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THE MORALITY OF MONOPOLIZATION LAW

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ABSTRACT

Congress enacted the Sherman Act in 1890 and prohibited, among other practices, monopolization. To prove monopolization, the government and other plaintiffs must show that a firm both possessed monopoly power and engaged in bad conduct. In interpreting the spare language of the statute, the courts have identified many practices that constitute monopolization, including below-cost pricing, refusals to deal with rivals, and tying. In general, however, they have failed to explain why these practices are unfair and restricted by law. Judges have instead applied labels such as "anticompetitive" without articulating normative foundations for their decisions.

A close examination of the case law reveals that the monopolization doctrine embodies implicit notions of unfairness. Legal precedent limits businesses' abilities to use their monopoly power, financial privileges, or generally prohibited conduct to acquire or perpetuate a monopoly. With its expansive "unfair methods of

* Legal Director, Open Markets Institute. I thank Stella Iweh for excellent research assistance and input, Bert Foer and Luke Herrine for thoughtful feedback, and Brian Callaci and Sanjukta Paul for many stimulating discussions on the topic of fair competition.

competition" authority, the FTC can codify and strengthen existing norms on unfair conduct. The FTC should specifically restrict firms' abilities to use exclusive dealing and below-cost pricing and ban the use of generally prohibited practices as unfair methods of competition. By proscribing these forms of business rivalry, the FTC would encourage businesses to grow and succeed through the fair treatment of trading partners, development of new products, and investment in new plants, facilities, and technologies.

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INTRODUCTION

The Sherman Act prohibits, among other business practices, monopolization, attempted monopolization, and conspiracies to monopolize.[1] One court described the anti-monopoly provision of the Sherman Act—section 2—in lofty terms. The Third Circuit in a 2003 decision wrote: "Section 2, the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists, is the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere."[2] The Supreme Court and the lower courts have held that the possession of monopoly power is not sufficient to violate § 2.[3] Monopoly power must be accompanied by bad conduct.[4] In contrast, monopoly power acquired through "a superior product, business acumen, or historic accident" is not illegal.[5] That is, the courts distinguish good competition from bad competition and, at least implicitly, accept that business rivalry is structured by law.

The judiciary has identified several practices, such as below-cost pricing, refusals to deal, and tying, as acts that can give rise to legal liability for monopolization.[6] Yet, the courts have failed to articulate why these practices are bad and, instead, have relied on labels such as "anticompetitive" to reach their conclusions.[7] What Milton Handler said about "unfair competition" in 1936 could be equally applied to terms like "anticompetitive conduct," too: "The phrase is obviously more of an epithet than a word of art. Its legal usage embodies a conclusion rather than the means of determining the legality of business behavior."[8] But a close review of the case law shows an implicit normative criteria informing the courts' interpretation

1. 15 U.S.C. § 2.

2. LePage's Inc. v. 3M (Minn. Mining & Mfg. Co.), 324 F.3d 141, 169 (3d Cir. 2003) (en banc).

3. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offs. of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004); United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

4. *Trinko*, 540 U.S. at 407.

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

6. *See generally* Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611 (2010).

7. *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 452 (7th Cir. 2020).

8. Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 175 (1936).

of section 2 of the Sherman Act. Specifically, the body of legal precedent restricts businesses from using their dominance, financial advantages, or generally prohibited practices to obtain or maintain a monopoly.

The Federal Trade Commission (FTC) has the authority to codify rules of unfair competition and make the morality embedded in Sherman Act case law explicit. Congress gave the FTC expansive power to identify and prohibit "unfair methods of competition."[9] Recently, the Democrats on the five-member Commission indicated they are prepared to use this unfair competition power more fully.[10] This Article argues that, under Chair Lina Khan, the FTC should use this authority to establish clear rules of unfair competition and channel business strategy toward developing "superior product[s]."[11] Accordingly, the FTC should prohibit exclusive dealing by dominant firms, below-cost pricing by dominant and near-dominant firms, and the use of generally prohibited practices by all firms as unfair methods of competition.

I. THE CONFUSED AND UNDERDEVELOPED STATE OF MONOPOLIZATION DOCTRINE

The Supreme Court established a two-part test for monopolization in 1966 and has stood by it for more than five decades. The Court and lower courts have held that monopolization requires monopoly power and improper conduct to obtain or maintain that power.[12] Acts that can trigger § 2 liability include below-cost pricing, exclusive dealing, and property destruction.[13] While offering a list of bad practices, the courts have failed to offer principles that distinguish unfair competition from fair competition and have relied

9. 15 U.S.C. § 45.

10. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy That Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under [https://perma.cc/M6F7-45H4].

11. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

12. *See, e.g.*, Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

13. *See generally* Hovenkamp, *supra* note 6.

on empty labels such as "anticompetitive," "procompetitive," and protecting "the competitive process."[14]

A. The State of the Law

In *United States v. Grinnell Corp.*, the Court laid out the prevailing test for monopolization. According to *Grinnell*, two showings must be made to establish monopolization:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[15]

Monopoly power[16] alone is not sufficient for liability.[17] The Court affirmed this in subsequent decisions,[18] sometimes even paying tribute to the public value of monopoly.[19] Second, obtaining a monopoly position solely through a better product is not illegal.

The Supreme Court and lower courts have cataloged a range of practices that meet the second part of the *Grinnell* test. These

14. *See, e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 989-90 (9th Cir. 2020). This is a definitional problem that predates the rise of Chicago School antitrust. Indeed, some of the landmark antitrust decisions of the mid-twentieth century also failed to articulate the meaning of "anticompetitive" and associated terms. *See generally, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

15. 384 U.S. at 570-71.

16. The courts read "monopoly power" to encompass more than just firms with a 50 percent share of a relevant market and have typically defined firms with 70 percent or more of a relevant market as having monopoly power. *See, e.g.*, E.I. du Pont de Nemours Co. v. Kolon Indus., Inc., 637 F.3d 435, 451 (4th Cir. 2011).

17. For a textualist argument that the possession of monopoly power should be sufficient to violate the Sherman Act, see generally Robert H. Lande & Richard O. Zerbe, *The Sherman Act Is a No-Fault Monopolization Statute: A Textualist Demonstration*, 70 AM. U. L. REV. 497 (2020).

18. *See* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136 (1998) ("We concede Discon's claim that the petitioners' behavior hurt consumers by raising telephone service rates. But that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist.").

19. *See* Verizon Commc'ns Inc. v. Law Offs. Of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

include refusals to deal, exclusionary contracting, below-cost pricing strategies, and certain tortious conduct.[20]

First, the courts have held that monopolists cannot refuse to deal with rivals under limited circumstances. Per the antitrust laws, firms have a general right not to deal with another party, but this right does not include the license "to create or maintain a monopoly."[21] In a 1985 decision, the Supreme Court held that a Colorado ski resort with monopoly power violated the antitrust laws when it terminated a joint ticketing arrangement with a smaller competitor and deprived this rival of skiers.[22]

Second, monopolists cannot use exclusive dealing and functionally similar contracts with trading partners to restrict rivals' market access and maintain their monopoly power. The Third Circuit in a 2005 decision affirmed a finding of monopolization against the leading manufacturer of artificial teeth.[23] The court concluded that the monopolist, by imposing exclusivity on distributors, prevented rival manufacturers from entering the market and capturing market share.[24] In a case involving similar facts in another industrial sector, the Eleventh Circuit affirmed an FTC decision finding that a monopolistic manufacturer of iron pipe fittings excluded rivals by coercing distributors to accept exclusivity.[25]

Third, monopolists and aspiring monopolists cannot use certain pricing tactics. Firms cannot engage in below-cost pricing when the practice "poses 'a dangerous probability of actual monopolization.'"[26] In deciding a motion for summary judgment in an antitrust suit between two rival airlines, the Sixth Circuit held in 2005 that the plaintiff had introduced enough evidence to take its predation claims against the monopolistic rival to trial.[27]

20. *See generally* Hovenkamp, *supra* note 6.

21. United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

22. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-11 (1985).

23. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 196 (3d Cir. 2005).

24. *See id.* at 190-91. In a 2012 decision, the Third Circuit noted that discounts "linked to purchase (volume or market share) targets [can be] challenged as de facto exclusive dealing arrangements on the grounds that the discounts induce customers to deal exclusively with the firm offering the rebates." ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 275 (3d Cir. 2012).

25. *See* McWane, Inc. v. FTC, 783 F.3d 814, 840-42 (11th Cir. 2015).

26. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993)).

27. Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 931 (6th Cir. 2005).

Fourth, businesses cannot employ tortious and other generally prohibited practices to obtain or preserve their dominance. These practices include deception,[28] fraud,[29] and property destruction.[30] In a 2002 decision, the Sixth Circuit affirmed a jury verdict against a smokeless tobacco monopolist.[31] The court found that the monopolist used, among other practices, large-scale theft and destruction of a rival's products and display racks at convenience stores and other retailers.[32]

B. The Judicial Failure to Offer Principles on What Constitutes Bad Conduct

In articulating the Sherman Act's prohibition on monopolization, the courts have not presented normative criteria for separating good competition from bad competition. They have not explained what principles distinguish the "willful acquisition or maintenance" of monopoly power from the permissible acquisition or maintenance of monopoly power due to "a consequence of a superior product, business acumen, or historic accident."[33] Rather than offer philosophical grounds for which methods antitrust law permits and which it proscribes, the judiciary has used empty terms and labels such as "competitive process," "anticompetitive," and "procompetitive" in condemning certain practices and blessing others.[34] What is the competitive process? What constitutes anticompetitive conduct?

As a baseline matter, firms are affected by a myriad of laws, apart from antitrust, that restrict the methods by which firms can compete. Consider the relationship between copyright law and business rivalry. A publishing house cannot copy and republish the titles of a rival without obtaining permission; copyright law prohibits such unauthorized copying and deprives firms of the

28. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988).
29. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 176-78 (1965).
30. *See* Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 787-88 (6th Cir. 2002).
31. *See id.* at 795.
32. *Id.* at 787-88.
33. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
34. *See, e.g.*, FTC v. Qualcomm Inc., 969 F.3d 974, 989-90 (9th Cir. 2020).

ability to compete in this fashion.[35] The law also restricts certain types of advertising as a method of competition. A firm cannot use deceptive marketing that gives its products an advantage over competitors.[36] For example, a car manufacturer cannot make false claims about the fuel economy of its vehicles to appeal to budget and environmentally conscious drivers and increase sales. Nicolas Cornell has described these practices as "competition wrongs."[37]

Rather than grapple with different forms of competition and acknowledge that certain forms are illicit, the courts, in antitrust decisions, present competition as categorically good. Relying on a 1962 merger case, the courts have consistently stated that the antitrust laws were enacted for "the protection of *competition*, not *competitors*."[38] In a similar spirit, judicial decisions state that showing conduct that "harm[s] the competitive process" is a requirement for monopolization claims.[39] The courts rely on labels that posit competition as good, which contradicts the fact that the judiciary does restrict certain forms of competition.

Consider the common choice of words in antitrust decisions. The courts describe conduct that is illegal as "anticompetitive"[40] and conduct that is legal as "procompetitive"[41] or even "[h]ypercompetitive."[42] Practices they proscribe are *against* competition, while practices they allow and encourage are *for* competition. Certain practices are not unfair or unhealthy forms of competition, but departures from competition itself.

While the Supreme Court described the Sherman Act as "a 'consumer welfare prescription,'"[43] this objective cannot be squared with current doctrines on monopolization. According to the Court,

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35. *See* 17 U.S.C. § 501(a)-(b).

36. *See* 15 U.S.C. §§ 45(a)(1), 1125(a)(1).

37. *See generally* Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030 (2020).

38. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

39. *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis omitted).

40. *E.g.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007); Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1070 (10th Cir. 2013).

41. *E.g.*, Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 593 (1986); *Microsoft*, 253 F.3d at 59.

42. FTC v. Qualcomm Inc., 969 F.3d 974, 1005 (9th Cir. 2020).

43. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

consumer welfare antitrust, though a hotly contested term without a settled meaning,[44] is concerned with conduct that reduces short-term output and can raise prices.[45] This principle does not fit with the established rule that monopoly power, the power of a single firm to reduce output and raise prices, alone is not sufficient to establish monopolization.[46] A monopoly in which pricing decisions are concentrated in the hands of one firm is more insidious from a consumer welfare perspective than a cartel, in which vigorous price competition and increased output could happen at any time given the existence of multiple independent firms.[47]

Monopoly power alone does not violate the Sherman Act. The Supreme Court has made clear that bad acts must accompany monopoly power.[48] In a 2004 decision, the Court even praised monopoly power and pricing, writing:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[49]

This tolerance of monopoly pricing power and the requirement for bad acts in monopolization suits are difficult to reconcile with the consumer welfare objective. In a February 2022 virtual American Bar Association event in which I participated, leading antitrust economist and former government official Carl Shapiro said: "We don't really have a consumer welfare standard. A firm raises its

44. *See* Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 571 (2012).

45. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893-94 (2007).

46. *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

47. See *High Drug Prices and Monopoly*, OPEN MKTS. INST., https://www.openmarketsinstitute.org/learn/drug-prices-monopoly [https://perma.cc/8HC9-2EDT].

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

49. *Trinko*, 540 U.S. at 407 (emphasis omitted).

price, that's bad for consumers, well that's not illegal."[50] A strict consumer welfare philosophy would restrict such exercises of pricing power.

The judicial analysis of predatory pricing further shows the lack of philosophical content, or at least its underdeveloped quality, in monopolization doctrine. In *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, the Court approached articulating principles of legal versus illegal competition but declined to delve into particulars on the normative bases of the distinction.[51] The Court wrote: "As a general rule, the exclusionary effect of prices above a relevant measure of cost [may] reflect[ ] the lower cost structure of the alleged predator, and so represents competition on the merits."[52] But the Court did not articulate the meaning of "competition on the merits" except tying it to "the lower cost structure of the alleged predator."[53] Why are lower prices that are not connected to a "lower cost structure" something besides competition on the merits? The court declined to say. Other courts have invoked "competition on the merits" with little explanation of what constitutes "competition on the merits."[54]

Indeed, one application of the consumer welfare philosophy might support legalizing all predatory pricing. If "[l]ow prices benefit consumers regardless of how they are set,"[55] why are the courts even concerned with below-cost pricing? Under a rough cost-benefit analysis, the benefit from *actual* low prices today seems to exceed the costs from *potential* higher prices in the future. Then-Judge Breyer captured this point in a 1983 decision, writing that "[t]he antitrust laws very rarely reject such beneficial 'birds in hand' [of low prices today] for the sake of more speculative (future low-price)

50. ABA Antitrust Law Section, *Is Consumer Welfare in Hot Water?*, YOUTUBE (Feb. 10, 2022), https://www.youtube.com/watch?v=TuZkVlSNqGQ (at 1:34:36).

51. *See* 509 U.S. 209, 223 (1993).

52. *Id.*

53. *See id.*

54. *See, e.g.*, Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013). The Ninth Circuit in *Qualcomm* offered a brief explanation and associated "competition on the merits" with conduct that "involves, for example, greater efficiency or enhanced consumer appeal." FTC v. Qualcomm Inc., 969 F.3d 974, 991 (9th Cir. 2020).

55. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990).

'birds in the bush.'"[56] Yet, current law does deem certain prices to be too low and in violation of the antitrust laws.

II. THE MORALITY IMPLICIT IN MONOPOLIZATION LAW

Despite the lack of judicial articulation of principles in monopolization cases, certain normative criteria can be inferred from a close read of the court decisions. The courts have implicitly prohibited firms from exploiting certain advantages to gain an edge over rivals and obtain or maintain a monopoly. First, court decisions restrict firms from using their monopoly power to maintain or extend their monopoly. Second, they limit firms from employing favorable access to finance to outcompete rivals on price. Third, they bar firms from using generally prohibited practices to acquire or maintain their monopoly power. In contrast, judicial interpretations of the Sherman Act permit the acquisition and maintenance of monopolistic positions through superior products, services, or investment in plants and equipment.

First, the courts prevent monopolists from using their dominance to maintain their monopoly. The Supreme Court alluded to this concern in a 1948 decision, writing "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[57] Employing monopoly power to perpetuate or expand a monopoly is a form of unfair competition.

In monopolization decisions, this anti-coercion purpose has principally come up in two contexts. First, monopolists, under limited circumstances, cannot refuse to do business with a rival as a means of excluding it from the market.[58] In other words, monopolists cannot use their dominance in a market and the dependent position of rivals to marginalize them.[59] Second, monopolists cannot coerce

56. Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

57. United States v. Griffith, 334 U.S. 100, 107 (1948).

58. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). ("Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.").

59. *See id.* In a similar spirit, the Robinson-Patman Act restricts firms from using their buyer power to extract discounts and other concessions from suppliers as a method of competition. Brian Callaci & Sandeep Vaheesan, *How an Old U.S. Antitrust Law Could Foster*

trading partners into *not* doing business with the monopolist's rivals.[60] For example, a monopolistic manufacturer cannot impose exclusive dealing contracts on wholesalers to prevent rivals from accessing essential distribution channels and, ultimately, end-use customers.[61] One court of appeals called these practices "refusals to deal" and "conditional refusals to deal," respectively.[62]

Second, firms cannot solely use their advantageous access to finance to obtain or maintain a monopoly. The rules governing predatory pricing are based on the belief that firms with deep pockets due to size or scope of operations or access to favorable funding should not be allowed to deliberately run losses to capture market share.[63] The Supreme Court's decision in *Brooke Group* implied as much. The Court stated that price reductions tied to a "lower cost structure" constitute "competition on the merits."[64] The majority opinion failed to further explain what conduct does *not* qualify as competition on the merits.[65] But the decision, on the whole, can be read for the proposition that using financial advantages to sell goods and services at a loss to acquire or perpetuate a monopoly is unfair competition.[66]

Third, firms cannot use generally prohibited practices to acquire or maintain a monopoly. The Sherman Act restricts firms from using practices such as deception, industrial sabotage, and property destruction to obtain a competitive advantage.[67] These practices are prohibited by other laws, at the federal and state levels.[68] The generally applicable prohibitions establish these practices as unfair, immoral, and illegal for all firms, whether they are large, medium, or small.[69]

a Fairer Retail Sector, HARV. BUS. REV. (Feb. 9, 2022), https://hbr.org/2022/02/how-an-old-u-s-antitrust-law-could-foster-a-fairer-retail-sector [https://perma.cc/6NLP-CYJQ].

60. *See* McWane, Inc. v. FTC, 783 F.3d 814, 841-42 (11th Cir. 2015).
61. *E.g.*, *id.* at 840-42.
62. Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 453 (7th Cir. 2020).
63. *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).
64. *Id.* at 223.
65. *See id.*
66. *See id.* at 224.
67. *See supra* notes 29-33 and accompanying text.
68. *See supra* Part I.B.
69. *See supra* notes 29-33 and accompanying text.

Consider legal proscriptions on false advertising. The FTC Act and the Lanham Act generally ban deceptive marketing.[70] In addition to injuring purchasers who may purchase a product based on false information, deception hurts rivals that engage in truthful advertising and refuse to mislead prospective customers.[71] Antitrust law further prohibits deception if a firm employs the practice in a monopolization effort.[72] Accordingly, a firm that uses deception to maintain a monopolistic position can violate the Lanham Act, FTC Act, and Sherman Act.

The Sherman Act does not prohibit monopolies per se. It does allow firms to acquire or maintain monopolies using any means, except those that are deemed "anticompetitive." The Supreme Court stated that a monopoly is legal if it was acquired and maintained through "a superior product, business acumen, or historic accident."[73] A firm can acquire a monopoly by offering better terms to customers or making a better product than rivals and capturing the entire market.[74] Similarly, it can obtain a monopoly by investing in more efficient production processes that lower its cost structure and allow it to undercut rivals on price.[75] In short, the Sherman Act encourages businesses to compete by offering more favorable terms to trading partners, making and selling better products, and investing in productive capacity and new production methods.

The legislative history of the Sherman Act indicates that some drafters recognized the distinction between unfair and fair methods of obtaining a monopoly. A senator raised the question of whether a dealer of shorthorn cattle who obtained a monopoly on account of his superior livestock would violate the new antitrust law.[76] Senator Hoar, a key figure in helping draft and pass the Sherman Act, replied that "a man who merely by superior skill and intelligence,

70. 15 U.S.C. §§ 45(a)(1), 1125(a)(1).

71. *See id.* § 1125(a)(1) (granting a cause of action to "any person who believes that he or she is or is likely to be damaged"). Cornell, *supra* note 37, at 2042 ("It is natural to think of marketing law as fundamentally aimed at protecting consumers from being misled. But even if such consumer protection determines the substantive norms, competitors are empowered to assert their own grievances at violations of those norms.").

72. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988).

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

74. *See id.*

75. *See id.*

76. 21 CONG. REC. 3151 (1890).

a breeder of horses or raiser of cattle, or manufacturer or artisan of any kind, got the whole business because nobody could do it as well as he could was not a monopolist."[77] He distinguished such an acquisition of a monopoly—benign and permissible under the bill being debated on the floor—from "the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business."[78]

III. THE FTC'S POWER TO MAKE IMPLICIT MARKET MORALITY EXPLICIT AND CODIFY FAIR COMPETITION RULES

Businesses and the public are not resigned to accept the present muddled and unsatisfactory state of monopolization law. The FTC has the power to codify and strengthen rules of unfair competition.[79] Congress established the FTC to reclaim authority from the federal judiciary and to serve as a national policymaker on fair competition.[80] The FTC has broad authority to develop rules of unfair competition and can function as a "court of equity."[81] To put this congressional mandate to work, the FTC should prohibit three categories of practice as unfair methods of competition.

A. The FTC as a Maker of Market Morality

As a means of reclaiming policymaking power from the courts in the wake of *Standard Oil Co. v. United States*, Congress set up the FTC in 1914.[82] Members of Congress were outraged by the Supreme Court's announcement of the rule of reason in *Standard Oil*.[83] As Justice Harlan wrote in a partial dissent, the Court claimed the legislative power to decide which restraints were reasonable and

77. *Id.* at 3152.
78. *Id.*
79. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).
80. *See id.*
81. *See id.*
82. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 232 (1980); *see also* Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911).
83. *See* Averitt, *supra* note 82, at 231-32.

which were unreasonable.[84] To restore congressional supremacy, the national legislature passed the Clayton Act—which restricted or outlawed enumerated practices such as exclusive dealing,[85] mergers,[86] and interlocking directorates[87]—and the FTC Act.[88] Congress intended the FTC to serve as an expert policymaking body that would identify and prohibit unfair methods of competition over time while being accountable to members of Congress and the public.[89]

Fair conduct was at the heart of the new Commission's mission. Members of Congress discussed the importance of good morals governing trade.[90] For example, Senator Newlands, a key figure in the creation of the FTC, described unfair practices as going "against good morals in trade"[91] and "shock[ing] the universal conscience of mankind."[92] Other Senate supporters of a federal commission analogized unfair methods of competition to using brass knuckles in a fight,[93] and firms that employed such methods as "pirates of business."[94] Citing a political science article, members of Congress identified localized price cutting, tying, and exclusive dealing as unfair methods of competition.[95] Senator Hollis contrasted these unfair methods to fair competition in which firms achieved "success[ ] through superior efficiency."[96]

The Supreme Court has held that the FTC Act's prohibition is broad. The Court made clear that the FTC's "unfair methods of competition" authority reaches conduct that does not necessarily violate the Sherman and Clayton Acts.[97] The FTC Act's scope of

84. *Standard Oil*, 221 U.S. at 88-89 (Harlan, J., concurring in part and dissenting in part).
85. 15 U.S.C. § 14.
86. *Id.* § 18.
87. *Id.* § 19(a)(1).
88. *See id.* § 45(a)(1)-(2).
89. Averitt, *supra* note 82, at 233-38. Congress subsequently gave the FTC authority to also prohibit "unfair or deceptive acts or practices." For a sophisticated history of the FTC's unfairness authority, see Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431 (2021).
90. *See* Averitt, *supra* note 82, at 235.
91. 51 CONG. REC. 11,084 (1914).
92. *Id.* at 12,980.
93. *Id.* at 11,448.
94. *Id.* at 12,147.
95. *Id.* at 11,230-31, 16,329 (quoting William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282, 283-84 (1914)).
96. *Id.* at 12,146.
97. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

unfairness "is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons," wrote the Court in 1986.[98] In a 1972 decision on the Commission's power under § 5, the high court wrote that the FTC can function like "a court of equity" and "consider[ ] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[99] This was in line with earlier decisions. In *FTC v. Brown Shoe Co.*, Justice Black, on behalf of a unanimous Court, wrote: "[T]he Commission has 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."[100]

The current FTC has stated it aims to use this power. In 2015, the FTC under Democratic Chairwoman Edith Ramirez adopted a policy statement that indicated the Commission would apply § 5 in a fashion largely identical to how the courts interpreted the Sherman and Clayton Acts.[101] Specifically, the Commission stated it would use the consumer welfare standard to guide its § 5 actions and employ the rule of reason as the default analytical framework.[102] On July 1, 2021, the FTC, under new Chair Lina Khan, rescinded this statement and announced that it will apply § 5 more expansively, in accord with legislative intent, and use this power to attack assorted unfair competitive practices.[103]

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

99. *Sperry & Hutchinson*, 405 U.S. at 244.

100. 384 U.S. 316, 322 (1966).

101. Press Release, Fed. Trade Comm'n, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute (Aug. 13, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act [https://perma.cc/4NEW-46Z2]; Edward Wyatt, *White House Elevates a Commissioner to Chairwoman of the F.T.C.*, N.Y. TIMES (Feb. 28, 2013), https://www.nytimes.com/2013/03/01/business/obama-set-to-appoint-edith-ramirez-to-fill-top-ftc-post.html [https://perma.cc/ZXH4-5SEY].

102. FED. TRADE COMM'N, STATEMENT OF ENFORCEMENT PRINCIPLES REGARDING "UNFAIR METHODS OF COMPETITION" UNDER SECTION 5 OF THE FTC ACT (2015) https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/Z9FH-HD7Q].

103. FED. TRADE COMM'N, STATEMENT OF CHAIR LINA M. KHAN (2021), 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 [https://perma.cc/Z4CT-HG2X].

B. Rules on Unfair Competition the FTC Should Establish

Using its potentially expansive authority, the FTC should prohibit a range of unfair competitive practices. Building on existing Sherman Act case law and its implicit norms, the FTC should target three unfair competitive practices, whether through rulemaking[104] or policy statements. It should prohibit exclusive dealing and other exclusionary contracts by dominant firms, strengthen restrictions on predatory pricing, and outlaw generally prohibited practices as unfair methods of competition. These rules would spur firms to compete by offering better terms to trading partners and improving their goods, services, and production methods.

First, the FTC should prohibit exclusive dealing and related arrangements by dominant firms. Through exclusive dealing, dominant firms use their power to prevent competitors from doing business with customers, distributors, or suppliers of essential inputs.[105] For example, a dominant brewer can offer incentives to distributors not to carry the beers of competitors.[106] Through such exclusivity by the dominant firm, smaller competitors may be foreclosed from the normal channels of distributing their brews to bars, restaurants, and retailers.[107] To prohibit exclusive contracting by dominant firms, the FTC should define market dominance as a share of a relevant market greater than or equal to 30 percent.[108] By

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104. The D.C. Circuit held that the FTC has the authority to write competition rules. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (1973); Kacyn. Fujii, *National Petroleum Refiners Is (Still) Correctly Decided*, Notice & Comment (Mar. 28, 2022), https://www.yalejreg.com/nc/national-petroleum-refiners-is-still-correctly-decided-by-kacyn-h-fujii/.

105. *See, e.g.*, Tripp Mickle, *Craft Brewers Take Issue with AB InBev Distribution Plan,* WALL ST. J. (Dec. 7, 2015, 2:16 PM), https://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668 [https://perma.cc/M2FQ-BSQX].

106. *Id.*

107. *Id.*

108. The FTC currently accepts courts' interpretation of monopoly power as requiring over 50 percent of relevant market share. *See Monopolization Defined*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined [https://perma.cc/LQ55-9UZC]. For precedential bases for the 30 percent threshold for dominance, see, e.g., United States v. Visa U.S.A., Inc., 344 F.3d 229, 240 (2d Cir. 2003) ("[T]he court inferred market power from the defendants' large shares of a highly concentrated market: In 1999, Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while MasterCard members accounted for approximately 26%."); United States v. Phila. Nat'l Bank, 374 U.S. 321, 364

setting a market share for dominance that is lower than the existing threshold for monopoly power, the FTC would, in line with its statutory mandate, strike at monopolies in their "incipiency."[109] In July 2020, the Open Markets Institute, where I work, and a broad public interest coalition petitioned the FTC to initiate such a rule-making.[110]

Second, the FTC should prohibit below-cost pricing by dominant and near-dominant firms. By relying on their deep pockets or preferential access to finance, firms can run losses to undercut and eliminate rivals who do not have the privilege of sustaining losses.[111] If they succeed in excluding rivals, they can exercise dominance over customers, suppliers, and workers.[112] Importantly, such firms can obtain a reputation as being price predators in other markets.[113] New entrants may be unwilling—or even unable to obtain financing—to challenge them because of this history and reputation for running losses against competitors.[114] The FTC should prohibit below-cost pricing by firms with a share of a relevant market greater than or equal to 10 percent.

This rule would halt below-cost pricing strategies in their incipiency. For instance, a large, diversified firm entering a new product or geographic market would only have a limited opportunity to use its financial advantages as a competitive weapon.[115] Once it

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(1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

109. *See* FTC v. Motion Picture Advert. Serv. Co., 344 U.S. 392, 394-95 (1953) ("[T]he 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, as well as to condemn as 'unfair method of competition' existing violations of them." (citations omitted)).

110. Press Release, Open Mkts. Inst., Broad Coalition Petitions the Federal Trade Commission to Ban Exclusionary Contracting by Monopolists (July 20, 2021), https://www.openmarketsinstitute.org/publications/petition-federal-communications-commission-ban-exclusionary-contracting [https://perma.cc/SW49-BPFK].

111. *See* Sandeep Vaheesan, *Reconsidering* Brooke Group*: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 101-02 (2015).

112. *See id.*

113. *Id.* at 101.

114. *See id.*

115. The fear of large national firms using their financial power to drive out local firms animated the Robinson-Patman Act's prohibition on targeted price cutting. *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119 (1954) ("As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local

captured more than 10 percent of the market, it could no longer use below-cost pricing as a competitive tactic.

Third, the FTC should hold that generally prohibited practices are an unfair method of competition.[116] As described earlier, the law prohibits practices such as deception and property destruction, whether done by large or small firms. A practice like deception has no redeeming social benefits.[117] Other generally applicable laws include consumer protection, environmental, and labor laws. What is the value in deeming a violation of labor law an unfair method of competition too? It reinforces general social norms, embodied in law, that certain practices are immoral and unfair. Further, running afoul of labor law strictures, for instance, can give firms an important competitive advantage over rivals who comply with them and falls within the ambit of competition policy in the broadest sense.[118] A former FTC chairman wrote:

> Noncompliance [with various laws] could provide a major cost advantage; a broad range of conduct that infringed legal rules outside the antitrust laws—for example, failing to satisfy air pollution abatement mandates, ignoring workplace health and safety standards, employing [undocumented immigrants] and shortchanging their wages, or evading taxes—could confer a significant cost advantage on their wrongdoer.[119]

A firm that illegally thwarts the unionizing efforts of its workers can lower its wage bill and obtain a cost advantage over a competitor

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merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns.").

116. In the late 1970s, FTC Chairman Michael Pertschuk proposed using the unfair methods of competition authority in such a fashion. *See* Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools 11 (Dec. 27, 1977).

117. *See generally* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823 (2010).

118. In the late 1970s, FTC Chairman Michael Pertschuk proposed using the unfair methods of competition authority in such a fashion. Pertschuk, *supra* note 116.

119. William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 WM. & MARY L. REV. 1269, 1300-01 (2019) (footnotes omitted).

that respects the legal right of its workers to organize.[120] By holding such union busting to be an unfair method of competition, the FTC would promote high-road employment practices, discourage lawbreaking as a method of competition, and promote honest, law-abiding business practices in general.[121]

These three applications of the FTC's unfair methods of competition power would channel business strategy in more socially beneficial directions. By restricting exclusionary contracting, below-cost pricing, and general lawbreaking, the FTC would encourage businesses to compete by offering more favorable terms to trading partners (whether customers, suppliers, or workers), developing new products and services, and investing in new plants, equipment, and technologies. In other words, these rules on competition would help foster better treatment of customers, workers, and suppliers, increases in the nation's productive capacity, and technological innovation.

CONCLUSION

Although Congress enacted the Sherman Act more than 130 years ago, the courts generally have not articulated the principles informing the law's prohibition on monopolization. The courts have identified many practices that are illegal, including below-cost pricing, refusals to deal, and tying.[122] They, however, have failed to explain *why* these practices are unfair and restricted by law. Judges have instead applied labels such as "anticompetitive" without articulating their meaning.[123] The law embodies implicit notions of fairness and limits businesses' abilities to use their power, financial privileges, or generally prohibited conduct to acquire or perpetuate a monopoly. The FTC can codify and strengthen these rules of unfair conduct in general. To encourage businesses to grow through

120. *See* GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., FEAR AT WORK 3-5 (2020).

121. In a recent amicus brief, the U.S. Department of Justice argued that misclassification of workers as "independent contractors" can be an unfair method of competition. Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, The Atlanta Opera, Inc. (NLRB) (Case 10-RC-276292), https://www.justice.gov/atr/case-document/file/1470846/download [https://perma.cc/5Q6C-HLJ2].

122. *See generally* Hovenkamp, *supra* note 6.

123. *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 452 (7th Cir. 2020).

the development of "superior product[s]"[124] and investment in new plants, facilities, and technologies, the FTC should specifically restrict firms' abilities to use exclusive dealing and below-cost pricing and ban the use of generally prohibited practices as unfair methods of competition.

124. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).