

BOSTON COLLEGE

INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XVI

JANUARY 1975

NUMBER 2

TOWARD A COHERENT ANTITRUST POLICY: THE ROLE OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT IN PRICE DISCRIMINATION REGULATION

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INTRODUCTION

Section 5 of the Federal Trade Commission Act (FTCA) forbids "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" ¹ On its face, section 5 is a

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¹ 15 U.S.C. § 45(a)(1) (1970).

broad delegation of authority to the Federal Trade Commission (FTC or the Commission) to reach a wide range of economic practices. Furthermore, the language of section 5 expresses the broadest of the prohibitions contained in the federal antitrust and trade regulation laws. Although the FTC has not yet attempted to use section 5 as a broad authorization to act as roving commission to regulate commercial activity,² over the years it has used the statute to reach a great variety of business practices often thought not to be within the Sherman Act, the Clayton Act or the Robinson-Patman Act.³ However, these apparent extensions of the three antitrust statutes have not been without criticism.⁴ Specifically, the use of section 5 of the FTCA to supplement and extend the Robinson-Patman Act, a statute more criticized than praised, raises many issues. Such issues relate to the relationship between those two statutes, to the antitrust field in general, and to the propriety of interpretation of any broadly-worded statute as a legislative mandate to extend the sphere of a more narrow, controversial statute.

The United States has three major federal antitrust statutes: (1) the Sherman Act,⁵ (2) the Federal Trade Commission Act,⁶ and (3) the Clayton Act, as amended by the Robinson-Patman Act.⁷ The FTCA and the Clayton Act were passed to supplement the Sherman Act;⁸ the Robinson-Patman Act was passed to strengthen the existing sanction against price discrimination and to afford equality of

² See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1935) (contrasting § 5 of the FTCA with the National Industrial Recovery Act).

³ As in the case of the Sherman Act, 15 U.S.C. §§ 1-7 (1970), Congress, in enacting the FTCA, left undefined the prohibitions of the statute:

What shall constitute unfair methods of competition denounced by the act, is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes.

FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922).

⁴ The response of Robinson-Patman Act aficionados to the Commission's decision in *Grand Union Co.*, 57 F.T.C. 382 (1960), illustrates the commentary which such § 5 cases elicit. See, e.g., Alexander, Section 5 of the Federal Trade Commission Act, *A Deux ex Machina* in the Tragic Interpretation of the Robinson-Patman Act, 12 *Syracuse L. Rev.* 317 (1961); Handler, Recent Antitrust Developments, 71 *Yale L.J.* 75 (1961); Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 *Mich. L. Rev.* 821 (1961); Rahl, Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?, 5 *Antitrust Bull.* 533 (1960); Note, 61 *Colum. L. Rev.* 291 (1961).

⁵ 15 U.S.C. §§ 1-7 (1970). Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy" in restraint of interstate or foreign trade. 15 U.S.C. § 1 (1970). Section 2 of the Act condemns not only combinations to monopolize commerce but also unilateral attempts to do so. 15 U.S.C. § 2 (1970).

⁶ 15 U.S.C. §§ 41-58 (1970).

⁷ 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1970).

⁸ See *FTC v. Raladam Co.*, 283 U.S. 643, 647 (1931).

opportunity to competitors, especially buyers.⁹ Unfortunately, the various prohibitions of the several antitrust laws are not always in harmony with one another.¹⁰ Yet these three statutes, individually and collectively, are the tools available for executing contemporary antitrust policy. Antitrust policy is not merely a set of economic rules governing market behavior but also a reflection of our social philosophy;¹¹ and, as such, demands expression as a coherent, integrated policy rather than merely as an enumeration of prohibitions. The problem arises in trying to draw an integrated policy from these disparate sources.

Recently, the issue of harmonization of the antitrust statutes has been brought to a focus by FTC statements¹² concerning Commission efforts to use section 5 of the FTCA "to its fullest extent, to reach all practices with anti-competitive effects."¹³ Attacking practices under section 5's "unfair methods of competition" language avoids certain requirements of the more specifically worded Sherman, Clayton and Robinson-Patman Acts. The effects of such a broad application of section 5 are very clearly exhibited where section 5 is used as a tool to recast or supplement a statute as specific and controversial as the Robinson-Patman Act.¹⁴

As a prelude to analyzing the propriety of the use of section 5 as a price discrimination law supplementary to the Robinson-Patman

⁹ See, C. Edwards, *The Price Discrimination Law* 511-17 (1959).

¹⁰ See, e.g., *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953) (Frankfurter, J.); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 405 (1953) (Frankfurter, J., dissenting): "I am not unaware that the policies directed at maintaining effective competition, as expressed in the Sherman Law, the Clayton Act, as amended by the Robinson-Patman Act, and the Federal Trade Commission Act, are difficult to formulate and not altogether harmonious." *Id.* at 405 (dissenting opinion).

The judiciary, however, has not been the only branch of the government to recognize this difficulty. See, e.g., Report Of The Attorney General's National Committee To Study The Antitrust Laws (1955):

Adherence to the essence of antitrust laws leaves us not unmindful of the risks in oversimplifying the variant statutory formulations and their judicial construction. The three major statutes—the Sherman, the Federal Trade Commission, and Clayton Acts—have been interpreted and enforced . . . with varying degrees of autonomy. And the Sherman Act has gone through several cycles of judicial construction.

Id. at 2 (footnotes omitted).

¹¹ See, e.g., Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy—The Crisis in Antitrust*, 65 *Colum. L. Rev.* 363, 364 (1965); Blake & Jones, *In Defense of Antitrust*, 65 *Colum. L. Rev.* 377, 382-84 (1965).

¹² "Section 5 of the Federal Trade Commission Act has been likened to a slumbering giant. Our authority extends to all 'unfair methods of competition,' and this is one of the broadest mandates granted to any government enforcement agency." Kirkpatrick, *The Federal Trade Commission and Antitrust Enforcement*, 1971 *New York State Bar Ass'n, Antitrust L. Sym.* 14, 18.

¹³ *Id.*

¹⁴ 15 U.S.C. § 13 (1970).

Act, this article presents a survey of the background and legislative history of section 5. The use of section 5 as an antitrust tool against unfair methods of competition is then examined and criticized.¹⁵ Next a model is developed for the use of section 5 in the price discrimination area. As the dissatisfaction with the Robinson-Patman Act grows, the FTC may look more frequently to its section 5 powers in order to restrain price discriminations which it cannot reach under the Robinson-Patman Act. A look at the operation of the model is provided in the final section of the article.

I. THE LEGISLATIVE HISTORY OF SECTION 5

The Federal Trade Commission derives its authority from several sources. Section 5 of the FTCA authorizes the Commission to prohibit "unfair methods of competition" and "unfair or deceptive acts or practices."¹⁶ Section 5 has been interpreted as empowering the Commission to enforce the Sherman Act by means of the prohibition against unfair methods of competition.¹⁷ Furthermore, Congress has expressly delegated the administration of various statutes to the Commission, the most important of which, for the purpose of this analysis, are the Clayton and Robinson-Patman Acts.¹⁸

The legislative history of section 5 of the FTCA has been given varying interpretations by different commentators. Professor Gerard Henderson, in his classic work on the Federal Trade Commission,¹⁹ imports a broad reach to the section:

[T]he debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional

¹⁵ The Supreme Court held, in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), that (1) section 5 empowers the FTC to proscribe an unfair competitive practice which does not infringe either the letter or the spirit of the antitrust laws; and (2) section 5 empowers the FTC to proscribe practices as unfair or deceptive regardless of their nature or quality as competitive practices or their effect upon competition. *Id.* at 239.

This article does not consider whether price discrimination practices which may be beyond the reach of the Robinson-Patman Act and the "unfair methods of competition language" of section 5 may nonetheless be attacked as "unfair or deceptive acts or practices." To date, the FTC apparently has relied upon the "unfair methods of competition" language when issuing complaints against price discrimination practices under section 5. See text at note 96 *infra*.

The role of section 5 as a tool for consumer protection and regulation of business practices and ethics, though touched upon below, is beyond the scope of this article. It is assumed that the authority to reach unfair practices beyond those likely to have anti-competitive consequences after the manner of the antitrust laws currently lies in the "unfair or deceptive acts or practices" language and not the "unfair methods of competition" language.

¹⁶ 15 U.S.C. § 45 (1970).

¹⁷ *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395 (1953); *FTC v. Cement Institute*, 333 U.S. 683, 689-93 (1948).

¹⁸ For a list of numerous other regulatory statutes enforced by the Federal Trade Commission, see Handler, *Recent Antitrust Developments*, 71 *Yale L.J.* 75, 93 n.110 (1961).

¹⁹ G. Henderson, *The Federal Trade Commission* (1924).

intention to confer on the Commission, subject to court review, the duty of giving a detailed content to the general principle embodied in the phrase [unfair methods of competition], and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar.²⁰

Professors Eugene Baker and Daniel Baum also argue for a broad reading of section 5, viewing it as a mandate empowering the Commission to reach and to deal effectively with new techniques for the development of economic power, and to develop regulation for evolving commercial practices.²¹ On the other hand, Professor Milton Handler insists that while Congress could have given the Commission the power of defining price discrimination boundaries as unfair competition, it instead merely conferred the limited power to enforce the Robinson-Patman Act, Clayton Act and Sherman Act.²²

The legislative history can be read to provide support for each of these views. Businessmen in the early 1900's desired further clarification and definition of the practices which fell within the prohibitions of the Sherman Act.²³ Instead, they received both a general ethical and economic principle in the form of section 5, and the specific prohibitions of the Clayton Act. The reach of the broad mandate of section 5 was left to be determined by future judicial, legislative and administrative action.²⁴ Section 5 supplemented rather than amended or clarified the Sherman Act, while the

²⁰ *Id.* at 36.

²¹ Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 *Vill. L. Rev.* 517, 542-43 (1962).

²² Handler, Recent Antitrust Developments, 71 *Yale L.J.* 75 (1961).

²³ G. Henderson, *supra* note 19, at 17.

²⁴ See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

The Federal Trade Commission Act (§ 5) introduced the expression "unfair methods of competition" which were declared to be unlawful. That was an expression new in law We have said . . . that it does not admit of precise definition, its scope being left to judicial determination as controversies arise. [citations omitted] What are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. [citations omitted] Provision was made [by Congress] for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the Commission is taken within its statutory authority.

Id. at 532-33. See also *Lichter v. United States*, 334 U.S. 742 (1948).

"A constitutional power implies a power of delegation of authority under it sufficient to affect its purposes." *Id.* at 778. In the same case, the Court also noted that additional, subsequent legislation did not restrict the concept of "unfair methods of competition." *Id.* at 783-84.

Clayton Act, written in precise terms, isolated and defined certain enumerated practices, and subjected them to special prohibitions and methods of enforcement. It does seem clear from the legislative history that some latitude was to be given to the Commission to give content to section 5:

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what particular practices were unfair. It concluded that the latter course would be the better for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be possible to invent others.²⁵

However, at the time section 5 was enacted, the scheme of the antitrust statutes did not include the Clayton Act and the Robinson-Patman Act, although the Clayton Act was being discussed in House and Senate committees when section 5 was passed.²⁶ Therefore, the determination of the reach of the section 5 delegation of authority to the Commission, must be made in conjunction with an analysis of the effect of subsequent legislation relating to the same subject matter.

While it has long been held that section 5 may be used beyond common law prescriptions or previously adjudicated Sherman Act violations to reach conduct proscribed by the Clayton and Robinson-Patman Acts²⁷ and conduct constituting incipient Sherman Act violations,²⁸ the justifications for so extending the Acts have not been critically examined.²⁹ The legislative history of the Robinson-Patman Act, for example, indicates that those instances of

²⁵ S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914). See also H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

²⁶ G. Henderson, *supra* note 19, at 28-33. There was in fact much debate over whether the phrase "unfair methods of competition" in the Federal Trade Commission Act would cover the specific practices enumerated in the Clayton Act. See S. Doc. No. 585, 63d Cong., 2d Sess. (1914); 51 Cong. Rec. 15828-29, 16147, 16154, 16273 (1914).

²⁷ See, e.g., *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463, 466 (1941).

²⁸ *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934).

²⁹ The courts have tended to defer too readily to Commission "expertise." See, e.g., *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953).

The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.

Id. at 396.

price discrimination included within the provisos and exceptions of the Robinson-Patman Act were not meant to be subject to antitrust attack, but gives no direction with regard to those price discriminations which are neither explicitly protected nor specifically proscribed by the Robinson-Patman Act. Furthermore, the Commission has never offered an all-encompassing justification for the use of section 5 to attack conduct which is similar to conduct prohibited by the antitrust laws but not within those prohibitions.

It is the thesis of this article that section 5 should be used to condemn those pricing practices: (1) which are in form and effect similar to those condemned by the Robinson-Patman Act; (2) which are not protected by a statutory defense or proviso; and (3) which produce anti-competitive effects outweighing any justification or social benefits. The language of section 5 refers to unfair methods of competition, and hence, it is reasonable to read section 5 as concerned with injury to specific competitors only where such injury produces injury to competition as well. Congress has not subjected every business practice which is potentially anti-competitive to the antitrust laws, and the Commission should take note of this fundamental fact in its use of section 5 as an enforcement weapon. The adoption of a rule of reason test for section 5 violations is urged as being consonant with the basic or central policy of the antitrust laws. Such a construction of section 5 could harmonize the language of the statute with traditional national antitrust policy.³⁰

Further evidence that "unfair methods of competition" should be defined as those business practices which unreasonably injure competition as opposed, for example, to a business practice which would tend to encourage competition [although to the detriment of an individual competitor or two] is provided by the Conference Report accompanying the enactment of the FTCA. That Report stated:

It is now generally recognized that the only effective means of establishing and maintaining monopoly . . . is the use of unfair competition. The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men thoroughly informed

³⁰ To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in § 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated.

FTC v. Bunte Bros., Inc., 312 U.S. 349, 351 (1941).

in regard to business, who will be able to apply the rule enacted by Congress to the particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.

. . . Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.³¹

The question, therefore, is not how far the Commission can go in using section 5 to extend the reach of the other antitrust statutes. Rather, the issue is how far ought it go, assuming the desirability of harmonizing the several antitrust statutes and forging a unified and coherent program of antitrust enforcement. Accordingly, in applying section 5 to extend the dimensions of the other antitrust laws, it is asserted that the Commission should always look both to the section 5 prohibition against those unfair methods of competition which have substantial anti-competitive effects and to the types of practices at which the Sherman Act, the Clayton Act and the Robinson-Patman Act are aimed. In doing so, care must be taken not to use section 5 to extend the antitrust statutes in a direction contrary to the mainstream of antitrust policy, *i.e.*, in a manner which makes section 5 applicable to practices which may not be anti-competitive or, may be anti-competitive but not in the form or with the effects which Congress chose to proscribe by the three antitrust statutes. In sum, enforcement of section 5 should be guided, by rule of reason standards, measured in terms of the anti-competitive dangers addressed in the Sherman, Clayton and Robinson-Patman Acts.

II. FASHIONING A GENERAL ANTITRUST WEAPON: JUDICIAL APPLICATION OF SECTION 5

Early attempts by the Federal Trade Commission to employ section 5 as an antitrust statute were defeated by narrow judicial interpretations of the statutory language. In the first section 5 case decided by the Supreme Court, *FTC v. Gratz*,³² the Court established criteria for a section 5 violation: (1) a violation of the Sherman or Clayton Acts; or (2) a violation of prevailing and accepted standards of commercial morality. This restrictive approach was repeated in *FTC v. Curtis Publishing Co.*,³³ *FTC v. Sinclair*

³¹ H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).

³² 253 U.S. 421 (1920).

³³ 260 U.S. 568, 512 (1923) (exclusive dealing contract).

Refining,³⁴ and *FTC v. Eastman Kodak*.³⁵ In the former two cases, the Court refused to find a section 5 violation absent a showing of unlawful motive, defined in terms of existing antitrust laws and prevailing moral standards. In *Eastman Kodak*, the Court, while finding a section 5 violation, held that the Commission, though proceeding under section 5, was empowered to grant no greater relief than the Clayton Act itself authorized.³⁶

The 1940's saw the demise of the *Gratz* test, the evolution of an expansive interpretation of section 5, and the appearance of dicta which evidenced an even more expansive reading. The expansion began in the sphere of Sherman Act and Sherman Act-type cases. In *Fashion Originators' Guild of America, Inc. v. FTC*,³⁷ the Supreme Court enunciated the incipency doctrine, which it defined as empowering the Commission to attack, as unfair methods of competition, those practices which may, when full-blown, violate the Sherman or Clayton Act.³⁸ Similarly, in *Cement Institute v. FTC*,³⁹ the Court held that a multiple basing point pricing system tended to restrain trade and thus constituted an unfair method of competition, regardless of whether the conduct was also a violation of the Sherman Act⁴⁰ or merely an incipient Sherman Act practice.⁴¹

³⁴ 261 U.S. 463 (1923). "The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition." *Id.* at 475-76.

³⁵ 274 U.S. 619 (1927).

³⁶ *Eastman Kodak*, prior to the Commission's action, had acquired some photographic laboratories which were used as leverage in negotiating a reciprocal agreement with Allied Laboratories, a foreign company. The agreement provided that Allied would use only American-made film (Kodak's) and Kodak would not use its laboratories in competition with Allied. The Court held that even if acquisition of the laboratories was a step in an unfair method of competition, the Commission did not possess the equity power necessary to order divestiture. *Id.* at 625.

³⁷ 312 U.S. 457 (1941).

³⁸ *Id.* at 466. The Court found that the combination of manufacturers which sought to suppress competition by others who copied their designs violated the principle and policy of the Sherman and Clayton Acts due to the presence of unlawful purposes, potential power, coercion or tendency to monopolize. *Id.* at 467. The practices ran counter to the Clayton Act because the sale of textiles and garments was conditioned upon the buyer's agreement not to deal in the copies. *Id.* at 464. The combination was counter to the Sherman Act because the Commission found that it foreclosed outlets, constituted an organized boycott, and resulted in the suppression of competition from the sale of unregistered textiles and copied designs. *Id.* at 465.

³⁹ 333 U.S. 683 (1948).

⁴⁰ *Id.* at 692, 720.

⁴¹ *Cement Institute* involved a combination in restraint of trade made effective through agreement, express or implied, to adopt a multiple basing point pricing system. The combination had been in existence for many years, and the Commission found that its pricing system had produced uniform prices and terms of sale throughout the country. It is significant to note that while the Commission's order was pending in the court of appeals, and prior to the Supreme Court decision, the Justice Department filed a Sherman Act § 1 proceeding against the same respondents.

Cement Institute was extended in *Triangle Conduit & Cable Co. v. FTC*,⁴² a case upholding a section 5 complaint against individual sellers for parallel pricing as part of a delivered pricing system. In condemning the conscious parallelism in the use of a delivered price system, the Commission and the court emphasized that each seller knew that each other seller was using and would continue to use the same basing point formula. The court also discussed the economics underlying delivered pricing and noted that, even absent an explicit agreement, the delivered pricing system depended upon reciprocal pricing practices. It is thus difficult to determine whether the *Triangle Conduit* case condemned parallel pricing when used to implement a delivered pricing system or only when such individual pricing grew out of a delivered pricing system originally implemented by a conspiracy.

The Supreme Court condemned the latter scheme several years later in a section 5 case, *FTC v. National Lead Co.*⁴³ There, the Court approved the FTC decree prohibiting the individual respondents from continuing to quote delivered prices "for the purpose or with the effect of systematically matching the delivered . . . prices of other sellers"⁴⁴ The Court observed that such an order against the individual parties was necessary to prevent the parties from continuing to use their prior arbitrary zone delivered pricing system without the necessity of a conspiracy, which had been enjoined. *Triangle Conduit* and *National Lead* illustrate the use of section 5 when there exist alternative, independent methods of accomplishing the same result, some of which, in the Commission's view, could not be reached under the Sherman Act itself.

It is difficult to draw a clear dividing line between the Commission's use of section 5 in the Sherman Act area and in the Clayton Act area. Occasionally, the Commission and the courts have condemned a practice generally as violating the policies of both acts.⁴⁵ The vague dicta found in several such cases⁴⁶ gave rise to much of the confusion accompanying the use of section 5 in the antitrust field. For example, in a 1953 opinion, *FTC v. Motion Picture Advertising Service Co.*,⁴⁷ condemning a motion picture

⁴² 168 F.2d 175 (7th Cir. 1948), aff'd mem. sub nom. *Clayton Mark & Co. v. FTC*, 336 U.S. 902 (1949).

⁴³ 352 U.S. 419 (1957).

⁴⁴ Id. at 423.

⁴⁵ See, e.g., *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953). The practice has occurred in recent years as well. See *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

⁴⁶ Confusing dicta are enunciated and repeated in several cases: *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606-09 (1953); *Fashion Originators' Guild of America, Inc.*, 312 U.S. 457, 463-66 (1941); *FTC v. Raladam Co.*, 283 U.S. 643, 647-48 (1931).

⁴⁷ 344 U.S. 392 (1953).

distributor's exclusive contracts with ten percent of the available theatres (and with 40% of the theatres in its geographical area) as an unfair method of competition, the Court asserted that section 5 was designed to reach incipient violations of the Sherman and Clayton Acts. Without producing evidence of a conspiracy or concerted action, and speaking in the Clayton Act language of foreclosure and tendency to monopolize, the majority found a violation of Sherman Act policy.⁴⁸ The opinion's reasoning was quite unclear as to how "a device which has sewn up the market so tightly for the benefit of a few" falls within the Sherman Act, and neglected to provide any rule of reason analysis of the harms and benefits from the challenged agreements.⁴⁹

The basis for the more broad application of section 5 was also broadly but vaguely expressed in *FTC v. Brown Shoe Co.*⁵⁰ In that case, the Supreme Court rejected the argument that proof of anti-competitive effect must be shown under section 5, and approved the application of section 5 to "practices which conflict with the basic policies of the Sherman and Clayton Acts."⁵¹ The Court, reiterating the incipency argument, said that Brown Shoe's franchise program "obviously conflicts with the central policy of both section 1 of the Sherman Act and section 3 of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market."⁵² Thus, the *Brown Shoe* decision left the outer boundaries of section 5 almost undefined. By failing to inquire into the extent to which competing shoe suppliers were foreclosed, the Court in *Brown Shoe* extended the Commission's powers under section 5 well beyond the confines of the other antitrust laws. The policies of the Sherman and Clayton Acts tolerate those practices whose redeeming virtues outweigh their competitive harms. The *Brown Shoe* Court did not indicate that it would be bound by this test, nor did it indicate just what limits it would apply to section 5.

The Court has also approved the Commission's use of section 5 to reach practices which resembled tying arrangements and which, the Court found, placed an unfair burden and a significant restraint upon a substantial amount of commerce. In *Atlantic Refining Co. v. FTC*⁵³ and *FTC v. Texaco, Inc.*,⁵⁴ the Court upheld the FTC's

⁴⁸ Id. at 395.

⁴⁹ Id. A possible explanation is that the Commission, being uncertain whether the agreement fell within the Clayton Act, chose to proceed under § 5; the Court, rather than being restricted by the potential agency agreement issues raised by a Clayton Act analysis, followed the expansive dicta of earlier cases and upheld the Commission's determination under § 5. Id. at 394-98.

⁵⁰ 384 U.S. 316 (1966).

⁵¹ Id. at 321.

⁵² Id.

⁵³ 381 U.S. 357 (1965).

attack upon sales-commission arrangements between a tire manufacturer and an oil company. Concluding that the arrangements had an adverse effect on competition in the marketing of tires, batteries and accessories, the Court examined only evidence concerning the large dollar amount of commerce that was involved and the increasingly important role that service stations exercised in the marketing of tires, batteries and accessories, without inquiry into the possible benefits from such arrangements.⁵⁵ The Court in *Texaco* simply adopted the *Atlantic* Court's conclusionary statement that "there would be little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers. . . ."⁵⁶ Thus, by holding that dominant economic power was in itself sufficient to render a sales-commission agreement illegitimate, the Court approved the use of section 5 as a per se rule against inherent coercion.⁵⁷ Moreover, in neither the *Atlantic* nor the *Texaco* case did the Court analyze the possibility of applying section 1 of the Sherman Act if indeed the practices were not proscribed by section 3 of the Clayton Act.

III. THE INCIPIENCY AND POLICY DOCTRINES—THE EXPANSION OF SECTION 5

A. *The Relationship between Section 5 and the Sherman Act*

An examination of the merits of utilizing section 5 to extend and supplement the Sherman and Clayton Acts first requires inquiry into the nature and identity of those practices which are not covered by the Sherman or Clayton Acts but which would be encompassed by section 5 of the FTCA. The section 5 prohibition against "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" is broader than the language of the Sherman Act. Specifically, section 5 covers a more extensive range of unilateral actions than does the "attempt to monopolize" language of section 2 of the Sherman Act.

There is one important class of unilateral practices which, though outside the prohibitions of the Sherman Act, falls within the reach of section 5. Congress, as was recognized years ago in *FTC v. R.F. Keppel & Brother, Inc.*⁵⁸ and more recently in *FTC v. Sperry & Hutchinson Co.*,⁵⁹ defined the powers of the Commission to

⁵⁴ 393 U.S. 223 (1968).

⁵⁵ "To the extent that dealers are induced to select the sponsored brand in order to maintain the good favor of the oil company upon which they are dependent, to that extent the operation of the competitive market is adversely affected. . . ." 393 U.S. 223, 229 (1968).

⁵⁶ 393 U.S. 223, 229 (1968), citing *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 376 (1965).

⁵⁷ 393 U.S. at 232 (Stewart, J., dissenting).

⁵⁸ 291 U.S. 304 (1934).

⁵⁹ 405 U.S. 233 (1972).

protect consumers as well as competitors. The Commission can use section 5 to reach practices which do not pose a threat to competition within the letter or spirit of the antitrust laws but nonetheless injure consumers or otherwise constitute unethical practices. However, if the values involved in a particular application of section 5 to a unilateral unfair practice are "beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws,"⁶⁰ then this use of section 5 is not an extension in the direction of Sherman Act policy, but rather the evolution of a completely different policy. The Sherman Act was directed at only those unilateral acts which either constitute monopolization or which, though insufficient in themselves to produce monopoly, are accompanied both by an intent to do so and a dangerous probability that the intended result will occur.⁶¹ If unfair unilateral practices which do not meet these requirements may be attacked under section 5, the justification must come from a source other than the Sherman Act.

Section 5 may also be given a broader scope in the Sherman Act area by extending it to cover unfair practices involving agreement. Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of interstate trade. As in the unilateral practice situation described above, section 5 language may be applied to cover unethical practices which are the result of contract, combination or conspiracy but have negligible effects on competition. However unethical they may be, such practices should not be reached by a reading of section 5 grounded on Sherman Act policy, since the Sherman Act condemns only those combinations which unreasonably restrain trade, and does not reach those combinations with little or no effect on competition.

The controversy over the use of section 5 to reach Sherman Act-type violations is most acute when the combination actually is restrictive of competition. The Commission and the courts have employed section 5 to reach such practices where the practice is also prohibited by the Sherman Act as well as where it is deemed to be outside the proscriptions of the Sherman Act.⁶² When used in the former situation, the section 5 charge is superfluous at best; at worst it results in a substitution of section 5 standards for those prescribed by Congress or established judicially in Sherman Act cases.⁶³

It is the theory of this article that practices which cannot be

⁶⁰ *Id.* at 244.

⁶¹ See *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

⁶² *FTC v. Cement Institute*, 333 U.S. 683, 689-73 (1948). But cf. Report Of The Attorney General's National Committee To Study The Antitrust Laws 148-49 n.78 (1955).

⁶³ This would occur if the Commission were to develop a separate burden of proof standard, independent of the Sherman Act and applicable to § 5 cases.

reached under the Sherman Act itself should not be reached by section 5 under a Sherman Act justification. The judicially created rule of reason⁶⁴ limits the applicability of the Sherman Act prohibitions to those practices which unduly restrain competition or trade without a sufficiently justifiable purpose.⁶⁵ The policy behind the Sherman Act requires a detailed inquiry into dangers and benefits, effects and alternatives, before condemning or approving agreements. If, after such an inquiry, it is determined that the justifications outweigh the harms (actual and potential), and therefore that the combination should be permitted to continue rather than being struck down because of the Sherman Act, it is difficult to understand the justification for striking it down under section 5. The "policy" of the Sherman Act should operate no less effectively in Sherman Act cases than in section 5 cases.

The Commission and the courts, however, have often given section 5 a more extensive reach than the Sherman Act. In reaching anti-competitive conduct not violative of the Sherman Act, violations of section 5 have been nonetheless found. Two doctrines have been used to justify this extension: (1) the "incipiency" doctrine and (2) the "policy" doctrine. The basis of the incipiency doctrine is that section 5 should be used "to stop in their incipiency acts and practices which, when full blown, would violate those [the Sherman and Clayton] Acts"⁶⁶ The policy doctrine applies section 5 to conduct which violates the principles and policies of the Sherman Act.

If the incipiency doctrine is read as an authorization to condemn any combination which, if hypothetically expanded in time and space, would result in an unreasonable restraint of competition, the doctrine would in fact be without meaning. For example, an application of that doctrine would permit section 5 to prohibit any exclusive dealing arrangement or requirements contract entered into between one buyer and one seller, regardless of the lack of any adverse effect on competition or the existence of any economic justifications for the combination. A second possible application of the incipiency doctrine is to use that doctrine as if it were an "attempt" statute, *i.e.*, as legislation affording the basis for attacking the first step in a scheme to violate the Sherman Act. This application of the incipiency doctrine theoretically would permit section 5 to reach combinations which, though currently having insufficient anti-competitive effect to fall within the prohibitions of the Sherman Act, evidence an intent to effectuate illegal competitive

⁶⁴ *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 65 (1911).

⁶⁵ *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

⁶⁶ *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953).

restraints. The justification for this application of the incipency doctrine assumes an interpretation of the Sherman Act which is not proper.

In framing section 1 of the Sherman Act, Congress did not require any particular set of effects as proof of a violation, but rather expected the use of a balancing process. Applied literally the language of the Sherman Act is "broad enough to embrace every conceivable contract or combination" and therefore "inevitably . . . called for the exercise of judgment" on the part of the judges to determine which combinations unduly restrained trade and which were reasonable.⁶⁷ For the purposes of section 1 of the Sherman Act a combination which adversely affects competition and for which insufficient economic justification can be offered, is as much a restraint of trade whether it is in its early stages or "full-blown." Conversely, a justifiable combination which is in its incipency should not be condemned simply because there exists the possibility that eventually it may expand so as to lose its present justification.

In applying the incipency doctrine, the Commission and the courts have in fact reached practices within the normal scope of the prohibitions of section 1 of the Sherman Act. For example, it is difficult to see why the long term exclusive contracts in the *Motion Picture Advertising Service* case,⁶⁸ should not fall within the prohibition of section 1 of the Sherman Act. Surely contracts which violate the policy of the Sherman Act (i.e., the rule of reason) for the purpose of a section 5 case would violate the same policy in a Sherman Act case. The same is true of *Fashion Originators' Guild*⁶⁹ and *Cement Institute*,⁷⁰ two cases in which section 5 was used to reach a collective boycott and a delivered pricing scheme, respectively. In each case the participants in the combinations were shown to have acted with intent to restrain competition. The Commission should not have refused to hear evidence offered on the reasonableness of the methods pursued by the combination. It is not clear that all combinations involving boycotts should be subject to a per se rule under either the Sherman Act or section 5 of the FTCA. More importantly however, it is not clear that section 5 was needed at all to reach the Guild's agreement. Evidence was presented that there was a boycott agreement which did restrain trade⁷¹ and thus the evidence introduced was sufficient to support a section 1 Sherman Act complaint. Section 5 was also resorted to unnecessarily in *Ce-*

⁶⁷ *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

⁶⁸ 344 U.S. 392 (1953).

⁶⁹ 312 U.S. 457 (1941).

⁷⁰ 333 U.S. 683 (1948).

⁷¹ 312 U.S. at 464-65.

ment Institute to strike down a delivered pricing scheme. As set forth above,⁷² the label "incipient" could hardly be applied to the *Cement Institute* case since the delivered pricing scheme had been in effect nationwide for several years and had produced uniform prices and terms of sale throughout the country.⁷³ Those circumstances, combined with the inference of agreement made by the Court, should have been sufficient to bring the practice within the proscriptions of section 1 of the Sherman Act.

The application of similar analysis to cases in which the use of section 5 has been justified on policy grounds rather than under the incipency doctrine illustrates that the practices to which the Commission and courts have applied the policy either could have been attacked under section 1 of the Sherman Act or should not have been prohibited at all. For example, in *Atlantic Refining Co. v. FTC*⁷⁴ and *FTC v. Texaco, Inc.*,⁷⁵ where the Commission's section 5 complaint read as a hybrid of Sherman, Clayton section 3, and Robinson-Patman allegations, the policy doctrine was used to extend section 5 to reach practices which, if economically and socially justifiable, were arguably permissible business practices, and, if not so justifiable, were violations of section 1 of the Sherman Act. Although the *Texaco* tires, batteries and accessories sales-commission agreements may not have been fully justifiable, the court should have given consideration, as one possible justification to a plan which enabled an oil company to meet the demands of its outlets for tires, batteries and accessories promptly and without the cost of warehousing. Putting aside any overtly coercive practices (which the Commission had separately enjoined under section 5),⁷⁶ the Court basically employed section 5 as a per se rule for striking down a possibly justifiable agreement because of the inherent coercion that exists between a franchisor and a franchisee, or a large seller and small buyer. On the other hand, if, as the facts indicate, the tire companies dealt with and delivered to the individual retail outlets, it is hard to imagine a legitimate purpose served by the agreement which paid a commission to the oil companies on such transactions. Absent a judicial attempt to balance the economic and business justifications against the harmful effects of the arrangement, it cannot be determined whether the agreements were reasonable business arrangements which should be permitted to stand or unreasonable restraints which should be struck down under section

⁷² See text at note 39 supra.

⁷³ 333 U.S. at 713, 715.

⁷⁴ 381 U.S. 357 (1965).

⁷⁵ 393 U.S. 223 (1968).

⁷⁶ 381 U.S. at 361, 363.

1 of the Sherman Act. However, neither alternative required the use of section 5. Furthermore, the Court's approach in the *Texaco* case opened the door to using section 5 arbitrarily in those unequal bargaining situations where the larger party's interest was created by virtue of an agreement with a third party.⁷⁷

In *National Lead*⁷⁸ and *Triangle Conduit*,⁷⁹ the policy approach produced a better-reasoned though unnecessary application of section 5. In order to effectuate a Sherman Act decree, a section 5 cease and desist order was entered forbidding each respondent individually from adopting the same or similar system of pricing for the purpose of matching the prices of competitors.⁸⁰ Without the section 5 order, the parties could have individually continued their pricing policies and thus benefited from the years of practice acquired during the conspiracy period. The statement by the Court in *National Lead* that the Commission "must be allowed effectively to close all roads leading to the prohibited goal"⁸¹ illustrates that the Court used section 5 as an aid in enforcing the anti-monopoly and pro-competitive policies of the Sherman Act, in much the same way the Clayton Act supplements the Sherman Act. In each of these cases, the courts set out the effects of the practices and then used section 5 to stop these practices which had no justification other than to continue, in fact if not in law, the same pricing system which had been enjoined under the Sherman Act.

In summary, in light of the fact that the Sherman Act has been and is presently being used to reach all those monopolistic or restraint-of-trade practices which fall within the ambit of its policy, there are no Sherman Act-type practices with regard to which it would be appropriate to find a violation of section 5 which would not already fall under the Sherman Act itself.

B. Section 5 and the Clayton Act

In view of the less rigid requirements for illegality under the Clayton Act⁸² than under the Sherman Act, there is less reason to resort to the broad language of section 5 and the incipency and policy doctrines in the Clayton Act area than there is in the Sherman Act area. The Clayton Act itself was designed to halt incipient

⁷⁷ See Justice Stewart's dissenting opinion in the *Texaco* case. 393 U.S. at 223-32 (dissenting opinion).

⁷⁸ *FTC v. National Lead Co.*, 352 U.S. 419 (1957).

⁷⁹ *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948), *aff'd mem. sub. nom.* *Clayton Mark & Co. v. FTC*, 336 U.S. 902 (1949).

⁸⁰ 352 U.S. at 423; 168 F.2d at 176.

⁸¹ 352 U.S. at 429.

⁸² 15 U.S.C. § 14 (1970), provides in part: "[W]here the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

practices likely to grow into Sherman Act violations.⁸³ Furthermore, the basis of liability under the Clayton Act is expressed in terms of reasonable probability of anti-competitive harm or tending to hinder competition unduly or to create a monopoly, all of which amount to an incipency test. However, labeling incipient Clayton Act violations unlawful under section 5 would result in the prohibition of incipient incipency, which is a meaningless concept.

In the *Brown Shoe* case,⁸⁴ the Court applied both the incipency and the policy tests to sustain the Commission's determination that Brown's franchising plan violated the central policy of the Sherman and Clayton Acts, and hence constituted a violation of section 5.⁸⁵ It is difficult to determine exactly what the Court meant by classifying the franchise program as an incipient violation. If the Court intended to state that the franchise program, though within the spirit of the general prohibition of section 3 of the Clayton Act, had not yet risen to the level of a full blown section 3 violation due to lack of showing of anti-competitive effects, then the Court effectively removed all constraints on the application of section 5 to the antitrust field. Numerous commercial practices, if pursued on a large enough scale and over an extended time period, would yield anti-competitive results, but it would be inconsistent with the policy underlying the Clayton Act to prohibit each incipient practice in that category.

The Clayton Act is aimed at particular types of anti-competitive effects. It is not directed at all practices which may tend to lessen competition, but only at those which lessen competition in ways thought to be particularly dangerous. The United States is not a completely regulated economy; business practices are presumed legal unless prohibited by a specific statute. The Clayton Act, like the Sherman Act, tolerates those business practices which do not unreasonably restrain competition. Reasonable is defined not only in terms of extent of injury, but also in terms of the procedure causing the injury and the manner of inflicting the injury. For this reason, the use of the "policy" doctrine to extend the reach of section 5 of the FTCA is as inappropriate in the Clayton Act sphere as in the Sherman Act sphere. By means of "policy" and "incipiency" language, a court may easily avoid inquiry into actual anti-competitive effects and pro-competitive justifications, and therefore may condemn too quickly an agreement between a seller and an insignificant number of buyers that may have sufficient benefits to justify its existence.

⁸³ See, e.g., *FTC v. Proctor & Gamble Co.*, 386 U.S. 568, 577 (1966).

⁸⁴ *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

⁸⁵ *Id.* at 320-22.

However, the parallel which has been drawn between the Sherman and Clayton Acts with respect to section 5 does not sufficiently cover each situation. Closer examination reveals that unlike the Sherman Act, the Clayton Act contains "technical" limitations in its scope, and that it would be appropriate to broaden the scope of section 5 in the area of these technical limitations. Section 3 of the Clayton Act is limited to leases, sales or contracts for sale "of goods, wares, merchandise, machinery, supplies or other commodities"⁸⁶ and section 7 is limited to corporations.⁸⁷ The FTC's use of section 5 of the FTCA to proceed against practices which are economically equivalent to those enumerated in the Clayton Act but which do not fall within the letter of the Act because of a jurisdictional or technical deficiency—termed the "jurisdictional deficiency" theory⁸⁸—has been advocated by commentators and supported by the Report of the Attorney General's Antitrust Committee.⁸⁹

Unlike the practices which a "policy" or "incipiency" doctrine would bring within the scope of an expanded FTCA section 5, the jurisdictional deficiency approach does not by itself reach either practices which are already covered by the specific language of the Clayton Act or practices which are not covered by the Clayton Act because they do not produce the requisite anti-competitive effects. The jurisdictional deficiency doctrine covers practices whose economic effects are the same as their statutorily-enumerated counterparts. Furthermore, while the jurisdictional omissions from sections 3 and 7 may not have been completely inadvertant, neither were they the result of a deliberate decision integral to the furtherance of the policies of the Clayton Act.⁹⁰

Although the Supreme Court has not yet decided any jurisdictional deficiency section 5 cases, the Commission has used this approach frequently when proceeding against practices technically beyond those enumerated in the Clayton Act.⁹¹ Transactions such as loans, gifts, construction services, painting benefits, alleged to be expressly or impliedly conditioned on exclusive dealing, have been the subject of section 5 complaints. In two such cases, *Shell Oil*

⁸⁶ 15 U.S.C. § 14 (1970).

⁸⁷ 15 U.S.C. § 18 (1970).

⁸⁸ The leading article on this theory is Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 Mich. L. Rev. 821 (1961).

⁸⁹ Report Of the Attorney General's National Committee To Study The Antitrust Laws 148-49 n.78 (1955).

⁹⁰ See, the legislative history of the Celler-Kefauver Act, c.1184, 64 Stat. 1125 (1950) amending 15 U.S.C. § 18, in 1950 U.S. Code Cong. Serv. 4293. See also *Beatrice Foods Co.*, [1965-67 Transfer Binder] Trade Reg. Rep. ¶ 17311, at 22,469 (FTC Doc. No. 7599).

⁹¹ See the cases collected in Oppenheim, *supra* note 88, at 845 n.70.

*Co.*⁹² and *Socony Mobil Oil Co.*⁹³ the Commission adopted the Hearing Examiner's dismissal recommendation for failure of reliable, probative and substantial evidence of reasonable probability of substantial injury to competition. Although Professor Oppenheim reads that dismissal as an adoption of a rule of reason test of section 3 of the Clayton Act in section 5 cases, it appears more likely to be a rule of reason test derived from section 5, *i.e.*, a decision to measure the burden of proof in section 5 jurisdictional deficiency cases by the section 5 standard rather than adopting the proper standard from the specific Clayton Act section.

In his article advocating the jurisdictional deficiency standard, Professor Oppenheim proposed taking the standard used in section 5 cases directly from the connected Clayton Act section.⁹⁴ On the one hand, it may be argued that specific Clayton Act standards are designed to deal with the particular violations specified in that statute, and that there is no reason to extend automatically these burden of proof standards to cover activities not within the statute. For example, without a section 5 test requiring substantial competitive injury, any subsidiary transaction between two individuals who are parties to an exclusive dealing agreement would be subject to a section 5 charge governed by no greater standard of competitive injury than prevailed for a "lease . . . sale or contract for sale of . . . commodities." It may be that certain subsidiary transactions, not within the quoted statutory phrase, are subject to sufficiently different justifications to warrant individual tests of competitive injury, rather than tests borrowed from related statutory prohibitions. On the other hand, it may be argued that activities, outside of the statutory language but within the reach of section 5 under the jurisdictional deficiency doctrine, do not differ from those activities explicitly prohibited in section 3 or section 7 in any way relating to anti-competitive effect or economic justification; and therefore that they should be subject to the same burden of proof as their Clayton Act counterparts. This approach, for example, would subject exclusive dealing contracts for services to a *Standard Stations* test,⁹⁵ and

⁹² 56 F.T.C. 456 (1959).

⁹³ 56 F.T.C. 1209 (1960).

⁹⁴ Oppenheim, *supra* note 88, at 836-37. In jurisdictional deficiency cases, Professor Oppenheim advocates adhering to the burden of proof for anti-competitive effects used in Sherman Act and Clayton Act cases for activities which, but for the jurisdictional deficiency, would have been within those sections. The opposing view would employ a rule of reason test in § 5 jurisdictional deficiency cases. Oppenheim avoids dealing with the dilemma with regard to § 3 of the Clayton Act by interpreting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), as restoring the *Maico* (*Maico Co.*, 50 F.T.C. 485 (1953)) rule of reason burden as the test for exclusive dealing agreements. Oppenheim, *supra* note 88, at 847.

⁹⁵ *Standard Oil Co. v. United States*, 337 U.S. 293 (1949).

a horizontal merger between unincorporated businesses to the same guidelines and judicial tests which govern corporate mergers.

Thus, the foregoing analysis supports the conclusion that, within the subject matter sphere of the Sherman Act and sections 3 and 7 of the Clayton Act, the only proper role for the broad prohibition of section 5 against unfair methods of competition is as a tool for reaching anti-competitive practices economically equivalent to those proscribed by the Clayton Act, but not covered by the Clayton Act because of the technical limitations of section 3 and 7.

IV. IMPACT OF SECTION 5 UPON THE LAW OF PRICE DISCRIMINATION

The extension of section 5 to cover activities within the subject matter sphere of the Robinson-Patman Act raises not only the issues encountered above, but also problems unique to and inherent in price discrimination law. Consequently, an analysis of the relationship between section 5 and the Robinson-Patman Act provides an example of the need to reconcile the various antitrust laws to promote a coherent, rational antitrust policy and entails an inquiry into the field of price discrimination law.

The FTC frequently brings proceedings under section 5 to attack Robinson-Patman Act violations.⁹⁶ For example, the Commission has prohibited the granting of cumulative quantity discounts,⁹⁷ discriminatory treatment of price cutters as a condition of selling to them in the future,⁹⁸ the granting of price concessions to favored customers who have given preferred display position to the seller's products,⁹⁹ the granting of rebates or discounts not equally available to all competing purchasers,¹⁰⁰ price discrimination for the purpose of underselling competitors¹⁰¹ and the conditioning of discounts on the buyer's carrying a minimum stock of the seller's product.¹⁰² However, where the Commission's practice of proceeding under the section 5 complaint with the same standards of proof as it would use if the case had been brought under the Robinson-Patman Act, cannot be said to extend the Robinson-Patman Act.¹⁰³

⁹⁶ This practice was approved in *Grand Union Co. v. FTC*, 300 F.2d 92, 95 (2d Cir. 1962).

⁹⁷ *Dentists' Supply Co.*, 37 F.T.C. 345 (1943).

⁹⁸ *Cream of Wheat Co. v. FTC*, 14 F.2d 40 (8th Cir. 1926).

⁹⁹ *Continental Baking Co.*, 37 F.T.C. 670 (1943).

¹⁰⁰ *Grove Laboratories, Inc.*, 54 F.T.C. 664 (1957).

¹⁰¹ *Crouse-Hinds Co.*, 46 F.T.C. 1114 (1950); *Utah Wholesale Grocery*, 39 F.T.C. 411 (1944).

¹⁰² *Champion Spark Plugs Co.*, 50 F.T.C. 30 (1953).

¹⁰³ A different problem arises if § 5 is used as a means of framing vague and broad charges which fail to give the respondent proper notice. *Morgan v. United States*, 304 U.S. 1 (1938).

In a 1964 section 5 case,¹⁰⁴ the FTC noted that unjustifiably low, albeit nondiscriminatory and above marginal cost pricing, may, if engaged in by a powerful firm, be a potent weapon of predatory and destructive economic warfare; and hence unfair under section 5.¹⁰⁵ This view seems to imply that section 5 could be extended to reach multiproduct sellers who sell in competitive and noncompetitive markets, and who charge a uniform low, yet above marginal cost, price for the product facing the stiffest competition. However, aside from that FTC comment, section 5 has been applied to extend the Robinson-Patman Act only in the areas of liability of buyers and promotional allowances.

In a 1960 case, *Grand Union Co.*,¹⁰⁶ the Commission held that a buyer who knowingly solicits and receives payments which are unlawful under section 2(d)¹⁰⁷ is engaged in unfair methods of competition or unfair trade practices in violation of section 5, notwithstanding that section's silence as to buyers. The Commission majority in *Grand Union* based its decision upon the theory that the purpose of section 5 was to bolster other antitrust statutes by outlawing practices which violate their "spirit" but not their letter. Since, as the Commission determined, the purpose of the Robinson-Patman Act was to curb the use of mass purchasing power by large buyers to gain price concessions, *Grand Union's* knowing solicitation and receipt of discriminatory advertising al-

¹⁰⁴ *Quaker Oats Co.*, 66 F.T.C. 1131, 1193-94 (1964). The Commission charges that the manufacturer had violated § 5 by selling a certain grade of oat flour below cost with the intent, purpose and effect of injuring or restraining competition. The § 5 charge was coupled with a § 2(a), 15 U.S.C. § 13(a) (1970), charge. The § 2(a) charge was dismissed for insufficient proof of adverse competitive effect because there was no showing that the cost of the oat flour was a significant element in the price of the finished product. 66 F.T.C. at 1193.

In dismissing the charge, after finding that the record did not indicate predatory or otherwise unfair conduct, the Commission noted that selling at unjustifiably low prices, though nondiscriminatory and not below cost (the Commission referred to "actual" cost and "cost of manufacture," leaving it uncertain as to whether the relevant figure is to be long-run or short-run, marginal or average, cost) may, if engaged in by a powerful firm, be a potent weapon of predatory and destructive economic warfare, especially where such sales are subsidized by profits from other product markets where the seller faced relatively weak competition. The difficulties inherent in extending § 5 to cover this type of multiproduct firm pricing policy are discussed in text at notes 181-184 *infra*.

¹⁰⁵ *Quaker Oats Co.*, 66 F.T.C. 1131 (1964). The Commission noted the absence of any evidence of predatory or other unfair conduct.

¹⁰⁶ 57 F.T.C. 382 (1960).

¹⁰⁷ 15 U.S.C. § 13(d) (1970). Section 2(d) prohibits the provision of discriminatory promotional allowances to a buyer. Section 2(e), 15 U.S.C. § 13(e) (1970), prohibits discriminatory articles or facilities furnished by the buyer to the seller. Both sections are aimed at discriminations given in connection with the resale of the supplier's product, and are *per se* in the sense that competitive injury need not be shown and the defenses provided in § 2(a), 15 U.S.C. § 13(a) (1970), are not fully available. Unless otherwise noted, the analysis below of the buyer-inducement promotional allowance cases and indirect customer case applies to both § 2(d) and § 2(e), even though only one section may be explicitly mentioned.

lowances was a violation of section 5.¹⁰⁸ Furthermore, since section 5 was used to reach an integral part of a transaction which was per se illegal as to sellers (the granting of promotional allowances implies the receipt of promotional allowances, and vice versa), in order to fulfill the policies of section 2(d) the same standard of per se liability should be applied to the buyers.

The Second Circuit affirmed in *Grand Union*.¹⁰⁹ The court, although noting the possibility of misuse of section 5 and recognizing the fear that the "spirit" of the Robinson-Patman Act could "haunt the antitrust laws, emerging wraithlike when the Commission utters the incantation 'section 5,'" ¹¹⁰ nevertheless concluded that such fears were misplaced in the *Grand Union* case for two reasons: (1) it was evident from the legislative history that the omission of buyers from section 2(d) was more "inadvertant" than "studious;" and (2) no previously legal transaction was being suddenly transformed into an antitrust violation. However, the court did acknowledge the existence of a distinction between a buyer and a seller engaged in receiving or granting advertising allowances: unlike the seller, the buyer has no control over ensuring that the payments are proportionate.¹¹¹ The seller possesses all the data which the buyer would need to determine whether in fact the advertising allowances were available to his competitors on proportionally equal terms. For that reason, the section 5 complaint was appropriately limited to "knowing" receipt or inducement of disproportionate payments.¹¹² The dissent,¹¹³ following the points made by Commissioner Tait's dissent below,¹¹⁴ objected to the judicial and Commission-made legislation of the *Grand Union* case, and claimed that by such use of section 5, the court and the Commission makes ex post facto laws, renders specific antitrust statutes superfluous, and expands the area of per se Robinson-Patman Act prohibitions without regard to the broader policies of the antitrust laws.¹¹⁵

Although the Commission did not explicitly make the an-

¹⁰⁸ In its affirmance, the Court of Appeals for the Second Circuit also laid emphasis on the fact that the benefits which *Grand Union* obtained came to it by virtue of its large size, and the practice was therefore directly contrary to the congressional aim, in enacting the Robinson-Patman Act, of protecting small businesses. *Grand Union Co. v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

¹⁰⁹ *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

¹¹⁰ *Id.* at 96 (footnotes omitted).

¹¹¹ *Id.* at 100.

¹¹² The court explicitly did not reach the question of whether inducement, absent receipt, of illegal payments, could cause a buyer to violate § 5 even though there was no seller violation of § 2(d). 300 F.2d at 96 n.4. Cf. *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962).

¹¹³ *Grand Union Co. v. FTC*, 300 F.2d 92, 101 (2d Cir. 1962) (dissenting opinion).

¹¹⁴ 57 F.T.C. 382, 426 (1960) (dissenting opinion).

¹¹⁵ 300 F.2d at 102, 104 (dissenting opinion).

nouncement until 1964,¹¹⁶ its success in *Grand Union* marked the beginning of a new enforcement policy: given a highly competitive industry with few buyers and many sellers, slight product differentiation, and the presence of discriminatory promotional allowances, the FTC would proceed under section 5 against buyers rather than under sections 2(d) or 2(e) against sellers. In *Max Factor & Co.*¹¹⁷ the Commission dismissed, without adjudication, charges of violations of section 2(d) on the ground that the respondents were only two of a very large number of suppliers participating in the special promotional events initiated by a large retailer; and as such, an order entered against only the respondents would be inequitable. The inequity lay (1) in the fact that, given the market structure described, proceedings against suppliers were unlikely to be brought against all suppliers¹¹⁸ (with the possible outcome of a buyer dealing with some suppliers who are enjoined from participating in promotional programs in which their competitors still participate); (2) in the difficult position the large buyer-small supplier relationship placed the supplier. The supplier was faced with the choice of joining the promotional program and risking a section 2(d) or a section 2(e) charge, or refusing to join the promotion thus losing shelf space in the buyer's outlet and the future good will of the buyer. The Commission concluded that it would be more economical and equitable, to proceed against the buyer¹¹⁹ in such special buyer-initiated promotional programs.

The emergence of the *Max Factor* doctrine has been substantiated by a line of cases¹²⁰ developing the basic factual elements required to establish a violation of section 5 through knowing inducement and receipt of an allowance in violation of section 2(d).¹²¹

¹¹⁶ *Max Factor & Co.*, 66 F.T.C. 184 (1964).

¹¹⁷ *Id.*

¹¹⁸ Even if the Commission could proceed simultaneously against all involved suppliers, a large buyer could easily turn to alternate suppliers.

¹¹⁹ Commissioner MacIntyre, without concurring in the result, enigmatically stated that he agreed that an *appropriate* proceeding under § 5 would be a better means for challenging such practices than a § 2(d) action against a seller. *Max Factor & Co.*, 66 F.T.C. 184, 251 (1964).

¹²⁰ See, e.g., *Colonial Stores v. FTC*, 450 F.2d 733 (5th Cir. 1971); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *aff'd* on other grounds, 390 U.S. 341 (1968); *R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *Giant Food, Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *Alterman Foods, Inc.*, 82 F.T.C. 298 (1973); *Kroger Co.*, Doc. No. C-2453, 3 Trade Reg. Rep. ¶ 20,396, at 20,278 (1973); *Foremost-McKesson, Inc.*, Doc. No. C-2427, 3 Trade Reg. ¶ 20,365, at 20,256 (1973); *Furr's Inc.*, 68 F.T.C. 584 (1965); *J. Weingarten, Inc.*, 62 F.T.C. 1521 (1963), *aff'd* on other grounds, 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965).

¹²¹ In *J. Weingarten, Inc.*, 62 F.T.C. 1521 (1963), *appealed* on other grounds, 336 F.2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965), the Court of Appeals for the Fifth Circuit approved the list of necessary factual elements for a buyer-inducement charge set forth

Evidence that a buyer had a position of near dominance in its field, had insisted on sharply increased rebates, and had met with resistance from publishers who protested and evidence that the rebates far exceeded those granted to competitors, combined with the fact that no competitor received proportionally equal allowances, supports a finding that the buyer knew or should have known of the disproportionality of the payments.¹²²

R.H. Macy's 100th Anniversary Sale provided the opportunity for further elucidation of the elements necessary to or sufficient for a *Grand Union*-type violation. The nature of the promotional allowance and the content of the requirement that such allowance be in connection with the resale of a supplier's product were examined in *R.H. Macy & Co. v. FTC*.¹²³ Holding that solicitation of contributions from suppliers by a buyer as large as Macy's was inherently oppressive and coercive, and that such activity contravened the spirit of the Robinson-Patman Act and hence violated section 5, the court relied upon a broad reading of section 2(d). The section was applied even though the payments were made solely for institutional publicity and Macy rendered no services for the suppliers.¹²⁴ However, the court did draw a distinction between payments by a supplier to a buyer who merely pocketed the money (a section 2(a) violation) and a supplier who used the payments for institutional advertising and promotions in order to attract more people into the store. In the latter case, the court reasoned, more people in the store meant more purchases of all goods which included more purchases of the supplier's goods, thus satisfying the "in connection with" requirement of the statute.

Although neither section 5 nor section 2(d) make reference to

by the Commission. 336 F.2d at 693 n.16. These elements were: (1) solicitation and receipt by a buyer of payments for promotional services in connection with the resale of the supplier's product; (2) a product of like grade and quality as that sold to competing buyers; (3) failure to affirmatively offer payments (from the seller) to competing customers on proportionately equal terms; and (4) proof that the buyer knew or should have known that the payments were not being made available to competitors on proportionately equal terms.

¹²² See *American News Co. v. FTC*, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962). The court limited the cease and desist order to inducement *and* receipt—mere attempt to induce illegal payments, without receipt thereof, has not been held to violate § 5, by either the courts or the Commission.

¹²³ 326 F.2d 445 (2d Cir. 1964).

¹²⁴ The *R.H. Macy* court examined the House and Senate Judiciary Committee reports, explaining the practices at which section 2(d) was aimed:

Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.

Id. at 448 (quoting from H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936)) (emphasis added by court).

knowledge, the Commission has imported language from section 2(f) into its FTCA section 5 complaints against buyer-inducement of promotional allowances.¹²⁵ In ascertaining whether the buyer had knowledge, the courts have cited *Automatic Canteen Co. of America v. FTC*¹²⁶ as setting the standard, but have then quickly read that case as providing the Commission with great leeway¹²⁷ in meeting its burden of proof;¹²⁸ arguably even more leeway than that permitted in section 2(f) cases.¹²⁹ Along these lines, it has been held that lack of knowledge is not a defense if it appears that such lack of knowledge is culpable.¹³⁰ Rather, looking at the record as a whole, the court will examine the evidence presented by the Commission to determine whether the purchaser, at the time of inducement and receipt, possessed enough information to be subject to a duty of inquiry to determine whether the payments were available to competitors on proportionally equal terms.¹³¹

There is some indication that the Commission desires to use section 5 to place an even heavier burden of disclosure upon purchasers by requiring them to disclose the material information concerning prices and allowances offered by suppliers. This disclosure would be required to be made to suppliers from whom a lower price or allowance is being sought, at least when the induced supplier indicates that his offer is designed to meet competition. It is not sufficient that the seller had indicated that the promotion at issue

¹²⁵ See, e.g., *Giant Food, Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

¹²⁶ 346 U.S. 61 (1953).

¹²⁷ E.g., *Giant Food, Inc. v. FTC*, 307 F.2d 184, 186 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963); *American News Co. v. FTC*, 300 F.2d 104, 111 (2d Cir. 1962). But see *American News Co. v. FTC*, 300 F.2d 104, 113 (2d Cir. 1962) (dissenting opinion).

¹²⁸ See *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 79-80 (1953) (trade experience as sufficient basis for knowledge).

The fact situations in which § 2(f), 15 U.S.C. § 13(f) (1970), cases most frequently arise appear to be more conducive to a higher degree of knowledge than § 5 cases of the buyer-inducement-promotional allowance cases. This is probably due to the greater certainty with which prices can be known and evaluated as compared with promotional allowances. See cases cited in note 129 infra.

¹²⁹ See, e.g., *General Auto Supplies, Inc., v. FTC*, 346 F.2d 311 (7th Cir.), cert. denied, 382 U.S. 923 (1965); *Mid-South Distributors v. FTC*, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961); *American Motor Specialties Co. v. FTC*, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960).

¹³⁰ *Giant Food, Inc. v. FTC*, 307 F.2d 184, 186-87 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

¹³¹ 307 F.2d at 187. The Commission explicitly stated in *Furr's, Inc.*, 68 F.T.C. 584 (1965), that the absence of an inquiry by the buyer of the seller does not prevent the Commission from finding that the buyer knew or should have known, where the record shows facts sufficient to put the buyer on notice that he was requesting a special allowance. *Id.* at 683-90. The Commission expressed no opinion as to what effect the fact that the buyer had made an inquiry of the seller and received an affirmative answer (to the effect that proportionally equal payments were being offered to the buyer's competitors) would have upon a finding that the buyer knew or should have known otherwise.

will be available to competitors at some undisclosed time in the future, *e.g.*, on their one hundredth birthday, the promotional allowance must be available on proportionally equal terms to all competitors at the same time.¹³² The evidence in the *Giant Food* case indicated that the promotional plan was buyer-initiated, independent of existing promotional allowances, involved payments disproportionately higher than those offered under existing promotional plans, and was so vaguely worded as to make it difficult for a supplier to offer proportionally equal benefits to his competing customers.¹³³ The court held that this fact situation, common to buyer-initiated promotional programs, was sufficient to support the Commission's finding of buyer knowledge.

The Commission has indicated that in buyer-inducement cases it will hold buyers to the standard of knowledge of a reasonable and prudent businessman.¹³⁴ However, as yet there is little guidance as to how a reasonable and prudent businessman should fulfill the buyer's duty of inquiry. The Commission has held that a statement on the buyer's promotional contract form, which was signed (albeit one month after the allowances were granted) by virtually all suppliers and which asserted that the "same agreement is made available by the Vendor on a proportionally equal basis to all dealers in the competitive area who purchase products herein satisfied," did not satisfy the buyer's duty of inquiry nor negate its inducement.¹³⁵ Language in *Colonial Stores* indicated that in this area, factual findings rather than legal principles will be determinative. Hence the courts most likely will place a great deal of weight upon the determination made by the Commission.¹³⁶

Two recent cases, *Alterman Foods, Inc.*¹³⁷ and *Foremost-McKesson, Inc.*,¹³⁸ demonstrate the Commission's willingness to apply section 5 to inducement cases involving a buyer operating at both the wholesale and retail levels. The respondents in both cases had sponsored trade shows in connection with which they had induced their suppliers to participate and to pay booth rentals. The

¹³² See FTC Advisory Opinion, No. 288, Receipt of Promotional Allowance without Concurrent Availability to Competitors, 74 F.T.C. 1668 (Sept. 6, 1968) (digest).

¹³³ *Giant Food Co. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

¹³⁴ FTC Advisory Opinion, No. 288, Receipt of Promotional Allowance without Concurrent Availability to Competitors, 74 F.T.C. 1668 (Sept. 6, 1968) (digest).

¹³⁵ [1967-70 Transfer Binder] Trade Reg. Rep. ¶ 19,248, at 21,417 (FTC 1970). The examiner characterized the buyer's forms as a "meaningless self-serving declaration obtained by the respondent [buyer] and worthy of no weight." *Id.*

¹³⁶ Insofar as the credibility of the buyer is at issue, as it would tend to be in determining state of mind and good faith effort to discharge a duty of inquiry, the Commission will in turn give great weight to the findings of the examiner.

¹³⁷ [1970-73 Transfer Binder] Trade Reg. Rep. ¶ 20,248, at 22,259 (FTC 1973).

¹³⁸ 3 Trade Reg. Rep. ¶ 20,365, at 20,256 (FTC 1973) (consent order).

FTC's decisions and consent orders attacked these inducements on the ground that they were not available to competing customers, including those customers who bought from the suppliers through intermediaries. As a result of these actions, firms acting as dual distributors must now identify their competitors at each level and insure that wholesalers, direct-buying retailers and indirect-buying retailers receive proportionally equal promotional allowances. A second result of these cases has been an expanded reading of the "in connection with the processing, handling, sale or offering for sale" requirement of sections 2(d) and (e) of the Robinson-Patman Act. The FTC concluded that the sales presentations at the trade shows (attended by retail customers and their guests) benefited the respondents' retail divisions and indirectly facilitated sales to the consuming public. These cases seem to indicate the intention of the Commission to use section 5 as an elastic clause to expand the restrictive language of the Robinson-Patman Act.¹³⁹

V. AN EVALUATION OF THE RELATIONSHIP BETWEEN THE ROBINSON-PATMAN ACT AND SECTION 5

The Robinson-Patman Act, like the Clayton Act, is a precisely drawn statute aimed at specific types of practices which cause competitive injury by substantially lessening competition or by tending to create a monopoly. Because of this loose competitive injury test and its specific language, it might appear reasonable to use section 5 in the same manner in the Robinson-Patman Act area as in Clayton Act sections 3 and 7 areas, that is, to fill in the gaps where activities covered by the policy of the Act fall outside of its proscriptions because of technical limitations. However, the problem cannot be resolved that simply. The Robinson-Patman Act is aimed not only at price discrimination tending to injure competition, but also at price discrimination which has a tendency to injure competitors. Practices which are pro-competitor are not necessarily pro-competition—a fact responsible for much of the tension in the Robinson-Patman area. These two policies are often in conflict and thus sacrifice of one may be required in order to further the objectives of the other.

It would not be consistent with the policy of the statute to extend the Robinson-Patman Act where practices similar to those prohibited by the Act, but outside its technical confines, may substantially restrain competition. Such an approach ignores the policy behind that part of the Robinson-Patman Act which is aimed at

¹³⁹ Another recent complaint, *Great Atlantic & Pacific Tea Co.* [1970-73 Transfer Binder] Trade Reg. Rep. ¶ 19,639 at 21,685 is discussed in text *infra* following note 196.

protecting competitors.¹⁴⁰ It is this internal conflict of statutory purposes which requires a different approach to the use of section 5 in the Robinson-Patman Act area than in the Clayton Act area.

As mentioned above, the Commission has applied section 5 to extend sections 2(d), 2(e), and 2(f) of the Robinson-Patman Act. Sections 2(d) and (e) play an integral part in implementing the overall policy of the Robinson-Patman Act "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."¹⁴¹ Prior to the enactment of the Robinson-Patman Act, congressional concern had focused on the buying practices of large retailers of and the preferential treatment accorded to large retailers.¹⁴² Especially noticed was the practice of inducing price discrimination in the form of advertising and promotional allowances.¹⁴³ However, the only provision of the Robinson-Patman Act addressed to buyers merely dealt with inducements to discriminatory prices and did not mention discriminatory allowances or services.

The Act has been limited further by the Commission's insistence upon interpreting each subsection of the Robinson-Patman Act separately, rather than reading the Act as a whole.¹⁴⁴ The Commission has read sections 2(c), (d) and (e) as per se prohibitions. Thus, injury to competition need not be proved and the usual price discrimination defenses of section 2(a) are not available.¹⁴⁵ Likewise, the Commission has sharply distinguished between those sections and sections 2(a) and (f), and has refused to combine them to produce an integrated statute, possibly due to the differences in standard of proof. A tradition of reading the Robinson-Patman Act

¹⁴⁰ The purpose of this legislation is to restore, so far as possible, equality of opportunity in business by strengthening the antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.

H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936).

¹⁴¹ *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960).

¹⁴² See, e.g., FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 57-65 (1935); C. Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 6-11 (2d rev. ed. 1959).

¹⁴³ See FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 44-46, 78-82 (1935); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

¹⁴⁴ *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 71, 76-77 (1953).

¹⁴⁵ To be sure, there is evidence that it may have been the legislative intent to treat indirect price discrimination, such as brokerage and promotional allowances, differently, for there were continual references to the §§ 2(c), (d), and (e) practices as "secret" discriminations. See 80 Cong. Rec. 8126, 8127, 8132, 8135, 8137, 8226 (1936). Nonetheless, among those commentators who would not do away with the Robinson-Patman Act entirely, there is strong support for abolishing § 2(c) and incorporating §§ 2(d) and (e) into § 2(a)'s prohibition against indirect price discrimination. See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 64-67, rehearing denied, 361 U.S. 855 (1959).

as a whole most likely would have led the Commission to proceed against buyer-induced discrimination under section 2(f) on the assumption that the prohibitions of sections 2(d) and (e) were included in section 2(f)'s "discrimination in price." Instead, the policy of nonintegrated statutory interpretation has been a strong force in the developing reliance on section 5 of the FTCA.

An examination of two types of Robinson-Patman Act extensions, the indirect-customer doctrine and the buyer-induced promotional allowances, and the approaches taken by the Commission and the courts to each is revealing. The Commission and the courts appear to be more willing to read the Robinson-Patman Act broadly and without resort to section 5 where the issue can be narrowed to one section of the Act, as in the cases espousing the indirect-customer doctrine.¹⁴⁶ However, where the activity conceivably required a combination of two sections of the Act to justify the complaint, section 5 of the FTCA has been pressed into service.

The Robinson-Patman Act, prior to *Grand Union* and *Fred Meyer*, had not been interpreted to include either: (1) buyers who induced discriminatory promotional allowances or (2) buyers who did not purchase directly from the seller or subject to seller control over price or terms of sale.¹⁴⁷ In *Grand Union* and its related line of cases,¹⁴⁸ the Commission resorted to the "unfair method of competition" language of section 5, while in *Fred Meyer* the Supreme Court reached the indirect buyers by directly extending section 2(d).¹⁴⁹ In the latter case, the Court adopted the rationale of the dissenting opinion of Commissioner Elman.¹⁵⁰ The Commissioner argued that sellers who grant price and promotional allowances to direct-buying retailers must grant proportionally equal allowances to competing indirect-buying retailers rather than simply to the direct-buying retailers or wholesalers. This extension of the word "purchaser" to include retailers remote from the manufacturer requires the language of the Robinson-Patman Act to be stretched little less than the buyer-inducement cases require. However, because of the established approach of reading each prohibition of the Robinson-Patman Act independently of each other prohibition, the section 5 approach was employed in the latter cases.

¹⁴⁶ See, e.g., *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

¹⁴⁷ Previously, the indirect purchaser doctrine had been limited to transactions in which the seller exercised substantial control over the terms upon which the buyer purchased. See, e.g., *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969); *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956); *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y. 1968); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937).

¹⁴⁸ See cases cited in note 124 supra.

¹⁴⁹ 390 U.S. at 348, 352.

¹⁵⁰ *Id.* at 355, following *Fred Meyer, Inc.*, 63 F.T.C. 1, 74 (1963) (dissenting opinion).

Closer examination of the *Grand Union* line of cases fails to reveal any radical extension of the Robinson-Patman Act as a result of the utilization of section 5 in reaching buyer-inducement of promotional allowances. Such use of section 5 has not resulted in the creation of a new substantive antitrust violation but rather in the application of an established rule against another party to an already-prohibited practice. There is no indication in the legislative history of the Robinson-Patman Act that buyers ought to be immune from the restrictions embodied in section 2(d).

Generally, the fact that a purchaser can induce and receive allowances or services not available to his competitors indicates the presence of a degree of market power in that purchaser. Presumably, the induced allowance or service will provide the purchaser with a further advantage over competitors. The acquisition of competitive advantages by one already in possession of a degree of market power widens the gap between the competitive viability of the large and small competitors, and tends to eliminate the less viable. Thus, a more concentrated market may be produced. It was exactly such a process which the draftsmen of the Robinson-Patman Act sought to prevent. Therefore, if the facts of a particular instance of price discrimination indicate that the effect of the inducement is more than insubstantial, it should fall within the prohibition of section 5 as conditioned by the Robinson-Patman Act. Furthermore, inducement of discriminatory prices and promotional allowances may, at least in a concentrated market, result in the recipient being free from pressure to pass on any savings to customers. The same result may occur even in a non-concentrated market, provided the inducing supplier is large enough and cautious enough to induce secret allowances from his suppliers. Both these factors increase the likelihood that inducement of discriminatory allowances will be anti-competitive in the manner envisioned by the framers of the Robinson-Patman Act.

Further evidence that *Grand Union* represented an appropriate case for the application of section 5 lies in the fact that the practice which is explicitly forbidden by section 2(d) requires the participation of two parties, a buyer and a seller. As long as the buyer is cognizant of the discriminatory nature of his allowance, holding him liable under section 5 hardly creates a totally new offense. In the case of a large-volume buyer, it may be more equitable and effective to attack the practices from the buyer's rather than the seller's end.¹⁵¹ Section 2(d) was aimed at *covert* price discrimination disguised as advertising allowances. Inasmuch as its prohibitions were

¹⁵¹ See the discussion of the *Max Factor* doctrine in text following notes 117 *supra*.

made absolute, a prima facie case of violation does not depend on a showing of competitive injury.¹⁵²

Since the requirement that promotional allowances be made available to all competitors on proportionally equal terms was imposed not to punish sellers for granting any promotional allowances but rather to protect a large buyer's competitors, the per se prohibition in section 2(d) arguably should apply with equal force whether the proceeding is brought against a buyer or a seller. However, assuming both the desirability of encouraging buyers to seek advantageous terms and the practical difficulties which confront a buyer seeking to discover the allowances which his seller has granted competing buyers, it is difficult to justify the adoption of a per se rule. The fuzziness of the policies involved in holding buyers liable is evidenced by an evaluation of the burdens the Commission would require an inducing buyer to satisfy. For example, as a result of the *Fred Meyer* decision and the Advertising Guides,¹⁵³ a buyer who is both a wholesaler and a retailer must insure that all his competitors (wholesalers, direct and indirect-buying retailers, cooperatives) receive advertising allowances which equal the cost to them of mounting advertising programs similar to that mounted by the buyer who originally sought the allowance.¹⁵⁴ The seller's burden of guaranteeing that his indirect customers receive benefits equivalent to those granted to his direct customers is slight in comparison with the burden upon a buyer presumed to be dealing at arm's length with the seller whose records he seeks. It should be noted that these are records of allowances granted his competitors.¹⁵⁵

It is disturbing that the Commission, in the buyer-inducement of advertising allowance cases, applied section 5 not as the result of its own conclusion that the prohibited conduct was sufficiently anti-competitive or anti-competitor to conflict with the policies in the Robinson-Patman Act, but rather on the basis that the conduct constituted a per se violation of a congressional mandate, the spirit of the Robinson-Patman Act.¹⁵⁶ Section 5 of the FTCA was de-

¹⁵² *Simplicity Pattern Co. v. FTC*, 360 U.S. 55, rehearing denied, 361 U.S. 855 (1959).

¹⁵³ *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. § 240 (1974).

¹⁵⁴ See, e.g., *Foremost-McKesson, Inc.*, 3 Trade Reg. Rep. ¶ 20,365, at 20,256 (FTC 1973).

¹⁵⁵ Per se rules should not be applied unless it is clear that the situation is one unlikely to be justifiable. That this is no longer the case in the area of promotional allowances, given the indirect-purchaser and buyer-inducement extensions of that area, can be seen by applying the Guides to prices rather than simply allowances, or even to price promotions without any performance required in connection with the price allowance. Applying the Advertising Guides, the seller would be responsible for insuring that his wholesaler's customers pay the same price as his direct-buying customers of the same level. The result would be a system of resale price maintenance. See, e.g., *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972).

¹⁵⁶ For example, in *Max Factor*, 66 F.T.C. 184 (1964), the Commission perceptively

signed specifically to provide the Commission with the flexibility necessary to apply its administrative expertise in the determination of what constitutes unfair methods of competition. Although the results were proper in the buyer-inducement cases, a blind following of so-called legislative mandates without analysis of the competitive implications of pricing practices could result in undesirable enforcement policies, and mocks the Commission's expertise and function.¹⁵⁷ In the future this could well result in a Commission chasing "wraithlike" Robinson-Patman spirits rather than pursuing those violations with more substantive effects on competition and competitors. The question of the propriety of using section 5 of the FTCA to extend the Robinson-Patman Act obviously encompasses more than the buyer-inducement cases of the 1960's.

VI. A MODEL FOR THE USE OF SECTION 5 AS A ROBINSON-PATMAN ACT SUPPLEMENT

A. *Judicial Legislation*

Extending the scope of a statute, either by means of a broad reading of its own language or by means of a mandate contained in another related statute, is a powerful tool of judicial legislation. This latter term is not used pejoratively. On the contrary, it is the responsibility of a principled judiciary to apply the tools of legal reasoning and analysis to the statute before it in order to give effect to the statutory purpose and to harmonize that statute with the surrounding statutory and common law framework. However, the aggressiveness with which the judiciary pursues a statutory policy should be a function of the clarity with which the legislature has expressed that policy.¹⁵⁸

B. *The Structure of the Robinson-Patman Act*

The Robinson-Patman Act was a product of legislative compromise, a marriage between the Clayton Act and an anti-chain-store bill.¹⁵⁹ Thus, it reflects not one strong policy but rather a

noted that in a buyer-inducement case, where the buyer has induced the non-proportional allowances, thus creating a situation in which the sellers have a good faith meeting of competition defense, it would be "anomalous and destructive of statutory policy" to read *Automatic Canteen*, 346 U.S. 61 (1953), as providing a defense for the buyer. *Max Factor Co.*, 66 F.T.C. at 251 n.4.

¹⁵⁷ The need for the Commission to develop procedures compatible with its broad administrative function rather than relying on judicially-conceived rules of practice is discussed in Dingell, *Dingell Report on the Federal Trade Commission's Enforcement of the Robinson-Patman Act*, 3 Antitrust L. & Econ. Rev. 53 (1970).

¹⁵⁸ For example, in interpreting the Sherman Act, the courts have found a very clear legislative intent and have thus continually extended the coverage of the Act.

¹⁵⁹ See Note, *The Robinson-Patman Act in Action*, 46 Yale L.J. 447, 448-50 (1937).

combination of elements of two policies. Preventing the type of harms inherent in secondary line injury (injury among competitors of the customers receiving the discriminatory price) may result in authorizing practices which have unfavorable primary line effects (effects on competition among competitors of the initiator of the discriminatory price), and vice versa. The meeting competition defense (§2(b)) provides both a cogent illustration of the dilemma and a resolution of the issue. By establishing this defense, Congress made the value judgment that the secondary line injury to unfavored purchasers was outweighed by the primary line injury which a seller would face if he could not lower his price to meet a competing offer.

There is no simple relationship between antitrust policy, as contained in the Robinson-Patman Act, and economic theory. The tensions present in the Act cannot therefore be resolved by economic analysis without careful reference to the congressional purposes in enacting this price discrimination legislation.¹⁶⁰ It is for this reason that the Commission and the courts must proceed with caution in extending the Robinson-Patman Act.

The Act itself contains elements of policy reconciliation resulting from an attempt to distinguish between destructive price discrimination and competitive price discrimination.¹⁶¹ Section 2(a)

¹⁶⁰ For the view that the Robinson-Patman Act, as administered, operates to restrain vigorous price competition and also victimizes the smaller firm, see Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law—A Paradox of Antitrust Policy*, 64 *Colum. L. Rev.* 415 (1964).

¹⁶¹ The Supreme Court gave similar advice to the Commission and lower courts in *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963): "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." *Id.* at 527.

In distinguishing between desirable and undesirable price variations, the focus should be upon price discrimination, rather than upon mere price differences, taking costs into account. Only those prices which reflect economic price discrimination should be a target of an antitrust policy which has as one of its aims efficient allocation of resources through a competitively-structured economy. Given a price discrimination, it must then be examined to see at what level the discrimination operates: whether the discrimination is likely to injure competition among competitors of the initiator of the discriminatory prices (primary line injury), or among competitors of the customers receiving the discriminatory price (secondary line injury), or at both levels. This determination is related to the nature of the competitive injury: is it injury to competition (in the broad sense) or to competitors? The former leads to damage akin to that caused by monopolization while the latter may be limited to damage to business opportunities for a few firms, involving standards of fairness in addition to antitrust concepts. Injury to competitors in the primary line may well be caused by competition which is "fair." Unless the lower price is below marginal cost, or unless so many sellers are driven out of the business that, in view of the power and purpose of the seller, a continuation of the discrimination would be inconsistent with the healthy continuation of a competitive market, the practice does not possess the requisite degree of unfairness necessary to fall within the policy of section 5. On the secondary line, however, injury to competitors represents a more substantial claim for section 5 protection. If, as is usually the case, the favored customer is a

prohibits only that price discrimination which substantially lessens competition, tends to create a monopoly, or injures, destroys or prevents competition with any competitor. Meeting competition and cost justification defenses were provided to enable competitors to survive during price wars and to take advantage of economic efficiencies. Brokerage and promotional payments, considered invidious practices used to conceal price discrimination, accordingly were made subject to strict per se prohibitions. This framework is the proper reference point for responsible expansion of the Robinson-Patman Act. Careful analysis of the anti-competitive effects of a practice is necessary to determine whether a practice should be declared illegal subject to a rule of reason analysis and the full array of the statutory defenses, or whether one of the existing per se rules should be extended to include the practice.¹⁶² Failure to give proper weight to the various policies and elements contained within the Act can too easily result in the underlying rationale being lost if the scope of the Robinson-Patman Act's prohibitions is broadened beyond that reasonably defined by its language.

C. *The Role of Section 5*

Given the problems inherent in the Robinson-Patman Act, "the wiser course for th[e] [Supreme] Court [would be] to hew as closely as possible to the wandering line that the statute has drawn (with due deference to the expertise of the Commission charged with enforcing this statute). . . ."¹⁶³ However, the FTC is also charged with enforcing section 5 of the FTCA which prohibits unfair methods of competition. Thus, an important issue is presented: the nature of the relation between the broad mandate of section 5 and

larger customer, persistent, non-cost-justified price discrimination (direct or indirect) is likely to lead to a less competitive market structure on the buyer's side. On the other hand, it is also likely to be in the interest of competition on the seller's level to permit the seller to adjust prices according to market conditions, to clear the market.

The structure of the market and the identity of the price discriminator is likewise important. Discrimination practiced by a relatively small firm or a new entrant into the market is unlikely to have an adverse effect upon competition. If, for example, the discriminator is a member of an oligopolistic market of a recently broken-up cartel such price discrimination represents shading and is a move toward, not away from, a competitive pricing system. See, e.g., W. Hawley, *The New Deal and the Problem of Monopoly* 83 (1966).

The criteria sketched briefly above, though by no means exhaustive, indicate the lines along which analysis of anti-competitive effect should proceed, and indicate the types of anti-competitive conduct (persistent, significant, discriminatory, below marginal cost pricing, and inducement by large buyers of non-cost-justified allowances) at which the Robinson-Patman Act was aimed.

¹⁶² See Elman, "Petrified Opinions" and Competitive Realities, 66 Colum. L. Rev. 625 (1966). Commissioner Elman warned that improper extension of the antitrust laws may result in their becoming "quaint, breathtakingly subtle and logical, but of little contemporary relevance." *Id.* at 634.

¹⁶³ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 360 (1968) (Harlan, J., dissenting).

the specifically-focused Robinson-Patman Act. The canon of statutory construction mandating that statutes *in pari materia*—statutes relating to a common end—should be construed together, will not let the Robinson-Patman Act rest in peace. Thus the various antitrust statutes and section 5 of the FTCA which are aimed at the promotion of vigorous competition, should be construed together in order to create a coherent expression of national antitrust policy.¹⁶⁴ Furthermore, as discussed above, it was the intent of Congress in creating the FTC to endow it with a sufficiently flexible and dynamic mandate to permit it to function effectively despite the accelerating changes in the nation's commercial practices. The Commission is endowed with a wide discretion in determining the type of order necessary to end the unfair practice found,¹⁶⁵ and must be able to close all alternative avenues leading to the prohibited goal.¹⁶⁶ In light of these considerations, any arbitrary attempt to prevent the Commission from reaching Robinson-Patman Act-type practices under section 5 would be to misinterpret the scope of authority which Congress, in enacting the FTCA, delegated to the Commission.

D. *Methods of Reconciliation*

There are four main theories which are currently advanced by the Commission, courts and commentators and which seek to define the proper scope of the Commission's power to extend the Robinson-Patman Act under section 5.¹⁶⁷

The courts have followed the "policy" or "spirit" test, which permits section 5 to extend the Robinson-Patman Act by outlawing activities which violate its spirit but not its letter.¹⁶⁸ The potentialities and pitfalls of this approach were discussed above.¹⁶⁹ Because the cases in which the Commission or courts have promulgated this theory involved promotional allowances which are practices subject to a per se Robinson-Patman prohibition, the extension has developed into a "per se knowledge" rule. As mentioned earlier, justifying new per se rules by a tool as nebulous as the policy or

¹⁶⁴ See, e.g., *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953): "Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Id.* at 74.

¹⁶⁵ *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). But see *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974).

¹⁶⁶ *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

¹⁶⁷ The theories were in fact developed to apply to the antitrust laws in general, but for the purposes of the remainder of this paper, the discussion will be limited to their application to the Robinson-Patman Act field.

¹⁶⁸ *Grand Union v. FTC*, 300 F.2d 92 (2d Cir. 1962).

¹⁶⁹ See discussion in Part V *supra*.

spirit test runs the risk of upsetting the congressionally-established balance of policies contained in the Robinson-Patman Act.

A second theory is based upon the "general subject matter" approach of Professor Handler: "[W]here Congress has spoken on the general subject but what it has said does not go as far as the Commission would like," the Commission should not find practices within that general subject to be unfair methods of competition.¹⁷⁰ The difficulty with this theory lies in the scope to be given to the term "general subject." For example, a difficult issue is whether Congress, in the Robinson-Patman Act, has spoken on the general subject of price discrimination, or merely on the subject of price discrimination in the sale of commodities.¹⁷¹

A third theory has been advocated by Professor Oppenheim. His position is that: "[O]n balance, the Commission has authority under section 5 to proceed against *equivalent types* of practices not within the jurisdictional bounds of the coverage specified in the Clayton Act."¹⁷² This "jurisdictional deficiency" doctrine suggests that section 5 adopt the standard of proof with regard to competitive injury which is contained in the relevant section of the Robinson-Patman Act. There are two difficulties with this approach. First, the equivalency concept is an easily expandable one, raising issues such as: (1) whether it should be limited to reaching new classes of competitors engaged in transactions explicitly prohibited by the Robinson-Patman Act; and (2) whether the charging of the same price for commodities of differing costs should be equivalent to the charging of different prices for the same commodities. Second, especially in the Robinson-Patman area, distinguishing between jurisdictional elements and other elements is a difficult process which, once accomplished, is still of questionable value.¹⁷³ Not only is so much of the Robinson-Patman Act "jurisdictional,"¹⁷⁴ but the different jurisdictional and non-jurisdictional elements bear with differing force upon the statutory policies, *i.e.*, some characteristics of a particular statutory violation are more important than others.¹⁷⁵

¹⁷⁰ Handler, *Recent Antitrust Developments*, 71 *Yale L.J.* 75, 97-98 (1961). Handler emphasizes that, as he reads the legislative histories, there is no requirement in either statute that the provisions of the Clayton Act are to be merged with § 5 and lose their identity as to the specific expression of the legislative intent on the legitimacy of the practices to which they relate.

¹⁷¹ For a critique of Handler's approach, see Pearson, *Section 5 of the Federal Trade Commission Act as Antitrust: A Comment*, 47 *B.U.L. Rev.* 1, 8-11 (1967).

¹⁷² Oppenheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts*, 59 *Mich. L. Rev.* 821, 835 (1961).

¹⁷³ That is to say, there is no reason to assume that a "jurisdictional" element is any less central to the policies of the statute than a "merits" element.

¹⁷⁴ For example, the requirements of two different purchasers, two contemporaneous sales, commodities of like grade and quality, in commerce, are all jurisdictional elements.

¹⁷⁵ See the criticism in Pearson, *supra* note 172 at 11-14.

The fourth theory resembles the theory proposed by this article but proposes a more broad employment of section 5 of the FTCA. It advocates the use of section 5 as an all purpose remedy for any unfair method of competition which has, in the Commission's opinion, an anti-competitive effect.¹⁷⁶ In propounding this "elastic clause" doctrine, Professor Pearson adopts a point of view apparently shared by many Commission members. This viewpoint is that section 5 is an independent source of antitrust law. However, this approach fails to specify which practices are anti-competitive or by which standard injury to competition should be evaluated.¹⁷⁷ The latter theoretical weakness is especially significant in the Robinson-Patman area, where the formation of critical distinctions between injury to competition and injury to competitors depends upon how the balance between primary and secondary line injury is struck.

This author agrees with Professor Pearson's interpretation of section 5 as a statute aimed at anti-competitive conduct. However, when used to attack practices in the antitrust sphere, the scope of section 5 of the FTCA should be limited by the standards developed in the course of interpreting and enforcing the Sherman, Clayton and Robinson-Patman Acts. The justification for declaring a particular practice an unfair method of competition available for section 5 proscription ought not to come from the viscera of the Commissioners but rather from the Sherman and Clayton Acts, for it is those statutes which provide concrete guides for antitrust policy. If the statute focuses on specific forms of injury to competition, the anti-competitive effects caused by the conduct sought to be made subject to section 5 attack should be required to produce similar injury.

In price discrimination cases, the proper standard for measuring the prohibited anti-competitive effects should be the degree to which market concentration and oligopolistic conduct has increased. In enacting the Robinson-Patman Act, Congress recognized that the practice of granting discriminatory prices to favored customers (specifically chain stores) provided the customer with a competitive advantage likely to result in the dominance of the market by those favored customers. The ability to continue to induce discriminatory prices would insure that smaller competitors remain in their weak position which would in turn result in a market of few firms capable of oligopolistic and oligopsonistic conduct. Higher, rigid prices,

¹⁷⁶ See *id.* at 14-18.

¹⁷⁷ Professor Pearson, while suggesting that the antitrust statutes may serve as guidelines and may be consulted concerning standards for determining anti-competitive effect, concludes that such reference does not indicate how anti-competitive injury is to be measured. *Id.* at 17-18. The approach of the present article uses the antitrust statutes as mandatory references for determining anti-competitive effect, and balances the alleged justifications against the type of injury with which the relevant statutory section was concerned.

lower output, and the destruction of small competitors were the evils motivating the Robinson-Patman Act's prohibition of price discrimination.¹⁷⁸

E. *A Proposal*

Analysis of the use of section 5 to reach incipient infractions and policy violations of the Sherman, Clayton and Robinson-Patman Acts revealed two major problems. First, section 5 was used frequently to reach practices which, while arguably "unfair," did not have anti-competitive effects as defined by the antitrust statutes. Also, section 5 was used to reach practices closely resembling those prohibited by the antitrust laws, but whose anti-competitive effects were minimal or nonexistent. It is submitted that the following proposal avoids these difficulties.

First, if a practice is already illegal under the Robinson-Patman Act, the Commission should not attempt to reach it under section 5.¹⁷⁹ Due process concepts of specificity and notice favor the agency proceeding under a specific rather than a general statute. Second, it should be recognized that the mere exclusion of a situation from the Robinson-Patman Act does not imply a congressional judgment that such a situation should be privileged. There is no indication in the legislative history of the Robinson-Patman Act that Congress meant to save each price discrimination not within its prohibitions or condemn each practice not specifically saved by one of the provisos. The privileged situations are defined by the defenses and provisos explicitly contained in the Robinson-Patman Act.¹⁸⁰ Having thus removed one obstacle from the use of section 5 as a price discrimination law, it is necessary to show an affirmative justification for reaching price discrimination practices under section 5. It is suggested that the affirmative justification can be found in the combination of the focus of section 5 on unfair methods of competition, the Robinson-Patman Act's requirement of a probability of a substantial lessening of competition, and that statute's definition of practices unreasonably restraining competition. Evidence of both substantially increased market concentration and the resulting market behavior provides a means of measuring the anti-competitive injury prohibited by the Robinson-Patman Act. Such evidence also constitutes a standard by which to measure the injury prohibited by section 5 where that provision is used in aid of the price discrimina-

¹⁷⁸ See generally H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); H.R. Rep. No. 2951, 74th Cong., 2d Sess. (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. (1936).

¹⁷⁹ This includes a practice alleged to fall under the Robinson-Patman Act's prohibitions, but the proof of which is insufficient by that Act's standards.

¹⁸⁰ See, e.g., the provisos of § 2(a) and the qualified proviso of § 2(b). 15 U.S.C. §§ 13(a),(b) (1970).

tion prohibitions of the Robinson-Patman Act. Although mere injury to competitors is an equally important focus of the Robinson-Patman Act, such harm should be outside the reach of section 5, except where enough competitors have been eliminated from the market to result in a significant decrease in the competitive quality of that market's price, output and allocation of resources. The Robinson-Patman Act was aimed at a specific type of conduct because it tended to produce specific harms. Where the same type of conduct, producing the same type of competitive harm, is neither explicitly proscribed nor protected by the Robinson-Patman Act, it should be a proper subject for attack under section 5 and the above standards. A broader reading of section 5, in connection with anti-trust prohibitions in general and price discrimination in particular, would render the Sherman, Clayton and Robinson-Patman Acts superfluous for purposes of FTC activity.

Admittedly, this approach places a substantial burden of proof on the Commission. The difficulty of proving potential anti-competitive effects has been emphasized by recent Supreme Court decisions.¹⁸¹ However, Congress created the Federal Trade Commission precisely for this sort of practical factual determination.

VII. ILLUSTRATIONS OF THE APPLICATION OF THE THEORY

A. "Unjustifiably" Low, Non-discriminatory Pricing by a Multiproduct Firm

In *Quaker Oats*, the Commission indicated that it viewed the charging of unjustifiably low, albeit uniform, prices by a large, multiproduct firm to be a "potent weapon of predatory and destructive economic warfare, and hence unfair"¹⁸² This statement recognizes the practice of multiproduct firms of financing expansion in one sector by profits earned in a more profitable sector, which enables the firm to charge lower prices than it would absent the "subsidization" available in the first sector. Where the differently priced goods satisfy the jurisdictional requirements of the Robinson-Patman Act, this is often the scenario which precipitates a Robinson-Patman Act case brought by a local firm against a nationwide firm.

A seller who keeps his price very low or barely remunerative, *i.e.*, above marginal cost, on products facing competition, while at the same time maintaining higher prices and profits margins on

¹⁸¹ See, e.g., *United States v. Marine Bancorporation, Inc.*, 94 S. Ct. 2856 (1974); *United States v. Connecticut Nat'l Bank*, 94 S. Ct. 2788 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

¹⁸² *Quaker Oats Co.*, 66 F.T.C. 1131, 1193-94 (1964).

different products is simply making an investment decision. The ability of a multiproduct or multimarket firm to "underwrite" its sales in certain areas from the profits in other markets may be viewed as "unfair" by less diversified merchants. While such price discrimination may evidence monopoly power,¹⁸³ it may also be evidence of competitive conduct such as price cutting designed to assist entry into a market surrounded by high barriers. Such markets are likely to net low profits initially for a new entrant. Obstructing entrance into such a "locked up" market by forbidding price cutting discourages competition and is inconsistent with the general pattern of the antitrust laws.¹⁸⁴ Decisions about what profit margin to accept are competitive investment decisions. The decision to finance price cuts in another market is merely a choice of investment policy. Financing one product by profits from another product or market represents other investment opportunities foregone. The fact that a firm could borrow money and, de facto, be in the same position implies that opportunity costs and interest rates should be computed as part of the cost of the low-priced product, thus compounding the difficulty of computing the price cutter's costs. The factor of complementary product lines also produces difficulty in distinguishing between profitable and unprofitable lines. Unless the price cutter is so powerful that it can afford to sell below marginal cost long enough to drive out its competitors, the resulting primary line injury will not likely be anti-competitive, and hence should not be attacked under section 5 of the FTCA.

B. *Non-Commodity, Non-Sale Transactions*¹⁸⁵

Under the Robinson-Patman Act, prohibited discriminatory transactions must involve sales of commodities. The making of loans, a sale of services, or a sale of real estate are examples of common non-sale transactions in which price discrimination might

¹⁸³ See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

¹⁸⁴ Compare this with the policy in other areas of antitrust of greater receptivity to justifications and greater willingness to sanction restraints where the restraints are essential to the continuation of the firm (usually a small firm or a new entrant) as a significant competitive force in a market dominated by a few larger firms. Cf. *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964).

The same analysis could be applied to price cutting practiced by an oligopolist. Because an oligopolist knows that an across the board price reduction on his part will be met by his competitors, he may be unwilling to institute such cuts, yet he may nonetheless be willing to test the water by a discriminatory price cut to one customer. Such price shading may eventually be matched by his competitors, leading to a gradual disintegration of the pre-existing oligopolistic price structure. Applying the Robinson-Patman Act to such a situation discourages price movements and reinforces the rigidities of oligopolistic pricing.

¹⁸⁵ A detailed study of the present state of the law in this area is found in ABA, *Report On Price Discrimination In Non-Sale And Non-Commodity Transactions* (1973).

arise, yet which are outside the scope of the Robinson-Patman Act. Likewise, the long-term lease of a machine, the licensing of patents, the consignment of goods and other non-sale transactions are not subject to the Robinson-Patman Act.¹⁸⁶ The legislative history of the Robinson-Patman Act indicates that the coverage of the law was limited to conventional sales of tangible articles and products.¹⁸⁷ This probably reflects the types of business transactions most common at that time, and those foremost in the minds of the legislators.

If a price difference is cost-justified, it generally will not result in an unreasonably anti-competitive effect. The theory of competitive pricing is based on costs. A sale of a commodity is typically a transaction which can be quantified by the accountant. The further the transaction moves from this benchmark, the more difficult it becomes to assign meaningful costs or values to the object of the transaction. Long term leases of commodities, especially those in which the allocation of risks resembles that accompanying a sale, are amenable to the pricing practices applied to sales, and are thus more susceptible to proof of anti-competitive effects. However, though competition, for example, in the television market, may well appear to be suffering as the result of discriminatory advertising rates, proof could require determining the cost and value of a minute of time on such widely diverse programs as a morning talk show, the evening network news and a seasonal special. Given the near impossibility of proving cost and establishing a causal relationship with the alleged anti-competitive effects, most likely it would be an unwise allocation of resources for the FTC to file complaints against such service transactions under section 5, and non-sale transactions should be attacked only where their elements closely resemble those of a sale.

C. Long-term Procurement Arrangements

The Robinson-Patman Act requires that the discriminatory transactions must be substantially or reasonably contemporaneous.¹⁸⁸ Those differences in prices between two non-

¹⁸⁶ E.g., *Baum v. Investors Diversified Servs., Inc.*, 409 F.2d 872 (7th Cir. 1969) (sale of mutual fund shares); *Tri-State Broadcasting Co. v. United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966) (contract with a news information service); *Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961), cert. denied, 369 U.S. 812 (1962) (contractual right to advertising time during a television broadcast); *General Shale Prod. Corp. v. Struck Constr. Co.*, 132 F.2d 425 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943) (construction contract requiring contractor to furnish bricks at a stated price); *United States v. United Shoe Mach. Co.*, 264 F. 138 (E.D. Mo. 1920), aff'd on other grounds, 258 U.S. 451 (1922) (lease of patents).

¹⁸⁷ The use of such words as "manufacture, sale or delivery," "goods, wares or merchandise," and "perishable goods" in § 2(a), 15 U.S.C. § 13(a) (1970), further supports a traditional reading of the word "commodities."

¹⁸⁸ See *Atlanta Trading Corp. v. FTC*, 258 F.2d 365, 369-70 (2d Cir. 1958).

contemporaneous transactions which result from diverse market conditions rather than from intent to discriminate have been held sufficient to make the transactions not contemporaneous.¹⁸⁹ There appear to be two reasons for the contemporaneous sales requirement: (1) to insure that the commodities sold are in fact relevant to the current competitive situation between buyers or sellers; and (2) to insure that the relevant market conditions are the same for each sale.

Long-term procurement arrangements generally exist in two settings. On the one hand, the market for the commodity involved may be such that most competing purchasers enter into long-term procurement arrangements, although they may have different commencement dates and duration. On the other hand, it may also be the case that only one firm in a market utilizes long-term procurement arrangements, while the majority of the purchasers buy at frequent intervals. In either case, the first reason for supporting the contemporaneous sales requirement is not present since by their nature, long-term procurement arrangements involve commodities that would be purchased at frequent intervals except for the specific arrangement. Primary line competition is thus affected by the granting of non-cost-justified favorable prices in connection with long-term procurement arrangements. Assuming that buyers purchasing under long-term procurement arrangements are in competition with buyers who purchase at regular intervals for the market on their level, the first justification also is unrelated to secondary line injury.

The second justification affects the use of section 5 and raises the same problems of proof of anti-competitive harm raised by the non-sale, non-commodity transactions. However, these problems should not prevent the use of section 5 in such situations, but rather they should serve to emphasize the need for careful analysis of market conditions and cost-justification defenses.

Thus it can be concluded that the policies of the Robinson-Patman Act which support the contemporaneous sale requirement do not, *per se*, reflect a judgment to permit long-term procurement arrangements to oust the statute. In addition, the anti-competitive effects on the primary and secondary lines are the same whether one or more of the sales involved in the discriminatory transactions was a non-contemporaneous sale by virtue of being a long-term procurement arrangement.¹⁹⁰ Accordingly, if proper consideration is

¹⁸⁹ *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793 (9th Cir. 1969).

¹⁹⁰ See, e.g., *Hartley & Parker, Inc. v. Florida Beverage Corp. & American Distilling Co.*, 307 F.2d 916 (5th Cir. 1962) (holding non-contemporaneous purchases within the scope of § 2(a), in a case involving stock on hand, purchased at a previous date in large quantities, being sold in competition with items more recently purchased by a competitor from the same seller at a different price).

given to changed market conditions, long-term procurement arrangements should be subject to section 5 proceedings.

D. *Economic Discrimination Resulting from Equal-Price Sales*

Economic price discrimination is present not only where the same goods with the same costs are sold at different prices, but also where goods of like grade and quality but with different costs are sold at the same price. However, the Robinson-Patman Act does not cover the latter situation.¹⁹¹

Two examples illustrate the types of situation in which equal-pricing generates economic discrimination. The first situation involves a *Borden*-type¹⁹² manufacturer who sells both branded and unbranded items which are commodities within the Robinson-Patman "like grade and quality" phrase. Assume that the manufacturer sells his branded item to a favored customer while offering competing customers only the unbranded item (at the same price as the branded item), and also assume that it can be shown that the cost of the branded item is greater than the cost of the unbranded item (due perhaps to advertising, more elaborate containers, etc.). If it is also true that (1) the price of the unbranded item is set to match the price which provides a sufficient return on the unbranded item, and (2) consumers will pay more for the branded than the unbranded item, then retail-purchasers of the unbranded item will either be forced to take a low return on that item in order to keep the price to the consumer below the price of the branded item, or they will lose customers to their competitor selling the branded item. Although not covered by the Robinson-Patman Act, this is clearly a case of secondary line injury. However, if indeed the unbranded item can be manufactured and sold at a lower price, in a competi-

¹⁹¹ Although "like grade and quality" may appear to be an arbitrary distinction, it is a necessary one in order to stop short of using § 5 to monitor a completely regulated economy. For example, a situation, involving similar products, in which economic price discrimination would have serious secondary line effects is illustrated by considering sales, by a manufacturer to a favored retailer, of a deluxe model item at the same price as sales of the standard model to competing, unfavored retailers. However, the difficulties of enforcing a prohibition against economic price discrimination across the entire economy are staggering. To be sure, such economic discrimination is subject to regulation in certain transportation fields (consider, for example, the role of the ICC) but there is a quantum difference between regulating one sector of the economy and the regulation that a theory of economic discrimination would allocate to § 5 of the FTCA. For if economic discrimination, rather than current Robinson-Patman Act violations, is taken as the starting point, there is no reason to limit the prohibition to charging the same price for different cost commodities. Any sale of commodities which resulted in a seller receiving a different profit margin than he received on other sales to competing purchasers, would fall within this expanded concept of price discrimination. Even if such a regulatory system were feasibly enforceable, the decision to so drastically depart from the limited thrust of the Robinson-Patman Act should come from the legislature, not from the Commission.

¹⁹² *United States v. Borden Co.*, 370 U.S. 460 (1962).

tive market with low barriers to entry, either another manufacturer would enter the field and manufacture the unbranded item at a lower price, or the unfavored retailers themselves would arrange for the unbranded item to be manufactured at a lower price. Unless the seller has a natural monopoly, his decision not to sell the branded, premium product simply opens up the market demand for another seller to fill. Furthermore, those factors which would prompt a manufacturer to limit the outlets for his premium product (e.g., limiting distribution to "exclusive" or high quality outlets) could well indicate the lack of competition, on their level, between the favored and the disfavored buyer. These considerations make it unlikely that such pricing practices would substantially restrain competition.

A second situation in which equal-pricing economic discrimination may arise is where a manufacturer distributes through a dual distribution system. Under the Robinson-Patman Act, a distributor can sell to purchasers at different distribution levels at the same price. The problem arises where some firms along the chain of distribution integrate and produce an entity which buys at one "level" of distribution but resells at a different "level." If the manufacturer sells to an integrated firm at the same price as it sells to all firms buying at that level, the non-integrated firms competing at its selling level are injured.¹⁹³ On the other hand, if the integrated firm is required to pay the same price as its competitors at the selling level, the integrated firm is denied the economics of its integration.

While it has been urged that the Commission should not use the Robinson-Patman Act to require uniformity of prices when selling to integrated and non-integrated firms,¹⁹⁴ if the manufacturer himself

¹⁹³ For example, if Seller (S) sells directly to Wholesaler (W) and Independent Retailer (IR) at a price of 90, there is no price discrimination unless Retailer (R) who buys from W, is also considered a purchaser from S. If, under § 5, this price structure is held to be a violation, S will, if 90 was indeed cost-justified, simply say that he will only sell direct, in large lots, to purchasers who will pick up at the plant, etc. This latter result cannot be attacked because it is not within the policy of the Robinson-Patman Act to regulate manufacturers' decisions concerning how much marketing they wish to undertake. Assuming that only W and IR will purchase under the set terms, it can be seen that IR should really also be viewed as a vertically integrated wholesaler.

On the other hand, under a different dual distribution scheme, consider if Seller (S₂) sells to Warehouse Distributor (WD); and WD in turn sells directly to Independent Jobber (IJ); and both WD and IJ sell to Dealers. Assuming that (S₂) has control over prices and terms of sale along the distribution chain, requiring that the price from S₂ to WD equal the price from WD to IJ (on the theory that IJ is an indirect customer of S₂), and if both IJ and WD sell to Dealers, results in injury to the integrated WD who also performs jobber functions.

These examples illustrate the dangers in comparing prices paid by purchasers who buy or sell at the same level but who perform different distribution functions, usually by virtue of operating on another level as well. See Memorandum for the United States as Amicus Curiae in Support of Petition for Certiorari 16-24, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968).

¹⁹⁴ See, e.g., Memorandum for the United States as Amicus Curiae in Support of

prices in that way, the Robinson-Patman Act cannot always reach him. Where the manufacturer charges an integrated wholesaler-retailer or cooperative the same price charged to competing retailers, directly or indirectly, the integrated firm is being denied any benefits of its possibly more efficient distribution system. Uniform pricing, unless justified by uniform manufacturer's costs, unreasonably impedes the development of efficiently integrated firms, and therefore is likely to be anti-competitive. Such functional pricing by the manufacturer may stimulate a trend toward vertical integration between the wholesale and retail levels, but vertical integration, absent pre-existing horizontal market power, does not increase concentration or restrain competition. To the extent that there are economies to be gained by vertical integration, and to the extent that "equal pricing" inhibits such integration, the practice should be vulnerable under section 5.

E. *Independent Brokers*

Section 2(c) of the Robinson-Patman Act was designed to prohibit the use of phony brokerage or price concessions given indirectly to favored large buyers and disguised as a brokerage paid to "dummy" brokers within the buyer's control. The Commission recently dismissed allegations that five food store chains and "ground" and "field" brokers had received illegal brokerage in violation of section 2(c).¹⁹⁵ The basis for the dismissal was the lack of evidence that the broker was acting for or in behalf of the buyer or subject to the buyer's direct or indirect control.

The brokers involved operate "on the ground" or in the growing areas and perform various buying and shipping services. They act as middlemen between the growers and the grocery stores. The FTC's section 2(c) complaint was based upon the argument that where a buyer obtains greater benefit from the broker than the seller does, the Robinson-Patman Act is violated unless the buyer pays the brokerage fee. Applying the model suggested in this article, the complaint should have failed even if it had been brought under section 5.

There is no evidence that the practice of a seller paying an

Petition for Certiorari 16-24, Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965) cert. denied 389 U.S. 1045 (1968).

¹⁹⁵ Doc. Nos. 8786-8790 were dismissed on January 22, 1974. 3 Trade Reg. Rep. ¶ 20,519, at 20,453 (FTC 1974). The Commission's dismissal orders cite: (1) Food Fair Stores, Inc., Philadelphia, Pa.; Hallee-Boy Sales, Orlando Fla.; and John P. Storm, Salinas, Calif. (D.8786); (2) H.C. Bohack, Co., Brooklyn, N.Y. and Henderson Distrib. Co., State Farmers Market, Pahakee, Fla. (D. 8787); (3) Jewel Companies, Chicago, Ill.; and Jack Stires, Inc. El Centro, Calif. (D. 8788); (4) Borman Food Stores, Inc., Detroit, Mich. (D. 8789) and (5) First Nat'l Stores, Inc. Somerville, Mass. and Ruby Produce Co., Pedricktown, N.J., (D. 8790).

independent broker is anti-competitive, or, if so, that having the buyer pay the fees in that case would be less anti-competitive. Presumably, in computing the selling price, the seller included the payments made to brokers. There was no evidence that the brokerage paid by the seller was discriminatory. Therefore, since the buyer's costs reflect the brokerage fees no more or less where he pays them as part of the seller's price than where he pays them directly to the broker, it is difficult to see why brokerage payments by sellers should be anti-competitive regardless of whether buyer or seller benefits more from the services. Furthermore, section 2(c) was not designed to regulate when and by whom independent brokers should be paid. Therefore, regulation of such payments under section 5 involves a substantial and unwarranted extension of the antitrust laws.

Assuming that small buyers pay more, for example, per crate of lettuce than do chain stores, and further assuming that price difference is wholly attributable to higher brokerage charges, a requirement that the buyer pay such charges would change nothing.¹⁹⁶ Whether the differential is cost-justified or in response to large buyer pressure, it is not likely to disappear merely because the buyer pays the brokerage fee. The price to the consumer and the profit to the food store presumably will remain unchanged. Price differentials charged by independent brokers are in fact differential brokerage fees, not price discriminations masquerading as brokerage, and as such represent discriminatory pricing in the sale of service. Assuming that an independent broker provides different services for different buyers and different sellers, proof that differential charges were anti-competitive, were not attributable to costs, and were for the purpose of favoring large buyers, will encounter the difficulties discussed above.¹⁹⁷

F. *The A & P Case*

The FTC recently filed a complaint raising the issue of the nature of the duty to investigate imposed on a buyer and a seller where a seller offers a low bid to a buyer in order to meet lower bids which the seller believes the buyer already has from competing sellers. In *Great Atlantic & Pacific Tea Co.*,¹⁹⁸ the FTC charged A&P with a section 2(f) violation for knowingly inducing and receiving discriminatory prices for dairy products and a section 5 violation

¹⁹⁶ See *Borman Food Stores, Inc.*, [1967-70 Transfer Binder] Trade Reg. Rep. ¶ 18,707, at 21,078 (Elman, Commissioner, dissenting).

¹⁹⁷ See Part VI A, *supra*.

¹⁹⁸ [1970-73 Transfer Binder] Trade Reg. Rep. ¶ 19,639, at 21,685 and ¶ 19,826, at 21,838 (FTC 1972).

for failure to provide its supplier, Borden, with material information concerning competing bids. A&P and Borden were also charged with membership in a combination illegal under section 5.¹⁹⁹ Borden had given A&P a price quotation at which it would supply milk to A&P, and informed A&P that the price was aimed at meeting the competitive bids which A&P already possessed. A&P accepted the offer with the knowledge that Borden had granted a substantially lower price than the only other bidder, but failed to notify Borden of that fact.

Charging Borden and A&P under section 5 as members of an illegal combination contravenes the model proposed in this article in that the alleged violation falls within sections 2(a) or 2(f), unless it is determined to be protected by the "good faith meeting of competition" defense of section 2(b) (in the case of Borden) or the "unknowning" defense in A&P's case. Section 5 should not be used for reaching instances of price discrimination which are covered (either explicitly included or excluded) by the Robinson-Patman Act.

The validity of charging a purchaser under section 5 for failure to notify a seller of the competing bids in the purchaser's possession, where the seller has indicated that his bid is made in order to meet competition, depends upon the competitive structure of the markets in which the buyer and seller operate. Nondisclosure of the exact level of competing bids is but one step in bargaining. In competitive markets, competition is increased when buyers vigorously attempt to bargain down sellers' prices. Likewise, a large buyer who pressures an oligopolistic or monopolistic seller into lowering his price may well initiate price cutting and lead to more competitive pricing practices. On the other hand, pressure by a large buyer upon a competitive seller is more likely to lead to some of the anti-competitive results, sought to be prohibited by the Robinson-Patman Act. By definition, a competitive seller is already selling at or near a competitive price. A buyer who succeeds in inducing a lower price further increases the large buyer's economic advantage over his competitors. If the buyer chooses not to pass the savings on to his customers, the anti-competitive implications are clear. However, if the buyer does pass the savings on in the form of lower prices, factors, such as how large a share of the market the buyer has and how close to marginal cost the seller's prices were, must be examined in order to determine whether the buyer was merely squeezing excess profits from his seller or whether he was in fact using his market power as leverage to capture a larger share of his market. Basically, the conclusion is that section 5 will not permit large buyers to bargain as vigorously as small buyers unless they are

¹⁹⁹ *Id.* ¶ 19,639 at 21,685.

bargaining against large sellers. Where the fight is between two heavyweights, a more competitive situation may result if they are allowed to fight unhindered than if section 5 is used to stabilize prices.

VIII. CONCLUSION

This article has attempted to formulate a working model for the use of section 5 as an antitrust tool, especially in the area of price discrimination law. The shortcomings of this endeavor, however, must be recognized. There are obviously elements and considerations important to antitrust law which have not been included in the model. Furthermore, situations may well arise which are not adequately handled by the model. However, models do have advantages which justify the effort necessary to develop them. The modeling technique provides an approach to problem solving different than the frequently used ad hoc technique of legal adjudication. Thus, it may produce different insights into the problem. Experience may expose flaws in the model which may require that it be abandoned and that new analysis be undertaken. If the flaw-finding and reanalysis lead to a more enlightened view of the problem, than the initial model was itself useful. For these reasons, the model's development and application should facilitate the task of understanding and harmonizing the antitrust laws.

BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XVI

JANUARY 1975

NUMBER 2

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