

THE GOLDEN EGGS: A STUDY IN TRAGELAPHINE
ANATOMY

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PART II: THE F. T. C. VERSUS THE DELIVERED PRICE—A STUDY
IN TERRITORIAL ISOLATION *

“Iron and Steel Are Hard to Get, Hard to Get, Hard to Get,”
London Bridge, Traditional.

The first part of this study was concerned with the rate charged by the carrier, within the context of the Interstate Commerce Act; the discussion to follow will treat and contrast the problem of the shipper in passing those rates on to his customers, within the limits permissible under the applicable statutes, satellites in our system of anti-monopoly legislation.

In turning to this second phase of the problem we cannot focus our attention on a single key case, like *New York v. United States*,¹⁶⁶ as embodying the current law and reasoning of the Supreme Court on the point, and as illustrating the bases for criticism as well. In treating the law of delivered price systems, we are confronted with a complex of cases, not dominated by any single policy-forming decision, but each shedding a significant part of the light thrown off by the group: the *Syrup* cases,¹⁶⁷ the *Cement* case,¹⁶⁸ the *Steel Pipe* case,¹⁶⁹ the *Lead* case,¹⁷⁰ (the latter not fully developed), in the outer fringes of the constellation an auxiliary, the *Salt* case,¹⁷¹ and far in the background the *Steel* case.¹⁷² Not all these are Supreme Court decisions on delivered price systems, but each contributes to the aggregate effect of the complex.

Before proceeding to trace the development of these cases, however, it may be well to sketch the background of the problem of basing

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166. 331 U.S. 284 (1946).

167. *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726 (1945); *F.T.C. v. Staley Mfg. Co.*, 324 U.S. 746 (1945). See notes 233 and 240 *infra*.

168. *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948). See notes 223 and 254 *infra*.

169. 168 F.2d 175 (7th Cir. 1948), *aff'd per nec.*, 336 U.S. 956 (1949).

170. F.T.C. Doc. No. 4878.

171. *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948). See also *Standard Oil v. F.T.C.*, *infra* at note 238.

172. 8 F.T.C. 1 (1924). See note 210 *infra*.

point and other delivered price systems, as results of marketing policies and external circumstances, and as objects of governmental condemnation.

DELIVERED PRICE SYSTEMS: THE PROBLEM

The Impact of Regulation on Policy

The issue of the basing point cases concerns the legitimacy of a pricing policy used by a few industries whose peculiar marketing circumstances dictate a departure from standard pricing practices. These standard practices, the reference point by which deviational conduct in marketing is judged, operate in the simplest situation as a resultant vector of three basic principles which have largely influenced the development of commercial pricing policies in this Country:¹⁷³

- (1) Maximum return,¹⁷⁴
- (2) Uniformity,¹⁷⁵ and
- (3) Discount.¹⁷⁶

These have functioned uniformly within the classical marketing structure echeloned, as the simplest case, into manufacturer, wholesalers, and retailers, although they have been subject to some artificial variants, such as advertising,¹⁷⁷ or special auxiliary services granted by the

173. See the following for descriptions of the standard marketing pattern: DUDDY AND REVZAN, *MARKETING* (1947); MAYNARD, WEIDLER AND BECKMAN, *PRINCIPLES OF MARKETING* (3d ed. 1939); PHILLIPS AND DUNCAN, *MARKETING* (1948); PYLE, *MARKETING PRINCIPLES* (Rev. ed. 1936).

174. Starting from the premise that human nature, at least in the long run, will lead traders to try to exact the maximum profits from their enterprises, this basic principle, that sellers will charge what the market will bear, may be enunciated. The flower vendors along Boston's Federal Street follow this principle to the exclusion of the next one, raising their prices before holidays and on Fridays, and lowering them on rainy days or on a sliding scale from 4:30 to 5:30 p.m.

175. This, the fixed-price principle, is a phenomenon of the Western world (as distinct from that of Oriental commerce, where the art of individual bargaining has been developed to probably its highest peak) and is most highly developed as a principle of American commerce. See, e.g., NAT. IND. CONF. BOARD, *PUBLIC REGULATION OF COMPETITIVE PRACTICES* 69 (1929) (referred to also in McLAUGHLIN, *CASES ON THE FEDERAL ANTI TRUST LAWS* 424 n. 119 (2d ed. 1933)) on this point. The Oriental mores in this respect are illustrated nicely by the anecdotes in FULANAIN, HAJI RIKKAN, *MARSH ARAB* (1932), of which perhaps the most pointed is that of a Haji merchant in the Fertile Crescent area, where religious feelings run high, who utilized his status to assume to sell places in Paradise, and thus monopolized the available spending money in the market, only to lose it after a Christian merchant competitor, representing that he realized that there was no place for him in the Mohammedan paradise, purchased instead all of Hell, and then advertised that he had done so, and that there were consequently no places left there.

176. On the economic background of discounts and discount policies see PHILLIPS AND DUNCAN, *op. cit. supra* note 173, at 666-73; MAYNARD, WEIDLER AND BECKMAN, *op. cit. supra* note 173, at 518 (functional discounts) and 520 (quantity discounts); AGNEW AND HOUGHTON, *MARKETING POLICIES* c. 13 "*Price Policies and Trade Discounts*" (1941); Agnew, *Quantity Discount Survey*, Bull. Nat'l Ass'n Marketing Teachers (1934); DUDDY AND REVZAN, *op. cit. supra* note 173, at 509-11; see also Till, *The Fiction of the Quoted Price*, 4 *LAW & CONTEMP. PROB.* 363 (1937).

177. Used as an induction coil, or as a supercharger to raise performance above the merit base.

seller in connection with the articles sold.¹⁷⁸ The uncomplicated picture of a sale process divided up into three distinct phases, each one capable of description as a slight modification of the simplest marketing situation, and of the three as a trinity inseparable and indispensable, underlies much of Government thinking and writing, sacred and profane, in this field. Where these three marketing levels and the distinction between them break down, however, so also do some of the mechanisms set up to control prices and geared to this scheme of things. A good portion of the regulatory law dealing with prices rests on the premise that parallel sales lines are equidistant, and that other patterns are *a priori* subject to suspicion.¹⁷⁹ Extensions of functions by the manufacturer or retailer to eliminate the wholesaler, or to re-establish the primitive sale channel from the manufacturer direct to consumer—vertical integration¹⁸⁰ and variations in marketing organization and in the division of marketing functions, are alike viewed with hostility, which has been only partially formulated into specific regulations of trade practice. These specific, tangible regulations are, however, the starting point in measuring the development of the policies which came into conflict in the basing point cases.

It is obvious that governmental regulation will play a part in the determination of pricing policies in any area of commerce, to the extent that such regulation is present. The only variable is the degree of regulation, that is, the extent to which governmental regulation of marketing approaches governmental price fixing.

Historical examples of price control and price fixing go all the way back to the book of Genesis, in the career of Joseph in Egypt, and are found in later days in the time of Diocletian, in medieval Spain, and in nineteenth and twentieth century Europe, as well as in this country.¹⁸¹ These historical examples serve only to indicate that price fixing may be an inherent function of sovereignty, and not necessarily

178. Or special terms of purchase, which may serve either to raise or to lower the effective price charged.

179. Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 312 (1937); McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); see Kaylin, *Retailing Under the Patman Act* in BUSINESS AND THE ROBINSON-PATMAN ACT 132-141 (Werne ed. 1938); NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES xvi-xx, 3, 81 (3d ed. 1940). It may be suggested that this reasoning includes what Professor Fuller has called the "static pie" fallacy: *The Places and Uses of Jurisprudence*, 1 J. LEGAL EDUC. 495, 498 (1949).

180. See PHILLIPS AND DUNCAN, *op. cit. supra* note 173, c. 10, 12, 13, dealing with the chain store, the mail order house, and direct sale to consumers. The currently notorious problem is that raised by the anti-trust suit against the A. & P. chain stores. This case has not progressed far enough for complete development in the reports, but a succinct statement of the issues will be found in *Time*, Sept. 26, 1949.

181. See ROHLFING, CARTER, WEST & HERVEY, BUSINESS AND GOVERNMENT 511-512 (1938).

that it is a desirable function in a government system conceived under a presumption, however weak, of *laissez faire*.

Price controls in this country existed in Revolutionary times and shortly thereafter, and they may be supposed to have been assumed as a basis for government by the Founding Fathers, familiar as they were with practices in Colonial and Revolutionary times.¹⁸² However, price control disappeared, whether due to the indirect effect of provisions written into the Constitution¹⁸³ or to the gradual pervasion of *laissez faire* thinking inherent in the economic growth of a new country, hostile to such governmental curbs.¹⁸⁴ The only area in which during the first half and more of the nineteenth century price controls were commonly employed was in the field of transportation.¹⁸⁵

The modern law of price regulation in this country can be said to have its roots in the political upheavals of the last quarter of the nineteenth century, of which the Sherman Act¹⁸⁶ was one of the first major positive-law symptoms, if not exactly a calculated result. The Sherman Act was directed at monopolistic combinations. Restraint of trade was the antagonist, but free competition, the protagonist, was at least partially a political stalking horse, for the interests which were rampant at the time were not primarily the small business interests, frozen out by private curbs on competition, but consumer interests: labor elements, and, much more important at the time, farm elements, both concerned basically with consumer price levels. The Sherman Act, then, although a price-fixing act only in a limited sense, rested to a considerable extent on price regulation interest, and its enforcement often resulted in curbs on pricing policies, direct or indirect, and often involved litigation concerning the propriety of pricing policies, particularly those involving agreements or combinations supporting given policies.¹⁸⁷

182. An excellent historical treatment of the price control function in this country is McAllister, *Price Control by Law in the United States*, 4 LAW & CONTEMP. PROB. 273, 274-275 (1937).

183. No provision would seem directly to bar either state or Federal controls.

184. See McAllister, *op. cit. supra* note 182, at 276.

185. *Id.* at 276-280.

186. 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946). See generally on the application of this Act the Symposium, *The Sherman Anti-Trust Act and Its Enforcement*, 7 LAW & CONTEMP. PROB. No. 1 (1940). Cases discussing the application of anti-trust policy to pricing practices include F.T.C. v. Beech Nut Packing Co., 257 U.S. 441 (1927); United States v. General Electric Co., 272 U.S. 476 (1926); Frey & Son v. Cudahy Pkg. Co., 256 U.S. 208 (1921); United States v. Colgate Co., 250 U.S. 209 (1919). See also Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301 (1937).

187. See cases cited note 186 *supra*; see also Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925), discussed below, for an example of an attempted application of the Act to basing point pricing policies. The influence of combination on prices was a major point in the prosecution in Standard Oil Co. of New Jersey v.

If the Sherman Act was the grandfather of the statutory provisions supporting the recent basing point price cases, the Clayton Act,¹⁸⁸ a quarter of a century later, was the parent. The key provision of the Clayton Act is present in section 2, outlawing price discrimination which may substantially lessen competition or tend to create monopoly. It was under this section that the case law problems of two decades arose, including questions of propriety of trade discounts, quantity discounts, brokerage allowances, advertising allowances, and similar practices not tied to any individual discriminatory intent or to any monopolistic purpose.¹⁸⁹ There were specific savings clauses in the statute to cover some of these practices to the extent that they were reasonable,¹⁹⁰ and the result was a general rule of reason in the field of pricing practices somewhat similar to that adopted in connection with industrial combinations under the Sherman Act; that is, price differentials resulting from circumstances inherent in the commercial situation were not condemned by the courts, but the scope of the Act was considered to be limited to practices individually oppressive in character, or tied into schemes to reduce competition generally or to create monopoly generally.¹⁹¹

The Clayton Act was on the books for over two decades before the next major step was taken, in the form of the Robinson-Patman amendment.¹⁹² The wartime era¹⁹³ which followed each so closely served to allow the philosophy of these Acts to percolate into the con-

United States, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911) (both leading cases under the Act). See also *Continental Wallpaper Co. v. Voight & Co.*, 212 U.S. 227 (1909); *United States v. Addyston Steel Co.*, 175 U.S. 211 (1899).

188. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-26 (1946); 38 STAT. 740 (1914), 15 U.S.C. § 27 (1946).

189. See *I.B.M. Corp. v. United States*, 298 U.S. 131 (1936); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922) (monopoly of purchasers); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929) (price cutting); *Lord v. R.C.A.*, 24 F.2d 565. *aff'd*, 28 F.2d 257 (3d Cir.), *cert. denied*, 278 U.S. 648 (1928) (tie-in sales). Discounts are discussed, and authorities cited, in McAllister, *supra* note 182, at 312-315. A number of leading cases are collected and usefully annotated in OPPENHEIM, *CASES ON TRADE REGULATION* 918 (1936).

190. These are discussed in McAllister, *supra* note 182; Burns, *supra* note 186; and in McAllister, *Sales Policies and Price Discrimination Under the Clayton Act*, 41 YALE L.J. 518 (1932).

191. MacLachlan (né McLaughlin). See HANNA AND MACLACHLAN, *CASES AND MATERIAL ON CREDITORS' RIGHTS* viii n. 2 (4th ed. 1948). The older spelling is used herein as a matter of bibliographical convenience., *The Courts and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 410 (1937) (dealing primarily with Clayton Act interpretation). He predicts here a similar approach under the Robinson-Patman Act, as does NORWOOD, *TRADE PRACTICE AND PRICE LAW* 121 (1938): "We may safely banish any vague fear of hidden meanings and drastic decisions and apply the practical common sense measurements which have been used by the courts and by businessmen from time immemorial."

192. 49 STAT. 1256 (1914), 15 U.S.C. §§ 13, 21 (1946).

193. Commencing in April, 1917 and June, 1940 respectively.

sciousness of the country for some time before vigorous enforcement proceedings had to be commenced to prevent the legislation from becoming stale. Further, in the case of the Robinson-Patman Act, an additional impetus was provided by the wartime price controls, which were imposed to a far greater extent than during World War I. These ran interference for the Robinson-Patman Act in popularizing a sense of unfairness in price discrimination, a task which might otherwise have been uphill work for the Federal Trade Commission. This is not to say that O. P. A.¹⁹⁴ precedents influenced Supreme Court thinking as an extra-judicial factor in the recent price cases, but merely that price controls could be tightened to the full extent justified under the legislation with less disturbance of individual economic practices than would have been true had businessmen not been habituated to the same sort of thinking under the O. P. A.

The Robinson-Patman amendment added little substantively to the anti-price discrimination rules contained in the Clayton Act and in the Federal Trade Commission Act, considering the latter two acts in sum. The big difference stemmed from the fact that under the Clayton Act it was necessary to prove the monopolistic effect or the injury to competition resulting from any price discrimination shown, and possibly also to show combination or collusion rather than individual action in the discrimination complained of.¹⁹⁵ Under the Robinson-Patman Act the burden of proof was shifted to the defendant in any case in which price discrimination was shown, to negative injury to competition or to show that the discrimination should be found within one of the savings clauses relating to meeting competition and similar situations.¹⁹⁶ This presumption of injury to competition may also have had the effect of outlawing individual price discrimination, as distinct from that resulting from conspiracy, combinations, or collusion. The extent to which this suggestion can be borne out is probed in the study of the basing point cases.

In general evaluation of governmental programs in price fixing, price control, and lesser form of price regulation, it can be noted that the effectiveness of Governmental control depends on the degree of economic pressure it generates and not on the severity or breadth of the controls exercised. Where the controls run sharply counter to the economic interests of those engaged in the market, opposition will not

194. Under 56 STAT. 23 (1942), as amended, 50 U.S.C. § 901 (1946) and enabling executive orders.

195. Under Sec. 2 of the Act. A good discussion of the proof requirements is found in *Am. Can Co. v. Lagoda Canning Co.*, 44 F.2d 763 (7th Cir. 1930).

196. Including justifiable discounts. See cases cited note 189 *supra*. On this burden of proof as to quantity discounts, see *F.T.C. v. Morton Salt Co.*, 334 U.S. 37 (1948), and its discussion in Merrigan, *infra* notes 236, 275.

stop in the political arena, but may be expected to continue as an obstacle to enforcement. Areas of competition may shift, and this may achieve the Governmental purposes in many cases, although it is certainly not explicit in the case of the Federal Trade Commission that its prime objective is to protect the consumer by stimulating non-price competition, and it is not clear whether without additional controls emphasis on non-price competition is actually a boon to the consumer. The second big result, however, of price controls which set up business barriers between willing purchasers and willing sellers, is the black market, which was observed during the French Revolutionary period,¹⁹⁷ and again with almost equal intensity in the Western Europe of 1944-1947,¹⁹⁸ and which cannot be ascribed entirely to Latin mores or temperament, as experience in this Country has shown. It may, then, be said generally that price controls can be completely effective so long as they do not run directly counter to economic pressures, and perhaps partially so even beyond that point; but what can be achieved by the Government in shifting markets or in shifting wealth within this effective area is also strictly limited.

Basing Point Prices

In any price structure the question is likely to arise, whether transportation costs from seller to buyer shall be taken into account in fixing the price exacted. Shall one buyer be charged more than another, because it costs more to ship the product sold to him than to the other, or shall the same price be charged both irrespective of transportation costs? This question underlies the entire problem of delivered price systems, of which the basing point systems are the heated areas, not differing greatly otherwise from other such systems. The answer to these questions opens the door to such chambers of horrors as the cost accounting laboratory¹⁹⁹ and the temple of free competition. It also will be affected by the need, in enterprises of a marginal economic character, for a minimum level of profit, and on the other hand by the always-present American principle of uniformity of price.

In most industries the answer is simple: transportation is a negligible factor, not readily differentiated from other elements in marketing costs, even if distinct from production costs; it will be disregarded as a separate factor, and a uniform delivered price will be charged, to avoid unfortunate customer reaction to apparent discrimination and to

197. See ROHLFING, *op. cit. supra* note 181, at 522.

198. And later. See *Life*, Dec. 5, 1949, p. 131.

199. See p. 148 *supra*.

facilitate advertising on a nation-wide basis (if such advertising is to include price information).

In an industry whose production is very bulky or very heavy, so that transportation costs assume major significance in relation to cost of materials or expense of fabrication, then more serious attention must be given to this question, who shall pay the freight? If transportation is a significant factor in cost, then it becomes a significant factor in regulating competition, as it increases the area in which efficiency cannot serve to limit cost. In such an industry the producer who is close to the consumer is obviously at an advantage, granted free competition with no circumstantial, monopolistic, or legal restrictions on pricing policies. But consumers are usually not concentrated in one locality; while in such industries the producers are themselves closely located in areas nearby the source of weighty or bulky raw materials.²⁰⁰

To trace the development of pricing policy in such an industry it may be helpful to consider an illustrative hypothetical manufacturer, bearing in mind that this picture may involve some oversimplification. The *A* manufacturer, then, finds available three possible price policies in a new market area:

- (a) F. O. B. pricing,
- (b) Delivered pricing, or
- (c) Some other pricing policy.

F. O. B. pricing has proved ineffective as against competitors who are nearer the customer, because in the *A* industry transportation costs are a more important item than possible variations in quality between the product (a standard one) of *A* and of his competitors. *A* decides, then, to discard F. O. B. pricing, in order to meet competition while still maintaining uniformity. Delivered prices, on the other hand, have proved unfortunate for *A*'s predecessors, because they provided no profit margin sufficient to meet price-cutting competition, or because in areas where minimum profit ratios are expected. It is then determined to discard delivered pricing as *A*'s policy, and concluded that probably some other pricing policy must be adopted; but what other pricing policy?

The desired price must be one which meets the following requirements:

- (a) It must provide a sufficiently low price at distant points to enable *A* Company to meet competition;

200. See NATIONAL INDUSTRIAL CONFERENCE BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTISES 115, 116 n. 1 (3d ed. 1940). See also *id.* at 106.

(b) It must provide a sufficiently high price elsewhere to balance the loss from individual transactions at a great distance, in order that *A* may have a healthy large volume of steady customers at a sufficient over-all profit margin to sustain the *A* enterprise;

(c) It must be based on a simple formula, so that salesmen use it and customers understand it without resort to complex computations which would in themselves scare off customers and increase administration costs in correcting the errors of arithmetically salesmen;

(d) It must be demonstrably impartial, so that customers may understand that net price differentials are based on circumstances and not on personality; that is, it must render reasonable compliance with the principle of uniformity.

The answer which *A* actually developed in this situation, in many an industry in this country, was the so-called basing point price system, under which the price to any customer was the mill net price plus the freight from some pre-established point (the basing point but not necessarily the actual point of shipment) to the point of delivery.²⁰¹ This system, with its variations, met the requirements better than any other system tried.

Two matters should be especially noted in connection with the initial adoption by any industry of a basing point price system. First, any sale might involve a charge for freight in excess of or less than the actual freight from point of shipment to destination. The excess freight can be understood as coming under the principle of exacting all that the traffic will bear; but the willingness of industry to continue the absorption of freight, where the freight charge is less than the actual freight, must be specially explained. In industries of this sort, where fabrication expenses are slight and raw materials not a great item in relation to transportation, the entire unit cost is normally low. Consequently, a large volume of business must be maintained by any individual company in order to remain alive. This may make it worthwhile to keep on customers whose accounts do not show currently a net profit, in order to maintain a desirable over-all volume of operations and to provide a cushion in number of customers against anticipated business slumps. The problem of required volume of

201. On the economic backgrounds of basing point pricing see *id.* at 104, and materials cited; NATIONAL RECOVERY ADMINISTRATION, REPORT ON THE OPERATION OF THE BASING POINT SYSTEM IN THE IRON AND STEEL INDUSTRY, ch. 1 (1934). Means, *infra* note 207; Withrow, *infra* note 208, at 692. For a brief treatment of the problem of legality prior to the Robinson-Patman Act, see Note, 45 HARV. L. REV. 548 (1932).

business in an industry with a low production cost is a key factor in the adoption and maintenance of any basing point pricing system.²⁰² Second, basing point prices will prove economically feasible and desirable only under the special circumstances of the type case described above: that is, where the product to be marketed is standardized and has a great unit weight or unit bulk, and where raw material and fabrication costs are low enough that transportation costs form a significant portion of the total price to be charged. Such industries are perhaps not few enough to be excepted from general policy and treated on an *ad hoc* basis, but it may be worthy of inquiry whether they are too few to be considered typical, and too few to furnish a proper factual basis for the regulation of marketing policies generally. The limited area of incidence of the basing point price policy tends to specialize the proper scope of regulatory precedents derived from it, although of course regulations and decisions issued without limiting language must be considered as not subject to such limitation.

In the history of basing point prices in the United States three general types have come into use:²⁰³

(1) *The Single Basing Point Price System.* This system, sometimes called the "Pittsburgh-plus" system because of its close association with pricing policies in the steel industry, operates as follows:

Each seller selects a single point, the "basing point," from which all transportation charges will be figured in sales made by it. This basing point is typically the site of the principal shipping point operated by the seller; but it may be arbitrarily selected—for instance, the national center of population for the time being, or the geographical center of the country, might be selected and serve a similar purpose. If the seller operates more than one mill as a shipping point, then the result of the system will be that the transportation charged in sales involving shipment from non-basing-point mills may be either greater or less than the actual freight rates from the shipping mill to the buyer, and will only be by coincidence the same amount—as in the case of a sale to a buyer located midway between the basing point and the actual point of shipment. In case the freight charged, calculated from the basing point, is greater than the actual freight rate from the point of shipment to the destination, the amount of such excess is commonly referred to as "phantom freight". In case the freight actually charged

202. See PHILLIPS AND DUNCAN, *MARKETING* 674 (1948).

203. The flat delivered price, although considered by many to be outlawed along with basing point price systems, and although within the scope of some of the general language in the materials treating the field, is not properly speaking a basing point price system, and is therefore not listed here.

is less than the freight rates for the distance, the seller is said to "absorb" the amount of the differential in freight.

The second phase of the system arises in the case where a seller adopts as a basing point not one of its own mills, nor an arbitrary freight center, but a basing point already in use by a rival seller. In this case, if the seller has no mills at the basing point in use, all sales (except by coincidence) will involve freight absorption or phantom freight. In the steel industry, for example, when this system was in use steel companies charged (spontaneously or not) on sales from mills at any point to buyer at any point the freight which would be charged on a shipment of the same amount of steel from Pittsburgh to the buyer, irrespective of the actual locations involved in the sale.

(2) *Multiple Basing Point System.* The multiple basing point system differs from the single basing point system only in the fact that a number of basing points are designated in the industries using this system, and that freight charges on all sales are computed on the basis of the actual freight from the nearest basing point to the buyer. The results from a single basing point system might equally well be the results under a multiple basing point system, except of course that they would be on a smaller scale because of the reduction in distance differentials which could be involved. The difference would be only a difference of degree, depending on the number of basing points selected and their distribution throughout the country. As the number of basing points increases, of course, basing point effects disappear, as the system approaches as an asymptote a so-called mill-base system, which is actually F. O. B. pricing.

(3) *Zone Pricing.* Under this system flat delivered prices are established within zones, whose boundaries are usually arranged to compensate for differences in transportation costs involved. Systems under which the quoted price "applies east of the Mississippi", or under which prices vary west of the Rockies, or the system of the U. S. Post Office, under which the price charged for the shipping service on parcels increases by steps from one concentric band to another around the point of shipment, all are examples of zone pricing.²⁰⁴

Pressure for Change

The principal complaints against basing point prices encountered in the economic area of the marketing process covered, stemmed from

204. The last example, perhaps the most familiar, involving the familiar series of circles around the point of shipment, is the poorest example here because it does not involve merchandising activities. It may serve nonetheless as a useful illustration of the meaning of zone pricing.

consumers who were adversely affected by the phantom freight phenomenon.²⁰⁵ If an industry were concentrated in the Northeast, for example, the basing point selected would probably be in the same area. Then if a few isolated mills were developed in the South or in the Far West, consumers who bought from them would naturally object to the payment of freight charges computed from a Northeastern basing point rather than from their actual point of shipment. Some shipper complaints were also experienced in such areas, when it was found that proximity to the customer did not produce a price differential, and that non-price competition continued.²⁰⁶ Shipper complaints, however, were of course negligible, as no shipper would be obliged to employ such a system unless there were such calculated elements of coercion present within the industry as could be made a special subject of legal complaint. The existence of any shipper complaints at all in such a situation nevertheless serves as an indication that the inconveniences of the basing point system are largely balanced off as between shipper and customer. As between geographical areas it may be suggested that there is a similar balance-off of interests adversely affected, as, in the example used above, a Northeastern shipper could, using this price system, compete with one located close to the market only by a process of costly freight absorption which might far outweigh any advantage which could be derived otherwise from non-price competition, while the shipper close to the market would be able to locate there generally at the expense of greater raw material shipping costs than those in the areas to which the bulk of the industry had gravitated. These same interests could be cited as balancing off consumers close to and those distant from their source of supply.

There were in addition certain academic criticisms of the practice, by authorities ranging from such experts as Professor McLaughlin all the way downward,²⁰⁷ some of them based on pure economic factors and some based on suggestions of illegality or of offense to governmental policy.²⁰⁸

205. NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit. supra* note 200, at 113. See, for a general discussion of the controversies, articles by George, *Basing Points*, *Dun's Review*, Sept., p. 14, Oct., p. 11, Nov., p. 22, 1948; FTC, *THE BASING POINT PROBLEM* (1941). See also Note, *The Legality of Basing Point Price Systems*, 45 *HARV. L. REV.* 548 (1932).

206. NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit. supra* note 200, at 115. See also BURNS, *THE DECLINE OF COMPETITION*, ch. 7 (1936).

207. See McLaughlin, *The Courts and the Robinson-Patman Act*, 4 *LAW & CONTEMP. PROB.* 410, 412 (1937). The most vigorous critic of the system was FETTER, *MASQUERADE OF MONOPOLY* (1931). On this work, see McLaughlin, *Book Review*, 45 *HARV. L. REV.* 395 (1931), and Means, *Book Review*, 32 *COL. L. REV.* 389 (1932).

208. Withrow, *Basing Point and Freight-Zone Price Systems Under the Anti-Trust Laws*, 85 *U. OF PA. L. REV.* 690 (1937); FTC, *THE BASING POINT SYSTEM IN THE IRON AND STEEL INDUSTRY* (1934). On the simplicity-of-computation factor, an interesting parallel will be found in *Jewell Ridge Coal Co. v. Local #6167, UMW*,

The following effects of the practice have been cited as indicating its general undesirability: ²⁰⁹

First, that it indicated some degree of monopoly in the control of the goods to be sold under this system.

Second, that discrimination among buyers does result from it, even though there is no personal element and it is entirely arbitrary and geographical.

Third, that buyers under the system are subject to unfair uncertainty in being required to formulate business policy on the basis of artificial pricing systems subject by the same arbitrary action to change. As this factor in turn influences the buyer's selection of plant location, calculation of market, and pricing policies for his own product, considerable hazard is envisioned under it.

Fourth, that price competition at the basing point, or in the entire selling industry, is reduced or eliminated by the existence of this system, whether it arises calculatedly (which is considered likely) or spontaneously or haphazardly.

Fifth, that there is some tendency under this system to encourage rather than to discourage wasteful cross-haulage, because of the difficulty of separating freight absorption factors from others in the determination by shippers to accept or to reject a potential customer. That this is true can easily be seen, at least in the case where a market is maintained at a loss in order to provide a cushion against a future general business slump.

For these reasons, at least, the Federal Trade Commission inaugurated a campaign against basing point prices soon after the passage of the Clayton Act, and pursued this campaign in the face of several judicial reverses until what appears to be a fairly complete victory was gained by 1948.

HISTORY OF THE BASING POINT LITIGATION

Pittsburgh Plus. The opening gun of the Federal Trade Commission's Thirty Years' War against basing point prices was fired with

325 U.S. 161 (1945), dealing with computation of labor rates, as complicated by the portal-to-portal element. In Justice Murphy's opinion the question is left open as to "the validity of agreements whereby, in a bona fide attempt to avoid complex difficulties of computation, travel time is averaged or fixed at an arbitrary figure, and underground miners are paid on that basis rather than according to their individual travel time."

^{209.} NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit. supra* note 200, at 111; Withrow, *supra* note 208, at 691. See also authorities cited notes 205-208 *supra*.

the institution of proceedings under the Clayton Act against the U. S. Steel Corporation and other steel companies shortly after World War I.²¹⁰ The Clayton Act had been on the books since 1914, but it was not until after the War that the Federal Trade Commission had gathered enough momentum in its own operations, or that the implications of the Clayton Act had been sufficiently studied, for a project of such magnitude as an attack on the steel price system prevalent throughout this country.

The Pittsburgh-Plus system consisted basically of the use of Pittsburgh as a basing point for computation of transportation in quoting prices for semi-finished rolled steel products to any buyer, even though the actual shipment might be made from the Chicago area, from Duluth, or from Birmingham rather than from the basing point, Pittsburgh. A fixed differential was added to the Pittsburgh base price in the case of shipments from Birmingham, and certain products were excepted from the general system, tending to reduce its impact in the Chicago area.

The Federal Trade Commission contended that this system amounted to discrimination under the Clayton Act because of the phantom freight and freight absorption involved in it; that is, that to absorb freight of one buyer and to exact phantom freight from another is discrimination; and that a tendency towards identical bids of different sellers in Government contract negotiations and similar cases also resulted from the system.

The U. S. Steel case resulted in a cease-and-desist order of the Federal Trade Commission in 1924, based on a finding that the Pittsburgh-Plus system was both a violation of Section 2 of the Clayton Act and "an unfair method of competition" under Section 5 of the Federal Trade Commission Act.²¹¹ There was no court fight on the basis of the F. T. C. order, and the U. S. Steel Company did not even file a court appeal until more than a decade later, when it was compelled to do so to save its rights.²¹² A public statement was issued by the defendants promising to comply with the order in so far as it was practicable to do so,²¹³ and the truce thus joined brought active hostilities on this particular area of the front to a standstill. The situation remained static until finally the position of the steel industry was bypassed by the success of the F. T. C. in the *Cement* salient.

210. U.S. Steel Corp., 8 F.T.C. 1 (1924). The best description of this case is in Withrow, *supra* note 208, at 692, 710.

211. *Ibid.*

212. Under the Wheeler-Lea Act, 52 STAT. 111 (1938), 15 U.S.C. § 45 (1946).

213. OPPENHEIM, *The Basing Point Price System*, CASES ON TRADE REGULATION 964 (1936), emphasizes the steel case and outlines this history. See also Withrow, *supra* note 208, at 711, and Note, 45 HARV. L. REV. 548 (1932).

What the steel industry actually did under the 1924 F. T. C. order was to convert to the multiple basing point system,²¹⁴ which action was sanctioned by default by the F. T. C. until the passage of the Robinson-Patman Act a decade later. The basing point established by the industry under the new system varied depending on the precise product, so that there was one set of basing points for wire products, another for tubes, and still another for ingots or sheet products. Under the operation of this system it was found that prices remained close to those which would have been charged under the original Pittsburgh-Plus system, so that under a different pricing procedure the original price levels remained.²¹⁵

Some wonder has been expressed at the Commission's failure to follow up its initial results in the steel industry case more vigorously,²¹⁶ but it seems that some light might be shed on this by considering the fate the Commission met on other fronts of the basing-point price battle in the decade following the first steel case.

Tempered Steel. The Federal Trade Commission, under the statutory authority it enjoyed prior to 1936, might have anticipated success in a basing point price case on one of several grounds: that a price-fixing conspiracy existed, that a monopolistic control of prices was exercised, that the system was employed as a means of unfair competition, or that this system was inherently illegal as necessarily involving one of the other grounds mentioned. Two cases decided under the Sherman Act shortly after the first U. S. Steel case effectively ruled out the latter as a possible ground of success in the Commission's control of basing point pricing. In *Maple Floor Mfrs' Ass'n v. U. S.*²¹⁷ and *Cement Mfrs' Protective Ass'n v. U. S.*,²¹⁸ both decided in 1925, the rule of reason generally adopted as a yardstick for judging questions under the Sherman Act²¹⁹ was applied to the use of the basing point price system, with the result that the mere existence or use of a basing point price system was held to be unobjectionable under that act in the absence of collusion.

214. Withrow, *supra* note 208, at 711.

215. Or sometimes higher levels. *Id.* at 712; Note, 45 HARV. L. REV. 548, 551 (1932).

216. *E.g.*, Withrow, *supra* note 208, at 712.

217. 268 U.S. 563 (1925).

218. 268 U.S. 588 (1925).

219. On the "rule of reason" generally, see Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179 (1932); McLAUGHLIN, *CASES ON THE FEDERAL ANTI-TRUST LAWS OF THE U.S.* 215 n. 51 (1933). The rule stems from Chief Justice White's opinion in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). McLaughlin, *The Courts and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 410 (1937) finds a similar approach under the Clayton Act, and predicted (*pro tunc*) the same attitude under the then new Robinson-Patman Act. See note 191, *supra*. For the application in the two cases under discussion, see Withrow, *supra* note 208, at 697. It is true that

Several other cases consolidated the net effect of these two decisions,²²⁰ and dictum from a lower court indicated that the same reasoning would probably apply in a Clayton Act proceeding as well as in one brought, like these cases, under the Sherman Act.²²¹ Though there had been no express determination under the Clayton Act, it appeared that under both acts mere non-collusive use of the basing system was not objectionable and that the court considered that each case was a matter for *ad hoc* determination. The Commission's next attempt was to secure legislation which would more directly attack these practices. It was still convinced of the soundness of the objections it had urged against the system, even in the face of various judicial rebuffs.

The Legislative Attack. The economic legislation of 1933 marked the close of an era in Federal Trade Commission work, as the National Recovery Act, in particular, amounted to a moratorium on all Sherman and Clayton Act prosecution, and established a framework for official Governmental sanction of all sorts of monopolistic combinations, in the midst of which minor examples of impersonal discrimination in pricing policies would be very small potatoes.²²² Again, as the N. R. A. passed, the Robinson-Patman Act was already *en ventre Congressi*, and reorientation of Federal Trade Commission policy on prices necessarily awaited its passage.

The Robinson-Patman Act itself presented no basing point price issue in its passage, for it was advertised and debated primarily as an anti-chain store measure designed to prevent local loss pricing by large chain stores as an unfair means of competition.²²³ As a sideshow, however, to the main question, the basing point price problem was raised, and the history of this legislation gives some indication, in combination

in the *Maple Flooring* case the single basing point was close to all shipping points, thus involving minimal amounts of phantom freight or freight absorption, 268 U.S. at 571, but in the *Cement* case this was not true, and in both cases the court gave attention to the administrative and economic justification for individual adoption of the system. Thus the court was not relying on any *de minimis* factor.

220. See Withrow, *supra* note 208, at 701; OPPENHEIM, *op. cit. supra* note 213, at 972.

221. See *United States v. Corn Products Ref. Co.*, 234 Fed. 964, 994 (S.D. N.Y. 1916) (L. Hand, J.).

222. See OPPENHEIM, *op. cit. supra* note 213, at 967. The definitive official discussion of the N.R.A. program is the REPORT OF THE PRESIDENT'S COMMITTEE OF INDUSTRIAL ANALYSIS ON THE N.R.A. (1937), which makes this point in its discussion starting at p. 216.

223. See McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 n. 1 (1937). A discussion not entirely from an open viewpoint of the legislative history of this Act is Sammons, *Half the Verdict Is in on the Patman Act in BUSINESS AND THE ROBINSON-PATMAN ACT* 99 (Werne ed. 1938) (a chrestomathy, mostly of reprinted materials better cited from the original source). See also in the same collection at 152-171, Judkins, *Trade Associations and the Recent "Price Control" Legislation*. See also generally ZORN and FELDMAN, *BUSINESS AND THE NEW PRICE LAWS* (1937). See also *History of the Robinson-Patman Act, F.T.C.*, App. 9 to TOULMIN, *TRADE AGREEMENTS AND THE ANTI-TRUST LAWS* (1937).

with other legislative attempts, of Congressional attitudes toward the Federal Trade Commission campaign against basing points.

First, it was attempted by F. T. C. representatives in Congress to eliminate in the Robinson-Patman Act its repetition of the Clayton Act qualifications permitting sellers to lower their prices to meet competition. This attempt failed and the proviso was put in the Robinson-Patman Act in substantially the same form as in the original Clayton Act.²²⁴

Second, it was attempted in the Robinson-Patman Act to outlaw all pricing policies producing varying mill nets to the seller. This provision, looking toward F. O. B. pricing practices, was also defeated, the judiciary committee of the House of Representatives specifically concluding that the bill would not pass if it were included.²²⁵

Third, after the Robinson-Patman Act, an attempt was made to pass an "anti-cross-haul" bill, requiring F. O. B. pricing and thus eliminating basing point systems. This bill also failed to pass.²²⁶

Fourth, the Temporary National Economic Committee in its final report suggested the outlawing of basing point prices by Congress, but Congress ignored this suggestion even in the face of its repetition by the Federal Trade Commission on two subsequent occasions.²²⁷

Thus concluded a legislative history in which the reluctance of Congress to pass any curbs on basing point price systems as such was made especially clear. But under the Robinson-Patman Act itself the Federal Trade Commission soon launched a new attack against basing point prices in several of the principal industries using them, charging the collusive use of these systems in some cases, but also in others testing out the possibility that the Robinson-Patman Act reached individual non-collusive use of these prices as well as basing point price combinations of producers. This latest attack over the course of a five-year period proved largely successful.

The Court Battle: Second Phase. The present law on basing point prices rests partly on a few recent cases dealing with alleged conspiracies to use basing point systems as a type of price fixing combination. In another more significant group of cases, however, the issue of the fundamental illegality of this system was developed ultimately

224. H.R. 8442, 74th Cong., 2d Sess. (1936); H.R. 10486, 74th Cong., 2d Sess. (1936); 80 CONG. REC. 8223 (1936). See Head, *The Basing Point Cases*, 26 HARV. BUS. REV. 641, 644 (1948).

225. 80 CONG. REC. 8223-4, 8226-7 (1936).

226. S. 4055, 74th Cong., 2d Sess. (1936); Head, *supra* note 224, at 644.

227. Report of the T.N.E.C. (1941) at 33; Head, *supra* note 224, at 644-5.

on the assumption that no conspiracy was involved, and so there is available at least some law on the policy issue.

The important conspiracy cases involved the salt and paper industries; the first included disclaimers of criticism of independent competitive price policies of any type,²²⁸ and this position is supported by language in other cases.²²⁹ In the *Paper* case,²³⁰ however, the language of the court deviates considerably from this position, and indicates that the result that a basing point price system is inherently bad might have been reached even without the *Syrup*, *Cement* and *Steel Pipe* cases on the ground that a showing of the use of a basing point system carries with it a conclusive showing of conspiracy as well: that is, that the use of basing point prices is *per se* conspiracy.²³¹

Under the Robinson-Patman Act, starting in 1937, 1938, and 1939, a number of complaints were brought against different industries using basing point prices, charging that even their individual use involved a discrimination outlawed by the Robinson-Patman Act.²³² Out of these complaints came three leading cases, the *Syrup* case,²³³ the *Cement* case,²³⁴ and the *Steel Pipe* case,²³⁵ which contained the framework of present Supreme Court law on basing point prices.

The *Syrup* case held that individual use of a single basing point price system is illegal discrimination under the Robinson-Patman Act, because of the phantom freight involved in the system. The *Cement* case necessarily involved only collusive action to employ basing point prices, but is more important for the dictum in the opinion relating to individual action in the absence of agreement. The piece added to the framework by this dictum is that freight absorption, as well as phantom freight, is, as a consistent result of a multiple basing point system, a violation of the Robinson-Patman Act. The *Steel Pipe* case provides a decision to match the important dictum in the *Cement* case, as a part of the Commission's order there specifically forbade any individual price system other than a uniform mill net system.

228. Salt Producers' Ass'n v. F.T.C., 134 F.2d 354 (7th Cir. 1943).

229. See, e.g., Milk Can Inst. v. F.T.C., 152 F.2d 478 (7th Cir. 1946).

230. Allied Paper Mills v. F.T.C., 168 F.2d 600 (7th Cir. 1948).

231. See Head, *supra* note 224, at 654.

232. The net effect of this statute, of course, lay not in making unlawful what had been previously lawful, but in dispensing with the necessity for proof of one of the essential elements of the case, injury to competition.

233. Corn Products Refining Co. v. F.T.C., 324 U.S. 726 (1945); F.T.C. v. Staley Mfg. Co., 324 U.S. 746 (1945).

234. F.T.C. v. Cement Institute, 333 U.S. 683 (1948).

235. Triangle Conduit Co. v. F.T.C., 168 F.2d 175 (7th Cir. 1948), *aff'd, per nec.*, 336 U.S. 956 (1949). (The "Rigid Steel Conduit" case.)

Collateral decisions fill in the chinks in the structure in these cases: in *F. T. C. v. Morton Salt Company*²³⁶ the lack of need for an affirmative showing of a reduction of competition under the Robinson-Patman Act is emphasized. In the *National Lead* case the Commission has attacked zone pricing, and perhaps by implication even uniform delivered prices;²³⁷ and in the *Standard Oil* case it is indicated that even a good faith effort to meet a competitor's price will not save a system otherwise illegal.²³⁸ But the nub of the matter is in the *Syrup*, *Cement*, and *Steel Pipe* cases, so far as the basic illegality of the system is concerned, for the other decisions merely supply collateral details. Some attention will be given, then, to the reasoning of the Court in the *Syrup*, and *Cement* cases, as embodying the key thinking on economic policy relating to delivered prices.

ANALYSIS OF THE *Syrup* AND *Cement* OPINIONS

The *Syrup* case²³⁹ was really two separate proceedings by the F. T. C., one brought against the Corn Products Refining Company, and the other brought against the Staley Manufacturing Company. Both respondents were manufacturers of glucose (corn) syrup and their principal customers for large shipments were candy manufacturers. Both employed single basing point price systems. In both cases the Commission found the systems employed to be unlawful discriminations under Section 2 (a) of the Clayton Act as amended by the Robinson-Patman Act, and issued cease-and-desist orders against such violations. The Seventh Circuit Court of Appeals sustained the order in the *Corn Products* case and set it aside in the *Staley* case,²⁴⁰ the distinction between the two being obscure and a matter of divided opinion.²⁴¹ On certiorari the Supreme Court upheld the Commission in both cases.

The bulk of the spadework was accomplished in the *Corn Products* case, the points decided there being in summary as follows:

236. 334 U.S. 37 (1948). See a discussion of this case in Merrigan, *Delivered Pricing and Quantity Discounts*, 5 LOYOLA L. REV. 18, 51-56 (1949).

237. *Supra* note 170. See Merrigan, *supra* note 236, at 45; Head, *supra* note 224, at 647.

238. *Standard Oil Co. v. F.T.C.*, 173 F.2d 210 (7th Cir. 1949); 49 COL. L. REV. 863 (1949); 62 HARV. L. REV. 1249 (1949). This decision goes sufficiently far that even Administration thinking is not unified on it, and the Department of Justice and the F.T.C. appear to have split in their views on this point: *Business Week*, Jan. 14, 1950, p. 15.

239. *Corn Products Refining Co. v. F.T.C. and F.T.C. v. Staley Mfg. Co.*, *supra*, note 233.

240. 144 F.2d 211 (7th Cir. 1944) (*Corn Products*); 144 F.2d 221 (7th Cir. 1944) (*Staley*).

241. One judge in the latter case rested his opinion on the proof of an affirmative defense by the respondent. See *infra*.

a. A basing point price system, as it includes phantom freight or freight absorption on different shipments, constitutes a violation of the amended Clayton Act as a price discrimination.²⁴²

b. The prohibition against price discrimination applies even though the different purchasers involved are situated in different localities rather than at the same delivery point.²⁴³

c. The *Maple Flooring* case and the first *Cement* case do not establish the legality of basing point systems under the Clayton Act, as those were actually decided under the Sherman Act and not under the Clayton Act.²⁴⁴

d. The *Maple Flooring* and first *Cement* cases are also distinguishable on the ground that in the former freight variances were trivial, and in the latter a multiple basing point price system was involved.²⁴⁵

e. The legislative action in rejecting the bill outlawing basing point price systems does not restrict the scope of the Clayton Act, as the bill rejected would have required f. o. b. pricing and would have prohibited all uniform delivered prices.²⁴⁶

In the *Staley* case Chief Justice Stone, who wrote the opinions in both cases, relied largely on the *Corn Products* case as deciding the basic illegality of the basing point price system,²⁴⁷ and devoted his attention principally to the attempted defense that the Staley Company adopted the system "in good faith to meet competition," under one of the savings clauses in Section 2 of the Clayton Act. It was found that the respondent had not met the burden, placed upon it by the Robinson-Patman Act, of proving that its pricing system was justified, the Court noting that what the respondent had done was not to make individual basing point sales, or to absorb freight in individual cases, but rather to adopt a whole system which in its nature involves price discrimination.²⁴⁸ The Court inserted an admonitory qualification that there would be no discrimination in uniform delivered prices at all points of delivery, and that this decision also failed to cover freight absorption to meet competitors' prices.²⁴⁹

242. *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726, 732-3 (1945).

243. *Id.* at 734.

244. *Id.* at 735.

245. *Ibid.*

246. *Id.* at 734. The remaining points in the *Corn Products* case related to weight of evidence, the scope of the requirement of possible injury to competition, and the inferences properly drawn by the F.T.C. from the evidence received.

247. *F.T.C. v. Staley Mfg. Co.*, 324 U.S. 746, 750-1 (1945).

248. *Id.* at 753-7.

249. *Id.* at 757.

The evil in the system adopted by the Staley Co. was that under it prices charged might sometimes be higher than competitors' prices, rather than as low or lower, and that insofar as phantom freight was charged to produce such a higher price the system was not within the savings clause. It further appeared, however, from the tenor of the opinion, that even if the system involved only freight absorption it did not come within the savings clause if "slavishly followed" as a system rather than consisting of isolated instances of price reduction to meet competition.²⁵⁰

The Court thus abolished the weight of much of the dictum in the *Maple Flooring* and first *Cement* cases, and ignored, except for two brief disclaimers, the implication of the *Syrup* cases as to the validity of other delivered price systems. The statement of the Court that it found it unnecessary to decide the validity of multiple basing point systems,²⁵¹ and the statement that uniform delivered prices are valid as not involving discrimination, pass over the hidden Government premise of the Commission's argument in the *Syrup* cases that a pricing system must be judged as discriminatory or not on the question of uniformity of mill net return: *i.e.*, uniformity of delivered price less transportation charged. It is this which renders phantom freight and freight absorption illegal, if anything expressed in the Commission's argument does, for the only other result consistent with the validity of uniform delivered prices and the invalidity of basing point prices is the invalidity of f. o. b. pricing. Either transportation charges are a part of the price for purposes of the Clayton Act or they are not; it cannot be argued both ways.²⁵²

Certainly the *Syrup* cases marked the biggest single step in the outlawing of basing point prices, but this was not the step announced by the Court; rather, it was the step involved in the compelling similarities between the system here condemned and the systems here specifically approved or specifically distinguished. For the combined rule of these cases, that any systematic rather than desultory (individually justified) use of a system was discriminatory because of the incidence of phantom freight or freight absorption, provided a tremen-

250. *Id.* at 754-5.

251. *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726, 735 (1945).

252. An escape from this problem, not expressly adopted by the Court, would permit the seller to determine whether transportation charges are to be included in his price or not, and then require him to be uniform either in his mill price or in his delivered price. It is questionable whether the legislative history and the interpretation of the Clayton Act and the Robinson-Patman Act would support this position without carrying with it the validation of a uniformly applied compromise system such as a basing point system. Certainly so far as economic effect is concerned, the overall purport of the Clayton Act must cover uniform delivered prices if it covers any departure from f.o.b. pricing.

dously satisfactory premise for the Commission in the arguments it was to construct in the *Cement* case. The Commission was justified to a considerable extent in taking the view that the way had been cleared for the battle against other delivered price systems.²⁵³

The opinion in the *Cement* case,²⁵⁴ aside from some discussion dealing with the purely procedural issues which were raised, may be divided into two main portions. It had been contended before the circuit court of appeals by the F. T. C. that basing point pricing systems involve collusion *per se*, and that hence multiple basing point price systems are illegal if followed even on an individual basis.²⁵⁵ After losing the case in the circuit court of appeals, the Commission argued that its order applied only to collusive action and not to individual use of such pricing systems, and hence that the case should be determined on the basis of a finding of conspiracy.²⁵⁶ The Supreme Court's first point was that the Commission was correct in its position that the order related only to conspiracy and that a conspiracy to use a multiple basing point pricing system is illegal.²⁵⁷ The second part of the Supreme Court's opinion is directed to the question, whether the multiple basing point pricing system would have been illegal if there had been no element of conspiracy involved. This portion of the opinion would seem to be dictum, but it nevertheless lays down the limits which, confirmed in the *Steel Pipe* case, establish current Court doctrine on delivered prices.²⁵⁸

On this latter point, *i.e.*, the basic illegality of the basing point price system in absence of conspiracy, the Court rested its conclusion on the *Syrup* cases, saying that their combined effect was "to forbid the adoption . . . of any basing point pricing system".²⁵⁹ This is certainly not inconsistent with the decisions in the *Syrup* cases, which upheld the F. T. C. orders involved, nor with the general language of those cases, which meticulously refrained from specifying that the systems in use were, as they were, single basing point systems; but it is difficult to reconcile with the statement in the *Syrup* cases that the

253. See Business Week, *Basing Point Decisions*, April 28, 1945, p. 5, and *Basing Point Pricing Under Fire*, May 5, 1945, p. 22.

254. F.T.C. v. Cement Institute, 333 U.S. 683 (1948).

255. See Aetna Portland Cement Co. v. F.T.C., 157 F.2d 533, 558 (7th Cir. 1946). The F.T.C. decision itself was as to at least one count in terms of combination: 37 F.T.C. 87 (1943).

256. See the extracts of argument, 92 L. Ed. at 1016-1018, including the point that "The court below misapprehended the meaning . . . of the . . . order," p. 1018, and the stress placed on "combination" and "conspiracy" throughout. See also Head, *supra* note 224, at 648.

257. F.T.C. v. Cement Institute, 333 U.S. 683, 720 (1948).

258. This is not, of course, to say that the *Steel Pipe* case was actually decided in advance, but merely that some very strong clues were given as to what the Court's position would be in the latter case as a matter of consistency in language.

259. 333 U.S. at 723.

Court need not decide there whether the basing point system used in the cement industry is permissible under the Robinson-Patman Act.²⁶⁰

No other serious objection can be raised to that part of the reasoning of the Court in the *Cement* case which bears on the central pricing-policy problem except that so far as the *Cement* case was concerned it was, by the Court's own admission, dictum. The opinion is closely reasoned under its premises, which appear to be as follows:

a. Any basing point price system involves normally both phantom freight and freight absorption, and this is as much true of multiple basing point systems as of the single basing point system.²⁶¹

b. Phantom freight and freight absorption result in discrimination among purchasers, as prices must for the purposes of this Act be calculated at the mill of the seller.²⁶² (Here is the weakest point in this case, so far as the premises supporting it are concerned.)

c. There is nothing in the legislative history of the acts under which the F. T. C. brought this proceeding which is inconsistent with the conclusion that basing point price systems are illegal.²⁶³

d. The previously decided *Syrup* cases, read together, establish the position of this Court that such systems are illegal.²⁶⁴

e. There is nothing in the procedure followed by the Commission, or in the opinions formed and expressed in advance by individual members privately and by the Commission officially on the legality of these price systems, which denied the respondents the fairness required by the due process clause.²⁶⁵

f. The findings of the Commission on the maintenance of the basing point system in this case, and the evidence supporting the findings, were adequate.²⁶⁶

On the conspiracy point one difficulty arises which is probably inherent in the Federal law of conspiracy rather than in the judicial reasoning of this particular case, but which is exceptionable here as elsewhere. Some companies contended that they should be given special consideration because of proof of differences between their practices

260. *Supra* note 251.

261. 333 U.S. at 723-4.

262. *Id.* at 725-6.

263. *Id.* at 724. (Relying on the *Syrup* cases.)

264. *Id.* at 723.

265. *Id.* at 700-703.

266. *Id.* at 709-720.

and those of other defendants. The Court said that this merely indicated that "some respondents were more active and influential in the combination than were others, and that some companies probably unwillingly abandoned competitive practices and entered into the combination."²⁶⁷ Though some defendants had not participated in all the steps of the conspiracy, they were held equally responsible, as members of the Cement Institute.²⁶⁸

The Court, however, did mention a point which would seem to go far in meeting the argument of these defendants: that evidence showed "that the delivered prices of these respondents, like those of all the other respondents, were, with rare exceptions, identical with the delivered prices of all their competitors".²⁶⁹ If the essential element in the price system is the price actually charged, and not the method of reaching it, then this point would seem sufficient to establish the case, if, indeed, individual rather than collusive use of the basing point system would suffice to sustain the charge, although perhaps not otherwise. Even in conspiracy cases this point would seem to go far in justifying inferences of submerged collusive relationships.

On the sufficiency of the evidence to support the findings, the reasoning of the Court is unobjectionable if we overlook the reliance on feel rather than on concrete testimony. The administrative "expert feel" concept plays a part in the language of the Court that "we are persuaded that the Commission's long and close examination of the question it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practise—that kind of practice which, if left alone, 'destroys competition and establishes monopoly'."²⁷⁰ Again the Court said, "we cannot say that the Commission is wrong in concluding that the delivered-price system . . . would result in complete destruction of competition and the establishment of monopoly . . ." ²⁷¹ in terms strongly reminiscent of the Dobson Rule ²⁷² and its tendency in application toward findings of administrative infallibility on questions of law.

267. *Id.* at 718-19.

268. *Id.* at 719.

269. *Ibid.*

270. *Id.* at 720. On the importance of maintenance of competition even against the effects of conditions in a given industry, note the Court's references to the Sugar Institute cases: "The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price makes it the more important that such opportunities as may exist for fair competition should not be impaired." 333 U.S. at 715. No reason is stated here, and without further discussion of the problems of standardized-product industries the statement appears unduly pontifical.

271. *Id.* at 720-1.

272. *Dobson v. Comm'r*, and comment thereon, *supra* note 121.

Mr. Justice Burton's dissent²⁷³ pointed out that the majority opinion involved a repudiation of the factual basis on which the case had proceeded in the lower court, and failed to answer, because of this repudiation, the question actually presented by the appeal.

" . . . this Court today has held not only that the Commission found the existence of the combination as charged, but that such finding is sufficiently supported by evidence in the record. This Court accordingly has applied the law of the case to a set of facts which includes a combination. . . . The resulting effect is that the Court below has held that without such a combination there was not the alleged violation . . . yet on the other hand, this Court has held that including such a combination, there was a violation. . . . This Court, therefore, has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination. . . ."²⁷⁴

Although the dissenting justice did not stress the point, what he here said involves a characterization of all that the majority said relating to individual non-collusive activity as dictum.

With the position of the Court on basing point prices as of the *Cement* decision fairly well established, the next objective is to examine the effect of the decision, legally and economically.

THE EFFECT OF THE BASING POINT CASES

An apparent feeling of outrage has taken hold of businessmen since the *Cement* case. A tremendous flood of criticism has appeared in business literature, as well as in legal periodicals.²⁷⁵ Many of those

273. Justices Douglas and Jackson took no part in the *Cement* cases, but their absence cannot be taken as affecting the outcome; even though Jackson's concurrence in the result of the *Syrup* cases was somewhat ambiguous and might indicate that he would draw a line between those cases and the *Cement* case, at most it would seem that the absent justices were "paired" in this case.

274. 333 U.S. at 731-3.

275. There is an excellent note by Blaxter, *Delivered Prices and the Cement Institute Decision: A Suggestion for Legislative Treatment*, 10 U. OF PITT. L. REV. 67 (1948), and a more extended discussion in an article by Merrigan, *Delivered Pricing and Quantity Discounts*, 5 LOYOLA L. REV. 18 (1949), which also discusses the *Syrup* cases. See also Head, *Validity Under the Robinson-Patman Act of a Uniform Delivered Price of One Seller*, 31 MINN. L. REV. 599 (1947); Hilder, *The Attack Upon Delivered Price Systems*, 14 GEO. WASH. L. REV. 397 (1946). Supporting the result of the cases are two articles by Wooden, of counsel in the FTC in the cases: *The Defense of Delivered Price Systems*, 15 GEO. WASH. L. REV. 1 (1946), and *Validity Under the Robinson-Patman Act of a Uniform Delivered Price of One Seller*, 32 MINN. L. REV. 129 (1948), as well as a note, *Basing Point Pricing and Anti-Trust Policy*, 55 YALE L.J. 558 (1946). A discussion without a clear thesis pro or con is Edwards, *Delivered Prices: Doing Business Under the Present Law*, 47 MICH. L. REV. 743 (1949). See also, more recently, Smithies, *Economic Consequences of the Basing Point Decisions*, 63 HARV. L. REV. 308 (1949), and a symposium, *Delivered Pricing*, 15 LAW & CONTEMP. PROB. NO. 2 (1950). Among comments in business literature are Head, *The Basing Point Cases*, 26 HARV. BUS. REV. 656 (1948); Bliss,

who have written have been frankly speaking from an advocate's point of view, and this has, of course, reduced the objectivity of their treatment,²⁷⁶ much of which appears to reflect the heated nature of the policy debate now being waged in legislative halls and elsewhere. From the discussions available, a number of specific points emerge by way of criticism and otherwise.

Disregard of legislative intent. The most serious objection to the decision, as judicial action, would seem to be that the Court disregarded the intent²⁷⁷ of Congress in the matter of basing point price curbs, and was thus legislating, not interstitially, but on a frolic of its own.²⁷⁸ The Court disclaimed this, saying that the language of Congress did not amount to legislative approval of basing point prices, and that it did not affect the previous meaning of existing legislation,²⁷⁹ but as the

Some Field Notes on Freight Absorption, 26 HARV. BUS. REV. 656 (1948); Foy, *The Essentials of the Steel Producer's Right to Compete* (address before the 1948 Economic Institute, United States Chamber of Commerce, Dec. 9, 1948), making a point of inconsistency in the approach of the FTC, itself; Fortune, Sept. 1948, p. 73. As a further symptom of the reaction, in the 1949 session of Congress remedial legislation was proposed by Senator Johnson, S. 236, 81st Cong., 1st Sess. (1949), see the N.Y. Times, Jan. 4, 1949, p. 27 Cols. 2-3; and semi-remedial and clarifying legislation proposed by Senator Myers, S. 1008, 81st Cong., 1st Sess. (1949) (popularly known as the O'Mahoney Bill); see Time, June 13, 1948, p. 88, col. 3. On other legislative proposals see Merrigan, *supra* at 49-51.

276. A striking example of this is the debate which was carried on, *supra* note 275, by Mr. Wooden and Mr. Hilder concerning the soundness of the *Syrup* decisions. There is an old saw about more heat than light being generated by certain types of debate; this seems applicable to these discussions. Mr. Wooden, for example, rejoins to Mr. Hilder's argument in one of his articles by taking each of the latter's propositions separately, quoting them, and then stating an opposite conclusion, without analysis or evaluation, as a complete snub. See, e.g., *The Defense of Delivered Price Systems*, 15 GEO. WASH. L. REV. 1, at 20 (1946): "Mr. Hilder concedes that delivered prices which make due allowances for differences in delivery cost are not discriminatory, that this is a reasonable interpretation of the statute, and that 'to this extent there should be no quarrel with the Commission's due allowance argument' (p. 417). He objects, however, to the converse as a non sequitur. Unless the converse be true, we would have a condition where not only the delivered prices are lawful which make due allowance for differences in delivery cost but also delivered prices which do not make such allowance, in which event it would seem impossible to have unlawful discrimination in delivered prices at all."

And also at page 5: "To contend that the system does not produce the discriminations, as the article does at page 401, is in conflict with the concession at page 419 that it does produce identical delivered prices. For it is the identity of delivered prices at various places that automatically reflects the systematic variation in mill-net prices of the respective sellers which constitutes the discrimination. Moreover, it is a logical impossibility to consider the legal status of discriminatory prices without considering whatever it is that causes or accounts for them. The assumption that the same prices would or could exist without the system has nothing to support it. Proponents of delivered price systems are concerned with more basic matter than that of mere convenience in accomplishing what would be the result anyway."

The propriety of such "discrimination" goes to the main issue of the argument, so this is equivalent to saying, "If he is right, than I am wrong"; to which a suitable rebuttal might be, "Q.E.D."

277. Or "intendment," as it is called by the Court. 333 U.S. 683, 702 (1948).

278. See Blaxter, *supra* note 275, at 71; Head, *supra* note 275, *passim*.

279. 333 U.S. 683, at 692-3 and 724 (1948); see also *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 737 (1945).

cases were brought by the Commission under the Robinson-Patman Act and decided under that Act it would seem that the Court was primarily bound by the scope of that legislation, unless it wished to articulate a reliance on the meaning of the unamended Clayton Act. In matching these decisions with the Robinson-Patman Act, it seems that a rather distinct departure from legislative instructions can be made out, in view of the express and repeated Congressional refusal to include basing point prices within the legislative pattern.

One or two counter-arguments might be advanced, based on the fact that the disregard of legislative intent, if any there was, consisted of a decision not contrary to the letter of the statute, but inconsistent with expressions of the legislators who were concerned with the passage of the statute, and with the refusal to pass other statutes.

It might be urged, first, that the Court's interpretation of the statute may not properly take into consideration such matters as legislative hearings, floor debates, and other statements of legislators, but that a rule something like the parol evidence rule limits the process of statutory interpretation, so that the letter of the statute is the sole governing criterion as to the "intent" of the legislature. These are deep waters, and it is not desired here to compare subjective and objective standards of statutory interpretation generally, although it may be suggested that the objective standard can easily be carried to a point of absurdity.²⁸⁰ Against this it can only be urged that evidence of actual legislative intent is plentiful and explicit, and that at least as to the statutes which were proposed and not passed, the objective test fails altogether; for there the only evidence goes to explain the lack of any statute at all, rather than the meaning of an existing statute.

The Failure to Produce the Desired Effect. Considering the net economic effect of the basing point cases, the question is raised, whether the decisions will actually foster competition—as a phase of the statutory policy—as they are intended.²⁸¹ This question may be ap-

280. Cf. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949) as to the omission of the word, "not," from the statutory text, and, at 625, as to the difference between lay and legal statutory interpretation. There is precedent for the use of the objective standard in price policy legislation. See, e.g., *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245 (1929). This decision is called "correction of error" in McLaughlin, *The Courts and The Robinson-Patman Act: Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 412 (1937), thus joining in the criticism of the use of legislative history in interpretation of the Clayton Act in *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923); and in *National Biscuit Co. v. FTC*, 299 Fed. 733 (2d Cir. 1924), *cert. denied*, 266 U.S. 613 (1924). See on the last two cases, Note, 38 HARV. L. REV. 103 (1924). The Court did, however, in the *Syrup* cases, purport to look behind the words of the statute. E.g., *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 752 (1945); so justification in the *Van Camp* case cannot necessarily be relied on.

281. See *supra* note 275, Head, at 653; Blaxter, at 72; Foy, at 2; Edwards, at 745.

proached from several angles. First, it may be suggested that the industries in which basing point prices are likely to rise initially will be just those which, because of their size, the large capital investments involved in manufacturing and other matters mentioned above, are not adapted to the most free competition under any regulatory system. Assuming that this is not an insuperable difficulty, however, it still remains to ask whether a clear criterion has been established for determining whether competition exists to a desirable degree, and for determining how to restore it where it has disappeared.

The confusion of criteria established here is shown in the failure to draw a clear distinction between basing point prices and delivered prices. Is mill net the standard of price? If it is, then what about the validity of a uniform delivered price? If it is not, then what is the test? Can it be a problem of individual harm? If so, then why must freight absorption necessarily invalidate a pricing policy?

So far as the effect of the decision on a uniform delivered price is concerned, no positive prediction can be made, in view of the conflicting dicta in the *Syrup* cases, which say that such a pricing policy is not bad,²⁸² and the *Cement* case, which says that such a policy is bad.²⁸³ Another difficulty in adopting the mill net price as the definition of price under the Act is in the meaning of the proviso which allows a seller to meet the price of a competitor by lowering his own price. Does this "price" to be met mean mill net price? Further, if the policy of the statute looks to net return to the seller in determining the existence of discrimination, then why should this return be figured by eliminating transportation costs alone rather than considering that labor and materials costs and overhead must also be left out of account in determining whether a price is discriminatory²⁸⁴ (thus making all sales contracts in effect cost-plus-fixed-fee contracts)?

It may also be pointed out, to contribute to the confusion which appears to attend this question, that there are in actuality several levels of the basing point price problem. The number will vary, but generally we may say that there are three levels, involving sales of ore and coal at one, of iron and steel at the second, and of automobiles and refrigerators at the third. It is certainly not clear that buyers generally will benefit from the basing point decisions, unless we can discount

282. See *FTC v. A. E. Staley Manufacturing Co.*, 324 U.S. 746, 757 (1945).

283. See 333 U.S. 683, 725 (1948). See Edwards, *supra* note 275, at 755, on this inconsistency in dicta. Lowell Mason is quoted in *Fortune*, *supra* note 275, as saying the rule applies "from pins and needles on up," and the *Harvard Law Review* (1949) advertises its complete set as f.o.b., although the cumulative index may still be purchased under a delivered price.

284. See Blaxter, *supra* note 275, at 69; Edwards, *supra* note 275, at 752.

the effect on most buyers as sellers. If a fundamental economic policy underlies the decisions, then to be sound it must consider both points of view of the average businessman, and determine whether he will be hurt as a seller before counting the eggs which have been hatched for him as a buyer.²⁸⁵

The essence of this criticism is to say that the reasoning surrounding the F. T. C. position in this field is cloudy; it fails to establish that these decisions will have a beneficent result, either on the concept of free competition or on the country's economy generally. A separate criticism has been made that it is possible to predict the economic effect of these decisions, and that that effect is not a desirable one.²⁸⁶ Special consideration will be given next to that criticism.

The limitation on the scope of competition. There is certainly some narrowing of the scope of competition involved in these decisions, which reflect a tendency to eliminate the bargaining concept from American commerce.

The argument here is that where the product is a heavy item of standard quality and low unit cost, competition is mostly in price in a free field: that is, basing point prices are necessary here, as a competitor's price must be met where there is no room for other competition: ²⁸⁷ "cement is cement." Non-price competition generally includes quality and service, differentiation of the product (other than qualitative), consumer advertising, and trade promotion.²⁸⁸ Of these, however, only the first reflects any difference in benefit to the consumer in the ordinary case, while the others involve only psychological appeals, but if it is true that in the industries such as cement and steel there is virtually no room for competition in this first area, then, while the other three remain, activity in those areas is not likely to result in ultimate consumer benefit, the guiding light of the FTC position in pricing policies.

It has been more specifically said that the effect of these decisions on competition will be to "Balkanize" the country, so that a manufacturer who has previously been able to afford to build a plant in a given area will be protected by an "umbrella of governmentally imposed price

285. On the difficulties of tracing cost elements of price generally see Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321, 328 (1937). See note 114 *supra*. See also McNair, *supra* note 223, at 347.

286. See Head, *supra* note 275, at 653-5; Edwards, *supra* note 275, at 743-6; and, generally, the business literature material cited in note 275 *supra* tends to this criticism.

287. See Merrigan, *supra* note 275, at 36-7; the first *Cement* case, *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 591 (1925); and the FTC in the second *Cement* case, 37 F.T.C. 87 (1943).

288. See Alderson, *The Effect of Price Controls on Non-Price Competition*, 4 LAW & CONTEMP. PROB. 356 (1937) for a discussion of these functions.

monopoly" in the area closest to his shipping point.²⁸⁹ This provincialization of the country seems a reasonably probable consequence, but if free competition is impossible in such industries, it may not be, without more, a bad thing. In considering whether there are other factors which render provincialization of industry bad for the Country, it may be well to consider the situation of a businessman in a part of the country not highly developed industrially—that is, the specific effect of the basing point decisions on a Southern manufacturer, for instance.²⁹⁰

Assume a unit costing \$95 at the normal mill price, plus \$5 freight from Pittsburgh, for a total \$100 price to a consumer in C town. The actual freight from M ville, where the manufacturer is, to C town is \$10. To meet the price of a Pittsburgh manufacturer, the Southern manufacturer must cut his mill price to \$90, and to compete with others closer than Pittsburgh, he must cut his mill price even further, approaching a lower limit of \$85. In a competitive or slow market, and where \$95, the normal mill price, has been closely figured, such a price cut may prove ruinous for the Southern manufacturer, although, of course, in sellers' markets some of the slack may be taken up by raises in price by Pittsburgh and closer manufacturers, under the Principle of Maximum Return, to reduce the price cut the Southern manufacturer must take to compete.²⁹¹ It may seem illusory to complain of this situation, as even under Pittsburgh-Plus the Southern manufacturers' price to the C-town consumer will be only \$90 mill net, after considering freight absorption, but under a mill base the closer customers will also insist on a \$90 or less mill price, and the loss will be considerably greater to the Southern manufacturer if he is to try to compete for Northern markets, when the delivered prices in competition must tend to be fixed by those available from closer mills.

There will be some provincialization of markets inevitable in this process, as the market for steel and rubber in Michigan, for food for processing in Great Lakes areas and in New Jersey, and for textiles in New England, is large enough to be a significant price-fixing factor. Depending on the shipping rates for raw cotton and for yard goods, it might prove profitable in the long run for textile mills, for instance,

289. See *supra* note 275: Blaxter, at 73-4; Foy, at 2; Edwards, at 751. See also on competition under the *Cement* case generally, Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1266-7 (1949). An instance of this feared consequence becoming actuality is reported in *Business Week*, Jan. 7, 1950, p. 24, cols. 2-3, a report dealing with industrial shifts occasioned by the end of basing point prices. Cf. the evasion plan advertised in *Business Week*, Jan. 21, 1950, pp. 24-25.

290. This example is adapted from that used by Mr. Foy, *supra* note 275, in terms of Steeltown and Motorville, with alterations to point up the effect on a businessman in the South.

291. It is difficult to see how this process helps the consumer, the stated beneficiary of the basing-point decisions and of The Robinson-Patman Act.

under this law, to move closer to their markets in the Northeast, so that shipping costs will again become a cost item and subject to their control in fixing prices—that is, a part of the mill price. The other answer is to develop Southern markets for Southern manufacturers—provincialization of the country from another point of view—but that process is under a handicap so long as there are other effective sources of the commodity desired. There is no incentive for the market to move except to approach, for an advantage, a source of supply.

This criticism is perhaps from the point of view of governmental economic policy the most telling of those made, although, of course, even it represents some oversimplification, as fluctuations in the cycle will provide some cushion against the business shifts which might otherwise be entailed from the decisions. It has also been suggested that “the rigidity of price structures in many industries will be lessened”²⁹²—in other words, that the principle of uniformity may suffer on a time scale as homage is paid to it on the price scale at any moment of a given seller. This is just another way of phrasing the criticism discussed above, that the effect of the decisions is not certain or predictable, rather than saying that it is predictable and undesirable. The two criticisms are not consistent, but the dilemma they pose raises a question as to whether a process of attempted economic regulation has not once again gone awry.

The Enlarged Definition of Conspiracy and Collusion. It seems that apart from economic effect, these cases had a significance in legal theory, whose desirability is questionable, in making it easier to prove collusion than would be the case in judging the charge according to the tests imposed in determining various types of individual criminal liability or even tort liability.²⁹³ It may be noted that under the *Syrup* cases a general basing point system is found to be prima facie discriminatory under section 2 (a) of the statute,²⁹⁴ but this discriminatory effect is not permitted to be rebutted so far as the system itself is concerned, under section 2 (b).²⁹⁵ What is sauce for the goose appears not to be sauce for the gander, and this again marks an enlargement of the law as known before, even in the field of conspiracy.

The collusion argument points up a peculiar sensitivity of the Government in dealing with associations such as the Cement Institute,

292. See Blaxter, *supra* note 275, at 74.

293. See Mason, *supra* note 289, at 1280 as stating that these cases involve an enlarged definition of collusion. It should be noted, however, that Mr. Mason agrees with the result in the *Cement* case, on the collusion point. *Id.* at 1279.

294. *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 738 (1945); *FTC v. A.E. Staley Manufacturing Co.*, 324 U.S. 746 (1945).

295. *Id.* at 753, 755.

as against the attitude toward the individual. An illuminating question to ask is, why do people have associations if the Government always attacks them, and if one can be found guilty as a member of the association of what he would not be guilty of individually? The answer to this may lie in the fact that an association may be able to develop influence in the legislature where its individual members could not, and thus presents a greater hazard to the program of an administrative element of the Government such as the FTC. The vehemence of governmental attacks on those lobbyists who oppose the program of the administration,²⁹⁶ while ignoring those who support it, may serve as further indication of this sensitivity; but it may be suggested that this first fact is an unhealthy factor if the Government is not to become unduly centralized or sycophantic, and that it might be well to bear in mind the merits of such lobbyist groups, in evaluating the desirability of special hazards set in their path by such rules as the collusion rule involved in these cases.

These specific criticisms are directed here to the theory or to the economic policy of the specific cases here under discussion, but do not serve to answer the point whether, good or bad, these cases form a part of an unsatisfactory over-all economic program. To treat that point is the next objective.

THE ANATOMY OF DISCRIMINATION

In determining the particularized meaning of discrimination under the recent basing point cases, a good starting point seems to be the following definition, taken from the report of the Conference Committee on the Robinson-Patman Act just before its final passage:

"In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other . . . But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."²⁹⁷

The judicial application of the Act has not, of course, followed quite the line indicated by this definition. The question to be solved

296. "Real estate lobbies" and "the medical lobby," as well as manufacturers' and business groups, have been officially and publicly criticized as "wicked" by responsible governmental officials, in addition to the normal and proper attacks by political candidates, for their positions in opposition to the program.

297. Representative Utterback, 80 CONG. REC. 9416 (1936).

is, just what is the ultimate criterion to guide the courts in determining whether a discrimination exists under these cases?

According to the definition above, a mere existence of a difference would not be controlling on the question of discrimination, and this is obviously so, as under the language of the Act the difference must be as to "commodities of like grade and quality" and must also be beyond the scope of "due allowance for differences in the cost of manufacture, sale or delivery resulting from . . . differing methods or quantities. . . ." ²⁹⁸ The Act itself, then, specifically eliminates cases where there is a difference in quantity, quality, or marketing procedure. These provisos have been judicially circumscribed to a certain extent, ²⁹⁹ but there remains a substantial area to support the statement that a mere price differential without more does not create discrimination.

Indeed, suppose there is no price differential, the question still exists as to whether there might not be discrimination. Here again it seems that disproportionate quantity, trade, or functional discounts may render prices discriminatory even though there is no difference in the basic price or even in the actual price charged. ³⁰⁰ It would seem that a differential is neither necessary nor sufficient in making out a case of discrimination under the Robinson-Patman Act. If the existence of a price difference fails as the primary indicator in determining discrimination, what new lodestone may be substituted in charting this area of the law?

Statutory and judicial language suggests here that the test lies in the effect of the pricing practice on competition. ³⁰¹ All the statutory rules, under the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act alike, have been developed to implement a general policy of furtherance of free competition in American business. The task here can be reduced to that of defining more precisely the

298. 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13 (1946) (Clayton Act).

299. See *McNair*, *supra* note 223, for a discussion of the importance of standard discounts and of their judicial interpretation under the Clayton Act. The most noteworthy restriction on the original sense of these words was in the *Sears-Roebuck* case. *Goodyear Tire & Rubber Co. v. FTC*, 92 F.2d 677 (6th Cir. 1937), *rev'd*, 304 U.S. 257 (1938), *cert. denied*, 308 U.S. 557 (1939).

300. *Van Camp & Sons v. American Can Co.*, 278 U.S. 245 (1929). See also *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Goodyear Tire & Rubber Co. v. FTC*, 92 F.2d 677 (6th Cir. 1937), *rev'd*, 304 U.S. 257 (1938), *cert. denied*, 308 U.S. 557 (1939). See also *McAllister*, *Price Control by Law in the U.S.: A Survey*, 4 LAW & CONTEMP. PROB. 273, 291 (1937). On discriminatory though equal railroad rates for differing services, see 3-B SHEARFMAN, THE INTERSTATE COMMERCE COMMISSION, 556-7 (1936), and authorities cited at 416n. and 417n.

301. See 49 STAT. 1526 (1936), 15 U.S.C. § 13c (1946) (Robinson-Patman Act); Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137 (1937); Mason, *supra* note 289; *McNair*, *supra* note 223, at 355.

exact type of competition, injury to which may render a pricing practice discriminatory.

A priori, statutory restrictions on pricing policy seem to be generally calculated to restrict competition, rather than to liberate it.³⁰² This paradox may be resolved, however, by noting that in certain large industries competition unchecked tends in the course of time to destroy itself, particularly where the pasturage in the available area of competition is insufficient for more than a few to partake. In this light, the regulation of competition to preserve competition becomes theoretically comprehensible.

It may still be asked, however, whether the concern of the court in protecting "competition" in these cases is in reality the protection of competition or the protecting of a competitor. If it is the latter, then it cannot be the former, for competition presupposes two equalities turned loose in the ring of strife together, and this approach would provide one of those two with a second to insure that competition is maintained within narrower rather than broader limits.

An elusive question is whether the competition to be preserved is that of the seller or of the buyer. At just what level of the market do these statutes seek to maintain competition? The indication above of the several levels of the market between ore and automobiles, for instance, was calculated to show that the basing point decisions may have unexpected indirect consequences;³⁰³ but here it shows that it might be necessary to choose between two areas of competition even at any one level of the market.³⁰⁴

Generally speaking, price regulation is calculated for the protection of the consumer.³⁰⁵ From the consumers' point of view a price is a delivered price and includes the shipping costs he must pay, but the basing point cases indicate that a price is something else. They indicate vast importance in the return to the seller in determining whether a price is discriminatory, and move one step away from the equality of delivered price toward equality of net return to the seller in determining discrimination. They have not indicated why other manufacturing costs should not be treated the same way as freight absorption for this purpose, or where the line is to be drawn between equality of delivered price and equality of net return to the seller. Of course, considerations

302. On this shift "from the Preservation of Competition between Manufacturers to the Control of their Prices," see Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301, 308 (1937). See also, in general, LOEVINGER, *THE LAW OF FREE ENTERPRISE* (1949).

303. See note 285 *supra*.

304. As to railroad rates, see 3-B SHARFMAN, *op. cit. supra* note 300, at 559.

305. See Ely, *The Work of the Federal Trade Commission*, 7 WIS. L. REV. 195 (1932).

of internal efficiency become necessary when costs other than shipping costs are to be taken into account, and it might be unwise to open up a field of regulation in which such matters are to be probed. However, such differences in efficiency have not been considered to justify price differentials for the same article, or even, *semble*, for different articles, under the *Goodyear-Sears Roebuck* case.³⁰⁶ Further, every functional discount, and possibly some trade discounts, may raise questions of the propriety of a seller's inquiry into the internal efficiency of the buyers' processes. The subject is not satisfactorily excluded.

In a related area, that of discriminatory railroad rates, it seems that the competition which is to be preserved is that of the shippers and not that of the carriers. Similarly, under the *Van Camp*³⁰⁷ and *Goodyear-Sears Roebuck*³⁰⁸ cases, it seems that under the price regulation laws the competition which is important is that of the purchasers and not that of the sellers, although there were some inconsistent earlier cases. It seems that the Robinson-Patman Act makes this point even clearer, so that it should be possible to measure discrimination by considering the situation of the consumer only.

The basing point cases, however, mark a sharp departure from the line of the *Van Camp* case, insofar as they tend to define discrimination not in terms of the effect on the person acted against, but rather of that on the actor himself. Insofar as the equality of net return to the seller is important in determining discrimination under the basing point cases, they are not concerned with the effect on competition among purchasers; they are concerned with competitive interests among sellers and not among consumers. On the other hand, insofar as they are concerned with the economic effect of price differences on the buyers, and with the preservation of competition among buyers, they are within a more commonly recognized sense of the term discrimination, and in addition would seem to be closer to the expressed word of the governing statute. It is submitted that the cases do not make the answer clear whether discrimination is to be found by examining the situation of the seller or by examining that of the buyer. It may be said that the seller is examined to determine whether there is a differential, and the buyer, to determine whether it is injurious; it does not seem proper to take the question both ways in this manner, as the ultimate problem is whether a price is discriminatory, and this approach involves looking at price both from the point of view of the buyer (who thinks only of delivered price) and of the seller (who is concerned primarily with profit margin) in answering the same legal question.

306. See note 299 *supra*. Here is the golden eggs aspect of the basing point cases.

307. See note 280 *supra*.

308. See note 299 *supra*.

THROUGH THE LOOKING GLASS: TRANSPORTATION COSTS
AND CHARGES

Looking at this field one sees tumuli of many an accepted institution of a quarter century since, but few of these bear case names. Yet here lies unmarked all that was mortal of the old *Cement* case, the *Maple Flooring* case, and the *Texas & Pacific R. R.* case, not to mention the doubtful fate of the *Diffenbaugh* case and of the *Mechling* case, which might be determined by probing nearby. The previous detailed criticism of *New York v. United States*, and of the basing-point cases, however, has not been designed here to show these cases wrong within their context, as a primary purpose, but rather to complete a critical study of two important pillars of governmental economic policy. Those older cases, with their virility sapped by the recent decisions, have become as shadows in the law, and a study resting on their precedent merits would seem a dry and brittle thing. One may say here with Motley: "Even the most devout of genealogists might shudder to chronicle the long succession of so many illustrious obscure."³⁰⁹

Neither is it here the place to preach for change in the law as it exists under the rate case or the basing-point cases, because a law review article is at best a sophotaph,³¹⁰ and because to do so would obscure the central thesis of an argument for consistency at either price.³¹¹ Criticisms have been developed in considering the precise nature of either of these cases as a piece of legal tissue. It may be inferred, for instance, from some of the language above that a ruling is not altogether fortunate which places a penalty on bigness even where its effects are beneficent,³¹² or on efficiency because efficiency breeds bigness, or vice versa. This would seem to be too blind a worship of the competition god, or too broad an association with the Other Thing—monopoly. Further, the overcomplacent reliance on administrative expertise and the overfree arrogation of power not exercised by Congress has been seen some cause for concern. A rule depending on the impartiality of the executive in enforcement has the protective stability of a bundling board, even where popular sentiment has not accepted, except in a few municipal environments, the concept of the veniality of

309. 1 MOTLEY, *THE RISE OF THE DUTCH REPUBLIC* 25 (1855).

310. See REPORT OF THE COMMITTEE ON TEACHING AND EXAMINATION METHODS, ASSOCIATION OF AMERICAN LAW SCHOOLS (1949).

311. That is, to avoid the "hydrostatic paradox of controversy." See HOLMES, *AUTOCRAT OF THE BREAKFAST TABLE* 114 (4th ed. 1891).

312. This question may underlie the prosecutions of the DuPont and A. & P. Companies, though the issues have not been judicially discussed except in *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), as they affect those cases. The same problem affects the consideration of the *Sears Roebuck* case, *Goodyear Tire & Rubber Co. v. FTC*, 92 F.2d 677 (6th Cir. 1937), *rev'd*, 304 U.S. 257 (1938), *cert. denied*, 308 U.S. 557 (1939).

venality. But this thesis is directed primarily to the question of consistency, and if these two bodies of law cannot coexist consistently within an integrated governmental policy, then neither can the bulk of the criticisms directed to them exist together, so far as they are aimed at substantive policy.

With this disclaimer the matter of policy in economic regulation may be approached, and here is esculent material to be found.

At the smallpox death of the Emperor Tungchih and his wife, just about a lifetime ago, it was said that "Fate is under governmental control in China."³¹³ This view cannot be altogether accepted, at least as to most modern governments,³¹⁴ and if it is considered that fallible human processes are being used to regulate economics, then it is a natural source of concern if these processes do not support one another.

Economic legislation, it would seem, must not only usually contain its "*exceptis excipiendis*" but must always be prefaced by its "*ceteris paribus*". Economic laws are always in hypotheticals, and the flaw in the planning and regulatory processes is that economic legislation changes the condition and not the law: e.g. *If* incentive, *then* production; *if* a four-hour week and secured future, *then* production in a different light. The *If* clause in the laws of economics contains blanks which are open to the legislature to fill in. The *Then* clause follows inexorably from what the lawmakers, judicial or otherwise, have provided. It is possible, then, by way of evaluation of the cases under study, to summarize first their purport in terms of economic effect, that is, in terms of the *If* clause they have constructed, with some attempt at projection of the *Then* clause, and then to contrast the two pictures to complete the thesis as to their consistency in policy.

First there is the railroad rate case. The medium through which policy is there expressed is the question whether those charges were, in a specialized sense, discriminatory. The criticisms developed in the discussion of *New York v. United States* are directed largely to the propriety of the underlying economic policy of the case: whether the reasonableness of a rate might be determined on any other basis than the classical rate base; whether it was proper to adjust the inequality

313. See SCIDMORE, CHINA: THE LONG-LIVED EMPIRE 119 (1900).

314. See LANCASTER, CLASSICAL LANDSCAPE WITH FIGURES 62 (1948), as to rugged individualism in modern Greece: "It had been intended by the city fathers that the future development of Athens should be an orderly southward expansion, eventually linking the city with the port of Piraeus, and plans to this effect had in fact been drawn up. Before, however, they could be carried into effect a shrewd Athenian of the period, operating along lines exactly opposed to those which have been so successfully pursued by land-speculators in our own country, bought up all the land he could lay his hands on to the north of the town. As he had anticipated the Athenian public, the moment it was suggested to them by the powers-that-be that they should dwell to the south, straightway rushed out and bought building sites in exactly the opposite direction, and the psychologist's future was made."

of rates by raising the rates of the Northern railroads without a finding that those rates were unreasonable; and whether the criteria suggested in determining the propriety of the rate order were actually given due judicial consideration.

Taking a point of view a little further removed, it is difficult to sustain these criticisms in sweeping terms. It does not seem, for instance, that the rate base is a sacred thing, fixed for all courts and times; it varies in circumference as the times are feast or famine, like an unglutted's equator;³¹⁵ there is no reason why it might not be required to vary to meet the needs of the Country as well as to conform to the state of the Country. There is something more of a problem as to whether the justifying factors cited in such a case are really given consideration. A simple computation of the time involved in a study of the data adduced by the Commission in this case raises a problem as to whether the Court could give the material *de novo* consideration, even if it be suggested in this article that to do otherwise would be to rely overmuch on administrative justice. Further, in such a complicated case there are plenty of data which can be cited for either side, creating a temptation to handle the case on a broad policy base—that is, to set up certain presumptions to be overcome, which is the same thing—and then to support the position taken by gleaned data *ad lib.*

These criticisms have pointed to the existence of an underlying policy base for the case, but have not pointed specifically to the nature of such policy. In approaching this, a start will be made with a suggested epitome of the interstate commerce rate law prior to *New York v. United States*. The general rule, then, is that a rate is proper if reasonable—i.e., if it yields a fair return on the rate base.³¹⁶ An exception is that even such a rate is not proper if it involves undue preference or discrimination.³¹⁷ There is preference or discrimination if there

315. With suitable apology to Professor Powell. See also, on the effects of general economic conditions on transportation policy, *Hearings before Committee on Interstate Commerce on S. 942*, 78th Cong., 1st Sess. 213, especially the part containing Thurman Arnold's memorandum and testimony. A later collection of materials on the problem will be found in a symposium, *Interterritorial Freight Rates*, 12 *LAW & CONTEMP. PROB.* 391 (1947). Compare also, with the *New York v. United States* decision, *Ayrshire Collieries Co. v. United States*, 335 U.S. 573 (1949), which held that the I.C.C. can compel equal rates from points of origin in the same group even without a finding that there are being charged different rates for items moving under substantially similar circumstances. On the application of the anti-trust laws to rate bureau practices (providing an interesting parallel to the practices of such agencies as the Cement Manufacturers' Association and other possible price-fixing agencies operating by agreement) see a Note, *Railroad Rate Bureaus and the Anti-Trust Laws*, 46 *COL. L. REV.* 990 (1946).

316. See 3-B SHARFMAN, *op. cit. supra* note 300, at 425 on the relative weight given to value of service and to cost of service in fixing rates.

317. Under sections 3 and 4 of the Act. See 3-B SHARFMAN, *op. cit. supra* note 300, at 521-572, on preference, prejudice, and discrimination generally.

is a difference not justified by cost differentials.³¹⁸ Such preference or discrimination is "undue" if it hurts in shipper competition.³¹⁹ In determining this, makeweight factors which may be considered are the commercial effects, including the desired degree of carrier competition and the question, whether an adjustment not of the rate complained of, but of the other rate involved in the discrimination, would actually help the complaining party.³²⁰ Under these rules, there were a number of proof difficulties, and the location of the burden of proof was always an important factor.³²¹

The policy shift which seems to underlie *New York v. United States* consists in a greater emphasis on commercial factors to justify adjustment of rates. This is by no means a completely new departure in this field. A striking example, (not relied on as a precedent by the Supreme Court) of such an approach was in the *Lake Cargo Coal* case twenty years earlier.³²² The fate of the Commission's orders in that case was inconclusive, depending in part on court action and in part on political determinations,³²³ but the case is sufficient to show that the factors considered here were not being given weight for the first time.³²⁴

On the point that cost factors cannot always be judged precisely, it has been noted that traffic density is not always justification for a low rate,³²⁵ as then density may be the effect as well as the cause (justification) of a rate.³²⁶ Such a statement invites the suggestion

318. *Id.* at 559, n. 442.

319. *Id.* at 560, n. 423.

320. *Id.* at 562, n. 429 containing the excerpt from *Bunker Hill Co. v. Northern Pacific R.R.*, 129 I.C.C. 242, 246 (1927). See also, 2 SHARFMAN, *op. cit. supra* note 300, at 382 n. 58 on the consideration of factors other than the core of the rate base.

321. See especially Eastman, concurring in part, in *Carthage Pulp & Board Co. v. Pa. R.R.*, 177 I.C.C. 217, 244 (1931), and in *Acme Mills v. Alabama Great Southern R.R.*, 136 I.C.C. 114, 118 (1927) and *Duluth Chamber of Commerce v. Chicago, St. P., M. & O. R.R.*, 122 I.C.C. 739, 743 (1927), as contrasted with the dissent in *Duluth Chamber of Commerce v. Chicago, St. P., M. & O. R.R.*, *supra* at 744 and the concurring opinion in *Acme Mills v. Alabama Great Southern R.R.*, *supra* at 120. These and other authorities on the point are listed in 3-B SHARFMAN, *op. cit. supra* note 300, at 562 n. 428 and 566 n. 435.

322. *Lake Cargo Coal Rates*, 101 I.C.C. 513 (1925), *further hearing*, 126 I.C.C. 309 (1927); *Lake Cargo Coal from Ky., Tenn., Va., and W. Va. to Lake Erie Ports*, 139 I.C.C. 367 (1928); *Anchor Coal Co. v. United States*, 25 F.2d 462 (S.D. W. Va. 1928).

323. See 3-B SHARFMAN, *op. cit. supra* note 300, at 661 on this controversy.

324. *Hearings, supra* note 315. In the *Lake Cargo* case itself, however, the Commission disclaimed any primary reliance on commercial factors, saying "It is no part of our duty to canvass and compare . . . the social and economic conditions stressed by this intervener with the view of adjusting the rate structure to them." 126 I.C.C. 309, 359 (1927). And, "We have neither the inclination, the wisdom, nor the power to make or regulate rates for the purpose of determining whether goods shall be bought or sold, produced, manufactured, or consumed in one section or locality, or by one set of persons or another." 139 I.C.C. 367, 391 (1928).

325. See 3-B SHARFMAN, *op. cit. supra* note 300, at 514, 570 and authorities at 570 n. 444.

326. See *id.* at 688 and 690, concerning the effect of transportation costs on local economy, absolutely and relatively.

of some other factor which may be helpful to putting the rate on a fixed base rather than in a boot-strap situation where it is both cause and effect. Among other factors which have been given consideration are competitive factors,³²⁷ which have been of significance but whose spurs have been pre-empted to a considerable degree by the policy expressions underlying the Transportation Act of 1920. The remaining factor, then, is the commercial factor, including the distribution of traffic on a "fair-share" basis, and the ultimate economic effect of rate levels and rate systems.³²⁸ Although these commercial factors have a respectable place in the over-all subject, it has been emphasized that prosperity factors alone cannot be conclusive,³²⁹ and that there must be some justification for their consideration other than an attempt by the I. C. C. to regulate the economy beyond the area of the transportation system itself.³³⁰

But assuming that the purpose of the order was to improve the state of the economy in the South, then it must be regarded as a territorial subsidy. In considering whether such a subsidy is a proper expression of policy, one may look both to precedents and to statements of value judgment for its justification. It cannot be denied that there is precedent for such a subsidy. The post-war American loans to Great Britain and other countries (assuming there to have been no mutual intent that such loans should ever be repaid), the Federal Emergency Relief Act of 1933, which provided that one-half the fund appropriated might be used for outright grants to states which could not meet the fund-matching provisions of the Act,³³¹ and the current proposed legislation for education subsidies to certain states,³³² are all examples.

On the other hand, it could be noted that equalization is not the only factor to be taken into account in bolstering territorial economy, and it must be observed that that cannot be given to Paul which has not been taken from Peter. Senator Taft, for instance, noted in connection with recent legislation relaxing international trade restrictions that this

327. See *id.* at 572-656.

328. See *id.* at 656-693.

329. See *id.* at 561 and n. 426.

330. See *id.* at 685. See also 1 *id.* at 223 n. 95.

331. 48 STAT. 55 (1933), 15 U.S.C. § 609c-1 (1946).

332. See editorial in the Boston Herald, May 2, 1949; the point was also developed, critically, by Connecticut's Republican Chairman Baldwin, in an address on August 30, 1949, The Boston Herald, Aug. 31, 1949, pointing out that money freed by such a subsidy from educational uses might be used to compete with the non-subsidized states, as by the tax exemptions granted an industry to induce its removal from Connecticut to Texas. This, of course, is merely a phase of the economic leveling policy, involved, for good or for bad, in the case under discussion. A contrary trend is represented by the 1949 Amendment to the Fair Labor Standards Act. It is probably too early to evaluate its effect in the provincialization of economy, though it is clear that union agreements equalizing wage levels on a country-wide basis have retarded, if not reversed, the industrial migration to the south, as the labor and cost differential vanishes.

is "good for the world, but bad for the U. S.; we average down as the poorer sections of the world average up".³³³ Similarly, what is given to the South under a policy such as that found in *New York v. United States* is also taken away from some other part of the Country, and this should not be done without the most careful consideration of the fairness of doing so. Also, there is the problem of whether this eliminates the premium on efficiency by establishing a new law of discrimination. Here is the golden-eggs point, as, of course, to the extent that incentive for efficiency is removed, efficiency itself is likely to wane. The golden-eggs point, of course, poses a dilemma as to what should be done in handling a backward area, the two horns being a policy calculated to change the laws of economics, or a policy calculated to change the philosophy of a government founded on premises of *laissez faire*³³⁴ and free and equal competition.

Now let us compare the territorial freight rate cases with the delivered price cases. In the latter field the law of the future is not entirely set as changes may be effected by the decisions in controversies yet pending. Also practical considerations may even impel an administrative retreat from the position won. The prospect of remedial legislation is not certain, and both the Johnson³³⁵ and O'Mahoney bills³³⁶ have thus far failed to become law; but an F. T. C. compromise with the steel industry on the general terms of the latter bill has been reported,³³⁷ and there has been some indication also of Commission reluctance to proceed with further prosecutions implementing the *Syrup* decisions.³³⁸ The Commission may have reached the point of no returns in these prosecutions, but this solution does not destroy the legal worth of the Supreme Court cases, which still stand as an indication of Court thinking in this area.

Whatever the anti-trust acts³³⁹ might have meant originally, the rite of determination by the Supreme Court has given them in this area the transferred meaning that pricing policies are objectionable when they

333. News reports, Sept. 25, 1949.

334. *Ci-devant*.

335. See note 275 *supra*.

336. See note 275 *supra*. The O'Mahoney Bill passed Congress in a somewhat altered form in June, 1950, but was vetoed by the President, leaving the matter of legislative alteration in this field still up in the air. That thought is still active on the underlying problem, whether transportation, or distribution, costs the economy too much, see a report of an address by Wroe Alderson, sponsored by the United States Chamber of Commerce, delivered in Detroit before the National Marketing Conference, in *Business Week*, Mar. 11, 1950, p. 98, col. 2.

337. *Delivered Pricing Is Legal—by Fiat*, *Business Week*, Nov. 12, 1949, p. 19, col. 1.

338. Robert S. Allen in *The Boston Herald*, Nov. 21, 1949. See also note 238 *supra*, on difficulties in handling the Standard Oil case.

339. Dedicated to the principle that might is not right, and employed in the interests of divorcing right from might.

enable a distant seller to compete on equal terms, pricewise, with a local seller. This has been done by an extension of the meaning of the term "discrimination", but the economic policy inextricably linked with the decisions is that, other things being equal, the economies of the various territories of the country must stand alone, and attempts to reach across territorial boundaries to draw strength from markets in "foreign" territories are to be discouraged.

The internal criticism of this policy decision is that it does not only what Congress has failed to do, but what Congress has refused to do. This instance is not unique among courts and administrative tribunals, and other examples can be found in recent times;³⁴⁰ but the fact that this is customary does not make it right. Within the framework handed down, the legislature can be overruled only on existing Constitutional grounds; but these cases indicate that it is not only in the field of Constitutional Law that the distinction between a court and a constitutional convention may have been overlooked.

And having examined these two fields what do we find? Consistency certainly there is not. Under *New York v. United States*, a railroad with lines in both the North and the South would be required to violate the net return rule of equality in price, that is, it would be forced to discriminate between Northern and Southern shippers under the rule of net return. This does not indicate, however, that there is a fundamental distinction between the two disciplines as to the meaning of the word "discriminatory", as the Interstate Commerce Commission has considered the desirability of a "postage-stamp" freight rate, and criticized it as possibly discriminatory,³⁴¹ although in an inconclusive

340. As by an administrative commission, when the Federal Communications Commission barred "giveaway" radio programs, relying more on their general and undeniable undesirability than on its statutory powers (no official citation is yet available, as F.C.C. reports are almost two years in arrears, and advance sheets are not available in law libraries near Boston. See *Broadcasting Magazine*, Aug. 22, 1949, p. 18, col. 1, noting especially Commissioner Hennock's dissent at page 28, which stresses the point that the Commission was acting without specific statutory authority in promulgating these rules. See also *Time*, Aug. 22, 1949, p. 80, col. 3), and by a court when the Court of Appeals for the Second Circuit recognized the Labor Department's power to sue to collect overtime even if the workers had not sued (*McComb v. Frank Scerbo & Sons*, 177 F.2d 137 (2d Cir. 1949)), after Congress refused to grant such power (*Time*, Aug. 29, 1949, p. 73, col. 1), Judge Learned Hand saying in a special concurrence in the case that "The (Labor Department) ought to have the power . . . many deserving claims might otherwise be lost," (p. 140) thus relying more on considerations of desirability than on the sense of the statute. See a criticism of such judicial conduct in *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F.2d 533, 573 (7th Cir. 1946) (the lower court Cement case). See also Hamilton, *Trade Regulation*, *PRACTICING LAW INSTITUTE* 59, 82 (1946): "The other day a judge . . . came to preside in a criminal suit under the Sherman Act. His rulings for the first day and a half represented the old-time severities; then it dawned on him that his real task was to amend (*sic*) the pattern of an industry, not to guard the rights of the accused. At once he liberalized his rules for the admission of testimony." *Mirabile dictu*.

341. 3-B SHARFMAN, *op. cit. supra* note 300, at 689, and especially n. 660.

fashion; and it has been remarked that the I. C. C. at least needs "a more carefully articulated enunciation of majority views on basic matters in the interests of clarifying policy".³⁴²

What has been said must be taken as only the statement of a *prima facie* case. It is not possible always to derive an inconsistency of philosophies from external manifestations, which may wander erratically as the hypocycloid, being yet always bound to a determined focal point, and returning always and again to a point of origin.

Again, the policy conflict disclosed on these two points is not unique, and has been found elsewhere even within the limited field of trade regulation.³⁴³ But again its existence should not be taken as also an excuse for being. An epigrammatic judge has said that "consistency is the hobgoblin of small minds";³⁴⁴ but this seems an unduly cavalier dismissal of a prime requirement for fairness anywhere, and in this area not only for fairness, but also for ultimate welfare of the interest protected.

The question of policy to be determined may be phrased as whether the nation shall in this field subsidize backward areas as it has done in the operations of some of its other departments, or whether it shall accept the possibility of a natural death of an area as a lesser evil than the expense of artificial respiration.³⁴⁵ A national interest which might be assigned as barring such a hands-off policy is the interest in decentralizing for defense, but this interest cannot be closely evaluated without being considered in the same forum with all the others which may be affected. If the economy is to be decentralized, then consumer-benefit and individual-fairness rules must be re-examined to see whether they are accomplishing enough of their objectives to offset the braking effect on the territorial subsidy.

Perhaps the kernel of the difficulty is not that departmental policies may be superficially inconsistent, but that such inconsistencies in broad policy can exist unnoticed. If this is symptomatic, it is an indication of the need for placing an economic policy coordinator in some such government branch as the Department of Commerce,³⁴⁶ rather than

342. *Id.* at 764.

343. As in the case of the Sherman Act and the N.R.A., for example. If the effect of the 1949 amendment to the Fair Labor Standards Act (*supra* note 332) is marked, it will stand as another example of such a policy conflict, taken in conjunction with the manipulation of transportation costs by ICC.

344. Paraphrasing EMERSON, *Self-Reliance*, in *ESSAYS AND ENGLISH TRAITS* 70 (Harv. Classics ed. 1909).

345. As the Italy of 2000 years ago and the Great Britain of 200 years ago have perished from the face of the earth, they may stand as examples of the fact of mortality.

346. Such an agency, of course, to be capable of a consistent long-range view, beyond the scope of political mortality, should be in personal tenure and in functional

leaving its independent administrative competitors (agencies which belong to it functionally but not administratively) to attack blindly their own fragments of the economic elephant.

If a constitution must be "short and obscure",³⁴⁷ then perhaps similarly the basic economic policy of a country must be difficult of definition. Perhaps in the background is a moving force which tolls off the milestones toward its objective patiently, like the clepsydra, and which may not be offended by a right hand which defines discrimination in a Pickwickian sense, while a left hand does so in a para-Pickwickian sense. The difficulty with this concept, however, is that it ignores the human factor in government. If there is such a central force, whose function is it to control it? More important, does the agency which ought to exercise this function do so consciously? If the Supreme Court, for instance, is charged with this objective, must there not properly be some attempt to relate individual decisions to a formulated ground plan, the same for railroad rates as for pricing policies? A contemporary ambassador is quoted as telling his staff, "We must now decide just what is our official position, so that when we depart from it we will know what we are departing from".³⁴⁸ It is the thesis of this study that the same requirement applies to our Government.

responsibility an independent agency, not responsible solely to the executive. See a discussion of the problems arising otherwise (in connection with the work of the Council of Economic Advisers created by the Unemployment Act of 1946, 60 STAT. 23, 15 U.S.C. 1021-24 (1946)), in Nourse, *Why I Had to Step Aside*, Colliers, Feb. 18, p. 13, col. 1.

347. Winston Churchill, before the Council of Europe's Assembly at Strasbourg, 1949, quoting Napoleon.

348. Ambassador Franks. See *Time*, Sept. 26, 1949, p. 30, col. 1.