[1] There are some differences today, of course. Back then, the antitrust laws were young, and competition policy was *sexy*

The Standard Oil case of 1911, in which the Supreme Court adopted “rule of reason” analysis for the Sherman Act’s prohibition on “restraints of trade,” was an even greater flashpoint.

violations of the Sherman Act, if that had been the purpose of the legislation."[9] Other cases, including *FTC v. Brown Shoe Company* and *FTC v. Motion Picture Advertising Service Company*, while perhaps not reading the statute quite as broadly, nevertheless clarified that Section 5 reaches both "practices which conflict with the basic policies" underlying the antitrust laws and incipient violations of the antitrust laws.[10] Similarly, in *Sperry & Hutchinson*, the green stamp case, the Court made clear that the Commission was to "consider[] public values beyond simp

Is there anyone in this room who possibly believes that such a deal should be challenged today? I doubt it would even reach a second request.

You can all see that the Commission, to go beyond the then dominant interpretation of the antitrust laws and reach the penumbra that is Section 5, had to venture very far indeed from the types of conduct that we would now consider anticompetitive. That leads to the concern that animated the panels in *Ethyl, Boise Cascade* and *Official Airline Guides.* Without putting too fine a point on it—and let me apologize here for moving from monster to baseball imagery—the Commission crowded the plate and the courts threw us a brush back pitch. Actually, several.

During the last three decades, we never really left the on-deck circle again. But because of the breadth of the antitrust laws for some of this period, we didn't need to.

During these last three decades, however, we have also seen a dramatic retrenchment in the scope of the antitrust laws. Cases like *Von's Grocery* and *Albrecht* gave way to more reasonable decisions like *Matsushita, Sylvania* and *Brooke Group.*[16] Clearly this has often been the right direction for the law to go. But given the even more restrictive Supreme Court opinions of just the past few terms—I am thinking of *Trinko, Twombly* and *Leegin* but you may each have your own favorites—it seems reasonable to say that the Sherman Act is no longer the broad mandate protecting consumers that it once was.[17]

The Supreme Court's rationale underlying these decisions is, I believe, a justifiable concern about the toxic combination of treble damages and class actions (a monster of a different color). But I also believe that the result, at least in the aggregate, is that some anticompetitive behavior is not being stopped—in part because the FTC and DOJ are saddled with court-based restrictions that are designed to circumscribe private litigation. Simply put, consumers can still suffer plenty of harm for reasons not encompassed by the Sherman Act as it is currently enforced in the federal courts.

So the same rationale that motivated Congress to create the FTC in the first place and give us the authority to stop unfair methods of competition, requires us to use that statute again today.

What standards should apply when we use Section 5?

Well, that is part of the reason that we are holding this workshop – it is not entirely clear; really, not clear at all. Indeed, as I read through some of the excellent submissions—from my former colleagues Tom Leary, Susan Creighton and Tom Krattenmaker to my current colleague Tom Rosch, among others—all of us agree that there are circumstances in which the Commission ought to bring "pure" Section 5 cases. But none of us agree on precisely when the Commission should invoke this statute. If we do use Section 5—and I strongly believe we should—it is essential that we try to develop

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[16] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[17] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007).

a standard. Businesses deserve, if not certainty, then at least a sense of what behavior we are trying to reach.

To my mind, the beasts of the late 1970s and 1980s—*Ethyl, Official Airline Guides* and *Boise Cascade*—can give us useful guidance at least insofar as they make it clear that, when we go beyond enforcement of the antitrust laws, Section 5 is only violated by conduct that is not "normally acceptable business behavior" (a phrase straight out of the Second Circuit in *Ethyl).*[18] To the limited extent that we have been enforcing Section 5 since then—in our invitation to collude cases—this is how we've been doing it.[19] There is no clearer example of conduct that is not normally acceptable business behavior than an attempted felony!

There should be another element for a Section 5 violation though. Our powers to restrict unfair methods of competition, consistent with Congressional intent, should only extend to those anticompetitive schemes or practices that harm consumers. It should not be enough for the Commission to show just that a firm acted inconsistently with normally acceptable business behavior, because Congress did not create the Commission to be a national nanny or to mediate between firms th

disinterring them from the crypt: let me assure you, we are not. But for those of you who want us to abandon our congressionally mandated statutory responsibilities: let me assure you, we are not going to do that either. Some of the retrenchment from the 1960s makes sense, as Chairman Pitofsky acknowledges in his introduction to the new book on how the Chicago School overshot the mark.