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Daniel Crane[1]

I. INTRODUCTION

The Federal Trade Commission's ("FTC's") unprecedented enforcement action against Intel[2] raises profound issues concerning the scope of the FTC's powers to give a construction to Section 5 of the FTC Act that goes beyond the substantive reach of the Sherman Act. While I have urged the FTC to assert such independence from the Sherman Act,[3] this is the wrong case to make a break. Indeed, if anything, *Intel* poses a risk of seriously setting back the development of an independent Section 5 power by provoking a hostile appellate court to rebuke the FTC's effort and cabin the FTC's powers in future matters better suited to an independent Section 5.

The essential flaw in the Commission's assertion of an independent Section 5 in *Intel* is that there is little or no connection between the Commission's comparative institutional advantages over Article III courts and this case. The Commission should not make a break for Section 5 independence until it finds a case in which it can explain what facts about that particular case—and not about antitrust cases in general—justify judicial deference. Otherwise, the Commission runs the risk that courts will interpret its plea for deference as a request to be excused from the rule of law. There is a very real risk that courts will view *Intel* as an effort to achieve carte blanche permission for the Commission to run an antitrust program divorced from the strictures of the Sherman Act. Courts are unlikely to react sympathetically to such a perceived request.

This article's structure is as follows: Part II sounds a sympathetic note for the Commission's project of developing an independent Section 5, but also some general notes of caution about the enterprise. It also responds to Commissioner Rosch's arguments for why application of an independent Section 5 is warranted as to *Intel*. Part III articulates six principles for sound development of an independent Section 5, and argues that the *Intel* action violates each of them. Finally, Part IV suggests a strategy for turning *Intel* into a victory for the Commission's long-run enforcement powers, even while ceding this particular case on its facts. Part V concludes.

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[1] Professor of Law, University of Michigan. This article was funded by the Intel Corporation. The views expressed herein are solely my own and not those of Intel Corporation or the University of Michigan.

[2] In re Intel Corp., Docket No. 9341 (FTC), hereafter "Complaint."

[3] *See generally* FTC Workshop on Section 5 of the FTC Act as a Competition Statute (hereinafter "FTC Workshop"), Remarks of Daniel Crane, (October 17, 2008), Official Transcript at 72-80; available at http://www.ftc.gov/bc/workshops/section5/transcript.pdf. See also Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1198-1202, 1207-1210 (2008); Daniel A. Crane, *Obama's Antitrust Agenda*, REGULATION (Fall 2009); Daniel A. Crane, *linkLine's Institutional Suspicions, 2009* CATO S. CT. REV. 111 (2009); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1 (2008).

II. REASONS FOR CAUTION

A. The Need for Restraining Principles

The FTC Act gives the Commission a seemingly simple mandate: Detect and prohibit "unfair methods of competition . . . and unfair or deceptive [trade] practices."[4] The Commission's powers under Section 5 are at least co-extensive with the substantive reach of the Sherman Act—in other words, that anything that is illegal under the Sherman Act is also illegal under the FTC Act.[5] But the Supreme Court has also held that the FTC may go further than the Sherman Act and "stop in their incipiency acts and practices which, when full blown, would violate those Acts."[6] Thus, "the standard of unfairness under the FTC Act . . . encompass[es] 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."[7]

There are compelling reasons to allow the FTC an independent norm-creation role in antitrust.[8] Over the past several decades, the courts have sharply constricted antitrust liability norms under the Sherman Act largely out of a reaction to the dangers and abuses of private antitrust litigation, which outnumbers public antitrust enforcement (at both the FTC and Department of Justice) by a 10-1 ratio.[9] Among these real or perceived dangers and abuses are the chilling effects of automatic treble damages and one-way fee-shifting, the damages-compounding effects of easy class certification, strategically-minded competitor plaintiffs, discovery run amok, and generalist judges and unsophisticated juries who create inconsistent and incoherent industrial policy.[10] Reacting to these perceived infirmities in the institutional structure of private antitrust litigation, the federal courts (led by the Supreme Court) have contracted the Sherman Act's substantive liability norms. While such contraction may be justified to mitigate the systemic risks of private litigation, to the extent that the government sues under the same statute a perhaps unintended side effect has been to stymie public litigation.

The Justice Department has no means of avoiding this difficulty—it can only enforce the Sherman and Clayton Acts. The FTC, however, need not tie itself to the Sherman Act. Indeed, it has no power to enforce the Sherman Act, but only the FTC and Clayton Acts. If it so chooses, it may declare that it is enforcing the Sherman Act as incorporated into the FTC Act through judicial decision, but then it appropriates all of the baggage of private litigation as expressed in contracted liability norms.

In recent years, the Commission has frequently tied itself to the Sherman Act.[11] Why would it choose to accept that baggage? Of late, the FTC has been shell-shocked by its treatment in the courts when it has invoked an independent Section 5. There is a wide gulf between the theoretical availability of an expansive Section 5 and actual judicial affirmation of FTC decisions

[4] 15 U.S.C. § 45.

[5] FTC v. Cement Inst., 333 U.S. 683, 694 (1948).

[6] FTC v. Brown Shoe Co., 348 U.S. 316, 322 (1966).

[7] FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986).

[8] Crane, *Technocracy*, *supra* note 3. at 1207-10.

[9] *Id.* at 1179.

[10] I have made these points at length in various publications, including Crane, *linkLine's Institutional Suspicions*, *supra* note 3. *See also* Statement of Chairman Leibowitz and Commissioner Rosch, In re Intel Corp., Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216Intelchairstatement.pdf.

[11] *See, e.g.*, Rambus, Inc. v. FTC, 522 F.3d 456, 462 (D.C. Cir. 2008) (observing that the Commission had expressly limited its theory of liability to conduct that would violate Section 2 of the Sherman Act).

to enjoin behavior that would not violate the Sherman Act. The courts have frequently quashed the FTC's efforts to develop an independent Section 5, even while paying lip service to the independence principle.[12] As Bill Kovacic remarked during his opening comments at the FTC's October 2008 workshop on the meaning of Section 5, it is difficult to find even ten successfully litigated Section 5 antitrust cases over the Commission's nearly hundred-year history.[13]

The reason is institutional. Courts tend to be jealous of their jurisdiction. To cite a venerable precedent to which we will return at end, courts are loathe to abandon their prerogative "to say what the law is."[14] In an early decision—subsequently overruled but never quite forgotten—the Supreme Court applied a *Marbury v. Madison* thematic to the FTC: "The words 'unfair competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include."[15] Courts are wary of agency assertions that the agency should be accorded independent space to develop legal norms. As Bob Pitofsky has explained, a construction of Section 5 that would make the same behavior lawful at the Department of Justice and unlawful at the FTC is "untenable."[16]

So this is where we are today: Legal doctrine theoretically allows space for an independent Section 5 and there are good policy reasons for some movement away from the constraints of the Sherman Act, but great care needs to be taken in the formulation of a "separation strategy." It simply will not do for the FTC to declare independence from the Sherman Act and then proceed to formulate its own antitrust policy.[17] As Commissioner Rosch recognizes in his statement dissenting from the Commission's decision to bring an independent Sherman Act Section 2 "tag-along" action, the Commission must not merely assert independence from the Sherman Act, but explain the principles that justify departure from Sherman Act norms in each relevant case.[18] A "just trust us, we're the FTC," strategy has no chance of success in the courts.

B. A Brief Comment on Commissioner Rosch's Proposed Principles

While Commissioner Rosch is to be lauded for attempting to explain the particular features of *Intel* that justify departure from ordinary Sherman Act liability rules, his four justifications are insufficient. In particular, Commissioner Rosch's claims are not grounded in the Commission's comparative institutional advantages, but rather in a general hostility to the legal standards enunciated by the courts in Sherman Act cases.

First, Commissioner Rosch believes that *Intel* is an appropriate case in which to assert Section 5 independence because the oft-repeated maxim that antitrust law protects "competition not competitors" does not fit well in a duopoly market with high entry barriers where harm to competitors necessarily results in harm to competition and hence consumers. The premise is correct but the conclusion doesn't follow. If Intel truly did cripple AMD's ability to compete in

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[12] *See generally* FTC Workshop, Opening Remarks of Chairman William Kovacic, Official Transcript at 4-20.

[13] *Id.* at 10.

[14] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[15] FTC v. Gratz, 253 U.S. 421, 427 (1920)

[16] FTC Workshop, Remarks of Robert Pitofsky, Official Transcript at 64.

[17] *See* Crane, *linkLine's Institutional Suspicions, supra* note 3 at 132.

[18] Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, In re Intel Corp., Docket No. 9341, *available at* http://www.ftc.gov/os/adjpro/d9341/091216Intelstatement.pdf.

the CPU market and was also able to keep out other potential new entrants, then nothing in the Sherman Act's "competition not competitors" maxim would stand in the way of liability. Conversely, if Intel did not cripple AMD through anticompetitive conduct condemned under the Sherman Act, then competition itself would not be injured either. So this is not a very convincing reason to argue for Section 5 independence.

Second, Commissioner Rosch argues that Section 5 would apply if Intel reduced the variety of choices facing consumers, even if it did not raise prices because of the acquisition or maintenance of monopoly power. Certainly, it would be a mistake to construe the Sherman Act or any antitrust law as prohibiting only anticompetitive conduct resulting in price increases but not conduct resulting in the diminution of quality. Fortunately, the courts have not taken that view, but have held that the Sherman Act protects against anticompetitive conduct that also diminishes quality.[19] So if Commissioner Rosch is equating variety with quality (including subjective consumer preferences) then existing Sherman Act precedent fully protects the interests he advances.

But suppose that a particular course of conduct neither increases price nor diminishes quality. In such a case, the market must be functioning well, for a monopolist would take its profits either by raising its prices or keeping its prices level and reducing quality. To be sure, some competitive strategies—including certain forms of exclusive dealing contracts—may reduce the variety of choices faced by a particular set of customers. But, as recently explained by Kevin Murphy, the Commission's economic expert in the *Whole Foods* litigation, in such cases the reduction of variety comes with a decrease in price (or, more precisely, a decrease in quality-adjusted price) that, on balance, benefits consumers.[20] So it is very difficult to see how the structure of existing Sherman Act law fails to protect consumer's interests or justifies an independent Section 5 with respect to choice and variety considerations.

Third, Commissioner Rosch argues that courts have been hostile to (my words, not his) "monopoly broth" theories where monopolization liability is predicated on the "synergistic effects" of multiple varieties of conduct, none of which would be independently unlawful but that Section 5 should reach such conduct. But, if anything, as I argue in a forthcoming paper, courts have been too indulgent of "monopoly broth" theories, allowing liability to be founded on a series of pro-competitive acts that supposedly combined to harm a rival.[21] It is not my purpose here to discuss the proper resolution of monopoly broth theories, but merely to observe that: (1) many courts have, in fact, recognized monopoly broth theories under the Sherman Act, which negates the justification for an independent Section 5 approach; and (2) there is no reason of comparative institutional advantage to allow the FTC to aggregate multiple poor theories of liability if other plaintiffs cannot.

Fourth and finally, Commissioner Rosch argues that an independent Section 5 challenge is justified because intent should play an important role in the adjudication of this case. In some cases, courts have been hostile to the use of intent evidence in Sherman Act cases because juries

[19] *See*, e.g., Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995) (recognizing that "an act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality").

[20] *See* Benjamin Klein & Kevin Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L. J. 433 (2008).

[21] Daniel A. Crane, *Monopoly Broth Makes Bad Soup*, ANTITRUST L. J., (forthcoming) *available* in draft form at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474954.

tend to be over-persuaded by intent evidence since they cannot understand the economic evidence. Agreed, juries are unduly swayed by intent evidence. But why does the Commission need to rely on intent evidence when it has the world's best economists at its disposal to analyze the objective economic significance of Intel's commercial practices? This is not a case in which the consequences of the challenged conduct—which began over a decade ago—are unknown and have to be predicted from the supposed fantasies of industry actors. We have the data; the question is what do they mean? If the Commission has to rely on Intel's supposed intent to make its case, there is something very wrong with either the Bureau of Economics (which is stronger than it has ever been) or the Commission's case.

Commissioner Rosch's principles for Section 5 independence come across more as quarrels with the interpretation that some judges have given the Sherman Act than justifications founded in the institutional structure of the FTC and its comparative advantages over Article III courts. If the FTC is to succeed in revitalizing an independent Section 5, it will need to take a more cautious, robust, and ultimately strategically-minded approach. Instead of confronting the courts with their supposed errors under the Sherman Act, the FTC will need to convince the courts why the FTC should sometimes—although not always—be allowed to walk a different path.

III. SIX PRINCIPLES FOR SOUND DEPLOYMENT OF AN INDEPENDENT SECTION 5

This section outlines six principles for development of a strong and viable independent Section 5. Adherence to all six principles is not necessarily essential for a successful (meaning both conceptually-sound and review-proof) enforcement action, nor is adherence to all six principles a guarantee of success. However, the greater the adherence to the principles, the greater the likelihood of success. The *Intel* enforcement action violates all six principles. In such a case, there is a very strong likelihood of reversal in the courts.

A. Do Not invoke Section 5 in Paradigmatic Sherman Act Cases

Courts are most likely to defer to administrative agency judgments in cases involving commercial practices about which the courts have not developed a deeply rooted body of precedent. In such cases, the courts may allow some administrative experimentation and testing, even though they might not have reached the same result as the agency if they had analogized to conduct already covered by established liability norms. Conversely, courts are least likely to defer when they have already spoken to the exact practice on many occasions and developed a time-tested body of liability rules to govern it. Refusal by the agency to honor the judicially created precedents may look—to judges at least—like intransigence.[22] It is human nature (and judges are human after all) to be more open to an idea on which one has not yet expressed an opinion than to approve of an idea that contradicts one's prior assertion.

An example of such judicial hostility to an agency decision recently appeared in *Schering-Plough*, where the Eleventh Circuit testily rebuked the Commission for failing to follow its *Valley Drug* decision on patent settlements.[23] The court took umbrage at the Commission's failure to adhere to *Valley Drug's* legal framework in a private Sherman Act case when deciding a very similar issue in an adjudicative proceeding. The Commission should avoid similar judicial

[22] *See* FTC Workshop, Remarks of Robert Pitofsky, Official Transcript at 65 ("The Federal Trade Commission really cannot overrule the Supreme Court. I don't care what Section 5 says.").

[23] Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

confrontation by declining to assert Section 5 independence in cases where the courts have recently decided precisely the same questions under the Sherman Act and decided, as a policy matter, to confine the liability rule in a particular way.

The bulk of the *Intel* enforcement action is a challenge to commercial practices about which there is paradigmatic Sherman Act precedent. Much of the case challenges Intel's pricing/rebating behavior. The Complaint acknowledges that that these practices are akin to predatory pricing, but then proposes tests that are at odds with well-established Sherman Act precedents. For example, the Complaint includes sunk costs in the appropriate measure of cost and says that the Commission need not prove the possibility of recoupment[24]—both assertions are directly at odds with the Supreme Court's insistence that predatory pricing plaintiffs show pricing below an appropriate measure of incremental cost and the dangerous probability of recoupment.[25]

The Complaint also makes assertions about Intel's alleged exclusive dealing or exclusive dealing-like contracts.[26] Like predatory pricing, exclusive dealing is subject to well-established judicial liability norms.[27] The last major Justice Department monopolization case was an exclusive dealing matter.[28] Whether or not the Commission can satisfy those norms as to *Intel*, exclusive dealing claims are very familiar to the courts.

The Complaint also asserts that Intel had a "duty to deal" with its competitors.[29] Such an allegation waves a red flag in the face of the courts, which have been sharply cutting back on the duty to deal since *Aspen Skiing*[30] narrowly opened the door to the duty. In *Trinko*,[31] the Supreme Court declared *Aspen* "at or near the outer boundary of § 2 liability" and, in its most recent Section 2 decision—*linkLine*[32]—continued to cast aspersions on any duty to deal. It would be very surprising to see the courts passively defer to an independent Section 5 evaluation of refusal to deal claims when they have spent so much time and energy analyzing such claims in recent years.

For virtually every practice alleged in the Complaint, there is a well-developed body of Sherman Act precedent that will naturally become the focus of legal argumentation on appeal. Convincing a reviewing court to defer to the Commission's prophylactic interpretation of Section 5 where courts already have honed legal tests for the relevant conduct will be a very tough sale.

B. Do invoke Section 5 in Cases involving a Statutory Gap

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[24] Complaint ¶ 53.

[25] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). In Brooke Group, the Supreme Court held that recoupment (either actual or dangerously probable) is required in every predatory pricing case, whether brought under the Sherman Act or the Robinson Patman Act. *Id.* at 224. It also held that defendant's price must be shown to have fallen below "an appropriate measure of cost." *Id.* at 222-23. While the Court found it unnecessary to decide on exactly what measure of cost should be employed, it suggested that cost in a predation context means "incremental cost." *Id.* at 223. Post-Brooke Group courts have held that Brooke Group rules out any effort to define cost in a way that does not approximate incremental cost. *See* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 909 (9th Cir. 2008); U.S. v. AMR Corp., 335 F.3d 1109, 1117 (10th Cir. 2003).

[26] Complaint ¶¶ 51-52.

[27] The leading Supreme Court decision, expounded upon hundreds of times in subsequent lower court decisions, is Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[28] U.S. v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005).

[29] Complaint ¶ 21.

[30] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[31] Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004)

[32] Pacific Bell Tel. Co. v. linkLine Communcs., Inc., 129 S. Ct. 1109 (2009).

One area where many commentators have urged the Commission to assert Section 5 independence is where there is a gap between Sections 1 and 2 of the Sherman Act.[33] Although Sections 1 and 2 plausibly could be seamlessly read to cover all commercial conduct of an anticompetitive nature, judicial construction of the statutory texts has created some coverage gaps. Section 1 requires a "contract, combination, or conspiracy"—and hence agreement between at least two unrelated actors—which precludes coverage of purely unilateral acts, such as the unilateral adoption of practices that facilitate tacit price coordination, or unsuccessful attempts to induce others to join a cartel. Section 2 requires monopoly power, thus precluding application to anticompetitive acts involving a lesser degree of market power. Further, there is a serious juridical question about the viability under Section 2 of "joint monopolization" offenses where the defendants did not agree on a concerted pattern of conduct but adopted parallel measures, such as exclusive dealing contracts, that effectively lock up the market to new entrants.

During the 1970s, the FTC brought cases that sought to fill these statutory gaps with the seamless and open-ended text of Section 5.[34] Though it was rebuffed by the courts, the Commission is surely on strong ground when asserting Section 5 as a catch-all, intended by Congress to avoid end-runs around the Sherman Act. The FTC Act's legislative history evidences such Congressional intent.[35] Further, it is not hard to explain to courts why the Act should be broadly read to capture conduct that, for statutory construction as opposed to public policy reasons, falls outside the purview of the Sherman Act.

The *Intel* case involves no such statutory gaps, as evidenced by the Commission's decision (strongly objected to by Commissioner Rosch) to bring a supplemental Sherman Act Section 2 challenge concerning the same conduct as the Commission challenges in its Section 5 allegations. As set forth in the previous section, the conduct challenged here is paradigmatic Sherman Act conduct. It will be difficult for the Commission to explain the need for Sherman Act independence in a case involving conduct that the Commission admits is directly covered (and unfavorably to the Commission's position) by the Sherman Act.

C. Do invoke Section 5 in Cases Involving Fraud or Deception

The FTC's original mission, incorporated in the 1914 Act creating the Commission, was to prohibit "unfair competition." In the 1938 Wheeler-Lea Amendment, Congress added a prohibition on "unfair or deceptive" trade practices. Although these prohibitions are juridically separate and not every "unfair method of competition" need involve "deception," there are obvious statutory synergies between the amended statute's competition and deception prongs. It follows that the Commission should enjoy the greatest independence from the constraints of Sherman Act law when advocating against market power acquired by deception or in antitrust cases that otherwise involve misrepresentation or fraud.[36]

Consider Justice Breyer's dissenting opinion in *FTC v. California Dental*, where he and three other justices assumed that the Commission should be afforded an extra measure of discretion when dealing with a dentist's organization's prohibition on price and quality

[33] *See*, e.g., FTC Workshop, Comments of Robert Pitofsky, Official Transcript at 65.

[34] *See*, e.g., Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980) (rejecting FTC's efforts to challenge unilaterally adopted basing point pricing systems).

[35] *See* Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L. J. 1, 74-75 (2003).

[36] *See*, e.g., FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968) (observing that FTC determinations are entitled to "great weight" when the FTC has previously studied and examined a particular issue on multiple occasions).

advertising that was ostensibly justified by the prevention of fraud.[37] All four Justices who signed onto Justice Breyer's opinion are still on the Court and Justice Souter, who wrote the majority opinion, has been replaced by Justice Sotomayor. The best test case in the Supreme Court for an independent Section 5 would be one where the Commission could argue for a norm-creation role in areas involving deception or fraud, justified by its unique statutory mandate and expertise with such matters.

Although there are a few scattered references to deception in the *Intel* Complaint, deception clearly is not the core of the action. As to the CPU market, the Complaint enumerates five species of alleged anticompetitive conduct: first, anticompetitive contracts with OEMs (¶ 6); second, market share or volume discounts to OEMs (¶ 7); third, the redesign of its products in markets adjacent to CPUs (¶ 8); fourth, paying suppliers of complementary software and hardware products to eliminate or limit support for non-Intel CPUs (¶ 9); and only fifth and last, deception by failure to disclose information about the effects of its redesigned compiler on non-Intel CPUs (¶ 10). Similarly, the Complaint enumerates a catalogue of alleged wrongs as to the GPU market, of which deception is merely one. (¶ 18)

Not only are the references to deception few and thin, they appear to bootstrap the other antitrust allegations. For instance, the Complaint alleges that Intel denied interoperability between competitive GPUs and Intel's CPUs and then deceived people (who, exactly, is unspecified) about interoperability. (¶ 18) Similarly, it alleges that Intel anticompetitively redesigned its compilers and then failed to disclose its anticompetitive redesigns. (Compare ¶¶ 8, 10) This is much like charging a corporate director with breach of fiduciary duty for failing to consider a promising tender offer and then fraud for failing to report himself. The fraud charge has little, if any, extra value.

In context, the deception allegations look suspiciously like an attempt to justify an independent Section 5 challenge in a case that, in reality, has very little to do with fraud or deception. The Commission would be on much stronger ground in bringing a Section 5 challenge in a circumstance where fraud or misrepresentation lay at the heart of the case.

D. Do Invoke Section 5 in Cases involving Direct Relations Between the Defendant and Consumers

The FTC brands itself as first and foremost a consumer protection agency.[38] The Commission enjoys its greatest prestige in that capacity, as manifested by the extreme popularity and positive reputational benefits for the Commission of the Do Not Call registry. Indeed, the courts have afforded the Commission Chevron deference almost exclusively in its consumer protection capacity.[39] It follows that the Commission is most likely to secure deference from the

[37] California Dental Ass'n v. FTC, 526 U.S. 756, 787 (1999) (Breyer, J., concurring in part and dissenting in part) (observing that the FTC "an expert in the area of false and misleading advertising," found no basis for the association's claim that a prohibition on price and quality advertising was necessary to protect consumers against misleading claims).

[38] *See*, e.g., Prepared Statement of the Federal Trade Commission on "Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission;" Before the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection, United States House of Representatives (July 8, 2009), *available at* http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf (noting that the "Commission also appreciates the proposal's recognition of the FTC's role as the nation's consumer protection agency.").

[39] *See* Crane, *Technocracy,* supra note 3. at 1206-07.

courts for an independent Section 5 construction when the Commission is acting directly for the benefit of consumers.

To secure maximum deference, the Commission should not only invoke a general consumer welfare justification for its actions—all antitrust actions should be justified on consumer grounds, whether or not consumers are directly involved in the market segment at issue. Rather, the Commission should pursue an independent Section 5 program primarily in cases that directly involve choices and decisions by consumers and where the Commission can explain how its expertise with consumer psychology, values, and practices justifies a more liberal construction of Section 5 than might be justified under the Sherman Act.

For example, a good bit of the Justice Department's enforcement action against Microsoft involved claims about consumer behavior. Operating system users allegedly were confused by the existence of multiple browsers on a desktop, which meant that if Microsoft indelibly engraved Internet Explorer on the Windows desktop, OEMs would be reluctant to add Netscape Navigator for fear that their support lines would be overwhelmed by confused and irate consumers.[40] Thus, even in a case involving primarily commercial practices between businesses (operating systems, browsers, programmers, OEMS, etc.), consumer mentality, habits, and vulnerabilities played a major role. In a case like *Microsoft*, the Commission could stake a strong claim to Section 5 independence by invoking its expertise about, and protection of, consumers.

The *Intel* case, by contrast, seems to have little to do with consumer decision-making. Again, most of the allegations concern contractual relations between Intel and OEMs that supposedly constrained AMD, Nvidia, and Via in their respective markets. The *Intel* matter is primarily a dispute about relations between big businesses, not one where consumer psychology or habits should play a major role. Accordingly, there is very little in the FTC's unique expertise that should justify departure from ordinary Sherman Act norms in *Intel*.

E. Do invoke Section 5 in Cases involving Incipient Behavior

Agency expertise may be most useful—and hence call for the greatest judicial deference—where it concerns predictions about future consequences of incipient behavior. In such cases, courts may be comparatively ill-equipped to divine the future and more likely to trust an agency's prediction based on its superior familiarity with the type of conduct at issue. Conversely, courts are less likely to defer when the relevant conduct has been in place for some time and its actual effects can be tested using judicial empirics—discovery and adversarial procedures. Judges are more confident in answering the question "have prices gone up" or "has innovation been stifled" than "are prices likely to go up" or "is innovation likely to be stifled." The more confident judges are in their own abilities to work out the facts, the less likely they are to defer to administrative agencies.

The *Intel* Complaint alleges that Intel's anticompetitive practices began in 1999. (¶ 2) This is obviously not a case of incipient conduct. The Korean, Japanese, and European authorities have already concluded their investigations, aspects of the case went to the U.S. Supreme Court six years ago,[41] and Intel has already settled with AMD after years of protracted litigation. No predictions need be made about the effects of Intel's conduct on the market, about the viability of AMD or other competitors, about price levels, or about the pace and quality of innovation.

[40] U.S. v. Microsoft Corp., 253 F.3d 34, 61 (2001).

[41] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

While the conclusions about those facts are contested, the data supporting the conclusions have been revealed in the market for over a decade and collected and sifted by scores of lawyers, economists, and regulators. FTC expertise is not needed to turn up new angles on the data or make bold predictions about what will happen in a year or two if Intel's behavior is left unchecked.

It is hard to see the need for an independent Section 5 in such a case. Indeed, Supreme Court precedent appears to preclude it. Consider the classic formulation of an expansive Section 5 power, cited in the first paragraph of the *Intel* Complaint: The FTC 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 . . . as well as to condemn as 'unfair methods of competition' existing violations of them."[42] As this quotation makes clear, the FTC's prophylactic Section 5 powers—the power to reach beyond the Sherman Act—exist as to categories of incipient behavior that could "when full blown" blossom into Sherman or Clayton Act violations. Conversely, as to practices that are not incipient but fully developed, *Brown Shoe* suggests that the FTC Act is merely co-extensive with the Sherman Act.

F. Do Not invoke Section 5 in Cases Seeking Extraordinary Remedies

One of the chief justifications for giving the FTC prophylactic powers beyond the reach of the Sherman Act is that Section 5 remedies are prospective and preventative rather than compensatory, punitive, or structural.[43] The Commission should be accorded the greatest deference on liability norms when it simply orders the defendant to cease and desist from conduct that could impair the competitive functioning of a market in the future. When the Commission seeks extraordinary remedies—such as those that radically restructure an allegedly damaged market and seek to restore competition—the likelihood of judicial deference on liability norms is much smaller.

The Sherman Act's criminal penalties and treble damages require a strict construction of the Act, whereas the semi-regulatory nature of the FTC Act creates greater room for a broad enforcement mandate. As explained in the first treatise on the FTC, written the year after the Commission's formation (by the son of the first Justice Harlan and the father of the second Justice Harlan):

> The word "unfair" is undeniably indefinite in sense and meaning. What one person may consider "unfair" in competitive trade, another may perhaps regard as legitimate. Conceivably, members of a court may disagree as to whether or not, under the circumstances of a particular case, a given method of competition is "unfair," just as in one case they were unable to agree and adjudge whether or not certain regulations there involved constituted an "unreasonable" restraint of trade within the purview of the Sherman Law. That, however, is of no consequence, so far as concerns the validity of the Trade Law [the FTC Act]. The Trade Law does not purpose to denounce any competitive act as a crime. It does not provide for the imposition of a fine upon, or for the imprisonment of, any person guilty of

[42] FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966) (quoting FTC v. Motion Picture Adv. Serv. Co., 344 U.S. 392, 394-95 (1953)).

[43] *See*, e.g., FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968) (observing that the FTC Act was intended to delegate power to "'an administrative body of practical men' who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations") (citation omitted).

> practising "unfair methods of competition." Whatsoever the peril, under the Sherman Law, of practising "unfair methods of competition," a person resorting to such practices incurs no other risk, under the Trade Law, than that the Trade Commission, by proceeding as pointed out in the statute, may obtain the order of a court requiring him to cease and desist from such practice.[44]

At least that is true where the FTC seeks truly prospective, corrective, and non-punitive remedies akin to cease and desist orders. For example, in *nData*, the Commission invoked Section 5 to require an intellectual property licensor to comply with its preexisting commitment to license on particular terms.[45] There was nothing punitive or deterrence-oriented about that remedy. It was thus consistent with the FTC's broad prophylactic powers to declare conduct unlawful combined with narrower remedial possibilities than the other antitrust laws. Even if the Sherman Act might not have allowed a finding of liability, the Commission may have had the power under Section 5 to correct a market failure based on industry participants' reasonable reliance on nData's prior representations about its licensing intentions.

In *Intel*, by contrast, the relief sought by Complaint Counsel is extraordinarily broad and invasive to the point of appearing punitive. It effectively strips Intel of control over its pricing and distribution strategies, technological development, intellectual property enforcement activities, advertising and information dissemination, and customer relations for the foreseeable future and places Intel's core business functions into the receivership of an independent monitor controlled by the Commission. The relief requested, if granted by the Commission, would shackle Intel's ability to compete effectively, significantly damage Intel's business, and fundamentally alter the shape of the relevant markets. That the proposed relief is styled as prospective and corrective cannot detract from the obvious fact that it would be a far greater punishment to Intel than the imposition of even a substantial fine or damages award.

Although liability and remedy are theoretically separate and independent analytical modes, there is little doubt that reviewing courts will take into account the stringency of the Commission's proposed remedy in deciding how much leeway to accord the Commission under Section 5. The Commission could not have picked a case with a more aggressive set of proposed remedies to advance its case for an independent Section 5. In my view, this is a colossal mistake.

IV. A *MARBURY V. MADISON* STRATEGY FOR THE *INTEL* CASE

For the reasons set forth above, the *Intel* action raises serious risks of setting back the FTC's antitrust enforcement powers. Certainly, the Commission risks losing the matter in a pro-business appellate court[46] or the Supreme Court during a time of economic trouble when antitrust cases are historically difficult for the Government to win.[47] But the risk goes far beyond losing this individual matter. There is a very real risk that an appellate court will write an opinion

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[44] JOHN MAYNARD HARLAN & LEWIS WILSON MCCANDLESS, THE FEDERAL TRADE COMMISSION, ITS NATURE AND POWERS: AN INTERPRETATION OF THE TRADE LAW AND RELATED STATUTES 31 (1916).

[45] In re Negotiated Data Solutions, LLC, 2008 WL 258308 (F.T.C.).

[46] Under the FTC Act, a losing defendant may appeal to any of the federal appellate courts "within any circuit where the method of competition or act or practice in question was used or where such person, partnership, or corporation resides or carries on business." 15 U.S.C. § 45(c). This means that Intel can pick any of the federal circuits in which to lodge its appeal.

[47] *See* Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, THE CPI ANTITRUST CHRONICLE (Dec. 2008).

rebuking the Commission for asserting independence from the Sherman Act, thus setting a precedent that could constrain the Commission's enforcement mission for years to come.

Nonetheless, there is a way forward that could turn *Intel* into a victory for the Commission's enforcement power. It is what I will call a *Marbury v. Madison*[48] strategy. Should the Commission conclude that Intel's conduct did not violate Section 5, it could nonetheless create a precedent for more expansive enforcement powers in the future. Indeed, such an opinion could work to the Commission's long-run advantage, since it would be insulated from immediate and potentially hostile appellate review—just as *Marbury* created a long-run victory for judicial power even while deciding against judicial power on the narrow facts of that case.

To provide a very abbreviated recap on *Marbury*, early during the Jeffersonian period, Chief Justice Marshall faced a dilemma: Although he wanted to affirm in principle the power of judicial review of acts of Congress, he risked seriously damaging the Court's long-run effectiveness and prestige by striking down an act only to have the newly elected Jeffersonians, who were hostile to the Federalist Supreme Court, disregard the Court's decision.[49] Hence, Marshall wrote an opinion that at once declared Madison's refusal to deliver Marbury's commission illegal, but also the Judiciary Act unconstitutional insofar as it assigned a mandamus power, a species of original jurisdiction, to the Supreme Court. The upshot was that the Court declined to issue the writ of mandamus sought by the Federalists, even while affirming the power of the Court to strike down an Act of Congress. Though hostile to the Court's assertion of the power of judicial review, the Jeffersonians were impotent to challenge the decision since it left the status quo undisturbed and denied the Federalist justices of the peace their commissions. In the long run, establishing the principle of judicial review proved far more lasting a victory for the Federalist view of judicial power than winning the narrow skirmish over justice of the peace commissions.

The FTC could pursue a similar strategy here by writing an opinion announcing a broad view of its Section 5 powers and independence from the Sherman Act, even while finding in favor of Intel and thus avoiding an immediate and probably hostile judicial reaction. Such an opinion would demonstrate the FTC's self-control over its enforcement powers and assuage concerns that divorcing Section 5 from the Sherman Act would lead to unchecked administrative discretion and an abandonment of the "rule of law." The opinion could announce a framework for future judicial review of Section 5 decisions—perhaps announcing a set of limiting principles for independent Section 5 challenges along the lines of those proposed above. In the future, courts might be much more inclined to respect the Commission's views on Section 5 if it had previously articulated a self-disciplining set of limitation principles and censured itself without the need for judicial intervention.

In the long run, such an opinion might do a great deal more to revive the Commission's enforcement powers than an effort to survive judicial review after an adverse finding against Intel. Even if the FTC is convinced that it might win this case in the courts, there are undoubtedly very substantial risks of reversal and setback. It would be far better to proceed with Section 5 independence cautiously and incrementally in niche cases than in a high-profile,

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[48] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[49] *See* generally Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES (Michael Dorf, ed., 2d ed., 2009).

headline-grabbing case where reversal could seriously damage the Commission's enforcement agenda for years to come.

V. CONCLUSION

In the legal, academic, political, and business communities, there is a high degree of skepticism about any effort by the Commission to assert independence for Section 5 from the Sherman Act. On many occasions, the Commission has felt the sting of a similar sentiment in the courts. It may be that the time has come for the Commission to launch a renewed effort for Section 5 independence. Such a move, however, requires not only the right time, but also the right case. *Intel* is not that case.