SHIFTING AND SHRINKING COMMON GROUND: RECALIBRATING THE FEDERAL TRADE COMMISSION'S AND DEPARTMENT OF JUSTICE'S ENFORCEMENT POWERS OF SINGLE-FIRM MONOPOLY CONDUCT

ABSTRACT

In an effort to define unilateral conduct that is violative of the Sherman Act, the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) held joint hearings to establish guidelines for determining when the conduct creates anticompetitive outcomes. At the conclusion of the joint hearings, the DOJ singularly released a report recommending a heightened standard to find single-firm conduct anticompetitive. The standard tacitly endorsed and aimed to extend the United States Supreme Court's recent interpretations of section 2 of Sherman Act (Sherman section 2). The FTC did not endorse the DOJ's new standard or its report. The FTC alleged that the DOJ's new heightened standard incorrectly relied on an overstated consensus among academics and practitioners in the antitrust community and improperly favored the interests of business over those of consumers.

This note argues that this divergence should be expected as the two agencies derive their antitrust enforcement powers from different legislative sources and aim to achieve different ends. The FTC's inherent focus on consumer interests necessitates a lower standard that would find more conduct in violation of antitrust laws. But because section 5 of the Federal Trade Commission Act (FTCA section 5) derives ancillary powers from Sherman section 2, the DOJ's recommendation of a heightened standard affects the FTC's scope of enforcement. Specifically, a heightened DOJ standard will correspondingly heighten the FTC's standard. In order to mitigate further shifts in favor of business interests, the FTC must continue to vigilantly enforce the edges of FTCA section 5 so that any heightened Sherman section 2 standard does not swallow FTCA section 5's mandate and leave consumers to fend for themselves.

I. INTRODUCTION

More than two years ago, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) began a series of public hearings with a common purpose: to provide assistance to courts in interpreting unilateral

conduct that violates section 2 of the Sherman Antitrust Act (Sherman section 2).[1] The agencies wanted to examine the current state of Sherman section 2 jurisprudence in order to help courts and businesses assess the types of unilateral conduct that are truly anticompetitive and harmful to competition.[2] The agencies also wanted to determine when particular types of unilateral conduct might cause harm to consumers.[3] But despite these common goals, the outcome of the hearings revealed an underlying difference in the agencies' enforcement focus.

At the culmination of the joint hearings the agencies' differing enforcement philosophies were exposed to the public. The Sherman section 2 hearings produced a unilateral report prepared by the DOJ the (DOJ Report)[4] that went unendorsed by the FTC.[5] This note will argue that the split between the agencies is to be expected because of the FTC's broader jurisdiction in antitrust enforcement. In disagreeing with the DOJ's interpretation of Sherman section 2, the FTC is fulfilling its own legislative duty under section 5 of the Federal Trade Commission Act (FTCA section 5). Under this act, the FTC is empowered to pursue incipient Sherman Act violations[6] and consider public values beyond the scope of the antitrust laws.[7]

The DOJ Report proposes a disproportionality standard that raises the bar for the government and private citizens to bring, and win, Sherman

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[1]*See* Consumer Benefits and Harms: How Best to Distinguish Aggressive Pro-Consumer Competition From Business Conduct To Attain or Maintain a Monopoly, 71 Fed. Reg. 17,872, 17,872-17,874 (Apr. 7, 2006).

[2]Press Release, U.S. Dep't of Justice, DOJ and FTC to Hold Joint Public Hearings on Competition Policy Related to Single-Firm Conduct (Nov. 28, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/213369.pdf.

[3]*Id.*

[4]*See* U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), http://www.usdoj.gov/atr/public/reports/236681.pdf [hereinafter DOJ REPORT].

[5]*See* PAMELA HARBOUR ET AL., FED. TRADE COMM'N, STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ, AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE 1 (2008), http://www.ftc.gov/os/2008/09/080908section2stmt.pdf [hereinafter FTC STATEMENT];WILLIAM E. KOVACIC, FED. TRADE COMM'N, MODERN U.S. COMPETITION LAW AND THE TREATMENT OF DOMINANT FIRMS: COMMENTS ON THE DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION PROCEEDINGS RELATING TO SECTION 2 OF THE SHERMAN ACT 1 (2008), http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf [hereinafter KOVACIC STATEMENT].

[6]*See* FTC v. Cement Inst., 333 U.S. 683, 708 (1948) ("A major purpose of [FTCA section 5] . . . was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained.").

[7]*See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (stating that the FTC may "consider[] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").

section 2 claims.[8] This newly synthesized rule would affect interpretations of unilateral conduct and effectively replace both the rule of reason[9] and per se anticompetitive[10] standards for certain types of unilateral conduct.

This heightened standard is in line with the United States Supreme Court's recent antitrust decisions filed under section 1 of the Sherman Antitrust Act (Sherman section 1) and Sherman section 2. The Court's recent decisions in *Bell Atlantic Corp. v. Twombly*,[11] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[12] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[13] *NYNEX v. Discon, Inc.*,[14] and *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*[15] each raised the legal standard previously applied for the particular type of conduct or failed to recognize a new liability theory. Implicit in the DOJ Report's heightened standard is an approval of the Court's recent jurisprudence, as well as an appeal to continue the direction of its Sherman section 2 jurisprudence.

The Court's heightened Sherman Act legal standard has made it more difficult to show that businesses are acting in an anticompetitive manner. But the FTC does not derive its antitrust enforcement powers directly from the Sherman Act.[16] The FTC's overarching duty to consumers[17] allows the

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[8]*See* DOJ REPORT, *supra* note 4, at 46-47.

[9]*See infra* Part IV.

[10]*See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133 (1998) ("[C]ertain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful *per se*.") (citations omitted).

[11]550 U.S. 544, 561-66 (2007) (overruling and replacing the *Conley v. Gibson*, 355 U.S. 41 (1957), "no set of facts" pleading standard with the higher "plausibility" pleading standard for antitrust cases).

[12]540 U.S. 398, 409-10 (2004) (limiting a refusal-to-deal violation to retail prices and allowing monopolists to refuse to sell at cost-based prices).

[13]549 U.S. 312, 325 (2007) ("The general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged *Brooke Group* test should apply to our predatory-bidding claims.").

[14]525 U.S. 128, 135 (1998) (holding that the per se rule against boycotts does not apply even if no legitimate business for the purchasing decisions are shown).

[15]129 S. Ct. 1109, 1123 (2009) (denying to recognize liability for a price squeezing claim and describing the proposed theory as an attempt to "join a wholesale claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability"). Although this case was decided after the DOJ submitted its report, the Court's denial of liability in the price squeezing context shows the Court's propensity to shrink the Sherman section 2 violative conduct realm.

[16]*See infra* Part III.C.2.

[17]Fed. Trade Comm'n, A Guide to the Federal Trade Commission, http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm (last visited Apr. 14, 2009).

FTC to maintain a lower legal standard and pursue conduct that fails to reach the Sherman Act antitrust standard.[18] The two agencies, therefore, share jurisdiction for conduct that violates Sherman section 2, but the FTC also reaches conduct that is adjacent to, and does not reach, the DOJ standard.[19] In this sense, the FTC's legal standard straddles both competitive and anticompetitive unilateral conduct under the DOJ's standard. If the joint enforcement is viewed as a continuum, the DOJ's heightened standard will shift causing a correlative shift in the FTC's standard. Because of this relationship the FTC will be able to enforce conduct that does not meet the DOJ's standard. But under the new heightened disproportionality standard, some conduct that was an incipient violation under the previously applied rule of reason standard may now be too incipient under the disproportionality standard for the FTC's enforcement powers to reach.

II. A HEARING THAT COULD HAVE USED MORE LISTENING

In 2006, the FTC and the DOJ began a series of hearings on unilateral conduct and Sherman section 2.[20] This effort was cosponsored by both agencies in an attempt to "help define the boundaries between single-firm conduct that is legal and conduct that is illegal under current antitrust

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[18]The FTC's standard under FTCA section 5 is to prevent the use of "[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2000); *see also infra* Part III.C.2 (discussing FTC's regulation powers).

[19]It is understood that both agencies may pursue violations of the Sherman Act. *See* FTC v. Cement Inst., 333 U.S. 683, 693 (1948) ("The [FTC] has jurisdiction to declare that conduct tending to restrain trade is an unfair method of competition even though the selfsame conduct may also violate the Sherman Act."). The FTCA's reach, however, extends to conduct that subsequently may become antitrust violations. *See id.* In coming to this determination the Court states:

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

Id. Therefore, when a potential violation of the Sherman Act occurs, both agencies may be on alert but the FTC may have a duty before the conduct rises to a full-blown Sherman Act violation.

[20]*See* Press Release, *supra* note 2. President Obama has recently appointed Christine Varney to the head of the Department of Justice Antitrust Division. *See* John R. Wilke, *U.S. News: Internet-Law Expert is Nominated as Antitrust Chief*, WALL ST. J., Jan. 23, 2009, at A3. Assistant Attorney General Varney was a commissioner at the FTC and also "helped persuade Justice officials to launch a successful antitrust case against Microsoft Corp." *Id.* Her background may suggest that she will lead the DOJ's Antitrust Division to pursue a more liberal construction of Sherman section 2 and more active enforcement of the antitrust laws in general. The Court's recent decision in *Linkline Communications*, however, and its other recent Sherman section 2 decisions should act to temper any potential increase in the DOJ's enforcement of Sherman section 2. *See supra* notes 11-15 and accompanying text.

laws."[21] The panel hearings began with common ground and consensus between the two agencies. During opening remarks, Assistant Attorney General of the Antitrust Division, Thomas O. Barnett, and FTC Chairman Deborah Platt Majoras, both agreed that the agencies must fulfill their mutual legislative duty to protect both competition and consumers.[22]

At the beginning of the hearings, both agency representatives showed that they started from a common point in their interpretation of antitrust jurisprudence by separately quoting Justice Scalia's explanation in *Trinko* that "[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."[23] In echoing Justice Scalia's characterization, the agencies appear to implicitly agree that legal monopolies have a role to play in the free-market system. But despite this shared opinion, there were underlying differences in the agencies' expectations at the outset of the hearings that foreshadowed the resultant split.

Chairman Platt Majoras advocated the above stated goals with a focus on the consumer. She anticipated the new standards that would result from the hearings as a "means, not the end."[24] The end that the new standards would promote, would be "undistorted competition, driven by 'King and Queen Consumer.'"[25]

Assistant Attorney General Barnett, however, focused on competition to reach the goals enunciated in the hearing.[26] He appeared to place competition above the interests of consumers by quoting from Judge Easterbrook, "The gale of creative destruction produces victims before it produces

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[21]Press Release, *supra* note 2.

[22]*See* THOMAS O. BARNETT, ASSISTANT ATTORNEY GEN., ANTITRUST DIV., THE GALES OF CREATIVE DESTRUCTION: THE NEED FOR CLEAR AND OBJECTIVE STANDARDS FOR ENFORCING SECTION 2 OF THE SHERMAN ACT 1 (June 20, 2006) [hereinafter BARNETT SPEECH], *available at* http://www.usdoj.gov/atr/public/speeches/216738.pdf ("The Federal Trade Commission and the Antitrust Division share a common goal of protecting competition and promoting consumer welfare . . . ."); DEBORAH PLATT MAJORAS, CHAIRMAN, FED. TRADE COMM'N, THE CONSUMER REIGNS: USING SECTION 2 TO ENSURE A "COMPETITIVE KINGDOM" 2 (June 20, 2006) [hereinafter PLATT MAJORAS SPEECH], *available at* http://www.ftc.gov/speeches/majoras/060620revisedhearingon section2.pdf ("The FTC and the Antitrust Division have the responsibility to ensure that competition in U.S. markets is free of distortion and that consumers are protected not *from* markets but *through* markets unburdened by anticompetitive conduct and government-imposed restrictions.").

[23]Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); BARNETT SPEECH, *supra* note 22, at 6; PLATT MAJORAS SPEECH, *supra* note 22, at 9.

[24]*See* PLATT MAJORAS SPEECH, *supra* note 22, at 13.

[25]*Id.*

[26]*See* BARNETT SPEECH, *supra* note 22, at 2 (discussing as one of two reasons for the hearings, the various stakeholders that have a vested interest in antitrust enforcement and how "[t]hose views are significant to our understanding of the real-world implications of various business practices and their potential impact on competition").

economic theories and proof of what is beneficial."[27] In this interpretation, consumer victims appear a necessary means to reach a competitive process that eventually proves beneficial to business and consumers.

Along with the agencies' different focuses at the outset of the hearings, there also appeared to be a split in the agencies' expectations of how the outcome of the hearings would be used. While both agencies wanted the product of the hearings to help develop the law in Sherman section 2 jurisprudence, their focus on the course of that development was not shared. The DOJ appeared focused explicitly on influencing the development of antitrust law.[28] Assistant Attorney General Barnett wanted the hearings to identify and "articulat[e] points of consensus."[29] And he hoped that these points of consensus would be valuable in assisting courts and putting businesses on notice of anticompetitive conduct.[30] Chairman Platt Majoras had lower expectations. She realized that a consensus on a universal test may not occur, but hoped that the hearings would "identify relative consensus on a number of principles and . . . how to approach a significant fraction of the single-firm conduct we encounter."[31] She envisioned this consensus, however, to lead to the development of "signposts for when the conduct may harm competition and when it typically does not"[32] and hoped that these signposts would then be thoroughly examined before "determining what workable legal rules can be applied to the specific conduct."[33]

Though the differences were subtle, the distinctions at the opening of the hearing foreshadowed the break between the agencies when the DOJ singularly presented recommendations based on the hearing's findings. Following the unilateral release of the DOJ Report, the FTC, in a statement joined by three of the four FTC commissioners,[34] responded by critiquing the

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[27] *Id.* at 12 (quoting Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984)).

[28] *Id.* at 2 ("Developing the law—or, more accurately, influencing the development of the law—in ways that help competition is an important goal for the Antitrust Division.").

[29] *Id.*

[30] BARNETT SPEECH, *supra* note 22, at 2. In the merger context, Assistant Attorney General Barnett noted how the courts reliance on the DOJ's merger guidelines have "increased transparency regarding merger-enforcement policy and improved merger-enforcement practice." *Id.* at 3. It seems that Assistant Attorney Barnett hoped the product of these hearings would yield the same influence in Sherman section 2 jurisprudence. *Id.* 2-3.

[31] PLATT MAJORAS SPEECH, *supra* note 22, at 8.

[32] *Id.*

[33] *Id.*

[34] Chairman Kovacic did not join this statement but rather penned his own critique of the DOJ's report interpreting unilateral firm conduct through a historical perspective and the Chicago-Harvard Double Helix. *See* KOVACIC STATEMENT, *supra* note 5, at 1 n.1.

DOJ Report's focus on business interests over those of the consumer,[35] and its overstatement of the "level of legal, economic, and academic consensus regarding [s]ection 2."[36] These same concerns were evident during the opening statements of the hearings. The FTC explicitly placed consumers' interests as the top concern for any new standards. And the FTC's desire to prudently develop the law suggests caution in stating consensus between the legal and academic communities.

Given that the FTC does not have statutory authority to directly enforce antitrust conduct under the Sherman Act,[37] the agencies' divergent Sherman section 2 interpretations should be academic. But the Sherman Act, while providing direct statutory enforcement powers to the DOJ, plays an important role in the FTC's interpretation of its own enforcement powers.[38] As will be demonstrated below, the FTC's unilateral conduct enforcement takes its lead from Sherman section 2 jurisprudence. But its enforcement power is not bound by any interpretation of Sherman section 2.

III. THE SHERMAN ACT, THE DOJ, AND THE FTC

The FTC and the DOJ Antitrust Division "share dual jurisdiction to enforce the federal antitrust laws."[39] Within this shared jurisdiction, the agencies acquire their enforcement power from different statutory bases and correspondingly apply different legal standards in determining whether conduct is anticompetitive. If either agency determines that unilateral conduct is anticompetitive, the agencies may also subject violators to different punishments.

A. *The Sherman Powers and the Court's Application*

"The Sherman Act contains a 'basic distinction between concerted and independent action.'"[40] While Sherman section 1 regulates concerted action,[41] "[t]he conduct of a single firm is governed by [section] 2 alone and

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[35]FTC STATEMENT, *supra* note 5, at 1 ("[T]he Department's Report is chiefly concerned with firms that enjoy monopoly or near monopoly power, and prescribes a legal regime that places these firms' interests ahead of the interests of consumers.").

[36]*Id.*

[37]15 U.S.C. § 45(a)(2) (2000).

[38]*Id.*

[39]Lauren Kearney Peay, Note, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 VAND. L. REV. 1307, 1308 (2007).

[40]Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984)).

[41]The language of section 1 implies more than one actor. Section 1 states, "Every *contract*,

is unlawful only when it threatens actual monopolization."[42] The difficulty in analyzing Sherman section 2 arises because "[i]t is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression."[43] Presumably, this murky area of antitrust law is the area that the FTC/DOJ joint hearings were intended to clarify.

In *Standard Oil Co. of New Jersey v. United States*,[44] the Court interpreted Sherman section 1 to proscribe contracts or combinations, which, under common law, were undue restraints on trade and contracts and combinations that, as a result of evolving economic conditions, are unreasonable.[45] This test has gained fame as the "rule of reason" that directs "the factfinder [to] weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[46] Although the invitation to explore all circumstances may seem to allow defendants broad discretion to show conduct is not anticompetitive, the rule of reason has narrowed its focus mainly on circumstances that impact competitive conditions.[47]

In interpreting Sherman section 2, the Court viewed the provision as "mak[ing] the prohibitions of the act . . . more complete and perfect by embracing all attempts to reach the end prohibited by the first section."[48] The Court anticipated this gap filling provision would prohibit "attempt[s] to monopolize, or monopolization thereof, even []though the acts by which

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combination in the form of trust or otherwise, or *conspiracy*, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2000) (emphasis added). In contrast, Sherman section 2 states, "Every *person* who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2 (emphasis added). The "every person" language of Sherman section 2 contrasts the collective language in section 1. *See id.* The Court acknowledges that there is "[n]othing in the literal meaning of those terms [that] excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that [section] 1 was designed to police." *Copperweld*, 467 U.S. at 769.

[42]*Copperweld*, 467 U.S. at 767. The court stated:

> By making a conspiracy to monopolize unlawful, [section] 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under [section] 2 and not under [section] 1. Monopolization without conspiracy is unlawful under [section] 2, but restraint of trade without a conspiracy or combination is not unlawful under [section] 1.

Id. at 767 n.13.

[43]*Id.* at 767.

[44]221 U.S. 1 (1910).

[45]*Id.* at 59-60.

[46]Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[47]*See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[48]*Standard Oil*, 221 U.S. at 61.

such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section."[49] Courts tend to apply the "rule of reason" analysis to unilateral conduct, while typically finding concerted conduct illegal per se.[50]

The Court has defined a Sherman section 2 violation as requiring two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power."[51] Significant in the Sherman section 2 analysis is the consideration that the acquisition or maintenance of monopoly power element must be "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[52]

B. *The Court's Current Interpretations of Sherman Section 2*

In certain contexts, the Court has considered refusals to deal with competitors as unilateral conduct that fulfills the willful acquisition or maintenance of monopoly power element. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[53] the Court held that a ski resort that eliminated a joint ticket agreement with a competitor, and later would not re-establish the ticket relationship even when the competitor offered to buy the tickets at retail price, was a willful maintenance of monopoly power.[54] But the Court has retracted from this view. In *Trinko*, the Court demarcated "*Aspen Skiing* . . . at or near the outer boundary of [section] 2 liability."[55] The Court distinguished *Aspen Skiing* by noting that the defendant in *Aspen Skiing*

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[49] *Id.*

[50] *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1223 (2008) (stating that "claims involving unilateral restraints are almost always evaluated under a rule of reason-type approach where the courts weigh the anti- and pro-competitive effects of the challenged conduct, while many (though by no means all) concerted acts are illegal per se").

[51] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

[52] *Id.* at 571.

[53] 472 U.S. 585, 595 & n.19 (1985). In order to meet this element the conduct must "not only (1) tend[] to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Id.* at 605 n.32 (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 78 (1978)).

[54] *Id.* at 608-10. The defendant could not persuade the jury that refusing the joint ticket venture was done for "any normal business purpose." *Id.* at 608. Therefore, the jury may have concluded that the defendant "elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor." *Id.*

[55] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

refused to sell at retail price, whereas the defendant in *Trinko* refused to sell at a cost-based price.[56] The Court reasoned that, while in *Aspen Skiing* it could be suggested that the defendant's refusal to sell at retail showed a monopolistic intent, "[the defendant's] reluctance to interconnect at the cost-based rate of compensation . . . tells us nothing about dreams of monopoly."[57] In effect, the Court limited any extension of a refusal to deal beyond an offer to buy at retail.

The Court has also singled out predatory pricing[58] as unilateral conduct that is a willful maintenance of monopoly power. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[59] the Court established two prerequisites for predatory pricing violations under Sherman section 2.[60] The plaintiff must show "[f]irst . . . that the prices complained of are below an appropriate measure of its rival's costs"[61] and second that there exists "a dangerous probability, of [the defendant] recouping its investment in below-cost prices."[62] The Court warned that the prerequisites are "not easy to establish"[63] and "the costs of an erroneous finding of liability are high."[64] In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[65] this high burden was subsequently extended to unilateral predatory bidding conduct.[66] In expanding the scope of the *Brooke Group* test, the Court reasoned that "a

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[56] *Id.*

[57] *Id.*

[58] A definition of predatory pricing may be helpful:

> Predatory pricing is defined in economic terms as a price reduction that is profitable only because of the added market power the predator gains from eliminating, disciplining, or otherwise inhibiting the competitive conduct of a rival or potential rival. Stated more precisely, a predatory price is a price that is profit-maximizing only because of its exclusionary or other anticompetitive effects. The anticompetitive effects of predatory pricing are higher prices and reduced output—including reduced innovation—achieved through the exclusion of a rival or potential rival.

Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2242-43 (2000).

[59] 509 U.S. 209 (1993).

[60] *Id.* at 222.

[61] *Id.*

[62] *Id.* at 224. The court understands that "'[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices.'" *Id.* at 225-26 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590-91 (1986)).

[63] *Brook Group Ltd.*, 509 U.S. at 226.

[64] *Id.*

[65] 549 U.S. 312 (2007).

[66] *Id.* at 325 ("The general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged *Brooke Group* test should apply to our predatory-bidding claims.").

predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses."[67] Because the Court assumes that there is minimal to no effect on consumer prices in the predatory bidding context, the burden is raised to meet the first element of the *Brooke Group* test.

In *NYNEX Corp. v. Discon, Inc.*,[68] the Court limited the use of a violative per se rule to boycotts between horizontal competitors.[69] The plaintiff in *NYNEX* alleged a boycott by way of a vertical agreement between supplier and distributor that kept the plaintiff out of the market, ultimately forcing the plaintiff out of business.[70] The Court acknowledged that this tactic may "hurt consumers by raising telephone service rates,"[71] but that the injury was a natural result of "market power that is *lawfully* in the hands of a monopolist."[72] Because the Court determined that the defendant held legal monopoly power, the plaintiff's Sherman section 2 theory of conspiracy to monopolize by way of the vertical agreement was rendered moot because the Court found the vertical behavior lawful under Sherman section 1.[73] The typical illegal per se finding for collusive conduct, therefore, was not applicable because the monopoly power was not illegal under Sherman section 1.

It should be noted that the last four Sherman section 2 cases (*Weyerhaeuser*, *NYNEX*, *Trinko*, and *Linkline Communications*) were decided without dissent.[74] This trend exemplifies the Court's concern to make sure it does not mistakenly classify conduct as anticompetitive, i.e., "false positive" conduct.[75] In the past, the Court has stressed the need to reduce "false positives" because "mistaken inferences . . . chill the very conduct the antitrust laws are designed to protect."[76]

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[67]*Id.* at 324 (citing Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 676 (2005)).

[68]525 U.S. 128 (1998).

[69]*Id.* at 135 ("[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.").

[70]*Id.* at 132.

[71]*Id.* at 136.

[72]*NYNEX*, 525 U.S. at 136.

[73]*Id.* at 139-40 ("We do not see, on the basis of the facts alleged, how Discon could succeed on [its section 2] claim without prevailing on its [section] 1 claim.").

[74]Pacific Bell Tel. Co. v. Linkline Commc'ns, 129 S. Ct. 1109 (2009); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[75]*See Trinko*, 540 U.S. at 414.

[76]Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

The restriction that is apparent in the Sherman section 2 context is indicative of the Court's recent shrinking of violative conduct under the Sherman Act. The Court has been consistent in its aim to reduce catching "false positive" conduct and has applied a similar presumption in favor of reducing "false positive" conduct in areas outside of Sherman section 2.[77] In two recent Sherman section 1 cases, the Court has raised the pleading bar required to bring a monopoly claim,[78] and overruled a violative per se rule against vertical price restraints, by replacing a nearly 100-year-old precedent with the rule of reason analysis.[79] Based on these increasing barriers to prove anticompetitive conduct, the DOJ's proposed disproportionality standard is in line with the Court's trend, and will continue to make it more difficult to present and prevail on a Sherman Act claim.

C. *The Agencies' Enforcement Powers Under Sherman Section 2*

1. DOJ

The DOJ Antitrust Division enforces unilateral monopoly conduct under Sherman section 2.[80] The DOJ is able to pursue anticompetitive conduct that appears to meet the Sherman section 2 standard as articulated by the Court.[81] The punishment for a violation is severe—a violation is deemed a felony and carries a punishment of up to ten years in prison and, for a corporation, up to $100 million in fines.[82] Furthermore, individuals that are injured by illegal monopolistic conduct may use Sherman section 2 to obtain treble damages.[83] Because individuals are able to tack follow-on private claims onto government actions,[84] and still be eligible for treble

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[77]While *NYNEX* does have a tangential Sherman section 2 issue, this case is essentially a reduction of Sherman section 1 collaborative activity. *See supra* note 73 and accompanying text.

[78]*See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553-56 (2007) (overruling Conley v. Gibson, 355 U.S. 41 (1957)); *see also supra* note 11 and accompanying text.

[79]*See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling the decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that established the violative per se rule to judge vertical price restraints and applying the rule of reason to this type of conduct).

[80]This enables the DOJ to prosecute and punish "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . . ." 15 U.S.C. § 2 (2000).

[81]*See supra* Part III.A (describing the conduct that meets the standard).

[82]15 U.S.C. § 2 (2000).

[83]*Id.* § 15(a) (stating that a plaintiff "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

[84]*See* Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private*

damages, a company pursued by the DOJ in violation of the Sherman section 2 violation can be expected to pay large fines, legal fees, serve prison time, or all of the above.

2. FTC

The FTC does not enforce antitrust violations directly through the Sherman Act. Rather, the FTC is granted its regulation powers under FTCA section 5 to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce."[85] The FTC derives its antitrust enforcement powers from the "unfair methods of competition" language.[86]

The remedy available for an FTC violation is less than that imposed by a direct Sherman Act violation. If conduct is deemed "unfair," the FTC is able to bring forth a cease and desist order,[87] a civil action to recover a civil penalty,[88] or a consent order.[89] Unlike the Sherman Act, prosecution under FTCA section 5 has remained the sole jurisdiction of the FTC, and there are no follow-on opportunities for private individuals.[90] In short, these remedies are less punitive than those imposed by the Sherman Act.

The FTC's power to regulate "unfair methods of competition" has been difficult to establish since the FTCA's enactment in 1914.[91] In *FTC v. Gratz*,[92] an early interpretation of FTCA section 5, Justice Brandeis, in dissent, noted that "[FTCA section 5's] action was to be prophylactic. Its

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Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared, 74 GEO. L.J. 1163, 1165 (1986) (stating that the DOJ filing a complaint "is likely to trigger the filing of private suits and influence both perceptions of the merits of the subsequent litigation and the conduct of the parties").

[85] 15 U.S.C. § 45(a)(2) (2000). These are two separate powers. The "unfair methods of competition" prong grants the FTC the power to pursue antitrust violations. Roger E. Schechter, *Letting the Right Hand Know What the Left Hand's Doing: The Clash of the FTC's False Advertising and Antitrust Policies*, 64 B.U. L. REV. 265, 265 (1984). The "unfair or deceptive acts or practices" prong allows the FTC to pursue false advertising and other consumer protection issues. *Id.*

[86] 15 U.S.C. § 45(a)(2) (2000).

[87] *Id.* § 45(m)(1)(B).

[88] *Id.* § 45(m)(1)(A).

[89] *Id.* § 45(m)(1)(B).

[90] *See* Holloway v. Bristol-Myers Corp., 485 F.2d 986, 988-89 (D.C. Cir. 1973) ("The Act nowhere purports to confer upon private individuals, either consumers or business competitors, a right of action to enjoin the practices prohibited by the Act or to obtain damages following the commission of such acts.").

[91] *See generally* Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 ANTITRUST L.J. 871 (2005) (discussing the historical context at the creation of the FTC and the challenges to the FTC since its founding).

[92] 253 U.S. 421 (1920).

purpose in respect to restraints of trade was prevention of diseased business conditions, not cure."[93] Justice Brandeis was an early proponent of creating a new antitrust agency[94] and wanted the new agency to regulate both competition and monopoly.[95] The Court eventually adopted Justice Brandeis's dissenting opinion in *Gratz*, and the spirit of that opinion is followed in modern FTCA section 5 jurisprudence.[96]

Congress later supplemented FTCA section 5 by adding the "unfair or deceptive acts or practices" language in the 1938 Wheeler Act.[97] By adding this language, the legislature explicitly "charged the FTC with protecting consumers as well as competitors."[98] In expanding the FTC's authority to include enforcement of "unfair or deceptive acts or practices," the congressional motivation was to "make[] the consumer . . . of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor."[99] This language is significant as it strongly alludes to the FTC's antitrust enforcement standard.

In later interpretations of "unfair methods of competition," the Court has adopted the congressionally recognized concern for consumers. In *Sperry & Hutchinson*, the Court determined:

> that the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.[100]

The Court has allowed the FTC a broader antitrust mandate by allowing the agency to protect public values. This explains why the FTC can find an

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[93] *Id.* at 435 (Brandeis, J., dissenting).

[94] *See* PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 87 (1993). Brandeis "was . . . convinced that no law could cover all possible violations of antitrust policy, and an agency with the power to expand upon basic legislative policy should be created." *Id.*

[95] *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 37-38 (2003) (describing Justice Brandeis's views on competition, monopoly efficiency, and agency enforcement before the passage of the FTCA).

[96] *See* FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966) ("Later cases of this Court, however, have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair.").

[97] *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

[98] *Id.*

[99] *Id.* (quoting H.R. REP. NO. 1613, at 3 (1937)).

[100] *Id.*

unfair method of competition before the conduct rises to the type of anticompetitive conduct that violates the Sherman Act.[101]

In general, the Court gives great deference to the FTC's interpretation of its power under the "unfair methods of competition" rubric.[102] These interpretations have oscillated over time. At times, the FTC's interpretations have been extremely broad and lower courts have attempted to rein in the FTC's powers. After the broad grant of power allowed by the Court in *Sperry & Hutchinson*,[103] the Second Circuit attempted to restrict the FTC's power based on the concern that the FTC would "substitute its own business judgment for that of the monopolist."[104] But after the Second Circuit's attempt to reduce the FTC's authority, the Supreme Court restated its previous grant of FTCA section 5 power as "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."[105] At other times, the FTC has interpreted its FTCA section 5 power narrowly. In a waning period, the FTC did not perceive that FTCA section 5 gave it the power to pursue attempts to monopolize.[106] Currently, the FTC is attempting to expand its FTCA section 5 authority to include acts that do not fit neatly within Sherman section 2 unilateral conduct such as invitations to collude[107] and standard setting.[108] The FTC's current efforts have been met with mixed results.[109]

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[101] *See* FTC v. Cement Inst., 333 U.S. 683, 708 (1948) (stating that "[t]he Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition'").

[102] *Id.* at 720. This is in line with the notion that "[w]here the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision 'has warrant in the record and a reasonable basis in law.'" Atl. Ref. Co. v. FTC, 381 U.S. 357, 367 (1965) (quoting NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 131 (1944)).

[103] *See Sperry & Hutchinson*, 405 U.S. at 244.

[104] Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980). The Second Circuit was concerned that "[s]uch a decision would permit the FTC to delve into, as the Commission itself put the extreme case, 'social, political, or personal reasons' for a monopolist's refusal to deal." *Id.* During this period, the FTC was publicly humiliated in its attempt to interpret "deceptive acts or practice" to include restricting commercials from advertising sugared products to children and was condemned as a "national nanny." *See* Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22; *see also* Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79 (2006) (discussing the FTC's proposal to restrict advertising to children).

[105] FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (citations omitted).

[106] *See In re* Gen. Foods Corp., 103 F.T.C. 204, 365 (1984) (refusing "to expand the reach of the prohibition against attempted monopolization in the Sherman Act by condemning less offensive conduct under the purview of the Federal Trade Commission Act").

[107] *See* Complaint at 4, *In re* Valassis Commc'ns, Inc., No. C-4160, 2006 WL 1367833 (F.T.C. Apr. 19, 2006) ("Valassis invited its competitor to collude with Valassis in violation of

3. The Relationship Between Sherman Section 2 and FTCA Section 5

While the agencies' antitrust remedies may be different, a violation of FTCA section 5 encompasses Sherman Act violations.[110] The FTC's "unfair methods of competition" standard is clearly related to the Sherman section 2 standard. Because the FTC may target a business practice before it reaches a full-blown Sherman Act violation, the Sherman section 2 standard is an indicator of anticompetitive conduct that the FTC can comfortably enforce. But enforcement under FTCA section 5 also reaches conduct that does not meet the Sherman section 2 standard. Therefore, the DOJ's interpretation of Sherman section 2 greatly affects the FTC. If the DOJ interprets Sherman section 2 more strictly and finds less conduct that violates this statute, the FTC's area of enforcement will shift. Enforcement under FTCA section 5 will continue to reach conduct that does not meet the new Sherman section 2 standard.[111] But conduct that the FTC may have previously pursued may be too incipient a violation based on the heightened standard. With the FTC's reliance on Sherman section 2 in mind, we now turn to the DOJ Report.

IV. THE DOJ REPORT

A. *The DOJ's Dependence on Disproportionality and Deterrence*

In analyzing the evolution of Sherman section 2 standards and enforcement, the DOJ felt that "a consensus—as reflected in both judicial decisions and the views of a broad cross-section of commentators—exists on at least seven core principles regarding section 2."[112] These seven principles are: (1) the monopoly power requirement;[113] (2) the anticompetitive-conduct requirement;[114] (3) condemning assaults on the competitive process should

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Section 5 of the Federal Trade Commission Act.").

[108] *See* Rambus Inc. v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008) (overturning the FTC's finding that "Rambus engaged in exclusionary conduct consisting of misrepresentations, omissions, and other practices that deceived JEDEC about the nature and scope of its patent interests while the organization standardized technologies covered by those interests"). *But see* Complaint at 5-7, *In re* Negotiated Data Solutions, LLC, No. C-4234 (F.T.C. Sept. 22, 2008) (alleging that a breach of a licensing agreement after a standard has been set will injure consumers and threaten or actually produce anticompetitive effects).

[109] *See supra* notes 107-08.

[110] *See Ind. Fed'n of Dentists*, 476 U.S. at 454 (stating that "'unfairness' under the FTC Act . . . encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws").

[111] *See supra* note 105.

[112] DOJ REPORT, *supra* note 4, at 8.

[113] *Id.* at 9.

[114] *Id.* at 9-10.

be condemned;[115] (4) protection of competition, not competitors;[116] (5) recognition that distinguishing competitive and exclusionary conduct is often difficult;[117] (6) concern with underdeterrence and overdeterrence;[118] and (7) the importance of administrability when crafting liability standards under Sherman section 2.[119] In arriving at these principles, the report makes an implicit assumption that a firm's desire to obtain monopoly power may lead the firm to innovate to the benefit of consumers.[120]

The first two principles describe the necessary elements required in a Sherman section 2 case.[121] The next two principles describe conduct that may be anticompetitive under the second principle.[122] Overall, the first four principles state the necessary elements in a Sherman Act claim and provide a rationale for applying the law. The next three principles attempt to isolate concerns that raise difficulties in interpreting the Sherman section 2 analysis. It is these concerns that the DOJ Report spends the most time addressing.[123]

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[115] *Id.* at 10-11.

[116] DOJ REPORT, *supra* note 4, at 11-12.

[117] *Id.* at 12-13.

[118] *Id.* at 13-15.

[119] *Id.* at 15-18.

[120] DOJ REPORT, *supra* note 4, at 8. The DOJ Report suggests that "[c]ourts and enforcers have in recent years come to better appreciate[] the prospect of monopoly profits [which] may well be what 'attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth.'" *Id.* (quoting Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)). It should be noted that this assumption is not unanimously held. *See, e.g.*, Somnath Bhattacharyya, U.S. Philips Corp. v. International Trade Commission*: Seeking a Better Tie Between Antitrust Law and Package Licensing*, 40 COLUM. J.L. & SOC. PROBS. 267, 276 (2007) ("[M]onopoly power can potentially inhibit dynamic efficiency, the innovation and creation of new technologies through investment."); Robin Cooper Feldman, Essay, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2094 (1999) (suggesting that in the "next-generation" scenario, defensive leveraging in antitrust inhibits competition).

[121] Monopolization under the Sherman Act requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power." United States v. Grinnell Corp, 384 U.S. 563, 570-71 (1966). The "monopoly power" principle is synonymous to the first prong of the *Grinnell* test. The "anticompetitive-conduct" principle simplifies the elusive "acquisition or maintenance" prong in *Grinnell.*

[122] In discussing the third principle, the DOJ follows the interpretation in *Spectrum Sports, Inc. v. McQuillan* and allows "conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." DOJ REPORT, *supra* note 4, at 10 (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)). In describing the fourth principle, the DOJ follows the Court's interpretation that the purpose of the Sherman Act "'is not to protect businesses from the working of the market; [but rather] it is to protect the public from the failure of the market.'" *Id.* at 11 (quoting *Spectrum Sports*, 506 U.S. at 458).

[123] *See* DOJ REPORT, *supra* note 4, at 18.

> Section 2 enforcement is crucial to the U.S. economy. It is a vexing area, however, given that competitive conduct and exclusionary conduct often look alike. Indeed, the same exact conduct can have procompetitive and exclusionary effects. An efficient legal regime will consider the effects of false positives, false negatives,

The fifth and sixth principles deal with enforcement and selecting violative conduct. The DOJ recognizes that "[c]ourts and commentators have long recognized the difficulty of determining what means of acquiring and maintaining monopoly power should be prohibited as improper."[124] It is hard to find the line between competitive and anticompetitive conduct because "often the *same conduct* can both generate efficiencies and exclude competitors."[125] Because of these difficulties, the Court must try to balance enforcement to deal with the problems inherent in under- and overdeterrence.[126] In considering the difficult task of finding the balance between these extremes, the DOJ seems more concerned with the problem of overdeterrence.[127] The DOJ states that it is taking its cue from the Court's stance of "consistently emphasiz[ing] the potential dangers of overdeterrence."[128]

In order to properly consider the deterrence concern, courts have developed tests to provide tools to businesses and judges for assessing conduct under Sherman section 2. Analyzing these tests and promoting common legal standards is one of the DOJ Report's main purposes.[129] In considering the administrability principle, the DOJ Report reviews five general exclusionary conduct standards: (1) the effects-balancing test;[130] (2) the profit sacrifice test;[131] (3) the no-economic-sense test;[132] (4) the equally

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> and the costs of administration in determining the standards to be applied to single-firm conduct under section 2.

Id.

[124] *Id.* at 12.

[125] *Id.* at 13.

[126] *See id.* at 14-15.

[127] *See* DOJ REPORT, *supra* note 4, at 14 (stating that "[r]ules that overdeter . . . undermine the incentive structure that competitive markets rely upon to produce innovation"). The DOJ Report continues by stating that "rules that are overinclusive . . . will sacrifice those benefits not only in markets in which enforcers or courts impose liability erroneously, but in other markets as well." *Id.*

[128] *Id.* at 15; *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of [section] 2 liability.").

[129] *See* BARNETT SPEECH, *supra* note 22, at 2; PLATT MAJORAS SPEECH, *supra* note 22, at 13.

[130] DOJ REPORT, *supra* note 4, at 36-38. This test is also called the consumer welfare effect standard and finds that "exclusionary conduct violates the antitrust laws if it reduces competition without creating a sufficient improvement in performance to fully offset these potential adverse effect [sic] on prices and thereby prevent consumer harm." Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 329-30 (2006). The DOJ "does not believe [that the effects-balancing test] should be the general test for analyzing conduct under section 2." DOJ REPORT, *supra* note 4, at 38.

[131] DOJ REPORT, *supra* note 4, at 39. "Generally, a profit-sacrifice test asks whether the scrutinized conduct is more profitable in the short run than any other conduct the firm could have engaged in that did not have the same (or greater) exclusionary effects." *Id.* The DOJ "believes that a profit-sacrifice test . . . should not be the test for section 2 liability." *Id.* at 42.

efficient competitor test;[133] and (5) the disproportionality test.[134] The DOJ analyzes these tests using the framework provided in decision theory.[135] Decisions under this framework should propose "optimal legal standards [that] minimize . . . inevitable error and enforcement costs, [by] considering both the probability and the magnitude of harm from each."[136] The DOJ handles inevitable errors by adhering to "a general rule that, in the section 2 context, the cost of false positives is higher than the cost of false negatives."[137] In order to expeditiously and predictably handle matters, decision theory suggests the use of per se rules and bright line tests.[138]

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[132]The no-economic-sense test is similar to the profit-sacrifice test and "compar[es] the non-exclusionary profits from the conduct to the profits the firm would have earned from alternative, legal conduct in which it would have engaged (the 'but-for' scenario)." *Id.* at 39. The DOJ "does not recommend the no-economic-sense test as a necessary condition for liability in all section 2 cases, [but] it believes that the test may sometimes be useful in identifying certain exclusionary conduct." *Id.* at 43.

[133]The equally efficient competitor test requires the plaintiff to show that "'the challenged practice is likely in the circumstances to exclude from defendant's market an equally or more efficient competitor.' If a plaintiff makes such a showing, 'defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient.'" *Id.* at 43 (quoting RICHARD A. POSNER, ANTITRUST LAW 194-95 (2d ed. 2001)). The DOJ believes that "whether conduct has the potential to exclude, eliminate, or weaken the competitiveness of equally efficient competitors can be a useful inquiry and may be best suited to particular pricing practices." *Id.* at 44-45.

[134]"Under the disproportionality test, conduct that potentially has both procompetitive and anticompetitive effects is anticompetitive under section 2 if its likely anticompetitive harms substantially outweigh its likely procompetitive benefits." *Id.* at 45. The DOJ "believes that, when a conduct-specific test is not applicable, the disproportionality test is likely the most appropriate test identified to date for evaluating conduct under section 2." *Id.* at 46.

[135]*See* DOJ REPORT, *supra* note 4, at 15-16 ("[D]ecision Theory . . . articulates a process for making decisions when information is costly and imperfect.").

[136]*Id.* at 16. In analyzing inevitable errors under this framework, the decision theory identifies two types of errors: Type I (false positives) and Type II (false negatives). *Id.* The DOJ calculates the cost of false positives as "not just the costs associated with the parties before the court (or agency), but also the loss of procompetitive conduct by other actors that, due to an overly inclusive or vague decision, are deterred from undertaking such conduct by a fear of litigation." *Id.* Conversely, "the cost of false negatives includes not just the failure to condemn a particular defendant's anticompetitive conduct but also the loss to competition and consumers inflicted by other firms' anticompetitive conduct that is not deterred." *Id.* In considering enforcement costs in the Sherman section 2 realm, decision theory focuses on "the judicial or agency resources devoted to antitrust litigation, the expenses of parties in litigation [including opportunity costs] . . . and the legal fees and other expenses incurred by firms in complying with the law." *Id.*

[137]*Id.* at 17. The DOJ Report acknowledges that because of the precedent values of stare decisis, this may "inhibit[] courts from routinely correcting errors or updating the law to reflect the latest advances in economic thinking." *Id.* A court would then wrongfully condemn a beneficial practice, and firms that use the condemned practice would "'face[] sanctions in the name of stare decisis, no matter the benefits.'" *Id.* (quoting Easterbrook, *supra* note 27, at 2).

[138]*Id.* at 17-18. An application of "per se illegality [is] not designed to achieve perfection." *Id.* at 17. The rule is, however, "warranted so long as false positives are sufficiently rare and procompetitive benefits from conduct deterred by the rules are sufficiently small." *Id.* "Court[s] have long recognized the benefits of bright-line tests of legality (also known as safe harbors) when

After analyzing the general standards for exclusionary conduct, the DOJ does not fully endorse any principle and concludes that "conduct-specific tests and . . . safe harbors enable more effective enforcement [and] provid[e] businesses with greater certainty."[139] And the DOJ alleges that the conduct specific tests and safe harbors "are most administrable by the agencies and courts, and reduce the risk of erroneous determinations."[140] But in its explicit endorsement of conduct-specific tests and safe harbors, the DOJ Report also recognizes that conduct-specific tests are not available for all types of unilateral conduct. In light of this limitation, the DOJ recommends that "when a conduct-specific test is not utilized, the disproportionality test is likely the most appropriate test identified to date for evaluating conduct under section 2."[141] The DOJ then applies these preferences to the following types of unilateral conduct: (1) price predation;[142] (2) tying;[143] (3) bundled discounts and single-product loyalty discounts;[144] (4) unilateral, unconditional refusals to deal with rivals;[145] and (5) exclusive dealing.[146]

The DOJ Report suggests safe harbors for predatory pricing, bundled discounting, and exclusive dealing.[147] But unilateral conduct that does not

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conduct is highly likely to bring consumer-welfare benefits and the threat of anticompetitive harm is remote." *Id.* at 17-18.

[139]DOJ REPORT, *supra* note 4, at 46.

[140]*Id.*

[141]*Id.* at 47.

[142]*See id.* at 49-75 (discussing the development of predatory pricing jurisprudence and determining that predatory pricing may be analyzed using conduct-specific tests).

[143]*See* DOJ REPORT, *supra* note 4, at 77-90 (discussing the development of tying jurisprudence and determining that ties should be analyzed using the disproportionality test).

[144]*See id.* at 91-117 (discussing the development of bundled discounting jurisprudence and determining when actual or probable harm to competition is shown, and when it is established, it should be analyzed using the disproportionality test).

[145]*See id.* at 119-29 (discussing the development of unilateral, unconditional refusals to deal with rivals jurisprudence and determining that the conduct should not play a meaningful part of Sherman section 2 enforcement).

[146]*See id.* at 131-41 (discussing the development of exclusive dealing jurisprudence and determining that the conduct should then be analyzed using the disproportionality test).

[147]In the predatory pricing context, the DOJ recognizes above-cost pricing as a safe harbor. *See* DOJ REPORT, *supra* note 4, at 58. The DOJ believes that "the focus of the price-cost analysis should be on the additional output generated by the incremental input purchases." *Id.* at 74. The DOJ then argues that the best way to measure incremental changes in cost is by using average avoidable cost. *Id.* In the bundled discounting context, the DOJ adopts the same price-cost safe harbor as developed in the predatory pricing context, where bundle-to-bundle competition is reasonably possible. *Id.* at 101. And "[w]here bundle-to-bundle competition is not reasonably possible, the [DOJ] believes that a discount-allocation safe harbor is appropriate." *Id.* at 102. In the exclusive dealing context, the DOJ endorses a safe harbor where an exclusivity deal between dealer and customer results in a rival being unable to deal with less than thirty percent of the market. *Id.* at 141. The DOJ also "emphasizes that exclusive dealing affecting more than thirty percent should be neither automatically nor presumptively illegal." *Id.*

satisfy the conduct-specific safe harbor requirement must be analyzed by the disproportionality test.[148] Broadly stated, the disproportionality standard considers "conduct that potentially has both procompetitive and anticompetitive effects . . . anticompetitive under section 2 if its likely anticompetitive harms substantially outweigh its likely procompetitive benefits."[149] The DOJ did not develop this standard on its own. The DOJ cites a amici curiae brief filed jointly by the FTC and DOJ in *Trinko* as support for the standard.[150]

The DOJ Report recommends applying the disproportionality test to three types of single-firm conduct that does not meet its safe harbor requirement: (1) tying;[151] (2) bundled discounting;[152] and (3) exclusive dealing.[153] The DOJ recommends the same test for each of these types of conduct and finds conduct anticompetitive when "(1) it has no procompetitive benefits, or (2) if there are procompetitive benefits, the [tying, bundled discounting, or exclusive dealing] produces harms substantially

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[148] *Id.* at 46.

[149] *Id.* at 45.

[150] *See id.* at 45, 47. In this brief the agencies argue that, in applying the second prong of the *Aspen Skiing* test, "the harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition)." Brief of the United States & the Federal Trade Commission as Amici Curiae Supporting Petitioner at 14, Verizon Comm'cs Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682); *see also supra* notes 53-57 (discussing the *Aspen Skiing* test).

[151] "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). The DOJ believes, in determining the appropriate legal standard to analyze this conduct, "that a rule of per se illegality . . . is misguided because tying has the potential to help consumers and cannot be said with any confidence to be anticompetitive in almost all circumstances." DOJ REPORT, *supra* note 4, at 90.

[152] "Bundled discounting is the practice of offering discounts or rebates contingent upon a buyer's purchase of two or more different products, including bundled rebates where the amount of rebates a customer receives is based on the quantities of multiple products bought over some period." DOJ REPORT, *supra* note 4, at 91. In considering the appropriate legal standard, the DOJ worries that "overly broad prohibitions against bundled discounting may inhibit pricing practices that benefit consumers." *Id.* at 105. The DOJ Report treats single-product loyalty discounts separately from bundled discounting. Single-product loyalty discounts occur when "a seller . . . offer[s] discounts (or rebates) on all units of a single product conditioned upon the level of purchases." *Id.* at 106. The DOJ "believes that the standard predatory-pricing approach to single-product loyalty discounts has a number of advantages, including its administrability, clarity, and reduced risk of chilling procompetitive price competition." *Id.* at 117. Despite these advantages, the DOJ "thinks further assessment is necessary before concluding that it is appropriate in all cases." *Id.*

[153] "Exclusive dealing describes an arrangement whereby one party's willingness to deal with another is contingent upon that other party (1) dealing with it exclusively or (2) purchasing a large share of its requirements from it." *Id.* at 131.

disproportionate to those benefits."[154] While each category of conduct may still be deemed anticompetitive, even if it can satisfy the disproportionality test, it is important to note that the DOJ "believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement."[155] Thus, the DOJ is recommending the elimination of refusals to deal as anticompetitive. This type of unilateral conduct has previously been deemed as a potential violation of Sherman section 2.[156]

B. *The FTC's Critical Response*

Shortly after the DOJ Report was published, the FTC announced an official non-endorsement and critique of the DOJ Report.[157] In those statements, the FTC found problems with two of the DOJ Report's overarching themes. First, the FTC is "concerned that voices representing the interests of consumers were not adequately heard."[158] Second, the FTC contends that "[a]t almost every turn, the Department . . . place[s] a thumb on the scales in favor of firms with monopoly or near-monopoly power and against other equally significant stakeholders."[159]

The FTC first criticizes the DOJ Report's assumption that the "promise of monopoly profits drives firms to innovate and compete."[160] The FTC does not believe consensus exists on this point and argues, "Monopolies have been appropriately criticized because they tend toward inefficiency and have reduced incentives to innovate."[161] Second, the FTC is

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[154] *Id.* at 90 (stating the disproportionality test specifically for tying); *id.* at 105 (stating the disproportionality test specifically for bundled discounting); *id.* at 140 (stating the disproportionality test specifically for exclusivity arrangements).

[155] *Id.* at 129. The DOJ essentially eliminates this conduct as anticompetitive based on its perception that "the essential-facilities doctrine is a flawed means of deciding whether a unilateral, unconditional refusal to deal harms competition." *Id.*

[156] *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 378 (1973) (stating that the defendant's "refusals to sell at wholesale . . . [was] solely to prevent municipal power systems from eroding its monopolistic position"); Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 375 (1927) (stating that defendant's refusal to sell tended to indicate a purpose to monopolize).

[157] *See* FTC STATEMENT, *supra* note 5, at 1; *see also* KOVACIC STATEMENT, *supra* note 5 (acknowledging the divergence of the DOJ and FTC policy prescriptions).

[158] FTC STATEMENT, *supra* note 5, at 1.

[159] *Id.*

[160] *Id.* at 2; *see also* DOJ REPORT *supra*, note 4, at 14 ("Being able to reap the gains from a monopoly position attained through a hard-fought competitive battle . . . may be crucial to motivating the firm to motivate in the first place.").

[161] FTC STATEMENT, *supra* note 5, at 2-3. The FTC is also concerned that monopolies may use monopoly power in one market as "leverage power in other markets." *Id.* at 3; *see also supra* note 120 (describing the arguments regarding monopolies' impact on innovation and competition).

also concerned with the DOJ Report's assumption regarding deterrence.[162] Specifically, the FTC takes issue with the assertion "that the risk of over-enforcement of [s]ection 2 is greater than the risk of under-enforcement."[163] In trying to find the proper enforcement balance, the FTC believes that the DOJ "downplays the risks of under-enforcement."[164] Third, the FTC disagrees with the DOJ's reliance on the "'costs of administration' as a factor weighing against enforcement of [s]ection 2."[165] The FTC recognizes the difficulty in defining remedies for alleged violations, but it "do[es] not agree that any category of conduct can be excluded from the scope of [s]ection 2 based on the difficulty of devising an appropriate remedy."[166] Fourth, the FTC is concerned with the DOJ's emphasis on creating clear and administrable rules[167] and expanding the creation of safe harbors.[168]

In critiquing the DOJ Report's legal standards, the FTC states, "The Department's premises lead it to adopt law enforcement standards that would make it nearly impossible to prosecute a case under [s]ection 2 of the Sherman Act."[169] In effect, the new standard will provide too high of a hurdle for enforcement agencies and consumers to pursue potential antitrust violations. The FTC goes a step further and interprets the DOJ's disproportionality test as "distort[ing] the rule of reason standard."[170] The FTC believes that the rule of reason standard "already poses a significant hurdle to liability."[171] Beyond the critique of the DOJ's proffered disproportionality standard, the FTC also takes aim at other recommendations made in the DOJ Report.[172]

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[162] *See supra* notes 124-28 and accompanying text.

[163] FTC STATEMENT, *supra* note 5, at 3.

[164] *Id.*

[165] *Id.* at 4.

[166] *Id.*

[167] *See* FTC STATEMENT, *supra* note 5, at 4. The FTC acknowledges that "clear rules are desirable in the abstract, [but] the benefits of clarity must be balanced against the benefits of effective and reasonable law enforcement, lest the interests of consumers be compromised." *Id.*

[168] *Id.*

[169] *Id.* at 5.

[170] *Id.*

[171] FTC STATEMENT, *supra* note 5, at 5. The FTC blatantly states, "The Department's position enjoys no support in the law, and it is so ill-defined that it will be hard, if not impossible, for any public or private plaintiff to satisfy it." *Id.* at 8.

[172] *Id.* at 8. The FTC specifically critiques the safe harbors suggested for unilateral conduct involving predatory pricing, loyalty discounts, bundled discounts, and exclusive dealing. *See id.* at 5-10.

V. CONSUMERS MUST REMAIN KINGS AND QUEENS OF THE COMPETITIVE PROCESS

The FTC closed its remarks by stating, "This Commission stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report."[173] Based on this statement, the FTC appears ready to apply its FTCA section 5 authority if the courts implement the DOJ's proposed standards. This provides more incentive for the FTC to continue the current application of its FTCA section 5 powers, as well as attempting to expand those powers.[174]

The unilateral conduct "void" that worries the FTC is conduct that is unreasonable based on the "rule of reason" analysis, but will not meet the standard articulated in the disproportionality test. This potential "void" should be filled by the FTC's enforcement powers under FTCA section 5. Conduct that is unreasonable under the Sherman Act "rule of reason" standard may eventually fulfill the disproportionality test. But there is a chance that it will not meet the more stringent standard. Despite this shortcoming, in terms of the Sherman Act, the conduct may be of the type that qualifies as an incipient violation of the antitrust laws.[175] It is this area where the reach of FTCA section 5 seems to apply.[176] In other words, this conduct may be an "unfair method of competition" regardless of the conduct's anticompetitive status under the Sherman Act.

In applying its FTCA section 5 powers, the FTC may consider a recently proposed procedural approach.[177] This approach suggests that in

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[173] *Id.* at 11.

[174] *See supra* notes 107-09; *see also* James Langenfeld & Daniel R. Shulman, *The Future of US Federal Antitrust Enforcement: Learning from Past and Current Influence*, 8 SEDONA CONF. J. 1, 14 (2007) (discussing the unanimous vote in the "*Valassis* invitation to collude case" and stating the result "suggests there may be renewed enforcement in this area").

[175] *See* FTC v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-95 (1953) ("It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts.").

[176] While the holding in *General Foods Corp.* may cause pause when considering an expansion of FTCA section 5 power, it must be emphasized that the FTC appears to be attempting to expand its FTCA section 5 power. *See supra* notes 107-09 and accompanying text. This expansionary stance is also evidenced in a recent workshop where the FTC "explore[d] the scope of the prohibition of 'unfair methods of competition' in Section 5 of the FTC Act." 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 (Aug. 28, 2008).

[177] Andy J. Miller, Note, *A Procedural Approach to "Unfair Methods of Competition,"* 93 IOWA L. REV. 1485 (2008) (suggesting a procedural approach for FTCA section 5 determinations

considering whether conduct constitutes "unfair methods of competition" the FTC should ask:

> (1) Does this behavior violate the antitrust laws?
> (2) (a) If the answer to (1) is "yes," then the conduct ought to be condemned as an antitrust violation.
> (b) If the answer to (1) is "no," the Commission ought then ask:
> (3) If this conduct goes unchecked, will it result in an antitrust violation?
> (4) (a) If the answer to (3) is "no," then the conduct ought not be condemned.
> (b) If the answer to (3) is "yes," then the conduct ought to be condemned as a [FTCA] [s]ection 5 violation.[178]

In this analysis, the issue centers on conduct that does not violate the antitrust laws—a "no" response to question 1, and subsequent move to question 3 for conduct left unchecked—will eventually result in an antitrust violation. The heart of the procedural approach is then to determine whether the conduct, if left unchecked, will result in an antitrust violation.

In order to conceptually grapple with this problem, a concrete hypothetical may help. Consider a monopolist who ties a new product to a product in which she already maintains a monopoly in the relevant market.[179] This behavior results in procompetitive benefits that do not produce harms substantially disproportionate to those benefits.[180] The DOJ would not pursue this conduct because it does not violate the disproportionality test, but

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that should be tied to antitrust analyses).

[178] *Id.* at 1515. Miller runs through the proposed procedural approach using *Valassis* as a demonstration. In step one, he determines that an invitation to collude does not violate the antitrust laws, and then moves to the third question and concedes that determining this answer is more difficult. *Id.* at 1515-16. Miller concludes that because collusion could result if News American accepts the invitation, and this conduct would violate antitrust laws, that "the Commission was right to condemn the action as a pure section 5 violation." *Id.* at 1516.

[179] For purposes of this analysis, we will operate in a post-*Microsoft* world, where tying is not an antitrust violation per se, and assume the tied product meets the separate product test. Meeting the separate product test "does not turn 'on the functional relation between them.'" United States v. Microsoft Corp., 253 F.3d 34, 86 (D.C. Cir. 2001) (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19 (1984)). There must be sufficient demand, however, when the two products are separate. *See Jefferson Parish*, 466 U.S. at 21-22 ("[N]o tying arrangement can exist unless there is a sufficient demand for the purchase of [product 2] separate from hospital services to identify a distinct product market in which it is efficient to offer [product 2] separately from [product 1].").

[180] This is the disproportionality standard. *See supra* note 154 and accompanying text.

should the FTC? The tie does not currently violate antitrust laws, but if the conduct goes unchecked, will it result in an antitrust violation?

It is very easy to conceive facts that yield an affirmative response. For example, in the future, rivals in the tied market may exit or the monopolist's entrance may keep those competitors inefficiently small.[181] Without rivals, the monopolist may increase prices or reduce output—an outcome detrimental to the consumer.[182] The monopolist may also leverage its monopoly in one market to establish a monopoly in another.[183] Before this time arises, and the monopolist has time to implement these strategies, the FTC can use FTCA section 5 to slow or stop the monopolist's future anticompetitive conduct. Enforcement by the FTC would give the monopolist notice that its conduct is being monitored. While the tie may currently be legal under the Sherman Act, the monopolist is warned that future anticompetitive conduct related to the FTC enforcement might be pursued by the DOJ. This may serve as a remedial action and temper "unfair methods of competition" in the adjacent market.

If the courts adopt the disproportionality test, the FTC must decide whether it will serve as the cop on the beat, and rely on its ability to deter anticompetitive conduct,[184] or serve as an enforcement agency, waiting to levy fines after anticompetitive conduct has occurred. If the agency chooses to enforce after the fact, there is the potential that the FTC's niche will be swallowed by the DOJ in the antitrust arena. This outcome would not live up to the legislative purpose that inspired FTCA section 5.[185] And if the FTC follows this path, there is no genuine reason for the FTC to enforce antitrust law. Given the Commission's propensity to explore the fringes of the Sherman Act,[186] however, it appears that the FTC enjoys its beat policing

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[181]DOJ REPORT, *supra* note 4, at 83.

[182]It is worth remembering that in early antitrust cases, the Court was concerned with the potential to later raise prices. *See* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 324 (1897) ("[I]t is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country.").

[183]*See* Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 23-24 (1st Cir. 1990) (suggesting that a firm may be able to use its monopoly power to eliminate competition in an adjacent market it has entered).

[184]This is a metaphor that the FTC and members of the public use to describe the FTC. *See* Transcript: Workshop on Section 5 of the FTC Act as a Competition Statute, held by the Federal Trade Commision (Oct. 17, 2008), http://www.ftc.gov/bc/workshops/section5/index.shtml (follow "webcast" hyperlink to "Oct. 17, 2008" hyperlink; then follow "Transcript" hyperlink under "Panel 2: Interpretations of section 5").

[185]*See supra* notes 91-99 and accompanying text.

[186]*See supra* notes 107-09 and accompanying text (citing cases that evidence the FTC's pursuit of standard setting and initiation to collude actions).

conduct that may evolve from incipient antitrust violations to full-blown violations.

The use of FTCA section 5 will also subject companies to lower costs and punishments than if found guilty of a Sherman section 2 violation. As stated above, companies that are found in violation of Sherman antitrust laws are liable for treble damages that may reach $100 million and felony jail time,[187] as well as being vulnerable to actions initiated by private parties and follow-on actions.[188] The penalties are not as draconian for FTCA section 5 violations. Under FTCA section 5, violations are subject to a maximum civil penalty of $10,000 per violation[189] without the threat of follow-on actions.[190] Along with the penalties, conduct is also subject to a cease and desist order.[191] The difference in monetary liability between the two statutes is substantial, and prison is a much stiffer penalty than a cease and desist order.

Relying on the decision theory framework applied in the DOJ Report,[192] the FTC's use of FTCA section 5 would meet many of these goals. First, in considering enforcement costs, FTCA section 5 imposes lower fines and immediately reduces the parties' expenses as compared to a Sherman section 2 violation.[193] Because there is no opportunity for follow-on actions, FTCA section 5 may also reduce legal fees for all parties.[194] Second, in considering the risk of inevitable error, the problems of Type I errors are reduced.[195] Unilateral conduct that is condemned in the gray area between the rule of reason and disproportionality test will not be a full-blown antitrust violation. Therefore, the specific unilateral conduct will not be barred by stare decisis under the Sherman Act. This reduces the risk of false-positives because the improper enforcement is limited to the falsely accused firm. This enforcement strategy does not eliminate a particular type of unilateral conduct from being used in the future because the conduct has been barred

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[187] 15 U.S.C. §§ 1-2 (2000).

[188] *See id.* § 15.

[189] *Id.* § 45(m)(1)(A)-(B).

[190] *See supra* note 90 and accompanying text.

[191] 15 U.S.C. § 45(m)(1)(B) (2000).

[192] *See supra* notes 129-37 and accompanying text.

[193] In the DOJ Report, there is a focus on "enforcement costs" that include "judicial or agency resources, . . . expenses of the parties in litigation, . . . and the legal fees and other expenses incurred by firms in complying with the law." DOJ REPORT, *supra* note 4, at 16. The FTC's lower fines would aim to achieve this goal. *See supra* notes 187-90 and accompanying text.

[194] *See supra* note 90 and accompanying text.

[195] Type I errors are false positives. DOJ REPORT, *supra* note 4, at 16. In the antitrust realm, this would include conduct that is condemned as anticompetitive or harmful to consumers when it actually is not. *See supra* note 136.

by the Sherman Act. Third, the problems of Type II errors are reduced.[196] Conduct that is actually anticompetitive would pass the disproportionality test, but would not be pursued by either agency. This conduct, however, occurs in the overlap of the agencies' enforcement areas. Because this conduct is actually anticompetitive, it stands a greater chance of eventually being pursued by either agency.

The FTC's separate ability to pursue anticompetitive conduct is important in ensuring that both business and consumer interests are properly protected. The two agencies' standards are closely related and if the DOJ increases its standard, the FTC naturally will shift its enforcement regime in the same direction. But, arguably, this shift has detrimentally squeezed consumers. The Court has recently stated that it is permissible for consumers to be adversely affected by lawful monopolistic conduct.[197] The Court's recent shrinking interpretation of monopoly conduct necessitates the FTC's increased attention in monopoly matters.[198] The FTC's belief that "the U.S. Supreme Court has declared that the welfare of *consumers* is the primary goal of the antitrust laws" requires it to diligently explore the fringes of Sherman section 2.[199] Chairman Platt Majoras' consumer focus at the onset of the Sherman section 2 was proper and the "undistorted competition, driven by 'King and Queen Consumer'" must be the FTC's mandate in antitrust enforcement.[200]

V. CONCLUSION

The FTC's non-endorsement of the DOJ's Report on single-firm conduct under Sherman section 2 could have been expected. Despite the collaborative effort at the outset of the joint hearings, the agencies' differing goals and expectations from the hearings foreshadowed the split. The FTC's inherent focus on consumers would naturally result in a less stringent legal standard for Sherman section 2. Furthermore, the FTC's antitrust enforcement powers derive from "unfair methods of competition" under FTCA

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[196]Type II errors are false negatives. DOJ REPORT, *supra* note 4, at 16. In the antitrust realm, this would include conduct that has not been caught by an enforcement agency but is anticompetitive and harms consumers. *See supra* note 136.

[197]In *NYNEX*, the Court allowed consumers' telephone service rates to increase based on a monopolist's conduct because the monopolist had lawful possession of market power. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998).

[198]*See supra* notes 11-15 and accompanying text.

[199]FTC STATEMENT, *supra* note 5, at 1 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979)).

[200]PLATT MAJORAS SPEECH, *supra* note 22, at 13.

section 5, which allow for enforcement of incipient violations of the antitrust laws. Therefore, the FTC's enforcement standard for antitrust violations is necessarily less than a Sherman section 2 violation.

Despite the FTC's lower standard in antitrust regulation, the DOJ's proposed disproportionality test in the Sherman section 2 context would still have an affect on the FTC in the enforcement of unilateral conduct. If the Court adopts the DOJ's proposed test, this heightened standard will correspondingly heighten the FTC's standard for unilateral conduct to meet the "unfair methods of competition." In this legal regime, some conduct that met the previous rule of reason standard will not be pursued by the DOJ. Based on this void, the FTC must actively pursue incipient antitrust violations under FTCA section 5 in order to hold the line for general antitrust jurisprudence. Based on the Court's constriction of Sherman section 2 violations, the FTC must diligently enforce FTCA section 5 in order to fully protect consumers.

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