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RECENT ANTITRUST DEVELOPMENTS *

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Antitrust's fever chart during the past twelve months has had more than its usual peaks and valleys. The Supreme Court's grist was abnormally high,¹ but there was nothing abnormal about the fact that most of the judgments went against the defendants.² The feature of the Court's work that has the "man bites dog" type of newsworthiness was Justice Douglas' lengthy quotation in *White Motor Co. v. United States*³ of Brandeis' classic formulation of the rule of reason, plus the citation of *Chicago Bd. of Trade v. United States*⁴ in *Silver v.*

* This Article is based upon a lecture before the Association of the Bar of the City of New York on June 6, 1963. The section, "THE AFTERMATH OF BROWN SHOE" has been substantially altered from its form in the oral address to reflect the recent decision of the Supreme Court in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

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¹ *United States v. Bliss & Laughlin, Inc.*, 371 U.S. 70 (1962); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962); *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

² *United States v. Bliss & Laughlin, Inc.*, *supra* note 1; *United States v. Loew's, Inc.*, *supra* note 1; *Los Angeles Meat & Provision Drivers Union v. United States*, *supra* note 1; *United States v. National Dairy Prods. Corp.*, *supra* note 1; *Silver v. New York Stock Exch.*, *supra* note 1; *FTC v. Sun Oil Co.*, *supra* note 1; *United States v. Singer Mfg. Co.*, *supra* note 1; *United States v. Philadelphia Nat'l Bank*, *supra* note 1.

³ 372 U.S. 253, 261-62 (1963).

⁴ 246 U.S. 231, 238 (1918):

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

*New York Stock Exch.*⁵ A revitalization of the Brandeis conception of the rule of reason—the antithesis of the current per se philosophy—would indeed be a noteworthy event, but obviously it would take more than a copious quotation or a passing citation for that to occur. Nonetheless, defendants in merger cases enjoyed a spectacular winning streak—six out of six⁶—until the Supreme Court came down with its decision in *United States v. Philadelphia Nat'l Bank*.⁷ Even the Federal Trade Commission at long last broke down and upheld a merger.⁸ The courts of appeals have become increasingly unkind to the Commission, and, instead of rubberstamping its decisions, have repudiated it ten times since last June.⁹ Gone, perhaps forever, is the

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

⁵ 373 U.S. 341, 360 (1963): "But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act," citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 394-95 (1912).

⁶ *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963); *United States v. Lever Bros.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963); *United States v. Aluminum Co. of America*, 214 F. Supp. 501 (N.D.N.Y. 1963); *United States v. Bliss & Laughlin, Inc.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70734 (S.D. Cal. March 27, 1963); *United States v. El Paso Natural Gas Co.*, 1962 Trade Cas. ¶ 70571 (D. Utah 1962), *prob. juris. noted*, 373 U.S. 930 (1963).

⁷ 374 U.S. 321 (1963).

⁸ *Warner Co.*, TRADE REG. REP. ¶ 16405 (FTC May 15, 1963). The Hearing Examiner had ordered divestiture of the two ready-mixed concrete producers which Warner had acquired, Chester Materials Co. and W. E. Johnson, Inc. The Commission reversed and dismissed. The basis for its action, however, is unclear. The brief dismissal order, which was not accompanied by an opinion, stated that the Commission was satisfied that it had jurisdiction over the Chester acquisition, but "does not consider it necessary to decide the question of [its] legality." The order added that "The public interest will be adequately served by exercising close scrutiny of any similar future acquisitions made by respondent, which would raise most serious questions under Section 7." Commissioner MacIntyre did not concur and Chairman Dixon dissented "for the reason that he believes an order should be entered requiring Warner to divest itself" of the Chester assets. Neither the dismissal order nor Chairman Dixon mentioned the Johnson acquisition. Thereafter, the Commission dismissed three more § 7 complaints. *Dresser Industries, Inc.*, TRADE REG. REP. ¶ 16513 (FTC July 24, 1963); *National Lead Co.*, TRADE REG. REP. ¶ 16513 (FTC July 24, 1963); *Kaiser Industries Corp.*, TRADE REG. REP. ¶ 16529 (FTC Aug. 2, 1963).

⁹ *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48 (7th Cir. 1962); *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962); *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962); *Colgate-Palmolive Co. v. FTC*, 310 F.2d 89 (1st Cir. 1962); *Korber Hats, Inc. v. FTC*, 311 F.2d 358 (1st Cir. 1962); *Nuarc Co. v. FTC*, 316 F.2d 576 (7th Cir. 1963); *FTC v. Sterling Drug, Inc.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70771 (2d Cir. May 6, 1963); *Rayexc Corp. v. FTC*, 317 F.2d 290 (2d Cir. 1963); *Central Retailer-Owned Grocers, Inc. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70835 (7th Cir. July 2, 1963); *Snap-On Tools Corp. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70861 (7th Cir. July 30, 1963); *cf. J. Weingarten, Inc. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70790, at 78184 (E.D. Tex. May 17, 1963).

abnegation that has led to judicial benediction of almost everything the Commission does.¹⁰

I. WHITE MOTOR

For years the Department of Justice has been attempting to outlaw two of the ancillary restraints that were traditionally tested under the rule of reason at common law, and in early cases under the Sherman Act.¹¹ The reference, of course, is to vertical territorial and customer restrictions, which at one time were commonplace in dealer franchise agreements. Beginning in 1949 the Department announced that it viewed such restrictions as illegal per se,¹² primarily in reliance upon dictum in *United States v. Bausch & Lomb Optical Co.*¹³ It even threatened certain manufacturers with criminal prosecution unless they amended their franchises.¹⁴ The threat worked, and the Government thereafter built up quite a skein of victories through consent decrees, without having to subject its legal theory to judicial scrutiny.¹⁵

Then the Department took on the White Motor Company.¹⁶ When this defendant, unlike its similarly situated predecessors, refused to capitulate, the Government moved for summary judgment. The district court accepted the Government's doctrine of per se illegality lock, stock, and barrel and summarily enjoined White from restricting the territories in which, or the persons to whom, its distributors and dealers might sell its trucks.¹⁷ White appealed to the Supreme Court, and the Government showed its disdain by moving to affirm.¹⁸ The

¹⁰ See Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 942-43 (1962).

¹¹ Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 374 (1960); Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 867 (1959); Handler, *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 434 (1958); HANDLER, ANTITRUST IN PERSPECTIVE 41, 142-43 n.60 (1957); Handler, *Annual Antitrust Review*, 11 RECORD OF N.Y.C.B.A. 367, 377 (1956).

¹² See *Hearings on Automobile Marketing Legislation Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 1st Sess. 89, 362 (1955).

¹³ 321 U.S. 707, 721 (1944).

¹⁴ See *Hearings*, *supra* note 12, at 89.

¹⁵ See *United States v. Lone Star Cadillac Co.*, TRADE REG. REP. (1963 Trade Cas.) ¶70739 (N. D. Tex. May 10, 1963); *United States v. Sperry Rand Corp.*, 1962 Trade Cas. ¶70495 (W.D.N.Y. 1962); *United States v. Shaw-Walker Co.*, 1962 Trade Cas. ¶70491 (W.D.N.Y. 1962); *United States v. Spring-Air Co.*, 1962 Trade Cas. ¶70402 (N.D. Ill. 1962); *United States v. Dempster Bros.*, 1962 Trade Cas. ¶70359 (D. Tenn. 1962); *United States v. Scott Aviation Corp.*, 1961 Trade Cas. ¶70148 (W.D.N.Y. 1961); *United States v. Hamilton Mfg. Co.*, 1960 Trade Cas. ¶69882 (E.D. Wis. 1960). For earlier consent decrees, see Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 374 n.57, 395 (1960).

¹⁶ *United States v. White Motor Co.*, 194 F. Supp. 562 (N.D. Ohio 1961), *rev'd*, 372 U.S. 253 (1963).

¹⁷ Final Decree, *United States v. White Motor Co.*, Civ. No. 34593 (N.D. Ohio Sept. 5, 1961).

¹⁸ Motion to Affirm of Appellee, *White Motor Co. v. United States*, 372 U.S. 253 (1963).

issue, according to the Department of Justice, was cut and dried, and did not merit serious consideration.¹⁹ When the Court noted probable jurisdiction,²⁰ the business world breathed a sigh of relief, and proceeded to wait, with bated breath, for the decision on the merits. Now that the Court has spoken,²¹ we find ourselves pretty much back where we started.

Viewing the case as one of first impression in the Supreme Court,²² a five-member majority led by Mr. Justice Douglas, with the concurrence of Justices Harlan, Brennan, Stewart, and Goldberg, declined to say whether territorial and customer restraints are unlawful as a matter of law, or whether they must be factually tested under the rule of reason. Before deciding this question, the majority wanted the benefit of a trial at which the economic pros and cons of the restraints could be fully canvassed. The Court had no difficulty in distinguishing *Bausch & Lomb*, "where price fixing was 'an integral part of the whole distributor system' . . . including customer restrictions."²³ Nor was the Court ready to equate the challenged vertical arrangements with horizontal agreements among competitors to divide markets or apportion customers, which "are naked restraints of trade with no purpose except stifling of competition."²⁴ "A vertical territorial limitation," wrote Mr. Justice Douglas,

may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business . . . and [therefore] within the "rule of reason."

¹⁹ *Id.* at 5: "The appeal does not present a substantial question because the issues have all been resolved, against appellant's contentions, by prior decisions of this Court."

²⁰ *White Motor Co. v. United States*, 369 U.S. 858 (1962).

²¹ *White Motor Co. v. United States*, 372 U.S. 253 (1963).

²² *But cf. Oregon Steam Nav. Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873), in which the Court upheld at common law a covenant by the purchaser of a steamship not to use it on the rivers of California. In so holding, Justice Bradley stated: "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered." *Id.* at 67. See also *Tri-Continental Financial Corp. v. Tropical Marine Enterprises*, 265 F.2d 619 (5th Cir. 1959); *Hill v. Staples*, 85 Ga. 863, 11 S.E. 967 (1890); *Dunlop v. Gregory*, 10 N.Y. 241 (1851).

²³ As already stated, there was price-fixing here and that part of the injunction issued by the District Court is not now challenged. In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States v. Bausch & Lomb Co.*, 321 U.S. 707, where price fixing was "an integral part of the whole distribution system" (*id.* 720) including customer restrictions. No such finding was made in this case; and whether or not the facts would permit one we do not stop to inquire.

372 U.S. at 260.

²⁴ *Id.* at 263.

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as *per se* violations of the Sherman Act.²⁵

The precise holding of the Court was that "the legality of the territorial and customer limitations should be determined only after a trial."²⁶ No view was intimated on the merits.

To the dissenters, a trial would have been a waste of time.²⁷ They would have condemned the limitations out of hand. They failed to see any material distinction between horizontal and vertical agreements which eliminate competition. Indeed, according to Mr. Justice Clark's biting dissent, "the intended and actual effect is the same if not even more destructive than a price fixing agreement or any of its *per se* counterparts."²⁸ All of White's economic arguments and business reasons—including its claim that the restrictions are "the only feasible way for [it] to compete effectively with its bigger and more powerful competitors'"²⁹—were swept aside as legally immaterial. To the minority this was merely an attempt "to make a virtue of business necessity, which has long been rejected as a defense in such cases."³⁰

It should be noted, however, that the cases to which Mr. Justice Clark referred involved resale price fixing, group boycotts, and tying arrangements.³¹ Ironically enough, if the legality of territorial and customer limitations were to be determined by *applicable* cases, lower federal and state court precedents would clearly dictate a verdict for the defendant.³² In light of the venerable body of case law sustaining

²⁵ *Ibid.*

²⁶ *Id.* at 264.

²⁷ *Id.* at 275. Mr. Justice Clark authored the dissent. He was joined by Chief Justice Warren and Mr. Justice Black.

²⁸ *Id.* at 279.

²⁹ *Id.* at 278.

³⁰ *Ibid.*

³¹ *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

³² *With respect to territorial restraints*, see, e.g., *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 595 (8th Cir. 1903), *cert. denied*, 192 U.S. 606 (1904); *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 283-84 (5th Cir. 1915), *writ of error denied*, 246 Fed. 831 (5th Cir. 1917), *cert. denied*, 247 U.S. 511 (1918); *Boro Hall Corp. v. General Motors Corp.*, 124 F.2d 822, 823 (2d Cir. 1942), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943); *Reliable Volkswagen Sales & Service Co. v. World Wide Auto. Corp.*, 182 F. Supp. 412, 425-27 (D.N.J. 1960); cases cited note 22 *supra*; *General Cigar Co.*, 16 F.T.C. 537 (1932); *Conference Ruling Nos. 13, 15, 21*, 1 F.T.C. 543, 544 (1916); *Pratt v. Marean*, 25 Ill. App. 516, 520 (1888); *Johnston v. Franklin Kirk Co.*, 83 Ind. App. 519, 148 N.E. 177 (1925); *Revlon Prods. Corp. v. Bernstein*, 204 Misc. 80, 119 N.Y.S.2d 60 (Sup. Ct. 1953), *aff'd*, 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955); *Stemmerman v. Kelly*, 150 App. Div. 735, 135 N.Y. Supp. 827 (1912), *aff'd*, 220 N.Y. 756, 116 N.E. 1077 (1917);

such limitations, it is astounding that the dissent castigated White's conduct as "one of the most brazen violations of the Sherman Act . . . experienced in a quarter of a century."³³

It may be, as Mr. Justice Clark said, that "the rule of reason is inapplicable to agreements made *solely* for the purpose of eliminating competition."³⁴ But that can hardly be dispositive of the legality of White's vertical arrangements in view of its claim (the truth of which was assumed) that the restrictions were necessary, among other things, to enable White to hold its own in the competitive struggle with other truck manufacturers. The truth of the matter is that the dissenting justices rejected the rule of reason approach even if the restraint is not

Thomas v. Belcher, 184 Okla. 410, 87 P.2d 1084 (1939); Delk v. City Nat'l Bank, 85 Okla. 238, 205 Pac. 753 (1922); Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 75 S.C. 378, 55 S.E. 973 (1906); *cf.* Sinclair Ref. Co. v. Wilson Gas & Oil Co., 52 F.2d 974, 976 (W.D.S.C. 1931); McConkey v. Smith, 112 Kan. 560, 211 Pac. 631 (1923).

With respect to use or customer limitations, see, e.g., Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 172-73 (1915); Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1, 9 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950); Fosburgh v. California & Hawaiian Sugar Ref. Co., 291 Fed. 29 (9th Cir. 1923); Revlon, Inc. v. Regal Pharmacy, Inc., 29 F.R.D. 169, 177 (E.D. Mich. 1961); United States v. Newbury Mfg. Co., 36 F. Supp. 602, 605 (D. Mass. 1941); P. Lorillard Co. v. Weingarden, 280 Fed. 238, 240 (W.D.N.Y. 1922); Authors & Newspapers Ass'n v. O'Gorman Co., 147 Fed. 616 (C.C.D.R.I. 1906); Buckalew v. Niehuss, 249 Ala. 585, 32 So. 2d 299 (1947); Morris & Morris v. Tuskaloosa Mfg. Co., 83 Ala. 565, 3 So. 689 (1887); California Bldg. Co. v. Halle, 80 Cal. App. 2d 229, 181 P.2d 404 (Dist. Ct. App. 1947); Lampson Lumber Co. v. Caporale, 140 Conn. 679, 102 A.2d 875 (1954); Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 Atl. 432 (1932); Frye v. Partridge, 82 Ill. 267 (1876); Meyer v. Estes, 164 Mass. 457, 41 N.E. 683 (1895); Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 316 (1951); Gano v. Delmas, 140 Miss. 323, 105 So. 535 (1925); Hall v. Wesster, 7 Mo. App. 56 (1879); Clare v. Ice Cream Cabinet Co., 166 Atl. 722 (N.J. Ch. 1933); New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 73 N.E. 48 (1905); Revlon Prods. Corp. v. Bernstein, 204 Misc. 80, 81, 119 N.Y.S.2d 60, 61-62 (Sup. Ct. 1953), *aff'd*, 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955); Hickock Mfg. Co. v. Fairley Trading Corp., 117 N.Y.S.2d 874 (Sup. Ct. 1952); Hodge v. Sloan, 107 N.Y. 244, 17 N.E. 335 (1887); Carneal v. Kendig, 196 Va. 605, 85 S.E.2d 235 (1955); Colby v. McLaughlin, 50 Wash. 2d 152, 310 P.2d 527 (1957); Messett v. Cowell, 194 Wash. 646, 79 P.2d 337 (1938). And see the decisions sustaining restraints prohibiting purchasers of new cars from reselling them without first offering them to the dealer at a stipulated price: Piazza v. Liberty Motors, 34 Ala. App. 376, 43 So. 2d 134 (1949), *aff'd*, 253 Ala. 132, 43 So. 2d 136 (1949); Summers v. Adams Motor Co., 34 Ala. App. 319, 39 So. 2d 300 (1949); Bay Shore Motors v. Baker, 90 Cal. App. 2d 895, 202 P.2d 865 (Super. Ct. 1949); King Motors v. Delfino, 136 Conn. 496, 72 A.2d 233 (1950); Schuler v. Dearing Chevrolet Co., 76 Ga. App. 570, 46 S.E.2d 611 (1948); Burnett v. Nolen, 336 Ill. App. 376, 84 N.E.2d 155 (1949); Elizabethtown Lincoln Mercury v. Jones, 313 Ky. 321, 231 S.W.2d 42 (1950); Wade & Dunton, Inc. v. Gordon, 144 Me. 49, 64 A.2d 422 (1949); Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N.W.2d 841 (1949); Larson Buick Co. v. Mosca, 79 N.Y.S.2d 654 (Sup. Ct. 1948); Thomas B. Martindale, Inc. v. Gorman, 165 Pa. Super. 612, 70 A.2d 409 (1950); Thomas B. Martindale, Inc. v. Dougherty, 68 Pa. D. & C. 243 (C.P. 1949); Becker-Mills, Inc. v. Boshier, 68 Pa. D. & C. 115 (Phila. Munic. Ct. 1949). See also RESTATEMENT, CONTRACTS § 516(b) (1932) ("The following bargains do not impose unreasonable restraint of trade unless effecting, or forming part of a plan to effect, a monopoly: A bargain by the buyer or lessee of property . . . not to use it in competition with or to the injury of the seller or lessor"); 6 CORBIN, CONTRACTS § 1389 (1951); 5 WILLISTON, CONTRACTS § 1642 (rev. ed. 1937).

³³ 372 U.S. at 276.

³⁴ *Id.* at 281. (Emphasis added.)

animated solely by anticompetitive considerations. It suffices if one of its purposes is to eliminate competition—any competition, even intrabrand competition, and regardless of whether interbrand competition is thereby enhanced. The dissenters were explicit on this point: "To admit, as does [White] . . . , that competition is eliminated under its contracts is, under our cases, to admit a violation of the Sherman Act. No justification, no matter how beneficial, can save it from that interdiction."³⁵ These words are reminiscent of the literalist view of the statute expressed over sixty years ago by Mr. Justice Peckham, who would have struck down every restraint of trade precisely because section 1 of the Sherman Act says "every."³⁶

It is disheartening to see Mr. Justice Clark, who breathed new life into the rule of reason in *Times-Picayune Publishing Co. v. United States*,³⁷ perform a complete about-face in *White Motor* and give vent to some of the most extreme views ever expressed in antitrust jurisprudence. At the same time, it is consoling to see Mr. Justice Douglas, who up to now has been one of the leading exponents of the per se philosophy,³⁸ quoting from *Chicago Bd. of Trade*,³⁹ and insisting on a comprehensive factual analysis to illumine the purpose and effect of the restraint. In the best rule of reason fashion, Justice Douglas did not undertake to accord decisive significance to the presence or absence of any particular fact; instead, he authorized a broad economic inquiry to determine the need for, and impact of, the restraints.

In a separate concurring opinion, however, Mr. Justice Brennan was more pinpointed as to what factors, in his judgment, should be considered by the district court on remand.⁴⁰ In the first place, he would treat territorial restrictions more favorably than restraints on customer selection. He can conceive of the territorial limitation as necessary in certain circumstances to foster effective interbrand competition, since the seller may otherwise find it impossible to acquire and retain adequate outlets and make sure that his product is properly advertised, promoted, and serviced.⁴¹ This, of course, is the heart of the economic justification for the territorial clause.

³⁵ *Id.* at 281.

³⁶ See HANDLER, ANTITRUST IN PERSPECTIVE 4-7 (1957).

³⁷ 345 U.S. 594 (1953). See also *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *cf.* *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

³⁸ See, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Masonite Corp.*, 316 U.S. 198 (1942); *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944); *United States v. Line Material Co.*, 333 U.S. 287, 315 (1948) (concurring opinion).

³⁹ *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

⁴⁰ 372 U.S. at 264.

⁴¹ *Id.* at 269.

If a manufacturer is not vertically integrated to the point where he distributes for himself, it is imperative for him to have independent dealers who will devote their energies to pushing the sale of his product vigorously and skillfully. To obtain maximum market penetration, these dealers must make the difficult, as well as the easy, sale. And if they are free to "skim the cream" from their neighbors, not only may the difficult sale be lost to a competing brand, but the neighboring dealer who needs some "cream" for his own sustenance may be forced to abandon his dealership as unprofitable—unless he retaliates in kind, in which event a veritable donnybrook may ensue. In either event, the manufacturer's distribution system is apt to become a shambles, with the competing brand emerging as the victor.⁴²

The problem is particularly acute where the product does not readily sell itself and the dealer must devote considerable effort to "preselling." Here "the local dealer may not only lose his expected profit, but incur a loss."⁴³ Still further complications are created by territorial invasions when service is an important factor. Human nature being what it is, the local dealer may be less than enthusiastic about servicing a product that has been purchased outside his bailiwick, even if he is fully compensated by the manufacturer's warranty.⁴⁴ Customers disgruntled by poor dealer service, needless to say, have a habit of taking it out on the manufacturer in the future.

Economic justification, however, is not enough for Mr. Justice Brennan. He would make a further inquiry to determine "whether the restraint so justified is more restrictive than necessary."⁴⁵ Specifically, what sanctions are imposed by the manufacturer against a raiding dealer? Is his franchise terminated? Or does he merely have to pay over part of his profit to his neighbor? Then, again, are "less restrictive alternatives" open to the manufacturer?⁴⁶ Can he get along by granting a dealer an exclusive franchise (that is, by promising not to appoint any other dealer, or not to sell directly, in the territory); or by assigning dealers "areas of primary responsibility" without inhibiting outside sales; or by establishing profit passovers at levels "so as to minimize the deterrence to cross-selling by neighboring dealers where competition is feasible"?⁴⁷

It is difficult to grasp why the validity of the territorial limitation should depend on the sanction that is, or may be, invoked by the

⁴² See *ibid.*

⁴³ Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 811 (1962).

⁴⁴ *Id.* at 812.

⁴⁵ 372 U.S. at 270.

⁴⁶ *Id.* at 271.

⁴⁷ *Id.* at 271-72

manufacturer if the limitation is ignored. If the restraint can be justified because, all things considered, it is likely to promote rather than subvert competition, it should be enforceable. And if the method of enforcement is cancellation of the offending dealer's franchise, this should not render unreasonable what would otherwise be a reasonable restraint of trade any more than a failure to cancel should save a restriction that would otherwise be unreasonable because of lack of business justification. If anything, the lesser sanction suggested by Mr. Justice Brennan—that of partial profit passovers from one dealer to another—may be more risky, since this device might conceivably be viewed as a horizontal agreement among the dealers themselves.⁴⁸ As Mr. Justice Brennan states elsewhere in his opinion:

If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by [White's] . . . dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement.⁴⁹

Nor do I believe that it should be incumbent on the manufacturer to prove, once economic justification for the territorial restriction is shown, that he could not have squeezed by with some lesser alternative restraint. Such a requirement would be wholly impractical both from the legal and business points of view. Suppose it appears that, in order to compete effectively against other brands, it was reasonably necessary for the manufacturer to have independent dealers who would concentrate their selling efforts in their assigned territories and not encroach upon their neighbors. How, as a practical matter, can the manufacturer go further and prove that if he had employed an "area of primary responsibility" clause, for example, his dealers would in fact have invaded each other's territories to his detriment? Maybe they would have, and maybe they would not have.⁵⁰ Maybe each

⁴⁸ See Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 261 n.32 (1960).

⁴⁹ 372 U.S. at 267.

⁵⁰ The Department of Justice has flip-flopped on the use of such "primary responsibility" clauses. Compare *United States v. Philco Corp.*, 1956 Trade Cas. ¶ 68409, at 71753 (E.D. Pa. 1956), with *United States v. Lone Star Cadillac Co.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70739, at 77919 (N.D. Tex. May 10, 1963). See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 797 (1962). In *White Motor* itself, at the hearing on the scope of the injunction after the District Court had granted the Government's motion for summary judgment, the Department of Justice successfully opposed White's efforts to incorporate a primary responsibility proviso in the final decree. Later, however, the Government told the Supreme Court that White might have employed primary responsibility clauses as a less restrictive alternative to prohibiting dealers from selling outside their assigned territories. Brief for Appellee, pp. 25-26; Reply Brief for Appellant, pp. 2 n.3, 16.

would have stayed in his own back yard even without a primary responsibility obligation. But surely the manufacturer should not be forced to build a distribution system on a foundation of maybes. He should not be required, at the pain of incurring antitrust liability, to experiment with "less restrictive alternatives" when, if he guesses wrong, he may find himself out of the competitive race. It is all well and good to sit back and theorize about what the manufacturer might get by with. But the manufacturer who operates in a keenly competitive business world cannot afford the luxury of theorizing. He is on the firing line and should not be second-guessed after the event if his own solution to the problem is reasonable.

When it comes to the customer restrictions used by White—the reservation to itself of governmental and fleet accounts—Mr. Justice Brennan is even more demanding: if the restrictions are meaningful, they are unlawful; if they are superfluous, they are unobjectionable. He states his position in these terms:

The crucial question to me is whether, in any meaningful sense, the distributors could, but for the restrictions, compete with the manufacturer for the reserved outlets. If they could, but are prevented from doing so only by the restrictions, then in the absence of some justification neither presented nor suggested by this record, their invalidity would seem to be apparent.⁵¹

This is because, as Mr. Justice Brennan sees it, such restrictions "serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts" and "seem to lack any of the countervailing tendencies to foster competition between brands which may accompany the territorial limitations."⁵² It is quite evident that his hostility to White's customer restrictions stems from his suspicion that they are "designed, at least in part, to protect a noncompetitive pricing structure, in which the manufacturer in fact does not always charge the lowest prices"⁵³—because if he did, his natural cost advantage over his distributors would itself effectively eliminate their competition without the necessity for any contractual restriction.⁵⁴

White had argued, among other things, that, until its distributors had received extensive technical training, they were not qualified to cope with the peculiar and intricate requirements of the reserved

⁵¹ 372 U.S. at 272-73.

⁵² *Id.* at 272.

⁵³ *Id.* at 275.

⁵⁴ *Ibid.*

governmental and fleet accounts;⁵⁵ hence White was fearful that it might lose standing with such accounts if its distributors obtained the business but could not provide adequate service. Of course, absent a restraining covenant, there would be nothing to prevent a distributor from underbidding his supplier for a large account, even if he did so at a loss. And he might be willing to take a loss in order to alleviate an overstocked inventory position, to facilitate profitable sales of other products to the account, or to gain prestige. Whatever the distributor's reason for soliciting such accounts in competition with his supplier, the latter has a legitimate interest in seeing to it that his own image is not tarnished by faulty servicing or promotional work on the part of the distributor. Here again, Mr. Justice Brennan visualizes the possibility of using "less drastic measures as, for example, improved supervision and training, or perhaps a special form of manufacturer's warranty to the governmental and fleet purchasers to protect against unsatisfactory distributor servicing."⁵⁶ But here again, I submit, the businessman should be given reasonable latitude in deciding how to grapple with the problem and not be told that he should have tried something else in the first instance.

Of course, customer restrictions take forms other than the species involved in *White Motor*. The manufacturer may reserve nothing for himself, but, if his product is sold through different types of market outlets, he may channel the sales of his distributors to particular classes of customers. In this way, one group of distributors will solicit business from one customer class without interference from another group whose job it is to promote the sale of the product with a distinct body of customers. This parceling out of customers was sustained a few years ago by the Federal Trade Commission in *Roux Distrib. Co.*,⁵⁷ in which a cosmetic manufacturer maintained separate sales channels through wholesalers to department and drug stores and wholesalers to beauty parlors. This type of customer restriction is certainly more closely akin to the territorial restriction than the reservation of accounts clause which Mr. Justice Brennan viewed with a jaundiced eye in *White Motor*. The manufacturer's purpose is to maximize sales and render optimum service through distributors who concentrate on the classes of trade which they are best equipped to handle. There is no reason, in my judgment, why customer restrictions of this character should be treated more harshly than territorial limitations.

Nor does Mr. Justice Brennan address himself to such other varieties of customer restrictions as an agreement by a wholesaler to

⁵⁵ Brief for Appellant, pp. 17-18.

⁵⁶ 372 U.S. at 274.

⁵⁷ 55 F.T.C. 1386 (1959).

sell only to retailers or to retailers approved by the manufacturer, an agreement by a retail account to sell only to the consumer, or an agreement by a consumer not to resell at all.⁵⁸ Each of these restraints may be justified as reasonably designed to achieve and perpetuate a vigorous and efficient dealer organization which will strengthen the manufacturer's hand in competing with other brands.

It would indeed be a shortsighted public policy that would view intrabrand rather than interbrand competition as the paramount anti-trust objective. The temporary advantages that might accrue to the public by a regime of disorderly marketing under which the manufacturer's distributors cut each other's throats are more than outweighed by the resulting impairment of the manufacturer's ability to compete effectively against his rivals. First things come first.

Hopefully, after the remand in *White Motor*, both territorial and customer restrictions will continue to play their vital role in our competitive economy.⁵⁹ It is inconceivable that these time-honored ancillary restraints, after being sheltered by the rule of reason for decades, if not centuries, will suddenly be deemed to have a "pernicious effect on competition" and lacking in "any redeeming virtue."⁶⁰ This, to my mind, would be bad economics and bad law.⁶¹

It is well to remember that it was Mr. Justice Brandeis, and not counsel for the defense, who wrote,

the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.⁶²

I venture to suggest that it might not be amiss on the second go-round of *White Motor* for this bit of wisdom to be applied as well as quoted.

⁵⁸ See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795, 796 (1962).

⁵⁹ See Robinson, *supra* note 48, at 261.

⁶⁰ 372 U.S. at 281, quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

⁶¹ Subsequent to *White Motor*, the Seventh Circuit sustained territorial and customer restrictions in *Snap-On Tools Corp. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70861, at 78484, 78489 (7th Cir. July 30, 1963). Cf. *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110, 136 (D. Del. 1963).

⁶² *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

II. THE AFTERMATH OF BROWN SHOE

Last year I noted⁶³ that the Government's efforts to convert the Celler-Kefauver Act⁶⁴ into a per se statute had been squarely rebuffed in *Brown Shoe Co. v. United States*;⁶⁵ that the teaching of the case was that every merger is "unique"⁶⁶ and must be "functionally viewed, in the context of its particular industry;"⁶⁷ that while market shares are "the primary index of market power"⁶⁸ and "one of the most important factors to be considered,"⁶⁹ "only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger;"⁷⁰ that product and geographic markets are likewise to be appraised empirically, and must correspond to "'commercial realities,'"⁷¹ on the basis of a "pragmatic, factual approach . . . and not a formal, legalistic one;"⁷² that markets are not defined differently under Section 7 of the Clayton Act and Section 2 of the Sherman Act, but are defined "for antitrust purposes" generally;⁷³ and that, although the outer boundaries of a product market encompass substitutes which are reasonably interchangeable in use or for which there is cross-elasticity of demand, a determination of whether this outer market embraces submarkets requires consideration of many "practical indicia,"⁷⁴ including, but not limited to "peculiar characteristics and uses."⁷⁵

Following *Brown Shoe*, and consonant with its teaching that legality depends on the facts of each case, the district courts within the past year decided six section 7 cases on their merits: *United States v. Bliss & Laughlin, Inc.*;⁷⁶ *United States v. Continental Can Co.*;⁷⁷ *United States v. El Paso Gas Co.*;⁷⁸ *United States v. Aluminum Co. of*

⁶³ Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 433-41 (1962).

⁶⁴ Antimerger Act (Celler-Kefauver Act), 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

⁶⁵ 370 U.S. 294 (1962).

⁶⁶ *Id.* at 322 n.38.

⁶⁷ *Id.* at 321-22.

⁶⁸ *Id.* at 322 n.38.

⁶⁹ *Id.* at 343.

⁷⁰ *Id.* at 322 n.38.

⁷¹ *Id.* at 336, quoting *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958).

⁷² 370 U.S. at 336.

⁷³ *Id.* at 325.

⁷⁴ *Ibid.*

⁷⁵ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957) (*du Pont-General Motors*).

⁷⁶ TRADE REG. REP. (1963 Trade Cas.) ¶ 70734 (S.D. Cal. March 27, 1963).

⁷⁷ 217 F. Supp. 761 (S.D.N.Y. 1963).

⁷⁸ 1962 Trade Cas. ¶ 70571 (D. Utah 1962), *prob. juris. noted*, 373 U.S. 930 (1963).

America;⁷⁹ *United States v. Penn-Olin Chem. Co.*;⁸⁰ and *United States v. Lever Bros.*⁸¹ They involved mergers of every conceivable variety—horizontal,⁸² vertical,⁸³ conglomerate,⁸⁴ and even a joint venture.⁸⁵ And in each instance the merger was sustained on its facts.⁸⁶ It was not until the Supreme Court handed down its ruling in *Philadelphia Nat'l Bank*,⁸⁷ at the end of last term, that the Government finally snapped its losing streak.⁸⁸

⁷⁹ 214 F. Supp. 501 (N.D.N.Y. 1963).

⁸⁰ 217 F. Supp. 110 (D. Del. 1963).

⁸¹ 216 F. Supp. 887 (S.D.N.Y. 1963).

⁸² *United States v. Lever Bros.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *United States v. Aluminum Co. of America*, 214 F. Supp. 501 (N.D.N.Y. 1963); *United States v. Bliss & Laughlin, Inc.*, 1962 Trade Cas. ¶ 70292 (S.D. Cal. 1962), *adhered to*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70734 (S.D. Cal. March 27, 1963); *cf.* *United States v. El Paso Natural Gas Co.*, 1962 Trade Cas. ¶ 70571 (D. Utah 1962), *prob. juris. noted*, 373 U.S. 930 (1963).

⁸³ *United States v. Aluminum Co. of America*, *supra* note 82.

⁸⁴ *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963).

⁸⁵ *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110 (D. Del. 1963).

⁸⁶ These decisions underscore that the legality of a merger must be appraised in the light of the peculiar facts of the industry under consideration, and that mergers may be condemned only on the basis of demonstrable probabilities, not speculation or theory. For example, it is easy enough to allege that a conglomerate acquisition will result in a decisive competitive advantage by enabling the combined entity to offer a "full line." But the Government now knows that such allegations will not be accepted on faith without supporting evidence. See *United States v. Continental Can Co.*, 217 F. Supp. 761, 789-790 (S.D.N.Y. 1963). By the same token, if the elimination of potential competition is claimed as an anticompetitive effect, it will not be assumed without a factual demonstration that the merging companies would otherwise have become significant and effective competitors. See *United States v. Penn-Olin Chem. Co.*, *supra* note 85, at 123-32; *United States v. Continental Can Co.*, *supra* at 796, 798-99; *United States v. Aluminum Co. of America*, 214 F. Supp. 501, 519 (N.D.N.Y. 1963); *United States v. El Paso Natural Gas Co.*, 1962 Trade Cas. ¶ 70751, at 77300 (D. Utah 1962); *United States v. Bliss & Laughlin, Inc.*, 1962 Trade Cas. ¶ 70292, at 76170-71 (S.D. Cal. 1962), *adhered to*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70734, at 77907 (S.D. Cal. March 27, 1963). Or if the claim is made that the acquisition is likely to discourage new entry into an industry, the courts want something more tangible than the *ipse dixit* of government counsel. See *United States v. Penn-Olin Chem. Co.*, *supra* note 85, at 126-28; *United States v. Continental Can Co.*, *supra* at 789-90, 791-92; *United States v. Aluminum Co. of America*, *supra* at 513; *United States v. Bliss & Laughlin, Inc.*, *supra* at 76162, *adhered to*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70734, at 77907 (S.D. Cal. March 27, 1963).

⁸⁷ 374 U.S. 321 (1963).

⁸⁸ The Government, however, obtained preliminary injunctions preventing consummation of acquisitions in three section 7 cases: *United States v. Ingersoll-Rand Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70758 (W.D. Pa. April 11, 1963), *aff'd*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70802 (3d Cir. June 5, 1963); *United States v. Parents Magazine Enterprises*, 1962 Trade Cas. ¶ 70437 (N.D. Ill. 1963); *United States v. Aluminum Co. of America*, 1962 Trade Cas. ¶ 70419 (E.D. Mo. 1962). The *Parents Magazine* case, *supra*, has been resolved by the entry of a consent decree. *United States v. Parents Magazine Enterprises*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70649 (N.D. Ill. Jan. 28, 1963). In another section 7 case the court refused to grant a preliminary injunction against the acquisition. *United States v. FMC Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70826 (N.D. Cal. June 27, 1963), *appeal dismissed for lack of jurisdiction*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70860 (9th Cir. June 30, 1963), *aff'd*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70865 (U.S. Aug. 9, 1963) (Goldberg, J., in Chambers).

During the past year, the Federal Trade Commission held acquisitions unlawful in three cases, *Brillo Mfg. Co.*, TRADE REG. REP. ¶ 16543 (FTC July 31, 1963); *Luria Bros.*, TRADE REG. REP. ¶ 16299 (FTC Feb. 13, 1963); *Consolidated Foods Corp.*,

The startling thing about this latest decision was the majority's conclusion that bank mergers are covered by section 7 as well as the Sherman Act⁸⁹—not that the particular merger was unlawful once section 7 was held to apply. As Mr. Justice Harlan noted in his dissent, "[N]o one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court."⁹⁰ The aptness of this observation is apparent from the makeweight argument on section 7 that the Government advanced in its Jurisdictional Statement⁹¹ and Brief on the Merits,⁹² and from its steadfast refusal to argue orally the applicability of section 7 despite the Court's express invitation that it do so.⁹³ But once the Court held bank mergers cognizable under section 7,⁹⁴ and viewed the relevant market as commercial banking in the four-county Philadelphia metropolitan area in which the two merging banks had their offices,⁹⁵ the ultimate holding that their fusion was likely to lessen competition substantially came as no surprise. The facts were these.

TRADE REG. REP. ¶ 16182 (FTC Nov. 15, 1962), and has dismissed complaints in four others, Kaiser Indus. Corp., TRADE REG. REP. ¶ 16529 (FTC August 2, 1963); Dresser Industries, Inc., TRADE REG. REP. ¶ 16513 (FTC July 24, 1963); National Lead Co., TRADE REG. REP. ¶ 16513 (FTC July 24, 1963); Warner Co., TRADE REG. REP. ¶ 16405 (FTC May 15, 1963).

At the trial stage in the Commission, one hearing examiner found a § 7 violation, Permanente Cement Co., FTC Dkt. 7939 (Nov. 28, 1962), while examiners in two cases dismissed anti-merger complaints. National Tea Co., FTC Dkt. 7453 (April 5, 1963); Inland Container Corp., FTC Dkt. 7993 (Dec. 18, 1962).

At the appellate level, the Commission was sustained by the District of Columbia Circuit in Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962). The Commission had made findings that after Reynolds had acquired its customer, Arrow Brands, Inc., a converter of decorative aluminum foil for the florist trade, Arrow's sales jumped; sales of five of its seven competitors dropped sharply; some were practically forced out of the field; and others operated at substantial losses. Reynolds Metals Co., 56 F.T.C. 743, 775 (1960).

⁸⁹ United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 335-49 (1963). The unsoundness of this conclusion was exposed by Mr. Justice Harlan in his dissenting opinion (Stewart and Goldberg, JJ., concurring), and was the subject of critical comment by the author in an address delivered before the Fourth Circuit Annual Judicial Conference on June 28, 1963.

⁹⁰ *Id.* at 373.

⁹¹ Brief for Appellant, pp. 29-33.

⁹² *Id.* at 72-74.

⁹³ Transcript of Oral Argument (as reproduced by M. A. Schapiro & Co.), pp. 21, 59-60.

⁹⁴ Mr. Justice Harlan, joined by Mr. Justice Stewart, dissented on the ground that section 7 was not applicable to bank mergers. 374 U.S. at 373. Mr. Justice Goldberg in a separate memorandum opinion agreed fully with Mr. Justice Harlan's dissenting views as to the applicability of section 7, but cautioned that in his opinion there was a substantial Sherman Act issue involved. *Id.* at 396-97. Mr. Justice White took no part in the consideration or decision of the case.

⁹⁵ Before the Supreme Court, the defendants did not contest the district court's ruling that "commercial banking is a line of commerce." *Id.* at 335. Moreover, despite a finding to the contrary by the district court in their favor, they apparently accepted the four-county area as a section of the country within the meaning of section 7. Transcript of Oral Argument, pp. 57, 58, 69; 374 U.S. at 359 n.36.

Philadelphia National Bank (PNB), with assets of over \$1 billion, is the second largest bank in the Philadelphia area. Girard Trust Corn Exchange Bank, with assets of about \$¾ billion, is the third largest. If they merged, the resulting bank would rank first, controlling over 30% of the commercial bank business in the area; the two largest banks (PNB-Girard and First Pennsylvania) would control 59%, a 33% increase in concentration over the 44% share presently accounted for by the two leading banks; and four banks would have 78% of the business.⁹⁶ Furthermore, there had been "a definite trend toward concentration" in recent years with a large decline in the number of commercial banks⁹⁷—a trend that had been particularly pronounced in the four-county area, which had witnessed a decline in the number of commercial banks from 108 in 1947 to 42 at the present time.⁹⁸ Since 1950, PNB and Girard had themselves acquired nine and six independent banks, respectively.⁹⁹ Only one new bank had opened up in the area in a decade, and after ten years of operation it was still an inconsequential factor, with only one-third of one percent of the area's deposits.¹⁰⁰

Given these facts as to market share, structure, and history, the recent trend toward concentration in the commercial banking field, the role which PNB and Girard had played in this trend, and the lack of easy entry into the market, it is not difficult to understand why the Court enjoined the proposed merger.

At the inception of his discussion of the substantive issue, Mr. Justice Brennan pointed out that the *Philadelphia Bank* case presented "only a straightforward problem of application" of the section 7 test, as analyzed in *Brown Shoe*, to "particular facts."¹⁰¹ Later, he specifically recognized that whether a merger is likely to lessen competition substantially "is not the kind of question which is susceptible of a ready and precise answer in most cases," and that a prediction as to probable future competitive effects "is sound only if it is based upon a

⁹⁶ *Id.* at 330-31, 364-65 & n.40.

⁹⁷ *Id.* at 325-26. "[T]he number of commercial banks in the United States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1,601 independent banks which thus disappeared, 1,503, with combined total resources of well over \$25,000,000,000, disappeared as the result of mergers." *Ibid.*

⁹⁸ *Id.* at 331.

⁹⁹ *Ibid.* "[T]hese acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth, and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90%." *Ibid.*

¹⁰⁰ *Id.* at 367-68 n.44.

¹⁰¹ *Id.* at 355.

firm understanding of the structure of the relevant market.”¹⁰² At the same time, however, he cautioned against a search for “complex and elusive” economic data—what he termed “a too-broad economic investigation”—in “certain cases” in which a less elaborate factual inquiry would be consonant with the underlying congressional objective.¹⁰³ In such cases, he proposed what he conceived to be a simplified test of illegality:

[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.¹⁰⁴

Applying these criteria to the facts in *Philadelphia Bank*, the Court felt that the creation of a bank with a percentage command of 30% was “undue,” and that a 33% increase in concentration in an already heavily concentrated market was a “significant” increase.¹⁰⁵ This, of course, did not end the inquiry. It still remained to consider the defendants’ claims that the merger was not likely to have such anticompetitive effects.

One of the principal defense contentions was that, because commercial banking was subject to pervasive government regulation, the industry should not be held to the strict letter of the antitrust laws.¹⁰⁶ This argument was not merely rejected; it was turned against the defendants. Precisely because of its unique position as “a highly regulated industry critical to the nation’s welfare,” the maintenance of the free “play of competition” in that industry was deemed “not less important but more so.”¹⁰⁷ Mr. Justice Brennan elaborated on this thesis as follows:

If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business bor-

¹⁰² *Id.* at 362.

¹⁰³ *Id.* at 362-63.

¹⁰⁴ *Id.* at 363.

¹⁰⁵ *Id.* at 364-65. The defendants had argued “that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area.” *Id.* at 367. To this the Court replied: “In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating.” *Ibid.*

¹⁰⁶ *Id.* at 368.

¹⁰⁷ *Id.* at 372; *cf.* *Northern Pac. Ry. v. United States*, 356 U.S. 1, 12 (1958). The Court also stated: “There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical.” 374 U.S. at 369.

rower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-a-vis* larger businesses with which he competes. In this fashion, *concentration in banking accelerates concentration generally*.¹⁰⁸

The Court also made short shrift of the "affirmative justifications" for the merger offered by the defendants.¹⁰⁹ In answer to the contention that mergers were necessary to enable banks to follow their customers to the suburbs and retain their business, the Court recommended the alternative of opening new branches.¹¹⁰ As for the claim that an increased lending limit would enable PNB-Girard to compete for very large loans with big out-of-state banks, particularly those in New York, the Court responded that anticompetitive effects in one market cannot be justified by procompetitive consequences in another.¹¹¹ By the same token, the Court viewed as legally immaterial the argument that Philadelphia needed a larger bank in order to attract business and stimulate the area's economic development.¹¹²

Last year I warned that certain passages in Chief Justice Warren's opinion in *Brown Shoe* might be seized upon out of context to imply a sweep to the decision, which the opinion, taken as a whole, expressly negates.¹¹³ The same may be said about the *Philadelphia Bank* case. It would be a mistake to read Mr. Justice Brennan's language as having universal applicability to all or even most mergers. For one thing, by its very terms his formulation cannot apply to vertical or conglomerate acquisitions, since neither of these types "produces" a firm with an "undue percentage share of the relevant market" or "results in" any increase—much less a "significant increase"—in concentration. A

¹⁰⁸ 374 U.S. at 369-70. (Emphasis added.) The Court further noted:

[I]f the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation.

Id. at 372.

¹⁰⁹ *Id.* at 370.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* Otherwise, "the logical upshot would be that every firm in an industry could, without violating §7, embark on a series of mergers that would make it in the end as large as the industry leader." *Ibid.* This rejection of the concept of "countervailing power" is nothing new. See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 617-18 (S.D.N.Y. 1958); cf. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).

¹¹² A merger which results in the proscribed anticompetitive effect "is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371.

¹¹³ Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 455 n.199 (1962).

vertical merger by definition presupposes the purchase of a customer by a supplier or vice-versa, and does not by itself alter the market share of either or the degree of industrial concentration. A conglomerate involves diversification from one line of commerce into another, with no elimination of a competitor, but merely a substitution of one for another, and hence no concomitant change in market shares or concentration.¹¹⁴ It is clear, therefore, that the Court's formulation can be meaningful only in a horizontal acquisition case, and even then it does not serve to foreclose pertinent factual proof.

Take, for example, the word "undue." The same percentage share may be "undue" in one market setting and devoid of anti-competitive repercussions in another.¹¹⁵ How can a court make this value judgment unless it explores the industrial context in which the merger occurs—as, indeed, the Supreme Court itself did in *Philadelphia Bank*? A similar study is necessary in order to determine whether an increase in concentration is "significant." And even if a court satisfies itself that a particular horizontal merger satisfies these criteria, this is not the end of the case. As Mr. Justice Brennan made plain, the door is still open to show by other evidence that the challenged transaction is not likely to have the prohibited effects.

When all is said and done, the methodology suggested (but not practiced) by the Court in *Philadelphia Bank*, which of necessity has limited application to begin with, will probably save the courts and litigants precious little time in the trial of section 7 cases. In this field, where each merger concededly takes place in a unique competitive milieu, there is no escape from the wise admonition in *Brown Shoe* that the merger under attack must be "functionally viewed, in the context of its particular industry."¹¹⁶ Or, as Judge Dawson put it in *Lever Bros.*: "[T]he Clayton Act cannot be made effective by a doctrinaire approach to the problem of competition."¹¹⁷

Ever since the passage of the Celler-Kefauver Act, the Government has waged a continuing campaign for the adoption of a set of per se rules which would result in the prohibition of most mergers.¹¹⁸ In my writings on this subject, I have repeatedly pointed out that such

¹¹⁴ This is not to say that the acquiring company in a vertical or conglomerate case may not ultimately improve its market position in its own or in the acquired line. It may or may not. The point is that the acquisition itself effects no automatic change in market shares or concentration.

¹¹⁵ See Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 670-71 (1961).

¹¹⁶ *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962).

¹¹⁷ *United States v. Lever Bros.*, 216 F. Supp. 887, 898 (S.D.N.Y. 1963).

¹¹⁸ See, e.g., Brief for Appellee, p. 131, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Brown Shoe Co.*, 1956 Trade Cas. ¶68244, at 71113-14 (E.D. Mo. 1956); *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 561 (1953).

a mechanical application of section 7 defied the language of the statute, its legislative history, and applicable decisional law.¹¹⁹ Finally, in *Brown Shoe*, the Supreme Court authoritatively laid to rest the notion that mergers are fungible phenomena which can be tested mathematically without regard to any other factual inquiry. Taking the *Philadelphia Bank* decision in its entirety, the law still requires a showing, as a matter of fact, that the particular acquisition under attack is reasonably likely to have the forbidden competitive consequences.

III. FAIR TRADE

Except for discussing *Schwegmann Bros. v. Calvert Distillers Corp.*,¹²⁰ I have not recently reviewed the fluctuating and unstable jurisprudence of resale price maintenance. The lot of this ugly duckling of antitrust has not been made happier by euphemistically denominating vertical price fixing as fair trade or by branding violations as unfair competition. We have here a striking example of what happens to legislation when the courts disapprove of its underlying purpose.

Recently, Mr. Justice Black observed that, "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." Underlining the point, he added that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."¹²¹

These admonitions have been pointedly ignored both in determining the validity of fair trade statutes under various state constitutions and in interpreting the legislation itself. It is an interesting jurisprudential exercise to contrast the attitude of the courts and the

¹¹⁹ Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 433 (1962); Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 945 (1962); Handler, *Recent Developments in Merger Litigation*, in SOUTHWESTERN LEGAL FOUNDATION, THIRTEENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 277 (1962); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961); Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 375 (1960); Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843 (1959); Handler, *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 436 (1958); Handler, *The Aftermath of the duPont-General Motors Case*, in CCH ANTITRUST LAW SYMPOSIUM 104 (1958); HANDLER, ANTITRUST IN PERSPECTIVE 49-70 (1957); Address by Milton Handler, *Antitrust at the Crossroads*, The Association of General Counsel, Oct. 22, 1957; Handler, *Annual Review of Recent Antitrust Developments*, 12 RECORD OF N.Y.C.B.A. 411, 415 (1957); Handler, *Annual Antitrust Review*, 11 RECORD OF N.Y.C.B.A. 367, 381 (1956); Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record*, 7 MERCER L. REV. 279 (1956); Handler, *Annual Review of Antitrust Developments*, 10 RECORD OF N.Y.C.B.A. 332, 334 (1955); Handler, *Monopolies, Mergers and Markets—A New Focus*, in TRADE REGULATION SERIES No. 1, at 17, 28 (Timberg & Hoffmann eds. 1955); Handler, *Recent Antitrust Developments*, 9 RECORD OF N.Y.C.B.A. 171, 186 (1954).

¹²⁰ 341 U.S. 384 (1951).

¹²¹ Ferguson v. Skrupa, 372 U.S. 726, 729, 730 (1963).

Commission toward fair trade with their approach to the Robinson-Patman Act. Although both pieces of legislation have an anticompetitive orientation, each undercutting the policy of the Sherman Act, one is viewed with open hostility while the other is given a broad and sympathetic reading.

In a national economy such as ours, with fair trade statutes constitutionally inoperative against nonsigners in twenty states,¹²² with six states having no such laws at all,¹²³ and with the interstate mail order loophole permitting avoidance of fair trade restrictions by having title pass in a non-fair trade jurisdiction,¹²⁴ vertical price control is largely ineffectual. And whatever efficacy might otherwise remain has been undermined by a jesuitical construction of both the federal and state laws.

After the McGuire Act¹²⁵ remedied the damage done by *Schwegmann*, it was not long before the process of erosion was resumed on other fronts. McKesson & Robbins, Inc., was denied the right to fair trade drugs which it manufactured because it was also engaged in wholesaling in competition with its own customers.¹²⁶ The Supreme Court discerned horizontal implications in the challenged vertical arrangements which the McGuire Act did not shelter from the Sherman Act's prohibition against price fixing.

Hard upon the heels of *United States v. McKesson & Robbins, Inc.*, came *Esso Standard Oil Co. v. Secatore's, Inc.*,¹²⁷ in which Esso, though not engaged in retailing, was held to be in competition with a retail outlet for sales to commercial accounts. It made no difference that Esso did not function on the same distribution level as its customers and that it offered different services and facilities to the commercial trade. Furthermore, Esso was precluded from maintaining fair trade prices even with respect to sales to the ordinary

¹²² TRADE REG. REP. ¶6041. These states are: Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, Oklahoma, Oregon, South Carolina, Utah, Washington, West Virginia, and Wyoming. The Idaho Fair Trade Act has been declared unconstitutional by a lower court. *Bulova Watch Co. v. Albertson's, Inc.*, 1962 Trade Cas. ¶70516 (Idaho Dist. Ct. 1962). And the Hawaii Legislature recently enacted a bill removing the nonsigner provision from the Hawaii Act. TRADE REG. REP. Report Letter No. 90 (May 14, 1963).

¹²³ TRADE REG. REP. ¶6017. These states are: Alaska, Kansas, Missouri, Nebraska, Texas, and Vermont.

¹²⁴ *General Elec. Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir. 1957), *cert. denied*, 355 U.S. 824 (1957); see *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 240 F.2d 684 (4th Cir. 1957), *affirming* 140 F. Supp. 165 (D. Md. 1956); *Revere Camera Co. v. Masters Mail Order Co.*, 128 F. Supp. 457 (D. Md. 1955).

¹²⁵ 66 Stat. 632 (1952), 15 U.S.C. §45(a) (1958).

¹²⁶ *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

¹²⁷ 246 F.2d 17 (1st Cir.), *cert. denied*, 355 U.S. 834 (1957).

motorist, despite the fact that it did not compete with its customers for that business. In short, the disqualification was not limited to the narrow area of competition between the parties, but was absolute.

To avoid the effects of *McKesson & Robbins* and *Secatore's*, many trademark proprietors who might have been charged with competing with their customers in a narrow segment of their business, expressly limited the coverage of their resale price maintenance agreement to those areas which were indisputably noncompetitive.¹²⁸ Although a number of agreements containing these carve-out clauses have been sustained,¹²⁹ one was recently invalidated in New Jersey in *Texas Co. v. DiGaetano*.¹³⁰ The question was whether the carve-out rendered academic the claim of a retail service station dealer that he competed with his supplier for commercial consumer accounts, since the parties concededly were not in competition for retail sales subject to fair trade. The Appellate Division of the Superior Court pushed *Secatore's* one step further, despite cases to the contrary,¹³¹ and held that such extrinsic competition would constitute a complete bar to any fair trading between the parties under the McGuire Act.¹³² On appeal, the Supreme Court of New Jersey refrained from deciding this federal antitrust question. Instead, it rested its affirmance, *sua sponte*, on the ground that it would be unfair to enforce the carve-out because of what the court deemed to be its uncertain scope, though no such contention had been advanced by the defendant.¹³³

¹²⁸ See *Snap-On Tools Corp. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70861, at 78488 (7th Cir., July 30, 1963); *Parke, Davis & Co. v. Janel Sales Corp.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70849, at 78452 (S.D.N.Y. July 16, 1963); *Parke, Davis & Co. v. Rocket Drugs, Inc.*, 214 F. Supp. 937 (S.D.N.Y. 1963); *Mead Johnson & Co. v. Westchester Discount, Health & Vitamin Center, Inc.*, 212 F. Supp. 310 (E.D. Pa. 1962); *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544 (E.D. Pa. 1962), *aff'd*, 310 F.2d 737 (3d Cir. 1962), *cert. denied*, 372 U.S. 976 (1963); *Johnson & Johnson v. Janel Sales Corp.*, 192 F. Supp. 780 (S.D.N.Y. 1961); *Johnson & Johnson v. Apollo Sales, Inc.*, 192 F. Supp. 779 (S.D.N.Y. 1961); *General Elec. Co. v. Hess Bros.*, 155 F. Supp. 57 (E.D. Pa. 1957); *General Elec. Co. v. Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956); *General Elec. Co. v. Federal Employees' Distrib. Co.*, 45 Cal. App. 2d 891, 291 P.2d 942 (Sup. Ct. 1955); *Texas Co. v. Fakete*, 1961 Trade Cas. ¶ 69976 (Pa. C.P. 1960); *World Publishing Co. v. E. J. Korvette, Inc.*, 1959 Trade Cas. ¶ 69423 (N.Y. Sup. Ct. 1959).

¹²⁹ *E.g.*, *Snap-On Tools Corp. v. FTC*, *supra* note 128; *Parke, Davis & Co. v. Janel Sales Corp.*, *supra* note 128; *Parke, Davis & Co. v. Rocket Drugs, Inc.*, *supra* note 128; *Fiumara v. Texaco, Inc.*, *supra* note 128; *Johnson & Johnson v. Apollo Sales, Inc.*, *supra* note 128; *General Elec. Co. v. Hess Bros.*, *supra* note 128; *Texaco Co. v. Fakete*, *supra* note 128.

¹³⁰ 39 N.J. 120, 187 A.2d 721 (1963), *affirming* 71 N.J. Super. 413, 177 A.2d 273 (App. Div. 1962).

¹³¹ See cases cited note 129 *supra*. *Snap-On Tools Corp. v. FTC*, *Parke, Davis & Co. v. Janel Sales Corp.*, and *Parke, Davis & Co. v. Rocket Drugs, Inc.* were decided after *DiGaetano*.

¹³² 71 N.J. Super. 413, 177 A.2d 272 (App. Div. 1962).

¹³³ 39 N.J. 120, 187 A.2d 721 (1963).

Even more bizarre was what happened in Pennsylvania in *Gulf Oil Corp. v. Mays*.¹³⁴ The Pennsylvania Supreme Court held that in order to satisfy the statutory requirement that a fair-traded product be "in fair and open competition with commodities of the same general class," the plaintiff must prove that it has not engaged in a price-fixing conspiracy.¹³⁵ The fact that the defendant's answer expressly admitted the existence of fair and open competition was not enough in view of what the court conceived to be the overriding public interest in competitive pricing. If the decision were accepted at face value, its effect would be to convert a fair trade enforcement suit into a full-blown anti-trust proceeding in which the plaintiff has the burden of establishing not only his own innocence of any antitrust dereliction, but also the competitive health of his industry.¹³⁶

These and other judicial setbacks have once again led proponents of fair trade to seek legislative redress. In two states, a new approach has been devised to overcome the effects of adverse court decisions invalidating the nonsigner clause.¹³⁷ Both Virginia and Ohio have eliminated such clauses from their statutes and substituted a provision whereby purchase of trademarked goods with notice of the manufacturer's fair trade prices is deemed a contract to maintain those prices. Surprisingly enough, in view of the earlier invalidation of fair trade,

¹³⁴ 401 Pa. 413, 164 A.2d 656 (1960).

¹³⁵ In addition, the court stated that "it is incumbent upon the [plaintiff] . . . here to prove to the satisfaction of the court that it is not engaged in competition similar to that in *Secatore's Inc.* . . ." 401 Pa. at 420, 164 A.2d at 660.

¹³⁶ See *Gillette Co. v. White Cross Discount Centers, Inc.*, 1962 Trade Cas. ¶ 70481 (Pa. C.P. 1962) (court concluded that fair and open competition required a showing of "effective competition" and held that plaintiff's dominance of the razor blade market precluded such a finding). In other cases subsequent to *Mays*, its scope has not been fully explored. The Pennsylvania courts have been content to rest their holdings on the narrow ground that the evidence was insufficient to sustain plaintiff's burden of proving affirmatively the existence of fair and open competition. See *Gillette Co. v. Masters*, 408 Pa. 202, 182 A.2d 734 (1962) (stipulation that only issue for decision was effect of plaintiff's failure to obtain certificate of authority to do business cannot dispense with need to prove existence of fair and open competition); *Mead Johnson & Co. v. Breggar*, 410 Pa. 408, 189 A.2d 866 (1963) (injunction entered upon consent cannot be enforced without independent showing of fair and open competition); *Revlon, Inc. v. Kaufman Furniture Co.*, 1961 Trade Cas. ¶ 70161 (Pa. C.P. 1961) (fair and open competition must be established by fact and not by opinion or conclusion of a witness); cf. *Sinclair Ref. Co. v. Schwartz*, 398 Pa. 60, 157 A.2d 63 (1959) (court will not take judicial notice of the existence of fair and open competition). But in *Mead Johnson & Co. v. Martin Wholesale Distribs., Inc.*, 408 Pa. 12, 182 A.2d 741 (1962), the court, in holding for plaintiff, did not accord to *Mays* the breadth its language would suggest. There, the testimony of plaintiff's area sales manager regarding competing products satisfied the court that the statutory proof had been adduced. See also *Schering Corp. v. Martin Wholesale Distribs., Inc.*, 212 F. Supp. 325 (E.D. Pa. 1962); *Gillette Co. v. Warner Stores Co.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70859 (Pa. C.P. 1963).

While it is at least apparent that stipulations, admissions, consents, and waivers will not do to establish fair and open competition, it is less than clear what quantitative and qualitative elements of proof will satisfy the courts that plaintiff has affirmatively shown that its products are in fair and open competition.

¹³⁷ *Benrus Watch Co. v. Kirsch*, 198 Va. 94, 92 S.E.2d 384 (1955); *Union Carbide & Carbon Corp. v. Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958).

both enactments have been sustained by the highest courts of those states.¹³⁸

The halls of Congress have also echoed with reverberations of the resale price maintenance muddle. As fair trade was being weakened by the courts in the later 1950's, bills were introduced to reverse the trend. At first, the approach was direct—to establish fair trade on a nationwide basis.¹³⁹ The measures now pending in Congress are labelled "quality stabilization."¹⁴⁰ The words have changed, but the melody lingers on. The current bills establish the right of a trademark owner to retain his property right in his goods throughout subsequent transfers until they reach the ultimate consumer. The owner is authorized to revoke the right of any reseller to use his brand, name, or trademark if the reseller engages in bait advertising, sells below prices established by the owner, or misrepresents the goods with intent to deceive the public. The battle over fair trade thus continues unabated.

Whether vertical price fixing as sanctioned by fair trade or cognate legislation is economically sound or socially desirable can be debated endlessly, and it is not my purpose to engage in such a debate. There are many who view this legislation as basically antagonistic to the competitive principles underlying a free economy.¹⁴¹ On the other hand, forty-four state legislatures, the chosen instruments of the public, disagree.¹⁴² So has the Congress,¹⁴³ despite consistent opposition to fair trade by the executive branch.

¹³⁸ *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1960), *appeal dismissed*, 368 U.S. 4 (1961); *Hudson Distribs., Inc. v. Upjohn Co.*, 18 Ohio App. 2d 182, 176 N.E.2d 236 (1963). The constitutionality of the Ohio Act was upheld by a minority of 3 to 4, since the Ohio Constitution requires six votes to reverse a lower court decision which sustained the validity of a statute. Even stranger is the fact that prior to the *Hudson* decision, the Ohio Supreme Court had dismissed an appeal from a ruling which held the act unconstitutional, "for the reason that no debatable constitutional question is involved." *Mead Johnson & Co. v. Columbus Vitamin & Cosmetic Distribs., Inc.*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70782 (Ohio March 27, 1963).

¹³⁹ See, e.g., H.R. 10527, 85th Cong., 2d Sess. (1958).

¹⁴⁰ See, e.g., H.R. 3669, S. 774, 88th Cong., 1st Sess. (1963). The bills are substantially identical, the difference being that the House bill exempts sales of prescription drugs and medicines from its coverage while the Senate bill does not.

¹⁴¹ The very idea that a commercial entity may hold in one fettering price-fixing grasp all businessmen engaged in vending a certain product, just as a herdsman holds lassoed cattle on the plains, offends against the most elementary concept of a free and independent society. The Fair Trade Act is not only in derogation of the common law, it is in defiance of principles which the Federal government has on countless occasions enunciated in its anti-trust legislation and litigation. Hence, the Fair Trade Act must be construed strictly.

Mead Johnson & Co. v. Breggar, 410 Pa. 408, 415, 189 A.2d 866, 869 (1963); see *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* 149-54 (1955).

¹⁴² See TRADE REG. REP. ¶ 6017.

¹⁴³ Fair Resale Price Act (Miller-Tydings Act), 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958); Fair Trade Act (McGuire Act), 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958). It is interesting to note, however, that the District of Columbia, over which Congress has legislative jurisdiction, does not have a fair trade law.

The interesting question to ponder is the proper role of the judiciary in areas in which there is a divergence between the policy views of a judge and public opinion as reflected in legislation. Is the judge warranted in striking down or emasculating a statute on the basis of his personal predilections? Is he justified in giving a scriptural reading to legislation he dislikes, while readily supplying deficiencies in statutes he finds congenial? Should he search for loopholes destructive of the viability of a law in the one case, while ignoring gaps in the other which the lawmakers were unprepared or unwilling to fill? If sound construction requires that the inadvertent omission be remedied in the one instance, why not in the other? If construction limits the reach of a statute to the confines of its four corners in a law whose underlying policy is antithetical to the judge's beliefs, should there not be a like restraint against embroidering upon legislation where the statutory objectives earn the judge's plaudits?

In his dissent in the California-Arizona water dispute, Mr. Justice Douglas observed: The present case "will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature."¹⁴⁴ I wonder whether there are not many candidates among judicial opinions for this signal honor.

All of which brings me to the Robinson-Patman Act.

IV. ROBINSON-PATMAN

This past year has witnessed a further intensification of the Federal Trade Commission's relentless crusade against the "meeting competition" defense under the Robinson-Patman Act. Twelve years ago the Commission took the position in *Standard Oil Co. v. FTC*¹⁴⁵ that section 2(b)¹⁴⁶ was no defense at all when the price discrimination was likely to injure competition. The Supreme Court, however, held the defense to be absolute, asserting that the Commission's interpretation struck at "the heart of our national economic policy . . . [which] has been faith in the value of competition."¹⁴⁷ Having been rebuffed in this frontal assault, the Commission then proceeded to chip away at the defense piece by piece.

In the realm of promotional payments, it held the defense unavailable even though it concededly applied when the buyer received

¹⁴⁴ *Arizona v. California*, 373 U.S. 546, 628 (1963) (dissenting opinion).

¹⁴⁵ 340 U.S. 231, 241 (1951).

¹⁴⁶ Robinson-Patman Act §2(b), 49 Stat. 1526 (1936), 15 U.S.C. §13 (1958).

¹⁴⁷ 340 U.S. at 248.

promotional services or facilities instead of money.¹⁴⁸ The District of Columbia Circuit rejected this wooden reading of the statute, declaring that Congress "was not shadowboxing or indulging in fine semantic shadings."¹⁴⁹ Then the Commission ruled that a seller is not sheltered if he matched a competitor's price in a sale to a new, rather than an existing, customer.¹⁵⁰ This time the FTC was overturned by the Seventh Circuit on the ground that "competition for new customers would be stifled and monopoly would be fostered."¹⁵¹ Next, the Commission required that a seller affirmatively prove that he had reason to believe that the price he was meeting was a lawful price, rather than merely show that he had no reason to believe that the price was unlawful.¹⁵² The Fifth Circuit had previously rejected such a requirement because it would lead to "endless" inquiries into "collateral issues" and vitiate the defense,¹⁵³ and the Ninth Circuit has recently been called upon to decide the same question.¹⁵⁴

A few months ago, in *Forster Mfg. Co.*,¹⁵⁵ the Commission erected some new obstacles to meeting competition, which, if left standing by the courts, may well prove insurmountable. Chairman Dixon and Commissioner MacIntyre, the decisional majority, say that a seller must have prior knowledge of both the amount of the competitive

¹⁴⁸ Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 29195, at 37588 (FTC Oct. 31, 1960); accord, Henry Rosenfeld, Inc., 52 F.T.C. 1535, 1552 (1956); J. H. Filbert, Inc., 54 F.T.C. 359, 364 (1957); Admiral Corp., 55 F.T.C. 2078 (1959); Shulton, Inc., TRADE REG. REP. ¶ 15323, at 20295 (FTC July 25, 1961).

¹⁴⁹ Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 502 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962); accord, Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962); Delmar Constr. Co. v. Westinghouse Elec. Corp., 1961 Trade Cas. ¶ 69947 (S.D. Fla. 1961). The Commission subsequently acknowledged the availability of the defense in section 2(d) proceedings. J. A. Folger Co., TRADE REG. REP. ¶ 16078, at 20897 (FTC Sept. 18, 1962); Max Factor & Co., TRADE REG. REP. ¶ 16165 (FTC Nov. 10, 1962).

¹⁵⁰ Sunshine Biscuits, Inc., TRADE REG. REP. ¶ 15469, at 20346 (FTC 1961); see Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y. C.B.A. 411, 425 (1962).

¹⁵¹ Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48, 52 (7th Cir. 1962). The Commission, with Commissioner Elman dissenting and Commissioner Higginbotham not participating, announced that it would not petition for certiorari from the Seventh Circuit's decision in view of the Solicitor General's judgment that Supreme Court review was inappropriate. However, the Commission stated that it had not changed its position on the legal question, and, citing the Second Circuit's opinion in Standard Motor Prods., Inc. v. FTC, 265 F.2d 674 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959), it noted a split among the circuits. TRADE REG. REP. ¶ 50166 (Nov. 23, 1962).

¹⁵² Tri-Valley Packing Ass'n, TRADE REG. REP. ¶ 15893, at 20704 (FTC May 10, 1962); American Oil Co., TRADE REG. REP. ¶ 15961, at 20787 (FTC June 27, 1962); J. A. Folger Co., TRADE REG. REP. ¶ 16078, at 20898 (FTC Sept. 18, 1962); see Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C. B.A. 411, 424 (1962).

¹⁵³ Standard Oil Co. v. Brown, 238 F.2d 54, 58 n.7 (5th Cir. 1956).

¹⁵⁴ Tri-Valley Packing Ass'n, TRADE REG. REP. ¶ 15893 (FTC May 10, 1962), petition for review filed (9th Cir. July 13, 1963).

¹⁵⁵ TRADE REG. REP. ¶ 16243, at 21083 (FTC Jan. 3, 1963).

price and the identity of the bidder. It would not be enough if a purchasing agent told the seller the amount of the bid if he refused to divulge its source. It would not be enough if he disclosed the source but not the amount—even if the seller's hunch was right and he hit the competing price on the nose. This is certainly a far cry from the Second Circuit's understanding that the requisite good faith is demonstrated if the seller's offers "were either in fact no lower than that of its competitors, or that it did not mean them to be."¹⁵⁶

The *Forster* case goes even further. It holds that the section 2(b) defense may not be invoked unless there has been an actual offer by a competitor to the seller's customer. It is immaterial that the competitor's price is generally available to the trade; it must be "individually received" by each customer.¹⁵⁷ In other words, a seller is supposed to wait on the sideline until his competitor has raided a specific customer and then hope he gets there in time to match the lower competitive offer.

The Commission had earlier made the same contention to the Supreme Court in *FTC v. Sun Oil Co.*,¹⁵⁸ but the Court left the question open.¹⁵⁹ The narrow holding in *Sun Oil* was that section 2(b) does not protect a supplier who has granted a discriminatory price concession "to enable its customer to meet the lower price of a retail competitor who is unaided by his supplier."¹⁶⁰ Mr. Justice Goldberg made it clear that if the competitor were either "an integrated supplier-retailer" or if "it had received a price cut from its own supplier," a different case would be presented.¹⁶¹ It was undisputed that there was never a competitive offer to Sun Oil's favored customer. Hence, if the defense is indeed available to Sun Oil under either of the factual hypotheses left open by the Court, the Commission's "actual offer" theory would necessarily fall. On the other hand, if this theory is ultimately sustained, it will mean the end of meeting competition not only in the gasoline industry, but wherever distributors or dealers customarily handle the product of only one supplier.¹⁶² Needless to say,

¹⁵⁶ *Samuel H. Moss, Inc. v. FTC*, 155 F.2d 1016 (2d Cir. 1946), *modifying* 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

¹⁵⁷ *Forster Mfg. Co.*, TRADE REG. REP. ¶16243, at 21085 (FTC Jan. 3, 1963). *But cf. Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

¹⁵⁸ Brief for Appellant, p. 29, *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963).

¹⁵⁹ *FTC v. Sun Oil Co.*, 371 U.S. 505, 529 n.19 (1963).

¹⁶⁰ *Id.* at 522.

¹⁶¹ *Id.* at 512 n.7.

¹⁶² The economic facts of the gasoline industry are such that competition among suppliers exists principally at the retail level through dealers rather than at the wholesale level. Almost all retailers handle the gasoline of a single supplier and act as that supplier's conduit to the purchasing public. Thus, in *United States v. Sun Oil Co.*, 176 F. Supp. 715, 720 (E.D. Pa. 1959), the court noted that over 99% of the branded gasoline purchased in the relevant market was dispensed at stations carrying the products of a single supplier.

a lost sale is a lost sale. It makes no difference whether a customer fails to buy because he has gone over to a competitor or because his own sales have dried up due to a price reduction by that same competitor.

The Commission's theory is not only untenable as a matter of practical economics, but it runs counter to the very language of the statute. Section 2(b) speaks of meeting the equally low price of a competitor; it says nothing about offers directly to a customer. A publicly announced price of a competitor is his price.

This highlights the double standard employed by the Commission in its interpretation of the Robinson-Patman Act. When the words of the statute, read literally, stand in the way of a finding of violation, the Commission interpolates.¹⁶³ But when literalism can be used as a tool to condemn, the Commission trots out the plain meaning rule.¹⁶⁴

This inconsistent approach in construing the same statute is graphically illustrated by the Commission's recent decision in *Fred Meyer, Inc.*¹⁶⁵ There, it held that a wholesaler is "competing" with a retailer for purposes of the prohibition of section 2(d); whereas in *Sun Oil* it had held that a wholesaler is *not* a "competitor" of a retailer for purposes of the defense of section 2(b). And how did it reconcile such patent discrimination? By telling us that "the scope of 'competition' embraced by one of the Act's provisions is not neces-

¹⁶³ "Purchaser" and "customer" in §§ 2(a), (d), and (e) are stretched to include indirect, not just direct, buyers. *E.g.*, *American News Co. v. FTC*, 300 F.2d 104, 110 (2d Cir. 1962), *cert. denied*, 371 U.S. 824 (1962). The jurisdictional commerce requirements of the act are expanded like an India rubber band. *E.g.*, *J. H. Filbert, Inc.*, 54 F.T.C. 359, 370 (1957). *But cf.* *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963). "Commission, brokerage or other compensation" in § 2(c) is enlarged from usual brokerage arrangements to embrace commissions to salesmen. *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 544 (5th Cir. 1962). The words "for services rendered" are read out of § 2(c). *E.g.*, *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 610 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945). And "available" and "accorded" in §§ 2(d) and (e) are changed to mean "affirmatively offered." *E.g.*, *Fred Meyer, Inc.*, TRADE REG. REP. ¶ 16368, at 21212 (FTC March 29, 1963).

¹⁶⁴ This approach has been manifested particularly in proceedings under the brokerage and promotional allowance prohibitions of §§ 2(c), (d), and (e). There is no need to prove probable injury to competition in such cases, as is required in suits under § 2(a). *E.g.*, *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667, 677 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959). Nor would the FTC make available a cost justification defense in such cases. *Thomasville Chair Co. v. FTC*, TRADE REG. REP. ¶ 29510, at 37810 (FTC 1961), *rev'd*, 306 F.2d 541 (5th Cir. 1962); *FTC v. Simplicity Pattern Co.*, *supra*.

When all else fails, and the Commission finds that neither interpolation nor literalism will establish a violation, it invokes § 5 of the Federal Trade Commission Act to "supplement and bolster" the specific Robinson-Patman prohibitions by banning an otherwise lawful practice as an "unfair method of competition." *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); see Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75, 90 (1961); Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 944 (1962).

¹⁶⁵ TRADE REG. REP. ¶ 16368 (FTC March 29, 1963).

sarily controlling in the context of another section." ¹⁶⁶ In other words, "Heads I win, tails you lose."

Mr. Justice Frankfurter once said that in matters of statutory construction, "it makes a great deal of difference whether you start with an answer or with a problem." ¹⁶⁷ Perhaps this explains why the courts no longer hesitate to overturn the Commission's Robinson-Patman rulings. ¹⁶⁸ However, I cannot help but feel that it would be unwise to place total reliance on the courts to undo the serious mischief wrought by the Commission's construction of the Robinson-Patman Act. It hardly seems arguable that there cannot be healthy competition as long as the right to compete is so hedged with legal restrictions that a sales manager must keep one eye on his prospect and the other on the latest utterance of a decisional majority of the Commission. ¹⁶⁹ The time is long overdue for a comprehensive legislative revision of the Robinson-Patman Act. The public interest demands no less.

V. CONCLUSION

Within the next year, the Federal Trade Commission, the *enfant terrible* of trade regulation, will celebrate its fiftieth birthday; a year later the law bearing Senator Sherman's name will cross the three-quarter century mark. Compared with the antitrust enactments of our cousins abroad, who are paying us the flattering compliment of emulation, ¹⁷⁰ ours is a mature jurisprudence of great breadth and

¹⁶⁶ *Id.* at 21215.

¹⁶⁷ Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 526, 529 (1947).

¹⁶⁸ See *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962); *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48 (7th Cir. 1962); *Shulton, Inc. v. FTC*, 305 F.2d 36 (7th Cir. 1962); *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962); *Nuarc Co. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶70754 (7th Cir. April 19, 1963); *Central Retailer-Owned Grocers, Inc. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶70835 (7th Cir. July 2, 1963).

¹⁶⁹ See Address by Earl E. Pollock, *A Checklist on the Meeting Competition Defense*, Robinson-Patman Workshop, Chicago Bar Association, May 19, 1963.

¹⁷⁰ See, e.g., ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES (1962); FRIEDMANN, ANTITRUST LAWS: A COMPARATIVE SYMPOSIUM (1956); OBERDORFER, GLEISS & HIRSCH, COMMON MARKET CARTEL LAW (1963); UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW, COMPARATIVE ASPECTS OF RESTRICTIVE TRADE PRACTICES (1961); Becker, *Effect of the Common Market "Antitrust" Law on American Companies*, 8 ANTITRUST BULL. 3 (1963); Buxbaum, *Antitrust Regulation Within the European Economic Community*, 61 COLUM. L. REV. 402 (1961); Conant, *British Antitrust in Action*, 59 MICH. L. REV. 855 (1961); Kronstein, "Cartels" Under the New German Cartel Statute, 11 VAND. L. REV. 271 (1958); Linssen, *Antitrust Rules of the European Economic Community*, 18 RECORD OF N.Y.C.B.A. 289 (1963); Riesenfeld, *Antitrust Laws in the European Economic Community* (pts. 1-2), 50 CALIF. L. REV. 459, 829 (1962); Riesenfeld, *Legal Protection of Competition in France*, 48 CALIF. L. REV. 574 (1960); Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects* (pts. 1-2), 62 COLUM. L. REV. 1, 201 (1962); Stevens, *Experience and Experiment in the Legal Control of Competition in the United Kingdom*, 70 YALE L.J. 867 (1961).

depth. And yet there is no respite in the perplexing problems, substantive and procedural, which ceaselessly arise. The dynamism of antitrust provides a wealth of topics each year.

The center of gravity, of course, constantly shifts. One year, it is conscious parallelism; then intracorporate conspiracy; thereafter quantitative substantiality; the vagaries of unfair methods of competition; the enigmatic proscriptions of Robinson-Patman; and so on. While as a nation it is not uncommon for us to swing from one extreme to another, our temper and tradition are centrist and we generally end up in the middle of the road. The swings become shorter and shorter but the pendulum never comes to rest.

The black and white philosophy has been in the ascendancy since the war. But judges, like the rest of us, recoil from absolutes.¹⁷¹ Even in the case of tie-ins, for which almost no one has a kind word, the pressures of the facts compel the recognition of some exceptions.¹⁷² Business life will not stand still and neither can the laws which regulate it. A static and rigid jurisprudence which lacks resiliency, adaptability, and the capacity for growth contains the seed of its own destruction. In antitrust, the instrument of adaptation and change is the rule of reason as Brandeis envisaged it—a rule that considers “the facts peculiar to the business to which the restraint is applied”¹⁷³ and requires a “factual showing of illegality”¹⁷⁴ save where the restriction is inherently pernicious and incapable of economic justification.

When we consider the work of the great antitrust jurists, we find that Stone could be the author of both *Trenton Potteries*¹⁷⁵ and *Maple Flooring*;¹⁷⁶ Hughes of *Miles Medical*¹⁷⁷ and *Appalachian Coals*;¹⁷⁸ Taft of *Addyston Pipe*¹⁷⁹ and *General Electric*;¹⁸⁰

¹⁷¹ Compare *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) (*du Pont-General Motors*), with *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Compare *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), (*Standard Stations*), with *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Compare *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), with cases cited note 172 *infra*. Compare *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960), with *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962).

¹⁷² See *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961); *Baker v. Simmons Co.*, 307 F.2d 458 (1st Cir. 1962); *Susser v. Carvel Corp.*, 206 F. Supp. 636 (S.D.N.Y. 1962).

¹⁷³ *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

¹⁷⁴ *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931) (*Cracking Process*).

¹⁷⁵ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

¹⁷⁶ *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

¹⁷⁷ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

¹⁷⁸ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

¹⁷⁹ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

¹⁸⁰ *United States v. General Elec. Co.*, 272 U.S. 476 (1926).

Black of *Northern Pacific*¹⁸¹ and *Noerr*;¹⁸² and Douglas of *Socony-Vacuum*¹⁸³ and *White Motor*,¹⁸⁴ to cite a few examples. And their decisions—sometimes for the plaintiff and sometimes for the defendant—were right in each instance. Let us remember that antitrust is not monolithic. There is no party line. There are no mechanical or slide rule formulae. Antitrust is pragmatic. It is a jurisprudence of the facts—and if the facts are correctly found (a big if, to be sure), the results will take care of themselves.

As I see it, virtually all of us—counsel for the plaintiffs, counsel for the defense, the Commission, and the courts—believe in the competitive ideal which antitrust seeks to safeguard, as well as the basic principles of freedom which are its underpinning. Thus I continue to preach that we have good doctrines, good procedures, and efficient instruments of enforcement with which to attain the goals that command universal support¹⁸⁵—if we will only use them. I therefore conclude with the encouraging thought that the aberrations against which we properly fulminate will not endure, and that attempts of angry young men to find facile shortcuts will ultimately prove sterile and unavailing.

¹⁸¹ *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

¹⁸² *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

¹⁸³ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹⁸⁴ *White Motor Co. v. United States*, 372 U.S. 253 (1963).

¹⁸⁵ See Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 441 n.2 (1962), collecting citations of the published Annual Lectures; see also Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930 (1962); HANDLER, *ANTITRUST IN PERSPECTIVE* (1957).