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Focus on Economic Efficiency
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I. INTRODUCTION

Commissioner Wright is right that it would be desirable for the Commission to issue Section 5 antitrust guidelines.² This article will demonstrate, however, that the best way to formulate Section 5 guidelines is to focus them on the goal of protecting consumer choice, rather than to embrace Commissioner Wright's proposal to neuter the FTC Act by confining it in an economic efficiency straightjacket. Only if Section 5 guidelines were formulated appropriately would they improve consumer welfare during the Commission's second century.

When Congress enacted the FTC Act it intended this law to be more expansive than the Sherman Act.³ Even though the Sherman Act was law, Congress decided that additional legislation was needed. The FTC Act's legislative history makes it clear that Section 5 was intended to prohibit not only every violation of the Sherman Act, but also (i) incipient violations of this law, (ii) conduct violating the spirit of the Sherman Act, and (iii) conduct violating recognized standards of business behavior.⁴ The Supreme Court has explicitly adopted this interpretation of the nature of the FTC Act,⁵ as Commissioner Wright observed.⁶

However, the Supreme Court case law verifying Congress' intent is relatively old.⁷ There is no guarantee today's more conservative⁸ Court would interpret Section 5 in the same expansive manner. If the Commission were to attempt to articulate Section 5 guidelines that were vague, were insufficiently bounded, or that gave the Commission undue discretion—as it did in its

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² See, e.g., Joshua D. Wright, *Revisiting Antitrust Institutions: The Case for Guidelines to Recalibrate the Federal Trade Commission's Section 5 Unfair Methods of Competition Authority*, (4) CONCURRENCES: COMPETITION L.J. at 1-2 (2013).

³ 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, passim (1980).

⁴ *Id.* at 299-300.

⁵ See, e.g., *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-240 (1972).

⁶ See Wright, *supra* note 2, at 4.

⁷ *Id.* The Supreme Court's most recent expansive interpretation of Section 5 of which I am aware was a generation ago in *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986), where the Court characterized Section 5 as including traditional antitrust violations and also "practices that the Commission determines are against public policy for other reasons."

⁸ See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* 6, tbl.3 (Univ. of Chicago John M. Olin Law & Economics, Working Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403> (documenting that a very large proportion of the most conservative Supreme Court justices of recent decades are serving on the Court today).

Opinion in the *N Data* case⁹—reviewing courts might well make Section 5 co-terminous with the other antitrust laws despite the clear Congressional intent.¹⁰ Fortunately, the Commission has an easy way to minimize the risk of reversal on appeal.

II. THE CONSUMER CHOICE FRAMEWORK FOR SECTION 5 GUIDELINES

The Commission should promulgate Section 5 antitrust guidelines that properly but prudently reflect this expansive Congressional intent. The best (perhaps the only) way to accomplish this is to frame these guidelines in terms of the fundamental idea that the FTC Act should focus upon "consumer choice."¹¹

The choice framework would impose a threshold requirement that conduct only can constitute a Section 5 antitrust violation¹² if it significantly impairs the choices that free competition would bring to the marketplace.¹³ Antitrust law prevents restraints on the competitive array of options in the marketplace, ensuring consumer choices are undiminished by such artificial restrictions as price-fixing or anticompetitive mergers. (The converse, however, is not correct. It is not true that everything that reduces consumer choice is an antitrust violation.

⁹ An example of the kind of expansive approach a reviewing court would be unlikely to uphold was the standard promulgated by the FTC in its *N Data* opinion. The Commission declared it has the power to ban practices it found to be "unjust, inequitable, or... contrary to good morals." See *Negotiated Data Solutions, LLC.*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

¹⁰ Former FTC Chair William Kovacic warned that as a practical matter courts won't allow a broader interpretation of Section 5 unless it is constrained and articulated in a relatively predicably manner. Kovacic colorfully, but accurately, stated: "In case after case, the courts have said, 'I might be with you on this one. But tell me how far it goes. Are we going to the moon? Are we going to the end of the solar system? Is it the universe and all it contains? I'd like to have some idea of what the boundaries are.'" See, *Ex-FTC chief: Google could beat an 'unfair competition' suit*, available at <http://www.cnet.com/news/ex-ftc-chief-google-could-beat-an-unfair-competition-suit/>

¹¹ For a detailed explanation of the consumer choice approach to antitrust law, see Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175 (2007), available at <http://ssrn.com/abstract=1121459>.

¹² Section 5 prohibits conduct that constitutes "unfair methods of competition" (which this article will refer to as Section 5 antitrust violations) as well as conduct that constitutes "unfair or deceptive acts or practices" (which this article will refer to as Section 5 consumer protection violations). See 15 U.S.C. § 45.

¹³ See Neil W. Averitt & Robert H. Lande, *Using The "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L. J. 175, 182 (2007) [hereinafter *Using the "Consumer Choice" Approach*]; see also Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law*, 65 ANTITRUST L.J. 713, 718-20 (1997) [hereinafter *Consumer Sovereignty*]. The choice framework also would impose the requirement that conduct only can constitute a Section 5 consumer protection violation if it significantly impairs consumers' ability meaningfully to choose from among the options the market provides. Construed this way, the two halves of Section 5, operating together, ensure that consumers have the two ingredients needed to exercise effective sovereignty—a competitive array of options and the ability to choose meaningfully from among those options. Consumer protection law ensures that consumers are able to make an informed and rational selection from among the options on the market, unimpeded by artificial constraints, such as deception or the withholding of material information. In this way the two halves of Section 5 together protect a free market economy.

What is true is simply that everything that is an antitrust violation significantly reduces or distorts the choices on the market.)¹⁴

It should be stressed that "choice" considerations would simply be a threshold for a Section 5 violation, a method of weeding out non-meritorious cases and focusing decision-makers' attention. Only if a practice significantly reduces the options in the market would the practice be evaluated more closely (under a rule of reason approach that will be discussed at the end of Section III *infra*).

Under a consumer choice standard, factors such as innovation, variety, perspectives,¹⁵ quality, and safety would in effect be moved up from the footnotes—where they are all too often forgotten—into the text, where they would play a more prominent role in the antitrust evaluation. When antitrust law is construed and applied within the consumer choice framework, rather than an economic efficiency framework, it would change some outcomes because it would give greater emphasis to such short-term issues as quality and variety in competition, and to such long-term issues as competitive innovation, ideas, and perspectives.¹⁶ The choice approach to antitrust, instead of a price or efficiency approach,¹⁷ also has the advantage of explaining accurately, simply, and intuitively—in a way that is easy to understand—why antitrust is good for consumer welfare.¹⁸

The consumer choice framework would make a difference in several broad categories of cases where a price or efficiency approach to antitrust often can lead to the wrong result.¹⁹ The first category involves conduct in markets with little or no price competition, as may occur as a result of certain types of regulation. In these situations, no avenues exist for properly assessing consumer welfare without focusing explicitly on non-price issues. For markets without price competition, or with only minimal price competition, a price standard would be inadequate because our main concern should be artificially diminished consumer choice.²⁰

A second general category of cases for which the consumer choice approach would work better involves conduct that increases consumers' search costs or otherwise impairs their decision-making ability. Such conduct tends to cause consumers to obtain products or services less suited to their needs, as well as to produce adverse effects on price. There are a large number of case examples in this category, including advertising restriction cases and similar cases that involve collusion to raise consumer search costs.²¹

¹⁴ It also is true that every consumer protection violation reduces or distorts consumers' ability to choose from among the options the market provides. *See* Averitt & Lande, *Consumer Sovereignty*, *id.* at 715-22.

¹⁵ Competition in terms of perspectives arises most meaningfully in the media contest. *See id.* at 206-12.

¹⁶ *See* generally Averitt & Lande, *supra* note 11.

¹⁷ For specific differences between the consumer choice, price, and efficiency approaches, *see* Averitt & Lande, *id.* at 185-89.

¹⁸ The choice framework should also be applied to Sherman Act and Clayton Act cases. Fortunately, there is reason to believe that all antitrust jurisprudence is slowly evolving in this direction. *Id.* at 263-64.

¹⁹ *Id.* at 201-22.

²⁰ *See id.* at 196-99.

²¹ *Id.* at 199-201. *See* also the cases cited in the sources cited in footnote 26 *infra*.

Finally, there are cases involving markets in which firms compete primarily through independent product development and creativity, rather than through price. Examples of these markets include high-tech innovation or editorial independence in the news media.²² In all these situations non-price competition is likely to be paramount.

Even though expansive Commission opinions such as the *N Data* decision came to the right result, the majority opinion's overall articulation of its "unfairness" standard risks attack as being unduly indefinite and for giving the Commission too much discretion.²³ This construction also could be criticized as not providing sufficient notice to businesses as to what specific conduct is likely to be illegal. By contrast, guidelines employing the consumer choice articulation would simply, succinctly, and clearly declare that conduct that does not significantly reduce the choices that otherwise would come onto the market could not violate the FTC Act.

III. COMMISSIONER WRIGHT'S SECTION 5 GUIDELINES PROPOSAL

FTC Commissioner Joshua Wright has proposed that the Commission adopt Section 5 Guidelines that only consider the economic efficiency effects of practices.²⁴ Unfortunately, his proposal contains a fatal flaw: It directly contradicts Congressional intent.

Despite his acknowledgement of Congress' desire that Section 5 be broader than the other antitrust laws, his proposal—astonishingly—reaches less anticompetitive conduct than the other antitrust laws. His proposed central test of illegality is whether a practice "generates harm to competition as understood by the traditional antitrust laws *and* generates no cognizable efficiencies." (emphasis added)²⁵

This test is much narrower than current law. The prevailing test of legality under the Sherman Act balances a practice's efficiency and market-power effects under a rule of reason.²⁶ The existing law most certainly does not follow Commissioner Wright's suggestion to immunize any conduct that leads even to a significant amount of monopoly power simply because it results in a cognizable efficiency. Almost every corporate action leads to some efficiencies.²⁷ The crucial legal question is—and should be—whether these efficiencies are outweighed by the harm caused by these practices. Thus, Wright's proposed interpretation would not apply the FTC Act to a considerable amount of conduct that currently violates the Sherman Act—the opposite of the

²² *Id.* at 201-22.

²³ The Commission noted: "The legislation history from the debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge... [including conduct that is] unjust, inequitable or... contrary to good morals..." See *Negotiated Data Solutions LLC*, Case No. 0510094 (Fed. Trade Comm'n Sept. 22, 2008), 2008 WL 4407246, at 1-2. (citations omitted)

²⁴ See, e.g., Wright, *supra* note 2, at 3.

²⁵ *Id.* at 3.

²⁶ For a discussion of the rule of reason in various contexts see John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211-33 & 240-43 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113927; See also Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134820&download=yes.

²⁷ For examples of rule of reason cases involving anticompetitive conduct that would be immunized from Section 5 scrutiny by this proposal, see the cases discussed in the two sources cited *id.*

broader prohibition Congress intended the FTC to become. Because his proposal directly contradicts Congressional intent it should be rejected.

Commissioner Wright appears to have proposed an unduly restrictive interpretation of Section 5 because he believes defendants are unfairly treated at the Commission, as evidenced by the fact that the staff wins at the Commission level almost all the time.²⁸ He contrasts this with the much lower success rate of plaintiffs in Federal Court.²⁹ However, there are five benign explanations for why we should expect the FTC staff to have an extremely high batting average, and a much higher batting average than private plaintiffs in federal court:

1. The FTC staff has much better judgment and experience as to what the five commissioners are likely to do. The staff studies them carefully and is unlikely to file cases they can't win. More than 600 federal judges are much harder for private plaintiffs to predict.
2. At the FTC economic experts usually are consulted before a complaint is issued and this often results in a complaint not being issued. By contrast, private attorneys usually decide to file their case and then offer outside economists perhaps \$300 to \$1000 per hour to help them win their case. Private attorneys are much less likely to use economists as a filter.
3. The Commission tries to be a bipartisan body, and only issues three to two complaints reluctantly.³⁰ By contrast, if even one of countless potential plaintiff lawyers wants to file a complaint, they can.
4. Government lawyers are usually more risk averse than plaintiff lawyers. It is not obvious why government lawyers should fear losing cases more, but this often is true. Perhaps this occurs because many plaintiff lawyers, by nature, are gamblers who are more likely to roll the dice even if they have only a modest probability of winning their case.
5. The FTC has much better research and data collection powers than private entities. This makes the staff less likely to make mistakes, less likely to be surprised, and less likely to lose than plaintiff lawyers.

In addition, there is a unique or almost unique statute that permits defendants who lose at the Commission level to appeal in any of 12 circuits they choose.³¹ Defendants' ability to forum shop is an unfair advantage for defendants, which would offset any unfair advantage the FTC staff may have.

²⁸ See Wright, *supra* note 2, at 2. Ironically, the FTC staff recently lost just such a case. See FTC:WATCH, *Commissioners hand FTC staff its first defeat in 19 years*, McWane Inc. (February 17, 2014) for unlawfully maintaining its monopoly in the domestic iron pipe fittings market.

²⁹ See Wright, *supra* note 2, at 2.

³⁰ The Commissioners prefer to issue complaints unanimously. When they vote out a complaint three votes to two, this signifies that the situation is likely to be more controversial.

³¹ See discussion and analysis in Prepared Remarks of Professor Daniel Crane, Before the United States House of Representatives House Energy and Commerce Committee, Subcommittee on Commerce, Manufacturing, and Trade at a Hearing entitled, "The FTC at 100: Views From the Academic Experts." Rayburn House Office Building, Washington, D.C., February 28, 2014. *available at* <http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-CraneD-20140228.pdf> at 14.

Commissioner Wright has called for an unbalanced rule of reason, one that gives an absolute preference to efficiencies compared to market power effects. Any cognizable efficiency, no matter how small, would trump any amount of market power—no matter how large.³² Congress, however, wanted a standard close to the reverse of this. Congress wanted competitive price options for consumers, and condemned practices that would raise consumer prices to supra-competitive levels.³³

As a practical matter, the way to ensure that prices will not rise is to give greater weight to market power effects than to efficiencies.³⁴ In other words, a practice's efficiencies would have to be so large that they would prevent any price increases. This would mean that some of the efficiencies would accrue to consumers or, at a minimum, that consumers wouldn't pay higher prices just so the firm acquiring the market power could attain a cost savings.

The efficiencies required to prevent price increases are much higher than the efficiencies required to neutrally offset the inefficiency effects of market power.³⁵ Depending upon a large number of factors, the required efficiency savings would be perhaps four times as large under a price standard as they would be under an efficiency standard.³⁶ Under other plausible assumptions the required efficiencies would be ten times as large if a "price to consumers" standard were used rather than a net efficiencies standard.³⁷

Commissioner Wright, however, proposes to give efficiencies infinitely more weight than market power effects! Any cognizable efficiency would justify any monopoly or cartel, no matter how high the firm or firms involved might raise prices! This is close to the opposite of what Congress intended.

Under the Choice standard's rule of reason, practices that are likely to raise prices significantly should be deemed anticompetitive. And, as noted earlier, practices that significantly reduce the current or future non-price options should be similarly condemned.

IV. EXAMPLES OF PURE SECTION 5 CASES THAT COULD BE BENEFICIAL

As noted above, Section 5 Guidelines should limit FTC Act antitrust violations to conduct that significantly impairs the choices that free competition would bring to the marketplace.³⁸ There are a number of specific ways the FTC could carry out this Congressional intent that

³² See Wright, *supra* note 2, at 3.

³³ See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, passim (1982); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065413. See also Alan A. Fisher, Frederick I. Johnson, & Robert H. Lande, *Price Effects of Horizontal Mergers*, 77 CALIF. L. REV. 777, 806, 816 (1989), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134826.

³⁴ *Id.* at 806, 816 (1989). Commissioner Wright does not consider this possibility. See Wright, *supra* note 2, at 3.

³⁵ Fisher, Johnson, & Lande, *supra* note 32, at 806, 816.

³⁶ *Id.*

³⁷ *Id.* The conditions include the relevant elasticities and assumptions concerning whether the probability of successful collusion will increase.

³⁸ See both articles by Averitt & Lande, *supra* note 13.

would be clear, predictable, and administrable, and also would be in the public interest. This article will very briefly discuss three specific categories of appropriate cases.³⁹

A. Invitations to Collude

Invitations to collude can violate Section 2 of the Sherman Act.⁴⁰ However, for enforcers to prove any type of Section 2 Sherman Act violation they must undertake a large number of formidable tasks, including proving a relevant market, a complex and time-consuming undertaking. Then the enforcers must prove that the challenged conduct was anticompetitive and that it would result in either the respondents achieving or maintaining monopoly power or the “dangerous probability” of achieving monopoly power. Lastly, claimed efficiencies associated with the practices would have to be litigated. Therefore, like every successful Section 2 action, invitation to collude cases would be complex, lengthy, and costly.⁴¹

By contrast to Section 2 violations, naked collusion cases are much less complicated to prove. The enforcers do not have to define markets, prove difficulty of entry into the market or any form of market power, litigate efficiencies, or establish actual anticompetitive effects. Invitation to collude cases should be as easy to prove as collusion cases. The same jurisprudential reasons that permit the enforcers to dispense with the complex, costly, and lengthy market definition and market power issues in collusion cases also apply to invitations to collude cases. As the Commission has concluded, they should violate Section 5 of the FTC Act.⁴²

B. Incipient Exclusive Dealing and Tying Cases

There currently is substantial uncertainty over the minimum market share required to establish a tying violation and the amount of foreclosure necessary for an exclusive dealing violation.⁴³ Regardless of how high these requirements are under the Sherman Act, they should be relaxed whenever the case involves a defendant with a significantly larger market share than those of its victims. In these “incipient” tying or exclusive dealing situations incumbents often will be able to significantly disadvantage smaller competitors and potential market entrants because of their relatively larger market shares, and thereby cause significant harm to consumer choice. This is true even in cases where the incumbents do not hold a large enough market share to trigger a traditional Sherman Act violation.⁴⁴

Suppose, for example, a company introduces a new brand of super-premium ice cream. Suppose also that an existing seller of super-premium ice cream has 30 percent of this market as well as another 30 percent of the premium and non-premium ice cream markets. Then suppose the incumbent firm tells supermarkets they have to choose between the established firm’s products and the newcomer’s products. No efficiencies would arise if the established firm’s demands were met. Suppose also that the supermarkets agree to the incumbent firm’s demands.

³⁹ Each of the three brief examples discussed in this article is discussed in more detail in Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using ‘Consumer Choice’ Analysis*, 8 (3) ANTITRUST SOURCE, 1 (Feb. 2009) available at <http://ssrn.com/abstract=1287218>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

These facts, including in particular the incumbent's 30 percent market share, would be unlikely to be found to constitute either an unlawful tying agreement or an unlawful exclusive dealing agreement under the Sherman Act.⁴⁵ However, if the incumbent's exclusionary strategy succeeded, then consumer choice in terms of varieties of ice cream on the market would be diminished and prices would be likely to increase. This conduct should violate Section 5 as an incipient exclusive dealing or tying arrangement.

C. Cases Similar to *N-Data*.

The FTC's action in the *Negotiated Data Solutions (N-Data)* case should be applauded, and the Commission commended, for condemning the opportunistic behavior at issue and affirming that this conduct can be an antitrust violation of the FTC Act even if it does not violate the Sherman Act.⁴⁶

The facts of this case are exceptionally complicated, and it is not clear that the conduct at issue would have violated the Sherman Act.⁴⁷ One could argue that the conduct only constituted the exploitation of intellectual property rights, in which case it might not have violated the Sherman Act. It could also be argued that the case did not clearly involve an act of monopolization in violation of Section 2 of the Sherman Act because the original patent holder adhered to its agreement and the successor holder was just exploiting its newly acquired parent rights rather than taking improper steps to acquire or maintain monopoly power.

In light of this uncertainty it is fortunate the Commission was able to use Section 5 of the FTC Act to challenge the anticompetitive conduct at issue. As noted above, however, it would have been much better if the Commission's opinion had been written using a "choice" articulation, rather than the amorphous, unbounded language it employed.

IV. AREAS FOR INCREASED FTC SCRUTINY

If Section 5 of the FTC Act were interpreted to have a consumer choice focus this would have a number of advantages in addition to providing a sound, clear, and predictable basis for Section 5 antitrust guidelines. There are a number of areas that would be affected, including:

- Media consolidations and joint ventures: These should receive increased scrutiny to determine whether they affect consumer choice, especially in the area of non-price options. This analysis should be undertaken in addition to the traditional antitrust concerns over the effects of media transactions on prices. A media sector transaction that would significantly reduce the variety and types of choices available to consumers, or the potential for innovation, should be challenged even if it does not result in price increases.
- Health care consolidations and joint ventures: These also should receive enhanced scrutiny to determine whether they affect consumer choice, including non-price options. (Price effects should of course continue to be crucial considerations because price is a

⁴⁵ *Id.*

⁴⁶ See *Negotiated Data Solutions, LLC.*, FTC File No. 051 0094, 2008 WL 4407246 (Sept. 22, 2008) (complaint and consent order), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

⁴⁷ See Robert H. Lande, *Revitalizing Section 5 of the FTC Act Using 'Consumer Choice' Analysis*, 8 ANTITRUST SOURCE, no. 3, Feb. 2009, at 1, available at <http://ssrn.com/abstract=1287218>.

dimension of competition that consumers value highly.) It is certainly possible that the arrival of Obamacare will lead to an increased number of anticompetitive consolidations and joint ventures in this sector, especially in cases involving hospital mergers and hospitals purchasing physician practices. These transactions should be analyzed carefully for both price and non-price effects on consumers.

- Food and agricultural industry consolidations, collusion, joint ventures, and exclusionary conduct: These should also merit similarly higher levels of FTC attention.⁴⁸ These are areas where the practices in question might not rise to the level where they constitute monopsony or monopoly, or give rise to a traditional Sherman Act violation. For the reasons given above as to why Section 5 should enable the Commission to more beneficially scrutinize incipient exclusive dealing and tying situations, Section 5 also might be used appropriately to guard against a variety of incipient anticompetitive practices in the food and agricultural sectors.

V. CONCLUSIONS

Commissioner Wright is correct that it could be desirable if the FTC issues comprehensive Section 5 antitrust guidelines. As he points out, guidelines could help increase business certainty and enhance the predictability of government enforcement actions.⁴⁹ FTC antitrust guidelines that utilize the consumer choice framework could do all of this successfully.

However, bad guidelines would be much worse than no guidelines at all. By analogy, years ago the United States wanted to negotiate an arms control agreement with the Soviet Union. A good arms control agreement would have had many benefits. However, an agreement that would have forced the United States to disarm unilaterally would have been far worse than no agreement at all.

Suppose the Soviet Union's opening position on an arm's control issue was 50 and the position of the United States was initially 100. Suppose the parties might have had a chance of compromising at somewhere between 70 and 80. Then, suppose the Soviet Union offered proposed guidelines that were at the level of only 30. The United States would have been justified in concluding that the Soviet Union was not negotiating seriously.

Yet, this is what Commissioner Wright has done. His proposal would disarm the FTC by restricting Section 5 to an enforcement program narrower than that of the Sherman Act. For this reason his proposal cannot be taken seriously by anyone who wants to carry out Congress's desire that the FTC Act be construed more broadly than the Sherman Act. It does not even contain token concessions towards Congress' preferred position.

Commissioner Wright apparently wishes Section 5 prohibited "inefficient methods of competition." However, Congress did not choose to word the statute this way, and Commissioner Wright can hardly expect the others commissioners to help him re-write it

⁴⁸ For example, see *Letter from the American Antitrust Institute to the FTC concerning the proposed merger of Sysco and U.S. Foods* (Am. Antitrust Inst., Washington, D.C.), Feb. 25, 2014, available at http://www.antitrustinstitute.org/sites/default/files/AAISyscoUSFoodsMergerLetter_0.pdf

⁴⁹ See Wright, *supra* note 2, at 1-2.

administratively. He cannot expect his proposal to neuter Section 5 to receive serious consideration other than by those already in his camp.