Michigan Law Review

Volume 63 | Issue 1

1964

Recent Antitrust Developments-1964

Milton Handler
Columbia University

RECENT ANTITRUST DEVELOPMENTS–1964*

Milton Handler†

I. Consignment Selling and the Antitrust Laws

Ever since the passage of the Sherman Act, the courts have consistently refused to permit the requirements of antitrust to be circumvented by the easy expedient of dressing a sale in the vestments of a sham agency agreement. In *Dr. Miles Medical*,[1] where the Supreme Court first held vertical price fixing unlawful, the seller and buyer denominated their agreement as an "agency," but the Court properly concluded that it was, in fact, a sale. Likewise, in *Standard-Magrane*,[2] the first occasion on which the Court considered section 3 of the Clayton Act, the seller purported to appoint his customers as agents. Again, the Court cut through to the heart of the transaction and found that, despite its formal trappings, it was not a real agency.

In the *General Electric* case,[3] however, Mr. Chief Justice Taft, for a unanimous Court, found that the consignment method of merchandising there challenged was a *true* and not a colorable agency and, accordingly, upheld the consignor's right to set the price at which the consigned goods might be sold to the ultimate consumer. This result was reached despite the fact that the consignor had established the resale price, had possessed great economic power,[4] had offered its dealers no alternative distribution arrangement, and had encompassed within a vast nationwide consignment network as many as four hundred wholesalers and 21 thousand or more retailers,[5] all of whom were independent businessmen.[6] And,

* This article is based upon a lecture before the Association of the Bar of the City of New York on June 18, 1964. The lecture, as delivered, included a section on the recent decisions in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964), and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964). That section is being separately published in the November 1964 issue of the *Columbia Law Review* as part of a symposium exploring the implications and effects of these novel rulings.

I am grateful to Michael Malina, Richard J. Medalie, and Leonard Orland for their invaluable assistance in the preparation of this paper.

† Professor of Law, Columbia University. Member, New York Bar.—Ed.

1. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
2. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).
3. United States v. General Elec. Co., 272 U.S. 476 (1926).
4. General Electric alone had 69% of the electric light business in 1921; together with Westinghouse and its other licensees, General Electric accounted for 93%. *Id.* at 481.
5. *Id.* at 483.
6. See *id.* at 484-85.

the Court went out of its way to make clear that its ruling applied to unpatented as well as patented goods.[7] Whatever reservations may have existed as to the correctness of the Court's determination in *General Electric* that an agency relationship existed in point of fact,[8] no one has ever doubted that a manufacturer may control the price charged by his consignees when there is a bona fide agency.

No doubt was expressed, that is, until early spring of this year when Mr. Justice Douglas in *Simpson v. Union Oil*[9] not only questioned, but appears to have denied, the right of a consignor to set the price at which his goods are sold by his duly appointed agents. Rather than overruling *General Electric* expressly, however, Mr. Justice Douglas chose to limit it to its special facts, emphasizing that the consignment considered in that case covered a patented product,[10] a distinction correctly termed "specious" by Mr. Justice Stewart in dissent.[11]

---

7. "The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." *Id.* at 488.

8. See, *e.g.*, Klaus, *Sale, Agency and Price Maintenance* (pts. 1-2), 28 COLUM. L. REV. 312, 441 (1928).

9. Simpson v. Union Oil Co., 377 U.S. 13 (1964), six-to-three, Mr. Justice Stewart dissenting and Justices Brennan and Goldberg voting to remand for a plenary trial on all issues.

10. "[T]he *ratio decidendi* of the *General Electric* case," according to Mr. Justice Douglas, was that "the patent laws . . . are *in pari materia* with the antitrust laws and modify them *pro tanto*." *Id.* at 24. Thus, "the Court in that case particularly relied on the fact that patent rights have long included licenses 'to make, use and vend' the patented article 'for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure.' [272 U.S.] . . . at 489. . . . Long prior to the *General Electric* case, price fixing in the marketing of patented articles had been condoned . . . , provided it did not extend to sales by purchasers of the patented articles." Simpson Union Oil Co., 377 U.S. at 23-24.

11. *Id.* at 27 (dissenting opinion): "[U]ntil today no one has ever considered this fact [of the patent] relevant to the holding in that case . . . . [T]he Court, throughout that portion of its opinion dealing with the validity of General Electric's consignment agreements, gave no intimation whatsoever that its conclusion would have differed in any respect if the consigned article had been unpatented." *Id.* at 27-28. Mr. Justice Stewart went on to observe that "possession of patent rights on the article allegedly consigned has no legal significance to an inquiry directed to ascertaining whether the burdens, risks, and rights of ownership actually remain with the principal or have passed to his agent. Nor is the power of a consignor to fix the prices at which his consignee sells augmented in any respect by the possession of a patent on the goods so consigned. It is not by virtue of a patent monopoly that a bona fide consignor may control the price at which his consignee sells; his control over price flows from the simple fact that the owner of goods, so long as he remains the owner, has the unquestioned right to determine the price at which he will sell them." *Id.* at 29. In this regard, Mr. Justice Stewart pointed out that "the quotations in the majority opinion from the *General Electric* case relate to a wholly separate second issue involved in that case—the validity of a license granted by General Electric to Westinghouse, under the patents owned by the former, to manufacture and sell lamps at prices fixed by the patentee-licensor—and have no relevance whatsoever to the issue here." *Id.* at 29 n.2.

Simpson's essential facts were these: In conjunction with renewable one-year leases on its retail outlets, Union Oil entered into consignment agreements with its lessee dealers, under which it controlled the retail price and retained title to and paid all property taxes on the consigned gasoline until it was sold. The dealer, on the other hand, received a guaranteed commission from Union, was obliged to carry personal liability and property damage insurance, was responsible for any ordinary losses of consigned gasoline, and paid his own costs of operation.[12] Similar agreements were made with non-lessee dealers. In 1956, Simpson entered into such an agreement with Union. Two years later, in an effort to meet competition,[13] he refused to abide by the Company's price policy and instead sold gasoline at two cents below the stipulated price. Upon the expiration of Simpson's one-year lease, Union refused to renew, the consignment arrangement thereupon ceasing. In Simpson's subsequent suit, both parties filed motions for summary judgment on stipulated facts stating that Union's refusal to renew the lease was prompted solely by Simpson's failure to adhere to the established price.[14] The district court granted the Union Oil Company's motion;[15] the court of appeals affirmed.[16]

Mr. Justice Douglas, observing that "by reason of the lease and 'consignment' agreement dealers are coercively laced into an arrangement under which their supplier is able to impose noncompetitive prices on thousands of persons whose prices otherwise might be competitive,"[17] held, in reliance on *Parke, Davis*,[18] that "resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws . . . ."[19]

As noted by Justices Stewart,[20] Brennan, and Goldberg,[21] consignment arrangements are widely used throughout the economy. Approximately one-sixth of the total volume of the nation's wholesale trade is carried on by independent brokers and agents who never acquire title to the goods they sell,[22] and three and one-half per cent of such

12. *Id.* at 14-15.
13. See Simpson v. Union Oil Co., 311 F.2d 764, 766 (9th Cir. 1963).
14. *Ibid.*
15. Simpson v. Union Oil Co., 1961 Trade Cas. ¶ 69936 (N.D. Cal. 1960).
16. Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963).
17. 377 U.S. at 21.
18. United States v. Parke, Davis & Co., 362 U.S. 29 (1960).
19. 377 U.S. at 24.
20. *Id.* at 30.
21. *Id.* at 31.
22. See BECKMAN, ENGLE & BUZZELL, WHOLESALING 101, 219-20 (3d ed. 1959).

trade[23] is accounted for by commission merchants or consignees.[24] At the retail level, consignment merchandising is also used extensively,[25] predominantly in the distribution of styled, expensive or unique goods, or new products for which the initial demand may be uncertain.[26] Despite some disadvantages, such as increased capital investment costs, greater administrative, managerial, and operating expenses, larger risks of loss and therefore higher insurance charges, and the impact of the obligation to accept returned goods, consignment merchandising has much to commend its use.[27] It assures adequate stocking of a line of products when buyers are unwilling to assume the risk of nonsale or are inadequately capitalized. It also avoids for the seller serious credit risks in situations where a dealer's financial condition is doubtful. And, since the seller retains the burdens and responsibilities of ownership, he will exercise a greater measure of control over the merchandising of his products. Indeed, the principal motivation for distribution through agents is the ability to exercise such control.[28]

There is a puzzling schizophrenic quality to the Court's opinion in *Simpson*. The breadth of language of certain passages implies total condemnation of the consignment device whenever the consignee's price is fixed by the seller;[29] there are, however, other pas-

---

23. *Id.* at 101, 224.

24. Consigness are especially active in the agricultural sector if our economy. See BECKMAN, ENGLE & BUZZELL, *op. cit. supra* note 22, at 225-26; PHILLIPS & DUNCAN, MARKETING—PRINCIPLES AND METHODS 423-24 (4th ed. 1960); Klaus, *supra* note 8, at 326-29 & n.39. In the manufacturing area, they operate less extensively, concentrating primarily in piece goods, lumber and millwork, and industrial supplies. See BECKMAN, ENGLE & BUZZELL, *op. cit. supra* note 22, at 225.

25. Consignment merchandising has been employed in the distribution of such diverse items as magazines, newspapers, student books, electrical appliances, tires, fertilizer, bread, electrical conduit, plumbing piping, and even caskets. See, *e.g.*, FTC v. Curtis Publishing Co., 260 U.S. 568 (1923); Torres v. International Gen. Elec., S.A., 303 F.2d 615 (1st Cir. 1962); Armour & Co. v. Celic, 294 F.2d 432 (2d Cir. 1961); Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); United States Rubber Co. v. Pulliam, d/b/a Pulliam Tire Service, 151 F. Supp. 491 (W.D. Ark. 1957); American Agricultural Chem. Co. v. Barnes Co., 28 F. Supp. 73 (E.D.S.C. 1939); MCCARTHY, BASIC MARKETING, A MANAGERIAL APPROACH 661 (1960); MARKETING HANDBOOK 208 (Nystrom ed. 1948).

26. See, *e.g.*, Bendix Home Appliances, Inc. v. Radio Accessories Co., 129 F.2d 177 (8th Cir. 1942); United States Fid. & Guar. Co. v. Slifkin, 200 F. Supp. 563 (N.D. Ala. 1961); Klaus, *supra* note 8, at 330-31.

27. See, *e.g.*, LAZO & CORBIN, MANAGEMENT IN MARKETING 370-71 (1961); NYSTROM, *op. cit. supra* note 25, at 208-09; Klaus, *supra* note 8, at 330-31; Note, 43 IOWA L. REV. 603, 605-06 (1958). See also DUNCAN & PHILLIPS, RETAILING—PRINCIPLES AND METHODS 339 (6th ed. 1963) for a discussion of the advantages and disadvantages to the retailer.

28. See, *e.g.*, MCCARTHY, *op. cit. supra* note 25, at 661; NYSTROM, *op. cit. supra* note 25, at 208; WEISS, MERCHANDISING FOR TOMORROW 356 (1961).

29. "If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce . . . ."

sages that flatly sustain consignment selling under conditions that are not fully elucidated.[30] No comprehensible principle is articulated that would divide the sheep from the goats. The result is quite baffling, and one can only speculate as to what is the decisive element that tips the scale.

There is some support for the view that Mr. Justice Douglas regarded the particular consignment agreement in suit as a pure sham. Thus, at the very outset of the opinion, he characterizes the arrangement as "a *so-called* retail dealer 'consignment' agreement,"[31] and, throughout the opinion, he encloses the word "consignment" in quotation marks. He further suggests that there is somehow something wrong with the fact that "dealers, like Simpson, are independent business men [who] . . . have all or most of the indicia of enterpreneurs, except for price fixing";[32] and, he goes on to distinguish the consignment arrangement upheld in *General Electric*, thereby suggesting that the terms of the Union agreement are inconsistent with a valid agency.[33] On the other hand, Mr. Justice Douglas concedes that the consignment arrangement in *General Electric* "somewhat *parallels* the one in the instant case,"[34] thus

377 U.S. at 16. "*United States v. Colgate*, 250 U.S. 300, as explained in *Parke, Davis*, 362 U.S., at 37, was a case where there was assumed to be no agreement to maintain retail prices. Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the *Parke, Davis* techniques in fixing monopoly prices on drugs." 377 U.S. at 17. "The evil of this resale price maintenance program . . . is its inexorable potentiality for an even certainty in destroying competition in retail sales of gasoline by these nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers." *Id.* at 21. "To allow Union Oil to achieve price fixing in this vast distribution system through this 'consignment' device would be to make legality for antitrust purposes turn on clever draftsmanship." *Id.* at 24.

30. "One who sends a rug or a painting or other work of art to a merchant or a gallery for sale at a minimum price can, of course, hold the consignee to the bargain." *Id.* at 18. "[A]n owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. *There is nothing illegal about that arrangement.*" *Id.* at 21. (Emphasis added.)

31. *Id.* at 14. (Emphasis added.)

32. *Id.* at 20. As he explains, "Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil." *Id.* at 20-21.

33. *Id.* at 23 n.10. As Mr. Justice Stewart notes in dissent, "The Court implies that the terms of this agreement providing that the consignee must carry personal liability and property damage insurance; that the consignee is responsible for losses of consigned gasoline incurred in the ordinary course of events; and that the consignee must pay his own costs of operation, are inconsistent with a valid consignment agreement. But such provisions are common to consignment agreements." *Id.* at 26-27 n.1.

34. *Id.* at 22-23. (Emphasis added.)

implying that a true agency did exist.[35] Moreover, he tells us that "a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy."[36] It is thus impossible to dispose of the case on the ground that the consignment was fictitious and, therefore, within the purview of *Miles Medical* and *Standard-Magrane*. Had the Court clearly decided that Union's consignment scheme was not a true agency, and had Mr. Justice Douglas articulated his reasons for such a finding, the Court would at least have provided the business community with guidance as to what indicia of ownership may be vested in a consignee without destroying his status as an agent. No one would quarrel with the proposition that the existence of a free agency is a *sine qua non* to price control by the consignor.

Nor can one conclude that the Court intended to outlaw all consignment arrangements, even if they include price limitations, since Mr. Justice Douglas frankly observes that "consignments perform an important function in trade and commerce"[37] and specifically notes that many courts, including the Supreme Court itself, have upheld their legality.[38] Yet, Union's consignment agreements with more than three thousand dealers are said to be unlawful.[39]

One thing is clear. The Court does not invalidate the consignment arrangement because of any horizontal price-fixing conspiracy, as it did in *Masonite*[40] or as the Federal Trade Commission ruled in *Sun Oil*.[41] Nor does Mr. Justice Douglas purport to outlaw the consignment system, as in the Commission's decision in the *Atlantic Refining* case,[42] on the ground that it was used only "at irregular intervals and in certain markets during price wars" and was not the regular method by which the company sold its products.[43] Quite to the contrary, Union's program had been in effect for close to a decade and was its regular method of doing business.[44]

Many times in his opinion, Mr. Justice Douglas characterizes the consignment as "coercive." But he never pauses to explain

35. See *id.* at 26 (dissenting opinion).
36. *Id.* at 18.
37. *Id.* at 17.
38. *Ibid.*, citing Ludvigh v. American Woolen Co., 231 U.S. 522 (1913).
39. Union had consignment agreements with 1,978 (99%) lessee dealers and 1,327 (63%) nonlessee dealers. 377 U.S. at 15 n.1.
40. United States v. Masonite Corp., 316 U.S. 265 (1942).
41. Sun Oil Co., TRADE REG. REP. ¶ 16,418 (FTC, May 15, 1963).
42. Atlantic Ref. Co., TRADE REG. REP. ¶ 16,422 (FTC, May 16, 1963).
43. *Id.* at p. 21289.
44. "Union put its 'consignment' program into effect in 1955, as a permanent measure." 311 F.2d at 766.

how he reaches this conclusion or to indicate the sense in which this term is used. He speaks of dealers having been deprived of "the exercise of free judgment whether to become consignees at all, or remain consignees,"[45] but the court of appeals emphasized that Simpson was completely aware of Union's consignment policy and had entered into the arrangement as a "result of his own free and deliberate choice."[46] The Court refers to no evidence of any compulsion or duress practiced upon Simpson or any other dealer. If Mr. Justice Douglas had in mind the disparity of economic power between the oil company and its dealers, the fact, of course, is inarguable, but the conclusion is a *non sequitur*. No court has ever proclaimed that inequality of bargaining power connotes coercion as a matter of law. Any such ruling would cast an ominous shadow over countless commercial arrangements.

Reference is made in the opinion to Union's use of short-term leases allegedly "to police the retail prices charged by the consignees, renewals not being made if the conditions prescribed by the company are not met."[47] The Court asserts that dealers were "coercively laced" into a price-fixing arrangement "by reason of the lease and 'consignment' agreement,"[48] and it voices alarm at the possibility that "a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of nonrenewal of short-term leases."[49] That short-term leases can be employed as an *in terrorem* device is undeniable; but whether they have been so misused is a matter of proof. In *Simpson* there was no such proof. There are many good business reasons for short-term leases and contracts. There is no rational basis for ascribing coercion to the naked fact that the assignment and its accompanying lease are of limited duration. The highest Court, with its immense powers, can by sheer fiat stigmatize even the most innocuous arrangement as unlawful, but it cannot repeal the laws of logic or alter the meaning of the English language. That the shortness of the term of the dealer lease is but a makeweight is irrefutably attested by the blanket condemnation of Union's agreements with 1,327 non-lease consignees.[50] In affixing its label of coerciveness to Union's consignments, the Court nowhere differentiates between lessee and non-lessee dealers.

45. 377 U.S. at 16.
46. 311 F.2d at 769.
47. 377 U.S. at 14-15.
48. *Id.* at 21.
49. *Id.* at 17.
50. See *id.* at 15 n.1.

Another crucial fact to Mr. Justice Douglas is that the consignment arrangement was "used to cover a *vast* gasoline distribution system, fixing prices through many retail outlets."[51] In such circumstances, the Court avows, "the antitrust laws prevent calling the 'consignment' an agency."[52] Is the Court suggesting that a single consignment is lawful, but a plurality is not? How many agreements are necessary to constitute a "vast system"? The Court's reliance on numerology would be more comprehensible if it took the public into its confidence and disclosed the controlling principles of that enigmatic science. Should not the policy postulates that persuade the Court to regard the "vast" nature of the system as a decisive element be articulated so that their validity can be intelligently weighed? And should not the guide-lines be explicitly delineated so that businessmen would know when consignments are and when they are not permissible? It is noteworthy that in *General Electric* the fact that the challenged arrangement involved four hundred wholesalers and 21 thousand or more retailers was not considered significant, the Court expressly affirming the legality of the consignment agreements "however comprehensive as a mass or whole in their effect. . . ."[53]

I believe all of us will say "amen" to Mr. Justice Stewart's statement that this "upsetting decision carries with it the most severe consequences to a large sector of the private economy . . . [and] inject[s] severe uncertainty into commercial relationships established in reliance upon a decision of this Court explicitly validating this method of distribution."[54] This uncertainty is compounded by the Court's curious assertion in conclusion that it was reserving the question "whether, when all the facts are known, there may be any equities that would warrant only *prospective application* in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."[55] It is difficult to fathom the precise implications of this statement. In determining whether damages should be awarded, what facts does the Court hope to ascertain that it has not already considered in declaring the illegality of the consign-

51. *Id.* at 21. (Emphasis added.)

52. *Id.* at 21.

53. 272 U.S. at 488. It is hardly feasible to confine a merchandising policy to a single outlet; if the policy is sound, it will be applicable to most, if not all outlets; indeed, it might be discriminatory for it to not be generally available. Furthermore, most consignees are individual businessmen. Consequently, if widespread use of a bona fide consignment agreement is inconsonant with antitrust requirements, this method of distribution cannot, as a practical matter, be employed.

54. 377 U.S. at 29-30 (dissenting opinion).

55. *Id.* at 25. (Emphasis added.)

ment arrangement itself? Why did it not defer condemning consignment as a matter of substantive law until it had all the relevant facts? Why did it not return the case for trial, as the dissenters urged,[56] to determine whether in fact there had been coercion? Moreover, what equities does the Court have in mind?

No one expects that the Court's resolution of the difficult issues litigated will or can satisfy everyone. But is it too much to expect the Court not to raise more questions than it answers, not to produce more doubt than it allays, not to inject more confusion than it dispels, and not to go out of its way to create uncertainty for the businessman, his legal adviser, and the lower courts? In a matter of such importance as the validity of consignments with price clauses, why should one have to speculate as to whether the Court intends to forbid them entirely or to permit them under limited conditions; and, if the latter, why should one have to be in the dark as to what those conditions may be?

II. MERGERS

Since the very beginning of antitrust, our merger jurisprudence has been unstable, obscure, and confused. In the first Sherman Act case to come before it, the Supreme Court sustained stock acquisitions that had resulted in ninety-eight per cent control of an industry; the decision, to be sure, rested on jurisdictional grounds and was not on the merits.[57] Within a decade, however, the Court abandoned its unsound jurisdictional conceptions and invalidated the combination of two major competing transcontinental carriers, without requiring any proof of monopoly power or predatory conduct.[58] These were the initial antipodes. Thereafter, our merger doctrines fluctuated with each decision.[59] In a comprehensive study made more than three decades ago, I stated my conclusions in these words:

> "The . . . opinions of the Supreme Court are singularly free of enlightenment. . . . [They] are . . . inconsistent and . . . hopelessly confused . . . [and] marked by a disheartening lack of candor. . . . Conflicting theories, divergent explanations of the facts

56. *Id.* at 31, 32.

57. United States v. E. C. Knight Co., 156 U.S. 1 (1895); see HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 46-47 (TNEC Monograph No. 38, 1941); Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179, 184-86 (1932).

58. Northern Sec. Co. v. United States, 193 U.S. 197 (1904); see HANDLER, *op. cit. supra* note 57, at 47-49; Handler, *supra* note 57, at 187-93.

59. See Handler, *supra* note 57.

and opposing contentions form an impenetrable jungle of words."[60]

That was in 1932.

Whatever else the legislative reform of 1950[61] may have accomplished, it did not expel uncertainty and confusion from our merger law. In 1953, when I first discussed the Celler-Kefauver Act in these annual reviews, I predicted that "it will take years of litigation before the bar will have any glimmering of what is the practical meaning of the statute."[62] And in 1954 I said that "the last word is that of the Supreme Court which alone can authoritatively draw the lines."[63]

During the initial years of litigation under the Celler-Kefauver Act of 1950, the Federal Trade Commission and the lower courts were as sharply divided as the commentators.[64] In the Commission, the initial rejection of mechanical formulae in *Pillsbury*,[65] *Scott Paper I*,[66] and *Brillo I*[67] was superseded by the more doctrinaire approach of *Reynolds Metals*[68] and *Union Carbide*.[69] In the courts, the statute was read one way in *Bethlehem Steel*[70] and *Crown Zellerbach*[71] and quite the opposite way in *Columbia Pictures*[72] and *American Crystal Sugar*.[73]

60. *Id.* at 183, 271.

61. See *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess. ser. 14, pt. 1, at 533 (1949); Handler & Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-64 (1961).

62. Handler, Recent Developments in the Antitrust Field 39 (1953) (unpublished manuscript).

63. Handler, *Monopolies, Mergers and Markets—A New Focus*, in TRADE REGULATION SYMPOSIUM 17, 36 (1955).

64. See, *e.g.*, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 115-28 (1955); STAFF OF ANTITRUST SUBCOMM., HOUSE COMM. ON THE JUDICIARY, 84TH CONG., 1ST SESS., INTERIM REPORT ON ANTITRUST LAW (Comm. Print 1955); Barnes, *Quantitative Substantiality*, 8 A.B.A. ANTITRUST SECTION REPORT 11 (1956); Celler, *Corporation Mergers and Antitrust Laws*, 7 MERCER L. REV. 267 (1956); Gwynne, *The Federal Trade Commission and Section 7*, 1 ANTITRUST BULL. 523 (1956); Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record*, 7 MERCER L. REV. 279, 289 (1956); Handler, *supra* note 63, at 17, 32; Massel, *The New Section 7*, 1 ANTITRUST BULL. 543, 547 (1956); Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176 (1955).

65. Pillsbury Mills, Inc., 50 F.T.C. 555 (1953).

66. Scott Paper Co., 55 F.T.C. 2050 (1959).

67. Brillo Mfg. Co., 54 F.T.C. 1905 (1958).

68. Reynolds Metals Co., 56 F.T.C. 743 (1960).

69. Union Carbide Corp., 59 F.T.C. 614 (1961).

70. United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

71. Crown Zellerbach Corp. v. FTC, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

72. United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960).

73. American Crystal Sugar Co. v. Cuban-American Sugar Co., 259 F.2d 524 (2d Cir. 1958); see also United States v. Lever Bros., 216 F. Supp. 887 (S.D.N.Y. 1963),

Then in 1962 came *Brown Shoe*,[74] in which the Supreme Court did provide an authoritative exegesis of the new legislation and established guide lines for determining the two major issues in merger litigation—the relevant market and the probable competitive effects. The debate over the law's proper scope and meaning was now concluded. Whether one agreed or disagreed with the Court's pronouncement, it had spoken and that was the end of the matter.[75]

Following *Brown Shoe*, six experienced trial judges conscientiously applied the rules there laid down to the detailed facts before them and concluded that the challenged acquisitions were lawful under the tests prescribed by the Supreme Court.[76] Of the six decisions, the Government chose not to appeal two;[77] the remaining four were taken to the Supreme Court in the term just concluded and were there reversed.[78] In addition, a successful appeal was taken by the

decided after *Brown Shoe*. Starting in 1953, I have discussed the developments in merger jurisprudence in each of these annual reviews. See Handler, Recent Developments in the Antitrust Field 30-39 (1953) (unpublished manuscript); Handler, *Recent Antitrust Developments*, 9 RECORD OF N.Y.C.B.A. 171, 186 (1954); Handler, *Annual Review of Antitrust Developments*, 10 RECORD OF N.Y.C.B.A. 332, 334 (1955); Handler, *Annual Antitrust Review*, 11 RECORD OF N.Y.C.B.A. 367, 381 (1956); Handler, *Annual Review of Recent Antitrust Developments*, 12 RECORD OF N.Y.C.B.A. 411, 415 (1957); Handler, *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 436 (1958); Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843 (1959); Handler, *Annual Review of Antitrust Developments*, 15 RECORD OF N.Y.C.B.A. 362, 375 (1960); Handler, *Recent Antitrust Developments*, 17 YALE L.J. 75 (1961); Handler, *Fifteenth Annual Review of Antitrust Developments*, 17 RECORD OF N.Y.C.B.A. 411, 427 (1962); Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 171 (1963).

74. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

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

76. See Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 171-72 (1963). Since *Brown Shoe*, the Federal Trade Commission held acquisitions unlawful in eight cases: Consolidated Foods Corp., TRADE REG. REP. ¶ 16182 (Nov. 15, 1962), *reversed*, Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir. 1964), *petition for cert. filed*, 33 U.S.L. WEEK 3066 (U.S. Aug. 21, 1964); Luria Bros., TRADE REG. REP. ¶ 16299 (Feb. 13, 1963); Brillo Mfg. Co., TRADE REG. REP. ¶ 16543 (July 31, 1963); Procter & Gamble Co., TRADE REG. REP. ¶ 16673 (Nov. 26, 1963); Scott Paper Co., TRADE REG. REP. ¶ 16706 (Dec. 26, 1963); Ekco Products Co., TRADE REG. REP. ¶ 16879 (April 21, 1964); Permanente Cement Co., TRADE REG. REP. ¶ 16885 (April 24, 1964); Inland Container Corp., TRADE REG. REP. ¶ 17012 (July 31, 1964); and the Commission has dismissed complaints in four others: Warner Co., TRADE REG. REP. ¶ 16405 (May 15, 1963); Dresser Industries, Inc., TRADE REG. REP. ¶ 16513 (July 24, 1963); National Lead Co., TRADE REG. REP. ¶ 16513 (July 24, 1963); Kaiser Indus. Corp., TRADE REG. REP. ¶ 16529 (Aug. 2, 1963).

77. United States v. Bliss & Laughlin, Inc., 1963 Trade Cas. ¶ 70734 (S.D. Cal. 1963); United States v. Lever Bros., 216 F. Supp. 887 (S.D.N.Y. 1963).

78. United States v. El Paso Natural Gas Co., 1962 Trade Cas. ¶ 70571 (D. Utah 1962), *rev'd*, 376 U.S. 651 (1964); United States v. Aluminum Co. of America, 214 F. Supp. 501 (N.D.N.Y. 1963), *rev'd*, 377 U.S. 271 (1964); United States v. Continental Can Co., 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd*, 378 U.S. 441 (1964); United States v. Penn-Olin Chem. Co., 217 F. Supp. 110 (D. Del. 1963), *rev'd*, 378 U.S. 158 (1964).

Government from a district court determination that the *Lexington Bank* merger did not violate the Sherman Act.[79] The Government thus had a perfect score this year in its merger appeals to the highest court.

In determining the metes and bounds of our merger doctrines, we no longer need speculate or indulge in deductive reasoning. We now have a body of nine Supreme Court decisions,[80] whose girth, including majority and dissenting opinions, runs well over 350 pages in the *United States Reports*. Only time will tell whether the bar and the lower courts will hereafter be more successful in applying this voluminous aggregation of case law to the facts of particular acquisitions than were the district courts in apprehending the teachings of *Brown Shoe*. Is it unfair to suggest that some of the comments I made in 1932 about the Sherman Act precedents apply to this new corpus of merger rulings?

Rather than weary the reader with a lengthy analysis of the Court's recent decisions, I thought that some illumination and amusement might be provided if I were to substitute an imaginary opinion of the Supreme Court for the detailed review of the cases made in my oral presentation.

SUPREME COURT of the UNITED STATES
No. 0000—October Term, 1963

UNITED STATES, Appellant, v. JOE'S DELICATESSEN, INC.	On Appeal from the United States District Court for the District of Columbia.

[June 22, 1964]

Mr. Justice Christopher Columbus Brown delivered the opinion of the Court.

In 1951, Joe's Delicatessen, Inc., the second largest food establish-

79. United States v. First Nat'l Bank & Trust Co., 208 F. Supp. 457 (E.D. Ky. 1962), *rev'd*, 376 U.S. 665 (1964).

80. United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964); United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957); see also United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961) (opinion on scope of relief).

ment at the intersection of K and 21st Streets, N.W., Washington, D. C., acquired all the assets of Victor's Meat Market Co., the third largest food store at this intersection, in exchange for five hundred shares of Joe's stock and the assumption by Joe's of all Victor's liabilities.

Six years later, the Department of Justice, encouraged by our decision in *United States v. du Pont,* 353 U.S. 586, and at the suggestion of the Antitrust Subcommittee of the House Judiciary Committee, brought this civil action, seeking a judgment that the acquisition violated both the Clayton and Sherman Acts and requesting an order of divestiture. Trying the case without a jury, the district court concluded on the basis of detailed findings of fact that the challenged acquisition was not likely substantially to lessen competition or to tend to create a monopoly. Accordingly, the complaint was dismissed. An appeal was taken under the Expediting Act, 15 U.S.C. § 29. We noted probable jurisdiction to consider the unique problems incident to the application of the antitrust laws to acquisitions in the vital area of retail food distribution in the Nation's capital. We reverse the decision of the district court and direct that divestiture be promptly accomplished.

We do not pause to consider the Government's persuasive attack upon the district court's findings of fact, since it is well settled that on a government appeal in an antitrust case the facts will be determined by this Court de novo.[81] Rule 52(a) of the Federal Rules of Civil Procedure[82] is applicable in antitrust cases only where review is sought by those charged with violations of law. On such appeals, the findings will be set aside only if they are shown, beyond a reasonable doubt, to be clearly erroneous. *Brown Shoe Co. v. United States,* 370 U. S. 294. We turn, therefore, to the threshold question in all merger litigation, the delineation of the relevant market.

Section 7 of the Clayton Act declares unlawful all acquisitions that have the proscribed anticompetitive effect in "*any* section of the country." The quoted language has been equated by us with the appropriate geographic market. The statute's legislative history makes it crystal clear that Congress intended the probable economic repercussions of a merger to be determined in *any* area, "defined as narrowly or as broadly as the Government chooses to define it."

81. Footnotes 81-87 are intended to be part of the hypothetical opinion. United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. Aluminum Co. of America, 377 U.S. 271 (1964). *But see* United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952).

82. "Findings of fact shall not be set aside unless clearly erroneous."

Cf. Harlan, J., concurring in *Brown Shoe Co. v. United States,* 370 U.S. at 368. To be faithful to the congressional command, we must "recognize meaningful competition where it is found to exist." *United States v. Continental Can Co.,* 378 U.S. 441 at 449.

The district court, misconstruing our decision in *Brown Shoe,* defined the geographic market as embracing the area within a one-mile radius of the intersection in question. Having incorrectly determined the geographical market, it inevitably reached the erroneous conclusion that there was no reasonable probability of any anticompetitive effect in that broad market.

To be sure, we held in *Brown Shoe* that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," 370 U.S. at 338-39, and that the environs of a city had to be included within the same market. Our reason was that Congress had "prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Id.* at 336. As we said, "The geographic market selected must . . . both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37. Indeed, had the market not been so broadly defined there, we could not have affirmed the conclusion below that the horizontal feature of the merger was unlawful, in which event the congressional purpose to outlaw those mergers that the Department of Justice deems socially undesirable would have been frustrated.

We took pains to stress the flexible aspect of markets from a business as well as a legal point of view. They vary with each situation and rest on commercial realities rather than abstract logical principles. For this reason, we recognized that there can be submarkets as well as markets. An acquisition that has no adverse effect in a submarket might conceivably have an incipient effect on competition in the broader market. The converse is equally true. Here the area of effective competition includes those food outlets that cater to the wants of the residents in the immediate vicinity of K and 21st Streets. This is an economic verity. In reaching this conclusion, we do no violence to the district court's finding that the one-mile surrounding area constitutes a retail market, since the submarket we adopt is "a logical extension of the District Court's findings," *United States v. Aluminum Co. of America,* 377 U.S. 271 at 277 n.4,[83] or, at

83. Our attention has been called to the fact that the Senate Committee rejected a suggestion that the word "community" be added to amended § 7. Defendants argue that, in light of this rejection, the market cannot be coterminous with a mere neighborhood, as distinguished from a geographical segment of the country. The argument is

any rate, a logical contraction thereof. It is an axiom of effective law enforcement, which commentators oft overlook,[84] that the courts cannot disregard the necessities of the prosecutor's case in tailoring markets if amended section 7 is not to be reduced to the innocuous desuetude that characterized the original 1914 version of the legislation.[85]

The district court found that delicatessen and ordinary meat products are distinct lines of commerce and cannot be combined. We disagree. As we held in *United States v. du Pont*, 351 U.S. 377, it is improper "'to require that products be fungible to be considered in the relevant market.'" *United States v. Continental Can Co.*, 378 U.S. at 449. We rejected the concept of fungibility as a criterion for defining markets when urged by the government in *United States v. du Pont, supra,* and we can do no less here when the same argument is pressed by the defense.

The decisive test, however phrased, is whether there is meaningful competition between the two types of products. We may not disregard the fact known to every housewife that delicatessen and ordinary meats are in the sharpest competition for the consumer's dollar. The rivalry between delicatessen and meat is "pervasive and . . . the area of competitive overlap between these two product markets is broad enough to make the position of the individual companies within their own industries very relevant to the merger's impact within the broader competitive area that embraces both of the merging firms' respective industries." *United States v. Continental Can Co.*, 378 U.S. at 456. We reject here, as we did in *Brown Shoe,* the contention that a product market may be fragmented on the basis of price and quality differences. We add that the market

specious. Congress did not shackle the judiciary in setting the metes and bounds of the market; all that it did was to quiet the fears of the opposition that the statute might be invoked against economically insignificant local mergers. That is not the situation with which we are here confronted. This conclusion is fortified by Webster's definition of "section" as "a distinct part of a country, of people, community, class, or the like." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed., unabr. 1958).

84. See, *e.g.*, Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 171 (1963); *Fifteenth Annual Review of Antitrust Developments—1962*, 17 RECORD OF N.Y.C.B.A. 411, 427 (1962); *Recent Antitrust Developments*, 71 YALE L.J. 75 (1961); *Annual Review of Antitrust Development*, 15 RECORD OF N.Y.C.B.A. 362, 375 (1960); *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843 (1959); *Recent Antitrust Developments*, 13 RECORD OF N.Y.C.B.A. 417, 436 (1958); *Annual Review of Recent Antitrust Developments*, 12 RECORD OF N.Y.C.B.A. 411, 415 (1957).

85. *Cf.* KAYSEN & TURNER, ANTITRUST POLICY 133 (1959); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 308-16, 328 (1960). Markham, *Merger Policy Under the New Section 7: A Six-Year Appraisal*, 43 VA. L. REV. 489, 521-22 (1957).

cannot be segmented in terms of the nature of the goods sold, since such fragmentation would be "unrealistic" and an impediment to effective enforcement. *Brown Shoe Co. v. United States*, 370 U.S. at 326. Nutritionally, functionally, and economically there is no significant difference between a piece of salami and a slice of pork. A more dramatic example of reasonable interchangeability would be difficult to conceive.

Having established that fresh meat and delicatessen constitute a relevant market, it does not follow, of course, that this is the only such market. We believe that all food products—vegetables, fruits, and groceries as well as meat and delicatessen—also constitute a relevant market for purposes of this case. The existence of a submarket does not by any means negate the equally significant existence of a broader market to which it belongs. It cannot be too often affirmed that the number of combinations and permutations of markets is not prescribed by any mechanical formula, but rather is determined by the dynamism of the market place.

We thus reach the ultimate question of this merger's effect on competition in the markets as we have now constructed them. Section 7 was enacted to curb "a rising tide of economic concentration in the American economy." *Brown Shoe Co. v. United States*, 370 U.S. at 315. Although the effect of an acquisition on competition was at one time thought not to be "the kind of question which is susceptible of a ready and precise answer . . . ," *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 at 362, we have dispensed "with elaborate proof of market structure, market behavior, or probable anticompetitive effects" and have replaced such archaic requirements with a simpler test that eliminates the uncertainty that is the bane of the businessman's existence. *Id.* at 363. Moreover, we must never forget that ease of enforcement is integral to the sound administration of justice.

This record exhibits the classic instance of the concentration with which Congress was concerned. At the crossroads there are four food establishments. In addition to Joe's, which handles delicatessen only, and Victor's, which purveys fresh meats, there is Gordon's Vegetable Store and an A&P Supermarket selling a variety of food products, including meat, delicatessen, fruits, vegetables and groceries. Before the merger, the A&P store had fifty per cent share of the overall food market, the remainder being divided twenty per cent for Victor's, seventeen per cent for Joe's, and thirteen per cent for the vegetable store. Thus, prior to the acquisition, the two market leaders in this oligopolistic structure accounted for seventy per cent, whereas after the merger they represented a figure of eighty-seven per cent. Concentration has thus been increased by more than twenty per cent. Whereas before there were four viable competitors, there are now only three, a diminution of twenty-five per cent in the number of establishments. As we held in *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 at 364-65, "without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat." On the facts presently before us, the creation of a new market factor having thirty-seven per cent of an already concentrated market is plainly violative of the statute.

If the percentage figures are refined further to take into account the economically meaningful meat-delicatessen submarket, an even more alarming result obtains. Prior to the acquisition, Victor's had fifty-nine per cent of the meat-delicatessen market at the relevant intersection; A&P twenty-five per cent; and Joe's sixteen per cent. Today, the merged company enjoys seventy-five per cent of this market, leaving only twenty-five per cent for the A&P.

The trial court was unduly impressed by the testimony of some one hundred witnesses, consisting of manufacturers, wholesalers, retailers, and consumers of food products to the effect that competition, far from being lessened, had in fact been strengthened by the acquisition. We give no weight to such unreliable testimony. As we have already noted, the plain fact is that Congress intended to curb concentration in its incipiency and to forbid minor accretions of economic power. A horizontal merger, of necessity, eliminates a competitor and increases concentration, the twin evils toward which this legislation is addressed. It takes more than proof that competition was increased to repel the presumption of illegality arising from the galloping trend toward concentrated economic power disclosed by this record and affirmed by recent congressional investigation.[86] Were this Court to sustain this acquisition, it would trigger a wave of mergers that would soon convert our free business system into a cartelized economy.[87]

Nor can we ignore the potential competition between Joe's and Victor's that has been foreclosed by this merger. A delicatessen may diversify through internal expansion to include fresh meats, and,

86. See, *e.g.*, the current Senate Antitrust Subcommittee investigation into the concentration of economic power, BNA ANTITRUST & TRADE REG. REP. No. 156, A-13 (July 7, 1964).

87. Standard Oil Co. v. United States, 337 U.S. 293, 315, 320-21 (1949) (Douglas, J., dissenting).

conversely, butcher shops often install delicatessen counters. As we noted in *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 at 174, "the existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated." Such competition is completely eliminated by the challenged acquisition.

In view of our holding, we need not deal with the Government's Sherman Act contentions at any length. Suffice it to say that the acquisition eliminates competition among major competitive factors in the market and, therefore, is governed by our recent decision in *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665.

The point is vigorously pressed that this case does not involve the fusion of industrial giants of the dimension of du Pont, General Motors, Alcoa, Continental Can, and the like. Size, however, is relative. Percentage command must be appraised in light of the controlling market facts. In this market, Joe's Delicatessen is just as dominant as are the industrial giants we have mentioned in their respective fields of operation.

We are not impressed by the claim that this is a combination of two small businesses. In enacting the Sherman and Clayton Acts, it was Congress' purpose to maintain the integrity of the competitive structure of the economy, upon which the preservation of our precious democratic way of life hinges. We repeat what we said in *Brown Shoe*: "Section 7 was enacted to prevent even small mergers that added to concentration in an industry." 370 U.S. at 345, n.72. If America is to remain strong and free, we must execute the congressional mandate of curbing monopoly in its incipiency, no matter what our personal predilections may be. Arguments of policy and convenience are to be addressed to the Congress.

A word about the fact that Mr. Victor of Victor's Meat Market Co. is getting along in years and has wanted to retire from business. The short answer to this is that Victor's is "the prototype of the small independent that Congress aimed to preserve by § 7." *United States v. Aluminum Co. of America*, 377 U.S. 271 at 281.

The judgment is reversed, and, since there must be divestiture, the case is remanded to the district court for the entry of an appropriate decree.

Reversed and remanded.

Mr. Justice Lucius Quintus Vespucius, dissenting.

I can do no better in voicing my disagreement with the majority than to quote the language of my brethren in registering their dissents in other contexts. "I find the Court's decision inconsistent with the language of the statute, with its history and background, and with any reasonable purpose which can be ascribed to Congress in enacting it." White, J., in *Costello v. Immigration & Naturalization Sserv.*, 376 U.S. 120 at 132. "The Court's opinion . . . is unsound logically on its face and demonstrably unsound historically." Harlan, J., in *Wesberry v. Sanders*, 376 U.S. at 22. "The root error . . . in the Court's decision is that it works an extraordinary and unwarranted departure from . . . settled principles . . . ." Brennan, J., in *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 at 319. "I cannot so cavalierly ignore the obligations of a court to dispense justice to the litigants before it." White, J., in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 at 456. "The present case . . . will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature." Douglas, J., in *Arizona v. California*, 373 U.S. 546 at 628.

Nor can I improve upon the criticisms of my brothers Stewart and Harlan in two of the other merger cases decided at this term, *United States v. Aluminum Co. of America*, 377 U.S. 271, 284 and *United States v. Continental Can Co.*, 378 U.S. 441, 467, 469-70, 477. Writes Mr. Justice Stewart in the former of these cases:

> "The District Court . . . did a careful and thoughtful job. It applied the proper law, and its reasoning was impeccable. Yet this Court overrules its decision with little more than a wave of the hand." 377 U.S. at 284.

Equally pertinent are the observations of Mr. Justice Harlan in *Continental Can*:

> "With all respect, the Court's conclusion is based on erroneous analysis, which makes an abrupt and unwise departure from established antitrust law.
>
> * * *
>
> "The bizarre result of the Court's approach is that market percentages of a non-existent market enable the Court to dispense with 'elaborate proof of market structure, market behavior and probable anticompetitive effects' . . . .
>
> * * *
>
> "I have no idea where § 7 goes from here, nor will businessmen or the antitrust bar. Hitherto, it has been thought that the validity of a merger was to be tested by examining its effect in

identifiable, 'well-defined' (Brown Shoe, supra, 370 U. S. at 325, 8 L.Ed. 2d at 535) markets. Hereafter, however slight (or even nonexistent) the competitive impact of a merger on any actual market, businessmen must rest uneasy lest the Court create some 'market,' in which the merger presumptively dampens competition, out of bits and pieces of real ones. No one could say that such a fear is unfounded, since the Court's creative powers in this respect are declared to be as extensive as the competitive relationships between industries. This is said to be recognizing 'meaningful competition where it is found to exist.' It is in fact imagining effects on competition where none has been shown."

Only two short years ago, in *Brown Shoe,* we endeavored to lay down merger guidelines for the instruction of the lower courts and the bar. This good doctrine, carefully considered and formulated, should not now be forsaken. We do not advance the public interest by inventing lines of commerce or sections of the country. To meet the needs of a dynamic society, our merger jurisprudence must be more than a mere numbers game, with the numbers getting smaller all the time. I would affirm.

III. Robinson-Patman

A. *Injury to Competition*

When the Supreme Court decided *Morton Salt*[88] sixteen years ago, there were some who construed it as establishing a rule of automatic illegality applicable to secondary-line (buyer level) price discrimination under the Robinson-Patman Act.[89] Affirming a Commission ruling that a quantity discount system that favored large grocery chains purchasing salt was unlawful under section 2(a), Mr. Justice Black stated:

> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers."[90]

88. FTC v. Morton Salt Co., 334 U.S. 37 (1948).

89. *E.g.,* FTC, *Commission Policy Toward Geographic Pricing Practices,* Trade Reg. Rep. (10th ed.) at pp. 5341-49. "At the other extreme, an injury to competition might be discerned in any case in which there was a price difference between competing customers, no matter how insignificant the difference nor how unimportant the commodity as a part of the business of those concerned." The Commission, however, did not adopt this "extreme" view.

90. 334 U.S. at 50.

Only a few years earlier, in the *Moss* case,[91] the Second Circuit had held that mere price differences were presumptively injurious to competition and that the burden was upon the respondent to rebut the existence of such injury. The Federal Trade Commission, however, promptly repudiated the *Moss* rule. In its brief opposing certiorari in *Moss*, the Commission explicitly stated that the statute required it "as a part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition."[92] This was echoed in *General Foods I*,[93] where Commissioner Gwynne emphasized:

> "The standard for determining the unlawfulness of an unjustified price discrimination, namely, the substantiality of the effects reasonably probable, is the same whether the competitive injury occurs at the seller level or at the customer level. The fact of injury is to be determined in all cases by a consideration of all the competent and relevant evidence and the inferences which may be reasonably drawn therefrom. Under differing circumstances the proof necessary to establish injury or even to make out a prima facie case will differ."[94]

In recent years, however, the suspicion has arisen that the Commission merely pays lip service to the *General Foods* doctrine and that, in actual practice, in order to establish a violation of section 2(a) at the buyer level it requires precious little more by way of proof than differences in prices charged competing purchasers. The Commission, to be sure, has never said that it is applying a per se rule, but cases such as *Tri-Valley*,[95] *United Biscuit*,[96] and *Borden*[97] began to quote the *Morton Salt* rubric as suggesting a rule of automatic illegality.

Finally, two years ago, a hearing examiner took the bull by the horns in the *Shattuck*[98] case. There the respondent had granted a ten per cent discount only to chain store purchasers of its packaged candy. Although the examiner could perceive "no evidence of

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

92. Brief for Respondent, p. 8, Samuel H. Moss, Inc. v. FTC, 326 U.S. 734 (1945).

93. General Foods Corp., 50 F.T.C. 885 (1954).

94. *Id.* at 887.

95. Tri-Valley Packing Ass'n, TRADE REG. REP. ¶ 15893 (FTC May 10, 1962), *rev'd on other grounds*, TRADE REG. REP. (1964 Trade Cas.) ¶ 71059 (9th Cir., March 18, 1964).

96. United Biscuit Co., TRADE REG. REP. ¶ 15966 (FTC June 28, 1962), *modified on rehearing*, TRADE REG. REP. ¶ 16799 (Feb. 7, 1964).

97. The Borden Co., TRADE REG. REP. ¶ 16776 (FTC April 22, 1964).

98. Frank G. Shattuck Co., TRADE REG. REP. ¶ 16882 (FTC April 22, 1964).

actual or probable injury,"[99] he felt that he could not dismiss the complaint because, as he viewed the Commission's recent secondary-line decisions:

> "[P]roof of competitive injury is no longer required. The Commission has enunciated a *'per se'* standard for judging probable injury to competition under § 2(a) of the Robinson-Patman Act."[100]

On appeal, however, the examiner was told that he had misunderstood the import of the Commission's prior rulings. Expressly disclaiming adherence to any rule of per se illegality,[101] Chairman Dixon dismissed the complaint for failure of proof on the issue of injury to competition. To support his conclusion, he pointed to these facts: (1) the discriminations did not affect the resale prices of the non-favored retailers, because they sold at pre-ticketed prices; (2) four of the five non-favored purchasers usually did not take advantage of a two per cent discount offered by the respondent for prompt payment; and (3) there was no showing of any adverse effect upon the buyers' profits.[102]

It would be nice to be able to report that the Commission's action in *Shattuck* heralds a reaffirmation of *General Foods*. But, in the same month that *Shattuck* was decided, the Commission filed a petition for certiorari from the Seventh Circuit's *Amoco*[103] decision that makes the picture murkier than ever. The facts in *Amoco* were these: During the course of a seventeen-day price war in the vicinity of Smyrna, Georgia, Amoco had granted discounts ranging from three to eleven and one-half cents per gallon to its Smyrna dealers. Similar discounts were not granted to dealers in neighboring Marietta. When the case was before the Commission, Chairman Dixon stated that *Morton Salt* permitted a finding of illegality merely from the existence of these "substantial" discriminations among dealers who were found to be competitors. But, he expressly refrained from bottoming his holding on that theory. Instead, he rested his decision upon a finding that sales had been diverted from the nonfavored Amoco dealers to those receiving the discriminatory discounts.[104]

---

99. Frank G. Shattuck Co., TRADE REG. REP. ¶ 16112 (FTC Sept. 20, 1962).
100. *Ibid.*
101. TRADE REG. REP. ¶ 16882, at p. 21917 (FTC April 22, 1964).
102. *Id.* at pp. 21917-18.
103. American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), *reversing* TRADE REG. REP. ¶ 15961 (FTC June 27, 1962).
104. American Oil Co., TRADE REG. REP. ¶ 15961, at p. 20786 (FTC June 27, 1962).

On appeal, the Seventh Circuit reversed, stating that there was "a lack of any substantial evidence to support a conclusion that this temporary and transient limited economic impact was the result of [Amoco's discrimination] . . . much less that it constituted a probable threat to the ability of the Marietta dealers to continue in competition."[105] The failure of proof on the issue of causation referred to by the court of appeals stemmed from the fact that competing brand stations were also posting lower prices and that they, therefore, might well have siphoned off sales from the nonfavored Amoco dealers. Having thus disposed of diverted sales as a basis for the Commission's decision, the Seventh Circuit was left with *Morton Salt*. On this question, the Court agreed with Commissioner Elman's dissent that *Morton Salt* involved a "classic" case of a "discriminatory 'two-price system'" that was "systematic," continually maintained, and gave larger buyers a "built-in, routine and permanent price advantage over smaller rivals."[106] The case, accordingly, was deemed inapplicable to the temporary and sporadic discriminations present in *Amoco*.

In its petition for certiorari, the Commission argued that its finding of diversion (and, therefore, the issue of proximate cause) was beside the point, because *Morton Salt* sanctioned a finding of competitive injury from the substantial price differential alone.[107] The Solicitor General, although he urged the Court to grant certiorari in order to settle this important question, disassociated himself both from the Commission's view of the merits and from its reading of *Morton Salt*.[108]

Since the Supreme Court did not accept this opportunity to clarify the meaning of *Morton Salt*,[109] it remains to be seen whether the Commission will press its construction of the case in the future. Thus far, in the wake of *Amoco*, it seems to have made a conscious effort to predicate its findings of injury to competition upon evi-

105. 325 F.2d at 104.

106. *Id.* at 106; TRADE REG. REP. ¶ 15961, at p. 20791.

107. "In short, the Commission believes that if *Morton Salt* means what it seems to say, it was fully warranted in concluding . . . that 'in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial.' Indeed, under this view it was unnecessary for the Commission further to consider whether in fact there was any significant diversion of business from American's Marietta to its Smyrna dealers." Petition for Writ of Certiorari, p. 14.

108. *Id.* at 16.

109. Certiorari was denied. 377 U.S. 954 (1964).

dence in addition to the price differences themselves. Thus, in *Purolator*,[110] the Commission went to considerable lengths to demonstrate the competitive significance of the quantum of the discrimination in relation to the buyers' low profit margins.[111] Similarly, in *Dayco*,[112] the Commission stressed the magnitude of the discrimination in the context of low industry profit margins and the importance of cash discounts.[113] And, in *Universal-Rundle*,[114] the significant element was that the discrimination was sufficiently reflected in resale prices to divert business to the favored buyer.[115]

Two years ago, in attempting to distill the essence of injury to competition in secondary line cases under the Robinson-Patman Act, Frederick M. Rowe observed:

> "Essentially, adverse competitive effects are most likely inferred from stable price differentials *substantial in amount*, in the supplier's sales of a *standardized product*, as between competing *resellers to the same trade*, which are in *keen competition*, and operate on *tight profit margins*. Conversely, the inference of competitive injury from a supplier's price variations is remotest when the price spread is *minimal*, concerns a *tailored, specialized*, or *component* product, in an industry displaying *moderate competition* and *ample profits*."[116]

The *Amoco* case further teaches that a discrimination of limited duration is not actionable, at least when there is no independent evidence pointing to a probable impairment of competition.

But, the broader and more important lesson of *Amoco* is to be found in its quotation from Mr. Justice Goldberg's opinion in *Sun Oil*:

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."[117]

If the Commission would heed these words, it would be taking a real step forward toward a realistic and constructive administration of the Robinson-Patman Act.

---

110. Purolator Products, Inc., TRADE REG. REP. ¶ 16877 (FTC April 3, 1964).

111. *Id.* at pp. 21882-84.

112. Dayco Corp., TRADE REG. REP. ¶ 17029 (FTC Aug. 5, 1964).

113. *Id.* at pp. 22139-40.

114. Universal-Rundle Corp., TRADE REG. REP. ¶ 16948 (FTC June 12, 1964).

115. *Id.* at p. 22007.

116. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 181 (1962). (Emphasis is the author's.)

117. 325 F.2d at 106, quoting from 371 U.S. 505, 527.

B. *Meeting Competition*

Last year,[118] I called attention to two serious roadblocks to the establishment of the meeting competition defense that the Commission had constructed in the *Forster*[119] case. The holding was that a seller may not invoke the defense to a charge of price discrimination unless, prior to meeting competition, he knew both the precise amount of the lower competitive price and the identity of the competing bidder. Chairman Dixon saw nothing unreasonable in these requirements because, in his view, buyers would understand the law's strictures and would provide the necessary information to their suppliers upon request.[120] Now, the First Circuit[121] has found this approach wholly impractical. Speaking for a unanimous court, Chief Judge Woodbury declared:

> "We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has even been the way of the market place. The Commission's requirement is unrealistic."[122]

Harking back to the Supreme Court's observation in *Staley*[123] that section 2(b) "does not require the seller to justify price discriminations by showing that in fact they met a competitive price,"[124] but that it suffices for the seller to show facts which would lead a "reasonable and prudent person" to believe that he was meeting competition, the court of appeals remanded the case for application of this more flexible test.

Another of the Commission's pet doctrines implicitly went down to defeat in *Forster*. Consonant with its position that the statute requires an actual offer by a competitor to the seller's customer,[125] the Commission had held that the section 2(b) defense was unavailable

118. Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 183-87 (1963).
119. Forster Mfg. Co., TRADE REG. REP. ¶ 16243 (FTC Jan. 3, 1963), *rev'd*, 1964 Trade Cas. ¶ 71190 (1st Cir. 1964).
120. TRADE REG. REP. ¶ 16243, at p. 21087 (FTC Jan. 3, 1963).
121. Forster Mfg. Co. v. FTC, 1964 Trade Cas. ¶ 71190 (1st Cir. 1964).
122. *Id.* at pp. 79743-44.
123. FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945).
124. *Id.* at 759.
125. *E.g.*, Sun Oil Co., 55 F.T.C. 955, 965 (1959), *rev'd*, 294 F.2d 465 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1963).

because the respondent's competitor had merely made its lower prices generally available to the trade and had not made a specific offer to any of the respondent's customers.[126] The Commission, in other words, would require a seller to stand by and wait until the very last second before trying to lock the barn door to prevent the theft of his horse. While the First Circuit did not expressly address itself to the "actual-offer" issue, it necessarily rejected the Commission's view of the law when it remanded for further proceedings on the meeting competition defense. Since the record was clear that Forster's customers did not actually receive competing offers,[127] a remand would otherwise have been a futile gesture.[128]

There seems to be no limit to the Commission's ingenuity in devising novel reasons for striking down the meeting competition defense. This year witnessed the birth of still another requirement in the *Callaway*[129] case. According to Chairman Dixon, the seller's products must be "similar in grade and quality"[130] to those of the competitor whose price he is meeting, because a price reduction to meet the price of "inferior goods is in effect an undercutting of the latter price" and "cannot be characterized as defensive."[131] If all that the Chairman meant was that a seller is beating competition if the quality of his product is such that it traditionally commands a premium price over his competitor's product and he eliminates the usual price differential, this would be old hat.[132] But the Chairman meant a good deal more, since the rugs of Callaway and its competitors customarily sold "at similar price levels."[133] To be sure, they may have been made of different materials, but this did not make them any the less competitive with each other. As Commissioner Elman noted in dissent, infusing the like grade and quality concept into section 2(b) is unwarranted because a seller "is permitted by 2(b) to meet a competitive price, that is, a price on *competing* products,

126. TRADE REG. REP. ¶ 16243, at pp. 21086-87.

127. *Ibid.*

128. The First Circuit appears to have left open the question whether the respondent's lower prices to seventeen customers, in response to its competitor's sales to only three accounts, constituted too "violent" a reaction to be compatible with good faith. 1964 Trade Cas. at p. 79743.

129. Callaway Mills, Inc., TRADE REG. REP. ¶ 16800 (FTC Feb. 10, 1964).

130. *Id.* at p. 21755.

131. *Ibid.*

132. *E.g.*, Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); Anheuser-Busch Inc., 54 F.T.C. 277, 280 (1957), *rev'd on other grounds*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960).

133. TRADE REG. REP. ¶ 16800, at p. 21755.

irrespective of whether those products are of 'like grade and quality,' for 2(a) purposes, to his own."[134]

Despite a continuation of the Commission's campaign against the section 2(b) defense, there was a slight ray of sunshine at the Commission level this past year. At long last, a respondent succeeded in getting a complaint dismissed on the ground of meeting competition[135]—by showing that it verified each discount by an on-the-spot check of competitive prices.[136] In sustaining the defense in *Continental Baking,* Commissioner Elman emphasized that the "good faith" concept is "flexible and pragmatic, not technical or doctrinaire";[137] that "rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense";[138] that the applicable standard is "simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity";[139] and that "the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application."[140]

If the Commission, in administering the meeting competition defense, would actually practice what Commissioner Elman preaches, there would be real cause for rejoicing. But, only a few months after *Continental Baking,* Commissioner Elman found himself in the minority in *Callaway,* with the majority warning that the defense should be accepted "only with caution after due deliberation"[141] and that the respondent should be held to "a strict showing."[142] On balance, therefore, it would appear that the fight for a meaningful meeting competition defense continues to be an uphill battle.

IV. Miscellaneous Developments

A. *Conscious Parallelism*

In the early 1950's, one of the most vexing antitrust issues was conscious parallelism. Reams were written on this subject in an effort to pin down the legal significance of this elusive concept in

134. *Id.* at p. 21760 (dissenting opinion).
135. In fact, two respondents succeeded. Continental Baking Co., TRADE REG. REP. ¶ 16720 (FTC Dec. 31, 1963); Ponca Wholesale Mercantile Co., TRADE REG. REP. ¶ 16814 (FTC Feb. 24, 1964).
136. Continental Baking Co., TRADE REG. REP. ¶ 16720, at p. 21648 (FTC Dec. 31, 1963).
137. *Id.* at p. 21647.
138. *Ibid.*
139. *Ibid.*
140. *Ibid.*
141. Callaway Mills, Inc., TRADE REG. REP. ¶ 16800, at p. 21755 (FTC Feb. 10, 1964).
142. *Ibid.*

the law of conspiracy.[143] I contributed my share to the spirited discussion.[144] Although conscious parallelism was frequently called a "doctrine" in those days, no one really knew what it meant. To be sure, the words conveyed the idea of several businessmen knowingly engaging in similar conduct. But, beyond that, there was a vast sea of doubt.

Did conscious parallelism, as a matter of substantive law, equal conspiracy? Or, to put it another way, did it dispense with the need to prove an agreement in order to establish a violation of section 1 of the Sherman Act? There were those who thought Mr. Chief Justice Stone's opinion in *Interstate Circuit*[145] held precisely that.[146] If conscious parallelism did not go that far substantively, did it mean, as a matter of procedural law, that it sufficed to make out a prima facie case of conspiracy? In other words, would such proof be enough to get to the jury, whose determination, one way or the other, would be conclusive? Or was conscious parallelism simply admissible circumstantial evidence on the issue of conspiracy, the probative weight of which would vary depending on the specific business context in which the uniform action occurred?[147]

The first of these questions was answered ten years ago by the Supreme Court in *Theatre Enterprises*[148]—a square holding that conscious parallelism is not the substantive equivalent of conspiracy and that there must be proof of agreement, express or tacit, in order to establish a section 1 violation. Hence, the plaintiff in *Theatre Enterprises* was not entitled to a directed verdict upon a showing that each of the defendants refused to grant plaintiff's theatre first run films, knowing that the other defendants had also refused to do so. A jury verdict for the defendants accordingly was upheld.

143. *E.g.*, Conant, *Consciously Parallel Action in Restraint of Trade*, 38 MINN. L. REV. 797 (1954); Dunn, *Conscious Parallelism Reexamined*, 35 B.U.L. REV. 225 (1955); Kittelle & Lamb, *Implied Conspiracy Doctrine and Delivered Pricing*, 15 LAW & CONTEMP. PROB. 277 (1950); Lasky, *The Long Bow of Lucretius, Book IV, Line 817*, 43 CALIF. L. REV. 596 (1955); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Note, *The Nature of a Sherman Act Conspiracy*, 54 COLUM. L. REV. 1108 (1954); Note, *Conscious Parallelism—Fact or Fancy?*, 3 STAN. L. REV. 679 (1951).

144. Handler, *Anti-Trust—New Frontiers and New Perplexities*, 6 RECORD OF N.Y.C.B.A. 59, 61 (1951); Handler, *Contract, Combination or Conspiracy*, 3 ABA ANTITRUST SECTION REP. 38, 40 (1953); Handler, *Recent Antitrust Developments*, 9 RECORD OF N.Y.C.B.A. 171, 173 (1954); Handler, *Annual Review of Antitrust Developments*, 10 RECORD OF N.Y.C.B.A. 332, 342 (1955).

145. Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

146. See, *e.g.*, Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 177 (1947).

147. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 39-40 (1955); Dunn, *supra* note 143, at 229-243.

148. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954).

What *Theatre Enterprises* did not answer was whether a jury verdict for the *plaintiff* would also have been upheld on the theory that conscious parallelism would permit, although not require, a finding of conspiracy. Mr. Justice Clark, writing for the Court, said that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."[149] On the basis of this cryptic observation, at least one district court subsequently ruled that proof of conscious parallelism was itself enough to go to the jury in a conspiracy case.[150] However, I have always interpreted Mr. Justice Clark's reference to "business behavior" as signifying something more than conscious parallelism, "encompassing a wide variety of conduct in addition to uniform action."[151] Otherwise, every time two or more businessmen acted in the same fashion in response to the same economic stimulus they could be charged with conspiracy, and their fate would be in the hands of a jury that would be free to draw a sinister inference from perfectly natural conduct.

Nevertheless, since *Theatre Enterprises*, there has been uncertainty as to the probative significance of conscious parallelism. The cases that have actually fastened liability on defendants have involved, in addition to uniform conduct, some circumstance pointing in the direction of concerted activity—as, for example, where the defendants met,[152] discussed prices,[153] or acted contrary to their apparent self-interest.[154]

In the past year, we have had unequivocal pronouncements by two courts of appeals that conscious parallelism, in and of itself, is insufficient evidence of conspiracy to warrant submission of the case to the jury. The First Circuit so held in *Winchester Theatre Co. v. Paramount Film Distrib. Corp.*,[155] and the Ninth Circuit did likewise in *Independent Iron Works, Inc. v. United States Steel Corp.*[156] Both decisions sustained directed verdicts for the defendants at the end of the plaintiff's case. A few quotations will give you their flavor. In *Winchester Theatre*, Judge Aldrich had this to say:

> "The plaintiff must introduce evidence from which the jury could reasonably infer concert of action. We have never recog-

149. *Id.* at 540.
150. Hathaway Motors, Inc. v. General Motors Corp., 18 F.R.D. 283 (D. Conn. 1955).
151. Handler, *Annual Review of Antitrust Developments*, 10 Record of N.Y.C.B.A. 332, 345 (1955).
152. Advertising Specialty Nat'l Assn. v. FTC, 238 F.2d 108, 115 (1st Cir. 1956).
153. Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 399-400 (4th Cir. 1958), *aff'd on other grounds*, 360 U.S. 395 (1959).
154. Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).
155. 324 F.2d 652 (1st Cir. 1963).
156. 322 F.2d 656 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963).

> nized conscious parallelism, standing alone, as sufficient to sustain such a finding. . . .
>
> "If parallel action is compelled by competition in this area, we find it difficult to say that such action warrants a finding of an illicit agreement."[157]

By the same token, in *Independent Iron Works,* Judge Koelsch wrote:

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. . . .
>
> "Similarity of prices in the sale of standardized products such as the type of steel involved in this suit will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act. . . ."[158]

The clarification furnished by these rulings is that businessmen will not have to convince a jury that their consciously uniform action was the product of individual decision where there are no plus factors or other unusual circumstances suggesting collusion. Thus there is no easy shortcut in the proof of a conspiracy. At least in this branch of antitrust, serious charges of wrongdoing must be proved.

B. *Consent Decrees*

The Government must have breathed a sigh of relief when the Supreme Court handed down its unanimous opinion in the *Ward Baking* case[159] this term. A district court in Florida had entered a so-called "consent" judgment at the instance of the defendants in a civil antitrust action without the Government's consent.[160] In so doing, it had issued a narrower decree than that sought by the Government. The court's theory was that a trial was pointless because it would not have granted broader relief even if the Government had succeeded in proving the allegations of the complaint to the hilt.

Specifically, the complaint charged price-fixing and allocation of business in the sale of bread and rolls to the United States Navy in the Jacksonville area. The defendants were willing to take an injunction prohibiting not only that precise conduct, but also one

157. 324 F.2d at 653.
158. 322 F.2d at 661, 665.
159. United States v. Ward Baking Co., 376 U.S. 327 (1964).
160. *Id.* at 328-30.

that covered all bakery products and all sales to the federal government. The Antitrust Division, however, insisted that the decree should include a general prohibition against conspiring to fix bakery product prices or allocate such business in sales to anybody anywhere.

The Supreme Court, through Mr. Justice Goldberg, held that the district court could not know whether the additional relief was justified unless it held a trial on the merits. The Court reversed and remanded for that purpose. "It would be a rare case," declared Mr. Justice Goldberg, "where all the facts necessary for a trial court to decide whether a disputed item of relief was warranted could be determined without an 'opportunity to know the record.'"[161]

This is the position that I took seven years ago when I pointed out that "if the Government were powerless to prevent a defendant from obtaining a unilateral consent decree, the result would be little short of chaotic."[162] However, there is one exception: that is, when the Government asks for relief that it is not entitled to receive as a matter of law. In such a case, it seems to me, the district court should have the power to enter a consent decree over the Government's objection without a trial. *Brunswick-Balke*,[163] which I commented upon two years ago,[164] is a case in point. There the defendants bowed to all of the Government's requests, except that they would not admit in the decree that they had violated the Sherman Act, since such an admission could be used against them as prima facie evidence in a treble damage suit filed by a state agency. The district court viewed this request of the Government as "an arbitrary and unauthorized demand," inconsistent with the purpose of the proviso of section 5 of the Clayton Act to encourage consent decrees.[165] It is interesting to note that the Government did not appeal *Brunswick-Balke*, that it has not subsequently pressed for such an admission in consent decrees, and that the Supreme Court in *Ward Baking* expressly leaves open the question of whether the Government can block a consent decree by insistence "upon an adjudication of guilt" where "there is agreement on every substantive item of relief."[166] The Court summarized its ruling in these terms:

161. *Id.* at 331.

162. Handler, *Annual Review of Recent Antitrust Developments*, 12 RECORD OF N.Y.C.B.A. 411, 440 (1957).

163. United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962).

164. Handler, *Fifteenth Annual Review of Antitrust Developments—1962*, 17 RECORD OF N.Y.C.B.A. 411, 419-22 (1962).

165. 203 F. Supp. at 662.

166. 376 U.S. at 334.

"We decide only that where the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the District Court may not enter a 'consent' judgment without the actual consent of the Government."[167]

C. *Judicial Enforcement of Subpoenas*

Although these annual reviews have been devoted solely to developments in the field of trade regulation, I find myself this year in the somewhat strange position of commenting upon a Supreme Court decision that arose under the Internal Revenue Code.[168]

Reisman v. Caplin[169] concerned the statutory power of the Commissioner of Internal Revenue to enforce a summons for the production of documents germane to his investigations. Because the statutory scheme of the tax law closely parallels the corresponding provisions of sections 9 and 10 of the Federal Trade Commission Act,[170] the Court's ruling may provide illumination concerning the enforcement of Commission subpoenas and inquiries, a topic which I have previously discussed.[171]

In *Reisman* the Internal Revenue Commissioner issued summonses directing the production by accountants of various papers relevant to civil and criminal tax proceedings pending against their clients. Shortly after the summonses had been served, the plaintiffs, who were the taxpayers' attorneys, instituted an action in the federal district court for a declaratory judgment and an injunction preventing enforcement, claiming attorney-client privilege, work-product protection, and unconstitutional seizure of confidential documents. The Supreme Court affirmed the court of appeals' dismissal of the action,[172] holding that the plaintiff had an adequate remedy at law because the Commissioner's summons could not be enforced absent court order and, in any court proceeding, "the witness may challenge the summons on any appropriate ground."[173]

167. *Ibid.*

168. INT. REV. CODE OF 1954, § 7602.

169. 375 U.S. 440 (1964).

170. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1963); 38 Stat. 723 (1914), 15 U.S.C. § 50 (1963).

171. Handler, *Fifteenth Annual Review of Antitrust Developments—1962*, 17 RECORD OF N.Y.C.B.A. 411, 414-19 (1962).

172. The district court held that petitioners had no standing to sue, that the complaint failed to state a cause of action, and that the papers in question were neither the work product of the petitioners nor within the attorney-client privilege. See Reisman v. Caplin, 375 U.S. 440 at 442. The court of appeals affirmed on the theory that the suit was one against the United States to which it had not consented. 317 F.2d 123 (D.C. Cir. 1963). See Reisman v. Caplin, *supra* at 442-43.

173. 375 U.S. 440, at 449.

Section 7602[174] of the Internal Revenue Code authorizes the Secretary of the Treasury or his delegate to summon taxpayers or other witnesses to testify and to produce relevant and material documents. Section 9[175] of the FTC Act grants the same power to the Commission. Should a recipient of a summons or subpoena refuse to comply, both statutes afford the same enforcement procedures. In neither case is the administrative subpoena self-executing; obedience can be obtained only by court order. In addition, both statutes, which are in *pari materia,* make it a criminal offense to "neglect" to appear or to produce subpoenaed documents.

Mr. Justice Clark's opinion sets to rest once and for all the view traditionally taken by Federal Trade Commission counsel that a district court must defer to the Commission's administrative expertise and, in effect, rubber stamp the agency's determination of the validity of its own subpoena. The Supreme Court makes explicit that which I have always regarded as inarguable[176]—when a respondent challenges a subpoena and the Commission goes into court, the district judge must conduct a de novo hearing on all issues, including questions of relevance, privilege, materiality, and burdensomeness. In Mr. Justice Clark's words, "Any enforcement action . . . would be an adversary proceeding affording a judicial determination of the challenges to the . . . [subpoena] and giving complete protection to the witness."[177] As he reiterates, "in any of these procedures before . . . the district judge . . . the witness may challenge the . . . [subpoena] on any appropriate ground."[178] Therefore, the determination of whether the subpoena shall be heeded by the respondent is made, not by the agency, but by the court, exercising all of its inherent as well as statutory powers.

Equally important is the Court's treatment of the Internal Revenue Code's criminal provision, which parallels section 10 of the FTC Act. Mr. Justice Clark minces no words in disposing of the notion that criminal liability automatically attaches to a refusal to respond to a subpoena prior to court review. He writes:

> "[T]his statute on its face does not apply where the witness appears and interposes good faith challenges to the summons. It only prescribes punishment where the witness 'neglects' either to appear or to produce . . . . It is sufficient to say that non-

174. INT. REV. CODE OF 1954, § 7602.
175. 38 Stat. 722 (1914), 15 U.S.C. § 49 (1958).
176. Handler, *supra* note 171, at 418-19.
177. 375 U.S. 440, at 446.
178. *Id.* at 449.

compliance is not subject to prosecution thereunder when the summons is attacked in good faith."[179]

In other words, if a respondent raises good faith objections, rather than comply with a demand that he considers to be beyond the Commission's authority, he has committed no crime and it is idle for him to be threatened with criminal prosecution.

D. *Fair Trade*

Despite the fact that in 1936 the Supreme Court upheld the constitutionality of state fair trade legislation under the federal due process clause,[180] the courts of twenty-four states in recent years have invalidated fair trade statutes as applied to nonsigners under the due process and other clauses of their state constitutions.[181] As I pointed out in last year's review,[182] two legislatures—Virginia and Ohio—sought to repair the damage done by their courts by adopting statutory schemes embodying a new theory for making fair trade mandatory on nonsigners.[183] Both states substituted for nonsigner clauses, whose "tort" theory had been held invalid, a provision whereby the purchase of trademarked goods with notice of the manufacturer's fair trade prices is deemed, by operation of law, a *contract* to maintain those prices. Thus, instead of imposing liability upon a nonsigner as a tortfeasor, the new statutes predicate liability upon a theory of implied contract. The highest courts of both states upheld the new theories of legislation.[184]

When the Supreme Court noted probable jurisdiction in *Hudson Distributors*,[185] opponents of fair trade were encouraged to believe that the Court might reconsider its twenty-eight year old ruling in *Old Dearborn*[186] and hold the Ohio statute unconstitutional or at least

179. *Id.* at 447.

180. The Pep Boys, Manny, Moe & Jack v. Pyroil Sales Co., 299 U.S. 198 (1936) (California statute); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936) (Illinois statute).

181. See TRADE REG. REP. ¶ 6041. The figure in the text is computed by adding to the above compilation the holdings of the highest courts of Virginia and Ohio that led to the enactment of their new fair trade statutes. See note 183 *infra*; Union Carbide & Carbon Corp. v. Bargain Fair, Inc., 167 Ohio St. 182, 147 N.E.2d 481 (1958); Benrus Watch Co. v. Kirsch, 198 Va. 94, 92 S.E.2d 384 (1956).

182. Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 181-82 (1963).

183. VA. CODE ANN. §§ 59-8.1-59-8.9 (Cum. Supp. 1964); OHIO REV. CODE §§ 133.27-.34 (Page 1962).

184. Hudson Distribs., Inc. v. Upjohn Co., 174 Ohio St. 487, 190 N.E.2d 460 (1963), *aff'd*, 377 U.S. 386 (1964); Standard Drug Co. v. General Elec. Co., 202 Va. 367, 117 S.E.2d 289 (1960), *appeal dismissed*, 368 U.S. 4 (1961).

185. 375 U.S. 938, 939 (1963).

186. Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936).

hold the McGuire enabling legislation[187] inapplicable to an implied contract statute, just as *Schwegmann*[188] had held the Miller-Tydings Act[189] inapplicable to the original fair trade nonsigner clauses. In *Schwegmann*,[190] it will be recalled, the Court held that state fair trade laws could be applied only to retailers who voluntarily agreed to comply with the manufacturer's price restrictions and could not be invoked on a tort theory against nonsigners. Mr. Justice Douglas read the Miller-Tydings Act as validating only actual contracts to maintain resale prices, thus denying to the states the power to hold nonsignatories liable in tort in interstate transactions. So too, in *Hudson*, it was argued that the McGuire Act now permits state enforcement of vertical price-fixing by *actual* contract and in tort, but does not authorize imposition of nonsigner liability upon the theory of *implied* contract.

Mr. Justice Goldberg's opinion for the Supreme Court in *Hudson*[191] came as a vast disappointment to detractors of fair trade. Reading the nonsigner provision of the McGuire Act literally, the Court held that, as long as there is an actual resale price maintenance contract between the manufacturer and some retailer, the state may bind nonsigners under *any* rationale sufficient under state law, whether it be tort, implied contract, or any other theory. Since such actual contracts existed in *Hudson*, the Ohio scheme is permissible under the McGuire Act.

In addition, the Court's decision manifestly upholds the constitutionality of the Ohio statute under the fourteenth amendment, thus reaffirming *Old Dearborn*. It is plain that Justice Goldberg could not have reached the question of the Ohio statute's validity under the McGuire Act without first deciding, albeit inferentially, the threshold question under the federal constitution. By refusing to give federal due process the same restrictive reading that some state courts have given their due process clauses, the Court followed its long tradition of abstaining from judicial interference with state economic legislation.[192]

187. 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958).

188. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

189. 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958).

190. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). Congress reacted quickly to overcome the disabling of state fair trade enforcement brought about by *Schwegmann*. Congress enacted the McGuire Act, 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958), which overruled *Schwegmann* and specifically exempted nonsigner clauses of state fair trade statutes from the prohibitions of the antitrust laws.

191. Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964).

192. See, *e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-31 (1963), and cases therein cited.

Although he validated Ohio's implied-contract theory where actual contracts were present, Mr. Justice Goldberg left open the question whether, if the manufacturer is unable to persuade a single buyer to agree to fair trade, the state may still bind all purchasers who have notice. This question need not have been reached on the facts before the Court, and Mr. Justice Goldberg properly refrained from considering it. However, the Court's practical approach, stressing the McGuire Act's legislative history which evidences a congressional purpose to restore the nonsigner liability invalidated by *Schwegmann,* indicates that the widest latitude will be given the states in molding fair trade legislation within the authority granted by McGuire. And by refusing to hold the Ohio statute unconstitutional, the Court has clearly indicated that it will give no aid and comfort to those who would use the Constitution to invalidate state fair trade legislation. The matter is now thrust back into state courts and legislative chambers.

V. Conclusion

It is customary in the law to speak metaphorically of "The Common Law" or "The Supreme Court." These, however, are not monolithic institutions. There have been many Supreme Courts. History records that the minority opinion of yesterday has often become the majority ruling of today. And so I conclude with the encouraging thought that the pressures of our complex society inevitably compel the abandonment of those rules that do not serve its needs. The doctrines that we criticize will survive only if they meet this pragmatic test. This is as it should be. Neither the critic nor the highest Court is immune from the judgment of time. Later Court will have no hesitancy in discarding doctrines that fail that acid test—just as this Court has not hesitated to reject the decisions of its predecessors.