

NOTES

TROUBLE BEGINS IN THE "NEW" SHERMAN ACT: THE PERPLEXING STORY OF THE A&P CASE*

THE recently expanded concept of "monopoly power" has given new life to Section 2 of the Sherman Act.¹ The line of cases culminating in 1948 with *Schine* and *Griffith*² established the view that power to control a market can violate the law, regardless of the ways in which it was acquired or used.³ The new doctrine seems well founded. Past history cannot indicate whether or not a market is effectively competitive now, nor whether it will be in the future. These issues depend on the *existence* of a monopoly power which can be used to raise price, pummel equally efficient competitors, or keep newcomers out of the field.

However, the new doctrine does not abolish the "rule of reason." It gives the courts no magic formula to substitute for the exercise of judgment. Courts must still decide what kind and degree of economic power is inconsistent with the broad purposes of the Act. Most economic markets contain elements of monopoly, and yet many of those same markets are for all practical purposes quite competitive.⁴ Not only are many monopoly elements relatively harmless; in some settings they may actually invigorate competition in product and price.⁵ The lure of temporary monopoly profits is an

*United States v. N.Y. Great Atlantic & Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949), *affirming* 67 F.Supp. 626 (E.D.III.1946).

1. 26 STAT. 209 (1890), 15 U.S.C. §2 (1946). See Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947); *Monopoly under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745 (1949).

2. *Schine Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

3. "... [M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control." *United States v. Griffith*, 334 U.S. 100, 107 (1948). See LOEVINGER, *THE LAW OF FREE ENTERPRISE* 212-8 (1949).

The market may be a very small part of the "national market." *United States v. Yellow Cab Co.*, 332 U.S. 218, 226 (1947); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *Schine* and *Griffith* cases, *supra* note 2. And see *United States v. Columbia Steel Co.*, 334 U.S. 495, 519 (1948).

The element of "intent" has become extremely circumscribed. See Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745, 770-2 (1949).

4. See EDWARDS, *MAINTAINING COMPETITION* 6-7 (1949); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1298-1304 (1948); Comment, *Price Systems and Competition: The Basing Point Issues*, 58 YALE L. J. 426, 429-30 (1949).

5. See Adelman, *supra* note 4, at 1300, 1303 n. 35.

important impetus to the introduction of new products and new techniques, which rudely upset the peaceful, profitable existence of long-entrenched business firms.⁶ This constant change to the new, the more efficient, is the very heart of the process of effective competition. Unless read and applied in the light of its broad purposes, therefore, the "New Sherman Act" may develop a serious contradiction.

The chance that the Act may be mechanically applied to stifle competitive forces is increased by the fact that vigorous competition is not a friendly pastime. New methods of production and distribution not only disturb existing firms; they frequently demolish them. It then becomes much too easy to identify the demise of these beleaguered competitors with a decline in competition itself, particularly where the attackers are large and powerful. It is even easier when other laws like the Robinson-Patman Act,⁷ largely the products of the inherently destructive competition of depression days, implicitly make just that identification.

Passed in 1936, the Robinson-Patman Act severely restricts direct and indirect price discrimination,⁸ and forbids the payment of brokerage to any buyer who deals directly with a seller.⁹ For whom and for what purpose was the statute passed? It came to the aid of producers of foods, drugs and other soft goods who were being driven into substantial price reductions by chain stores, mail order houses and department stores. But the main intended beneficiaries of the Act were the multitude of brokers, jobbers, wholesalers and small retailers whom the large buyers were short-circuiting out of the distribution business. In short, the Robinson-Patman Act was another in a series of attempts to stave off cost-cutting methods of distribution.¹⁰ It thus serves to fortify the anti-competitive side of the New Sherman Act.

Until recently, cases under the Sherman Act have not presented this

6. See, e.g., SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* c. VIII (2d ed. 1947), particularly at 89-92, 106. For a more skeptical view, see Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 *YALE L. J.* 1165, 1177-9 (1948).

7. 49 *STAT.* 1526 (1936), 15 *U.S.C.* § 13 (1946).

8. 49 *STAT.* 1526 (1936), 15 *U.S.C.* §§ 13 (a),(b),(d),(e) (1946).

9. 49 *STAT.* 1526 (1936), 15 *U.S.C.* § 13 (c) (1946).

10. See generally McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 *LAW & CONTEMP. PROB.* 334 (1937); Burns, *The Anti-Trust Laws and the Regulation of Price Competition*, 4 *LAW & CONTEMP. PROB.* 301, 307, 316-8 (1937); Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 *HARV. BUS. REV.* 137 (1937); Edwards, *The Place of Economics in the Course on Trade Regulation*, 1 *J. OF LEGAL ED.* 1, 7 (1948).

The drive to "equalize" (end?) price competition is a powerful one. It reached its zenith as a national policy in the NRA. But with NRA gone, the Miller-Tydings Act, the state "fair trade" laws, and laws prohibiting "sales below cost" continue to give strong support to anti-competitive forces. See Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 *YALE L.J.* 607 (1940); GREYER, *PRICE CONTROL UNDER FAIR TRADE LEGISLATION* (1939); Comment, *Sales Below Cost Prohibitions: Private Price Fixing under State Law*, 57 *YALE L. J.* 391 (1948).

problem. When the courts looked at monopoly power in the *Alcoa*, *Tobacco* and *Movie* cases,¹¹ they were dealing with power that shackled the forces of a free market. But in *United States v. N. Y. Great Atlantic & Pacific Tea Co.*,¹² the Court of Appeals for the Seventh Circuit has upheld a criminal conviction in a situation where the defendant corporation represented the forces of competition, efficiency and change. The potential contradiction in the New Sherman Act is sharply exposed.

A&P is an integrated system, admittedly powerful enough to affect the various markets in which it operates as buyer and seller. To supply its retail stores, which in 1943 sold some 7 per cent of all groceries,¹³ A&P maintains warehouses, manufacturing establishments and an extensive buying organization. A subsidiary, the Atlantic Commission Company (ACCO), is the largest single buyer in the fresh produce markets, and supplies both A&P and independent dealers.¹⁴

As did the district court,¹⁵ the Seventh Circuit stated that neither size, through vertical and horizontal integration, nor "the power that may rightly go with such size and integration" was necessarily illegal.¹⁶ The question, said the court, was whether A&P's activities amounted to an "abuse of that power."¹⁷

In its buying program, A&P wielded the persuasive power of its patronage to beat down prices, and obtained concessions which often were not extended to its competitors. When suppliers proved unduly adamant, the Company occasionally suggested that it might manufacture the product itself. The concessions were obtained in several forms. Since A&P dealt directly with suppliers, it at one time secured brokerage allowances. After the Robinson-Patman Act ended this practice, A&P induced suppliers to reduce the net price by the amount of the brokerage. When the FTC terminated that dodge,¹⁸ the Company preferred suppliers who made all sales direct—to the vast discomfiture of discarded brokers.

A&P also insisted on quantity discounts, often on a scale not demonstrably related to the seller's cost savings. As a result, according to the court, ". . . the supplier had to make his profits out of other customers' higher

11. See note 2 *supra*.

12. 173 F.2d 79 (7th Cir. 1949), *affirming* 67 F.Supp. 626 (E.D.III.1946).

13. 67 F.Supp. 626, 633 (E.D.III.1946). Except as noted, the facts of the case described in succeeding paragraphs are drawn from the opinion of the court of appeals.

14. 67 F.Supp. 626, 634 (E.D.III.1946); HOFFMAN, LARGE-SCALE ORGANIZATION IN THE FOOD INDUSTRIES 54 (TNEC Monograph 35, 1940) (hereinafter referred to as HOFFMAN).

15. 67 F.Supp. 626, 642 (E.D.III.1946).

16. 173 F.2d 79, 82 (7th Cir. 1949).

17. *Ibid.* The court in this respect appeared to be eschewing the new doctrine of monopoly power under Section 2. See note 3 *supra*. But when it got around to drawing legal conclusions, it cited the new cases liberally. See p. 973 *infra*.

18. *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). Paradoxically, the brokerage clause was first applied against the collective buying agencies of small buyers. *Biddle Purchasing Co. v. FTC*,

prices."¹⁹ The Company obtained advertising allowances from some manufacturers. These were said to be discriminatory and in excess of A&P's actual expenditures. Moreover, A&P took no pains to broadcast any concessions it obtained. It had a healthy respect for the Robinson-Patman Act, and in most contracts it compelled suppliers to insert a clause that they would offer the same terms to other buyers.²⁰

ACCO emulated its parent in putting pressure on suppliers for better price and delivery terms. The court was particularly disturbed over ACCO's double role as buyer for A&P and seller to the trade. Since ACCO "increased the price to competitors" by collecting brokerage, A&P got a "competitive advantage" in price.²¹ Also ACCO retained the best quality produce for A&P, selling the inferior to others.

On the selling side of the market, the Company was said to use its advantage in buying to undersell competitors wherever it chose. Moreover, it lowered its gross profit rates in many areas to gain additional volume at the expense of competitors.²² Occasionally the gross rates were so low that stores appeared to sell below cost for varying periods of time. It was an "almost irresistible conclusion," the court stated, that A&P could compensate for any reduction in profits in one area by raising the price in other areas.²³

In what respects do any or all of these buying and selling activities violate the Sherman Act? The district court, after a bow to A&P's part in getting distribution costs down, had seized on ACCO as the "rotten thread" which made all other activities, legal as they may have been standing alone, take on a "polluted colored light."²⁴ This conclusion, though admirably picturesque, was not particularly enlightening.

The Seventh Circuit was more explicit. First, A&P's threats to withdraw business from suppliers who wouldn't cut price were boycotts and *per se* illegal.²⁵ Second, the advantage which A&P gained through preferences illegal under the Robinson-Patman Act was also an "unlawful restraint in itself."²⁶ Third, the "chain reaction" of A&P's illegally-used buying power, permitting "selling below cost" and hence more buying power, could not

96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939).

19. 173 F.2d 79, 83 (7th Cir. 1949).

On the legitimacy of quantity discounts under the Robinson-Patman Act, see *FTC v. Morton Salt Co.*, 334 U.S. 37, 42-4 (1948).

20. 67 F.Supp. 626, 648-9 (E.D.Ill.1946).

21. 173 F.2d 79, 85 (7th Cir. 1949).

22. "If Area X is having a tough experience competitionwise, or the area looks prospective [sic] in which to increase the volume of business, the gross profit percentage in this area is lowered. This lowers the price at which goods may be sold and the volume increases at the expense of somebody." 173 F.2d 79, 87 (7th Cir. 1949).

23. *Id.* at 87.

24. 67 F.Supp. 626, 678 (E.D.Ill.1946).

25. 173 F.2d 79, 87 (7th Cir. 1949), citing *inter alia* *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

26. 173 F.2d 79, 88 (7th Cir. 1949).

help but "tend toward monopoly" and conceivably "ultimate extinction" of competitors.²⁷ While a showing of actual exclusion of competitors was not necessary under Section 2, the court stated, the record showed "how some local grocers were quickly eliminated" when set upon by A&P "armed with its monopoly power."²⁸ On these grounds, the court held that A&P violated both Sections 1 and 2 of the Act, citing the *Tobacco*, *Paramount*, *Schine* and *Griffith* cases.²⁹ Thus, a discussion of "abuses" was transformed into an application of New Sherman Act doctrine.³⁰

If the logic of the cases relied on were followed to the end, a civil suit would shortly be in order. The way to cure monopoly power is to dissolve its base, and divestiture, rather than a mere fine, would be the fate of A&P. But is this really an appropriate answer? Some 15 years ago, an ardent advocate of enforcing competition called chain stores a new weapon *against* monopolistic restraints.³¹ A&P's activities deserve closer scrutiny.

It is clear enough that A&P's buying program caused considerable distress among suppliers and competing distributors. But were the Company's activities unjustifiable? Certainly the attempts to secure the advantages of direct dealing rested on good reason, Robinson-Patman Act to the contrary. A&P dealt directly with suppliers, presumably because this was cheaper than buying through brokers. Suppliers in turn saved brokerage expense on these direct sales. Hence, to compel A&P to pay the same price to the supplier that his brokers charged to others on resale would make A&P the *victim* of price discrimination, give the supplier a windfall profit, and preserve costly methods of distribution as a charge on consumers.³² A&P's later shift toward suppliers who made all sales direct was calculated to avoid such results, and is no more open to criticism than its earlier methods.

27. *Ibid.*

28. *Ibid.*

29. See note 2 *supra*.

30. The emphasis on "abuses," "threats," and ungentlemanly behavior was a strong, and occasionally dominant, element in the older Sherman Act cases. See LOEVINGER, *op. cit. supra* note 3; Rostow, *supra* note 3, at 776. But it is unnecessary in considering whether Section 2, as newly defined, has been violated. The outcome of the *Griffith* case was identical with that of the *Schine* case; yet *Griffith*, unlike *Schine*, contained no evidence whatsoever of pressuring tactics. *Schine Theatres, Inc. v. United States*, 334 U.S. 110, 115-6 (1948); *United States v. Griffith*, 334 U.S. 100, 104 (1948).

31. "The unfortunately wide differentiation between wholesale and retail prices, and the sharp separation between wholesale and retail markets, may be regarded as a vestigial remainder of the mercantilist system (as a colossal system of restraint upon trade) which has only recently begun to be undermined. The growth of mail-order houses and of large-scale retailing through chain stores is salutary and (given not too much foolish legislation) abundantly promising—offering great economies through increase in the size of units, and *without raising any real problem of monopoly*." SIMONS, *A POSITIVE PROGRAM FOR LAISSEZ FAIRE* 33 (1934) (italics added).

32. See EDWARDS, *MAINTAINING COMPETITION* 169 (1949); Note, *The Brokerage Provision of the Robinson-Patman Act*, 47 *YALE L.J.* 1207 (1938); Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store*, 15 *HARV. BUS. REV.* 62, 66-7, 73-4 (1936).

A&P's aggressive buying policy inevitably resulted at times in other concessions—advertising³³ and quantity discount allowances—not available to its competitors on the same terms. While these differentials of course contributed to the difficulty of competing with A&P, the contribution was a minor one.³⁴ Moreover, in the market context involved, the behavior of A&P and other large buyers was beneficial to price competition. It is highly unrealistic to conclude that when a seller gives a lower price to one buyer he must thereupon *raise* the price to others. The argument makes two assumptions: that the seller could have charged others a higher price to begin with and for some unknown reason failed to do so; and that in lowering the price to an obstreperous buyer he is selling at a loss. Neither assumption is justified. What is overlooked is that the seller himself must be operating in an imperfectly competitive market to have such control of his price, and that a large buyer like A&P is forcing him to take less in the way of profits on new sales that he would like to get.³⁵

In this kind of situation, therefore, there is no good reason to call a refusal to buy or a "threat" to manufacture an illegal boycott, which until this case has meant an attempt to raise prices or exclude people from a market.³⁶

33. An expanded analysis of advertising allowances—as part of a thoroughgoing criticism of the A&P case—is presented in Adelman, *The A&P Case: A Study in Applied Economic Theory* (to be published in a forthcoming issue of the QUARTERLY JOURNAL OF ECONOMICS). Generally, while excessive advertising allowances are a form of price concession, in part at least they represent a joint enterprise on the part of A&P and the producer of branded products to make advertising at the retail level perform a double function. The result is savings in costs, which, if split, benefit both the supplier and A&P. Even if A&P gets them all, the supplier is no worse off—and in any event the consumer pays a lower advertising bill. In some cases where A & P got higher allowances than its competitors, it was apparently a better salesman and in that sense deserved them. The Government itself took pains to prove that the Company expanded the sales of some branded items much faster than did other distributors. Brief for the United States, p. 369, *United States v. N.Y. Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

34. An analysis of the data presented in FTC, CHAIN STORES: FINAL REPORT ON THE CHAIN STORE INVESTIGATION (1935), indicated that the buying advantage of grocery chains after *all* discounts averaged only 1.73 per cent of cost price. The advantage secured by "special" discounts—promotional, volume, and brokerage allowances—was only 0.45 per cent of cost price. Phillips, *supra* note 32, at 63-4. This is but a small fraction of the amount by which chains undersell small independents at the retail level:

"... [E]ven if all these special concessions had not existed, the methods of chain store operation are such that the chains would still have possessed some 80% to 90% of their total price advantage over the independent." *Id.* at 67. See also HOFFMAN, at 106, and notes 43-4 *infra*.

35. See Adelman, *supra* note 4, at 1331.

One of the leading pre-Robinson-Patman Act cases on price discrimination provides clear-cut evidence on the point. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939). The company made a net profit of \$7.7 million on sales of \$116 million worth of tires to Sears Roebuck during the years 1926-33. This was considerably less than the \$20.4 million net profit on sales of the same amount to others, but it was still a comfortable profit by any standards. *Id.* at 622.

36. In *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 461-2 (1941), the Guild

No seller would heed these pressures unless he thought his price could be beaten by other sellers or by A&P's own manufacturing. And if his price could be beaten, it is in the nature of competition that it should come down.

Actually, buyer-instigated price discrimination exerts downward pressure on general price levels. A price reduction to one buyer has what for the seller is a most unfortunate tendency to spread, as the long history of frantic efforts to stamp out price discrimination will testify.³⁷ It may be safely surmised that the purveyors of branded products, failing in their efforts to prevent price concessions, were far more anxious than A&P to keep them secret.

When sellers themselves are powerful, they deserve few tears merely because of pressure or threats by equally powerful buyers. Small unorganized suppliers of unbranded items, little known brands or fresh produce can be exploited by large buyers, but there was little evidence of such exploitation here. Small manufacturers could gain from transactions with A&P and ACCO a direct market for all or a large percentage of their output, with consequent reduction of sales expenditures.³⁸ Was ACCO or A&P able to make them pay too heavily for this advantage? Not unless suppliers had no place else to go, and this was not true. ACCO and A&P were not the only buyers in their respective markets,³⁹ and there is no claim that either

members attempted to drive out of business those manufacturers who copied their dress styles and sold them at much lower prices. The same issues were involved in the colorful case of *Millinery Creators' Guild v. FTC*, 109 F.2d 175 (2d Cir. 1940), where, as one witness put it, the goal was ". . . raising the prices for a better grade milliner because, for instance, the average milliner 15 years ago easily got \$30 for every hat they sold, today the God damn thing sells for \$1.95, I mean, they sell for \$1.95 around town. . . ." *Id.* at 178. See also *Associated Press v. United States*, 326 U.S. 1 (1945), where AP by-laws empowered members to obstruct the admission of non-member competitors, and AP's importance in the newsgathering field put non-members at a noticeable competitive disadvantage.

Another recent case involving illegal boycotts found traditional distributing groups combining with manufacturers to force cut-rate liquor vendors (A&P's counterparts in the field of potables) into abiding by resale price maintenance agreements. *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945).

37. See, e.g., *Sugar Institute v. United States*, 297 U.S. 553 (1936), analyzed in Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Cases*, 45 YALE L.J. 1339 (1936). See also PEARCE, *TRADE ASSOCIATION SURVEY* 50, 77-8, 81-2, 113-6 (TNEC Monograph 18, 1941); Comment, *Price Systems and Competition: The Basing Point Issues*, 58 YALE L.J. 426, 433, 436 (1949).

". . . [I]n industries in which concerns are relatively few and large, competition often takes the form of secret price concessions, which are likely to be discriminatory in character; and the effort to stamp out competition often consists primarily in attempts to require uniform methods of pricing." EDWARDS, *MAINTAINING COMPETITION* 167-8 (1949).

38. On output contracts generally, see Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirement Contracts*, 23 N.Y.U.L.Q.REV. 412 (1948). On their advantages for sellers, see *id.* at 414.

39. Nationally, A&P makes around 7 per cent of grocery sales. 67 F.Supp. 626, 633 (E.D.III.1946). ACCO in 1940 handled 11.6 per cent of the products in which it dealt, the various fruit and vegetable crops. *Id.* at 634. Unfortunately, there are no

was in collusion with any other buyers.⁴⁰ Hence the power to "exploit" suppliers was limited by the terms which those suppliers could get elsewhere.⁴¹ The only real danger in this situation is that small suppliers who sell a large part of their output to A&P for a continued period thereby lose other business contacts and a measure of their independence.⁴² A "cost-of-shifting" margin is created, within which A&P could drive a hard bargain. However, this is a risk common to all output arrangements.

In general, A&P's buying activities cannot cause undue concern, disturbing as they may have been in the food markets. They are the kind to be expected from active competition. As indicated, A&P often secured better prices than its competitors through use of its buying power and the ability to be all over the market at once. Yet its chief competitive advantages in *selling* stem from quite different factors.

The retailing superiority of A&P—and other chains—is due primarily to the efficiencies of streamlined distribution channels,⁴³ supposedly not under attack, and to the low-gross high-volume selling policy,⁴⁴ which definitely

figures as to particular regional or local buying markets. It may be safely assumed, however, that in none does A&P or ACCO have a monopoly position. For further discussion, see notes 40 and 52 *infra*.

40. Contrast, in this respect, the "parallel" or "concerted" action on the part of buyers in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 240 (1948), and *American Tobacco Co. v. United States*, 328 U.S. 781, 800-1 (1946).

Percentage of the market is a quite insufficient indication of the actual control which a firm enjoys, or of the role which that control actually plays in a market. See Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 749, 779-82 (1949).

41. "It is of some significance in this connection that most of the chains manage to retain more or less permanent connections with those from whom they buy. This statement applies not only to food processors but also to farmers and local shippers who sell direct to them. *Criticisms against the mass buyer come more often from those who do not sell to them than from those who do.* It is, after all, to the advantage both of the mass buyers and their suppliers to retain semipermanent and more or less amicable relationships. Generally speaking, the mass buyer today places less emphasis on trying to drive shrewd bargains here and there, and more on building up steady sources of supply on a price basis which insures their permanence." HOFFMAN, at 106-7. (Italics added).

42. "In selling to a particular chain, . . . [the small supplier] has perhaps given up his other trade connections, and these cannot be renewed quickly if his arrangement with the mass buyer is no longer satisfactory to him. It would probably be incorrect, however, to exaggerate this disadvantage, since any seller no matter how small can usually find some sort of outlet for his product through brokers and other specialized middlemen of this sort." HOFFMAN, at 106.

43. Perhaps the outstanding saving is the elimination of several stages of selling costs, which become superfluous with vertical integration. See SHEPHERD, *MARKETING FARM PRODUCTS* 392 (1946). Other savings include more efficient use of transportation and warehousing facilities, better utilization of labor, elimination of credit, delivery and clerk services, and more efficient and specialized management. See generally HOFFMAN, at 66-74.

44. "The retail margin is usually the largest single element in the cost of food distribution, and often it is larger than all other transportation and marketing costs combined.

was. It is difficult to understand why the latter should be so castigated by the Government and the court. Admittedly, it may be hard at times to draw the line between "predatory" and "competitive" price-cutting. This is particularly true where an integrated concern, with sizeable financial resources, is involved.⁴⁵ It may be, therefore, that in certain instances A&P's price-cutting went beyond what might be considered fair. But if so, neither the Government nor the court made a careful selection.⁴⁵

The general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process. Assume that A&P operated some stores at a loss until gain in volume made the low gross rate profitable. Ultimate success proves only that the old high-gross low-volume method was a highly inefficient way to sell groceries. Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo.⁴⁷ Perhaps

Because their operations have been primarily in this phase of distribution, the innovations made by the grocery chains probably have been more important from the standpoint of reducing food costs than those made by other types of large-scale food concerns." HOFFMAN, at 158. See also *id.*, at 60-3.

45. A large concern, if it is willing to stand the losses, can outlast a less affluent competitor. Even if it has not entered on a calculated campaign of elimination, mere inertia in applying accounting checks may carry price competition beyond the point to which small independent units could go. But speculation is not proof, and extreme care is necessary to avoid classing genuine price competition with attempts to monopolize:

"The competitor who finds it difficult to meet another's price may well believe that his rival intends to eliminate him, but this conviction cannot be taken as sufficient proof of such intent. Every act of competition is designed to attract business to one competitor rather than another and, to that extent, eliminate the latter from the market." WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 6 (TNEC Monograph 21, 1940).

46. Justice Douglas' treatment of the price-cutting charge in the *Schine* case is an appropriate contrast:

"... [F]acts and circumstances must be adduced to show that it was in purpose or effect employed as an instrument of monopoly power. Here there is nothing except a bare finding that at times Schine cut admission prices. That finding is not sufficiently discriminating to withstand analysis and is not adequate to support an injunction against price-cutting." *Schine Theatres, Inc. v. United States*, 334 U.S. 110, 120-1 (1948).

47. Consider the following argument: "Of course, the lowering of gross profit rates may ultimately result in increased sales and hence in increased profits. But appellants' argument here wholly ignores the restraining effect upon A&P's retail competition during the interval required for increased sales to reduce the expense rate." Brief for the United States, p. 384, 173 F.2d 79 (7th Cir. 1949). A&P's eloquent objection to this theory has more to it than the mock astonishment of an advocate. Reply Brief for Appellants, Part II, p. 469, *ibid.* The theory would apply to any manufacturer who reduced his price in order to get the low costs of mass-production, and to the main basis for the efficiencies of large-scale retailing. How else can volume production or sales, and the lower costs attendant thereon, be gained save by reducing price? Only by advertising, and consumers bear enough advertising burdens without having a new theory that requires more. See Brown, *supra* note 6, *passim*.

The Government's theory is strongly reminiscent of perennial business attempts to keep prices above "average costs" so that all can make a profit; and it is close to the philosophy of fixed retail mark-ups contained in resale price maintenance and "sales be-

they were misled by "mere size" after all, and price reductions which would not have raised an eyebrow if considered individually, somehow acquired an aura of illegality when practised by one big firm.

Equally confounding is the notion that A&P used one or more parts of its system to "subsidize" others. There were three variations on this theme. In one, advanced by the Government but apparently avoided by the Seventh Circuit, the "profits" on "sales" by ACCO and A&P's factories to A&P's own stores were claimed to "subsidize" the retail operations.⁴⁸ The argument is fancy. In an integrated concern there are no true profits until after the product is finally sold to consumers. Intra-company transfers are merely accounting transactions. If A&P's coffee company makes coffee at a cost of 25c a pound and the coffee is retailed at 30, it makes no difference whether the item is transferred at 29, so that manufacturing "profit" is high, or at 26, so that retail "profit" is high. The true profit—or loss—can be determined only by considering the Company's operations as a whole.

In the second "subsidy" argument, the court asserted that ACCO's "profits" on sales to independent dealers went "into A&P's coffers to increase its competitive advantage."⁴⁹ Part of these "profits" were the cost of services rendered, which dealers would have had to pay for elsewhere if ACCO were not there. As for the remainder, A&P had invested money in ACCO and investments are expected to earn returns. What if A&P sold that part of ACCO which dealt with independents and invested the proceeds in securities—would the dividends then be considered a subsidy to the retail stores? Both this and the first subsidy argument approach saying that vertical integration is illegal *per se*.⁵⁰

The last variation was that losses in some retail divisions were covered by

low cost" statutes. See note 9 *supra*. And see Adelman, *The A&P Case: A Study in Applied Economic Theory* (to be published in a forthcoming issue of the QUARTERLY JOURNAL OF ECONOMICS).

Of course A&P "manipulated" gross profit rates among various divisional areas—*i.e.*, changed the rates at different times, and had differing rates at the same time. But this in itself proves nothing. If, to use the court's words, an area "is having a tough experience competitionwise," one would expect the Company to lower its prices. The Government cited A&P's New England division as an instance of lowered gross profit rates from 1932 to 1936. Brief for the United States, pp. 94-101, 173 F.2d 79 (7th Cir. 1949). Actually the trouble was strenuous competition on the part of First National Stores. During those years, First National's sales rose from \$101 to \$121 million, while A&P's fell from \$104 to \$93 million. Reply Brief for Appellants, Part II, p. 451, *ibid*.

48. Brief for the United States, pp. 73-5, *ibid*. The Government appears to retreat from the argument subsequently, *id.*, at 363, 372, perhaps because of impressive attacks by A&P, Reply Brief for Appellants, Part I, pp. 269-89, *ibid*.

Although the court appears to have recognized the futility of talking about "retail profits," it does recite the figures presented by the Government that "retail profits" ranged from 6.3 to 11 per cent of A&P's total profits in the years 1939-41. 173 F.2d 79, 86 (7th Cir. 1949).

49. 173 F.2d 79, 85 (7th Cir. 1949).

50. See Adelman, *supra* note 47.

raising the price in others.⁵¹ This is a question of fact, not logic. A&P could raise the price in Area Y after lowering it in Area X *only* if it were free from competitive pressures in Area Y. Did A&P in fact have such a position in any divisional area? Despite the court's acceptance of the argument, there is no evidence to indicate it.⁵²

Generalized, the issue of whether a company has a monopolistic status in any phase of its system is central to any case involving vertical or horizontal integration. If, for example, ACCO were the only source of produce available to A&P's retail competitors, then A&P could exercise a real squeeze, both in price and quality. The same would be true if ACCO were one of few dealers acting collusively. Or if A&P were the only producer of coffee, it could manipulate the price to squeeze independent retailers.⁵³ But these conditions are no more true than the implicit assumption of A&P monopoly in particular retailing areas.

The final question—and second major issue in any integration case—is whether the activity or growth of A&P *tends* toward monopoly. It is an impressive argument that once expansion by an organization like A&P gets going, it will cumulate until all others are driven from the field. Yet this, too, is a question of fact. All indications in the grocery field are that the argument is false. It is at least probative, though not conclusive, that A&P's share of the national market declined from 11.6 to 7.1 per cent from 1933 to 1942.⁵⁴ The highest percentage in any "local" market area was 17 in 1925,

51. 173 F.2d 79, 87 (7th Cir. 1949).

52. Of A&P's 39 "retail units" in 1941, eight handled 15 to 20 per cent of the business in their respective territories; the rest of the units had less. 67 F.Supp. 626, 633 (E.D.Ill. 1946). In some cities (size not given), A&P had over 50 per cent. *Ibid.* Professor Adelman is of the opinion that the "retail units," which were usually metropolitan districts, approximated the true economic market areas, and that the 20 per cent figure represents the upper limit of A&P's market control. *Supra* note 33. It is suggested that even if A&P's control in certain areas were 50, 60 or 70 per cent, there would still be no effective monopoly position unless there were tacit collusion between A&P and other retailers—and there was none. As in connection with buying markets, *supra* note 40, contrast the "parallel" behavior of sellers found in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

The Government's case against A&P was characterized by a notable lack of actual price data, essential to any substantial conclusions regarding discriminatory price-cutting. For a thorough investigation of another chain's selling policies, which was based on price data, see Cassady & Grether, *Locality Price Differentials in the Western Retail Grocery Trade*, 21 HARV. BUS. REV. 190 (1943). The authors concluded that there was no true price discrimination, that ". . . the price differentials between cities seem to be explainable, directly, by the policy of meeting competition item by item and, indirectly, by variations in merchandise costs between regions." *Id.* at 205.

53. Compare the control of the "majors" over transport facilities in the oil industry. ROSTOW, A NATIONAL POLICY FOR THE OIL INDUSTRY 57-66 (1948).

54. 67 F.Supp. 626, 633 (E.D.Ill.1946). Chain store taxes may have contributed to this decline, but since the percentage of market covered by chain stores generally stayed about the same for this period, *ibid.*, the effect was probably minor.

20.5 in 1938 and 19.8 in 1941.⁵⁵ Other chains, cooperatives and independent super-markets show no signs of impending extinction. Even small retailers persist in large numbers, some because of strenuous efforts at efficiency, some because large numbers of consumers still like service extras and "quality" products.⁵⁶ The cardinal characteristic of the whole field is relative freedom of entry, an almost insuperable barrier to anything resembling monopoly.⁵⁷

The case against A&P dwindles to narrow grounds, and if anything they are Section 1 matters, not Section 2. The Company received concessions in price which were not available to others—a minor sin that has beneficial effects on prices in general—and perhaps it occasionally indulged in unduly severe price reductions. But as a foray against invidious monopoly power, the A&P case is a parade of mistakes.

Strangely enough, the verdict is not likely to have serious effects on A&P or give lasting succor to its competitors. Although the Seventh Circuit's opinion is not entirely clear, the heart of the complaint against A&P's assorted activities seems to be the price concessions gained in buying. The goal of price concessions makes the "boycotts" of uncooperative sellers bad. The fruits of price concessions, in the court's view, make "selling below cost" possible and (therefore?) bad. So A&P can no longer get price concessions unless in fact they are offered on "equal terms" to other buyers. But it can minimize the effects of this admonition by turning progressively to its private brands, either manufacturing its own requirements or buying the entire output of small producers for sale under its own labels.

Such a development would not create joy in the ranks of big-name sellers. It would take away the one small gain that competitors of A&P could hope to secure from the case. The principal advantages held by A&P and other chains—efficiency in handling and selling—are virtually untouched anyway.

55. See Adelman, *supra* note 33. It was not A&P but independents who initiated the super-market. A&P and other chains were forced to emulate them, both to meet the new competition and to reduce the impact of chain-store taxes based on the number of units, HOFFMAN, at 10. The shift-over involved the closing of over 7,000 stores from 1937 to 1941. Reply Brief for Appellants, Part II, page 450, 173 F.2d 79 (7th Cir. 1949). Moreover, A&P has abandoned at least 1000 towns since 1933. 67 F.Supp. 626, 641 (E.D.III.1946).

56. See MILLER, UNFAIR COMPETITION 169 (1941). From 1933 to 1943, the percentage of sales made by independent (non-chain) retailers rose from 61.7 to 70.2 per cent. 67 F.Supp. 626, 633 (E.D.III.1946).

"The nearest thing we ever have had to monopoly in grocery retailing . . . was the old village grocery store. The prices which it charged were not elastic and usually not very competitive until the automobile made them so." HOFFMAN, at 160.

57. ". . . [E]ven granting the possibility of eliminating rivals by means of local price-cutting, the retail field is so easy to enter that, when this purging process had been completed and prices had been raised, new rivals very likely would enter the field again almost immediately, with the result that all the effort would have gone for naught. This latter situation is particularly true in the grocery field, since normally stocks of merchandise and facilities are easily obtained." Cassady & Grether, *supra* note 52, at 206.

As for consumers, let them be excused for a secret hope that mass distributors will not suffer in the future from this odd twist in the law.

The Company has dropped the case, perhaps because two lower courts have interpreted the facts adversely, or perhaps because the burdens imposed by it are lighter than the trouble of further appeal. Until the Government sees fit to bring another case of similar ilk, the Supreme Court is saved from the pressing tasks of settling the effect of the Robinson-Patman Act and of clarifying the doctrine of monopoly power itself. A civil action, seeking dissolution of massed buying power, would make these two questions inescapable.

Are the provisions of the Robinson-Patman Act relevant in defining violations under the Sherman Act? They are with respect to Section 1 of the Sherman Act, but the effect they should have is not so clear. Section 1 deals with activities and patterns of behavior—some, like price-fixing, being considered so clearly unjustifiable as to be illegal *per se*;⁵⁸ others being treated as subject to the “rule of reason” and thus illegal only in particular contexts.⁵⁹ Under the view illustrated by the Seventh Circuit in the A&P case, obtaining a price advantage by inducing sellers to violate a statutory prohibition is in the class of *per se* illegality. But the view is not an inevitable one. If this type of price discrimination is looked on as a more or less incidental result of a buyer’s legitimate efforts to get a price reduction, then it would be inappropriate to say that the *buyer* has acted in unreasonable restraint of trade.

Relevant as the Robinson-Patman Act may be to Section 1 of the Sherman Act, it is almost completely unrelated to the issue now dominating Section 2—the existence of an illegal kind or degree of monopoly power. Depending on the nature of the market, price discrimination may be a symptom either of repressive monopoly or vigorous (though “monopolistic”) competition. Violations of the Robinson-Patman Act, therefore, cannot determine whether or not under the New Sherman Act the remedy of divestiture or dissolution should be applied.⁶⁰

The clarification of the monopoly power doctrine itself must be in terms of the central purpose of the Sherman Act—the protection and promotion of active competition. The opposition to bigness, most recently stressed in the vigorous dissent to the *Columbia Steel* decision, has been aimed at power which puts “control of prices” into the hands of “a few self-appointed men.”⁶¹ This is not the kind of power possessed by A&P. The contrast is a useful guide in refining the doctrine of monopoly power. A large integrated

58. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

59. *E.g.*, *Sugar Institute v. United States*, 297 U.S. 553 (1936).

60. In monopoly cases, divestiture or dissolution has now become “an essential feature” of civil decrees. *See Schine Theatres, Inc. v. United States*, 334 U.S. 110, 123 (1948).

61. *United States v. Columbia Steel Co.*, 334 U.S. 495, 536 (1948) (dissenting opinion).