Can the FTC Turn Back the Clock?

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During a stint at the Open Markets Institute, Lina M. Khan wrote a manifesto for the New Brandeis Movement advocating greater government control over the economy.[1] As the Federal Trade Commission Chair, Khan is trying to take a step in that direction. She wants to turn back the clock to a time when the Supreme Court gave the FTC a free hand to intervene in the marketplace. Eager to shed constraints imposed by Sherman Act precedent, Chair Khan issued a Statement declaring her intention to attack "unfair methods of competition even if they do not violate a separate antitrust statute."[2] If departure from Sherman Act precedent is Khan's rallying cry, we expect her to fail, but she could succeed by acting on fact-based, forward-looking assessments of competitive effects.

Section 5 of the FTC Act prohibits "unfair methods of competition," and the FTC's practice in litigating competition cases has been to let Sherman Act precedents supply the rationale for finding particular methods of competition unfair.[3] As a first step in a new direction, Chair Khan

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[1] *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J EUR. COMPETITION L. & PRAC. 131 (2018).

[2] Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021) (hereinafter "Khan Statement"), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

[3] The FTC has alleged free-standing Section 5 in some complaints while also making allegations tied to Sherman Act precedent, but none of those cases resulted in a court decision on a free-standing Section 5 violation. Some cases resolved by consent order were based on free-standing Section 5 violations. Beginning with *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992), the FTC deemed invitations to collude to be unfair methods of competition, and all invitation-to-collude complaints have been resolved by consent order.

pushed through a party-line vote to rescind a 2015 Statement of principles adopted by the FTC under Chair (and fellow Democrat) Edith Ramirez[4] which went a long way toward codifying that practice. The 2015 Statement pledged to apply "a framework similar to the rule of reason" under which "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process."

The Khan Statement repudiates that pledge on the basis[5] that the "likelihood requirement would abrogate the Commission's statutory mandate to combat incipient wrongdoing *before* it becomes likely to harm consumers or competition."[6] However, the Khan Statement misconstrues both the rule of reason and the incipiency concept. As articulated by Justice Brandeis in *Chicago Board of Trade*, the rule of reason asks whether the conduct under review "merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[7]

Justice Brandeis called his formulation of the rule of reason the "true test of legality," and it remains so today.[8] Nevertheless, Chair Khan adopted old Chicago School attacks on Justice Brandeis's formulation,[9] and thus disassociated herself from Brandeis's only contribution to antitrust jurisprudence.[10] The question asked by Brandeis's "true test of legality" can be

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[4] Statement of the Federal Trade Commission on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf. The Statement was the culmination of a lengthy process begun under Chair William E. Kovacic with a 2008 public workshop. Workshop on Section 5 of the FTC Act as a Competition Statute (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf.

[5] Chair Khan did not invoke the Supreme Court's statement that the FTC could consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972). In 2010 Chair Kovacic advocated a policy statement treating unfair methods of competition as a "competition-based concept" and thus ignoring *Sperry & Hutchinson*. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 944-47 (2010). The 2015 Statement followed that course, and Chair Khan has not suggested a different course.

[6] Khan Statement, *supra* note 2, at 6.

[7] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[8] *See generally* GREGORY J. WERDEN, THE FOUNDATIONS OF ANTITRUST: EVENTS, IDEAS, AND DOCTRINES ch. 21 (2020); Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713 (2014).

[9] Khan Statement, *supra* note 2, at 5 & n.31. On the Chicago School attacks and their refutation, see WERDEN, *supra* note 8, at 133-35, 240.

[10] During almost 23 years on the Supreme Court, Brandeis wrote only two majority opinions in antitrust cases, and the other one was forgotten long ago. He rarely sided with the Department of Justice in its cases. See WERDEN, *supra* note 8, at 173-75.

answered in a forward-looking manner that embraces the incipiency concept, but answering the question requires a fact-intensive inquiry,[11] which Khan might prefer to avoid.[12]

The Long and Winding Incipiency Road

The incipiency concept originated in legislative activity leading to passage of the Clayton Act and the FTC Act, both of which were responses to widespread dissatisfaction with the Sherman Act.[13] The 1911 decisions in *American Tobacco* and *Standard Oil*[14] ordering the breakup of both companies are now hailed as landmark victories. At the time, however, some commentators and politicians saw the breakups as inadequate, and the adoption of the rule of reason was widely condemned.[15] As an FTC commissioner observed on the occasion of the agency's centennial, both the Clayton Act and the FTC Act were meant to be "forward-looking and designed to preempt anticompetitive practices in their incipiency."[16]

Throughout the 1912 presidential election campaign, candidate Woodrow Wilson advocated a new antitrust law with specific prohibitions to supplement the Sherman Act's general prohibitions. The Senate report on the bill that became the Clayton Act explained that it was intended:

> to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.[17]

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[11] *See Board of Trade*, 246 U.S. at 238 ("To determine [the question posed by the rule of reason] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.").

[12] Chair Khan rejects the rule of reason in part because it "leads to soaring enforcement costs." Khan Statement, *supra* note 2, at 5. Much of that cost arises from the need to discover and prove facts.

[13] Sherman Act enforcement got off to a poor start because of vague statutory language, judicial reticence, and an acute lack of executive resources. *See* WERDEN, *supra* note 8, chs. 5, 7.

[14] United States v. Am. Tobacco Co. 221 U.S. 106 (1911); Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

[15] *See* WERDEN, *supra* note 8, chs. 10-12 (explaining, among other things, that the Supreme Court adopted the rule in language suggesting that it had been fully elaborated in common law, but that was not so).

[16] The Clayton and FTC Acts: 100 Years of Looking Ahead, Remarks of Commissioner Terrell McSweeny at the Clayton Act 100th Anniversary Symposium (Dec. 4, 2014), https://www.ftc.gov/system/files/documents/public_statements/603341/mcsweeny_-_aba_clayton_act_100th_keynote_12-04-14.pdf.

[17] Report of the Senate Judiciary Committee, S. Rep. No. 63-698, at 1 (1914) (Charles A. Culberson, chairman).

The Supreme Court acknowledged in an early case that: "The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency . . . ."[18]

Throughout the 1912 campaign, Wilson opposed candidate Teddy Roosevelt's idea of an expert agency with antitrust enforcement powers, and President Wilson initially proposed an expert agency with powers only to collect data and write reports. After the House of Representatives passed legislation creating that sort of FTC, advisors Joseph E. Davies and George Rublee talked President Wilson into adding Section 5 and making the FTC into an administrative enforcement agency.[19] From that point on, the FTC Act and the Clayton Act have been different means to the same end.

In an early FTC Act decision, Justice Brandeis quoted Senator Albert B. Cummins on the purpose of the FTC Act:

> Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. . . . The purpose of this bill . . . is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.[20]

The Supreme Court rightly observed that "one of the hopes of those who sponsored the Federal Trade Commission Act [was] that its effect might be prophylactic and that through it attempts to bring about complete monopolization of an industry might be stopped in their incipiency."[21]

The Senate report on the Cellar-Kefauver Act, which amended Section 7 of the Clayton Act in 1950 to make it into a merger prohibition, reasserted the incipiency concept: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[22]

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[18] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922). *See* FTC v. Raladam Co., 283 U.S. 643, 647 (1931) ("The Clayton Act . . . was intended to reach in their incipiency agreements embraced within the sphere of the Sherman Act.").

[19] *See* WERDEN, *supra* note 8, ch. 12.

[20] Statement of Albert B. Cummins, 51 CONG. REC. 11,455 (July 1, 1914), *quoted by* FTC v. Gratz, 253 U.S. 421, 435 n.1c (1922) (Brandeis, J., dissenting). Cummins was a leading advocate for the creation of the FTC, but Brandeis misidentified him as the "chairman of the committee which reported the bill."

[21] Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 466 (1941). In 1953 the Court (through Justice William O. Douglas) found it "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 . . . ." FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394-95 (1953) (citation omitted). It is unclear in what sense the Court meant that the FTC Act would supplement the Clayton Act, in part because the FTC Act became law before the Clayton Act.

[22] Senate Judiciary Committee, S. Rep. No. 81-1775, at 4-5 (1950).

The 1960s was antitrust law's incipiency decade, and most of the Supreme Court decisions invoking the incipiency concept were Section 7 cases. In *Brown Shoe*, the Court declared its obligation to follow "the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency."[23] And *Philadelphia National Bank* explained that "what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency'" is that a merger can be condemned on the basis of "a prediction of its impact upon competitive conditions in the future."[24] Other 1960s decisions invoked the incipiency concept to help explain why particular mergers were held to violate Section 7.[25]

Merger decisions still mention the incipiency concept,[26] and the 2019 *AT&T–Time-Warner* decision by the D.C. Circuit explained that the congressional policy of "halting incipient monopolies and trade restraints outside the scope of the Sherman Act" is manifest in Section 7's "reasonable probability" standard.[27] The court added: "Although Section 7 requires more than a 'mere possibility' of competitive harm, it does not require proof of certain harm. Instead, the government must show that the proposed merger is likely to substantially lessen competition, which encompasses a concept of 'reasonable probability.'"[28]

1960s and 1980s Unfair Methods of Competition Cases

In the 1960s, when the Supreme Court was condemning every merger that came before it and citing the incipiency concept, the Court decided two non-merger FTC cases now cited for the proposition that Section 5 goes beyond the Sherman Act. One concerned an arrangement between Goodyear and a chain of gas stations under which the chain's retailers and wholesalers promoted Goodyear's tires, batteries, and accessories. The Court noted that there are "many unfair methods of competition that do not assume the proportions of antitrust violations," and upheld the FTC's order terminating the arrangement on the basis that its competitive impact was similar to that of arrangements condemned under the Clayton and Sherman Acts.[29]

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[23] Brown Shoe Co. v. United States, 370 U.S. 294, 346 (1962).

[24] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

[25] FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967); United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966); United States v. Cont'l Can Co., 378 U.S. 441, 451, 465 (1964); United States v. Penn-Olin Chem. Co., 378 U.S. 158, 170-71 (1964). The Supreme Court most recently referred to the incipiency concept in the 1986 *Cargill* decision. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 124-25 (1986).

[26] United States v. AT&T, Inc., 916 F.3d 1029, 1032 (D.C. Cir. 2019); St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., 778 F.3d 775, 783 (9th Cir. 2015); Polypore Int'l, Inc. v. FTC, 686 F.3d 1208, 1214 (11th Cir. 2012); Chicago Bridge & Iron Co. NV v. FTC, 534 F.3d 410, 423, 428 (5th Cir. 2008); United States v. Dairy Farmers of Am., Inc., 426 F.3d 850, 858 (6th Cir. 2005); Midwestern Mach. v. Nw. Airlines, 392 F.3d 265, 269 (8th Cir. 2004).

[27] *AT&T*, 916 F.3d at 1032 (internal quotations and citations omitted).

[28] *Id.* (citation omitted).

[29] Atl. Refining Co. v. FTC, 381 U.S. 357, 369 (1965).

In the other case, shoe manufacturer Brown Shoe provided some retailers with services in return for a pledge to carry no lines of shoes "conflicting with" Brown's lines. Although retailers did carry other lines of shoes, the FTC held that the scheme violated Section 5 and Section 3 of the Clayton Act.[30] An appeals court held that that the FTC was wrong on both.[31] The Supreme Court reversed in a terse opinion that purported to distinguish FTC Act and Clayton Act standards: While a Clayton Act Section 3 violation required proof that the effect of the practice "may be substantially to lessen competition," the Court held that the FTC had the "power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws."[32] It was sufficient to violate Section 5 that the effect of Brown's contracts with retailers was "substantially to limit their trade with Brown's competitors."[33]

The outcomes of these cases might have been the same if the Justice Department had brought them under the Sherman Act,[34] and they would not be successful today under the FTC Act. In particular, Brown Shoe's conduct is now considered "competitively harmless,"[35] and the Supreme Court surely would unanimously reject any attack on it. Brown Shoe was far from dominant; its market share was just 5 percent, and it was not the largest shoe manufacturer. The HHI was only 170, and close to a thousand shoe manufacturers operated in the U.S.

The foregoing cases involved vertical agreements, but unilateral conduct was addressed in three subsequent appellate decisions. The first was *Official Airline Guides*. Before modern technology, the source of airline schedule information was the Official Airline Guide (OAG). Beginning in 1969, the OAG was a low-tech, two-sided platform: airlines paid to publish their schedules, and users (travel agents and businesses with frequent travel) paid for twice-monthly hard copies of the schedules. The OAG listed direct flights and connections, but it omitted connections between certified and commuter airlines. As a result, commuter airlines were hampered somewhat, even though travelers could build their own connections to commuter airlines. In view of Sherman Act precedent giving firms a great deal of freedom to decide with

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[30] Brown Shoe Co., 62 F.T.C. 679, 717 (1963).

[31] Brown Shoe Co. v. FTC, 339 F.2d 45, 56 (8th Cir. 1964).

[32] FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966).

[33] *Id.* at 321.

[34] The Court credited the FTC's finding that Brown Shoe "effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers." *Id.* at 319. And in the former case, the Court credited the FTC's finding that the arrangement had the "central competitive characteristic" of tying. *Atlantic Refining*, 381 U.S. at 369. Either finding could have been the basis for a Sherman Act violation. *See* Kovacic & Winerman, *supra* note 5, at 936 ("prevailing jurisprudence of the period perhaps had established a zone of liability under the Clayton and Sherman Acts that was so expansive that it required no further extension through Section 5").

[35] Herbert J. Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 886 (2010). *See also* John L. Peterman, *The Federal Trade Commission v. Brown Shoe Company*, 18 J.L. & ECON. 361 (1975).

whom to do business, the Second Circuit held that allowing the FTC to force the OAG to list additional connections "would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[36]

Boise Cascade concerned the delivered pricing schemes used by producers of plywood in the southeastern United States. The southeastern plywood mills were latecomers to the industry and competed with long-established mills in Oregon and Washington. The southeastern mills produced a somewhat inferior product from different trees species, so they sold their plywood at a slightly lower price. Each southeastern mill unilaterally established a pricing system keyed to the delivered price of plywood quoted by mills in Oregon and Washington. Similar pricing systems had been the subject of much prior litigation when they were the product of agreements among horizontal competitors, but the FTC condemned the pricing schemes without finding an agreement.[37]

The Ninth Circuit held that the FTC provided "little more than a theory of the likely effect of the challenged pricing practices" and that there was "a complete absence of meaningful evidence in the record that price levels in the southern plywood industry reflect an anticompetitive effect."[38] The court declined the FTC's suggestion that it should "sustain the order on the basis of something less than substantial evidence [of] an anticompetitive effect."[39] The court acknowledged the FTC's power to "to restrain practices . . . which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained," but found no basis for dispensing with the requirement of anticompetitive effects.[40]

Finally, the *Ethyl* case concerned pricing practices used by the four producers of tetraethyl lead, an octane booster in gasoline. The practices were quoting prices only on a delivered basis, employing most-favored-nations clauses, providing at least 30 days advance notice of a price increase, and publicizing price increases in advance. Ethyl Corp. introduced the practices when it was the only producer, and subsequent entrants adopted them as they entered. The FTC concluded that the practices were partly to blame for the industry's noncompetitive performance and ordered the two largest producers, Ethyl and du Pont, to cease using them.[41]

In vacating the FTC's order, the Second Circuit reasoned that:

> As the Commission moves away from attacking conduct that is either a violation of the antitrust laws or collusive, coercive, predatory, restrictive or deceitful, and seeks to break new ground by

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[36] Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 927 (2d Cir. 1980).

[37] Boise Cascade Corp., 91 F.T.C. 1 (1978).

[38] Boise Cascade Corp. v. FTC, 637 F.2d 573, 578-79 (9th Cir. 1980).

[39] *Id.* at 581.

[40] *Id.* (quoting FTC v. Cement Inst., 333 U.S. 683, 708 (1948)).

[41] Ethyl Corp., 101 F.T.C. 425 (1983).

> enjoining otherwise legitimate practices, the closer must be our scrutiny upon judicial review. A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be "analogous" to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system.
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> When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition.[42]

Finally, the court held that: "Even if the Commission has authority under § 5 to forbid legitimate, non-collusive business practices which substantially lessen competition, there has not been a sufficient showing of lessening of competition in the instant case to permit the exercise of that power."[43]

The Sherman Act: Comeback and Convergence

The Khan Statement asserts "that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws."[44] While that might have been the intent of Congress in creating the FTC, a lot has happened in the antitrust world since 1914. The Clayton Act and FTC Act were expected largely to supplant the Sherman Act, but that did not happen, and the meanings of Clayton Act, the FTC Act, and the Sherman Act all evolved considerably. A few highlights suffice to make the point.

When the Supreme Court declared that Sherman Act cases were governed by the rule of reason in 1911, the Court neglected to state what the rule was, much less how it should be applied. Generations of case-by-case adjudication gave the rule of reason structure and focus.[45] The 1940 *Socony-Vacuum* decision[46] dispelled any doubt about the per se illegality of cartel activity that might have been caused by the introduction of the rule of reason. The Sherman Act's per se rule remains the backbone of the Antitrust Division's active cartel enforcement.[47] One of the Supreme Court's most important statements on the rule of reason came in an FTC case—*California Dental Association*, in which the Court held that: "What is required [under the rule of

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[42] E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 137-39 (2d Cir. 1984).

[43] *Id.* at 142.

[44] Khan Statement, *supra* note 2, at 4.

[45] On the development, meaning, and application of the rule of reason, see WERDEN, *supra* note 8, ch. 21.

[46] United States v. Socony-Vacuum Oil Co. 310 U.S. 150 (1940).

[47] On the development, meaning, and application of the per se rule, see WERDEN, *supra* note 8, ch. 22.

reason] is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint."[48] The rule of reason now provides all the flexibility the FTC requires.

The specific prohibitions in the original Clayton Act are no longer interpreted to be more restrictive than the Sherman Act.[49] No hint of different standards under the Sherman and Clayton Acts was visible in 1984 when the Supreme Court last reached the merits of a tying case; the Court applied the Sherman Act while relying on the Clayton Act's legislative history.[50] Judge (now Justice) Stephen Breyer later set out the same conditions for a tying violation under Section 1 and Section 3,[51] and Judge Richard Posner held that same market power requirement applied to per se illegal tying under both Section 1 and Section 3.[52] A few years ago, the Tenth Circuit declared that the Section 1 and Section 3 tying standards were "identical."[53] Much the same is true for exclusive dealing. In 1984 Judge Posner declared that Sherman Act standards applied to all exclusive dealing claims,[54] and the Ninth Circuit applied Sherman Act standards to exclusive dealing in 1997.[55]

Convergence between FTC Act and Sherman Act standards also can be seen in cases involving unilateral conduct. In *McWane* the Eleventh Circuit declared that the monopolization offense has the same elements under Section 5 of the FTC Act and Section 2 of the Sherman Act.[56] The Eleventh Circuit endorsed the low bar for monopoly maintenance cases set by D.C. Circuit's *en banc Microsoft* opinion. The *Microsoft* court held that it was sufficient for the government to

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48 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

49 The original provisions of the Clayton Act relating to price discrimination and acquisitions were amended by the Robinson-Patman Act in 1936 and the Cellar-Kefauver Act in 1950.

50 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984). The Supreme Court previously declared that Section 3 prohibited tying if "the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained," whereas a Section 1 tying violation required that "both conditions are met." Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 608-09 (1953).

51 Grappone, Inc. v. Subaru of N.E., Inc. 858 F.2d 792, 794 (1st Cir. 1988).

52 Sheridan v. Marathon Petroleum Co. LLC. 530 F.3d 590, 595-96 (7th Cir. 2008).

53 Suture Express, Inc. v. Owens & Minor Distrib., Inc. 851 F.3d 1029, 1045 (10th Cir. 2017).

54 Roland Mach. Co. v. Dresser Indus., Inc. 749 F.2d 380, 393 (7th Cir. 1984). The Supreme Court previously held that Congress did not intend "the same tests of detriment to the public interest as [the Sherman Act] had been interpreted as requiring," and that the Section 3 standard for exclusive dealing was "satisfied by proof that competition has been foreclosed in a substantial share of the" relevant market, even absent evidence of a demonstrable anticompetitive effect. Standard Oil Co. of Cal. v. United States. 337 U.S. 293, 312, 314 (1949).

55 Omega Envtl., Inc. v. Gilbarco, Inc. 127 F.3d 1157 (9th Cir. 1997).

56 McWane, Inc. v. FTC, 783 F.3d 814, 828 (11th Cir. 2015). The FTC's appeal brief stated the elements for a Section 2 violation, although the FTC decided the case under Section 5. The court might have understood the FTC to argue that the elements were the same. Brief of the Federal Trade Commission, McWane, Inc. v. FTC, at 22, https://www.ftc.gov/system/files/documents/cases/140829mcwanebrief.pdf.

prove that the targets of Microsoft's exclusionary tactics "reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct" and that the "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power."[57] Thus, the monopoly maintenance offense under Section 2 incorporates the incipiency concept.

Professor Herbert Hovenkamp explained that

> The word "incipient" generally means something such as "starting to manifest itself." The term is useful in antitrust analysis if it is limited to situations where monopoly or collusion really is in prospect and the tribunal is in a position to solve the problem. That is, it should function something like the "dangerous probability of success" requirement in the law of attempt to monopolize.[58]

The elements of the Section 2 offense of attempt to monopolize are "proof of a dangerous probability that [the conduct at issue] would monopolize a particular market and specific intent to monopolize."[59] Thus, the attempt to monopolize offence under Section 2 also incorporates the incipiency concept.

The Next Few Years

When Chair Khan uses the unfair methods of competition prohibition of Section 5, she will face constraints. As Justice Brandeis declared in an early FTC Act case, "The [FTC] act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."[60] And in 1984 the FTC itself commented that: "While Section 5 may empower the Commission to pursue those activities which offend the 'basic policies' of the antitrust laws we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed."[61]

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[57] United States v. Microsoft Corp, 253 F.3d 34, 79 (D.C. Cir. 2001).

[58] Hovenkamp, *supra* note 35, at 880 (2010). Decades earlier, the FTC similarly had held:

> The proscription against attempted monopolization in Section 2 of the Sherman Act does not require a showing of monopoly power or injury to competition—a dangerous probability is sufficient. We do not believe this standard should be changed when a case is brought under Section 5. To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge the legal philosopher let alone the competitor trying to conform its conduct to the law. If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the Federal Trade Commission Act.

Gen. Foods Corp., 103 F.T.C. 204, 366 (1984).

[59] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[60] FTC v. Gratz, 253 U.S. 421, 427-28 (1922) (Brandeis, J. dissenting).

[61] *General Foods*, 103 F.T.C. at 365.

The incipiency concept does not dispense with proof of anticompetitive effects; it merely changes the nature of the proof by making the analysis forward looking and thus predictive.[62] The incipiency concept does not mean the mere possibility of anticompetitive effects suffices, so the best the FTC can hope for in the application of Section 5 of the FTC Act is adoption of the "reasonable probability" standard of Section 7 of Clayton Act. Chair Khan will have accomplished a great deal if she can get courts to hold that the FTC need not prove that anticompetitive effects are more likely than not.

Prior to her nomination to the FTC, Khan and FTC Commissioner Chopra published an article advocating a rulemaking on unfair methods of competition.[63] In confirming the power of the FTC to promulgate binding substantive rules, however, the D.C. Circuit warned that: "The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard."[64] A rulemaking on unfair methods of competition should conclude that the question asked by the Sherman Act's rule of reason is the determinative issue as to whether the Commission should prohibit a practice as an unfair methods of competition.

In an earlier article, Khan also had suggested that the FTC could use its rulemaking power to preclude the owners of Internet platforms from doing business on their own platforms.[65] Based on her work on the October 2020 report issued by the House Subcommittee on Antitrust, Commercial and Administrative Law,[66] she might be contemplating a rulemaking to declare self-preferencing an unfair method of competition when done by a dominant Internet platform. The fundamental problem the FTC would confront is that no two of the potentially dominant platforms are alike. What self-preferencing means differs across platforms, as does its impact, so any self-preferencing remedies should be the product of adjudicative proceedings examining the particular facts of each affected platform and each prohibited form of self-preferencing.

Chair Khan should proceed expeditiously but also cautiously. The Supreme Court likely would be unanimous in holding that harm to competition must be what makes a practice an unfair

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[62] *See* Richard M. Steuer, *Incipiency*, 31 LOYOLA CONSUMER L. REV. 155, 169 (2019) ("The incipiency doctrine does not alter the degree to which a merger or practice ultimately must be harmful to competition in order to be unacceptable; rather the doctrine extends the time horizon for assessing anticompetitive harm.").

[63] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

[64] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 678, 693 (D.C. Cir. 1973).

[65] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1083 (2019). President Biden's Executive Order on Promoting Competition in the American Economy encouraged the FTC to exercise rulemaking authority concerning, among other things, "unfair competition in major Internet marketplaces." Exec. Order No. 14,036, § 5(h)(iv), 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

[66] Investigation of Competition in Digital Markets, Subcommittee on Antitrust, Commercial and Administrative Law, House Committee on the Judiciary (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

method of competition,[67] and it might be prepared to hold the FTC itself unconstitutional.[68] All Chair Khan should ask of the courts is reasonable leeway on proof of harm to competition, especially as to likelihood and immediacy. And the Department of Justice should have just as much leeway because the Sherman Act directed the Attorney General to institute proceedings to "prevent" violations.[69]

Lina M. Khan's writings before becoming FTC Chair place her in the vanguard of a populist movement advocating radical reform, but a radical agenda as FTC Chair likely would be stymied by the courts. A better approach is incremental change through fact-based FTC decisions focused on competitive effects.

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[67] *Cf.* Nynex Corp. v. Discon, Inc., 525 U.S. 128, 135 (1998) (holding that a Sherman Act plaintiff "must allege and prove harm, not just to a single competitor, but to the competitive process, *i. e.*, to competition itself").

[68] Justices Gorsuch and Thomas have taken the view that the FTC is unconstitutional. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2216-17 (2020) (Thomas, J., dissenting). Chief Justice Roberts and Justices Alito and Kavanaugh went quite far in that direction. *Id.* at 2198-99. The issue of the FTC's constitutionality could be before the Supreme Court in the October 2021 Term. *See* Axon Enter., Inc. v. FTC, 986 F.3d 1173 (9th Cir. 2021), *petition for cert. filed* (July 20, 2021) (No. 21-86).

[69] 15 U.S.C. § 4.