RECENT ANTITRUST DEVELOPMENTS*

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PROBABLY the most dramatic antitrust development during the past year was the ruling by the Supreme Court directing District Judge LaBuy to order E. I. du Pont de Nemours & Co. totally to divest itself of the 23 per cent stock interest in General Motors which it had acquired more than forty years ago.[1] Perhaps of greater doctrinal import, if not equal notoriety, were two other decisions by the Court. In *Tampa Electric*,[2] it rejected quantitative substantiality as the test of illegality of exclusive-dealing arrangements under section 3 of the Clayton Act in favor of a factual inquiry designed to ascertain the probable impact of such arrangements on effective competition in the relevant market; and the *Noerr* case[3] made it clear that certain kinds of activity, namely, attempts to petition the government for amendment or enforcement of the law, were beyond the ambit of antitrust regulation whatever their effect on competition.

At the same time, the Federal Trade Commission was prescribing its own cure for antitrust violations; its *Grand Union* decision construed the "unfair methods of competition" language of section 5 of the Federal Trade Commission Act as a license to evade the limitations of the more specific provisions of the Robinson-Patman Act.

The year also marked the 25th anniversary of Robinson-Patman. Therefore, following an analysis of the year's most significant antitrust cases, the price discrimination law will be evaluated to determine whether it has furthered the objectives of antitrust.

I. THE CLAYTON ACT AND THE DU PONT-GENERAL MOTORS DECREE

Four years ago, Mr. Justice Brennan, speaking for a majority of four members of the Supreme Court in *United States v. E. I. du Pont de Nemours & Co.*,[4] declared that du Pont's acquisition of 23 per cent of General Motors common stock from 1917 to 1919 violated the original version of section 7 of the Clayton Act. The Court remanded the case to Judge LaBuy with directions to formulate a decree granting "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute."[5] In doing so, it stressed that "the district courts, in

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1. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961).
2. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).
3. Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961).
4. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957).
5. *Id.* at 607.

the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' "[6]

On remand the Government proposed total divestiture of du Pont's General Motors stock. It suggested that about two-thirds of du Pont's 63 million General Motors shares be distributed pro rata to du Pont shareholders as dividends over the course of ten years. The remaining one-third—instead of going to Christiana Securities Corporation and Delaware Realty and Investment Company, "holding companies long identified with the du Pont family itself" [7]—was to be sold to the public by a court-appointed trustee during the same ten-year period. The trustee could postpone sales if, in his judgment, "reasonable market conditions did not prevail," that is, if the price realized would not reflect "the fair value and true worth of the stock."[8] But, in any event, the stock would have to be sold by the end of the ten years. The Government also sought certain injunctive relief.[9]

After 28 days of hearings, Judge LaBuy rejected the Government's proposal for divestiture of legal title to the General Motors stock, but stripped du Pont of its voting rights and ordered them passed on *pro rata* to du Pont shareholders. Moreover, the decree sterilized the votes of Christiana, Delaware, directors or officers of du Pont, Christiana or Delaware, and members of their families living in their household.[10] In addition, the decree included injunctive proscriptions. Du Pont was enjoined from acquiring any additional General Motors stock, exercising any control or influence over General Motors, or nominating or designating any person for the General Motors Board of Directors. Du Pont was required to notify the Attorney-General—and secure court approval if there was an objection—before disposing of more than a specified number of General Motors shares.[11] The injunction ran against General

6. *Id.* at 608, quoting International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947).

7. 366 U.S. at 320.

8. United States v. E.I. du Pont de Nemours & Co., 177 F. Supp. 1, 7 (N.D. Ill. 1959), *rev'd*, 366 U.S. 316 (1961).

9. 177 F. Supp. at 7. According to the Government's proposed decree, du Pont, Christiana and Delaware would be prohibited from acquiring stock in or exercising any control or influence over General Motors; the three companies would be enjoined from having any director or officer in common with General Motors, and vice versa; du Pont and General Motors would have to terminate any agreement whereby General Motors was obligated to buy a specified percentage of its requirements of any du Pont product, either du Pont or General Motors was obligated to grant the other exclusive patent rights, or General Motors had to grant to du Pont a first or preferential right to manufacture or sell any chemical discovery of General Motors; and du Pont and General Motors would be enjoined from having any joint commercial enterprise.

10. These corporations and individuals were also enjoined from voting General Motors shares which they already owned.

11. Christiana and Delaware were also prohibited from acquiring General Motors stock, attempting to influence or control General Motors, or participating in joint ventures with General Motors. Christiana had to give notice before disposing of more than a specified number of its General Motors shares.

Motors as well as du Pont: both parties were enjoined from having common officers, directors or employees; from continuing any requirements contracts regarding any product, or any exclusive patent rights or preferential arrangements relating to any chemical discovery; and from participating in joint commercial ventures with each other, or dealing with one another on terms more favorable than those accorded competitors.[12]

The trial court recognized that its task was to devise "a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist."[13] It reasoned that the relief would be effective because du Pont would be left with "the most sterile kind of an investment"[14] and the injunction would further insure that the stock could not be used in any way inconsistent with the Supreme Court's mandate. Given the choice between what he conceived to be two effective alternatives—complete divestiture or divestiture of voting rights with the injunctive provisions—Judge LaBuy chose the latter course in order to avoid severe tax consequences for du Pont shareholders[15] and a likely depression in the market value of du Pont and General Motors stock.

On appeal by the United States, the Supreme Court overturned the decree,[16] with Mr. Justice Brennan writing the opinion for the same majority of four—Justices Clark and Harlan did not participate—which had originally held du Pont's stock interest unlawful. Over the dissent of Justices Frankfurter, Whittaker and Stewart, the majority directed the district court to order complete divestiture, including legal title, within ten years.

The Government's threshold argument on appeal had been that total divestiture in a section 7 case was mandatory as a matter of law.[17] It had contended

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12. These provisions were to remain effective so long as du Pont held General Motors stock, except that after three years the ban against requirements contracts was to be lifted. Thereafter, requirements contracts were permitted so long as no contract extended longer than a single calendar or automobile model year.

13. 177 F. Supp. at 13.

14. *Id.* at 41. Indeed, the trial court noted, § 7 expressly exempts acquisitions "solely for investment."

15. At the behest of the *amici curiae* appointed by the trial court to represent the du Pont and General Motors shareholders respectively, the court directed that a ruling be secured from the Commissioner of Internal Revenue concerning the income tax consequences of the Government's proposed decree. The Commissioner ruled as follows: annual dividends payable by du Pont in General Motors shares would be taxable as ordinary income to the extent of du Pont's current earnings and accumulated earnings and profits; for individual shareholders, the amount of the dividend would be the fair market value of the shares at the time of each annual distribution; for taxpaying corporate shareholders, the amount of the dividend would be the lesser of the fair market value of the shares or du Pont's tax basis for them, which was about $2.09 per share; corporate shareholders would be taxed at the regular corporate rate, after allowance of the dividends received deduction; and the sale of General Motors stock owned by or allocable to Christiana, Delaware and the Delaware stockholders would be taxable at the capital gains rate.

16. United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961).

17. *Id.* at 328 n.9; Brief for the United States, p. 34.

that section 11 of the Clayton Act required divestiture once a violation was found by the Federal Trade Commission, and that Congress could not have intended that relief should differ depending on whether the enforcing agency is the Commission or the Department of Justice.[18]

The Court found it unnecessary to pass upon the Government's underlying contention, namely, that section 11 automatically requires divestiture where it is the Commission which finds a section 7 infraction. It held, however, that courts are not in a strait-jacket when it comes to granting equitable relief and are as free in section 7 cases as elsewhere to exercise equity's traditionally "broad remedial powers."[19]

No one can quarrel with the principle articulated by the majority that "if the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences."[20] Certainly Judge LaBuy did not proceed on a contrary assumption; nor did Mr. Justice Frankfurter in dissent. The disagreement turned essentially on the efficacy of the decree as a matter of fact. Although Mr. Justice Brennan acknowledged the "large discretion" of the district court in fashioning a remedy,[21] he maintained that the Supreme Court has an important reviewing role in assuring that the Government has not " 'won a lawsuit and lost a cause.' "[22] Because he deemed the decree ineffective, he disregarded the impact of total divestiture on du Pont and General Motors shareholders.

Why did the majority conceive of the decree as tantamount to losing a cause? It pointed to the more than 40 million General Motors shares which would be voted by du Pont stockholders, and declared: "Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law."[23] Four reasons were given for this conclusion:

1. It would be in the interest of the du Pont shareholders to vote the General Motors shares to induce General Motors to favor du Pont.
2. General Motors' management, which had become "accustomed to du Pont's special relationship," would know that the relationship continued to a substantial degree, and "might well act accordingly."[24]
3. Du Pont's competitors might not try so vigorously to break du

18. Now that it is settled that divestiture is not mandatory in a § 7 case brought by the Department of Justice, the Government's uniform enforcement argument leads inexorably to the conclusion that Congress never intended divestiture as a mandatory remedy in Commission proceedings either. See Handler, *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 449 (1958).

19. 366 U.S. at 328 n.9.

20. *Id.* at 327.

21. *Id.* at 322.

22. *Id.* at 324, quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

23. 366 U.S. at 331.

24. *Id.* at 332.

Pont's hold on General Motors' business, as if complete divestiture were ordered.

4. Du Pont would have the power to sell its General Motors shares, and this "power to transfer the vote could conceivably be used to induce General Motors to favor du Pont products."[25]

In short, the fundamental deficiency of the decree, as perceived by the majority, stemmed from vesting the vote of General Motors stock in du Pont shareholders. But even the Government's original plan of divestiture contemplated that two-thirds of the General Motors shares would be distributed to du Pont shareholders. Nor was there anything novel in this approach. Where divestiture has been decreed in Sherman Act cases, it has frequently taken the form of a stock distribution to existing shareholders [26]—cases, ironically enough, which Mr. Justice Brennan cites with hearty approval.[27] Yet all the consequences which the majority foresees, if the voting rights were passed through to the du Pont stockholders, apply with equal force if the stock is distributed to them so long as they remain shareholders of both companies. The transfer of stock ownership obviously carries with it the right to vote.

Not only is the majority's reasoning inconsistent with the precedents on which it relies and approves, but it is far from convincing despite its reliance on "common sense." Wholly apart from its disdain for the elaborate injunction which was designed to preclude possible anticompetitive effects, (1) the majority makes the far-fetched assumption that shareholders of public corporations are likely to vote or to make their votes effective on such matters as the selection of suppliers; (2) it perceives a strange lack of self-interest in the welfare of General Motors by its own management; (3) it credits du Pont's competitors with a surprising lack of enterprise; and (4) it conjures the possibility that du Pont might sell its General Motors stock, with all the consequent untoward tax and market repercussions to du Pont itself, if General Motors refused to favor du Pont products.[28]

The majority's underlying premise in finding the trial court's decree in-

25. *Ibid.*

26. See, *e.g.*, Northern Sec. Co. v. United States, 193 U.S. 197, 355 (1904); Standard Oil Co. v. United States, 221 U.S. 1, 78 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911), *decree*, 191 Fed. 371 (C.C.S.D.N.Y. 1911); United States v. E.I. du Pont de Nemours & Co., 188 Fed. 127 (C.C.D. Del. 1911), *modified*, 273 Fed. 869 (D. Del. 1921).

27. 366 U.S. at 329 n.11.

28. Is it reasonable to assume that any company would incur a tax liability totaling well over $500 million to safeguard a customer relationship of some $26 million in annual purchases? See 353 U.S. at 596; 366 U.S. at 350 (Frankfurter, J., dissenting). And, of course, Judge LaBuy's decree expressly prohibited du Pont from exercising any control or influence over General Motors; from dealing with General Motors on terms more favorable than those accorded competitors; and from disposing of more than a specified number of General Motors shares without first notifying the Attorney General and, if he objected, securing court approval.

effective is that "the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy."[29] The assumption that the injunctive remedy is ineffective is refuted by seventy years of judicial experience under the antitrust laws, where the plastic remedy of injunctive relief has been the principal weapon of enforcment. Mr. Justice Reed was far closer to the mark when he stated in *Timken*:[30]

> The paucity of cases dealing with contempt of Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed. . . . Once in possession of facts showing violation, the Government would obtain a quick and summary punishment of the violator.[31]

In a scholarly dissent, Mr. Justice Frankfurter reviewed in detail the Supreme Court's 1957 *du Pont* decision, including the statement that the district court was "clothed 'with large discretion to model [its] judgments to fit the exigencies of the particular case.' " He analyzed the proposals of the parties and the *amici* before Judge LaBuy, noted the pertinent tax rulings, and so painstakingly canvassed the evidence and the issues presented at the hearings that the reader feels personally acquainted with every important detail. He summarized the reasoning of the trial court and set out the injunctive prohibitions at length. He surveyed the precedents on the scope of review and the equitable standards which guided the district court in formulating the decree. Like the majority, he agreed that the "overriding concern had to be for the protection of the public interest."[32] But he pointed out that the lower court

29. 366 U.S. at 333-34. This is presumably why the majority declared that "it cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7" and that divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found." *Id.* at 328, 331. Nevertheless, the majority recognized that "courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive," though it stated that "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *Id.* at 326.

The majority repeatedly posited the crucial issue in terms of the "effectiveness" of the decree to stamp out and prevent recurrence of the violation. Thus, it is all the more surprising that it did not remand the case to the trial court for the fashioning of a decree after ascertaining the facts relevant to effectiveness; rather it assumed that no injunction could be effective here.

30. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 604 (1951).

31. It is noteworthy that, before the Supreme Court, du Pont indicated that it was willing to accept a decree going beyond the pass through provision of the district court and have its General Motors stock stripped of *all* voting rights. The proposal was rejected by Mr. Justice Brennan for these reasons: (1) there would be a "large and permanent separation of corporate ownership from control," which would run counter to "corporate democracy" and (2) would make it easier for the "owner of a block of shares far below an absolute majority" to obtain control—"perhaps creating new antitrust problems . . . in the future"; further, (3) it would effect a "drastic change" in General Motors' capital structure, established under state corporation law. 366 U.S. at 333. All three reasons are quite irrelevant to the *effectiveness* of total disenfranchisement in eliminating the § 7 violation.

32. 366 U.S. at 359.

was well aware of this, and he found no basis for concluding that the decree would not fulfill this purpose. Hence, "it was proper for the district court to attend to the likelihood of danger to the public welfare that might arise from the serious adverse market consequences of divestiture and to the likelihood of extensive loss to innocent investors through both market decline and tax levy."[33]

Mr. Justice Frankfurter took sharp issue with the majority's assumption that a carefully wrought injunction would not protect the public interest. He rejected as an "unsubstantiated assertion" the idea that "*any* tie between du Pont and General Motors gravely jeopardizes the play of competitive forces."[34] He refused, as he tartly put it, "to enter Alice's Wonderland where proof is unnecessary and the governing rule of law is 'Sentence first, verdict after.' "[35]

It is difficult to believe that the four majority Justices are really prepared to write off the injunction as a feeble remedy in antitrust generally or merger litigation specifically. Mr. Justice Frankfurter may have provided a penetrating insight when he stated: "The essential appeal of the Government's position lies in its excitation of fear of any intercorporate relationship between two such colossi as du Pont and General Motors."[36] But he struck at the jugular when he added: "Insofar as the Court yields to that fear, it is strange, indeed, that this was not obvious to the Court when it found the illegality for which it directed the district court to evolve a corrective remedy."[37]

"The wise admonition that general principles do not decide concrete cases,"[38] to which Mr. Justice Frankfurter also referred, explains why the majority and dissent can be in general agreement on such principles and yet be at loggerheads on the facts in appraising the effectiveness of this decree.

II. Exclusive-Dealing Arrangements and Tampa Electric

In *Tampa Electric*,[39] the Supreme Court returned to an interpretation of section 3 of the Clayton Act which is faithful both to its legislative history

33. *Id.* at 361. The dissent noted in this connection that the Department of Justice recognized the relevance of the tax impact in a congressional hearing on a proposed amendment to the Internal Revenue Code which would alleviate the burden resulting from decrees of divestiture.

34. *Id.* at 379 (emphasis by Mr. Justice Frankfurter).

35. *Ibid.* Noting that Judge LaBuy granted the Government the right to appy for further relief should the decree prove inadequate in the light of changed circumstances, Mr. Justice Frankfurter commended this as leaving "the door open for 'judgment from experience,'" as contrasted with the majority's "'judgment from speculation.'" *Id.* at 378, quoting Tanner v. Little, 240 U.S. 369, 386 (1916). He added at another point that "surely there is merit to the notion of shaping the punishment to fit the crime, even beyond the precincts of the Mikado's palace." 366 U.S. at 371.

36. *Id.* at 377.

37. *Ibid.*

38. *Id.* at 357.

39. Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

and to the philosophy of antitrust. Twelve years ago, in the *Standard Stations* case,[40] the Court held that exclusive-dealing arrangements violated section 3 whenever they foreclosed competition from substantial share of the line of commerce affected, regardless of their real competitive impact in that market.[41] Though the narrow holding of *Tampa Electric* turned on the proper definition of the geographic market,[42] what Mr. Justice Clark, writing for a seven-member majority,[43] did to *Standard Stations* is as neat a piece of judicial surgery as has been seen in some time.[44]

Tampa Electric, a utility serving metropolitan Tampa, Florida and the surrounding area, was building the Gannon Station, which was to be its third integrated generating plant, adding two units to the eleven it already operated. These eleven units consumed oil; the two new Gannon station units were to use coal.

In 1955, Tampa agreed to purchase all requirements of the two Gannon units from a Kentucky coal company for 20 years. Deliveries were expected to begin in 1957, and it was anticipated that the Gannon Station eventually would consume 2,250,000 tons annually. The total value of the coal to be purchased pursuant to the contract was $128 million.[45] There were some 700 coal companies in the Appalachian area where the Kentucky seller operated. Gannon's maximum requirements would be less than 1 per cent of the coal of the same type marketed in that area. But within peninsular Florida, where total annual coal consumption excluding the Gannon requirements was only about 700,000 tons in 1958, Gannon would account for a very large proportion of coal purchases.

Just before the first coal was to be delivered to Gannon Station, the seller advised Tampa that the contract violated the Clayton and Sherman Acts and that it would not honor the agreement. Tampa brought suit for a declaratory judgment. The District Court and a divided Sixth Circuit found that the contract violated section 3. The Court of Appeals held that the agreement was exclusive as a practical matter, that the line of commerce was coal (not boiler fuels generally), and that the geographic market was peninsular Florida.

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40. Standard Oil Co. v. United States, 337 U.S. 293 (1949).

41. See HANDLER, ANTITRUST IN PERSPECTIVE ch. II (1957).

42. The Court never decided the issue posed by the partial exclusivity of the challenged contract. 365 U.S. 320, 331 (1960). See Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 371 (1960).

43. Justices Black and Douglas, who dissented, merely expressed their approval of the lower court decisions, and did not prepare an opinion.

44. *Compare* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), *with* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

45. If four new coal-burning units were added at Gannon Station within ten years, Tampa had to buy the coal from the Kentucky company for the remainder of the original 20 year contract. Tampa was free to buy coal from other sellers if its eleven existing oil units were converted to coal; it could secure up to 15% of its coal needs for Gannon Station from the by-product of a local supplier; and it could install new oil-burning, rather than coal-burning, units at Gannon Station after the initial two coal units were completed.

Relying on *International Salt*[46] and *Standard Stations*,[47] it ruled that the volume foreclosed by the contract was "not insignificant or insubstantial,"[48] and, without further assessment of the facts, branded the contract unlawful.

The Supreme Court assumed for the purpose of the case, without deciding, that the challenged agreement was an exclusive-dealing arrangement within the compass of section 3 and that bituminous coal was the pertinent line of commerce. But peninsular Florida, in its view, was not the relevant geographic market. The Court did "not believe that the pie will slice so thinly."[49] Instead, it found the area of effective competition to be the eight-state Appalachian region from which the 700 coal producers could ship their coal to Florida. And within that market, said the Court, "the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1 per cent is, conservatively speaking, quite insubstantial."[50] In other words, on the facts in *Tampa Electric*, given the market as defined by the Supreme Court, a finding of legality was inevitable even under a rigid application of the *Standard Stations* formula.

But the Court went out of its way to make clear that neither absolute quantitative substantiality (*i.e.*, the dollar volume foreclosed), nor the comparative quantitative substantiality of *Standard Stations*[51] (*i.e.*, the market share foreclosed) was to be the controlling doctrine, stating:

> To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account [1] the relative strength of the parties, [2] the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, [3] and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.[52]

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46. International Salt Co. v. United States, 332 U.S. 392 (1947).
47. Standard Oil Co. v. United States, 337 U.S. 293 (1949).
48. Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 772 (6th Cir. 1960).
49. 365 U.S. at 331.
50. *Id.* at 333. Assuming maximum pre-emption, the Court said, the figure would be .77%.
51. The Court in *Tampa Electric* explained *Standard Stations* this way:

> . . . the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in *Standard Oil Co. v. United States, supra.* There the impact of the requirements contracts was studied in the setting of the large number of gasoline stations—5,937 or 16% of the retail outlets in the relevant market—and the large number of contracts, over 8,000, together with the great volume of products involved. This combination dictated a finding that "Standard's use of the contracts [created] just such a potential clog on competition as it was the purpose of § 3 to remove" where, as there, the affected proportion of retail sales was substantial. *Id.* at 328-29.

52. *Id.* at 329 (numbering added). *Cf.* the "rule of reason" approach in Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

In short, substantiality of dollars or percentages is not the end of the inquiry; there must, in addition, be an evaluation of the probable impact of the exclusive on "effective competition" in the market—which is another way of saying that the market facts must be probed to see whether sellers have access to needed outlets and buyers to needed supplies. Lawfulness thus depends on the probable effect of the challenged agreement on the vigor of competition in the defined market.[53]

Applying these principles to the facts, the Court stated that although $128 million is a "considerable sum" of money, "the dollar-volume, by itself, is not the test. . . ."[54] Distinguishing other cases of section 3 illegality, the Court noted that "there is here neither a seller with a dominant position in the market as in *Standard Fashion* . . . ; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard [Stations]* . . . ; nor a plainly restrictive tying arrangement as in *International Salt*. . . ."[55] The *Tampa* contract, on the other hand, did not "substantially foreclose competition" and possessed legitimate economic advantages to the buyer to boot:[56]

> The 20-year period of the contract is singled out as the principal vice, but at least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest. . . . This is not to say that utilities are immunized from Clayton Act proscriptions, but merely that, *in judging the term of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized considerations of the parties' operations are not irrelevant.*[57]

Standard Stations had rested on an improper reading of the legislative history of section 3—which the Court itself recognized at the time, but only partially corrected in an amended opinion.[58] This is not the occasion to delve

53. See HANDLER, ANTITRUST IN PERSPECTIVE ch. II (1957).

54. 365 U.S. at 334. Though protracted requirements contracts "may well be" suspect, the Court observed, "they have not been declared illegal *per se*." *Id.* at 333. And, though a single contract may fall within the broad prohibitions of § 3, "it must also suffer the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market." *Ibid.*

55. *Id.* at 334.

56. Quoting from *Standard Stations*, the Court also stated: "In the case of the buyer it 'may assure supply,' while on the part of the seller it 'may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market.' " *Ibid.*

57. *Id.* at 334-35 (emphasis added).

58. As first published, the opinion recited: ". . . it is significant that the qualifying language was added only after a flat prohibition of tying clauses and requirements contracts had passed both Houses of Congress." 17 U.S.L. WEEK 4516 (U.S. June 13, 1949). After a petition for rehearing, this sentence was changed to read: ". . . it is significant that the qualifying language was not added until after the House and Senate bills reached Conference." 337 U.S. at 312. The Court's original version had been written under the misapprehension that, prior to Conference, both the House and Senate bills absolutely prohibited exclusives; the suggestion was that the Conference had inserted the qualifying

into that legislative history at length. But a capsulized review of the tortuous course of the measures that eventuated in section 3 should be enlightening.[59]

The bill originally considered by the House Judiciary Committee [60] stigmatized any exclusive-dealing arrangement as an illegal attempt to monopolize. Following extensive hearings,[61] the Committee revised the bill to provide criminal sanctions, violations being punishable by $5,000 fine and imprisonment of one year.[62] Unlike sections 2 and 7, which were simultaneously considered, there was no requirement in section 3 of a showing of intent to harm a competitor or of adverse competitive or monopolistic effects. The House approved the bill virtually without change.[63]

The Senate, however, took precisely the opposite view. Its Judiciary Committee struck the criminal penalties.[64] After the Committee rendered its report, but prior to the Senate debate, the Federal Trade Commission Act was passed. The Senate Committee then recommended deletion from the House bill of any reference to exclusives on the theory that this could best be handled by the Commission. The appropriate paragraph of the bill was stricken by the Senate.[65] The Senate thereafter reversed itself and restored the House prohibition against exclusives.[66] Debate continued, and the Senate once more reversed itself and dropped the section for the second time.[67] This spelled the final rejection by the Senate—so far as exclusives were concerned

clause though both houses had already agreed upon absolute prohibition. In fact, while the House bill included an absolute prohibition of exclusives, the Senate did not prohibit any exclusives, restricting itself to patent tie-ins. Thus, the Conference Bill was a compromise between the conflicting approaches of the House and Senate—a fact which the revised version of the *Standard Stations* opinion still sloughs over.

59. Following the skein of § 3's history through the labyrinth of the legislative proceedings is a far more precarious task than the usual sortie into legislative history, since the debates, save for the brief discussion of the Conference measure, related to bills which were totally different from the final enactment.

60. The bill provided:

> Sec. 10. That it shall be deemed an attempt to monopolize trade or commerce among the several States, or with foreign nations or a part thereof, for any person in interstate or foreign commerce to make a sale of goods, wares, or merchandise or fix a price charged therefor or discount from or rebate upon such price, on the condition or understanding that the purchaser thereof shall not deal in the goods, wares, or merchandise of a competitor or competitors of the seller.

61. *Hearings Before the House Judiciary Committee on Trust Legislation*, 63d Cong., 2d Sess. (1914).

62. H.R. 15657, 63d Cong., 2d Sess. (1914); see H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914).

63. 51 Cong. Rec. 9909-11 (1914). The House approved the Committee Bill by a vote of 277 to 54, making only one slight modification of the Committee version—inserting the word "agreement" after the word "condition" in the original phrase "on the condition or understanding."

64. S. Rep. No. 698, 63d Cong., 2d Sess. 43 (1914).

65. 51 Cong. Rec. 13849 (1914).

66. *Id.* at 14272.

67. *Id.* at 14273.

—of the general absolute-prohibition type of bill advocated by the House. The Senate, as a substitute, passed a section applying only to patent tie-ins, which were unqualifiedly forbidden.[68]

The bill then went to Conference.[69] Whereas the House bill had contained flat prohibitions against exclusives and the Senate bill had relegated exclusives entirely to the Federal Trade Commission, the final version adopted a middle ground: the language of the House bill relating to the practices condemned was retained (without its criminal penalties), but the exclusives covered by it were declared illegal only where their effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—the highly important qualifying language embodying the yardsticks of illegality.[70]

The advocates of absolute-prohibition bills in both Houses greeted the conference bill with cries of outrage, claiming that the addition of the qualifying language watered down the measure and greatly increased the difficulty of proving a violation; they urged that inclusion of the word "substantial" compounded the evils which the qualifying clause would create even without it.[71] Their complaints were unavailing, however, and the bill passed both houses of Congress without change.[72]

These conclusions can be drawn from the complete legislative history of section 3:

First, Congress as a whole categorically rejected the absolute-prohibition standard which originated in the House.

Second, the addition of the qualifying language in Conference was not meant as a mere gloss, without significant substantive effect, on an absolute-prohibition bill. The contrary intimation in *Standard Stations* is plainly erroneous.

Third, while the debates on the qualifying language occurred only after the Conference Committee rendered its report, the record as a whole indicates that the new standard, though more stringent than prior Sherman Act requirements, did not outlaw all exclusives—or even those which are quantitatively substantial—but rather intended the courts to apply a discriminating judgment in differentiating between those arrangements which had a reasonable prospect of lessening competition to a substantial degree and those which did not. It would be an overstatement to suggest that Congress apprehended the subtleties involved and expressed any preference between the tests of absolute or comparative quantitative substantiality and the qualitative appraisal of the anticompetitive effects of exclusives in their market settings. But it is clear that the qualifying language was added in the spirit of compromise and as part of a general revision of sections 2 and 7, as well as section 3. The

68. *Id.* at 14609-10.

69. See S. Doc. No. 585, 63d Cong., 2d Sess. (1914).

70. 51 Cong. Rec. 15637-40 (1914).

71. *E.g.*, 51 Cong. Rec. 15830 (1914) (remarks of Senator Reed); *id.* at 16325 (remarks of Congressman Nelson).

72. *Id.* at 16170, 16344.

absolute prohibition approach was abandoned and an uncalibrated yardstick of legality adopted whose ultimate meaning of necessity would be determined by the courts.

The rationale of the Court in *Tampa Electric* is in absolute harmony with the legislative record. By the same token, it is in accord with the stand taken by the *Report of the Attorney General's Committee* that the proper inquiry is "whether competitors in fact have ready access to adequate sources of supply and to a sufficient number of outlets to enable their products to be effectively marketed."[73] There is recognition that exclusives can promote as well as subvert competition. "Substantiality," to the Supreme Court, is no longer a matter of dollars or market shares alone, but includes as well "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." Moreover, "particularized considerations of the parties' operations," including the economic *raison d'etre* for the contract, may not be dismissed as irrelevant in a section 3 case.

It is ironic that the Federal Trade Commission overturned its seven year old *Maico*[74] doctrine on the eve of *Tampa Electric. Maico* was founded on the principle that, while the courts might feel ill-suited to appraise economic data (as suggested by *Standard Stations*), the Commission had the necessary expertise and a congressional mandate to make such an appraisal. While the Commission during the *Maico* era never upheld an exclusive,[75] at least the inquiry did not begin and end with the introduction of market share data. However, *in Mytinger & Casselberry, Inc.*,[76] decided in September of 1960, when respondents proffered certain economic data to justify exclusive agreements with distributors of their vitamin-mineral supplement, the Commission

73. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 147 n.73 (1955).

74. Maico Co., 50 F.T.C. 485 (1953). See also Kintner, *Exclusive Dealing*, 3 PRAC. LAW., Apr. 1957, p. 69; Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1177 (1955).

75. See Harley-Davidson Motor Co., 50 F.T.C. 1047 (1954); Revlon Prods. Corp., 51 F.T.C. 260 (1954), *motion to reopen denied*, 51 F.T.C. 466 (1954); Beltone Hearing Aid Co., 52 F.T.C. 830 (1956); Outboard, Marine & Mfg. Co., 52 F.T.C. 1553 (1956). *But cf.* Insto-Gas Corp., 51 F.T.C. 363, 364 (1954), *final order*, 54 F.T.C. 741 (1957) (tie-in). As a matter of fact, until *Tampa*, the courts also, with one exception, United States v. J.I. Case Co., 101 F. Supp. 856 (D. Minn. 1951), followed *Standard Stations* and found a § 3 infraction in every exclusive which came before them. See Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952), *rev'd on other grounds*, 346 U.S. 61 (1953); Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950); United States v. Sun Oil Co., 176 F. Supp. 715 (E.D. Pa. 1959); Red Rock Bottlers, Inc. v. Red Rock Cola Co., 1952 Trade Cas. ¶ 67375 (N.D. Ga. 1952); *cf.* Transamerica Corp. v. Board of Governors, 206 F.2d 163, 170 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953).

76. Mytinger & Casselberry, Inc., TRADE REG. REP. ¶ 29091, at 37529 (Sept. 28, 1960); see also Timken Roller Bearing Co., TRADE REG. REP. ¶ 29373, at 37699 n.2 (Jan. 24, 1961).

expressly overruled *Maico* and rejected the evidence. It remarked that since the date of that case, the courts had made it clear that economic considerations were irrelevant and that under *Standard Stations* illegality necessarily followed from the fact that respondents' volume of business "is substantial and that their exclusive dealing requirement affects a substantial share of the market."[77]

Now that *Tampa Electric* has given the *Standard Stations* doctrine a face-lifting, it is plain that the Commission was right the first time and that it will have no alternative but to revert to its *Maico* approach.

III. The Sherman Act and the Noerr Case

In its unanimous judgment in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[78] the Supreme Court announced that there are areas of our economic and political life in which the precepts of antitrust must yield to other social values. As in *Apex Hosiery*[79] a generation ago, it recognized that there are limits to the application of the Sherman Act to business activities.

The unusual facts of the *Noerr* case were these: twenty-four Eastern railroads engaged a public relations firm to conduct a publicity campaign designed principally to foster the adoption and retention of legislation and the enforcement of existing laws restricting the permissible weight-load of motor carriers and increasing taxes on the trucking industry. The trial court held the railroads' campaign unlawful under the Sherman Act, finding that it was malicious because its only purpose was to injure and destroy the truckers as competitors for the long-distance freight business, and that it was fraudulent because it utilized the "third-party technique" (pretending in its publicity that support of legislation favored by the railroads came spontaneously from independent persons and civic groups when, in fact, it was inspired and paid for by the railroads' public relations counselor).

To Mr. Justice Black, writing for the Court, the case presented "a new and unusual application of the Sherman Act" involving "severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable."[80] The challenged conduct, he believed, bore "very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts,

77. Mytinger & Casselberry, Inc., *supra* note 76, at 37530.

78. 365 U.S. 127 (1961).

79. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). In *Apex*, the Court had rejected the argument that a sit-down strike was a conspiracy in restraint of trade, thereby refusing to convert the Sherman Act into a policing measure to curb conventional torts and crimes.

80. 365 U.S. at 135.

market-division agreements, and other similar arrangements."[81] It was clear to the Court that "the Sherman Act does not apply to the . . . mere solicitation of governmental action with respect to the passage and enforcement of laws."[82]

The Supreme Court disagreed with the lower courts that there were factors present in the case which made antitrust proscriptions applicable to the railroads' activities. It believed that the anticompetitive *purpose* of the railroads —one of the elements relied upon below as a basis of liability—was legally irrelevant. "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."[83] While the lower courts said that the railroads' purpose was to hurt the truckers in every way possible, whether or not any legislation was secured, there were no specific findings that the defendants made any direct effort to persuade any shipper not to deal with the plaintiffs. This proved fatal to the truckers' case because it meant that any injury they may have suffered was no more than "an incidental effect" of the railroads' publicity campaign.[84] The third-party technique admittedly fell "far short of the ethical standards generally approved in this country," but the Sherman Act outlaws "trade restraints, not political activity";[85] "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned";[86] "the proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena."[87]

The Court clearly stated that its purpose in narrowing the scope of the Sherman Act was to avoid serious constitutional questions. Though the conclusion is articulated in these terms, in determining that the Sherman Act must be thus narrowly construed, the Court balanced the objectives of antitrust and the goals of the first amendment,[88] according the right of petition a higher place in the hierarchy of values than the protection of a tradesman against malicious and fraudulent competition.[89] Presumably, a "vicious" cam-

81. *Id.* at 136.

82. *Id.* at 138.

83. *Id.* at 139. See also: "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135.

84. *Id.* at 143. The Court acknowledged that there might be a publicity campaign aimed at influencing government which is a mere sham to cover an attempt to interfere directly with a competitor, but that was not this case.

85. *Id.* at 140.

86. *Id.* at 145.

87. *Id.* at 141.

88. See Associated Press v. United States, 326 U.S. 1, 7 (1945); *cf.* American Column & Lumber Co. v. United States, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting).

89. *Cf.* Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909), and kindred cases cited at HANDLER, CASES ON TRADE REGULATION 786 n.2 (3d ed. 1960); 3 RESTATEMENT, TORTS § 709 (1938).

paign to injure competition is beyond the reach of antitrust if it is executed by constitutionally guaranteed means, provided the Court is convinced on the facts of the particular case that the uninhibited exercise of the constitutional freedom is more important to society than the protection of an industry from such destructive conduct. This admirable technique of balancing conveniences is the very essence of the rule of reason fashioned by Lord Parker two and a half centuries ago for the common law [90] and by Chief Justice White fifty years ago for the Sherman Act.[91] It is noteworthy to see it employed by the able jurist who on other occasions has denigrated the rule of reason methodology in antitrust adjudication.[92]

IV. The Federal Trade Commission Act and the Grand Union Doctrine

In marked contrast with the Supreme Court's modest interpretation of the scope of the Sherman Act in *Noerr*, the Federal Trade Commission in *Grand Union* [93] gave an expansive reading to its organic statute. It condemned, as an unfair method of competition under section 5 of the Federal Trade Commission Act, the action of Grand Union in inducing its suppliers to provide promotional allowances on the ground that the practice infringed the spirit, though not the letter, of section 2(f) of the Robinson-Patman Act. As read by the Commission, section 5 of the Federal Trade Commission Act gave it the power to "supplement and bolster" the specific statutory prohibitions.[94]

Like the courts, the Commission has ample latitude under modern canons of construction to execute the legislative will.[95] Since promotional allowances are a species of indirect price discrimination, the argument might have been pressed in *Grand Union* that section 2(f) fastens liability upon the buyer who knowingly induces his seller to grant him an allowance denied his competitors.[96] But the Commission was unwilling to extend the coverage of sec-

90. Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

91. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). See Handler, Antitrust in Perspective ch. I (1957).

92. See Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

93. Grand Union Co., Trade Reg. Rep. ¶ 28980 (1960), *appeal docketed*, No. 26553, 2d Cir., Oct. 13, 1960.

94. Grand Union Co., Trade Reg. Rep. ¶ 28980, at 37480 (1960).

95. See Frankfurter, Some Reflections on the Reading of Statutes (1947).

96. In Automatic Canteen Co. v. FTC, 346 U.S. 61, 73 n.14 (1953), Mr. Justice Frankfurter left this question open.

Where a monopolistic exaction takes the form of the inducement of a wrongful promotional allowance, the conduct partakes of a Sherman Act infraction and, as pointed out in the text, is plainly cognizable by the Commission. *Cf.* Union News Co., Trade Reg. Rep. ¶ 29335, at 37669-70 (Jan. 10, 1961):

> Union's great size in comparison with its newsstand operator competitors placed it in a position of near dominance in the field. Profit margins realized from the operation of newsstands are very small and the total newsstand sales of magazines has

tion 2(f) by the traditional methods of statutory interpretation. Instead it chose to predicate its cease and desist order upon the broader base of section 5. The plain implication of the opinion is that the Commission, whenever it discovers limitations in legislative language which cannot be overcome by the liberal processes of statutory construction, can utilize the convenient vagueness of the concept of "unfair methods of competition" as an independent source of power to "supply what Congress has studiously omitted"[97] from its enactments.[98]

The scope of this novel theory can best be explored by considering a series of cognate situations.

Can the Commission in its discretion forbid *all* price differences by attacking them as an unfair method of competition under section 5 of the Federal Trade Commission Act instead of under section 2(a) of the Robinson-Patman Act, which requires proof of specified anticompetitive effects?[99]

Price discrimination is illegal under the Robinson-Patman Act only when it involves products of "like grade and quality." Can the Commission proceed against a tradesman who practices price discrimination among products that are *not* of like grade or quality by charging him with an unfair method of competition under the Federal Trade Commission Act?[100]

Section 2(a) of the Robinson-Patman Act speaks of discrimination in price in the sale of *commodities*. Can discrimination in the sale of *services* be condemned under the Federal Trade Commission Act?[101]

Can tie-ins, full-line forcing or exclusive arrangements, having none of the effects forbidden by section 3 of the Clayton Act, be stigmatized as unfair

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> shown a substantial decline over the past ten years. On these facts it is patently obvious that to allow respondents to continue receiving large sums not received by their competitors would inevitably lead to the demise of the competitors and the attainment of a monopoly by respondents.

Even here, the Commission erroneously based its order upon a strained construction of § 5 as a supplement to § 2(f) of the Robinson-Patman Act, rather than upon § 5's assimilation of the Sherman Act. Monopolistic exaction has always been deemed violative of both the common law and the Sherman Act, and the Commission could readily have rested its decision in *Union News*, on the facts as stated above, on this solid ground.

97. FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959).

98. *Cf.* Foremost Dairies, Inc., 52 F.T.C. 1480 (1956), where the Commission spoke of reaching "practices not technically within the scope of a specific section of the Clayton Act"—there, § 7—by means of § 5 of the Federal Trade Commission Act. *But cf.* the subsequent initial decision, Foremost Dairies, Inc., No. 6495, FTC, pp. 83-84 (Dec. 9, 1960).

Commissioner Tait, dissenting in *Grand Union*, articulated his objection to the majority view this way: "I am in vigorous disagreement with an approach to the law which has too much sail and too little anchor, or too much supplement and too little bolster." TRADE REG. REP. ¶ 28980, at 37486 (1960).

99. See Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961). *Cf.* Simplicity Pattern Co., 53 F.T.C. 771, 777 (1957).

100. See Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).

101. See Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935). *Cf.* Address, William Tincher, Associate Direc-

methods of competition in proceedings under the Federal Trade Commission Act?[102]

Is it to be assumed, under the rationale of *Grand Union*, that the Commission could have plugged the assets loophole in original section 7 without any amendatory legislation?[103]

Was the Robinson-Patman Act itself unnecessary since section 2 of the original Clayton Act dealt generally with the problems of price discrimination and its frustrating inadequacies could have been transcended by the process of administrative bolstering and supplementation?[104]

If, under *Grand Union*, the answers to these questions are in the affirmative, then the Commission is clothed with a plenitude of power hitherto unsuspected,[105] and the specific acts of Congress in the antitrust field which the Commission administers are essentially superfluous.

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tor, FTC Bureau of Litigation, Iowa Milk Dealers & Iowa Ice Cream Mfrs. Associations, Okoboji, Iowa, Sept. 15, 1960, p. 16:

> An actual sale of the seller's products must be involved and, apparently, a genuine consignment transaction by the seller accompanied by disproportionate equality of promotional treatment would not violate Sections 2(d) or 2(e), although it might be construed as grounds for a Section 5 FTC Act violation as an unfair method of competition.

102. *Compare* FTC v. Gratz, 253 U.S. 421 (1920), *with* FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953).

103. See FTC v. Western Meat Co., 272 U.S. 554 (1926); Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934); FTC ANNUAL REPORT 19 (1928); *id.* at 6, 59 (1929); *id.* at 50 (1930); *id.* at 62 (1932); *id.* at 68 (1933); *id.* at 52 (1934); *id.* at 16, 48 (1935); *id.* at 48 (1936); *id.* at 15 (1937); *id.* at 11, 19, 29 (1938); *id.* at 14 (1939); *id.* at 12 (1940); *id.* at 11, 19 (1941); *id.* at 9 (1942); *id.* at 9 (1943); *id.* at 8 (1944); *id.* at 8 (1945); *id.* at 12 (1946); *id.* at 12, 15 (1947); *id.* at 11, 16 (1948); *id.* at 3 (1949).

And can the limitations of § 8 of the Clayton Act be overcome by assailing interlocks under § 5? See FTC, REPORT ON INTERLOCKING DIRECTORATES 13-15 (1951).

104. See FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION 65 (1934):

> It may very well be that a violation of section 2 of the Clayton Act is *ipso facto* an unfair method of competition and therefore a violation of section 5 of the Federal Trade Commission Act. It does not follow, however, that a discrimination in price which falls short of violating the first may be attacked under the second. If the discrimination is actually within the provisos and exceptions of section 2, those same defenses would doubtless be interposed to a proceeding under section 5, with perhaps controlling effect. The wiser course seems to be to treat the price discriminations in favor of chain stores only as a possible violation of section 2, and not as a possibly unfair method of competition. The point cannot be overlooked that if price discrimination was included under the general prohibition of unfair methods of competition when the Federal Trade Commission Act was passed, the later expression of legislative will in the Clayton Act dealt specifically and in detail with the subject and would therefore seem to take precedence over the more general statutory prohibition.

Cf. 51 CONG. REC. 16318 (1914) (remarks of Congressman Floyd).

105. Apparently, the Commission's approach to statutory construction is a one-way street. When it came to deciding whether the meeting-competition defense applied in a § 2(d), as well as a § 2(e) proceeding, the Commission had this to say:

"We cannot supply what Congress has studiously omitted." Since subsection 2(b)

Whether Congress could constitutionally create an administrative agency with an express mandate to recast measures passed by both of its houses and signed by the President is a question of no concern here.[106] It is clear that Congress exercised no such power in establishing the Federal Trade Commission. The power to administer is not the power to amend or repeal.

Nowhere in the voluminous literature on the history and administration of the Federal Trade Commission Act nor in the comprehensive jurisprudence on unfair methods of competition will one find support for the view that the Commission can avoid limiting statutory language by resort to the broader contours of section 5.[107]

The Commission derives its authority from several separate and distinct sources:

1. It is charged with the responsibility of prohibiting unfair methods of competition,[108] a responsibility which has now been expanded by the Wheeler-Lea Act [109] to cover unfair or deceptive acts or practices.

2. It is one of the dual agencies enforcing the Sherman Act. This duty was never expressly conferred. It stems from and is an integral part of the Commission's assignment to outlaw unfair methods of competition. Any conduct rising to the level of a Sherman Act violation is within the Commission's competence to forbid.

3. In addition, Congress has expressly delegated to the Commission the administration of various enactments.[110] Included in this category are sections

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> refers only to a *seller's* furnishing a service or facility and since there is nothing in the history of the bill or in the language of the statute to support respondent's contentions that this provision may be applied defensively to a charge of violation of Section 2(d) we must to this extent deny respondent's appeal.

Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 29195, at 37589 (Oct. 31, 1960). See Henry Rosenfeld, Inc., 52 F.T.C. 1535, 1551 (1956) (". . . we are forced to the 'bare-bones' language of the statute. . . .").

106. *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

107. See cases and materials cited, Handler, *Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COLUM. L. REV. 527 (1931); HANDLER, CASES ON TRADE REGULATION 846 (2d ed. 1951); HANDLER, CASES ON TRADE REGULATION 1040-41 (3d ed. 1960).

108. 38 Stat. 717 (1914), 15 U.S.C. § 45 (1958).

109. 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958).

110. Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 13, 14, 18, 19 (1958); Export Trade Act (Webb-Pomerene), 40 Stat. 516 (1918), 15 U.S.C. §§ 64, 65 (1958); Robinson-Patman Act, 49 Stat. 1526 (1936), as amended, 15 U.S.C. §§ 13-13c, 21a (1958); Wheeler-Lea Trade Commission Act, 52 Stat. 111 (1938), 15 U.S.C. §§ 41, 44, 45, 52-58 (1958); Wool Products Labeling Act, 54 Stat. 1128 (1940), 15 U.S.C. § 68a-j (1958); McCarran-Ferguson Ins. Reg. Act, 59 Stat. 33 (1945), 15 U.S.C. §§ 1012, 1013 (1958); Lanham Trademark Act, 60 Stat. 427 (1946), 15 U.S.C. § 1064 (1958); Oleomargarine Act, 64 Stat. 20 (1950), 15 U.S.C. § 55 (1958); Celler-Kefauver Act, 64 Stat. 1125 (1950), 15 U.S.C. §§ 18, 21 (1958); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. § 69a-j (1958); Flammable Fabrics Act, 67 Stat. 111 (1953), as amended, 15 U.S.C. §§ 1191-1200 (1958); Textile Fiber Products Indentification Act, 72 Stat. 1717 (1958), 15

2, 3, 7 and 8 of the Clayton Act. Section 11 of that statute[111] vests the Commission with "authority to enforce compliance" with these sections in those areas of the economy that are subject to its jurisdiction.

Doubts concerning the meaning of "unfair methods of competition" have largely disappeared over the years. Comprehensive as is this phrase, it has never been regarded as an unlimited grant of jurisdiction. In *FTC v. Gratz*[112] the first section 5 case to come before the Supreme Court, it was held that "it is for the courts, not the commission ultimately to determine as matter of law" what the words "unfair methods of competition" include. There has been no deviation from this view, although the courts assuredly are more hospitable to administrative bodies today than they were forty years ago.[113] Originally, the Court was disposed to confine "unfair methods of competition" to practices that were unlawful at the time the statute was enacted. This atavistic view, which would have frozen this branch of the law and denied it all capacity for growth and development, has happily been discarded.[114] The trade practices which now may be prohibited must either be unfair or restrictive. They are unfair when they are "opposed to good morals because characterized by deception, bad faith, fraud, or oppression." They are restrictive when they have a "dangerous tendency unduly to hinder competition or create monopoly."[115] These categories are not "fixed and unyielding."[116] As Henderson pointed out in his authoritative work on the Commission,[117] written within the first decade of its existence:

> . . . [T]he debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional intention to confer on the Commission, subject to court review, the duty of giving a detailed content to the general principle embodied in the phrase [unfair methods of competition], and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law and under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar.[118]

U.S.C. § 70a-k (1958); Packers and Stockyards Act, 72 Stat. 1749 (1958), 7 U.S.C. § 227 (1958).

111. 15 U.S.C. § 21 (1958).

112. 253 U.S. 421, 427 (1920).

113. FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922); FTC v. Curtis Publishing Co., 260 U.S. 568, 579-80 (1923); FTC v. Sinclair Ref. Co., 261 U.S. 463, 475 (1923); FTC. v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924); FTC v. Raladam Co., 283 U.S. 643, 648 (1931); FTC v. R.F. Keppel & Bros., 291 U.S. 304, 314 (1934); FTC v. Gratz, 253 U.S. 421, 437 (1920) (Brandeis, J., dissenting). FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 396 (1953), is not to the contrary; it asserts that the *factual* analysis of competitive impact is for the Commission—the issue of law is still for the courts to determine.

114. *E.g.*, FTC v. R.F. Keppel & Bros., 291 U.S. 304 (1934).

115. FTC v. Gratz, 253 U.S. 421, 427 (1920).

116. FTC v. R.F. Keppel & Bros., 291 U.S. 304, 310 (1934).

117. Henderson, The Federal Trade Commission 36 (1924).

118. *Id.* at 36.

In reasoning by analogy, the Commission can fulfill the Congressional purpose as expressed by Senator Cummins, one of the managers of the Commission Bill, that "the words 'unfair competition' can grow and broaden and mold themselves to meet circumstances as they arise just as the words 'restraint of trade' have grown and been molded in order to meet the necessities of the American people."[119] Thirty years ago, the author, in writing about the jurisdiction of the Commission, observed that "Flexible language bespeaks a desire for flexible interpretation."[120] But there are metes and bounds even to flexible interpretation. There is no general authority in the Commission to formulate codes of permissible business behavior or to introduce into the fabric of competitive regulation its personal predilections of what is good or bad for the economy.[121] There is no general authority to label conduct as an unfair method of competition where Congress has spoken on the general subject but what it has said does not go as far as the Commission would like. For the Commission to do any of these things is not to reason by analogy or upon principle, but is to usurp legislative powers.[122]

An agency of government charged with preventing unfair methods of competition and restraint of trade has its task cut out for it. There is ample for it to do in discharging these heavy responsibilities without seeking new worlds to conquer. The stream can run deep and fast without overflowing its banks. It will be a long time before business is completely purged of all unfair or restrictive practices, including the novel restraints which these elastic principles necessarily comprehend.

When operating under a specific grant from Congress such as that contained in section 11 of the Clayton Act, the Commission's role is to "enforce compliance." The Commission's power to enforce is no greater and no less than that of the courts. It is to be emphasized that this explicit authority is to compel compliance with the sections as congressionally written, not to supplement or erase, bolster or emasculate, extend or contract, or otherwise rewrite. There is no suggestion in either statute that the provisions of the Clayton Act are to be merged with section 5 and lose their identity as the careful expression of the legislative will on the legitimacy of the practices to which they relate. Specific legislative terms such as commodities, price, lease or sale have finite meanings. Their stretch is quite limited. Once the permissible frontiers of interpretation have been reached, the enforcing authority is

119. 51 CONG. REC. 14003 (1914).

120. Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising*, 31 COLUM. L. REV. 527, 532 (1931).

121. See the ever-expanding list of unfair methods and practices forbidden by the Commission under § 5. FTC ANNUAL REPORT 85 (1959).

122. See Stone, J., in FTC v. R.F. Keppel & Bros., 291 U.S. 304, 314 (1934): "We do not intimate . . . that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences"; *cf.* Cardozo, J., concurring in Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935): "This is delegation running riot. No such plenitude of power is susceptible of transfer."

exhausted. No one has expressed this thought better than Judge Moore in *Atalanta Trading Corp. v. FTC*:

> The expertise possessed by an administrative agency, however, does not empower it to rewrite the laws which it has been charged with enforcing. This is the function of Congress.[123]

The notion that these concrete enactments can be incorporated by reference into the accordion-like concept of unfair competition and their narrow wording thereafter ignored is further belied by the legislative history of the Clayton Act. That statute was passed after the creation of the Federal Trade Commission.[124] The Senate, in considering the bill adopted by the House, eliminated sections 2 and 3 as unnecessary because it believed that the Federal Trade Commission Act itself imposed the duty upon the new agency to prohibit price discrimination, exclusive dealing, and tying arrangements.[125] But these sections were subsequently reinstated upon the insistence of the House Conference managers that the Commission, without specific authorization, would be lacking the power to attack these practices.[126] It is thus clear that Congress

123. Atalanta Trading Corp. v. FTC, 258 F.2d 365, 374 (2d Cir. 1958). See also Black, J., in FTC v. Morton Salt Co., 334 U.S. 37, 48 (1948): "Since Congress has not seen fit to give carload discounts any favored classification we cannot do so"; McReynolds, J., in FTC v. Sinclair Ref. Co., 261 U.S. 463, 475-76 (1923);

> The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition.

L. Hand, J., in Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1929):

> Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject matter.

124. The Federal Trade Commission Act was approved on September 26, 1914. The Clayton Act was finally passed by Congress on October 8, 1914.

125. 51 CONG. REC. 13849 (1914).

126. 51 CONG. REC. 16318 (1914). Congressman Floyd, speaking for the managers, reported:

> Your conferees believed that in dealing with these contractual relations, the Supreme Court having held that Congress has the power to declare null and void any contract that substantially interfered with interstate commerce, but that the courts have no such power in the absence of an act of Congress condemning them, such contracts would be upheld in the future, not only by the commission but by the courts until the legislative power of this Government declared them to be unlawful. We insisted that those three [sic, two?] provisions be placed back in the bill, and finally they were placed back in the bill without the penalties.

As a matter of fact, President Wilson had called upon Congress to enact an explicit legislative definition of anticompetitive practices:

> Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up

intended the conduct prohibited by sections 2 and 3 to be governed by these sections of the Clayton Act alone and not by section 5 of the Federal Trade Commission Act.[127] Perhaps Congress could have delegated to the Commission the task of defining the boundaries of illegality of price discrimination and exclusive dealing as species of unfair competitive methods; but it chose not to do so. It preferred, instead, to designate the Commission as an enforcing agency to outlaw specifically defined offenses. It was unwilling to leave the matter at large. Instead, it formulated the country's policies on these issues after full consideration and extensive debate. Far from endowing the Commission with power to "supplement and bolster," Congress expressly limited the Commission to the role of enforcing compliance with the sections as it drafted them.

Can the "incipiency doctrine" be employed as a tool to "supplement and bolster" the Clayton Act? To answer this question the meaning of the doctrine must first be explored. The word "incipiency" appears only once in the Committee Reports on the 1914 legislation. The Senate Report on the Clayton bill states:

> Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.[128]

The Clayton Act was adopted in order to prevent conduct which was thought not to be reached by the prior law and which, if unchecked, might flower into full-grown antitrust derelictions. Incipiency, thus, relates to the very acts made unlawful by these four sections of the Clayton Act. Similarly with the Federal Trade Commission Act. Its basic purpose was to strike at those unfair acts which had not theretofore been covered by federal law and which, if not prevented, might generate monopolistic tendencies. There is no such thing as an incipient violation of the Clayton or the Trade Commission Acts. The statutes are either violated or they are not. There is no incipient unfair method of competition; no incipient price discrimination; no incipient exclusive dealing arrangement; no incipient merger. Only those acts are for-

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> to the limit of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

51 CONG. REC. 1963 (1914).

127. Sections 7 and 8 are likewise to be enforced as written. If the Commission wants to attack mergers as Sherman Act violations, it may do so. But then it must apply Sherman Law criteria.

128. S. REP. No. 698, 63d Cong., 2d Sess. 1 (1914), quoted in United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597 (1957).

bidden which fall within the four corners of the statutes passed by Congress.

The basis of liability under the Clayton Act is a reasonable probability of anticompetitive harm. This standard would be meaningless if an incipient injury to competition constituted a statutory infraction. Incipiency in such a context would mean a mere possibility—not even a reasonable one—of anticompetitive harm. Reliance upon incipiency would be tantamount to erasing the qualifying language from the various Clayton Act sections.

Congress vested the Commission with a broad and flexible mandate. But it did not endow it with the power to legislate. In the final analysis a democracy cannot permit its laws to be rewritten by the administrative agencies or the executive. Where administration discloses defects or limitations in the laws drafted by Congress with which the techniques of interpretation are unable to cope, the remedy is to request supplemental legislation from the elected representatives of the people who, under our system of government, are the final arbiters of national policy. This has been the settled practice in the antitrust field where numerous legislative changes have been made over the years.[129] This, it is submitted, is the position the Commission should have taken in *Grand Union.*

V. The Robinson-Patman Act

An important personage in American life recently asked a group of antitrust specialists whether it was correct to say that the Robinson-Patman Act was a "mess." The Supreme Court, though not using such inelegant language, provided a partial answer to this provocative question several years ago when it observed, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act."[130] But the difficulty cuts more deeply than mere infelicity of statutory draftsmanship. Loose and sweeping application of the Act to conduct having no real anticompetitive significance not only does not promote but actually restrains competition. This is being increasingly apprehended by the courts. In *Standard Oil of Indiana,*[131] the Supreme Court warned that "Congress did not seek by the Robinson-Patman Act . . . to abolish competition." In *Automatic Canteen,*[132] the Court emphasized that Robinson-Patman had to be reconciled with "the broader antitrust policies that have been laid down by Congress." In *Atalanta,* the Second Circuit noted that the Commission's "rigid application of section 2(d) would stifle rather than encourage competition . . . ."[133]

129. See Antitrust Laws with Amendments 1890-1959 (1959).

130. Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953). Congressman Celler had branded the Act a "hodgepodge," adding that it "contains many inconsistencies, and the courts will have the devil's own job to unravel the tangle. . . . You have the herculean task to make it yield sense." 80 Cong. Rec. 9419 (1936).

131. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

132. 346 U.S. 61, 74 (1953).

133. 258 F.2d 365, 371 (2d Cir. 1958). See also Sun Oil Co. v. FTC, 1961 Trade Cas. ¶ 70083, at 78341 (5th Cir. 1961).

The problem which needs to be faced is not whether the Robinson-Patman Act can be harmonized with the Sherman Act as a matter of theory.[134] An effective price discrimination law is an integral part of a co-ordinated antitrust program. Rather, the problem is the more practical one of determining whether recent efforts to extend the reach of the statute and to emasculate the defenses which it expressly sanctions should be tolerated in the public interest.

Robinson-Patman does not in terms forbid all price differences.[135] What are interdicted are those differentials in price which are apt to have monopoly repercussions, sap the competitive order of its vitality, or prevent, destroy, or injure competition. The statute is very explicit on this point. Yet there is a discernible proclivity in the administration of this legislation to equate price differences with unlawful price discrimination.[136] This occurs in several ways.

There has been a tendency to infer injury to competition automatically from the fact that there are price differences in sales to competing buyers.[137] Because a buyer pays more than his competitor does not necessarily mean that his ability to compete is likely to be impaired. An inference of competitive

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134. *Cf.* Loevinger, *Recent Developments in Antitrust Enforcement,* 18 A.B.A. ANTITRUST SECTION REP. 102 (1961).

135. See Gwynne, Comm'r, in General Foods Corp., 50 F.T.C. 885, 890 (1954): "It has often been pointed out that differences in price without competitive injury are not illegal"; Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961); Fred Bronner Corp., TRADE REG. REP. ¶ 29125 (Sept. 29, 1960); Purex Corp., 51 F.T.C. 100 (1954); Yale & Towne Mfg. Co., 52 F.T.C. 1580 (1956); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 790 (7th Cir. 1951), *petition for cert. dismissed,* 344 U.S. 206 (1952). *Cf.* H.R. REP. No. 1422, 81st Cong., 1st Sess. 5-6 (1949):

> The seller who did not get the order may feel injured, but that does not mean that competition has been injured. In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. "Competition," Mr. Justice Holmes observed, "is worth what it cost." We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition. We can and do, however, prohibit injury to competition. Competition is injured through the seller acquiring monopolistic control of a market, by local price cutting, selling below cost, and in the use of other predatory practices. These practices are prohibited by the antitrust laws.

136. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 160 (1955). However, Chief Justice Warren in FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 553 (1960), made clear that "price differences constitute but one element of a § 2(a) violation" and that respondent had "vigorously contested this very case on the entirely separate [ground] of insufficient injury to competition . . . ." And see Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961).

137. See, *e.g.,* Moog Indus., Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), *aff'd on other grounds,* 355 U.S. 411 (1958); Tri-Valley Packing Ass'n, No. 7225, FTC, p. 18 (Aug. 4, 1961) (initial decision).

injury may be permissible, depending upon the circumstances, but it is not inexorable or conclusive. A tendency lightly to assume the existence of competition not solidly proven aggravates the likelihood that the requirement of competitive injury will be watered down to the point of disappearance and that price differences by themselves will be held unlawful.[138]

Moreover, though the Clayton Act admittedly deals with prospective rather than actual harm, if all that need be shown to make out a case of violation is that there is a reasonable *possibility* of injury to competition, as distinguished from a reasonable *probability*, the result comes dangerously near total condemnation of all price differentials [139]—unless the difference between "possibility" and "probability" is semantic only.

The same result may be produced by placing the burden upon the respondent to negate a presumption that the price differences are likely to injure competition.[140]

On every one of these matters the rulings are in conflict.[141]

Those who would attach liability to price differences alone, either as a deliberate choice of policy or by the erosion of the qualifying standards of section 2(a), might ask themselves what social end is furthered by encouraging rigidity and uniformity of prices and depriving the economy of the advantages of the sturdy bargaining between buyer and seller—the traditional first step by which prices are normally reduced.[142] Will it be seriously con-

138. In a secondary line case, there must be proof of the substantiality of the competition between favored and disfavored buyers, Chicago Sugar Ref. Co. v. American Ref. Co., 176 F.2d 1, 10 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950); Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 355 (E.D.N.Y. 1960); Alexander v. Texas Co., 165 F. Supp. 53, 57 (W.D. La. 1958); *id.*, 149 F. Supp. 37, 41 (W.D. La. 1957), and of the substantiality of the price differential. Fred Bonner Corp., TRADE REG. REP. ¶ 29125 (Sept. 29, 1960); Whitaker Cable Corp. v. FTC, 239 F.2d 253, 256 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

139. *Compare* FTC v. Morton Salt Co., 334 U.S. 37, 47 (1948), *with* FTC, Memorandum of General Counsel on Proof of Injury to Competition in Primary and Secondary Lines 7-8 (1952).

140. *Compare* Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), *modified on other grounds*, 155 F.2d 1016 (2d Cir. 1946); FTC v. Standard Brands, 189 F.2d 510, 515 (2d Cir. 1951); *and* Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 460 (2d Cir. 1957), *cert. denied*, 353 U.S. 965 (1957); *with* General Foods Corp., 50 F.T.C. 885, 889 (1954); Sun Oil Co., 55 F.T.C. 955, 976 (1959), *rev'd on other grounds*, 1961 Trade Cas. ¶ 70083 (5th Cir. 1961); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

141. See notes 137-40 *supra.*

142. *Cf.* Mr. Justice Frankfurter in Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953), who points to "that sturdy bargaining between buyer and seller for which scope was was presumably left in the areas of our economy not otherwise regulated," and who makes clear the duty "to reconcile such interpretation [of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress."

tended that the administrative and judicial processes are incapable of distinguishing between the price differences which increase the vigor of competition and those which are reasonably likely to produce the adverse effects condemned by the statute?[143] If the objective is the elimination of monopolistic discrimination, as the proponents of the statute assert,[144] the record of enforcement shows a misdirection of effort, since most Commission proceedings are brought against small business men,[145] including those intended to be benefited by the statute.[146] Orders forbidding monopolistic discrimination are such rarities as to be collectors' items.

Why is it that enforcement agencies do not concentrate on the hard-core violations and thus protect the public (and that includes sellers, buyers, and consumers) from the evil effects of the practices which Congress expressly prohibited? Why instead do they employ dragnet methods to implicate conduct having no real anticompetitive consequences?[147] Certainly no one will assert that the indefensible types of price discrimination have so completely disappeared from the economic scene that they no longer require the attention of prosecuting agencies. Instead of drifting into a regime in which a mere difference in price is equated with an unlawful discrimination, should not the Government, business, and the bar pause to consider whether this trend is in the public interest?[148]

The Robinson-Patman prohibitions become operative only if there is discrimination "between different purchasers of commodities of like grade and quality." There is little case law on the precise content of likeness in grade and quality. One thing, however, is clear: there is no authority to require uniform methods of pricing for disparate products. Thus, a multi-line seller

143. See Mr. Justice Jackson, dissenting in FTC v. Ruberoid Co., 343 U.S. 470, 492 (1952), condemning "an undiscriminating prohibition of discrimination."

144. *E.g.,* 106 CONG. REC. 2083-84 (1960) (remarks of Congressman Patman).

145. See Rowe, *Expectation Versus Accomplishment under the Robinson -Patman Act, 1936-1960: A Statement of the Issues,* 17 A.B.A. ANTITRUST SECTION REP. 298, 303 (1960).

146. *E.g.,* Carpel Frosted Foods, Inc., 48 F.T.C. 581 (1951), and the host of *Automotive Parts* cases: Moog Industries, Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), *aff'd on other grounds,* 355 U.S. 411 (1958); E. Edelmann & Co. v. FTC, 239 F.2d 152 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958); Whitaker Cable Corp. v. FTC, 239 F.2d 253 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957); C. E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957), *modified on other grounds,* 355 U.S. 411 (1958); P. & D. Mfg. Co. v. FTC, 245 F.2d 281 (7th Cir. 1957), *cert. denied,* 355 U.S. 884 (1957); P. Sorensen Mfg. Co. v. FTC, 246 F.2d 687 (D.C. Cir. 1957); Standard Motor Prods., Inc. v. FTC, 265 F.2d 674 (2d Cir. 1959), *cert. denied,* 361 U.S. 826 (1959).

147. *Cf.* Select Committee on Small Business, *Price Discrimination, The Robinson-Patman Act, and the Attorney General's National Committee to Study the Antitrust Laws,* H.R. REP. No. 2966, 84th Cong., 2d Sess. (1956); Kintner, *The Role of Robinson-Patman in the Antitrust Scheme of Things—The Perspective of Enforcement Officials,* 17 A.B.A. ANTITRUST SECTION REP. 315, 321 (1960).

148. See Rowe, *Expectation Versus Accomplishment under the Robinson-Patman Act, 1936-1960: A Statement of the Issues,* 17 A.B.A. ANTITRUST SECTION REP. 298, 308-09 nn.40-42 (1960), which collects the literature assessing the Act.

need not set prices to realize the same profit margin on all his goods. In pricing he necessarily must heed not only his costs, but the conditions of supply and demand in the market. Yet, the Commission's staff has tried to apply the statute when a seller has charged different prices or realizes different rates of profit, even though the subjects of sale were not of like grade and quality.

This effort was sharply rebuked by the Second Circuit in *Atalanta*,[149] in which the Commission contended that all cuts of pork must be marketed under the same promotional allowance programs.[150] The products were pork shoulder picnics, canned hams, loin roll, cottage butts, chopped ham, precooked Canadian bacon, and raw, smoked, and sliced Canadian bacon. Under the Commission's view, when a seller gives a promotional allowance on one meat item, such as canned hams, he must give proportionally equal allowances on all meat products which he sells. As the hearing examiner put it: " 'All of these products were pork, and to [me] ham is ham.' "[151] In short, by treating unlikes as likes and ignoring differences in quality among the various cuts, the Commission would erase the requirement of "like grade and quality" from the statute and compel sellers to adopt uniform pricing and promotional methods for every product in their line. This tendency of reducing the Robinson-Patman Act to a set of *per se* proscriptions, sweeping to one side the elements which the statute requires the Commission to prove, may facilitate the task of enforcement, but only at the price of stifling competition. To the Court of Appeals, it was plain that Congress never intended so to shackle the economy.

In *Standard Oil of Indiana*,[152] Mr. Justice Burton stressed that "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." One would have thought that in light of this pronouncement, the Commission would have accorded the meeting-competition defense the preferred position it should enjoy in a competitive society. Instead, the Commission continues to begrudge its existence and, in point of fact, has yet to sustain the defense in any of its proceedings.[153] It has held that competition may be met to retain a customer, but

149. Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).

150. *Atalanta* was concerned with the lawfulness of promotional allowances challenged under § 2(d) of the Act. Section 2(d)— unlike § 2(a), which is concerned with price discrimination—does not expressly require that the products be of "like grade and quality" before disproportionate allowances can be condemned. But the Second Circuit in *Atalanta* read the requirement of "like grade and quality" into § 2(d). *Id.* at 369. *Accord,* Shulton, Inc., TRADE REG. REP. ¶ 29783, at 37923 (Sept. 25, 1961).

151. 258 F.2d at 368.

152. Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951).

153. However, some investigations apparently have been dropped because of the defense. *Hearings on S. 11 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 86th Cong., 1st Sess. 324 (1959).

not to gain a new one;[154] that a seller may not lower his price to enable his customers to meet their own competition;[155] and that the defense is wholly unavailable in section 2(d) cases.[156] Capping these limitations is the argument of the Commission staff that the price met must be a lawful one, with the burden on the seller to prove its legality.[157] If the only way to meet competition is to indulge in brinksmanship, "a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to none."[158] It is pertinent to ask how the public interest is promoted by cutting the heart out of a defense which derives its content from the paramount national policy of stimulating competition.

Despite the fact that Congress intended to permit the seller's cost savings to be passed on to his customer,[159] the statutory cost justification defense also has been virtually annulled by the Commission. As the Supreme Court noted in *Automatic Canteen*,[160] "whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business." The upshot has been that the defense has "proved largely illusory in practice."[161] The Advisory Committee on Cost Justification, which the Commission itself established, promulgated its enlightening report in 1956, but the Commission has never adopted it. In the rare case when a cost justification defense has

154. Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 677 (2d Cir. 1959), *cert. denied,* 361 U.S. 826 (1959). *Contra,* Sunshine Biscuits, Inc., No. 7708, FTC, pp. 3-4 (Feb. 20, 1961) (initial decision).

155. Sun Oil Co., 55 F.T.C. 955, 977 (1959). The erroneous reading of the statute by the Commission was reversed by the Fifth Circuit, Sun Oil Co. v. FTC, 1961 Trade Cas. ¶ 70083 (5th Cir. 1961), the court holding that the "defense of meeting competition in good faith is available to a supplier of gasoline when the supplier reduces the wholesale price of its gasoline to one of its filling stations engaged in a price battle at the consumer level with a station owned and operated by a competing supplier." 1961 Trade Cas. ¶ 70083, at 78338.

156. Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 29195 (Oct. 31, 1960); Shulton, Inc., TRADE REG. REP. ¶ 29783 (July 25, 1961). *Contra,* Delmar Constr. Co. v. Westinghouse Elec. Corp., 1961 Trade Cas. ¶ 69947 (S.D. Fla. 1961).

157. See E. Edelmann & Co., 51 F.T.C. 978, 996, 1010 (1955), *aff'd,* 239 F.2d 152 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958). *Contra,* Standard Oil Co. v. Brown, 238 F.2d 54, 58 (5th Cir. 1956). *But cf.* Brief for Petitioner, pp. 35-36, FTC v. Standard Oil Co., 355 U.S. 396 (1958); FTC v. Standard Oil Co., 355 U.S. 396, 399 n.4 (1958).

158. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 181 (1955).

159. "Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes. . . ." Automatic Canteen Co. v. FTC, 346 U.S. 61, 72 n.11 (1953).

160. *Id.* at 68.

161. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 171 (1955).

been sustained, the bar has been left without guidance as to the acceptable accounting methodology.[162] As a result, pressure to avoid the perils of Robinson-Patman attack leads again to a one-price policy. Cost savings are pocketed by the seller, while the buyer and his customers, contrary to the explicit intent of Congress, are denied "the benefits of more economical processes."[163]

The Commission, not content with its virtually automatic inference of injury to competition under section 2(a), coupled with the difficulty of establishing the statute's meeting-competition or cost-justification defenses, prefers, whenever possible, to avoid section 2(a) in favor of section 2(c), the brokerage provision. It is easy to understand why section 2(c) is in vogue. That section is a *per se* statute with a vengeance: there is no requirement of proof of any likelihood of injury, and there are no defenses.

The purpose of section 2(c) was to prevent evasion of section 2(a) through the fictitious payment of brokerage to the buyer or the buyer's agents. But the Commission has been pressing for an ever-widening sweep for the brokerage provision. In the *Broch* case,[164] the Supreme Court sustained the Commission's finding of violation where a seller passed on savings resulting when *his* broker, not the buyer's, accepted a smaller commission so that the sale might be consummated. And in the recent *Thomasville Chair* case,[165] respondent sold furniture to large buyers at prices 5 per cent lower than to smaller buyers, paying salesmen in its own employ a 3 per cent lower commission on sales to the larger accounts. Although the salesmen admittedly were not "brokers," the Commission held that the statute applied because they were paid "a commission, brokerage, or other compensation" and the lower price accorded the favored customers was based, in part, on the lower commission to the salesmen.[166] This strained interpretation of section 2(c) portends still another onslaught against competitive pricing. If a seller saves by paying a salesman who handles volume accounts a lower rate of commission than a drummer who beats the pavements making small sales, why should the volume buyer not reap the benefits of the seller's lower cost of doing business with him? It is absurd to suggest that Congress intended to encourage the seller to charge lower prices by allowing, under section 2(a), savings in selling expenses to be passed on, while at the same time penalizing him under section

162. Hamburg Brothers, 54 F.T.C. 1450 (1958).

163. Automatic Canteen Co. v. FTC, 346 U.S. 61, 72 n.11 (1953).

164. FTC v. Henry Broch & Co., 363 U.S. 166 (1960).

165. Thomasville Chair Co., TRADE REG. REP. ¶ 29510 (Mar. 15, 1961).

166. In *Thomasville Chair*, the Commission found that respondent could not cost justify the full 5% discount to larger buyers without including the lower sales commission, and, further, that it had not, in fact, adhered to its purported categories and had allowed some smaller buyers to purchase at prices 5% lower than they were entitled to under respondent's pricing scheme. Nevertheless, the principle expounded by the Commission has a generality of application which makes it significant.

2(c) for doing that very thing. Yet these are the topsy-turvy implications of *Thomasville Chair.*

It is indeed extraordinary that in the face of virtually unanimous denunciation of section 2(c) by scholars of antitrust,[167] the Commission not only accords it top billing in the enforcement scheme,[168] but seeks to enlarge its scope beyond anything ever contemplated by Congress.

What then is to be the evaluation of a quarter-century of Robinson-Patman jurisprudence?

The predilection for *per se* rules of invalidity has rigidified price structures, deprived the economy of the advantages of free bargaining, prevented innovation in marketing techniques, and moved us in the direction of a cartelized distribution system.[169] Instead of bolstering the Sherman Act, Robinson-Patman has, in fact, suppressed competition in the guise of regulating it. This need not have occurred. A price discrimination law properly designed and administered could invigorate competition and promote the public welfare. There is still validity to the old-fashioned view that competition is a *summum bonum,* not only among sellers, but also among buyers, and that a retailer who buys with skill, operates with efficiency, and passes on his savings to the consumer, is "an ease to the people."[170]

What is needed is not the repeal of price discrimination laws but revived faith in the beneficence of competition. Robinson-Patman is not an end in itself; it is but one of the means of attaining larger antitrust goals.[171] To

167. The Attorney General's Report called for legislation to restore to § 2(c) the original vigor of the exception "for services rendered," stating that, "In our opinion, the virtual legal monopoly conferred by Section 2(c) on one type of middleman clogs competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special business class." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 191 (1955). Professor Corwin Edwards, former chief economist of the Commission, concludes in his monumental text that "the brokerage provision has no proper place in the statute." EDWARDS, THE PRICE DISCRIMINATION LAW 645 (1959). Dean Levi of the University of Chicago Law School has branded § 2(c) an "ugly example of class legislation." Levi, *The Robinson-Patman Act—Is It in the Public Interest?* 1 A.B.A. ANTITRUST SECTION REP. 60, 69 (1952). Frederick M. Rowe asserts that: "If anything is clear in the annals of Robinson-Patman enforcement, it is that Section 2(c) has served as a featherbedding guarantee for the organized food brokers protected from competing forms of distribution at the ultimate expense of the consumer." Rowe, *Expectation Versus Accomplishment under the Robinson-Patman Act, 1936-1960: A Statement of the Issues,* 17 A.B.A. ANTITRUST SECTION REP. 298, 304 (1960).

168. See EDWARDS, THE PRICE DISCRIMINATION LAW 70 (1959), showing that 43.5% of the Robinson-Patman complaints filed by the Commission from 1936 to 1957 attacked a brokerage payment or receipt under § 2(c). That there has been no marked change in this pattern may be seen from FTC ANNUAL REPORT 47 (1960).

169. *Cf.* Sun Oil Co. v. FTC, 1961 Trade Cas. ¶ 70083, at 78347 (5th Cir. 1961); Douglas, J., dissenting in Standard Oil Co. v. United States, 337 U.S. 293, 315 (1949).

170. The Schoolmaster Case, Y.B. 11 Hen. IV, f. 47, pl. 21, (Court of Common Pleas, Hillary Term 1410).

171. See Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953); Standard Oil Co. v. FTC, 340 U.S. 231, 249 (1951); Sun Oil Co. v. FTC, 1961 Trade Cas. ¶ 70083, at 78344 (5th Cir. 1961); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 132 (1955).

correct the aberrations from basic antitrust philosophy may require some amendments. But more important, it will require a new approach by the Commission—greater concentration upon the hard core offenses which imperil competition, abandonment of mechanical *per se* rules of liability which subvert the statutory purpose, less attention to section 2(c), increased emphasis upon section 2(f), and, finally, full utilization of its expertise to differentiate between practices which undermine and those which advance the cause of competition.

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