Note

The Maryland Petroleum Divestiture Statute

I. INTRODUCTION

Because of the constant threat of energy shortages[1] it becomes important to consider what is the role of the federal goverment and what is the role of state government in preparing for a petroleum shortage? A recent United States Supreme Court decision may have partially answered this important question.[2] In *Exxon Corp. v. Governor of Maryland*[3] the United States Supreme Court, in a seven to one decision, declared constitutional an innovative Maryland statute[4] that steps on the toes of big oil companies.[5] The Maryland statute (1) prohibits a producer or refiner of petroleum products from operating retail service stations within Maryland, (2) requires producers and refiners to offer all "voluntary allowances," defined by the Court as temporary price reductions granted to independent dealers injured by local competitive price reductions[6] uniformly to all stations they supply,

1. *Phase-Out Underway for U.S. Crude Control Prices,* OIL & GAS JOURNAL, Jan. 14, 1980, at 27.

2. *E.g.*, an estimate of costs to the United States of increases in world oil prices is a 2 million person increase in unemployment and a 60 billion dollar loss in gross national production in 1976 alone. BUSINESS WEEK, Dec. 20, 1976, at 45.

3. Exxon v. Gov. of Md., 437 U.S. 117 (1978).

4. MD. ANN. CODE art. 56, § 157E (Supp. 1979).

5. Or "lops off the toes," to employ the "dismemberment" analogy used by Stark Ritchie, forceful general counsel for the American Petroleum Institute. Ritchie, *Petroleum Dismemberment,* 29 VAND. L. REV. 1131 (1976).

6. Exxon, 437 U.S. 117, 122.

and (3) requires producers and refiners to distribute gasoline equitably during periods of shortage.[7]

This note will outline the *Exxon v. Governor of Maryland*[8] decision, including the arguments that were dropped at the appellate level,[9] and analyze the impact the decision may have on our system of federalism, on petroleum industry practices, and on transportation in the future.[10] Many of the tentative corporate decisions in the oil industry[11] and possible changes affecting consumers[12] that have emanated from the Exxon decision will be

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7. The relevant provisions of the statute are as follows:

> (b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.
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> (c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.
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> (d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.
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> (f) Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.
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> (g) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.
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> (h) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon these facts. MD. ANN. CODE art. 56, § 157E (Supp. 1979).

8. 437 U.S. 117 (1978).

9. *Id.* at 122 n.5.

10. The case could have a two pronged effect on transportation. On a realistic level, if the case impacts on the price of gasoline, that in turn could affect the use of gasoline-powered vehicles. On a theoretical level, if state legislation could cut back retail ownership, could it not also cut back transportation ownership (*i.e.*, trucks, oil and gas pipelines, inland barges and supertankers)? For an excellent review of federal legislation on oil company ownership of pipelines *see* Hart, *Antitrust Aspects of Oil Company Ownership of Deepwater Ports*, 10 TRANSP. L.J. 67 (1978).

11. *E.g.*, three refiners that marketed in Maryland solely through company-operated stations stated they may elect to withdraw totally from the Maryland market because of the statute. These refiners are Ashland Oil Company, Commonwealth Oil Refining Company (and its subsidiary Petroleum Marketing Corporation), and Continental Oil Company (and its subsidiary Kayo Oil Company). Exxon, 437 U.S. 117, at 122, 123 (1978).

12. *E.g.*, the Maryland statute may indirectly change the price of gasoline. It remains to be seen if that change in the price of gasoline would, in turn, effect consumer consumption patterns. M. WILLRICH, ADMINISTRATION OF ENERGY SHORTGAGES 120 (1976).

addressed briefly.

II. BACKGROUND

During the 1973 energy shortage, demand for petroleum increased, available supplies of petroleum diminished precipitously, and crude oil prices escalated.[13] Maryland had just adopted antitrust legislation in 1972.[14] It was admitted by the state that the retail petroleum market in Maryland was highly competitive.[15] However, the total number of retail service stations in Maryland declined through the period 1972-1975, and a number of independent dealer-operated stations were converted to company-operated stations.[16] The governor's office received many complaints about inequitable distribution of gasoline among retail stations.[17] No crude oil was produced or refined into motor fuel in Maryland in 1973, nor is any today.[18] These facts contributed to the economic milieu which had an important influence on the legislative history of the Act.

On June 13, 1973, the Governor requested the Comptroller of the Treasury to conduct a study of gasoline retailing in Maryland. The study was to determine whether the shortage was genuine or artificially invented, and whether company owned and operated service stations were receiving disproportionately larger allocations of gasoline than other types of service stations. On June 29, 1973, the Gasoline Tax Division of the Comptroller's Office sent out a survey, prepared in part by people who had previously been employed in the industry, to all registered gasoline service station dealers in Maryland. A total of 34.7% responded, some only in part.[19]

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13. The increase in United States demand for oil imports which had remained within range of 8% per annum during the period of 1962-1972 suddenly jumped by 30% in 1973. Shihata, *Arab Oil Policies and the New International Economic Order*, 16 VA. J. OF INT'L. L. 261, 271 (1976) quoting *British Petroleum Statistical Review of the World Oil Industry* 1973 (1974). Price of Saudi Arabian Oil rose from $1.62 per barrel in January 1973 to $7.11 per barrel in January 1974. *Council of Economic Advisors, Ann. Rep.* 75 (1975).

14. The Maryland Act is now codified in MD. COM. LAW CODE ANN. § 11-201-213 (1975). *See* Reynolds & Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 MD. L. REV. 323 (1977).

15. Brief for Appellees at 9, Exxon. As of July 1, 1974, there were approximately 3800 retail service stations in Maryland, 5% of which were "company-operated" defined in Exxon as "a retail service station operated directly by employees of a refiner of petroleum products (or a subsidiary)." Exxon, 437 U.S. at 121 (1978). This is generally a microcosm of the nationwide picture. *E.g.*, as of Dec. 31, 1973, approximately 4% of Exxon's 25,00 branded stations were company-operated nationwide.

16. Brief for Appellees, at 9, Exxon. For proof of a similar national picture, S. Rep. No. 95-731, 95th Cong., 2d Sess. 89 (1978). *Cf.* the oil companies said that the number of company-operated stations declined in Maryland and nationally. Court of Appeals of Maryland Brief at 7, but made no mention of the issue in their United States Supreme Court Brief.

17. Gov. of Md. v. Exxon, 279 Md. 410, 420, 370 A.2d 1102, 1108 (1977).

18. Exxon, 437 U.S. 117, 123 (1978).

19. Brief for Appelles, Governor of Maryland, at 11.

Information in these responses and information gained from field investigations and telephone calls from service station dealers was summarized for the Governor.[20] This summary was later presented to both Senate and House Committees which were considering the bill.[21]

According to the summary, company operated stations were "either unrestricted in their purchases or were allocated 100% of their needs while both branded and unbranded independents experienced 'the greatest difficulty in obtaining gasoline' and 'the greatest cost per gallon increase.' "[22]

On July 17, 1973, a questionnaire was also sent to twenty major oil companies operating in Maryland asking about allocation formulas, plans for the future, company activity in the past regarding closings of certain type stations, and the like. Nine companies responded, and their responses were also summarized and sent to the Governor.[23]

After several discussions with the Governor, the Comptroller forwarded proposed legislaton. Bills identical to the proposed legislation were introduced, and full hearings were held before both houses of the General Assembly. Representatives of the major oil companies as well as proponents of the bill appeared at these hearings. The legislature amended the bills by (1) deleting "wholesalers" from the ambit of the Act,[24] (2) permitting the Comptroller to adopt rules and regulations defining circumstances in which a producer or refiner might temporarily operate a station,[25] and (3) permitting the Comptroller to grant reasonable individual exceptions to the divestiture dates in the Act.[26] The bills were then passed.[27]

On May 29, 1974, the Governor held a special veto hearing at which, again, proponents and opponents testified. Thereafter the House bill was

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20. This summary divided service stations into the following four categories: retail service stations leased to a dealer by a major oil company, independently owned stations operating under a major brand, unbranded stations, and company-operated stations. Gov. of Md. v. Exxon, 279 Md. 410, 421, 370 A.2d 1102, 1109 (1977).

It should be noted at this point that one of the reasons it is very difficult to obtain valid data on retail service stations is the inability to obtain uniform categories for use in comparisons. *E.g.*, Lundberg data are based on state tax receipts. Sometimes major distributors will pay the tax and then resell the gasoline to nonbranded retailers. When one is attempting to find amount of sales of "majors" and of "independents," the Lundberg data may not be valid. W. JOHNSON, R. MESSICK, S. VAN VACTOR & E. WYANT, COMPETITION IN THE OIL INDUSTRY at 12 n.7 (1976) [hereinafter cited as COMPETITION IN THE OIL INDUSTRY].

21. Brief for Appellees at 12, n.6, Exxon.

22. Gov. of Md. v. Exxon, 279 Md. 410, 421, 370 A.2d 1102, 1109 (1977).

23. Brief for Appellees at 13 Exxon.

24. *Id.* at 14.

25. MD. ANN. CODE, art. 56, § 157E (Supp. 1979). Paragraph g (reproduced *supra* note 7).

26. *Id.* at paragraph h.

27. Senate Bill 465, signed into law as Chapter 854 of the Laws of Maryland of 1974, was passed by the Senate without a dissenting vote. Brief for Appellees at 15, Gov. of Md. v. Exxon, 279 Md. 410, 370 A.2d 1102 (1977).

vetoed and the Senate bill was signed into law.[28]

An observer may have wondered at the time if this law was a true solution to a bad problem or a reaction to public frustration with the big oil companies.[29] Oil *is* big business. For instance, when viewed in terms of total sales, four of the top ten, eight of the top twenty-five, and twelve of the top fifty companies in the United States are major oil companies. When viewed in terms of assets, net income, stockholders' equity and total profits, the major oil companies rate even higher.[30] Public opinion *can* move a legislature to act.[31] Justice Holmes once philosophized, "Subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."[32]

Economist, I. Stelzer, senses that the force of public opinion is against the oil industry now.[33] Considering just a few of the assumptions that have bred this antagonism, it might appear the companies have been victimized to some extent.[34] However, a brief review of the structure and history of the oil industry is necessary in order to form some valid conclusions.

According to the classification system of Professor Bain, the petroleum industry is no more than a "low grade oligopoly."[35] An oligopolistic industry or market is one containing a small number of large sellers supplying a large part of the output.[36] These sellers "assertedly are protected by high barriers to entry and are connected by a multitude of interrelationships, consortia, joint production operations, joint pipeline ventures, exchange pipe-

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28. Gov. of Md. v. Exxon, 279 Md. 410, 422, 370 A.2d 1102, 1110 (1977).

29. M. Harrell & M. Searcy, *Current Antitrust Problems of the Integrated Supplier*, 25 OIL AND GAS INSTITUTE (Southwestern Legal Foundation) 163 (1974). *See*, M. Adelman, statement to the Senate Foreign Relations Committee, Subcommittee on Multinational Corps., Jan. 29, 1975; Kestenbaum, *Energy* 43 ANTITRUST L.J. 369, 370 (1974); Ikard, *Competition in the Petroleum Industry: Separating Fact from Myth*, 54 ORE. L. REV. 583 (1975); *Disfavored Indirect Purchaser under the Robinson-Patman Act: Can the Small Businessman Survive?* 48 S. CALIF. L. REV. 909 (1975); COMPETITION IN THE OIL INDUSTRY, *supra* note 20, at XI.

30. COMPETITION IN THE OIL INDUSTRY at 113.

31. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 742 (1974). (Article concludes "consumerism, neopopulism," and public economic unrest help determine states' action or inaction in antitrust).

32. Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

33. *I.e.*, "If it is felt that the system of income distribution in the country is somehow inappropriate, no one is going to trust the market to distribute available supplies of anything. Gasoline is a good example." Stelzer, *An Economists View of Trends in Government Regulation*, 31 BUS. LAWYER 831, 833 (1976).

34. *E.g.*, Exxon stockholder's average annual rate of return during the period of 1953-1972 was 11.6%. During the period of 1960-1972 it was 10.7%. *See* VERTICAL INTEGRATION IN THE OIL INDUSTRY (E. Mitchel ed. 1976) [hereinafter cited as VERTICAL INTEGRATION]. Bureau of Census figures showed 40% of U.S. manufacturing industries are more concentrated than oil refining. Tell, *Attacks on the Petroleum Industry: A Rebuttal*, 20 ROCKY MTN. MINERAL L. INST. 94 (1975).

35. J. BAIN, INDUSTRIAL ORGANIZATION at 124-133 (1959).

36. *Id.* at 124.

line agreements, et cetera."[37] Posner has said "oligopolistic industries exhibit an inherent collusion phenomena which is called mutual inter-dependency or conscious parallelism."[38]

Collusive or not, all transactions in the industry can be divided into three groups: (1) horizontal transactions which take place between firms in actual competition with each other; (2) vertical transactions which constitute arrangements between suppliers and customers; and (3) 'conglomerate' transactions which include all other transactions.[39]

Vertical integration takes place when the participants in a typical vertical transaction are merged under one company or contractually linked in a special way. In the oil industry, one large company, for instance, may be a producer, refiner, transporter[40] and marketer.[41] The process of a big company integrating even further (*e.g.*, from wholesale marketing to operating retail gas stations with its own employees) is called forward vertical integration. Logically, then, if a retailer decides to purchase a refinery, this would be called backward vertical integration.[42]

Vertical integration can be accomplished by outright ownership (*i.e.*, stock or asset acquisition) or by contractual devices (*i.e.*, requirement, output, franchise, exclusive dealing, real estate lease, or agency contracts).[43]

One viewpoint holds that vertical integration is only a harmless, common sense way to reduce costs and increase efficiency, and that, for example, fixing one's own car or doing one's own painting is vertical integration.[44] The United States Supreme Court has not recognized vertical systems as illegal per se. The Court has instead looked at the purpose of the initial integration or the power actually created.[45] However, vertical integration in the oil industry has always been viewed as suspect.[46] In 1949 Justice Douglas foresaw the advancement of large companies into the retail

37. Kestenbaum, *Energy, supra* note 29, at 371.

38. Novotny, *The Gasoline Marketing Structure and Refusals to Deal with Independent Dealers: A Sherman Act Approach*, 16 ARIZ. L. REV. 475 (1974). *See generally* Posner, *Oligoply and the Antitrust Laws: A Suggested Approach*, 24 STAN. L. REV. 1562 (1969).

39. VERTICAL INTEGRATION, *supra* note 34, at 5.

40. *E.g.*, one study showed very little pipeline is owned by firms with no interest in production, refining or marketing. *See* VERTICAL INTEGRATION, *supra* note 34, at 152.

41. Ligon, *Antitrust Aspects of the Oil and Gas Industry*, 2 OKLA. CITY U.L. REV. 601, 609 (1977).

42. VERTICAL INTEGRATION, *supra* note 34, at 129.

43. Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1 (1959). For a long list of reasons corporations may wish to integrate vertically *see id.* at 2-14.

44. VERTICAL INTEGRATION, *supra* note 34, at 6.

45. United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948).

46. *E.g.*, FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968); *Hearings Before the Temporary National Economic Committee*, 76th Cong., 2d & 3d Sess., Parts 14-17A (1949-1950). The Supreme Court has said in dicta that elimination of retail service station dealers through forward vertical integration may be an "evil" requiring legislative action. FTC v. Sun Oil Co., 371 U.S. 508, 528 (1963).

market. He described this vertical movement as a "tragic loss to the nation."[47]

While the first service stations were owned and operated by dealers, refiners were not happy with the service provided. In 1913 Atlantic Refinery first experimented with its own outlets. The system spread by the mid 1920's, then phased out in the mid 1930's[48] for a variety of reasons.[49] Company operated outlets were then replaced by franchises, although many companies continued to operate a few service stations for training and experimentation.[50]

However, progress can often proceed only so far on ideas, and then a monetary stimulus is needed to take it further. The awesome financial capability of a huge oil company can be an asset in more ways than one. It is difficult for a dealer to open a gasoline station in a state where his brand of gasoline has not been sold before,[51] or to finance new tanks, pumps and lines when this is required because of emissions standards calling for non-leaded gas,[52] whereas a major oil company can absorb these types of costs with ease.

In conclusion, vertical integration is not patently iniquitous, but it must always be judged by how it is functioning in context. This article's judgment of the Maryland statute (and, reflectively, divestiture and vertical integration of the oil industry) will therefore be considered on two levels: state and national. It has already been stated that there was evidence in Maryland of some inequitable distribution. Nationally, too, it seems, there has been similar evidence.[53]

An argument could be made that the oil companies should have the freedom to supply whichever gas stations they choose—to be able simply

47. Standard Oil Co. of Calif. v. United States, 337 U.S. 293 (1949) (dissenting) at 321.

48. VERTICAL INTEGRATION, *supra* note 34, at 127.

49. *E.g.*, (1) dealers could not unionize; (2) avoidance of federal social security and minimum wage and hour legislation, state unemployment insurance and workmen's compensation; (3) as independent businessmen, dealers of same supplier could not combine their buying power to obtain any volume-buying advantage without violating the Sherman Act. *Gasoline Marketing and the Robinson-Patman Act*, 82 YALE L.J. 706, 715 n.58 (1973) referring to FTC brief for FTC v. Sun Oil, 371 U.S. 505 (1963). Likewise, the Federal Trade Commission frowns on a discount given to a group of dealers who form a cooperative to purchase a warehouse. Beringer, *The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act*, 31 BUS. LAWYER, 783, 797 (1976).

50. VERTICAL INTEGRATION, *supra* note 34, at 128.

51. Brief for Appellants at 13, Exxon 437 U.S. 117 (1978).

52. VERTICAL INTEGRATION, *supra* note 34, at 132.

53. NEWSWEEK, Feb. 11, 1974 at 71. *See FTC Complaint* TRADE REG. REP. (CCH) ¶ 1120,527. *E.g.*, in Romaco, Inc. v. Crown Petroleum Corp., [1973-2] TRADE CASES, ¶ 1174,694 (M.D. Ala. 1973) an independent marketer alleged horizontal conspiracy among its suppliers to cut off its supplies. The court found that such action was natural and acceptable in view of the then-current shortage and the defendants' need to supply their contractual customers on a priority basis.

to refuse to deal with some stations. *U.S. v. Colgate*[54] settled the argument long ago. A business *can* refuse to deal *unless* that refusal is designed to create or maintain a monopoly, to form a combination, or is in actuality, a conspiracy which is in restraint of trade.[55] To conclude that a refusal to deal is illegal, it has traditionally been deemed necessary (at least prior to the recent interpretation of the Federal Trade Commission Act)[56] to demonstrate refusal because of collusion of two or more firms in violation of Section 1 of the Sherman Act.[57] This is virtually impossible to demonstrate; moreover, compulsory dealing is more of an indirect, short term remedy.[58]

An argument at the other end of the spectrum is that there exists proof of wrongdoing; thus divestiture of the oil companies is necessary to prevent further wrongdoing.[59] Divestiture is not a new concept. It has been utilized by both the legislature[60] and the Federal Trade Commission[61] and is an accepted component of antitrust artillery.[62] The Federal Trade Commission is powerful,[63] and can order divestiture for anticompetitive practices.[64] Nevertheless, the validity of any remedy chosen by the Federal Trade Commission is subject to Supreme Court review,[65] and a recent Federal Trade

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54. 250 U.S. 300 (1919).

55. *Id.* at 307.

56. FTC v. Sperry and Hutchinson Co., 405 U.S. 233 (1972).

57. 15 USC § 1 et. seq. (1976).

58. *See generally Gasoline Marketing Structure and Refusals to Deal with Independent Dealers: A Sherman Act Approach*, 16 ARIZ. L. REV., 465 (1974); Besser Mfg. Co. v. United States, 343 U.S. 444 (1952).

59. *See generally* F. Allvine & J. Patterson, HIGHWAY ROBBERY: AN ANALYSIS OF THE GASOLINE CRISIS (1974). (Professor Patterson was the state's only expert witness in Gov. of Md. v. Exxon, 279 Md. 410, 370 A.2d 1102 (1977)).

60. *See Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies*, 37 MD. L. REV. 323, 329 n.44 (1977)—cited by Exxon, 437 U.S. 117, 124 n.13 (1978).

61. *Recent Developments Symposium: Unfair Competition Remedies*, 21 VILL. L. REV. 163, 165 (1975).

62. Scanlon, *Confirmation Hearings on the New FTC Chairman: Some Questions from the 'Review'*, 6 ANTITRUST L. ECON. REV. 41 (1973). *See* 613 [1973] ANTITRUST TRADE & REG. REP. (BNA) A-8.

Interestingly, the only divestiture in the oil industry U.S. v. Standard Oil of N.J., 221 U.S. 1 (1911) resulted in many of the severed companies becoming fully integrated oil companies and by the 1930s eight of them were among the twenty largest oil companies in the United States. VERTICAL INTEGRATION, *supra* note 34, at 191.

63. Magnuson-Moss Warranty—FCC Improv. Act, amending 15 U.S.C. §§ 45, 46(a)(b), 52 (1970); FTC Improv. Act, 88 Stat. 2199 (1975), 15 U.S.C. § 57a; *e.g.*, FTC v. Sperry and Hutchinson Co., 405 U.S. 233 (1972). *See supra* note 61, at 166; Verkuil, *Preemption of State Law by the Federal Trade Comm'n*, 1976 DUKE L.J., 225.

64. FTC v. Dean Foods Co., 384 U.S. 597, 606 n.4 (1966).

65. The Supreme Court's test is whether the remedy that the FTC has selected has a reasonable relation to the unlawful practices found to exist. It has been expressed in at least one law review article that this reasonable relation test may, in fact, be a necessary relation test. "The

Commission complaint against the big oil companies[66] met with abysmal failure.[67]

Despite its vast power, Congress' sporadic lurches toward divestiture of the large oil companies and economic regulation of the petroleum industry[68] have failed so far. As of January 19, 1980, Congress' reaction to President Carter's suggestion of imposing a "windfall oil profits tax" is still being negotiated.

According to Senator McIntyre, testifying at a Senate hearing regarding six of the more than ten petroleum divestiture proposals defeated in 1976, marketing divorcement bills aimed at the petroleum industry were first introduced in the Seventy-fifth Congress in 1927. However, World War II and the Mother Hubbard antitrust case brought by the Justice Department seemed to sap the urgency from divestiture efforts for years after this first failure.[69]

Testimonial recording was as far as any of the 1976 bills proceeded except for S2387.[70] Although S2387 did die, it has been resurrected in the form of an identical bill recently sponsored by Senator Bayh.[71] Even if this new bill passes (which is not likely), the logistics of divestiture might make its practical effective date sometime far in the future.[72]

The Maryland statute chose an effective date for its divestiture section[73] that brought immediate legal challenge to the entire statute by major

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cases in which the Supreme Court has overturned the Federal Trade Commission's choice of remedy have been those where the Federal Trade Commission had failed to consider less harsh, alternate relief." *"Unfair Competition Remedies,"* 21 VILL. L. REV. 172 (1975). *Compare*, Supreme Court review of state legislatures' choice of remedies—*infra* Part III(a) of this paper.

66. Complaint, Exxon Corp. No. 8934 (FTC July 17, 1973).

67. *See* FTC Docket of Complaints 24,474, No. 8934 (February 7, 1977). The FTC staff investigated for over three years and had to analyze several million documents and had to depose 500-700 industry officials.

68. *E.g.*, Hearings on Consumer Energy Act of 1974, 93rd Cong., 2d Sess. 1357 (1975). (This Act, which was not passed, would have made oil and gas companies almost like public utilities). *See* Kestenpaum, *Energy*, ANTITRUST L.J. 373 (1974).

69. *Hearing Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, U.S. Senate, 94th Cong., 1st Sess. 123 (1976). [In 1972 Senator McIntyre had proposed the first petroleum divestiture bill in the Senate in 30 years. H.R. 5 and 19, 92nd Cong., 2d Sess. (1972)].

70. S. 23287, 94th Cong., 1st Sess. (1976).

71. S. 82, 97th Cong., 2d Sess. (1979). A major operator would be allowed to engage in only one sector of the industry, or it would be allowed to split itself into smaller integrated units each falling under the size limits set by the bill. (Only largest producers, refiners and marketers would be affected). However, all petroleum transportation and pipeline companies would be subject to divestiture. Significantly, major marketers would be permitted to retain or acquire refining interests.

72. *E.g.*, AMERICAN PETROLEUM INST., THE FUTURE OF AMERICAN OIL at 20 (1976). One expert says if national divestiture law passed it would take ten years to prepare and resolve the case. *See* Statement of P. Bator bef. Senate Subcommittee on Antitrust and Monopoly (Jan. 27, 1976).

73. MD. ANN. CODE, art. 56, § 157E (Supp. 1979).

national oil companies involved in direct retailing in Maryland.[74] The oil companies sought a declaratory judgment that the Maryland statute was unconstitutional, and requested injunctive relief prohibiting enforcement.[75] Essentially, the oil companies won at trial level,[76] but lost before both the Court of Appeals of Maryland[77] and the United States Supreme Court.[78]

III. Issues in the Trial, Appellate and Supreme Court Levels of Exxon v. Governor of Maryland

A. *Due Process*

It is interesting to note that although the trial court opinion rested almost entirely on the oil companies' substantive due process claim, only Continental Oil and its subsidiary pursued the due process claim before the United State Supreme Court, which dismissed the claim in a single paragraph.[79]

The reason for this seeming contradiction is that prior to *Exxon*, the Court of Appeals of Maryland had generally applied the old United States Supreme Court standard of review,[80] which requires that the Court uphold the challenged statute only if it believes the statute bears a "real and substantial relationship between its object and the means employed to attain that object."[81] The Maryland Court of Appeals in *Exxon* chose to set aside the old standard and shift to the current Supreme Court standard—the statute should be upheld if it bears a rational relationship to a legitimate state goal.[82] In fact, both the Maryland appellate court and the Supreme Court

74. In a consolidated action in the Circuit Court for Anne Arundel County the plaintiffs were Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil, Inc., Continental Oil Company and its subsidiary Kayo Oil Company, and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation. Defendants were the Governor of Maryland, the Attorney General of Maryland, and the Comptroller of the Treasury of Maryland. Exxon Corp. v. Mandel, No. 22,066 (Anne Arundel County Cir. Ct. filed initially by Exxon Corp. June 17, 1974).

75. Gov. of Md. v. Exxon, 279 Md. 410, 416, 370 A.2d 1102, 1107 (1977).

76. Summary judgment for Exxon on preemption issue. Exxon Corp. v. Mandel, No. 22,066 (Anne Arundel County Cir. Ct. Oct. 14, 1975) (mem.), Trial court judgment Exxon Corp. v. Mandel, No. 22,066, slip op. at 90 (Anne Arundel County Cir. Ct. filed Jan. 27, 1976).

77. Gov. of Md. v. Exxon, 279 Md. 410, 456, 370 A.2d 1102, 1127 (1977).

78. *Id.* at 124.

79. Exxon, 437 U.S. 117, 124.

80. *E.g.*, Bureau of Mines v. George's Creek, 272 Md. 143, 175, 321 A.2d 748 (1974); Maryland Board of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 120, 311 A.2d 242 (1973); Potomac Sand & Gravel v. Gov., 266 Md. 358, 373, 293 A.2d 241 (1973).

81. [Emphasis supplied] *see, e.g.*, Lochner v. N.Y., 198 U.S. 45 (1905); *see generally* Preston & Mehlman, *The Due Process Clause as a Limitation on the Reach of State Legislation*, 8 U. of Baltimore L. Rev. 1 (1978); [hereinafter cited as *Limitation*]; J. Nowak, R. Rotunda & J. Young, Constitutional Law, 385-404 (1977); R. Carr, The Supreme Court and Judicial Review, 139 (1977).

82. *E.g.*, Nebbia v. N.Y., 291 U.S. 502, 537 (1934); Olsen v. Nebraska, 313 U.S. 236, 246

quoted from *Ferguson v. Skrupa* to the effect that the judiciary is not empowered to "sit as a super legislature to weigh the wisdom of legislation,"[83] which almost seems to mock the old standard.

Continental Oil was represented by Wibur Preston, Jr., who specifies in a laudable article on due process that:

> The appeal to the Supreme Court on substantive due process grounds was based on the appellant's argument that paragraph (c) relating to existing company-operated stations bore no rational relationship to the objective of preserving competition by assuring the continued existence of independent retail service station dealers. This appellant expressly disavowed any intention of requesting the Court to adjudicate the wisdom of paragraph (c) or deciding whether it served the public interest.[84]

Therefore, it would seem the economic substantive due process approach that was in vogue from 1900 to 1936 is, as Justice Marshall recently said, "moribund."[85] There are commentators who will say we should[86] or we are[87] returning to it. However, a constitutional law hornbook says of *Exxon* that it demonstrated that "a majority of the justices remain firmly committed to the use of the traditional rational basis test in cases that do not involve fundamental rights of suspect classifications."[88] Professor D.E. Engdahl, a scholar in the federalism area of constitutional law,[89] is quick to point out that substantive due process is still alive and well in other than economic or

(1941); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); N. Dakota St. Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); *see generally Limitation, supra* note 81; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW at 404-410 (1977).

83. Ferguson v. Skrupa, 372 U.S. 726, 731 (1963). Justice Douglas, the source of this quote, has also said, "When the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the Court of revision which was rejected by the Constitutional Convention." Flast v. Cohen, 392 U.S. 83, 107 (1968) (Douglas, J., concurring). Judge Eldridge may have said the Maryland situation demanded even more restraint, "especially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to proper means of solving the problem." Gov. of Md. v. Exxon, 279 Md. 410, 428, 370 A.2d 1102, 1112 (1977).

84. *Limitation, supra* note 81, at 39.

85. National Cable Ass'n. v. United States, 415 U.S. 336 (1974); accord: McCloskey, *Economic Due Process and the Supreme Court An Exhumation and Reburial*, 1962 S. CT. REV. 39.

86. *E.g.*, Note, *Federal Antitrust Policy State Anticompetitive Regulation*, 1975 UTAH L. REV. at 179. One commentator has said regarding Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), "It now appears that the Court would sustain not only legislation for which a basis could be assumed, but also that which is expressive of a policy offensive to the public welfare." Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 N.W.U.L. REV. 1 at 13 (1958).

87. *E.g., Comment: The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation*, 4 S. ILL. UNIV. L.J. 258, 277 (1978).

88. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW at 29 (1978); *Cf. Note of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 BOSTON U.L. REV. 462 (1977).

89. D. Engdahl, CONSTITUTIONAL LAW (Nutshell Series, 1974).

commercial spheres. Professor Engdahl does not consider *Exxon* a landmark case, only a strong illustration of the trend toward a generally more sympathetic tone on the Burger court for state regulation.[90]

B. COMMERCE CLAUSE

The disposition towards less interference with state regulation has not been constant,[91] however. An example of inconstancy is *Raymond Motor Transportation v. Rice*,[92] analyzed in a previous issue of the *Transportation Law Journal*.[93] Professor Engdahl notes that *Raymond*, decided only a short while before *Exxon* (but dealing with a state statute on safety rather than economics), seems to employ a three part test to determine whether a state statute violates the commerce clause:

(1) if the statute does not safeguard an obvious and legitimate state interest;
(2) if the statute discriminates against or unduly burdens interestate commerce
(3) if the objective is sufficient to outweigh its impact on interstate commerce.[94]

Exxon's majority, on the other hand, seems to apply directly only the first two parts of the test.[95] Mr. Justice Blackmun (who partially concurred but dissented from the Court's interpretation of the scope of the Commerce Clause) brought up two tests that have been used frequently in the past—the 'practical effect'[96] test and the 'less onerous alternatives'[97] test. The core of Mr. Justice Blackmun's dissent was: "The effect is to protect in-state retail service station dealers from the competition of the out-of-state

90. Conversation with Professor Engdahl, March 29, 1979. (In agreement that there is this positive trend, at least toward state antitrust regulation: J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION (1964); JACOBS, STATE REGULATION AND THE FEDERAL ANTITRUST LAWS, 25 CASE W.L. REV. 221 (1975); *e.g.*, Parker v. Brown, 317 U.S. 341, 350-351 (1943).

91. *See generally* CONSTITUTIONAL LAW, *supra* note 88, at 128-163; F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1964); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 319-412 (1978); *See* Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645 (1946); R. CARR, SUPREME COURT AND JUDICIAL REVIEW at 99 (1970). *Raymond Motor Transportation v. Rice*, 11 TRANS. L.J. 229 (1979). [It has been said that the dividing line between federal and state power regarding commerce is the most perplexing topic in American constitutional law. Burcell, *Federal Supremacy in the Regulation of Commerce*, 43 ICC PRAC. 72 (1975)].

92. 434 U.S. 429 (1978).

93. Note, *Raymond Motor Transp. Inc., v. Rice*, 11 TRANSP. L.J. 229 (1979).

94. Raymond Motor Transp. Inc., v. Rice, 434 U.S. 429 (1978), following Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) and in keeping with the 'balancing' approach of Southern Pacific Co. v. Ariz., 325 U.S. 761 (1945) and Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186 (1950); (Professor Engdahl notes that this third part is close to, but significantly different from, the "is this the right way to promote that objective?" question that can no longer be asked in economic substantive due process—Conversation with Professor Engdahl, March 29, 1979).

95. Exxon, 437 U.S. 117, 125 (1978).

96. H.P. Hood & Sons Inc. v. Du Mond, 336 U.S. 525, 540 (1949); Milk Control Bd. v. Eisenberg, 306 U.S. 346, 352 (1939).

businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more even-handed regulation."[98]

The majority's focus was on whether the state discriminated against or unduly burdened interstate commerce. The oil companies' strongest "discrimination" argument was that the statute was both prompted by and designed to protect the local independent dealers.[99] The Court points out, however, that local independent dealers still face competition with several major interstate marketers of petroleum who own and operate their own service stations but who do not produce or refine petroleum.[100]

The Court further stated that merely because the divestiture provision affects only interstate companies, that alone does not establish a claim against interstate commerce, and mildly rebuked Justice Blackmun's practical effect argument in a footnote.[101] The oil companies had referred to this same fact (*i.e.*, that the divestiture provision falls solely on out-of-state companies) to try to bolster their 'burden on interstate commerce' argument. The oil companies particularly relied on evidence that at least three refiners would probably stop doing business in Maryland because of inability to comply profitably with the divestiture demands.[102] The Court appeared especially unsympathetic to this argument.[103]

The first part of the *Exxon* two part test, state interest, was not overcome just because "the economic market for petroleum products is nationwide,"[104] and other states might decide to enact similar legislation. The

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97. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951); Hunt v. Washington Apple Commission, 432 U.S. 339, 350-52 (1977); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

One commentator has said of the 'less onerous alternatives' test, "Such hypothesizing of alternatives will in most instances give a predictable result—if the justices of the Supreme Court really want to, they will be able to hypothesize alternative, less restrictive solutions in nearly every case. Unfortunately, when doing so, their alternatives can turn out to be adequate abstract ideas but impractical real world solutions. *The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation*, 4 S. Ill. Univ. L.J. 258, 272 (1978).

98. Exxon, 437 U.S. 117, 135 (1978) (dissent).

99. *See, id.* at 137-140, 141 n.8, 143 n.10 (Blackmun, J., dissenting); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). *See* Business Week, Dec. 15, 1973 at 20. *Cf.* Exxon, 437 U.S. at 125; in Breard v. Alexandria, 341 U.S. 622, 636 n.20, the Court had said in passing, "So far as this argument seeks to blame the passage of the ordinance on local retailers, we disregard it. Such arguments should be presented to legislators, not to courts."

100. Exxon, 437 U.S. 117 at 125, 126 (1978).

101. *Id.* at 126 n.16. It should be noted that the majority took no cognizance of what Justice Blackmun and the oil companies considered additional evidence of practical discrimination, *i.e.* that the General Assembly amended the original bill and exempted wholesalers (who would be more or less local as a class) and that the statute might prevent any nonintegrated interstate company which wanted to do retail business in Maryland from integrating backwards. *Id.* (dissent).

102. *Id.* at 123 *supra* note 11.

103. Exxon, 437 U.S. 117, at 127, 128 (1978).

104. *Id.* at 128.

cumulative effect of this type of legislation was recognized, but the Court immediately thereafter said, "while this concern is a significant one, we do not find that the Commerce Clause, by its own force, preempts the field of retail gas marketing."[105]

C. FEDERAL PREEMPTION

The United States Supreme Court concluded that as the Commerce Clause did not preempt paragraphs B and C, so too neither the Sherman Act[106] nor the Robinson-Patman Price Discrimination Act[107] preempted the Maryland legislature from enacting paragraphs D (the voluntary allowance section) and F (the equitable allocation section) of the Maryland divestiture statute.[108] The partial dissent, which really dealt only with the Commerce Clause, merely mentioned that unfair allocation already had been prohibited by the Emergency Petroluem Allocation Act of 1973.[109]

There were two differences in this part of the opinion. Whereas the oil companies had challenged the other paragraphs as producers, refiners and retailers, the oil companies challenged paragraphs D and F as suppliers, and whereas the first part of the opinion was straightforward, the preemption section of the opinion was quite complicated.

Preemption is taken as a given in the area of natural gas.[110] In the petroleum area the preemption issue is complex because of judicial gloss over the years in interpreting almost every word of the primary antitrust statutes.[111] In today's milieu of cooperation between the national and state governments, the preemption doctrine is not as strong as it once was,[112]

105. *Id.*

106. 15 U.S.C. § 1 et. seq. (1976).

107. 15 U.S.C. § 13 et. seq. (1976). For an explanation of the Act *see generally* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962); A. SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT (1963); for a detailed analysis of the Maryland Court of Appeals rationale as to why the Act did not preempt the Maryland statute, *see generally Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing* by Oil Companies, 37 MD. L. REV. 323, 334-349 (1977).

108. Exxon, 437 U.S. 117, 129 (1978) reproduced *supra* note 7.

109. 15 U.S.C. § 751 et. seq. (1976).

110. Natural Gas Act, 15 U.S.C. § 717 et. seq. (1938) (subsection added in 1954); *e.g.* Natural Gas Co. v. State Corp. Comm'n of Kansas, 272 U.S. 84 (1963). The Federal Power Commission has issued a "Statement of Policy" as to priority of natural gas deliveries in time of shortage stressing end use rather than contractual commitments. K. DAVIS, ADMINISTRATIVE LAW 224 (1977).

111. *E.g.*, there is an "in commerce" requirement in the Robinson-Patman Act, 15 U.S.C. § 13(a) an "affecting commerce" requirement in the Sherman Act, 15 U.S.C. § 1, and an "engaged in commerce" requirement of the Clayton Act, 15 U.S.C. § 13 (1976); *Jurisdictional Requirements of the Clayton and Robinson-Patman Antitrust Acts: A Narrow Interpretation of the Commerce Clause*, 27 U. FLA. L. REV. 871, 874 n.26, 27 (1975); Ferguson, *Commerce Test for Jurisdiction Under the Sherman Act*, 12 HOUSTON L. REV. 1052 (1975).

112. Catz & Lenard, *Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L. QUART., 295 (1977); Exxon, 437 U.S. 117, 132.

but it has not been displaced by a counter doctrine.[113] Beyond the traditional difficult questions that must be answered when deciding whether a state statute should be preempted by federal law,[114] two intriguing questions have recently been added. One question is: even if the state statute is inconsistent with federal law, what if it is also consistent with some other federal policy?[115] An intertwining question is: even if the state statute contravenes a clear federal purpose, what if federal policy on that matter lacks "preemptive capability?"[116]

The *Exxon* Court is forced to apply these questions to the facts of the case and formulate an answer because the case is permeated with two often-opposing interests: protection of competition and protection of the small businessman.[117] The Court's answer is an honest one:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—our "charter of economic liberty." Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.[118]

The oil companies' underlying argument is that the pro-competition focus of the Sherman Act is made of basic national fiber; the small business spirit of the Robinson-Patman Act is just a heavy weight on that material, but the addition of the Maryland statute on the side of small business would tear some threads. The Court recognized that, "Indeed many have argued

113. *Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COL. L. REV. 623, 653 (1975).

114. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 680 (1974).

115. Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE W. RES. L. REV. 221, 241 (1975).

116. *See generally* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV., 51 (1973).

117. *E.g.*, Small Business Act of 1953, ch. 282, 67 Stat. 232 (current version at 15 U.S.C. § 631 (1976). Note: the Robinson-Patman Act was enacted as an attempt to protect the smaller businessmen of the country against the overwhelming purchasing power of their larger chain store competitors. *Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 144, 239 (1935); S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. No. 2287, 74th Cong., 2d Sess. 8 (1936); H.R. 8442, 74th Cong., 2d Sess. (1936); Exxon, 437 U.S. 133 n.25, 26; for list of law review articles regarding *see* Beringer, *The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act*, 31 BUS. LAWYER, 783 n.1 (1976); Brown Shoe Co. v. United States, 370 U.S. 294, 316 (1962).

118. Exxon, 437 U.S. 117, 133 (1978). A quote from the *Harvard Journal on Legislation* may give some insight into the Court's reasoning beyond the plain meaning of this answer. After explaining, how divestiture might raise prices, the author conceded, "Society may desire smaller oil companies as an end in itself rather than as a means to lower gasoline prices. In that case, divestiture may be desirable even if it increases the cost of petroleum products slightly." Greening, *Increasing Competition in the Oil Industry: Government Standards for Gas*, 14 HARV. J. LEG. 193, 224 (1977).

that the Robinson-Patman Act is fundamentally anticompetitive and undermines the Sherman Act."[119] Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act,[120] provides in part that "[i]t shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition. . . ." However, § 2(b) of the same Act[121] provides a seller with a defense to a charge of price discrimination "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

Section 2(b) seems perfectly in keeping with the Sherman Act, so it was Section 2(b) and the Sherman Act that the oil companies argued were in conflict with the Maryland statute.

Again, paragraph D of the Maryland statute requires voluntary allowances to be extended to all retail service stations within the state.[122] "Voluntary allowances" refers to "temporary price reductions granted by the oil companies to independent dealers who are injured by local competitive price reductions of competing dealers."[123] If these voluntary allowances had to be granted state-wide, the major suppliers would not be permitted to charge different prices in artificially drawn zones, and price competitors would be able to enter the market more easily.[124] That would seem to be the unspoken worry of the oil companies. What was articulated by the companies was a legal argument that the Robinson-Patman Act gave the oil companies an absolute right to keep the price reduction localized if the price was reduced within the scope of the "meeting competition" defense of section 2(b).[125] The oil companies argued that, as suppliers, if

119. Exxon, 437 U.S. at 133, n.26 (1978); *e.g.*, Robinson-Patman is against price discrimination but some sporadic price discriminations are procompetition in an oliogopolistic structure. *Comment, Interseller Price Verification of the Sherman Act, Robinson-Patman Act and the Forces of Competition*, 46 FORDHAM L. REV. 824, 825 (1978). A defense to a Robinson-Patman Act violation is meeting (not beating) competitor's price. There is a judicially-developed requirement that the seller verify that it is meeting the lower price of a competitor. Interseller communication regarding prices is directly against the Sherman Act. United States v. Container Corp. of America, 393 U.S. 333 (1969); *Note, Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476 (1977). *Cf.* Eaton, *Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act*, 18 ANTITRUST BULL. 411 (1973). *See generally Yes, Virginia, There Still is a Robinson-Patman Act (But Should There Be?)* 40 ANTITRUST L.J. 14 (1976).

120. 15 U.S.C. § 13a.

121. 15 U.S.C. § 13b.

122. Reproduced *supra* n.7.

123. Exxon, 437 U.S. 117, at 122, 123.

124. Application to facts in Exxon from general economic theories expressed in Note, *Gasoline Marketing and the Robinson-Patman Act*, 82 YALE L.J. 1706, 1712 (1973).

125. The two major decisions on the "meeting competition" defense had said it was a complete defense. Standard Oil Co. v. FTC, 340 U.S. 231 (1951): Federal Trade Commission v. Sun Oil, 371 U.S. 505 (1963). In agreement with the oil companies' reading of the defense, *Effective*

they complied with the voluntary allowance section of the Maryland statute, out-of-state dealers located around the Maryland state borders who were not receiving the voluntary allowance could hold the oil companies liable for damages under section 2(a).[126] The central problems with this argument were that the Maryland statute offered no such defense and the scope of the "meeting competition" defense was a matter that had been in great dispute in the circuit courts and the Federal Trade Commission.[127]

Therefore, the Court considered (1) when the oil companies could qualify for the federal defense, (2) once qualified, if the defense was an absolute right, and (3) if Maryland's not including the defense in this statute was serious enough to call for preemption.

As a prelude to the Court's analysis on the first question considered, a basic economic observation should be noted. Competitive 2(a) injury may theoretically occur at the following levels: (1) primary-line injury at the level of the seller's competitors; (2) secondary-line injury at the level of the buyer's customers (but since consumers are not in competition this is not considered an injury).

Any of these injuries are actionable under 2(a). However, it is only the primary-line injury which allows the 2(b) defense.[128]

In considering when the oil companies could qualify for the federal defense (*i.e.*, when they were "meeting competition" in good faith),[129] the Court looked first at when the oil companies definitely would not qualify. When a retailer (who is competing with the supplier-oil company's retailer-buyer) lowers its price on its own and the oil company gives its buyer a price reduction so its buyer can meet that lower price, the oil company does qualify for the defense. In this situation, the oil company is not responding to its own competitor, but to its buyer's competitor.[130]

There has been a long-standing question whether the oil companies would qualify for the defense in the hypothetical situation when a retailer (who is competing with the supplier-oil company's retailer-buyer) lowers its

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Marketing and the Robinson-Patman Act: Volume Incentives, Functional Discounts and Promotional Allowances 55 TEX. L. REV. 494 *Cf.*, *supra* note 124, at 1713, concludes that given the de facto exclusive dealing arrangements between suppliers and dealers, a 2(b) defense should not be available to most suppliers.

126. Brief of Appellants, Exxon at 77.

127. *See generally supra* note 124, at 1708-1718. *FTC Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) 11 10,373 at 18,245; *White House Task Force Report on Antitrust Policy* (Neal Report), BNA ATRR No. 411, Part II at 20 (1969); Elias, *Robinson-Patman: Time for Rechiseling*, 26 MERCER L. REV. 731 (Spring 1975); E. KINTER, A ROBINSON-PATMAN PRIMER at 179 (1970).

128. *Supra* note 124, at 1710.

129. 15 U.S.C. § 13(a)(b).

130. FTC v. Sun Oil Co., 371 U.S. 505 (1963).

price because it is being subsidized by its supplier.[131] If the oil company gives its buyer a price reduction so that the buyer can meet that lower price, the Maryland Court of Appeals said the oil company would not qualify for the defense.[132] The United States Supreme Court, on the other hand, left the discordance to be settled another day. The Court said: "In our opinion, it is not necessary to decide whether the § 2(b) defense would apply in the second situation, for even assuming that it does, there is no conflict between the Maryland statute and the Robinson-Patman Act sufficient to require pre-emption."[133]

The Court came to this conclusion by answering the second question above, whether the defense was an absolute right, in the negative: "The proviso in § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense and even narrowed the good-faith defense that had previously existed."[134]

The Court then rejected the oil companies' claims that paragraph D of the Maryland statute would make them liable to the out-of-state bordering dealers. After all, the Maryland statute did not require any voluntary allowances in the first instance. It was only after an oil company freely opted to extend such an allowance that the statute's force took hold and required uniformity in extension of the allowance. The Court restrained itself from seeing any conflict that was not apparent, "Instead, the alleged 'conflict' here is in the possibility that the Maryland statute may require uniformity in some situations in which the Robinson-Patman Act would permit localized discrimination. This sort of hypothetical conflict is not sufficient to warrant preemption."[135]

Never mentioned was whether the border dealers even had standing[136] or would vindicate a claim[137] under the Robinson-Patman Act or the

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131. Of the many cases, two especially have emerged as representatives of the divergent sides. Bargain Car Wash v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) said the defense would apply. Enterprises Industries v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (cert. denied), 353 U.S. 965 (1957) said the defense would not apply. *See* Covey Oil Co. v. Continental Oil Co., 340 F.2d 998 (10th Cir. 1965), where an integrated supplier-retailer was involved. *See generally supra* note 124, at 1708-1718.

132. Gov. of Md. v. Exxon, 279 Md. 410, 449, 370 A.2d 1102, 1123 (1977)).

133. Exxon, 437 U.S. 117, 133 (1978).

134. *Id.* at 131.

135. *Id.*

136. *Robinson-Patman Act—Price Discrimination Between Two Purely Intrastate Sales by a Corporation Engaged in Interstate Commerce Satisfies the Jurisdictional Requirements of § 2(a) of the Act*, 86 HARV. L. REV. 765 (1973): Klein, *Robinson-Patman Act In Commerce Jurisdiction Not Satisfied by Sales of Asphalt Within One State for Use in Interstate Highways*, 43 FORDHAM L. REV. 1036 (1975); Klein, *Corporate Price Planning in Light of the In Commerce Requirements of the Robinson-Patman Act*, 43 DETROIT LAWYER, 4 (1975). *Disfavored Indirect Purchaser Under the*

Sherman Act,[138] or if the oil companies' traditional methods of avoiding a section 2(a) violation could alleviate any potential violation.[139] Never mentioned was the fact that if oil companies decided to refrain from voluntary allowances altogether, they could lose buyers as customers,[140] or the fact that even if voluntary allowances were given statewide, it might not make much difference in consumer prices.[141] Nor was there ever any discussion, beyond reviewing the original purpose of the Robinson-Patman Act, about modern economic realitiies not foreseen by the drafters and whether courts should consider those realities when applying the Robinson-Patman Act.[142] These were all seemingly relevant issues, but not to discuss them was in keeping with the Supreme Court's avowed policy of avoiding review of the wisdom of state legislation in this area, and favoring nonpreemption when possible.

Another issue not mentioned by the majority was any possible conflict between the Maryland statute and the Emergency Petroleum Allocation Act of 1973.[143] It is difficult to detect a conflict after reviewing the legislative history[144] of the Act and the case[145] which some consider[146] the precur-

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Robinson-Patman Act: Can the Small Businessman Survive? 48 S. CALIF. L. REV. 899 (1975); *see* Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972). (One author has argued for a substantial effect test (which the border deals would surely come under)). *Jurisdictional Requirements of the Clayton and Robinson-Patman Antitrust Acts: A Narrow Interpretation of the Commerce Clause,* 27 U. FLA. L. REV. 876 (1975).

137. *E.g.*, Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345 (E.D.N.Y. 1960); Seacatores Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959).

138. *See generally* Furgeson, *Commerce Test for Jurisdiction Under the Sherman Act*, 12 HOUSTON L. REV. 1052 (1975).

139. *E.g.*, for explanation of "feathering" *Gasoline Marketing Practives and 'Meeting Competition' Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies*, 37 MD. L. REV. 340 (1977).

140. *Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act and the Forces of Competition*, 46 FORDHAM L. REV. 825 (1978).

141. Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of 'Competitive Advantage'* 44 GEO. WASH. L. REV. at 66 (1975); *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1480 (1977).

142. *Standing to Assert a Primary Line Robinson-Patman Act Violation:* A Proposal, 1974 UTAH L. REV. 61.

143. 15 U.S.C. § 751 et. seq. (1976) (amended 1978). (Note: there is a bill now before Congress to repeal the Emergency Petroleum Allocation Act—H732). For explanation of the Act *see generally* Cockell, *Federal Regulation of Energy: The Exceptions Process* 7 TRANS. L.J. 83 (1975); Dileo, *Introduction to the Mandatory Petroleum Allocation Requirements*, 22 LA. B.J. 107 (1974). Basically service station operators are limited to the same profit they made in 1973 plus a 3-cent increase for labor and other non-gasoline costs. Since January 1, 1979 they also have been allowed a 2-cent increase for higher rent and pollution controls. 1978 was recently made the base year for fuel allocations. Under Department of Energy regulatons, a dealer who sold gasoline below the ceiling price any time since 1973 can "bank" the difference between his lower price and the higher ceiling. He later could increase his selling price until the "bank" was used up.

144. P.L. 93-159, 87 Stat. 627 (Nov. 27, 1973).

145. Davis v. Crown Central Petroleum Corp., 483 F.2d 1014 (4th Cir. 1973).

sor of the Act, even though the express preemption words of the Act speak in terms of conflict with the scheme administered by the Federal Energy Administration.[147]

The case was *Davis v. Crown Central Petroleum Corp.*[148] An independent refiner had stopped supplying his non-contractual customers and two independent marketers sued the refiner. The Court of Appeals dismissed the case, telling the marketers to take their case to Congress.

The legislative history is divided into three main goals:

> (1) distribution of scarce supplies to protect the public and the economy;
>
> (2) protection of the public from price gouging; and
>
> (3) preservation of the market share of the independent sector and the competition the independents create.[149]

The oil companies also chose not to pursue before the high Court several constitutional arguments which they had argued before the Maryland Court of Appeals and which had been rejected by that court. These arguments included contentions that the statute was void for vagueness, that it constituted an unlawful delegation of legislative authority and an unlawful taking of property without just compensation, and that it denied equal protection of the laws to the oil companies.

IV. Federalism

When an issue of genuine national concern is one in which the states have a valid interest, but the federal government has failed to confront it adequately, the states should be allowed to legislate responsibly, at least until such time as the vacuum is filled by the federal government. Hence, this section is devoted to a concept only mentioned in the *Exxon* decision—federalism.

> Federalism in the United States embraces the following elements: (1) as in all federations, the union of several autonomous political entities, or 'states' for common purposes; (2) the division of legislative powers between a 'National Government' on the one hand, and constituent 'States' on the other, which division is governed by the rule that the former is a 'government of enumerated powers' while the latter are governments of 'residual powers'; (3) the direct operation, for the most part, of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; (4) the provision of each center with the complete apparatus of law enforcement, both executive and judicial; (5) the supremacy of the 'National Government' within its assigned sphere over any conflicting assertion of 'State power; and

146. *Supra* note 20, at 10 (1976).
147. 15 U.S.C. § 755(b).
148. 483 F.2d 1014 (4th Cir. 1973).
149. M. Willrich, Administration of Energy Shortages, at 142 (1976).

(6) dual citizenship.[150]

In the 1930's, states' interests were paramount. In the 1940's through the end of the 1960's, federal interests were paramount. The 1970's may represent a revival of state importance.[151] The Antitrust Division of the Department of Justice and the Federal Trade Commission both strongly support state involvement and enforcement;[152] after all, each state has its own economic conditions and a number of distinct business practices.[153]

There are some definite liabilities to state legislation. It may effect nonresidents and thereby burden individuals who had no representation in the state.[154] Where state agencies are evaluating effects of an activity on competition, they usually employ state rather than federal law.[155] Yet the United States Supreme Court chose to uphold the Maryland statute.[156]

V. The Future

What kind of state antitrust legislation can the oil companies expect to survive judicial scrutiny in the future? Also, what cutback on present practices will the federal government propose now that the cutbacks in the Maryland statute have been deemed permissible? Conclusive answers to these questions are impossible to formulate but this discussion will enumerate some of the possibilities.

Maryland already has a barrage of at least facially strong antitrust laws,[157] the Comptroller of the Treasury has promulgated regulations under the Maryland divestiture statute, and, at least to the knowlege of the Assistant Attorney General of Maryland and Chief of the Antitrust Division, Charles O. Monk II, the Maryland legislature is not contemplating any legislation which would impose additional restrictions on the leases of retail service stations or make the major oil companies sell station properties.[158]

150. *Congressional Research Service, Constitution of the United States of America, Analysis and Interpretation*, Sen. Doc. No. 82, 92nd Cong., 2d Sess. XVIII (1973).

151. *Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623 at 626 (1975); *supra* note 116, at 188; Gribbs, *New Federalsim is Here to Stay*, 52 J. Urban L. at 55 (1974).

152. *Supra* note 31, at 655.

153. *Id.* at 657; R. Lamm, *States' Rights v. National Energy Needs* at 41 (1976).

154. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

155. Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 Case W. Res. L. Rev. at 255 (1975).

156. Exxon, 437 U.S. 117, 135 (1978).

157. Maryland Motor Fuel Inspection Law, Md. Code Ann., art. 56, § 157E(f) (Supp. 1979); Maryland Antitrust Act, Md. Com. Law Code Ann. § 11-201 et seq. (1975); Maryland Unfair Sales Act, Md. Com. Law Code Ann. § 11-201 et seq. (1975); *see generally* W. Reynolds & J. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 Md. L. Rev. 323 (1977); *see* Sun Oil Co. of Pa. v. Goldstein, 453 F. Supp. 787 (1978).

158. March 28, 1979 letter on file at the Transportation Law Journal.

Some legislators tried the latter course in California, but their bill was defeated.[159]

At least twenty state legislatures have divestiture bills now pending, most of them similar to Maryland's. Some include wholesalers within the class that cannot operate retail stations directly. As has been mentioned, S82 calls for complete divestment of the entire petroleum industry. On June 19, 1978,[160] the United States congress passed legislation, the Petroleum Marketing Practices Act;[161] prior to its promulgation a section was deleted which could have been regarded as requiring a very limited divorcement at the retail and wholesale marketing level. Section 302 would have prohibited:

> certain persons from subsidizing any of their motor fuel marketing opertions. Persons subject to the prohibition of subsidization are those who meet each of the following three tests:
>
> (1) Are engaged in commerce.
>
> (2) In the course of such commerce are engaged in—
>
> (a) exploration for crude oil;
>
> (b) production of crude oil;
>
> (c) refining of crude oil; or
>
> (d) wholesale distribution of petroluem products; and
>
> (3) in the course of such commerce market petroleum products through persons owned or controlled by them. The term 'markets' is meant to include wholesale or retail operations beyond the stage of refining of petroleum.[162]

There are those who believe present antitrust laws are sufficient for courts to order divestiture.[163] There are those, on the other hand, who believe "vigorous enforcement of existing antitrust laws by the Justice Department, the Federal Trade Commission and private plaintiffs is in order as an alternative to new divestiture legislation . . . .[164]

The oil companies argued in *Exxon* that, beyond the host of antitrust laws already in existence, parens patriae actions are available if any wrongdoing is taking place.[165] However, it is extremely doubtful that federal authorities would rely on such actions to any real extent to heal injustices in the future, for as one commentator has observed, parens patriae actions

159. Calif. S2121 (defeated April 16, 1974).

160. Exxon was argued Feb. 28, 1978, decided June 14, 1978.

161. P.L. 95-297, 92 Stat. 323, 15 U.S.C. § 2801 et. seq. (1978).

162. *Id.* § 302.

163. Novotny, *Gasoline Marketing Structure and Refusals to Deal With Independent Dealers: A Sherman Act Approach*, 16 ARIZ. L. REV. 465 at 486 (1974).

164. *Supra* note 41, at 609.

165. Jurisdictional statement of Appellants Exxon, at 30; 15 U.S.C. § 15(c), 90 Stat. 1394 (1976). A parens patriae action "in which a state, through its attorney general may sue to recover damages for injuries sustained either by its individual citizens or its general economy as a result of an antitrust violation. Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. at 717 (1974).

have thus far received meager support in the courts when premised at least on federal antitrust claims.[166]

Antitrust class actions have been more successful. For instance, independent gasoline distributors of branded gasoline recently were allowed to proceed as a class on the issue of whether the oil company in question had engaged in a nationwide conspiracy to eliminate the distributors as competitors in sales to service station operators. This class action was allowed even though there was a possibility that release clauses in distributors' contracts would have to be examined under various state laws.[167]

Beyond merely keeping the status quo, or implementing the type of government regulation of which the Maryland statute is an example, another alternative to total divestiture is nationalization.[168] Yet another alternative to total divestiture that has been suggested is allowing the market forces free rein and establishing a system of government standards for gasoline. The three standards would be "lead content, cleanliness and driveability," so consumers could obtain precisely the grade of gasoline required by their automobile.[169]

With respect to the equitable allocation referred to in the Maryland divestiture statute,[170] Stuart Eizenstat, President Carter's chief domestic advisor, has made at least one commitment for the Carter administration supporting greater state flexibility in the allocation of extra gasoline if rationing is imposed.[171]

Companies in the petroleum industry may be bidding for gasoline in the future, but it is highly unlikely, for bidding, by its nature, involves price discrimination.[172] Likewise, little is mentioned about legally mandatory research by private companies on feasible alternatives to gasoline.[173]

In order to continue to give discounts to their own stations, the oil companies may attempt to remain in other states where they are still allowed to operate retail stations directly.[174] The law is in a state of confusion as to

166. *Id.*

167. Jennings Oil Co., DC N.Y. 1162, 314 per FED. TRADE REG. REP. NO. 358 (Nov. 6, 1978).

168. *Cf.* Adams, *Vertical Divestiture of the Petroleum Majors: An Affirmative Case*, 30 VAN. L. REV. at 1147 (1977).

169. *See generally* Greening, *Increase Competition in the Oil Industry: Government Standards for Gasoline*, 14 HARV. J. ON LEGISLATION 193 (1977).

170. MD. ANN. CODE art. 56 § 157E (Cum. Supp. 1979) at paragraph f (Reproduced *supra* Note 7).

171. Letter from Stuart Eizenstat to U.S. Rep. Timothy Worth, D. Colo. (April 26, 1979) mentioned in *Rocky Mtn. News*, April 27, 1979 at 56.

172. *Competitive Bidding Under the Robinson-Patman Act*, 49 ST. JOHN'S L. REV. at 540 (1975).

173. *Wisc. Leg. Council, An Introduction to the Feasibility of Gasohol Production and Use in Wisc.*, (1978) SB-78-11 (incl. summary of legislation by other states and the federal goverment).

174. Calvani, *Functional Discounts under the Robinson-Patman Act*, 17 BOSTON COLLEGE INDUSTRIAL & COM. L. REV. at 543 (1976).

whether functional discounts (when a buyer is permitted to purchase gasoline at a lower price because of a special service or function the favored buyer performs for the seller) are permissible generally. Under the Robinson-Patman Act,[175] cost justification is measured by suppliers' cost savings, so internal savings achieved by integration are not taken into account. Therefore, an integrated retailer has no claim to a wholesale functional discount.[176]

Even when franchising through dealers, it has traditionally been possible to maintain so much control that there was, in reality, forward vertical integration.[177] One recent federal law now covers abuses in termination and nonrenewal of franchise agreements.[178] Effective July 21, 1979, the Federal Trade Commission joins a number of states in regulating franchisors in their disclosures to prospective franchisees.[179] Price restrictions for dealers are per se illegal,[180] except that the owner of a trademark or brand name may generally establish a minimum resale price.[181] It was thought that setting retail prices by a consignment arrangement was settled fifteen years ago by prohibition by the United States Supreme Court.[182] However, there may be a technical wrinkle that the federal legislature will have to deal with by changing the type of injury that plaintiff must show. If the federal legislature chooses not to change the law, the consignment arrangement could be a practice to which the oil companies would gravitate in the future.[183] The Maryland statute's wording, prohibiting a "fee arrangement" and a "commissioned agent,"[184] should effectively preclude this route in Maryland, at least with a producer or refiner.

The law on the validity of location clauses in retail franchise agreements was upset in 1977, changing the clauses from per se violations of the Sherman Act to being judged by the rule of reason.[185] Nothing indicates that there would be any changes on this stance in the future.[186] Presumably, tying arrangements (a supplier agrees to sell his products to the customer at some price below market value if the customer agrees to

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175. 15 U.S.C. § 13 et. seq. (1970).

176. *Supra* note 174, at 553.

177. *Supra* note 59, at 10. *See generally supra* note 123; C. Wilcox, Competition and Monopoly in American Industry, 167-8 (1970); Bogosian v. Gulf Oil Corp., [1973-2] Trade Cases 1174,840 (E.D. Pa. 1973).

178. 15 U.S.C. § 2801 (1978).

179. [1978] Fed. Trade Reg. No. 365 at 1138,029.

180. Small, *Antitrust-Vertical Restrictions—Rule of Reason*, 1977 Wis L. Rev. 1240.

181. *E.g.*, Md. Com Law Code Ann. § 11-103 (1975).

182. Simpson v. Union Oil Co., 377 U.S. 13 (1964).

183. Hardwick, D.C. Tex. 1161,909 per [1978] Fed. Trade Reg. Rep. No. 324.

184. Md Ann. Code art. 56, § 157E (Cum. Supp. 1979) at Paragraph b (reproduced *supra* note 7).

185. Continental T.V. Inc v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

186. *Future of the Per Se Rule Against Vertical Price Restrictions*, 12 Ga. L. Rev. 612 (1978).

purchase only the supplier's products in locations where there are competing suppliers)[187] will continue to be outlawed.[188]

As long as the Federal Emergency Petroleum Allocation Act[189] is in effect, the oil companies as suppliers will be able to prevent arbitrage (the resale of gas by low price zone dealers to high price zone dealers).[190]

VI. CONCLUSION

Notwithstanding some of the substantial arguments against divestiture of the oil companies,[191] if there is not total divestiture by the United States government, additional state antitrust legislation of the oil companies may well be forthcoming. Review of that legislation will be modest.[192] Perhaps that is because the *Cooley* doctrine,[193] delineating national and state roles, is still viable today. In fact, the United States Supreme Court,[194] as well as the Maryland Court of Appeals,[195] cited *Cooley*[196] in the *Exxon* opinions. The present Supreme Court believes that states should be allowed the flexibility of creative responsible action[197] in economic matters that seem important to states where Congress, for one reason or another, has not precluded state action.[198] This author concludes, then, not that the Maryland law was 'right' or 'wrong', but that Maryland had every right to pass the law in light of present federal antitrust laws and policies.

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187. *Jurisdictional Requirements of the Clayton and Robinson-Patman Antitrust Acts: A Narrow Interpretation of the Commerce Clause*, 27 U. FLA. L. REV. 871 n.3 (1975).

188. *E.g.*, [1978] FED. TRADE REG. REP. NO. 324 at 3.

189. 15 U.S.C. § 751 et seq. (1976).

190. Arbitrage was discussed in Bargain Car Wash v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972).

191. *E.g.*, VERTICAL INTEGRATION, *supra* note 34, at 101; Ritchie, *Those Integrated Oil Companies: Is a Breakup Desirable?* 60 A.B.A.J. at 830 (1974); *supra* note 5, at 1133.

192. Choper, *Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 at 1621.

193. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

194. 437 U.S. 117, 126 (1978).

195. 279 Md. 410, 370 A.2d 1102, 1115 (1977) quote from Cities Service Co. v. Peerless Co., 340 U.S. at 186 (1950)).

196. 53 U.S. (12 How.) 299 (1851).

197. C. Douglas III, *10th Amendment: The Foundation of Liberty*, 16 N.H.B.J. 293 (1973).

198. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).