedings rather than in federal court and under Section 5 rather than under the antitrust laws.").

enforcement cheats defendants of the benefit of the Sherman Act's more demanding standards of proof,[13] and deprives the "traditional"[14] antitrust jurisprudence of opportunities to further develop.[15] Proponents of wider standalone enforcement, on the other hand, have argued that because standalone action entails more limited and potentially better tailored remedies, the Commission may and should rely on it to challenge certain instances of bad faith conduct that require more subtle intervention than the Sherman Act would allow, even if the Commission could plausibly argue a Sherman Act violation.[16] This Note proposes an approach to resolving the tension between the need to attack gaps in the traditional antitrust regime and the fear that the Commission might also use standalone enforcement to lower the bar for proving Sherman Act violations. In interpreting the third prong of the Statement, the Commission should distinguish scenarios that are weak Sherman Act cases for case-specific reasons from practices that are typically beyond the traditional antitrust regime for structural reasons. In addition, consistent with its mission and expertise, the Commission should judiciously use standalone authority to cure competitive ills in situations where a non-standalone action might reduce competition or be disproportionately punitive.

Part II of this Note introduces the Sherman, Clayton, and FTC Acts and explains that the Commission may enforce the prohibitions of the Sherman and Clayton Acts under Section 5 of

13. Wright & Diveley, *supra* note 5, at 12.

14. The "traditional antitrust laws" is a collective term for the Sherman and Clayton Acts. *See, e.g.*, UMC Statement, *supra* note 7; Chris Butts, *The Microsoft Case 10 Years Later: Antitrust and New Leading "New Economy" Firms*, 8 NW. J. TECH. & INTELL. PROP. 275, 278 (2010); Wright & Diveley, *supra* note 5, at 1. In the context of the FTC Act, the Sherman and Clayton Acts are also sometimes referred to as "the other antitrust laws." *See* FED. TRADE COMM'N, STATEMENT ON THE ISSUANCE OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (Aug. 13, 2015), https://www.ftc.gov/public-statements/2015/08/statement-federal-trade-commission-issuance-enforcement-principles [https://perma.cc/M73J-YQWG].

15. Melamed Statement, *supra* note 12, at 12 ("Every time the FTC brings a case under such circumstances, it passes up an opportunity to help the antitrust laws evolve in a direction it thinks wise and to that extent hinders the development of those laws.").

16. *See Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (2016) [hereinafter "2016 Hearing"], https://www.youtube.com/watch?v=nco7GS1y7tw [https://perma.cc/8EVZ-UA8X], 27:40–28:10 (testimony of Tim Wu, Professor, Columbia Law School). While this Note includes the Clayton Act in referring to the traditional antitrust laws, the Sherman Act figures much more prominently here.

the FTC Act.[17] Part III explores the Commission's standalone authority under Section 5 to proscribe and enjoin conduct that does not violate the other antitrust laws, and reviews the development of the standalone regime, including the Commission's UMC Statement in 2015. Part IV argues that criticisms of the third prong as unactionably vague miss the mark, and then develops a framework to actuate the third prong and guide the Commission's identification of proper standalone enforcement targets.

II. THE ANTITRUST STATUTES

This Part introduces the federal antitrust regime. Subpart A explains that the purpose of the antitrust laws is to protect competition. Subpart B briefly describes the Sherman and Clayton Acts, the elements of their prohibitions, the remedies they provide, and the implications of the Sherman Act's private right of action. Subpart C introduces the FTC Act, particularly Section 5, which contains the Commission's enforcement mandate. Subpart D summarizes the Section 5 enforcement process, and Subpart E reviews the remedies available under Section 5, as well as the implications of standalone and non-standalone enforcement actions for subsequent private suits.

A. THE PURPOSE OF THE ANTITRUST LAWS

The common purpose of the antitrust laws — both the traditional antitrust and the FTC Act — is to protect competition.[18] Antitrust policy protects competition because the competitive process is believed to foster certain social goods: "competitive rather than monopolistic price levels; more rather than less output; innovation; minimum cost production; and the availability of free choices in the marketplace for consumers and

17. The Clayton Act also directly grants the Federal Trade Commission authority to review mergers, independent of FTC Act Section 5, 15 U.S.C. § 21(a) (2012).

18. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION: VOL. 1, at 4 (2d ed. 2000) ("Today it seems clear that the general goal of the antitrust laws is to promote 'competition' as the economist understands that term. Thus we say that the principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively, while yet permitting them to take advantage of every available economy that comes from internal or jointly created production efficiencies, or from innovation producing new processes or new or improved products.").

producers alike. All of these benefits of competition are often summed up in the shorthand term 'consumer welfare.'"[19]

Yet it is the competitive *process*, and not these derived benefits, that is the direct focus of the antitrust laws.[20] No price, however high, poses an antitrust issue if the market determined that price.[21] Similarly, no firm's market share is so high that it violates the antitrust laws, so long as the firm has driven its competitors out of business by competing more efficiently.[22] It is a common axiom that "the antitrust laws were passed for 'the protection of competition, not competitors.'"[23] Paradoxically, protecting the competitive process, but not competitors, allows the fiercest competitors to defeat their rivals, become monopolists, and set prices that do not reflect competitive restraints.[24] Indeed, the Supreme Court has confirmed that

19. Phillip Areeda, *The Rule of Reason — A Catechism on Competition*, 55 ANTITRUST L.J. 571, 572 (1986). *See also* William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Department of Justice, Address at the Seminar on Convergence: What Is Competition? (Oct. 28, 2002), https://www.justice.gov/atr/speech/what-competition [https://perma.cc/XVL8-J3YX] (defining competition as "the process by which market forces operate freely to assure that society's scarce resources are employed as efficiently as possible to maximize total economic welfare").

20. Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. 93, 100 (2017) (stating that the Sherman Act protects the sovereignty of the competitive process in determining market outcomes, and does not intervene when competition produces market outcomes, such as high prices, that are undesirable to consumers, as such outcomes tend to spur new firms to enter the market).

21. *Id.* at 102. *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213 (1940).

22. *See, e.g.*, Alaska Airlines, Inc. v. United Airlines, Inc. 948 F.2d 536, 547 (9th Cir. 1991) ("This kind of monopoly, absent 'predatory' practices to maintain it, will continue only so long as the monopolist sustains a level of efficiency or innovation such that its rivals cannot effectively compete. Because this type of monopolist behaves in an economically efficient manner, the antitrust laws do not stand as an obstacle to its existence."). *See also* Ohlhausen, *supra* note 20, at 101–102 (arguing that the elimination of less-efficient competitors, even to the point of achieving monopoly is consistent with the process of competition on the merits); Richard A. Posner, *Antitrust in the New Economy*, 63 ANTITRUST L.J. 925, 930–31 (2000) ("[A] monopolist is free to compete, whether against the competitive fringe in its monopoly market or against potential competitors, as vigorously as a firm in an ordinary competitive market would be, provided it doesn't employ tactics calculated to drive an equally or more efficient firm from the market.").

23. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)) (emphasis omitted). *See also, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85, 107 (1984); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 367 (1982); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, J. COMPETITION L. AND ECON. 133, 4 (citing HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2 (2005) ("[The] only articulated goal of the antitrust laws is to benefit consumers.").

24. *See* Ohlhausen, *supra* note 20, at 102 ("Hence, a firm can lawfully increase price, reduce output, or harm its rivals so long as it does not eliminate a constraint on its market

"[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices — at least for a short period — is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[25] As will be seen, the Sherman and Clayton Acts channel this drive to monopolize towards the promotion of consumer welfare by closing off a number of shortcuts to the carrot of supracompetitive profits — mergers to monopoly, collusion, and schemes to monopolize other than on the merits.

B. THE SHERMAN AND CLAYTON ACTS

As noted previously, the Sherman and Clayton Acts are sometimes referred to collectively, and distinguished from the FTC Act as, the "traditional antitrust laws" or the "other antitrust laws."[26] The traditional antitrust laws warrant a brief review here, because standalone enforcement, in referring to enforcement independent of these laws, is defined by reference to traditional antitrust doctrine.[27]

The Sherman Act of 1890 is "the basic statute" of the federal antitrust regime.[28] Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[29] Subsequent case law has defined Section 1 violations to require two elements: (1)

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power. Monopolists can charge whatever price the market will bear."); Posner, *supra* note 22, at 931 ("Nor is it a violation of antitrust law to charge a monopoly price, or to price discriminate in an effort to maximize monopoly profits.").

25. Verizon Communications Inc., v. Law Offices of Curtis v. Trinko LLP, 540 U.S. 398, 407 (2003). *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.").

26. *See supra* note 14.

27. *See, e.g.*, Intel Corp., No. 9341, 2009 WL 4999728 (F.T.C. Dec. 16, 2009) (statement of Chairman Jon Leibowitz and Commissioner J. Thomas Rosch), https://www.ftc.gov/public-statements/2009/12/statement-chairman-leibowitz-commissioner-rosch-matter-intel-corporation [https://perma.cc/QYL5-ERXX].

28. PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 3 (7th ed. 2013).

29. 15 U.S.C. § 1 (2012).

an agreement that (2) unreasonably restrains trade.[30] The first element excludes unilateral conduct from Section 1, because a violation requires two or more parties to agree to a scheme, whether expressly or tacitly. Invitation without acceptance does not satisfy this element.[31] Nor does Section 1 cover mere parallel conduct, as when two competitors merely follow and match one another's pricing without any agreement to do so.[32]

As the second element, "unreasonable restraint," indicates, courts have interpreted Section 1, despite its absolute language, not to proscribe all agreements that restrain trade. Antitrust law regards some types of agreements as so obviously anticompetitive in nature and effect, and therefore unreasonable, that they are illegal per se and will be condemned under Section 1 without analysis of their effects in a particular case.[33] A leading antitrust treatise observes that these per se rules "derive from judgments about reasonableness, albeit for a type of behavior rather than for a particular case."[34] Such categorically unreasonable arrangements include agreements to set, peg, or otherwise manipulate pricing,[35] as well as agreements not to compete in

30. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

31. Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Address at the George Washington University Law School Competition Law Center (Aug. 13, 2015) ("For example, we have brought a number of cases involving "invitations to collude" — that is, efforts by one competitor to reach an anticompetitive agreement with another competitor. In the absence of a consummated agreement or potential monopoly power, such conduct generally falls through the cracks of Sections 1 and 2 of the Sherman Act.").

32. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) ("conscious parallelism" is "not in itself unlawful"). *See also* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not read conspiracy out of the Sherman Act entirely."). Courts have, however, recognized parallelism as a circumstantial "plus factor" that may help to establish the existence of an agreement. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 544 (2007). *See also* AREEDA ET AL., *supra* note 28, at 214; William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law,* 110 MICH. L. REV. 393, 395 (2011).

33. *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality-they are 'illegal per se.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.").

34. Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: VOL. 7 ¶ 1500 (3d ed. 2010).

35. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign

certain product or geographic markets.[36] Tying — an arrangement whereby a seller sells one good to a buyer only if the buyer also purchases some distinct good — is subject to its own nominally "per se" rule (which, despite that label, considers the case-specific effects of a tie).[37] To the extent that the classic Section 1 "agreement" may be imagined as a conspiracy among multiple bad actors, the inclusion of tying agreements, in which consumers "agree" to buy the tied product only because they are strong-armed into doing so, seems counterintuitive. Nevertheless, Section 1's first element addresses all agreements — not only enthusiastic ones or those that harm only third parties.[38]

Outside of these per se prohibitions, courts have evaluated the reasonableness of a "restraint" by considering its effects, or likely effects, under a consumer welfare-focused cost-benefit balancing framework known as the "rule of reason."[39] The three core questions in any rule of reason analysis are, first, whether the

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commerce is illegal *per se*."); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) ("The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed.").

36. *See* Palmer v. BRG of Georgia, 498 U.S. 46, 49 n.6 (1990) (noting market division as a per se offense); United States v. Topco Assocs., 405 U.S. 596, 608 (1972) ("This Court has reiterated time and time again that '(h)orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.'" (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963)); Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing; division of markets; and tying arrangements." (citations omitted)).

37. Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12–18 (1984). *See also* United States v. Microsoft Corp., 253 F.3d 34, 54 (D.C. Cir. 2001) (per curiam) ("There are four elements to a per se tying violation: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce.").

38. 15 U.S.C. § 1 (2012).

39. The rule of reason is a three-pronged inquiry. First, the plaintiff must show that the challenged conduct causes or is likely to cause harm to competition. Next, if the plaintiff has done so, the defendant must present pro-competitive justifications for the challenged activity. Finally, the plaintiff must show that, even if the defendant has pro-competitive and pro-consumer objectives, there are alternative means of achieving the desired benefits that are less burdensome to competition. Amy Marshak, Note, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 85 N.Y.U. L. REV. 1121, 1122 (2011) (citing Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 79–80)). The Supreme Court adopted the rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), discussed *infra* note 68.

plaintiff can persuade the fact-finder that the challenged conduct harms, or is likely to harm, competition; second, whether the defendant/respondent can show that the conduct will have pro-competitive or pro-consumer effects adequate to offset the predicted harm; and third, whether the plaintiff can show a less harmful alternative manner in which the defendant/respondent could achieve the pro-competitive or pro-consumer benefits.[40]

Section 2 of the Sherman Act prohibits both "monopolization" and "attempts to monopolize."[41] The Supreme Court in *United States v. Grinnell* established a two-element standard for monopolization: "(1) the possession of 'monopoly power' in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[42] Monopoly power is essentially an extreme degree of "market power."[43] Market power, in turn, describes a firm's ability to profitably raise its prices above the competitive level.[44]

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40. Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781 (9th Cir. 1996) (holding that the rule of reason requires a showing that "the restraint is unreasonable as determined by balancing the restraint and any justifications or pro-competitive effects of the restraint"). *See also* Hovenkamp, *Rule of Reason*, *supra* note 32, at 38 n.188 (citing, *inter alia*, Microsoft, 253 F.3d at 59 ("courts routinely apply a balancing approach" requiring the plaintiff to "demonstrate that the anticompetitive harm . . . outweighs the procompetitive benefit"); Marshak, *supra* note 39, at 1122 n.3. With respect to the less burdensome alternative point, *see* Michael Luca, Tim Wu, Sebastian Couvidat, Daniel Frank & William Seltzer, *Does Google Content Degrade Google Search? Experimental Evidence* 28-32 (Harvard Business School Working Paper, No. 16-035 2015).

41. 15 U.S.C. § 2 (2012).

42. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

43. *See* Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree — monopoly power is commonly thought of as 'substantial' market power."); Deauville Corp. v. Federated Dep't Stores, Inc., 756 F.2d 1183, 1192 n.6 (5th Cir. 1985) (defining monopoly power as an "extreme degree of market power"). *See also* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 19–31 (2008), https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf [https://perma.cc/S5UP-RTTK]. *See also* Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1304 n.1 (2017) ("Sherman Act section 2 requires monopoly power (understood as a great deal of market power) . . .").

44. *See, e.g.*, Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market."); *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 277 (6th Cir. 2014) ("Market power is defined as the ability to charge a supracompetitive price — a price above a firm's marginal cost."); Richard A. Posner & William M. Landes, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) (defining market power as "the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded"). *See also* Thomas G. Krattenmaker, Robert H.

The Supreme Court has defined monopoly power as "the power to control prices or exclude competition," which "requires, of course, something greater than market power."[45] Whereas a firm with mere market power can raise its prices above the competitive price point by a modest amount, a firm with monopoly power is not constrained by competitors or their prices, and can set its prices subject only to consumers' willingness to pay for the product. Monopoly power analysis entails a consideration of a defendant's market share and the extent of barriers to entry in the relevant market.[46] Courts will rarely find monopoly power if a defendant's market share is less than seventy percent.[47]

As to the second element of Section 2 monopolization, a great range of behaviors accomplish the "willful acquisition or maintenance" of monopoly power.[48] This element is often referred to as "exclusionary conduct" or "anticompetitive conduct."[49] Refusals to deal,[50] tying,[51] and predatory pricing,[52] for

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Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 245–249 (1987).

45. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992).

46. U.S. DEP'T OF JUSTICE, *supra* note 43, at 19–31, Barriers to an existing competitor's expansion of output may also be relevant. *See also* AM. BAR ASS'N SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS: VOL. 1, at 231 (6th ed. 2007).

47. *See* U.S. DEP'T OF JUSTICE, *supra* note 43, at 21, (citing Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam)). *See also* Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) (to establish "monopoly power, lower courts generally require a minimum market share of between 70% and 80%"). *But see* Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 COMPETITION POL'Y INT'L 3, 4 (2007) (criticizing judicial over-reliance on market share in market power analysis, and stating that "market shares are a very imprecise way of characterizing competition and are, at most, the beginning point for an analysis, not the endpoint").

48. Lepage's, Inc. v. 3M, 324 F.3d 141, 152 (3d Cir. 2003) (en banc) ("'anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties" (quoting Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998)).

49. *See, e.g.*, U.S. DEP'T OF JUSTICE, *supra* note 43, at 5–18.

50. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (finding a dominant ski operator's effective refusal to continue offering access to its slopes in a multi-slope pass covering both its slopes and those of its competitor was actionable exclusion under Sherman Act Section 2).

51. *See, e.g.*, *Lepage's*, 324 F.3d at 159 (finding a rebate that strongly incentivized buyers of transparent tape to deal exclusively with 3M or forfeit "substantial discounts" was actionable exclusion).

52. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224–29 (1993) (indicating that Section 2 liability for predatory pricing is possible, but that a plaintiff advancing such a claim must prove, first, "that the prices complained of are below an appropriate measure of its rival's costs" and second, that the defendant had "a dangerous probability of recouping its investment in below-cost prices," and holding that

example, may constitute anticompetitive conduct. Despite the Supreme Court's use of the term "willful" in *Grinnell*, "[e]vidence of the intent behind the conduct of a monopolist is relevant [to a monopolization charge] only to the extent it helps [courts] understand the likely effect of the monopolist's conduct."[53]

The second class of Section 2 violation, *attempted* monopolization, has three elements: "(1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power."[54] The United States Department of Justice (DOJ) has at times challenged unaccepted invitations to collude (which, as noted, do not constitute agreements violative of Section 1) as attempts to monopolize in violation of Sherman Section 2.[55] But the attempted monopolization charge cannot bring all invitations to collude into the reach of the Sherman Act, partly because not all agreements would imply a dangerous probability of achieving monopoly power if the invitee accepted.[56]

Sherman Act remedies are strong medicine. First, violations of the Sherman Act are criminal and may be punishable by up to ten years' imprisonment.[57] Second, to encourage private parties

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the plaintiff at bar had failed to demonstrate either below-cost pricing or dangerous probability of recoupment).

53. United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001). *See also* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"). In contrast, intent to monopolize is an element of attempted monopolization. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

54. *Spectrum Sports*, 506 U.S. at 456. *See also* U.S. DEP'T OF JUSTICE, *supra* note 43, at 5–18. Functionally, the definition of "anticompetitive conduct" may be somewhat narrower for an aspiring monopolist than for a current monopolist, insofar as some types of conduct may require greater market power to harm competition.

55. *See, e.g.*, United States v. Am. Airlines 743 F.2d 1114, 1120 (5th Cir. 1984).

56. *See* Ramirez, *supra* note 31, at 5 ("In the absence of a consummated agreement or potential monopoly power, such conduct generally falls through the cracks of Sections 1 and 2 of the Sherman Act.").

57. 15 U.S.C. § 1 (2012) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."). Congress in 1974 amended the Sherman Act to substantially increase the penalties provided in § 1 (and also in §§ 2 and 3). 88 Stat. 1706, 1708, cited in AREEDA ET AL., *supra* note 28, at 955 n.4. Prior to such amendment, violations were misdemeanors and the maximum monetary penalty was $50,000, with no distinction between corporate and individual violators. *Id.* While the Sherman Act provides that all violations are felonies, the DOJ typically does not prosecute Section 2 violations criminally. U.S. DEP'T OF JUSTICE, AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 4 (2005), https://www.justice.gov/atr/antitrust-primer-federal-law-enforcement-personnel-revised-april-2005 [https://perma.cc/8YCQ-ZU94].

to participate in the enforcement of the Act's prohibitions and reinforce its deterrent effect, the Sherman Act creates a private right of action and allows private plaintiffs to recover treble damages.[58] Furthermore, in any antitrust suit brought by the DOJ, a final judgment that a defendant has violated the antitrust laws constitutes prima facie evidence in all later proceedings against that defendant that the defendant did, in fact, commit that violation.[59] Thus, an opportunistic private plaintiff may wait until the DOJ has prevailed in a Sherman Act claim, thus establishing prima facie liability, and then file a private claim seeking treble damages against a defendant who is collaterally estopped from disputing the violation.[60]

The Clayton Act, enacted in 1914, outlaws mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[61] As amended, the Clayton Act requires that the parties pursuing a merger or acquisition notify both antitrust agencies (the Commission and the DOJ) and observe a waiting period before consummating the transaction.[62] The antitrust agencies may use this time to investigate the transaction and potentially seek to block the transaction by bringing suit to enjoin the merger or acquisition.[63] Courts reviewing such a transaction under Section 7 of the Clayton Act consider whether it would increase the concentration of the market to a degree that threatens to facilitate coordination and dull competition — assuming the merger would not create a monopoly outright.[64] The Clayton Act's text gives standing to "any" injured person, and thus in theory, private parties injured by a merger or acquisition prohibited by the Act ought to have standing.[65] In practice, however, courts have been reluctant to

58. *See generally*, AREEDA ET AL., *supra* note 28, at 59–61.

59. 15 U.S.C. § 16(a) (2012).

60. *See generally*, AREEDA ET AL., *supra* note 28, at 59–61. Defendants generally are jointly and severally liable and may not seek contribution from fellow violators. *Id.* at 60–61.

61. 15 U.S.C. § 18 (2012). The Clayton Act was enacted in October 1914, less than a month after the passage of the FTC Act.

62. 15 U.S.C. § 18(a) (2012).

63. *Id. See also* AREEDA ET AL., *supra* note 28, at 766.

64. *See, e.g.*, United States v. H & R Block, Inc. 833 F. Supp.2d 36, 77 (D.D.C. 2011) ("Merger law rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." (citations omitted)).

65. 15 U.S.C. § 15(a) (2012). *See also* AREEDA ET AL., *supra* note 28, at 67.

allow private plaintiffs to recover for violations of the Clayton Act.[66]

C. THE FEDERAL TRADE COMMISSION AND THE FTC ACT

Congress enacted the FTC Act in 1914[67] in the wake of widespread criticism of the Supreme Court's decision in *Standard Oil v. United States*,[68] which tempered the force of the Sherman Act by adopting the rule of reason.[69] Proponents of the Act sought to prohibit conduct that the earlier Sherman Act had not banned.[70] The Act created the Federal Trade Commission and, in Section 5, prohibited "unfair methods of competition in or affecting commerce" and empowered the Commission to enforce that prohibition.[71] Courts have long acknowledged that the Commission may use its Section 5 UMC authority to enforce the prohibitions of the Sherman Act.[72] But the Supreme Court has

66. *See, e.g.*, Bailey's Bakery Ltd. v. Continental Baking Co., 235 F. Supp 705, 717 (D. Haw. 1964) (rejecting the availability of private recovery under Section 7 of the Clayton Act because Section 7 addresses the "future monopolistic and restraining tendencies of corporate acquisition," and observing that "any damages claimed for such a prospective restraint of trade would be purely speculative"); Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 738 n.3 (8th Cir 1964). *But cf.* Gottesman v. General Motors Corp., 414 F.2d 956, 961 (2d Cir. 1969) (holding that if a Section 7 violation's threat to competition "ripens into reality," a private cause of action may lie), *cert. denied,* 403 U.S. 911 (1971); Sherry R. Feinsmith, *Treble Damage Actions for Violation of Section 7 of the Clayton Act: The View After Gottesman v. General Motors*, 1 LOY. U. CHI. L.J. 298 (1970).

67. 38 Stat. 717 (1914), codified as amended, 15 U.S.C. §§ 41–58 (2012). For a discussion of historical amendments to the FTC Act, *see* AREEDA ET AL., *supra* note 28, at 976 n.1.

68. Standard Oil Co. v. United States, 221 U.S. 1 (1911). The Court unanimously agreed that Standard Oil had violated Sections 1 and 2 of the Sherman Act, but Justice Harlan in dissent criticized the majority's adoption of the rule of reason as inconsistent with the absolute language of the Sherman Act's prohibitions.

69. Marshak, *supra* note 39, at 1127.

70. 51 CONG. REC. 12,454 (1914) (statement of Sen. Cummins) (stating the proposed FTC Act aimed to "make some things offenses that are not now condemned by the antitrust law").

71. 15 U.S.C. § 45 (2012). Note that Congress amended Section 5 in 1938 to add a prohibition against "unfair or deceptive acts or practices in or affecting commerce." Federal Trade Commission Act, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. §§ 41–58 (2012)). Except where explicitly indicated, this Note addresses only the UMC mandate.

72. *See* Marshak, *supra* note 39, at 1131 ("The FTC's authority under section 5 to pursue violations of the Sherman Act as unfair methods of competition is well established. When the Commission brings a Sherman Act claim, it is held to the same legal standard as the Department of Justice or a private plaintiff to prove each element of a Sherman Act violation."). Note that violations of the Clayton Act are also unfair methods of competition, and thus the Commission may challenge them as such under Section 5 of the FTC Act (as well as Section 7 of the Clayton Act). *See* UMC Statement, *supra* note 7

also held that the FTC Act was intended to "hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages."[73] Thus, the Commission can and does use Section 5 to attack anticompetitive practices as "standalone" violations of the UMC prohibition — that is, to challenge these practices essentially on the grounds that they violate the spirit and policies of the traditional antitrust laws, even if they do not violate the letter of those laws.[74]

D. THE SECTION 5 ENFORCEMENT PROCESS

An understanding of the Commission's Section 5 enforcement process illuminates the arguments for and against a broad reading of the Commission's standalone authority under Section 5 of the FTC Act. Accordingly, this Subpart provides a brief overview of the Section 5 enforcement process.[75]

Pursuant to the Act, the Commission continually gathers information on the activities of individuals and businesses engaged in commerce.[76] When the commissioners have "reason to believe" that an actor is violating or about to violate the antitrust laws, either on a traditional or standalone basis, they may vote to

("Section 5's ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman *or Clayton Act* . . .") (emphasis added).

73. FTC v. Cement Inst., 333 U.S. 683, 693 (1948). Even earlier, the Court had afforded the Commission extensive discretion to define unfair methods of competition. *See, e.g.*, FTC v. RF Keppel & Bros., Inc., 291 U.S. 304 (1934) (upholding the Commission's condemnation as a standalone UMC violation of a candy manufacturer's practice of offering what amounted to chance-based rebates to some candy buyers, because it pressured competitors to either lose business or adopt a "dishonest practice" that encouraged gambling among children). *RF Keppel & Bros.* offers a striking example of courts' recognition of the robustness of standalone authority, but is thoroughly inconsistent with the Commission's practice in recent decades. *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 946 (2010); Marshak, *supra* note 39, at 1132.

74. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972). *See also How the Federal Trade Commission Works to Promote Competition and Benefit Consumers in a Dynamic Economy: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 111th Cong. 11 (2010) (statement of Jon Leibowitz, Chairman, Fed. Trade Comm'n) https://www.judiciary.senate.gov/download/testimony-of-leibowitz.pdf [https://perma.cc/5K77-V6TH].

75. *See generally* Fed. Trade Comm'n, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority* (July 2008), https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/3MKU-F767]; Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?* 12 J. L. & ECON. 623, 633.

76. 15 U.S.C. § 46(a) (2012).

issue a complaint against the respondent. In an administrative hearing, the Commission's counsel litigates against the respondent before an administrative law judge (ALJ).[77] More often than not, the respondent will settle the charges against it by a negotiated consent order.[78]

If the parties do not settle beforehand, the ALJ issues an initial decision recommending either dismissal or the entry of a cease and desist order.[79] Either party may appeal the ALJ's decision to the full Commission (i.e. to the commissioners themselves).[80] The Commission reviews the ALJ's findings of fact and conclusions of law de novo.[81] When the Commission reaches a decision, it issues its own "final order" to the respondent.[82] The respondent may appeal that order to the federal court of appeals for any circuit in which the respondent resides, does business, or employed the challenged practice.[83]

Even with the availability of judicial review as a procedural safeguard, the Commission's authority to exercise de novo review in a matter it both initiated and litigated has raised concerns about procedural fairness.[84] In recent decades, the Commission has found for itself in almost every matter appealed to it, whether

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77. In hearings before the ALJ, "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a) (2011). "Administrative law judge" refers generally to the presiding official in the administrative proceeding. While a member of the Office of Administrative Law Judges may preside, commissioners may also do so. *See* Order Designating Administrative Law Judge, Whole Foods Market, Inc., Docket No. 9324 (Oct. 20, 2008), at 1 n.2 (citing 16 C.F.R. § 3.42 (2015)).

78. Consent orders are negotiated between respondents and Commission counsel. The Commission may accept or reject the proposed agreement. 16 C.F.R. § 2.34(a) (1999). If it approves, it will place the proposal in the public domain for 30 days for public comment. 16 C.F.R. § 2.34(c) (1999). After the comment period, the Commission may, if it deems appropriate, withdraw its approval of the proposed agreement. 16 C.F.R. § 2.34(e) (1999). For criticism of the heavy use of consent agreements in the Section 5 administrative litigation process, *see, e.g.*, Joshua D. Wright, *The FTC, Unfair Methods of Competition, and Abuse of Prosecutorial Discretion*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 351, 354–55 (Dean Reuter & John Yoo eds., 2016).

79. Fed. Trade Comm'n, *supra* note 75.

80. *Id.*

81. *See, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986); Realcomp II, Ltd., 2009 FTC LEXIS 250, at *37 n.11 (Oct. 30, 2009). *See also* Ohlhausen, *supra* note 75, at 642.

82. Fed. Trade Comm'n, *supra* note 75.

83. Federal Trade Commission Act, Section 5(b), 15 U.S.C. § 45(c) (2012).

84. *See*, *e.g.*, Wright, *supra* note 78; Malcolm B. Coate & Andrew N. Kleit, *Does It Matter that the Prosecutor Is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 MANAGERIAL & DECISION ECON. 1 (1998).

by affirming or reversing initial ALJ decisions.[85] Commentators, including those who have served as commissioners, debate whether the Commission meaningfully reviews the ALJ's opinions and evaluates the strength of the parties' arguments objectively, or whether the Commission always finds in its own favor due to bias.[86] Not unrelatedly, it has been argued that the Commission's procedural advantages compound uncertainty as to the scope of UMC authority in chilling respondents' willingness to defend themselves in administrative litigation.[87]

E. SECTION 5 REMEDIES

Although Section 5 of the FTC Act empowers the Commission to bring enforcement actions whenever the Sherman Act would allow the DOJ to do so, Section 5 does not give the Commission access to the full range of remedies that the DOJ may seek to impose. The FTC Act provides only for equitable remedies, and although the Commission may impose continuing restraints and even require disgorgement under certain circumstances, it cannot break up monopolized industries, nor can it impose criminal sanctions.[88] In addition, the FTC Act does not itself create a

85. Coate & Kleit, *supra* note 84. *See also* Wright Statement, *supra* note 6, at 21; Ohlhausen, *supra* note 75, at 636.

86. *See*, *e.g.*, Wright, *supra* note 78; Coate & Kleit, *supra* note 84; Wright Statement, *supra* note 6, at 21 (observing that the Commission had found in its favor "approximately 100 percent of the time" over the prior three decades, and arguing that the Commission's success rate is too high to be plausibly explained by intelligent case selection). Other commentators have critiqued Wright's suggestion that the Commission rubber-stamps its initial findings. Commissioner Maureen K. Ohlhausen pointed out that over the past three decades, the number of FTC competition cases has fallen at the same time as the rate at which the Commission has imposed liability in cases it authorized (that is, agreed with its own initial determination that the conduct challenged was a UMC) has increased. *See* Ohlhausen, *supra* note 75, at 636. Ohlhausen asserts that superior case selection, rather than systemic bias, explains the correlation among the Commission's falling number of competition cases, more frequent findings of liability in these cases, and improving success rate on appeal. *Id.* at 646–47.

87. *See*, *e.g.*, Wright, *supra* note 78, at 358 ("The apparent procedural advantages, coupled with the vague and unbounded potential scope of the FTC's UMC authority, give businesses the incentive to settle Section 5 claims rather than going through lengthy and costly administrative litigation in which they are both deprived of any predictability of statutory interpretation and must confront a tribunal whose history predicts it will rule against them").

88. *See* Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases 2 n.6 (Jul. 31, 2012) ("In addition to violating the federal antitrust statutes, anticompetitive conduct generally — and novel conduct in particular — may at times constitute a stand-alone violation of Section 5 of the FTC Act. The scope of the Commission's Section 5 enforcement authority is inherently

private right of action.[89] Moreover, no determination by the Commission, whether based on violations of the traditional antitrust laws or on standalone violations, will trigger collateral estoppel so as to arm private plaintiffs with a prima facie case.[90] That said, a Section 5 enforcement action successfully alleging a violation of the prohibitions of the Sherman Act is likely to attract the attention of the plaintiffs' bar and may be more likely than a successful standalone action to spark a wave of speculative private claims for treble damages.[91]

As former Commission Chairman Jon Leibowitz has observed, the aggregate consequences of standalone enforcement have generally been "relatively mild."[92] Beyond the FTC Act's hard limits on Section 5 remedies, the Commission has opted to take a particularly light touch in remedying standalone violations.[93] For example, the Commission has disavowed monetary equitable remedies (such as disgorgement and restitution) in standalone matters, whereas it has shown greater openness to pursuing disgorgement in non-standalone enforcement actions.[94]

Second, and at least as importantly, a standalone complaint does not make the respondent as attractive a target as a non-standalone respondent in the eyes of the private bar.[95] This is because private plaintiffs cannot sue under the FTC Act as they

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broader than the antitrust laws, in keeping with Congressional intent to create an agency that would couple expansive jurisdiction with more limited and, typically, forward-looking remedies. We do not intend to use monetary equitable remedies in stand-alone Section 5 matters."). *See also* Rambus, Inc., No. 9302, 11–12 (2006) (concurring opinion of Commissioner Jon Leibowitz), https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf [https://perma.cc/V6ET-6PQ4] [hereinafter "Rambus Concurrence"].

89. Rambus Concurrence, *supra* note 88, at 12.

90. 15 U.S.C. § 16(a) (2012).

91. *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Apr. 5, 2016) (statement of Amanda P. Reeves, Partner, Latham & Watkins LLP), https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Reeves%20Testimony.pdf [https://perma.cc/SM5M-AHB9] [hereinafter "Reeves Statement"].

92. Rambus Concurrence, *supra* note 88, at 12.

93. *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Apr. 5, 2016) (statement of Tim Wu, Professor, Columbia Law School), https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Wu%20Testimony.pdf [https://perma.cc/KT29-Q3BD] [hereinafter "Wu Statement"].

94. Fed. Trade Comm'n, *supra* note 88, at 2 n.6.

95. Rambus Concurrence, *supra* note 88, at 12. *See* also Reeves Statement, *supra* note 91, at 11.

can under the Sherman Act, and a standalone violation is not proof of a Sherman Act violation.[96]

III. SCOPE OF THE COMMISSION'S STANDALONE AUTHORITY

As noted previously, the Supreme Court has articulated a broad reading of Section 5 of the FTC Act, recognizing the Commission's authority to "hit at every trade practice . . . which restrain[s] competition or might lead to such restraint if not stopped in its incipient stages."[97] However, the Commission's standalone authority is subject to limiting principles. Subpart A of now describes the legal constraints on this authority, which predate the issuance of the UMC Statement. Subpart B turns to the Statement and lays out its three prongs.

A. LEGAL CONSTRAINTS

The Commission's UMC authority is bounded by the policies of the antitrust laws.[98] Through the 1970s, courts afforded the Commission substantial deference to construe and apply those basic policies to challenge business practices as unfair, and thus the Commission was relatively unfettered in exercising its UMC authority.[99]

Courts of appeals in the 1980s began to express and enforce more substantial limits on the scope of standalone enforcement. A trilogy of appellate decisions early in that decade rejected

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96. Rambus Concurrence, *supra* note 88, at 12.

97. FTC v. Cement Inst., 333 U.S. 683, at 693 (1948).

98. E.I. du Pont de Nemours & Co. v. FTC (*Ethyl*), 729 F.2d 128, 136–37 (2d Cir. 1984). *See also* Gen. Foods Corp., 103 F.T.C. 204, 366 (1984) (statement of the Federal Trade Commission) (the Commission stating that "[w]hile Section 5 may empower the Commission to pursue those activities which offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed"). *But cf.* FTC v. Sperry & Hutchinson Trading Stamp Co., 405 U.S. 233, at 244 (1972) for an earlier, substantially broader construction of the Commission's mandate to further good public policy based on values not embedded in the antitrust laws.

99. *See* Wu Statement, *supra* note 93, at 34 (suggesting that the Commission's earlier enforcement agenda was consistent with Congress' original intention to create a very broad enforcement mandate). *See also, e.g.*, Sperry & Hutchinson, 405 U.S. at 244; Atlantic Refining Co. v. FTC, 381 U.S. 357, 367–68 (1965). *But see* FTC v. Raladam Co., 283 U.S. 643, 649 (1931) (holding that Section 5 only gives the Commission jurisdiction to proscribe conduct as unfair where the respondent has present or potential competitors). The Supreme Court in *Sperry & Hutchinson* criticized *Raladam*'s limiting principle, and concluded that it was no longer good law. 405 U.S. at 243–244.

enforcement of the Commission's final orders condemning certain unilateral business practices as unfair methods of competition.[100] This in turn led to a narrowing of the scope of standalone enforcement in practice.[101]

In *Boise Cascade Corp. v. FTC*, the Ninth Circuit reviewed a Commission order finding that manufacturers of plywood had violated Section 5's standalone UMC prohibition by adopting a uniform system of "delivered pricing" that was based not on each manufacturer's distance from a given buyer, but rather on the distance to the buyer from an industry-standard location in Portland, Oregon.[102] The court refused to enforce the order, holding that "the Commission must find either collusion or actual effect on competition to make out a Section 5 violation for use of delivered pricing."[103]

In *Official Airline Guides, Inc. v. FTC*, the Commission imposed liability on a monopolist publisher of airline flight information that had excluded commuter airlines' flights from its publications.[104] The publisher appealed the order to the Second Circuit. The court held that "even a monopolist, as long as he has no purpose to restrain competition or to enhance or expand his monopoly, and does not act coercively, retains [the right to refuse to deal with other firms]," and determined that the Commission had failed to prove either (a) a connection between the defendant flight publisher's actions and the preservation and expansion of its monopoly, or (b) that the defendant had acted coercively by refusing to publish flight schedules for commuter airlines.[105]

Finally, in *E.I. du Pont de Nemours & Co. v. FTC* (commonly referred to as "*Ethyl*"), the Commission brought a standalone action against four large producers of gasoline additive that it alleged had adopted practices that "facilitated" price coordination

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100. *Ethyl*, 729 F.2d 128; Official Airline Guides, Inc. v. FTC (*OAG*), 630 F.2d 920 (2d Cir. 1980); Boise Cascade Corp. v. Fed. Trade Comm'n, 637 F.2d 573 (9th Cir. 1980). *But see* Rambus Concurrence, *supra* note 88, at 7–9 (arguing that *Boise Cascade*, *Official Airline Guides*, and *Ethyl* have all been misunderstood and their impact exaggerated, because the decisions turned on evidentiary defects, and did not reject the Commission's interpretation of the FTC Act).

101. *See* Wu Statement, *supra* note 93, at 4 (stating that "[o]ver the last few decades — beginning in the late 1980s — reacting both to a changing zeitgeist and feedback from the Courts of Appeals, the Commission has taken a far more restrained and limited approach").

102. *Boise Cascade*, 637 F.2d at 582.

103. *Id.*

104. *OAG,* 630 F.2d at 927–28.

105. *Id.*

among competitors.[106] Here, the Second Circuit again rejected the Commission's final order and held that in an oligopolistic industry, absent a tacit agreement, labeling a business practice as a UMC would require "at least some indicia of oppressiveness . . . such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct."[107]

Partly in response to this judicial pushback against aggressive uses of Section 5 in these cases of unilateral conduct, and partly in response to a broader sea change in antitrust law, the Commission began in the later 1980s to bring standalone claims less frequently and more conservatively.[108] Since then, the Commission's standalone actions have focused on two broad families of conduct: practices that violate the spirit but evade the reach of the traditional antitrust laws (the classic example, as discussed, being unaccepted invitations to collude) and schemes that pervert competition-facilitating institutions to anticompetitive ends (principally abuses of industry standard-setting processes).[109] Professor Tim Wu has observed that the Commission has in recent practice used Section 5 to attack conduct that is more "flagrant, nefarious, deceptive, [and] coercive," than a typical violation of the traditional antitrust laws.[110] As an example, he discussed the previously-closed FTC investigation relating to Google's practice of manipulating local search results to privilege Google content, the consumer harms

106. E.I. du Pont de Nemours & Co. v. FTC (*Ethyl*), 729 F.2d 128, 139 (2d Cir. 1984).

107. *Id.*

108. *See* Wu Statement, *supra* note 93, at 4. *See also* Ohlhausen, *supra* note 75, at 633–35 (describing a continuing trend of declining standalone action frequency in more recent decades). *But see* Rambus Concurrence, *supra* note 88, at 7–9 (stating that "[n]one of these cases significantly constrains the FTC's authority to apply Section 5 to violations of the policies that underlie the antitrust statutes or that cause actual or incipient antitrust injury," and construing *Boise*, *OAG*, and *Ethyl* as reflecting case-specific evidentiary defects).

109. Wu Statement, *supra* note 93, at 6–7 (observing that defendants in the latter category unilaterally "subvert or manipulate essential processes, like standard setting, the patent system, industry benchmarking or others, to foreclose competition in a manner lacking any pro-competitive efficiencies"). Industry-wide standards may be have procompetitive effects to the extent that they "lower the cost to consumers of switching between competing products and services, thereby enhancing competition among suppliers." Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 309 (3d Cir. 2007). But note Wu's point that standalone enforcement is useful to address unusually minor behaviors as well as unusually nefarious ones, *infra* note 191. *See* Marshak, *supra* note 39, at 1135.

110. 2016 Hearing, *supra* note 16, at 35:39–36:20 (testimony of Professor Wu); Wu Statement, *supra* note 93, at 9.

from which had become more apparent since the close of the investigation.[111]

The Supreme Court has not reviewed the limiting principles laid down in the *Boise Cascade-OAG-Ethyl* line of cases.[112] More generally, between the Commission's conservative case selection in response to judicial pushback in the 1980s,[113] and the tendency of its actions to generate consents rather than judicial precedent, federal courts have not opined squarely on the scope of UMC in over two decades.[114] Meanwhile, commissioners' own efforts to define the scope of UMC enforcement did not bear fruit until recently.[115]

B. THE 2015 STATEMENT ON SECTION 5 ENFORCEMENT PRINCIPLES

In August 2015, a bipartisan 4-1 majority of the Commission issued the UMC Statement.[116] Although the Statement did not go so far as to define "unfair methods of competition," it linked the Commission's enforcement decision-making to well-understood principles of antitrust law.[117] The Statement has been controversial since its inception.[118] Commissioner Maureen K. Ohlhausen, in a lone dissent from the Statement, became the first to criticize the new guidance as unclear and inadequate to reduce uncertainty and avoid chilling legitimate competitive conduct.[119]

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111. 2016 Hearing, *supra* note 16, at 1:15:07–1:18:50. *See generally* Luca et al., *supra* note 40.

112. *See* Marshak, *supra* note 39, at 1135.

113. *See* Wu Statement, *supra* note 93, at 4.

114. *See* Wright, *supra* note 78, at 354. *See also* Notice of Public Workshop Concerning the Prohibition of Unfair Methods of Competition in Section 5 of the Federal Trade Commission Act, 73 Fed. Reg. 50,818, 50,818–19 (Aug. 28, 2008) [hereinafter "Notice of 2008 Workshop"], https://www.gpo.gov/fdsys/pkg/FR-2008-08-28/pdf/E8-20008.pdf [https://perma.cc/874Q-9ZAJ].

115. Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1, 1 (2013). *See also* Notice of 2008 Workshop, *supra* note 114.

116. UMC Statement, *supra* note 7, at 57,056–59.

117. Wright Statement, *supra* note 6, at 9–10; Lindsey M. Edwards, Note, *Does the Federal Trade Commission's Section 5 Statement Impose Limits on the Commission's Unfair Methods of Competition Authority?*, 13 J.L. ECON. & POL'Y 243, 248 (2017).

118. Lawrence J. Spiwak, *FTC Misses Mark with New 'Unfair Methods of Competition' Statement*, THE HILL (Sept. 22, 2015), https://www.thehill.com/blogs/pundits-blog/technology/254463-ftc-misses-mark-with-new-unfair-methods-of-competition [https://perma.cc/ZAB3-TUVP].

119. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, UMC Statement, *supra* note 7, at 57,057 [hereinafter "Ohlhausen Dissent"].

Competition enforcement has important implications for businesses and consumers alike, so that interest in the Statement has extended beyond commissioners and antitrust scholars. On April 5, 2016, the United States Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing on the Commission's UMC authority. The Subcommittee heard from four witnesses: professor and former Commissioner Joshua Wright, law professors Douglas Melamed and Tim Wu, and Latham & Watkins partner Amanda Reeves. Each of these experts also submitted written testimony in connection with the hearing, as did Commissioner Ohlhausen.[120]

As noted previously, the UMC Statement sets out three principles guiding the Commission's decision-making about whether to challenge a practice as a UMC. First, "[t]he Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[121] Second, "[t]he act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications."[122] The third prong, the focus of this Note, states that "[t]he Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."[123] Conforming the Commission's enforcement actions to this announcement requires grappling with the ambiguous language of the third prong.

IV. INTERPRETING AND OPERATIONALIZING THE THIRD PRONG

The foregoing discussion of the legal scope of standalone authority frames the core questions of this Note: assuming the Commission has satisfied itself with respect to the first and second prongs of the UMC Statement, when *should* the

120. Wright Statement, *supra* note 6; Melamed Statement, *supra* note 12; Wu Statement, *supra* note 93; Reeves Statement, *supra* note 91; 2016 Hearing, *supra* note 16.
121. UMC Statement, *supra* note 7, at 57,056–59.
122. *Id.*
123. *Id.*

Commission interpret the third prong to disfavor standalone enforcement, and when is it appropriate for the Commission to exercise its standalone authority even if it is presumptively disfavored?

Subpart A now proposes a framework to help guide the Commission's thinking as it considers its enforcement options. The proposed framework divides potential standalone enforcement targets into two categories. Cases in the first category, discussed in Subpart B, represent types of anticompetitive practices and situations that the Sherman and Clayton Acts cannot reach for some structural reason, such that they inhabit meaningful "gaps" in the traditional antitrust regime. These situations reflect a recurring need for some solution other than traditional antitrust enforcement. This Note argues that in such cases, the third prong gives the Commission a "green light" to bring standalone challenges. Subpart C addresses a second category of conduct: practices of a kind that are normally within the reach of the traditional antitrust laws. Anticompetitive conduct falls in this category if the Commission concludes either that it could challenge the conduct as a Sherman or Clayton Act violation with reasonable chances of success, or that the only reason such a challenge would fail is due to some case-specific, one-off evidentiary deficiency. The third prong of the UMC Statement disfavors but does not foreclose the Commission's use of standalone authority in these "yellow light" cases, and this Note offers examples of situations that may justify bringing such cases on a standalone theory. Finally, Subpart D offers an illustration of this framework in practice, as applied to Google's allegedly anticompetitive manipulation of search results.

A. THE MEANING OF "SUFFICIENT TO ADDRESS" AND "LESS LIKELY"

The Statement's third prong provides that "the Commission is *less likely* to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is *sufficient to address the competitive harm* arising from the act or practice."[124] The "sufficient to address" language has drawn sharply contrasting assessments. Some

124. UMC Statement, *supra* note 7, at 57,056 (emphasis added).

commentators have attacked it as too vague to be valuable.[125] Others have assessed its potential effectiveness as a constraining tool, without discussing its meaning or how the Commission might reason its way to determinations about whether the traditional antitrust laws are, in fact, sufficient.[126]

In his April 2016 statement before the Senate Subcommittee on Antitrust, Competition, Policy, and Consumer Rights, Professor A. Douglas Melamed, who falls in the former camp, identified several potential meanings by way of emphasizing the third prong's ambiguity:

> [D]oes this ["sufficient to address"] mean that the FTC will not bring a standalone Section 5 case if the Sherman Act or Clayton Act can reasonably be construed to prohibit the conduct at issue? Or does it mean only that the FTC will not bring such a case if it is confident under settled precedent that the conduct will be found to violate the Sherman Act or the Clayton Act? In other words, does this statement mean that the FTC can bring standalone Section 5 cases challenging conduct that is plainly subject to the Sherman Act or the Clayton Acts whenever the FTC disagrees with the pertinent judicial decisions construing those statutes?[127]

The answer to Melamed's final question must be "no." Having issued a Statement that aimed to make UMC enforcement more predictable by linking it to well-understood concepts from

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125. Melamed Statement, *supra* note 12, at 5; *Section 5 and "Unfair Methods of Competition": Protecting Competition or Increasing Uncertainty: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 5 (Apr. 5, 2016) (statement of Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n.), https://www.ftc.gov/system/files/documents/public_statements/943963/160405section5testimony.pdf [https://perma.cc/WJP9-E827] [hereinafter "Ohlhausen Statement"] (arguing that the "less likely" language "leaves the Commission with a tremendous amount of leeway to pursue Section 5 claims when the antitrust laws have already established the boundaries of legal conduct"); Ohlhausen Dissent, *supra* note 119, at 57,057 n.8 ("The brief majority statement that accompanies the policy statement does not meaningfully add to its contents. For example, how will the Commission determine that the antitrust laws are not 'sufficient' or 'appropriate'? When will the Commission use a traditional rule of reason analysis, and when will it use Section 5 'in a manner similar to the case-by-case development of the other antitrust laws?'") *Cf.* Wu Statement, *supra* note 93, at 2 ("how 'certain' is it exactly what antitrust laws like Section 2 of the Sherman Act make illegal?").

126. *See, e.g.*, Edwards, *supra* note 117.

127. Melamed Statement, *supra* note 12, at 8.

traditional antitrust law, the Commission would undermine the value of the Statement if it were to adopt a substantially narrower view of the Sherman Act's scope and sufficiency than courts have articulated.

Overtly disregarding precedent in applying the third prong would be not only cynical, but also unwise. As former Commissioner Joshua Wright has noted, the Statement curbs the Commission's procedural and institutional advantages over respondents in the administrative litigation process by imposing "soft constraints" that make overreaches costly."[128] When the Commission brings a standalone claim to avoid a tough Sherman or Clayton Act case, or otherwise "go[es] too far," the third prong gives litigants, judges, dissenting commissioners, and Congress something to point to "as evidence that commission decisions merit reduced deference or greater scrutiny — or that Congress needs to rein in the commission's too-expansive power."[129] If, as Melamed fears, the Commission were to take the view that it is a better judge of "sufficiency" than courts are, it would risk precisely such backlash. The Commission should not, and probably will not, apply the third prong this way, for the reasons Wright and others have identified, and also because allowing the meaning of the third prong to turn on the Commission's private rewriting of Sherman Act jurisprudence would drain the Statement of meaning.

Against the background of the FTC Act's concededly broad language, and evidence that providing the Commission with flexibility, subject to scrutiny, is consistent with Congress's original and continuing intention,[130] the third prong sets down

128. Wright Statement, *supra* note 6, at 14–15 (citing Wright & Diveley, *supra* note 5, at 12 (citing Gus Hurwitz, *Will the FTC's UMC Policy Statement Save the Commission from Itself?*, AEI (Aug. 18, 2015, 6:00AM), https://www.aei.org/publication/will-ftcs-umc-policy-statement-save-commission)). *See also* Edwards, *supra* note 117, at 256. Wright has elsewhere identified the Commission's control over the scope of UMC authority, as well as its ability to overrule the ALJ and find in its own favor as procedural advantages, and argued that because the Commission sits as both complainant and judge, its consistent findings of liability do not suggest neutral decision-making. Wright, *supra* note 78, at 354–58.

129. Gus Hurwitz, *Will the FTC's UMC Policy Statement Save the Commission from Itself?*, AEI (Aug. 18, 2015, 6:00AM), https://www.aei.org/publication/will-ftcs-umc-policy-statement-save-commission [https://perma.cc/2643-4X56].

130. Rambus Concurrence, *supra* note 88, at 12–13 ("[T]he Agency does not enforce Section 5 in a vacuum. Congress also plays an active role, especially in oversight regarding the Commission's authority and statutory interpretations."). *See also, e.g.*,

lines and motivates the Commission to look hard before using standalone authority outside those lines.[131] If the Commission is "confident under settled precedent that the conduct will be found to violate the Sherman Act or the Clayton Act,"[132] it should certainly recognize the third prong as discouraging the use of standalone authority. But between such cases and those in which condemnation under the traditional antitrust laws is possible but highly unlikely under established precedent, there is inevitably a significant gray area in which the Commission must exercise discretion and sound judgment.

By indicating that the Commission will be "less likely" to bring standalone claims when the other antitrust laws could address a competitive harm, the third prong implies that the Commission will focus its standalone enforcement primarily on harms to competition that are beyond the reach of the traditional antitrust laws. This is consistent with the Commission's longstanding enforcement practices, embracing what former Commissioner William Kovacic has called the "gap-filling" function of standalone enforcement.[133] Gap-filling refers to the condemnation of "behavior that pose[s] the same competitive dangers as conduct proscribed by the other antitrust statutes yet evade[s] effective control because it lack[s] some characteristic required by these measures."[134]

The exercise in self-restraint that the third prong implicitly requires calls on the Commission to consider whether it can make out a colorable violation of the traditional antitrust laws from the course of conduct before it. Once it has satisfied itself that taking action is consistent with the first two prongs of the Statement, the Commission should ask itself whether the situation under examination (1) lacks the agreement element of a Sherman

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Marshak, *supra* note 39, at 1135; William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623 (1982).

131. *See* Wright Statement, *supra* note 6, at 15. *See also* Wright & Diveley, *supra* note 5, at 10.

132. Melamed Statement, *supra* note 12, at 8.

133. Kovacic & Winerman, *supra* note 73, at 935. *See also* Steven C. Salop, Guiding Section 5: Comments on the Commissioners 3 (2013) (unpublished manuscript, Georgetown University), https://scholarship.law.georgetown.edu/facpub/1275/ [https://perma.cc/9R5Y-DM7P]. *But see* Robert Davis, *One Step on the Road to Clarity: The 2015 FTC Statement*, ANTITRUST SOURCE, Feb. 2016 at A-1, A-3 (arguing that the use of gap-filling to address undesirable conduct where the elements of standard antitrust prohibitions are absent would disrupt antitrust counseling and market behavior).

134. Kovacic & Winerman, *supra* note 73, at 935.

Section 1 claim; (2) lacks the monopoly power element of a Sherman Section 2 monopolization claim; (3) lacks the "specific intent" or the "dangerous probability of achieving monopoly power" element of a Sherman Section 2 attempted monopolization claim; and (4) is not a merger or acquisition cognizable under the Clayton Act. A practice that lacks each of the foregoing elements cannot violate the Sherman or Clayton Act. Hence, the Sherman and Clayton Acts would be fundamentally unable to address the harm to competition caused by such a practice. On the other hand, if a course of conduct appears to satisfy the elements of a traditional antitrust claim under Sections 1 or 2 of the Sherman Act, the Commission should favor the pursuit of a Sherman-based challenge. As discussed below, it will sometimes be appropriate for the Commission to at least consider whether a standalone challenge is nevertheless appropriate, but a paucity of evidence or a lack of certainty should not make it so.

Even accepting that standalone authority was designed to "make some things offenses that are not now condemned by the [traditional antitrust laws],"[135] it does not follow that the third prong was intended to license the use of that authority whenever the Commission has *difficulty* proving that traditionally illegal conduct has occurred.[136] Such a broad conception of gap-filling — and, as a corollary, such a broad conception of the insufficiency of the traditional laws — would capture complaints that are more properly viewed as weak Sherman Act cases. The diversion of a stream of cases from the Sherman Act into standalone adjudication would also deprive the traditional antitrust laws themselves of grist for development. Fewer close cases applying the traditional laws to novel circumstances and rapidly evolving industries would make traditional antitrust doctrine less

135. 51 CONG. REC. 12,454 (1914) (statement of Sen. Cummins).

136. *See* Wright & Diveley, *supra* note 5 at 10 ("This third, 'anti-circumvention' prong . . . implicitly acknowledges that using Section 5 to evade the more rigorous standards of proof required by the traditional antitrust laws is inappropriate, and sets forth a limiting principle concerning the scope of Section 5."). *See also* Geoffrey Manne, *FTC Commissioner Joshua Wright Gets His Competition Enforcement Guidelines*, TRUTH ON THE MARKET (Aug. 13, 2015), https://truthonthemarket.com/2015/08/13/ftc-commissioner-joshua-wright-gets-his-competiton-enforcement-guidelines/ [https://perma.cc/US5Q-YJ8F] ("Notably, this [the third prong] doesn't mean that the agency gets to use UMC when it thinks it might lose under the Sherman or Clayton Acts; rather, it means UMC is meant only to be a gap-filler, to be used when the antitrust statutes don't apply at all.").

responsive to developing threats to competition.[137] Looking at past practice, other commentators, including Wu, have observed that the Commission has not used standalone authority this way, even prior to the UMC Statement.[138] Although Wu's observation is at least somewhat reassuring, firms and their advisors inevitably seek a more systematic basis on which to forecast the Commission's approach to enforcement. In order to distinguish the Commission's use of standalone authority as a gap-filler from its use as an unfair trump card in weak antitrust cases it would be helpful to identify an additional "third filter" beyond (1) the net-harm test framed by the first two prongs of the UMC Statement and (2) the missing element test described in the prior paragraph.

However difficult it may be to articulate in a way that satisfies all commentators and actors in each case, there would seem to be an important distinction between (1) cases that the Commission would probably lose under the traditional antitrust laws due to case-specific evidentiary deficiencies and (2) families of harmful practices that the antitrust laws categorically cannot address. Deciding which conduct falls in either camp is the Commission's work.

Just as Sherman Act jurisprudence distinguishes per se violations that are categorically illegal from those that fail the rule of reason in a given case, the Commission may distinguish practices and circumstances that are categorically beyond the scope of the traditional antitrust laws from those that probably would not survive a traditional antitrust challenge due to case-specific problems. The distinction this Note proposes can be envisioned as setting up a green light/yellow light dichotomy. Where a course of conduct under scrutiny is believed to be substantially harmful to consumer welfare — without sufficient countervailing benefits to outweigh the harm — but does not have all of the elements of any one traditional antitrust claim, the Commission should conclude that it has a "green light" to proceed with a standalone challenge. On the other hand, when the Commission believes that a potential respondent and its course of conduct are a reasonable fit for the elements of a traditional antitrust claim, it should use caution before

137. *See* Melamed Statement, *supra* note 12, at 12.

138. *See* Wu Statement, *supra* note 93, at 6 (noting the existence of "a fairly distinctive and defined corpus of Section 5 [standalone] investigation and enforcement").

proceeding with a standalone claim — the "yellow light." It should then tend to proceed by pursuing the enforcement of the traditional antitrust prohibitions. Even so, as discussed in Subpart C, the Commission should not peremptorily conclude that the third prong limits it to challenging the conduct in question as a violation of the Sherman or Clayton Act.

B. THE GREEN-LIGHT ZONE

The statement that the Commission is less likely to bring standalone actions where the traditional antitrust laws are sufficient implies that the Commission will resort more readily to standalone challenges to redress conduct that harms or threatens to harm competition but falls into a "gap" in the traditional antitrust regime. The third prong does not identify specific practices whose problems the traditional laws cannot solve. But the Commission has historically brought standalone actions where the Sherman and Clayton Acts did not apply, and the Statement does not indicate any change in enforcement against schemes beyond the traditional laws.[139] In fact, the Commission has maintained course in employing standalone authority in such cases.[140]

Even critics of broad standalone enforcement generally agree that the third prong of the UMC Statement does not discourage standalone challenges against unaccepted invitations to collude.[141] The traditional antitrust laws are insufficient to

139. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n (*Ethyl*), 729 F.2d 128, 135 (2d Cir. 1984) ("[T]he Commission took the view that because § 5 is not confined to the strictures of the Sherman and Clayton Acts but prohibits a broader range of conduct, it can be violated even in the absence of agreement . . ."). In the more distant past, the Commission brought standalone cases to enjoin practices that now seem unrelated to a consumer-welfare based understanding of competition. *See* FTC v. RF Keppel & Bros., Inc., 291 U.S. 304 (1934).

140. *See, e.g.*, Ohlhausen Statement, *supra* note 125, at 8; Wright Statement, *supra* note 6, at 19; Wu Statement, *supra* note 93, at 12. *But see* James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENFORCEMENT 87, 100 (2015) (favoring a per se rule on invitations to collude under Section 5, but noting the social cost of applying that rule against public communications).

141. *See* Melamed Statement, *supra* note 12, at 19–20; Cooper, *supra* note 140, at 89; *But cf*. Richard Epstein, *When Bureaucrats Do Good*, HOOVER INSTITUTION (Aug. 17, 2015) (arguing that Sherman Section 2's prohibition on attempting to conspire with others to monopolize trade adequately covers invitations to collude, but adding that "there is little harm in using the standalone authority in this incremental fashion to plug supposed gaps in the statutory language").

address mere invitations because "[i]n the absence of a consummated agreement or potential monopoly power, such conduct generally falls through the cracks of Sections 1 and 2 of the Sherman Act."[142] Not all invitations succeed, but, as is widely recognized, "[a]n invitation to collude is potentially harmful and . . . serves no legitimate business purpose."[143] Because the agencies may not discover a later, successful attempt by the same actor to form an agreement, the ability to attack only consummated Sherman Act Section 1 violations would likely produce inadequate enforcement of Section 1's intended prohibitions. Moreover, insofar as invitations to collude clearly are not legitimate competitive behavior, standalone actions against them cannot be deemed unnecessarily chilling.[144]

In the Matter of Step N Grip, LLC, concluded shortly after the Statement was issued, illustrates the Commission's continued standalone enforcement in the context of unaccepted invitations.[145] Respondent Step N Grip sold devices designed to prevent rugs from curling.[146] It and a competitor began undercutting each other's prices on Amazon.com in June 2015. When both firms had cut their prices to $11.95, Step N Grip sent a brief email to the competitor: "We both sell at $12.95? Or, $11.95?"[147] Step N Grip then raised its price to $12.95. The competitor reported the invitation to the Commission, which issued a complaint alleging a standalone UMC violation.[148] Step N Grip quickly settled with the Commission in a consent

142. Ramirez, *supra* note 31, at 5. Section 1 of the Sherman Act proscribes agreements and collusion, but does not address *invitations* to enter an agreement, unless the agreement is consummated, or the inviter is a potential monopolist. *Id. But see* United States v. Am. Airlines, 743 F.2d 1114, 1120 (5th Cir. 1984) (example of the Commission's use of Sherman Act Section 2 attempted monopolization theories to pursue invitations to collude).

143. *See, e.g.*, Valassis Commc'ns, Inc., 141 F.T.C. 247, 283 (2006) (analysis of agreement containing a consent order to aid public comment); Cooper, *supra* note 140, at 89; Kovacic & Winerman, *supra* note 73, at 935.

144. Reeves Statement, *supra* note 91, at 10. *See also* Edwards, *supra* note 117, at 266.

145. Step N Grip, LLC, Compl., No. C-4561, 2015 WL 9412614 (F.T.C. Dec. 7, 2015). *See also* Drug Testing Compliance Group, LLC, Compl., No. C-4565, 2016 WL 406531, at *2 (F.T.C. Jan. 21, 2016).

146. Step N Grip, Compl., at 1.

147. *Id.*, at 2.

148. *Id.*

agreement, and the Commission approved a final order in December 2015.[149]

While not as widely accepted as challenges in the invitation context, patent holdup[150] is another well-established target of Section 5 standalone enforcement.[151] How the Commission ought to approach such schemes under the third prong of the UMC Statement is less clear-cut, because it is not as clear that these schemes fall into a gap. Deceptive patent holdup schemes, in particular, involve calculated conduct that may enable the schemer to exclude its competitors and dominate a market, suggesting that Section 2 claims may be cognizable.[152] As will be discussed below, however, it is often impossible, as a practical matter, to prove causation in such cases (i.e., that a firm acquired, maintained, or was dangerously likely to acquire monopoly power *as a result of* its conduct), because doing so would entail proving a counterfactual.[153] Thus, such schemes are possibly, but perhaps not quite categorically, outside the reach of the traditional antitrust laws.[154]

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149. Step N Grip, Decision and Order., FTC No. 151-0181 (Dec. 7, 2015), https://www.ftc.gov/system/files/documents/cases/151216stepngripdo.pdf.

150. *See generally, e.g.*, Robert A. Skitol & Kenneth M. Vorrasi, *Patent Holdup in Standards Development: Life After Rambus v. Fed. Trade Comm'n*, 23 ANTITRUST 26 (2009).

151. *See* Negotiated Data Solutions LLC (*N-Data*), No. 051-0094, 2008 WL 258308 (F.T.C. Jan. 22, 2008) (decision and order); Dell Comput. Corp., 121 F.T.C. 616 (1996) (consent order); Wu Statement, *supra* note 93, at 7–8 (explaining that standard-setting abuses are often unscrupulous, and target "process[es] important to competition and innovation," but "fall[ ] between the cracks of the Sherman Act and Clayton Act," or cannot be readily addressed by those statutes without "stretching the law"). *But see* Edwards, *supra* note 117, at 270273 (arguing that the FTC can still challenge patent holdups post-Statement, but that the Statement will impose soft constraints on the Commission to avoid challenging deception-based patent holdup cases (*e.g. Dell*), licensing-breach-based cases (*e.g. N-Data*), and cases in which a patent-holder seeks an injunction against the continued use of its patented technology). As Edwards acknowledges, this last category is a subcategory of licensing-breach cases. *Id.*

152. *See* Wu Statement, *supra* note 93, at 9; M. Sean Royall & Adam J. Di Vincenzo, *The FTC's N-Data Consent Order: A Missed Opportunity to Clarify Antitrust in Standard Setting*, 22 ANTITRUST 83 (2008); Edwards, *supra* note 117, at 270.

153. *See* Michael A. Carrier, *The D.C. Circuit's Excessively High Causation Standard in Rambus* 12–14 (2010) (unpublished manuscript), https://ssrn.com/abstract=1586430 [https://perma.cc/LHE9-TM64].

154. *See* Wu Statement, *supra* note 93, at 8. Ohlhausen has argued that patent hold-up disputes generally do not implicate attempts to short-circuit the competitive process, and that these behaviors should therefore not be addressed under either the Sherman Act or the FTC Act, but rather under contract law to the extent that harm to the competitive process is absent. Ohlhausen, *supra* note 20.

For an example of a deceptive patent holdup case, consider *In the Matter of Dell Computer Corp*. Dell, a major computer manufacturer, was one of the many members of a standard setting organization (SSO) that had been formed to develop a standard, "VL-bus," for data transfer in computers.[155] Dell secretly acquired a standard-essential patent (SEP)[156] for a component of VL-bus, repeatedly certified to the SSO that it had no such patents, and then, once almost every U.S. software and hardware producer had become locked into the standard and had sold millions of products incorporating VL-bus, revealed its SEP, and asserted the right to exclude other firms from its use.[157] In short, Dell embarked on a deceptive course of conduct to gain an ability to hold up other manufacturers and to eliminate non-Dell products as constraints on Dell's ability to price its own products.[158] The Commission charged Dell with a standalone violation of Section 5, and found that Dell's acts constituted a UMC.[159] The Commission cautioned that it did not announce a general rule that failure to disclose patents in the standard-setting context rendered later enforcement of those patents a UMC.[160] The *Dell* decision instead turned on evidence that (1) Dell had been intentionally deceptive, and (2) the SSO would likely have used an alternative technology to Dell's IP had Dell disclosed its patents.[161] One commissioner dissenting from the final order in *Dell*, and some commentators since, have argued that *Dell* was properly a Sherman Act Section 2 case.[162]

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155. *Dell*, 121 F.T.C. at 617.

156. A standard-essential patent is, as the term suggests, a patent for technology that is essential to an industry standard. "Unlike most other patents, when a patent is truly essential there is no way to design around it and still comply with the standard." Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?* (Stanford Pub. Law Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128420 [https://perma.cc/W2MG-F2ZT].

157. Dell Comput. Corp., 121 F.T.C. 616, 617–618 (1996) (consent order).

158. *Id.*

159. *Id.* at 616.

160. *Id.* at 625–26.

161. *Id.* at 624.

162. Dell Comput. Corp., 121 F.T.C. at 628–29 (Commissioner Mary Azcuenaga, dissenting) ("This might have been a routine antitrust case. A traditional antitrust analysis of Dell's conduct would have centered on two questions: whether Dell intentionally misled VESA into adopting a VL-bus standard that was covered by Dell's '481 patent and whether, as a result of the adoption of such a standard, Dell obtained market power beyond that lawfully conferred by the patent. If Dell had obtained market power by knowingly or intentionally misleading a standards-setting organization, it would require no stretch of established monopolization theory to condemn that conduct. Indeed, Section IV of the order against Dell seems to address precisely such a traditional antitrust

The D.C. Circuit's 2008 decision in *Rambus, Inc. v. FTC* complicated matters further.[163] The court held that a patent holdup scheme constitutes exclusionary conduct for the purposes of a Sherman Act monopolization claim only if the conduct is actually exclusionary in its effect — that is, if it is a but-for cause of competitors' exclusion from the market.[164] Finding that the Commission had failed to show that the SSO would not have incorporated Rambus, Inc.'s IP but for the deception, the court refused to enforce the Commission's order.[165]

Some commentators, including former Commissioner Ohlhausen have argued that patent hold-up disputes generally do not implicate attempts to short-circuit the competitive process, and that these behaviors should therefore not be addressed under either the Sherman Act or the FTC Act.[166] Lindsey Edwards, who has published an extensive analysis of the constraining effects of the Statement, including in patent holdup cases, is also of the view that neither the Sherman Act nor the FTC Act is consistently applicable in the patent holdup context. Edwards' analysis assumes that the second prong of the UMC Statement incorporates into Section 5 a wide variety of the Sherman Act's judge-imposed limits, and views the holding of *Rambus* as insulating *Dell*-type schemes as much from Section 5 challenges as from the Sherman Act.[167] But on its face, the second prong's "framework similar to the rule of reason" does not imply that the Commission will or should sweep in virtually all of the Sherman Act doctrine developed under the rule of reason and proceed to count the Sherman Act's limits against standalone enforcement

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violation."). *See also* 2016 Hearing, *supra* note 16, at 36:35–37:32 (testimony of A. Douglas Melamed, Professor, Stanford Law School); 39:30–40:10 (testimony of Joshua D. Wright, Professor, Antonin Scalia Law School). Melamed appears to reason that while a patent right is not itself sufficient to prove monopoly power, Dell's *standard-essential* patent (SEP) conferred monopoly power, and its deceptive conduct in corrupting of the standard-setting process was a but-for cause of the acquisition of that power. *See also* Edwards, *supra* note 117, at 270. *But see* Wu Statement, *supra* note 93, at 8 (characterizing *Dell* as a characteristic standalone case). Ironically, Dell itself later criticized the Commission's decision to bring *N-Data* as a pure standalone case in 2008. Dell, Inc., Comment Letter on Proposed *N-Data* Consent Order (Apr. 7, 2008), https://www.ftc.gov/sites/default/files/documents/public_comments/negotiated-data-solutions-534241-00008/534241-00008.pdf [https://perma.cc/XN9T-PWMQ].

163. Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

164. *Id.*

165. *Id.*

166. Ohlhausen argues that such disputes should be handled under contract law, to the extent that harm to competition is absent. Ohlhausen, *supra* note 20.

167. Edwards, *supra* note 117, at 269–70.

on the third prong. While rewriting antitrust jurisprudence would be an inappropriate use of standalone authority,[168] the third prong itself does not disfavor standalone enforcement where traditional antitrust jurisprudence exists, but rather where the traditional antitrust laws are sufficient to address some competitive harm. The Commission should thus count *Rambus*' heightened standard for monopolization as favoring standalone enforcement in deceptive patent holdup cases, because deceptive patent holdup represents a subtle categorical gap in the traditional antitrust regime, even though the D.C. Circuit has recognized that a firm that obtains monopoly power through a *Dell*-type scheme violates the Sherman Act.

How can a seemingly valid theory of Sherman Act violation fall into a categorical gap? While patent holdup is in principle a valid Section 2 theory, Section 2 requires proof of a very elusive counterfactual: proof that a body of many firms would have voted differently if given different and very complicated information about alternative technologies.[169] This but-for causation requirement creates a significant problem of "fit" for Section 2 liability in patent holdup, because the complex choices among standards (with different licensing costs, effectiveness, compatibility with other component technologies, and so on) compound the general difficulty of proving counterfactuals.[170]

Concededly, deceptive patent holdup schemes may present an unusually close case for the sufficiency of the traditional antitrust laws, but perhaps no more so than some invitations to collude, which, as previously discussed, may satisfy the elements of attempted monopolization under Section 2 of the Sherman Act.[171] As with invitations to collude, the possibility that Section 2 can reach some deceptive patent holdup cases does not render the traditional antitrust laws categorically sufficient to address such conduct. Furthermore, such schemes bear the hallmarks of the Commission's recent standalone agenda: (1) they are unscrupulous, (2) they abuse a process important to competition and innovation, and (3) the traditional antitrust laws would need

168. *Supra* Part IV.A.

169. *See* Carrier, *supra* note 153, at 13–14.

170. *Id. See also* Joel M. Wallace, Note, *Rambus v. F.T.C. in the Context of Standard-Setting Organizations, Antitrust, and the Patent Hold-Up Problem*, 24 BERKELEY TECH. L.J. 661, 687–88 (2009).

171. *See generally* United States v. Am. Airlines, 743 F.2d 1114, 1120 (5th Cir. 1984). *See supra* note 142.

to be stretched considerably to reach the conduct if they could address it at all.[172]

In the Matter of Negotiated Data Solutions LLC (*N-Data*) exemplifies another type of patent holdup case in which the Commission has asserted standalone claims: a licensing-breach patent holdup.[173] Negotiated Data Solutions LLC (N-Data) acquired a patent, essential to the Ethernet standard, whose original patentee had committed to license the technology to any member of the Ethernet SSO for a one-time payment of $1000. N-Data bought the SEP knowing about this commitment, and after four years stopped honoring the licensing commitment and held up the SSO members to extract royalty payments substantially beyond the one-time $1000 payments previously agreed to.[174] *N-Data* differed notably from *Dell* in that the respondent's SEP, and thus its power, were not obtained by wrongful conduct; rather, the problematic conduct occurred after the acquisition of power.[175] The Commission voted to serve a complaint on N-Data, alleging a standalone Section 5 violation, and ultimately ruled that N-Data's conduct constituted an unfair method of competition.[176] Quoting the Supreme Court in *FTC v Indiana Federation of Dentists*, the Commission noted that "the standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws . . . but also practices that the Commission determines are against public policy for other reasons."[177] On the other hand, some commentators have argued that such cases are properly beyond both the prohibitions and policies of the antitrust laws, in that holdup artists are lawful monopolists who merely manage to escape pricing

172. *See* Wu Statement, *supra* note 93, at 8. *See also* 2016 Hearing, *supra* note 16, at 57:50–58:30 (Wu's testimony).

173. Negotiated Data Solutions LLC (*N-Data*), No. 051-0094, 2008 WL 258308 (F.T.C. Jan. 22, 2008) (decision and order). Edwards refers to these cases as "breach of contract-based patent hold-up cases." Edwards, *supra* note 117, at 270. She argues that *N-Data* would be an inappropriate use of standalone authority under both the second and third prongs of the UMC Statement. *Id.* at 271–272.

174. *N-Data*, 2008 WL 258308 at *4–5.

175. *See* 2016 Hearing, *supra* note 16, at 36:35–37:32 (testimony of A. Douglas Melamed, Professor, Stanford Law School).

176. *N-Data*, 2008 WL 258308 at *1.

177. *Id.* at *29 (quoting Fed. Trade Comm'n. v. Ind. Fed'n of Dentists, 476 U.S. 477, 454 (1986)).

constraints, without actually excluding rivals from a market.[178] Expressing this question in the language of the third prong, it is questionable whether antitrust jurisprudence and scholarship have answered in the negative whether "competitive harm aris[es] from the act or practice" of patent holdup, particularly when a patentee has legitimately obtained a SEP.[179]

Whichever view one takes of patent holdup cases, there presumably will be other practices and schemes, including some not yet devised, that offend the policies of the traditional antitrust laws but fall in the gaps of those laws' actual coverage. Congress may have anticipated the creativity of entrepreneurs when it framed the vague prohibitions of the FTC Act to allow the Commission to address new anticompetitive practices as they arise.[180] Notably, while the Sherman Act has prohibited agreements to collude since its enactment in 1890, the Commission's enforcement actions against invitations to collude only date back to 1992.[181] Thus, the future may reveal new, relatively uncontroversial situations in which a standalone action would be the most appropriate course for the Commission to take in order to protect consumer welfare.[182] In any case, even apart from any such gaps, emerging markets and technologies may give rise to scenarios that the Commission believes involve substantial harm to consumer welfare, even if they do not fall into a known category of scenarios that are structurally beyond the reach of the traditional antitrust laws. The Statement's third prong disfavors standalone enforcement when the Sherman or Clayton Act is "sufficient to address"[183] the competitive harm contemplated, rather than whenever the Commission is not certain that these laws are insufficient.[184] Accordingly, standalone challenges may be appropriate, despite the third prong's language, where it is too

178. *See, e.g.,* Douglas H. Ginsburg et al., *The Troubling Use of Antitrust to Regulate FRAND Licensing*, 10 CPI ANTITRUST CHRONICLE 1, 6–7 (Oct. 2015).

179. UMC Statement, *supra* note 7, at 57,056.

180. *See* Marshak, *supra* note 39, at 1153 ("Congress intentionally left section 5 vague in order to 'leave it to the commission to determine what practices were unfair' in the face of 'human inventiveness' and evolving business practices." (quoting S. REP. NO. 63-597, at 13 (1914) and H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)).

181. Quality Trailer Products, 115 F.T.C. 994 (1992) (complaint) (cited in Edwards, *supra* note 117, at 257).

182. *See* Marshak, *supra* note 39, at 1153 ("Congress intentionally left section 5 vague in order to leave it to the commission to determine what practices were unfair in the face of human inventiveness and evolving business practices." (citations omitted)).

183. UMC Statement, *supra* note 7, at 57,056.

184. *Id.*

early to determine conclusively whether some new and poorly-understood practice highlights a "gap" in the traditional laws.

C. EXERCISING CAUTION: THE YELLOW-LIGHT ZONE

When the Commission finds itself at a "yellow light" such as a plausible Section 2 violation, it should slow down (as the moniker suggests) before proceeding. The remaining and most difficult question follows here: when should the Commission use standalone authority despite the Statement's admonition that it should be "less likely" to do so when the Sherman or Clayton Act *is* sufficient to address the competitive harm arising from an act? The Commission has not foresworn the use of standalone enforcement in these situations. The Commission has not even said it is unlikely to bring standalone cases under those circumstances. Moreover, in indicating that standalone enforcement will be less likely where the traditional antitrust laws are sufficient than in other cases, the Commission does not explain when and why it will exercise the flexibility it has retained for itself — in other words, when it will use standalone authority despite finding itself in the "less likely" zone. This apparently reflects a compromise among the commissioners who voted for the Statement.[185] In any case, having ducked the resolution of commissioners' differences in issuing the UMC Statement, the Commission will have to determine what meaning to give ambiguous terms like "less likely" or "sufficient to address" if the Statement is to have value in informing the public's expectations concerning UMC enforcement.[186]

The need for more restrained remedies and/or predictable outcomes would be compelling considerations for the Commission in deciding whether to bring a standalone challenge where that is not its only option. Even in the absence of a categorical gap, if the Commission concludes that challenging a practice as a Sherman Act violation would create undesirable economic outcomes, it seems reasonable for the Commission to serve a complaint advancing only standalone theories of violation.

185. 2016 Hearing, *supra* note 16, at 1:35:12–1:36:35 (testimony of Professor Wright); *see also* Davis, *supra* note 133, at 2 ("As a political document, a number of ambiguities in the text presumably were necessary for the Statement to be voted out at all.").

186. Davis, *supra* note 133, at 2 ("[I]f the Statement is to have much value, the Commission will need to flesh out those ambiguities by its future actions and perhaps follow-up statements.").

Provided that the Commission does so to cure a harm to consumer welfare, it finds support for this approach in the first prong of the Statement, which stipulates that the Commission "will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[187]

The more limited remedies and consequences applicable with respect to the enforcement of standalone claims may be advantageous for a variety of reasons. In some situations, the Commission's economic expertise may enable it to develop remedies geared towards the optimization of consumer welfare, where that task would be more difficult if the Commission had to share control over the strength and nature of remedies with the private bar. The Commission might be concerned that alleging a violation of the Sherman Act would incite massive class-action litigation that could bankrupt or cripple the respondent, perhaps handing a monopoly to the second-largest firm.[188] More broadly, the Commission's expertise, employed in the public interest, would allow the Commission to enjoin anticompetitive practices in contexts where the private bar's eager response to a Sherman action might cause unnecessary shock or distortion in that market.[189] Where these risks are substantial, the promotion of consumer welfare (which the Statement's first prong makes the Commission's guiding purpose)[190] may favor the more surgical treatment possible in a standalone enforcement action.

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187. UMC Statement, *supra* note 7, at 57,056–59.

188. Rambus Concurrence, *supra* note 88, at 12. *See* also Reeves Statement, *supra* note 91, at 11. If the Commission is operating in the "less likely" area because the Commission believes that Sherman Section 2 is applicable, the respondent will tend to have the kind of dominant market share associated with monopoly power. If the rest of the market is also highly concentrated, bankrupting the monopolist could have severe unintended consequences. Suppose the respondent has a market share of eighty percent, and that twenty other firms make up the remaining twenty percent. Bankrupting the respondent could temporarily reduce consumer welfare, but may ultimately allow the regrowth of a less concentrated industry. On the other hand, if one other firm has twenty percent of the market, then bankrupting the respondent may well hand the second-largest firm a monopoly. *See* Wu Statement, *supra* note 93, at 5.

189. *See* Rambus Concurrence, *supra* note 88, at 12 ("Because of these relatively mild consequences, Section 5 can fairly extend more broadly than the antitrust laws. This characteristic makes Section 5 especially well designed to apply in circumstances where exposing the respondent to treble damage jeopardy might be unfair or inappropriate, even though the conduct itself may warrant prohibition."). *See also* INT'L COMPETITION NETWORK, DEFINING HARD CORE CARTEL CONDUCT, VOL 1: BUILDING BLOCKS FOR EFFECTIVE ANTI-CARTEL REGIMES 4 (2005).

190. UMC Statement, *supra* note 7, at 57,056–59 ("The Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare.").

The Commission might also opt for standalone enforcement for reasons that sound in justice and proportionality rather than industrial organization. The lighter remedies and after-effects associated with standalone enforcement may allow the Commission to exercise its sense of justice and restraint without turning a blind eye to behavior that harms consumers. Wu has endorsed this application, suggesting that the Commission may appropriately use its standalone authority to address what he refers to as "antitrust misdemeanors" even where those misdemeanors might also violate the Sherman Act.[191] In essence, Wu suggests that standalone authority enables the Commission to exercise a kind of prosecutorial discretion. Such discretion presumably would not chill legitimate competitive behavior that is not otherwise chilled by the traditional antitrust laws, assuming that the antitrust agencies could otherwise challenge the same conduct as violative of the Sherman or Clayton Act.

The distinction between the types of "insufficiencies" that the traditional antitrust laws exhibit in green-and yellow-light situations may appear nebulous. They are distinguishable, at least as a theoretical matter. Green-light cases involve the types of harms contemplated by the traditional antitrust laws, but arise in contexts that are structurally poor fits for the formal elements of the traditional laws, such as agreement or monopoly power. In contrast, yellow-light cases include those cases in which the Commission reasonably believes that a traditional antitrust prohibition already covers the type of problematic conduct at issue, and in which any inability to prove that the conduct violates that prohibition stems from a case-specific failing such as poor evidentiary support rather than a consistent, structural mismatch between similar practices and the elements of the traditional antitrust laws.

Some commentators have proposed that the Commission make greater use of its standalone authority to bring relatively experimental cases in areas where antitrust doctrine has not yet

191. Wu Statement, *supra* note 93, at 5. Wu highlights the historical use of standalone enforcement to address both "misdemeanors" and particularly nefarious conduct. *See id.* at 5. *See also* Salop, *supra* note 133, at 3 ("In contrast [to a Sherman Act violation], a violation of Section 5 is not subject to treble damages. This weaker sanction may be appropriate for conduct that generally would be presumed to have somewhat less harmful effects on consumers, where it might be feared that treble damages would lead to over-deterrence.").

developed.[192] Proponents of this application of standalone authority argue that the Commission's expertise in economic analysis makes it particularly well-situated to help set competition policy in uncharted territory.[193] For example, Wright proposes that the Commission "leverage its research and reporting functions to collect data, conduct research, and use its expertise and knowledge accumulated through those efforts to lead in the creation of new doctrine."[194] As discussed below in connection with Google, some of the enforcement targets Wright has in mind may correspond to those that Wu suggests are potential targets of, but poor fits for, traditional antitrust enforcement.[195]

D. AN ILLUSTRATION

This Subpart attempts to illustrate how the Commission might proceed in a particular case, relying on the green light/yellow light approach to the third prong of the UMC Statement. The illustration focuses on Google's allegedly anticompetitive practices as a relatively familiar example.

In 2013, the Commission issued a statement announcing that it had concluded and voted to close a wide-ranging investigation

192. *See* Wright Statement, *supra* note 6, at 17–18; Kovacic & Winerman, *supra* note 73, at 932–33. *See also* 2016 Hearing, *supra* note 16 at 57:50–58:30 and 1:15:07–1:18:50 (testimony of Professor Wu) (discussing the Commission's investigation of Google's manipulation of search results and the possible basis for reopening a standalone investigation).

193. Wright Statement, *supra* note 6, at 18. *See also* Kovacic & Winerman, *supra* note 73, at 932–33.

194. Wright Statement, *supra* note 6, at 18.

195. Wu Statement, *supra* note 93, at 9. Note, however, that those targets may not be out of the traditional antitrust laws' reach forever. The Federal Trade Commission has recently begun a series of hearings on "Competition and Consumer Protection in the 21st Century," at which commentators will discuss, among other topics, "whether the consumer welfare standard is the appropriate standard for antitrust law and, if not, whether other standards, including a total welfare standard, should be preferred." *FTC Announces Second Session of Hearings on Competition and Consumer Protection in the 21st Century September 21 at the FTC*, FED. TRADE COMM'N, (Sep. 10, 2018), https://www.ftc.gov/news-events/press-releases/2018/09/ftc-announces-second-session-hearings-competition-consumer [https://perma.cc/DY8G-8BTZ]. The retirement of the consumer welfare standard, if such a revolution ever occurred, would obviously reconfigure the scope and nature of traditional antitrust jurisprudence; even if the UMC Statement were not explicitly rescinded, the third prong would link the role of standalone enforcement to the reach of an antitrust jurisprudence that could well be unrecognizable.

of Google's allegedly anticompetitive practices."[196] One of these practices was "universal search": Google's presentation of results from its own vertical search engines (such as Google Flights) on web search results pages.[197] Google had placed this proprietary content at the top of its results pages, pushing down the "ten blue links" that compete with its products.[198] The Commission concluded that while Google's highlighting of its own content had reduced traffic to competitors, it also had potentially improved the Google Search product by delivering information instantly to consumers without requiring them to click through links to other websites, including those in competition with Google.[199] In short, the Commission concluded that Google's modified algorithm hurt competitors, but potentially benefitted consumers.

Since the closure of that investigation, Professors Michael Luca and Tim Wu have presented a working paper setting forth empirical evidence that Google's prioritization of its own content in fact reduces the helpfulness of search results, and thus, importantly, the quality of Google's own product.[200] The authors created a de-biased version of universal search, in which the universal search box was populated with the most relevant content, rather than proprietary Google content. According to their findings, users were forty percent more likely to engage with the generic search boxes than with Google's proprietary ones, indicating that Google's implementation of universal search diminished rather than improved product quality.[201] Luca and Wu argued that Google's conduct could potentially be attacked as an exclusion without pro-competitive efficiencies, as more

196. *See* Google, Inc., No. 111 0163, at 1, 3 n.2 (F.T.C. Jan. 3, 2013) (statement of the Federal Trade Commission regarding Google's search practices) [hereinafter "FTC Google Statement"]. Notably, although not germane to this illustration, several of the commissioners had found "record evidence to support strong concerns about Google's conduct" apart from the search bias question. These concerns included (i) alleged misappropriation of the content of competing websites, and (ii) allegedly unreasonable restrictions imposed by Google on the ability of advertisers to "multihome" (i.e. advertise simultaneously on Google and other search engines.) *Id.* at 1 n.2.

197. *Id.* Universal search "'blends' results from 'vertical' search engines like Google Images or Google News into its web search listings." *Google: Universal Search*, SEARCH ENGINE LAND, https://searchengineland.com/library/google/google-universal-search [https://perma.cc/24DG-ZA6X] (last visited Aug. 30, 2018).

198. FTC Google Statement, *supra* note 196, at 1.

199. *Id.*

200. Luca et al., *supra* note 40.

201. *Id.* at 5 ("The results demonstrate that consumers prefer the second [i.e. the de-biased] version of universal search. . . . This leads to the conclusion that Google is degrading its own search results by excluding its competitors at the expense of users.").

exclusionary than the alternative means of achieving Google's professed pro-competitive goals, and as an inherently suspect degradation of Google's own product.[202]

Luca and Wu did not purport to show whether Google's allegedly anticompetitive conduct constituted a violation of the Sherman Act prohibitions.[203] The question of whether Google is a "monopolist" or an "attempted monopolist" for purposes of the Sherman Act has drawn considerable attention, and it seems fair to concede that the question is open.[204] In the context of its alleged search bias specifically, a number of other commentators have maintained that Google's manipulation of search results satisfies the purposefully anticompetitive aspect of the Section 2 requirements.[205] The late Judge Robert Bork, on the other hand,

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202. *Id.* at 28–36.

203. *Id.* Luca and Wu's working paper focuses on the distinct but important questions of whether and how Google's alleged "search bias" reduces consumer welfare. They reject the Commission's 2013 findings, and offer empirical data to refute the conclusion that Google's redesign of its algorithm improved its product. Luca and Wu do not express a view as to whether Google's market share is high enough to suggest monopoly power and support a monopolization claim. Nor do the authors indicate whether or not Google's anticipated market share would make an attempted monopolization charge viable.

204. *See, e.g.*, Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J. L. & PUB. POL'Y 171 (2011); Mark R. Patterson, HARV. J. L. & TECH. OCCASIONAL PAPER SERIES, Jul. 2013; Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401, 412–13 (2014) ("The key antitrust fact is that Google has essentially monopoly dominance over search advertising, and there is little prospect that any potential competitor could mount an economically viable challenge to that dominance."); Joshua G. Hazan, Note, *Stop Being Evil: A Proposal for Unbiased Google Search*, 111 MICH. L. REV. 789 (2012). The definition of a "monopolist" for Sherman Act Section 2 purposes may be somewhat inexact — and it may need to remain general enough to adapt as market concepts evolve. Even granting that lawyers can often find elasticity in statutory language, there would seem to be a critical difference between interpreting the word "agreement" for example, as opposed to interpreting the term "monopoly power."

205. *See, e.g.*, Mark R. Patterson, *Non-Network Barriers to Network Neutrality*, 78 FORDHAM L. REV. 2843, 2861 (2010) (stating that search biasing, if proven, likely causes greater exclusionary effects than analogous practices that the Commission has challenged in the supermarket industry, because the search industry is more concentrated than the supermarket industry); Lisa Mays, Note, *The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe*, 83 GEO. WASH. L. REV. 721, 751 (2014) (describing Google's search manipulation as coercive with respect to consumers, and analogizing to *Microsoft*, in which Microsoft infringed consumer choice by requiring Windows-based computer manufacturers to install Internet Explorer as a default browser). *But see* Joshua D. Wright, *Dissecting Professor Wu and Yelp's Local Search Study: An Antitrust Law Analysis of the 'Experimental Evidence'* 13–14, 25 (George Mason L. Econ. Research Paper Series, Paper No. 17-31, 2017) (arguing, among other critiques, that Luca and Wu fail to establish that Google caused "substantial foreclosure," and that those authors have identified a failure to optimize the one box rather than an actual degradation of product quality).

contended that Google acquired its power by dint of superior business acumen[206] — which, unlike monopolization via the exclusion of equally-efficient competitors, does not constitute "exclusionary conduct" for Section 2 purposes.[207] Resolving this ongoing debate is beyond the scope of this Note; Google is used here as an example precisely because the Sherman Act's sufficiency to address its search biasing is not clear-cut.

To analyze under the third prong of the UMC Statement, assume that the Commission were first to agree with Luca and Wu's assessment of the effects of search biasing, such that the Commission's proscription of the conduct would be consistent with both the "consumer welfare" and "framework similar to the rule of reason"[208] prongs of the Statement. The Commission's next step would be to consider whether Google's course of conduct is lacking with respect to the elements of traditional antitrust claims. Under the assumptions stipulated above, the thorniest issue here is whether Google has, or is dangerously likely to achieve, monopoly power in Internet search.

This raises a threshold issue: is it possible for Google to have any market power at all in Internet search? Rightly or wrongly, market share data is an extremely influential factor in determining market power.[209] Ordinarily, the antitrust agencies calculate market share as a firm's share of total industry revenue.[210] Revenue-based measurement, however, is somewhat unhelpful to the antitrust agencies in the market for Internet search, because Google and its competitors earn revenue from advertising, not directly from running searches.[211] According to

206. Robert H. Bork, *Antitrust and Google*, CHI. TRIB., Apr. 6, 2012. *See also* John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015). *See also* George N. Bauer, *Why Internet-Based Monopolies Have an Inherent "Get-Out-of-Jail-Free Card,"* 76 BROOK. L. REV. 731 (2011).

207. *See* Posner, *Antitrust in the New Economy*, *supra* note 22, at 5.

208. UMC Statement, *supra* note 7, at 57,056.

209. *See supra* note 47.

210. AREEDA ET AL., *supra* note 28, at 535 n.22.

211. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 548–56 (2016) ("Traditional market power analysis is not designed to apply to free goods. This is because, as Evans notes, '[A]ntitrust analysis often relies on the basic finding that prices tend to equal the marginal costs of production in competitive markets, and that deviations from marginal cost prices indicate market power.' Accordingly, market power is often viewed as the ability to raise price above the competitive level. *Yet a simple cost-price difference of the free good will not provide any useful information. Rather, its application might lead to the conclusion that no market power exists at all, as the price does not rise at all above cost (and even stays constantly below it). Other tools must be sought*." (quoting

Areeda, share of market revenue "is the usual measure, although other measures of the relative significance of firms may be used instead — such as physical units sold, rental revenues or placements, or plant capacity."[212] Probably the most natural measure of Google's significance in search is the share of queries that it services.

Without question, Google dominates the national market for general Internet search in the United States; in August 2018, it handled 84.52% of U.S. general-purpose search queries.[213] The only other firms handling more than one percent of queries were Bing (7.8%) and Yahoo (6.68%).[214] Query share is critically important to the future competitive significance of a search provider, because users' queries and clicks furnish the provider with data that it uses to refine its results-ranking algorithms, reinforcing the firm's advantage in the relevance and completeness of results.[215] While barriers to entry are generally low in Internet-based industries, commentators have pointed to Google as a glaring exception to the rule that Internet firms

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David S. Evans, *The Antitrust Economics of Free*, COMPETITION POL'Y INT'L, Spring 2011, at 71, 81) (emphasis added)).

212. AREEDA ET AL., *supra* note 28, at 535 n.22. *See also Calculating Market Shares*, U.S. DEP'T OF JUSTICE (June 25, 2015), https://web.archive.org/web/20151208180912/https://www.justice.gov/atr/14-calculating-market-shares [https://perma.cc/MX58-WGKK] (stating that market share should be calculated "using the best indicator of firms' future competitive significance. . . . Dollar sales *or shipments* generally will be used if firms are distinguished primarily by differentiation of their products.") (emphasis added). A market characterized by significant product differentiation is one in which firms sell distinguishable rather than homogenous goods. *See* Carl Shapiro, *Product Differentiation and Imperfect Information: Policy Perspectives* Fed. Trade Comm'n, Bureau of Economics, Working Paper No. 70 (1982), https://www.ftc.gov/system/files/documents/reports/product-differentiation-imperfection-information-policy-perspectives/wp070.pdf [https://perma.cc/K59H-XPQK].

213. *Search Engine Market Share United States of America August 2017–August 2018*, STATCOUNTER, gs.statcounter.com/search-engine-market-share/all/united-states-of-america [https://perma.cc/ZH38-T99R] (last visited Sep. 18, 2018). Google is even more dominant in U.S. mobile search. Between August 2017 and August 2018, its share of U.S. mobile search, calculated on a monthly basis, ranged from 90.82% to 97.56%.

214. *Id.*

215. JONATHAN A. KNEE ET AL., THE CURSE OF THE MOGUL: WHAT'S WRONG WITH THE WORLD'S LEADING MEDIA COMPANIES 99 (2011) (arguing that Google results are more relevant than its competitors,' and that "as Google's share of search queries expands, these advantages are enhanced"). *Cf.* Luca et al., *supra* note 40, at 14 (arguing that Google's search bias has diminished the quality of its product). *See generally* Kira Radinsky, *Data Monopolists Like Google Are Threatening the Economy*, HARV. BUS. REV. (Mar. 2, 2015), https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy [https://perma.cc/SRJ8-6GCP] (arguing that Google's massive collection of data gives it a great advantage over competitors and prevents new firms from entering the market, as they lack the user data to generate competitive search results).

cannot prevent other firms from entering their markets — in part due to its "data advantage."[216] Given the DOJ's willingness to use output measurements such as "shipments"[217] rather than revenue to calculate market share in some markets, Google's business model (providing free search and charging advertisers for access to the audience of searchers) leaves open the question of Google's monopoly power.[218]

Complicating this question further, a number of circuits have held that a firm cannot possess monopoly power in a market that lacks substantial barriers to entry.[219] That position, which the D.C. Circuit adopted in Microsoft, also creates a hurdle for attempted monopolization claims, because firms in markets without entry barriers would not be dangerously likely to obtain monopoly power.

Meanwhile, Google has maintained that, far from enjoying the solitude of a true monopolist behind substantial barriers to entry, it operates under constant threat from competitors who are only "a click away."[220] If the Commission were to accept Google's position, and then concluded that Google cannot violate Section 2 of the Sherman Act because it cannot possess monopoly power, the third prong of the UMC Statement would give the Commission a green light to challenge Google's conduct on a

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216. KNEE ET AL., *supra* note 215, at 99.

217. *See Calculating Market Shares*, *supra* note 212.

218. A growing body of commentary points out that antitrust harms may arise in zero-price markets, and that antitrust enforcers have been overly complacent in appreciating and addressing these harms. *See* Evans, *supra* note 211; Gal & Rubinfeld, *supra* note 211, at 548–56; Newman, *supra* note 206. *But see* Bork, *Antitrust and Google*, *supra* note 206 ("Regulators may attempt to develop additional antitrust complaints against the search engines but they are unsupportable. There is no coherent case for monopolization because a search engine, like Google, is free to consumers and they can switch to an alternative search engine with a click.").

219. United States v. Microsoft Corp., 253 F.3d 34, 82 (D.C. Cir. 2001). *See also* Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 381 (3d Cir. 2005) ("In a typical section 2 case, monopoly power is 'inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.'") (quoting *Microsoft*, 253 F.3d at 51); W. Parcel Express v. UPS, 190 F.3d 974, 975 (9th Cir. 1999) ("'A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.'" (quoting United States v. Syufy Enters., 903 F.2d 659, 664 (9th Cir. 1990)).

220. *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy, & Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 5, 7 (2011), (testimony of Eric Schmidt, Exec. Chairman, Google Inc.), https://www.judiciary.senate.gov/imo/media/doc/11-9-21SchmidtTestimony.pdf [https://perma.cc/7QJG-PJM2]. *See also* Bork, *Antitrust and Google*, *supra* note 206.

standalone basis. That would be a strategic but not unfair position for the Commission to take. After all, the antitrust laws were not created with zero-price markets in mind, and the tools commonly used in traditional antitrust cases show their age when applied in such contexts.[221]

On the other hand, the Commission could also see a challenge to Google's conduct as a yellow-light matter, warranting particular caution before standalone authority is asserted. First, the Commission could advance a monopolization claim, based on conclusions that (i) Google's "data advantage" constitutes a barrier to entry, (ii) Google's sustained supernormal profits[222] and dominant query share[223] indicate that the firm has monopoly power, and (iii) the unilateral exclusionary conduct of this dominant search provider is therefore covered by Section 2's prohibition of monopolization.[224] Second, if the Commission feels the forensic argument for monopoly power above is at least somewhat persuasive, it could argue that Google is at least an attempted monopolist. The Commission might in that case point to Google's degradation of the quality of its own product as evidence of its specific intent to monopolize.[225] Of course, an attempted monopolization charge would still require the Commission to show that Google is dangerously likely to obtain (and, implicitly, could possess) monopoly power. Third, the Commission may decide that if it defines the relevant market as the online advertising market, Google becomes vulnerable to more traditional monopolization or attempted monopolization

221. *See* Gal & Rubinfeld, *supra* note 211, at 151 (noting, with disapproval, that the weight of commentary and precedent on zero-price markets tends to conclude that such markets are beyond the reach of the antitrust laws).

222. KNEE ET AL., *supra* note 215, at 98.

223. Query share is likely an excellent indicator of its future competitive significance, insofar as queries are a critical source of the data that search providers use to drive search algorithm improvements. *See, e.g.*, *Calculating Market Shares*, *supra* note 212 (stating that market share need not be revenue-based).

224. 15 U.S.C. § 2 (2012).

225. Luca et al., *supra* note 40, at 5. While the sacrifice of one's own product quality may support the inference of anticompetitive intent (as it does in the context of tacit collusion, *cf. supra* note 32) it probably is not necessary. According to Areeda, "'objective intent' manifested by the use of prohibited means should be sufficient to satisfy the intent component of attempt to monopolize." 3A Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 805b2, at 342. (2d ed. 2002). "[C]onsciousness of wrong-doing is not itself important, except insofar as it (1) bears on the appraisal of ambiguous conduct or (2) limits the reach of the offense by those courts that improperly undervalue the power component of the attempt offense." *Id.* ¶ 805a, at 339–40.

arguments that avoid price-based obstacles to demonstrating extreme market power.[226]

Under these conditions, the first and third prongs of the Statement, taken together, would admonish the Commission to consider carefully whether the potential of a non-standalone action to encourage private suits might produce outcomes that are undesirable in terms of the Commission's mandate to promote consumer welfare. While there is little doubt that a frenzy of private litigation would follow a successful Sherman-type challenge against Google, private plaintiffs would face imposing hurdles to recovery in a class action suit.[227] The Commission's allegation of a Sherman Act violation in a Section 5 complaint almost certainly would not bankrupt Google so as to reduce competition among Internet search providers.[228]

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226. *See* Gal & Rubinfeld, *supra* note 211, at 35.

227. Recovery in a treble-damage suit naturally requires a plaintiff to prove the amount of his or her damages. Courts may dismiss a suit whenever the court concludes that is likely to be able to quantify his or her damages — a conclusion courts often reach at the outset of litigation. AREEDA ET AL., *supra* note 28, at 62. Consequently, the ability to quantify damages is often articulated as a standing requirement in antitrust cases. *Id.* Quantifying the antitrust-type harms to users from Google's "search bias" would likely be extremely uncertain, if not largely speculative, and the effects on competition might vary among the markets for, *e.g.*, local restaurant reviews and information for nearby emergency rooms. *See* Gal & Rubinfeld, *supra* note 211, at 550 (noting, in the context of proposing a zero-price alternative to the "small but significant and non-transitory increase in price" (SSNIPS) test for market definition, that "differences in quality are more difficult to measure and quantify than differences in price," but suggesting that "consumer behavior might still provide rough indicators about consumer preferences when quality changes"). Thus the plaintiffs' case would presumably be one in which "damages are unlikely to be proved [or] are incapable of proof with reasonable judicial economy," and which Areeda therefore maintains should be promptly dismissed. AREEDA ET AL., *supra* note 28, at 62.

228. Consider these factors. There is little cause for concern that more punitive enforcement on a non-standalone basis would bankrupt Google or excessively reduce the "supply" of search. The International Competition Network identifies the fact that bankruptcies may increase concentration in an industry as an unintended consequence of excessive fines; the same rationale may apply to the cost of private-follow on suits, particularly when damages are trebled. INT'L COMPETITION NETWORK, *supra* note 189, at 4. Google has the resources to sustain massive liabilities — its parent company, Alphabet, Inc., reported holding almost $102 billion in cash, cash equivalents, and marketable securities in its December 2017 10-K. ALPHABET, INC., ANNUAL REPORT (Form 10-K) (Dec. 31, 2017). Accordingly, reactions to the European Commission (EC)'s decision to fine the company €2.4 billion in June 2017 for biasing search results noted the record-breaking and intentionally deterrent size of the penalty. Foo Yun Chee, *EU Fines Google Record $2.7 Billion in First Antitrust Case*, REUTERS (June 27, 2017), https://www.reuters.com/article/us-eu-google-antitrust/eu-fines-google-record-2-7-billion-in-first-antitrust-case-idUSKBN19I108 [https://perma.cc/HUR5-A667]; Lucille Roux, *Google Condamné: Le Bras de Fer Entre la Commission Européenne et les Géants du Net*, *translated in* THE NEW FEDERALIST (Jan. 17, 2018), https://www.thenewfederalist.eu/google-sentenced-the-struggle-between-the-european-commission-and-web [https://perma.cc/68TS-T7KS]. However,

The yellow light is not a brick wall, however, and the Commission might consider whether Google's conduct, even if believed to be within the scope of what the Sherman Act prohibits, otherwise warrants a more surgical intervention than the traditional antitrust laws would provide. By way of example, the Commission might be concerned that its excessive interference could discourage search providers from innovating towards the presentation of instant, relevant, and reliable results.[229]

V. CONCLUSION

The need for a flexible and expertly-administered power to prohibit and challenge anticompetitive practices left unaddressed by the traditional antitrust regime motivated the enactment of the FTC Act. The third prong of the Commission's 2015 UMC Statement vindicates this original intent by disfavoring, but not prohibiting, standalone Section 5 challenges against conduct whose harms the Sherman and Clayton Acts are sufficient to address and, correspondingly, elevating "gap-filling" as the core function of the Commission's standalone enforcement authority.

The third prong raises new questions in answering old ones: what practices are the Sherman and Clayton Acts "insufficient"

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press coverage also noted that the fine was far from a threat to Google's solvency. Matt Reynolds, *Google's €2.4bn Fine Is Small Change – the EU Has Bigger Plans*, NEW SCIENTIST (June 28, 2017), https://www.newscientist.com/article/2139097-googles-e2-4bn-fine-is-small-change-the-eu-has-bigger-plans/ [https://perma.cc/U3GW-YPC9]; Jeff John Roberts, *Google's $2.7 Billion Fine: What It Means and What Happens Next*, FORTUNE (June 27, 2017), http://fortune.com/go/tech/google-eu-fine-faq/ [https://perma.cc/Q23R-LXY8]; Aoife White, *Google's Record Fine of $2.8 Billion Was a 'Deterrent,' EU Says*, BLOOMBERG (Dec. 18, 2017), https://www.bloomberg.com/news/articles/2017-12-18/google-s-record-fine-of-2-8-billion-was-a-deterrent-eu-says (last visited Aug. 30, 2018). Even the $5 billion the EC fined Google in July 2018 for requiring Android manufacturers to install certain Google apps to use the Google Play Store was mainly relevant because Google's would have to adapt aspects of its business model to comply with the EC's decision. Rita Gunther McGrath, *The EU's $5 Billion Fine Is Bad News for Google — But It's Not About the Money*, FORTUNE (Jul. 20, 2018), fortune.com/2018/07/20/google-android-chrome-eu-fine-antitrust-laws/ [https://perma.cc/EW98-YZ5B]. The fine itself was "just a drop in the bucket for Google, which made more than $110 billion in revenue last year." Edmond Heaphy, *The EU Just Hit Google with a $5 Billion Fine Over Its Android Operating System*, QUARTZ (Jul. 18, 2018), https://qz.com/1330613/eu-hits-google-with-a-huge-antitrust-fine-over-its-android-operating-system/ [https://perma.cc/263X-5VM3].

229. In any event, as stated elsewhere, this Note considers Google's alleged search bias solely for purposes of illustration. This Note does not purport to address specifically the scope or content of the concerns that the Commission would face in a future Google challenge.

to address, such that the Commission has a "green light" to bring standalone actions? And under what circumstances should the Commission bring standalone actions against apparent Sherman or Clayton Act violations, despite being generally "less likely" to do so?

With respect to the first question, the traditional antitrust laws are most clearly insufficient to address consumer welfare harms or threats stemming from practices whose structure or nature makes them consistently poor fits for the elements of the traditional antitrust prohibitions. In order to tell merely weak Sherman or Clayton Act cases apart from "gaps" in the traditional antitrust regime, the Commission should distinguish between Sherman and Clayton Act cases that are viable or suffer from one-off evidentiary defects, on the one hand, and cases that are beyond the Sherman and Clayton Acts for structural (not case-specific or one-off) reasons, on the other. The structural/case-specific distinction mitigates tension between the need to fill legitimate gaps in the traditional antitrust regime and the concern that the Commission will perceive weak antitrust cases to be gaps unto themselves.

With respect to the second question, where an anticompetitive practice might colorably violate the traditional antitrust laws, the Commission should generally prefer to challenge a practice as a violation thereof. However, the use of standalone authority in such cases to address "antitrust misdemeanors" with a soft touch should not raise concerns about the Commission abusing its discretion or procedural advantages under Section 5. More importantly, the Statement's admonition that the Commission's competition enforcement should be guided by the promotion of consumer welfare, coupled with the Commission's economic expertise, justifies the Commission in opting to bring standalone actions in those cases where an optimal solution to the competitive ills at hand requires that the Commission carefully tailor a remedy.