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Senate Bill No. II and Antitrust Policy

Kenneth S. Carlston

SENATE BILL NO. 11* AND ANTITRUST POLICY

KENNETH S. CARLSTON**

When an individual considers and selects the goals which he desires to reach, experiments with and carries out action designed to reach such goals, and evaluates the effectiveness of his past action with a view toward shaping his future conduct, we have *organized* action. The individual here learns that no one goal can override all others and that action must reflect a composite of goals and values.

As we move from the organized life of the individual to the organizational life of society, we learn that the process of *ordering* action is quite different from that of *evaluating* action. We learn that the legislative process of determining social goals, and allocating the resources of society to reach those goals, is quite different from the evaluative or judicial process. The latter makes *one* aspect of a complex factual situation the turning point for its decision and for its pronouncement of a rule for action. The former is concerned with harmonizing a number of conflicting social demands, determining priorities among them, and achieving proportion, balance and harmony in the resultant group action.

The history of the judicial interpretation of the Sherman Act[1] is a history of the legislative process working through the mechanisms of the judicial process. Starting with an act phrased in the most general of terms,[2] nearly seventy years of judicial administration have developed a system of interdependent postulates analogous to legislative norms.[3] None of these postulates can be considered as prevailing over all others. But the binding thread of the Sherman Act is the proposition that the market shall be dynamic, manifesting sufficient energy through price competition by the organizations participating in the market to ensure that the advances of technology will be constantly passed on to buyers.

A desirable postulate, which can be only partially realized through

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* 85th Cong., 1st Sess. (1957).

** Professor of Law, University of Illinois.

1. 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1952).
2. "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).
3. For a list of such postulates, see CARLSTON, LAW AND STRUCTURES OF SOCIAL ACTION 214 (1956). For a more extended analysis of the Sherman Act, particularly with regard to the legislative and judicial processes at work therein, see *id.* c. 7, as well as Carlston, *Antitrust Policy: A Problem in Statecraft*, 60 YALE L.J. 1073 (1951) and Carlston, *Role of the Antitrust Laws in the Democratic State*, 47 Nw. U.L. REV. 587 (1952).

law, is the proposition that each seller's prices should be uniform, with variances reflecting the performance of noncustomary marketing services.[4] The Robinson-Patman Act[5] can be said to represent an attempt to legislate that principle into economic behavior. In fact, however, by subtly equating injury to individual competitors to injury to "competition,"[6] the act is antithetical to the fundamental philosophy of the antitrust laws that *price competition in the market* shall be preserved. The act seeks to preserve *competitors* in the market from the hazards of price competition, rather than the competitive market system itself. Instead of harmonizing the demands of conflicting social groups in a manner serving the public interest, instead of finding a balance between the interests of sellers and consumers, the Robinson-Patman Act serves the limited interest of a single group of sellers.

By shifting the judicial spotlight from the protection of *competition* to the protection of *competitors*, the Robinson-Patman Act enormously expanded the area of judicial control of economic behavior. In so doing, it struck at the very vigor of the competitive process itself. Each seller could thereafter no longer throw himself into the hurly-burly of the market and vigorously seek to capture as much of that market as possible by price competition. The moment a nonuniform price reduction had the possibility of injuring *individual* competitors,[7] at that moment must he stop and seek justification under the act for his action.

The essentially anticompetitive philosophy of the Robinson-Patman Act was a product of the drive to reach economic security through law which emerged in the depression. Pressures of traditionally anticompetitive groups,[8] bringing to bear in their support the findings of the Chain Store Investigation,[9] were successful in procuring the enactment of the Robinson-Patman Act. The act is formally couched, however, in terms indicative of the laudatory purpose to supplement Sherman Act policy by prohibiting discriminations the effect of which "may be to substantially lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition." To the extent the act prohibits predatory or systematic price discrimination, it is in harmony with the stated purpose and other antitrust objec-

4. CARLSTON, LAW AND STRUCTURES OF SOCIAL ACTION 214 (1956).

5. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952).

6. FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948).

7. *Ibid.*

8. See Evans, *Anti-Price-Discrimination Act of 1936*, 23 VA. L. REV. 140 (1936). It cannot be said that these groups had or have specific intent to injure the American ideal of vigorous competition, at least insofar as it is applied to others. See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334 (1948).

9. FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION (1934).

tives.[10] To the extent, however, it prevents or suppresses price competition on any level or between levels of the market structure, it is anticompetitive and reflects the retrogressive group demands of particular individuals or institutions.

We have pointed out that the dominant philosophy of the act is in essence the proposition that protection of competitors is identical to the protection or promotion of competition.[11] Certainly the protection or guarantee of economic security to all businessmen can be recognized as one of the group demands impinging on the legislative process.[12] The degree to which such a particularistic demand should be granted in shaping the conditions of the market is a legislative problem of the greatest magnitude.[13]

We are here concerned with one facet, and a central facet, of that problem. We have before us the problem of a price reduction made to meet competition and whether price competition of such a nature shall be permitted under the act.

Price competition for the custom of buyers inherently tends to break down price uniformity; hence both statute and decision recognized that striving to retain a customer as against a lower bidder for his custom would justify price reduction, at least to the extent of eliminating the factor of price as an element of buyer preference. In that manner, a basis for reconciliation between the conflicting group interests was found and room provided for the competitive drive to express itself in a manner consistent with the norm of uniform price.[14] Statutory recognition of this right to meet competition is contained in section 2(b)[15] of the Robinson-Patman Act:

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10. It should be noted, however, that price discrimination of this nature is also prohibited by the Sherman Act and by § 5 of the Federal Trade Commission Act, 38 STAT. 717 (1914), 15 U.S.C. §§ 41-51 (1952). Standard Oil Co. v. United States, 221 U.S. 1 (1911); E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944). See also EDWARDS, MAINTAINING COMPETITION 106 (1949).

11. "This dislike of having the security of any businessman impaired by competition is characteristic of present day thinking in Britain. The British, however, recognize that this is a denial of the competitive ideal, whereas we seem to be giving effect to the same philosophy under the pretense that it is a means of preserving competition." GRIFFIN, AN ECONOMIC APPROACH TO ANTITRUST PROBLEMS 34 (1951).

12. "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. . . . We cannot guarantee competition against all injury. This can only be accomplished by prohibiting competition." H.R. REP. No. 1422, 81st Cong., 1st Sess. 5, 6 (1949).

13. "Most Americans have long recognized that opportunity for market access and fostering of market rivalry are basic tenets of our faith in competition as a form of economic organization." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955).

14. See note 6 *supra*.

15. 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1952).

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Senate Bill No. 11 now faces us with the question whether our present system of antitrust laws shall be changed to the end that price competition shall be completely subordinated to price uniformity and price flexibility shall be superseded by price rigidity. It presents the question whether price raiders of a businessman's customers can be met with their own weapons and whether, in such circumstances, retaliation must take the form of universal price reductions or whether retaliation may instead be selective and limited to the area of struggle for the single trader's custom. Ultimately, it raises the question whether the law will permit a price structure to be subjected to the erosive impact of individual price reductions to retain individual customers, resulting at times in the gradual crumbling and eventual collapse of prices and the establishment of a new and lower price level generally, or whether the temptation to cut price shall be closed by law to a competitor, except insofar as market pressures generally may have built up to a point calling for a general and overall price reduction.

Senate Bill No. 11 presents these questions because it proposes to eliminate or to so restrict the "meeting competition" defense as to render it virtually unattainable. The manner in which this is to be accomplished is devious and marvellously dextrous:

> PROVIDED, HOWEVER, That unless the evidence affirmatively shows that the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, in any section of the country, it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor: PROVIDED FURTHER, That nothing contained herein shall be construed to alter the law applicable to the absorption of freight or of shipping charges.

We shall analyze the effect of the proposed amendment in the next section of this paper.

The bill represents the most recent manifestation of continuous pressure to eliminate the "meeting competition" defense by administrative, judicial, or legislative action. As introduced, both the original Robinson bill and the original Patman bill omitted the broad absolute defense contained in the original Clayton Act.[16] The legislative process of amendment and conference eventually brought forth the defense now contained in section 2(b) as a limited preservation of the competitive system in the interests of sellers who wished to compete and buyers who desired the benefits of competition.[17]

Senate Bill No. 11 and its counterparts appear to be a product of the failure of the attack on the "meeting competition" defense in *Standard Oil Co. v. FTC*.[18] Following a long history of administrative and judicial proceedings, the Supreme Court held the defense to be absolute, rather than a mere procedural device in shifting the burden of proof. Since Senate Bill No. 11 is aimed at the nullification of this decision, the basic facts of the case bear restatement.[19]

In the Detroit area Standard had 358 dealer customers to which it sold gasoline at a uniform dealer or tankwagon price. Four of these customers eventually acquired jobber facilities—bulk plants and tank trucks—and took deliveries of gasoline in wholesale quantities. After repeated demands or ultimatums from these customers and after much bargaining and haggling, Standard granted reductions in price of one and one-half cents per gallon from the prevailing dealer price. These reductions were granted individually and over a period of years, extending from the reduction to the first customer in 1929 to the last reduction in 1938. It was undisputed that these reductions were granted reluctantly to retain these customers and only approached or matched "an equally low price offered by a competitor" on branded gasolines of comparable grade and quality.[20]

The Commission seized upon the "prima facie" language, preceding the proviso of section 2(b), and interpreted the statute so as to make the meeting of competition defense ineffective where there might be an injury to competition (*i.e.*, competitors) or where there might be one of the other market effects proscribed by section 2(a).[21] Since section 2(a) had already provided that no violation occurred unless there was a finding that the particular discrimination *might* tend to have one of the prohibited market effects, the Commission's approach neatly relegated the defense to a futile procedure. Under Senate Bill No. 11 the defense would not lie when there was otherwise a possible

16. 38 STAT. 730 (1914), 15 U.S.C. §§ 12-27, 44 (1952).
17. Compare the majority and minority opinions in Standard Oil Co. v. FTC, 340 U.S. 231, 247 n.14, 256 (1951).
18. 340 U.S. 231 (1951).
19. For a thorough economic analysis and a detailed investigation of the facts surrounding this proceeding see McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398 (1956).
20. 340 U.S. at 234.
21. 49 STAT. 1526 (1936), 15 U.S.C. 13(a) (1952).

violation of section 2(a) arising from a price discrimination lessening competition.

In reading the two subsections together, however, a majority of the Supreme Court rejected the Commission's construction and found the defense to be absolute within the narrow confines of its limitations.[22] The Court recognized that under the Commission's interpretation the defense "would have such little, if any, applicability as to be practically meaningless." In commenting on the element of injury the Court observed:

> It must have been obvious to Congress that any price reduction to any dealer may always affect competition at the dealer's level as well as at the dealer's resale level, *whether or not* the reduction to the dealer is discriminatory.[23] (Emphasis added).

Faced with conflicting economic philosophies, the Court stated:

> We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. . . . There is nothing to show a congressional purpose. . . . to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased costs.[24]

To this date the proceeding has not yet been finally resolved and is now again pending before the Supreme Court.[25] The case was remanded by the Supreme Court for a specific finding of fact on the question of "good faith." In spite of the fact that the original trial examiner found the necessary facts to establish "good faith," the Commission has refused to make such a finding and is now trying to bring it within the pricing system interdicted under the *Staley* case.[26] In the *Staley* case, the Commission used the Robinson-Patman Act to invalidate a rigid and fictitious basing point pricing system invulnerable under the Sherman Act and to legislate an alternative "mill net" pricing system. Although the system invalidated in *Staley* artificially raised prices and restricted competition, the *Staley* doctrine is now resorted to as a means of denying sellers a competitive practice which

22. It should be noted that the minority agreed with the majority that the effect of the Commission's construction was "to weaken competition in that a seller, while otherwise maintaining his prices, cannot meet his antagonist's price to get a single order or customer. . . ." but dissented on the basis of Congressional intent. 340 U.S. at 253-54.
23. *Id.* at 250.
24. *Id.* at 249-50.
25. Standard Oil Co. v. FTC, 233 F.2d 649 (7th Cir.), *cert. granted,* 352 U.S. 950 (1956).
26. FTC v. Staley Mfg. Co., 324 U.S. 746 (1945).

would tend to undermine the price level and to promote innovation and flexibility in the market structure.

LIMITED SURVIVAL OF THE DEFENSE?

Price discriminations prohibited by section 2(a) of the Robinson-Patman Act are those where the effect of the discriminations may be (1) "substantially to lessen competition or tend to create a monopoly," or (2) "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them." Proponents of Senate Bill No. 11 contend that the bill would bar the meeting competition defense only where the *first* of these effects is present and would, therefore, not entirely eliminate the defense. This faces the businessman with the difficult task of deciding when the meeting of competition defense is available, in reacting to a competitor's equally low price. He must decide whether the effect of a retaliatory price reduction might be to lessen *"competition,"* and would therefore be unlawful, or whether it might be merely *to injure or destroy "competition,"* and would therefore be lawful.

In maintaining that the meeting of competition still remains a complete defense under certain conditions, advocates of the bill trace delicate distinctions between the two types of effects. Such distinctions are not apparent upon a reading of the statute and are, at best, somewhat elusive. The American businessman is given credit for a great deal of finesse in the intricacies of a field in which experts usually disagree, although his morality in defending himself against economic attack is sharply questioned.[27] Certainly we can hardly ask him to have a lawyer at his elbow for consultation on every price reduction of this nature—a consulation which might in judicial retrospect later prove to be futile. Except for one very recent case at the district court level,[28] the courts have assumed that "substantial lessening of competition" and "injury to competition" are synonymous, and some cases appear to imply the identity in character of the two concepts.[29]

Supposedly, the latter effect is to be applicable to individual competitors, while the former effect is to apply to the vigor of competition generally.[30] The lack of judicial distinction of such a nature, however, is further aggravated by the all-too-frequent application of a rule of automatic illegality, where violations have been found to be caused

27. S. REP. No. 2817, 84th Cong., 2d Sess. 14 (1956).
28. Alexander v. Texas Co., 149 F. Supp. 37 (W.D. La. 1957).
29. FTC v. Morton Salt Co., 334 U.S. 37 (1948); Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), *affirming* 144 F.2d 211 (7th Cir. 1944); Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), *rev'd. on other grounds*, 340 U.S. 231 (1951).
30. H.R. REP. No. 2202, 84th Cong., 1st Sess. 6 (1955), reporting on a companion bill H.R. 1840.

by acts having an infinitesimal impact upon either the vigor of competition generally or upon individual competitors. In the *Morton Salt* case,[30a] the prohibited market effect was found to exist where one-tenth of one per cent of Morton's customers failed to receive a minute quantity discount of ten cents per case on salt sold in carload quantities. Either the *de minimis* rule was erroneously translated to mean "the law exaggerates trifles" or the degree of market effect was considered immaterial.

The extent to which the Commission recognizes any distinction in degree is shown by the *Minneapolis-Honeywell* case,[31] where the Commission ruled that "to the extent that business is held or diverted" by a price differential "competition has been adversely affected within the meaning of the law." Obviously, any sale holds or diverts business. The complexities of a market or economic analysis of the problem were also avoided in the recent *Moog Industries* case,[32] where the question of competitive injury was found to be a mere matter of "simple mathematics."

An attempt to minimize the tendency toward automatic or per se market effect in the language of Senate Bill No. 11 was made by way of amendment by Senator Wiley, when the bill was reported without recommendation from the Antitrust Subcommittee to the full Judiciary Committee. The bill now requires that the evidence *affirmatively* show the prohibited market effect. This language does not appear in section 2(a) itself, although it is fairly to be implied therein. Whether the underscoring of this truism in the bill will cause any substantial difference in the application of the statute is at least doubtful.

The fact remains that through the subterfuge of artful artlessness in draftsmanship, Senate Bill No. 11 will effect a practical repeal of the meeting competition defense. The legislative process would then achieve through indirection that which would most probably fail if approached frankly and directly. This is not the first time the technique has been used.

NECESSITY

By pointing in alarm to the Supreme Court's decision in the *Standard Oil* case, those groups opposed to competitive pricing have used the case as a focal point in their demand for corrective legislation to restore the "original" vitality of the act. Yet the *Standard Oil* case

30a. FTC v. Morton Salt Co., 334 U.S. 37 (1948).

31. FTC v. Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 397 (1948), *rev'd*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

32. Moog Industries, Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), *cert. granted*, 353 U.S. 908 (1957). With respect to testimony by customers to the effect that they had not been injured the Court stated: "A witness cannot be allowed by conclusion to deny a mathematical fact." Moog Industries, Inc. v. FTC, *supra*, 238 F.2d at 51.

was no sudden and unexpected change in existing law.[33] As the Supreme Court stated:

> [T]here has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for a seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor.[34]

The Court then went on to document its statement by citation of actions by the FTC in Commission proceedings and by statements made by or on behalf of the Commission, Commission Counsel, and the Department of Justice.[35] Of particular note is the statement filed by the Assistant Chief Counsel of the Commission with the Temporary National Economic Committee:

> The amended Act now safeguards the right of a seller to discriminate in price in good faith to meet an equally low price of a competitor, but he has the burden of proof on that question. This right is guaranteed by statute and could not be curtailed by any mandate on order of the Commission. . . . The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack.[36]

The Department of Justice[37] and the Department of Commerce,[38] both of which are vitally concerned with safeguarding our competitive system through our antitrust laws, have consistently opposed Senate Bill No. 11 and its predecessors. The White House, under both a Democratic and a Republican administration, has approved legislation contrary to the purposes of Senate Bill No. 11.[39] Even the Federal Trade Commission has at times opposed Senate Bill No. 11 and similar bills, and its current approval of the bill was reached only by a vote of three to two.[40] Its change in position may have been caused by the decision of the Ninth Circuit in the *Balian Ice Cream Co.* case,[41] but the rationale of that decision was lack of competitive injury, although the court spoke freely of the meeting competition defense.

Whence, then, the necessity for the legislation? Is it that the defense

33. But see Senator Kefauver's remarks in *Hearings on S. 11 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 212 (1956).
34. 340 U.S. at 246.
35. *Id.* at 246 n.12, 247 n.13.
36. THE BASING POINT PROBLEM 139 (TNEC Monograph 42, 1941).
37. *Hearings on S. 11 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 688 (1956) (hereinafter referred to as *1956 Hearings*); 85th Cong., 1st Sess. 826 (1957) (hereinafter referred to as *1957 Hearings*).
38. *1956 Hearings supra* note 37, at 344; *1957 Hearings supra* note 37, at 669.
39. *1956 Hearings, supra* note 37, at 165.
40. Statement of William C. Kern, Member of the Federal Trade Commission, *1957 Hearings, supra* note 37, at 641.
41. Balian Ice Cream Co., Inc. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955).

has been abused by sellers in successfully circumventing the issuance of cease and desist orders for violations of section 2 (a)? Such a surmise does not accord with the facts. Since the enactment of the Robinson-Patman Act in 1936, the Federal Trade Commission has not upheld the meeting competition defense in a single recorded case. Even after the Commission was reversed in the *Standard Oil* case, it has, as yet, refused to sustain the defense.

If this be so, what is the source of the pressure for the legislation? It comes from groups which historically have sought shelter from price competition, such as associations of retail druggists, retail grocers, food brokers, etc. These are the groups which supported other anticompetitive legislation favoring horizontal price fixing, such as the McGuire Act,[42] the Miller-Tydings Act[43] and the so-called state "fair trade" laws, and state sales below cost statutes. The bill may be known by the company it keeps.

> There are many yardsticks to test the sincerity of a professed admiration for the antitrust laws—and no one publicly admits being opposed to our antitrust laws—but certainly the acid test of such sincerity is unequivocal opposition to price fixing agreements in any form.[44]

Seemingly, the proponents of Senate Bill No. 11 look upon the defense of meeting competition as some monstrous loophole, which is used to subvert the object of the Robinson-Patman Act.[45] Not only does past experience fail to bear this out but the defense is so expressly and impliedly qualified as to make it an extremely limited one. Constantly overlooked in speculating hypothetical abuses of the defense is the requirement of "good faith," the meaning of which has now been fairly well developed by the courts. Other limitations of the defense include the following conditions: It is available only in individual competitive situations;[46] the competitor's price must be a lawful price or reasonably believed to be lawful;[47] a competitor's price can be met but not undercut;[48] the defense is not available where the intent is predatory;[49] there is a possible requirement that the defense can only be used to retain an existing customer;[50] the defense is

42. 66 STAT. 632, 15 U.S.C. § 45 (1952).
43. 50 STAT. 693 (1937), 15 U.S.C. § 1 (1952).
44. Statement of William Simon, *1956 Hearings, supra* note 37, at 165.
45. That the object of the act is not entirely free of serious question, see Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman,* 60 YALE L.J. 929 (1951).
46. FTC v. Cement Institute, 333 U.S. 683 (1948).
47. Standard Oil Co. v. FTC, 340 U.S. 231 (1955). See also REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 181 (1955). The question of lawfulness is in fact an aspect of the element of "good faith."
48. *Id.* at 182.
49. Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).
50. Standard Oil Co. v. FTC, 340 U.S. 231 (1955). *But see* REPORT, *op. cit.* note 47, at 184.

affirmative, *i.e.*, the burden of proof is on the defendant;[51] and there is some authority denying a seller the right to help his customer meet competition.[52]

PROSPECTIVE EFFECT

The Senate Committee Report on Senate Bill No. 11[53] in the 84th Congress sets forth arguments for and against price discrimination, thereby reopening an issue which was closed by the enactment of the Robinson-Patman Act in 1936. Although this basic issue is indeed still open to serious question,[54] by centering its attention on the broad issue the *Report* avoids the much narrower issue presented by Senate Bill No. 11. To the extent that the defense of meeting competition permits price discrimination, however, the arguments relating to this practice are pertinent.

In setting forth the economic arguments against price discrimination, the *Report* labors the obvious and repeats that which was long ago conceded by reciting the manner in which the practice of price discrimination may be abused.[55] The enactment of section 2(a) settled this question over two decades ago. The discussion overlooks the fact that section 2(b) is not an offensive weapon of large corporations, but is rather virtually an automatic reaction of a competitor, used by either the large or the small, in defense of the economic life of the user.

The sole argument advanced by the *Report* in favor of price discrimination consists of a rather desultory account of the erosive effect of price discrimination upon established prices. The concept is said to be of little weight because it rests upon "pure theory and speculation."[56]

The erosion theory begins with fact; it accepts as a starting point what now exists—imperfect competition. Many markets are oligopolis-

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51. Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945).
52. Enterprise Industries, Inc. v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965 (1957).
53. S. REP. No. 2817, 84th Cong., 2d Sess. 14 (1956).
54. Austern, *Inconsistencies in the Law*, in ANTITRUST LAW SYMPOSIUM 158 (CCH 1951); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948); Berger and Goldstein, *Meeting Competition under the Robinson-Patman Act*, 44 ILL. L. REV. 315 (1949); Burns, *The Antitrust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301 (1937); McAllister, *Price Control by Law in the United States*, 4 LAW & CONTEMP. PROB. 273 (1937); McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); Rowe, *Price Discrimination, Competition, and Confusion. Another Look at Robinson-Patman*, 60 YALE L. J. 929 (1951).
55. The REPORT, *op. cit. supra* note 47, also mentions that supporting arguments are moral and sociological. See note 2 *supra*. No doubt discerning readers may also detect aspects of loyalty, patriotism and motherhood. In order that there may be "equality of opportunity" in discussion, it may charitably be said that both sides are in favor of good and against evil.
56. S. REP. No. 2817, *supra* note 53, at 16.

tic in nature, that is to say, have a limited number of sellers. Such a situation creates an attitude of "rival consciousness" or mutual watchfulness among competitors. The group interest of competitors, that of a united front on price, wars with an individual seller's self-interest. An individual seller can increase his own profits by utilizing excess capacity and selling increased output at a discriminatory price above his incremental cost. Whether a particular seller will choose to discriminate will depend upon his estimate of a variety of considerations,[57] the most important of which is the delay of retaliation from his competitors through secrecy. But such discrimination cannot go undetected indefinitely; the mere diversion of business gives rise to suspicion. Successful bargainers use their success with one seller as a bargaining pressure against other sellers. Other sellers gradually retaliate by similar concessions. Eventually the whole price structure becomes spotty and is gradually dropped to a lower level. Sticky prices and rigid price systems are thus undermined or eroded, forcing increased competition for business at lower prices.[58]

This is not to say that the sole and invariable effect of price discrimination is a tendency to eat away at rigid or uniform prices. As is the case with any other business practice, the effect of price discrimination is dependent upon its economic or market context. But the fact that price discrimination is capable of abuse in certain market contexts, *in ways which are in fact covered by existing law,* does not detract from the validity of the erosion theory in other market contexts.

The principal criticism of the theory before the Senate Antitrust Subcommittee consisted in the testimony of Dr. John M. Blair, chief economist for the subcommittee.[59] In citing the work of Dirlam and Kahn[60] in their analysis of the *A. & P.* case,[61] Dr. Blair chose a market context with an adjudged violation of the Sherman Act, in which a large buyer possessed sufficient market power to prevent sellers from extending to others the granted price concessions. Such an extreme cannot be said to be prevalent. The point urged by Dr. Blair is to the effect that large buyers, who have the greatest leverage in forcing price concessions, tend to by-pass large sellers and seek out small sellers, while, on the other hand, large sellers tend to seek out small buyers. But the interplay of market forces cannot thereby be com-

57. See McGee, *supra* note 19, at 400-04, for a more detailed explanation.

58. "Sporadic, unsystematic discrimination is one of the most powerful forces of competition in modern industrial markets. Like a high wind, it seizes on small openings and crevices in an 'orderly' price structure and tears it apart." Adelman, *supra* note 54, at 1331.

59. *1957 Hearings, supra* note 37, at 1176-83.

60. Dirlam and Kahn, *Antitrust Law and the Big Buyer: Another Look at the A. & P. Case,* 60 J. POL. ECON. 129 (1952).

61. United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949).

pletely eliminated and price erosion still takes place, though its force may be somewhat lessened. Moreover, if such a tendency does in fact exist, it can only be accelerated by Senate Bill No. 11. If large buyers are foreclosed from all possibility of obtaining a price concession, their purchasing power may be directed toward output contracts with small sellers, resulting in the estrangement of such sellers from alternative market outlets.[62] After estrangement, forced lower prices on an output basis avoid the question of price discrimination, since the seller has only one buyer.

The denial to buyers, through enforced uniform prices, of any effective possibility of success in bargaining for price reductions, can only tend to price rigidity, with a consequent adverse effect upon competition. The pressure of price competition tends to push prices downward to a uniform price level. The process is not reversible. Enforced uniformity tends toward the maintenance of higher prices at a level that is artificial in relation to demand and capacity. Sellers are foreclosed from probing demand at lower price levels through discriminatory prices and, consequently, "hesitate to make downward price changes for fear of 'spoiling the market' in case demand proves to be inelastic."[63] Greater output with its attendant benefits, such as fuller employment, is thereby restrained.

In defense of Senate Bill No. 11, Dr. Blair has asserted that price concessions by small sellers are discouraged by large sellers meeting their competition,[64] thereby lessening the erosion and tending toward price rigidity. Economist John S. McGee has a different view of the competitive practices of small firms:

> Contrary to many assertions, smaller firms can successfully intrude upon their larger rival's province by cutting prices. By nibbling away at their rival's business through *secret*, discriminatory price cuts, smaller firms may (1) escape the detection of their rivals over longer periods, and (2) make their rivals unsure of the magnitude of price changes even when the fact of price changes is well known. Furthermore, small firms may have the important advantages of flexibility, simplicity of organization, and an appropriate irreverence for the existing price level.[65]

Enforced price uniformity may also have the effect of causing sellers to divert their drive for business into advertising to create demand for their particular product. This causes buyers to differentiate the product from substantially similar products with a resulting lessening of competition. Or in a market where sellers are collusively inclined, uniform price policies supported by law are more easily maintained.[66]

62. Note, 58 YALE L. J. 1161 (1949).
63. McNair, *supra* note 54, at 337.
64. *1957 Hearings, supra* note 37, at 1182.
65. *1956 Hearings, supra* note 37, at 580.
66. Adelman, *supra* note 54, at 1329.

The maintenance of dynamic competition[67] demands freedom and flexibility of the marketing structure, but the advocates of single price policies take a static view of the market structure. Manufacturers, wholesalers, and retailers are pigeonholed and their functions classified and allocated. Shifting and realignment of functions between levels of distribution are looked upon as disturbing.[68] Such an attitude impedes progress and reduces competition. Yet the prohibition of price differentials has an anticompetitive effect, since functional discounts run afoul of such statutory prohibitions wherever there is a shift or realignment of functions in the market structure.

Supporters of Senate Bill No. 11 are concerned about the position of jobbers and retailers who do not operate in accordance with their concept of the classical mode of operation. They take a purely institutional view of the marketing process, with each level of distribution having vested rights in the performance of particular functions. This is certainly one of the problems presented by the *Standard Oil* case, and the effect of Senate Bill No. 11 on this problem is pointed up by the following exchange between Senator Kefauver and one of the jobbers involved in that case:

> Mr. Citrin: . . . I merely wanted to point out how the effects of this particular case, of this particular bill could hurt me as a jobber and how it could hurt all the other jobbers.
> Senator Kefauver: *You are the one that the bill is supposed to hurt because it is supposed to try to prevent you from retailing as a jobber.*[69] (Emphasis added.)

If this be true, one of the purposes of Senate Bill No. 11 is to inhibit the shifting of market functions and thereby to increase the stagnation of market structures. Antiquated systems of distribution will be further insulated against the competition of modern methods which result in lower prices to consumers. In other market situations, however, where middlemen by their usefulness can withstand the rigors of competition, Senate Bill No. 11 may cause their premature and unfortunate demise. Many sellers seek alternative channels of distribution to minimize risk and in so doing are said to "straddle the market."[70] Under Senate Bill No. 11, selling to both wholesalers and retailers, as in the *Standard Oil* case, may be extremely dangerous for a seller, unless he can police the wholesaler in violation of the Sherman Act. Sellers may therefore elect to assume entirely the

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67. See RODGERS, DYNAMIC COMPETITION, INSTITUTE ON ANTITRUST LAWS AND PRICE REGULATION, SOUTHWESTERN LEGAL FOUNDATION (1950).
68. "[U]nfortunately, the pseudo-simplicity of this A B C marketing structure seems to have commended it, in the minds of many people, as the suitable and appropriate arrangement, any deviations from which are to be discouraged." McNair, *supra* note 54, at 339.
69. *1956 Hearings*, *supra* note 37, at 404.
70. McNair, *supra* note 54, at 345.

wholesale function, thereby squeezing out competing wholesale distributors.

The economic advantages and increased competition resulting from the widespread practice of cross-hauling have been conceded by most parties on each side of the Senate Bill No. 11 debate. Through this practice manufacturers with excess capacity reach out into other areas to compete with other manufacturers having a freight advantage. This is commonly carried out by absorbing freight in order to deliver at a competitive price. When Senate Bill No. 11 was introduced in the current Congress, it had appended the following additional proviso:

> PROVIDED, FURTHER, That nothing contained herein shall be construed to alter the law applicable to the absorption of freight or of shipping charges.

But the legality of the practice of individual freight absorption in most cases rests upon the availability of the "meeting competition" defense. In this connection, a former Chairman of the Federal Trade Commission, Edward F. Howrey had this to say:

> But, one must ask, how can such language be added to a bill designed to eliminate from the statute the very provision upon which validity of freight absorption has always depended? To say that you cannot lower your price to meet competition, but can absorb freight, may be a neat use of the English language, but it is, of course, a complete paradox and from the standpoint of statutory interpretation may well prove to be a non-sequitur.[71]

Senate Bill No. 11 is concerned with a day-to-day problem presented to every businessman upon which he must make rapid decisions in a more or less routine fashion without benefit of counsel. The provisions, prohibitions and effects of the bill are so uncertain as to leave businessmen and lawyers, alike, in a sea of confusion in meeting this problem.[72] As Congressman Patman admitted: "It raises questions all right, but that is what makes lawsuits."[73]

Conclusion

Admittedly, vigorous competition is a heavy burden upon the participants. There will probably always be those who fear and are reluctant to assume that burden. As a group they can and do exert strong anticompetitive pressure. Senate Bill No. 11 is a manifestation of this pressure, but it is professed to be within the opposing goal of

71. Remarks of Edward F. Howrey Before the Section of Antitrust Law of the New York State Bar Association 15, January 23, 1957.

72. This confusion is aptly brought out by a hilarious account of a hypothetical but typical conversation between a businessman and his salesman after an assumed enactment of Senate Bill No. 11. *1956 Hearings, supra* note 37, at 282.

73. *Hearings before the Antitrust Subcommittee of the House Judiciary Committee on H.R.* 11, 84th Cong., 2d Sess. 14 (1956).

fostering competition, in order to make it politically palatable. By purporting to allow the defense of meeting competition, unless the effect of such action may tend to lessen "competition," the ostensible object of the bill is misleading. It effectively repeals the defense and lessens competition in so doing. The storm shelter afforded individual competitors by the Robinson-Patman Act is now to be made even more invulnerable. Former Chairman Howrey of the Federal Trade Commission has aptly called this approach "the most outrageous sort of legislative sophistry."[74]

There is no valid antitrust or competitive purpose compelling the enactment of Senate Bill No. 11. The group interest of its supporters is not sufficient to prevail over the interests of all other sectors of the economy. Antithetical to the desired and normal reactions of a seller faced with price competition—"S. 11 will succeed, I am afraid, in making a law violator of almost everyone who is in the business of buying and selling goods."[75]

74. HOWREY, *supra* note 71, at 17.
75. *Id.* at 10.