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The Fred Meyer Case and Section 2(d) of the Robinson-Patman Act

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NOTES

THE FRED MEYER CASE AND SECTION 2(d) OF THE ROBINSON-PATMAN ACT [1]

THE ROBINSON-PATMAN ACT

Chain Stores Are Out. There is No Place for Chain Stores in the American Economic Picture.[2]

There is a distinct note of irony in these words. Perhaps they represent wishful thinking by one whose apparent hopes were shattered; for, there can be no doubt about it, chain stores are in. They play a central role in the modern economic picture.

Grocery chains developed rapidly following World War I.[3] The advantages to the consumer in the form of lower prices, attributable to operational efficiencies, resulted in an increase in their share of total retail sales from nine to twenty-five per cent beween 1926 and 1933.[4] During this period, however, the general distress of the Depression aroused public sentiment against all forms of large scale enterprise, and the chain stores were a likely scapegoat. By 1929 an organized attack had been launched against the "chain store menace" in more than four hundred cities and towns.[5] Propaganda campaigns by the news media fanned the flames of discontent,[6] and the legislature responded with the Robinson-Patman Act.[7]

The Act was a product of a diseased economy and an organized effort to preserve the traditional marketing system during a time of revolutionary change.[8] The legislative purpose was to amend the inadequate Clayton Act [9] so as ". . . to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." [10]

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[1] F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968).

[2] Statement by Rep. Patman quoted in McNair, *Marketing Functions & the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 n.1 (1937).

[3] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 4 (1962).

[4] *Id.* at 5, *citing* J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 7 (1955).

[5] J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 160 (1955).

[6] *Id.* "Huey Long proclaimed he would rather have thieves and gangsters than chain stores in Louisiana." *Quoted* in Fulda, *Food Distribution in the United States*, 99 U. PA. L. REV. 1051 (1951).

[7] Robinson-Patman Act, 15 U.S.C. § 13 (1964).

[8] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3 (1962).

[9] *Id.* at 6.

[10] F.T.C. v. Henry Broch & Co., 363 U.S. 166, 168 (1960).

The language of the Act is inconsistent and ambiguous,[11] remaining a legal enigma to the present day.[12] Moreover, the cases interpreting it have served to increase the confusion and discrepancies. A primary example is the recent *Fred Meyer* case,[13] which could possibly be the most significant case since 1936 which patently displays the shortcomings of Robinson-Patman. Although the case is concerned both with sections 2(a) and 2(d) of the Act, the import of the decision rests with its construction of 2(d), to which this note is primarily devoted.

SECTION 2(d) OF THE ACT

It was obvious to the legislature in 1936 that provisions would have to be incorporated in the new amendment which would "... scotch evasions of the Clayton Act's ban on price discrimination by subterfuge arrangements which cloaked discriminatory favoritism to large buyers in the garb of cooperative promotional arrangements." [14] Thus section 2(d) was aimed at promotional allowances which had the effect of price adjustments.[15] Curiously, however, although the section was specifically intended to deter large buyers from using their economically advantageous positions to secure special allowances,[16] there is no mention of "buyers" in the language employed. Rather, the incidence of the legislation primarily befalls the seller.[17]

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[11] *See, e.g.*, C. EDWARDS, THE PRICE DISCRIMINATION LAW 154-56 (1959); Alexander, *Section 5 of the Federal Trade Commission Act: A Deus Ex Machina in the Trade Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317, 318-20 (1961); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 941 n.66 (1951).

[12] Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COLUM. L. REV. 1059 (1957).

[13] F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968).

[14] C. EDWARDS, THE PRICE DISCRIMINATION LAW 365 (1959); *see, e.g.*, General Foods Corp., 52 F.T.C. 798, 822 (1956); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230, 236 (D.N.J. 1956). The purpose of section 2(d) was explained by Representative Utterback, Chairman of the Senate-House Conferees thusly:

> The existing evil at which this part of the bill [2(d)] is aimed is, of course, the grant of discrimination under the guise of payments for advertising and promotional services, which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. . . . 80 CONG. REC. 9418 (1936).

[15] S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

[16] R.H. Macy & Co. v. F.T.C., 326 F.2d 445, 447 (2d Cir. 1964); American News Co. v. F.T.C., 300 F.2d 104, 108 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

[17] *See* C. EDWARDS, THE PRICE DISCRIMINATION LAW, ch. 15 (1959).

Making Allowances Available

Section 2(d) requires that promotional allowances be made "... available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." [18] The means by which payments or allowances for advertising were to be "made available" was and remains unclear. Some early cases required that suppliers make "affirmative and specific notification" to all customers that certain payments or allowances were being made available.[19] The FTC's *1960 Guides for Advertising Allowances and Other Merchandising Payments and Services* permit a more general notification in the way of publicity sufficient to allow all types of competing customers to participate.[20] In the *Vanity Fair* case [21] the Second Circuit quoted the requirement specified in the *Guides*:

> The seller should take some action to inform all his customers competing with any participating customer that the plan is available. He can do this by any means he chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. However, if a seller wants to be able to show later that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing.[22]

Proportionalizing Under 2(d)

The requirement of "proportionality" has been described by Mr. Frederick M. Rowe as "provocatively vague." [23] There is no

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[18] Robinson-Patman Act, 15 U.S.C. § 13 (d) (1964). Section 2(d) provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[19] *See, e.g.*, Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1060 (1957); Henry Rosenfeld, Inc., 52 F.T.C. 1532, 1548 (1956); Kay Windsor Frocks, Inc., 51 F.T.C. 89, 95 (1954).

[20] *F.T.C. 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services*, 1 CCH TRADE REG. REP. 6072. (Hereinafter cited as GUIDES). *See also* D. BAUM, THE ROBINSON-PATMAN ACT 60 (1964); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 400 (1962).

[21] Vanity Fair Paper Mills, Inc. v. F.T.C., 311 F.2d 480 (2d Cir. 1962).

[22] *Id.* at 485.

[23] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 370 (1962).

formula set forth in the statute whereby one can determine how to proportionalize. According to the approach taken in the *Soap* cases,[24] approved by the Supreme Court in *Simplicity Pattern*,[25] and subsequently endorsed in the 1960 *Guides*,[26] the legality of promotional allowances or payments is determined on the basis of (1) the relationship between the payments and the volume of purchases *and* (2) the actual value to the supplier of the promotional contribution.[27] To understand the value of these criteria it is necessary to analyze the problem. Simply, it will sometimes be desirable to grant an allowance to a large customer while it may not be at all feasible to grant any allowance, even on proportional terms, to his smaller competitor. For example, where a substantial payment or allowance for advertising is made available by a supplier to a large chain store, the expenditure may provide for a newspaper, radio or television advertisement of significant value to the supplier. On the other hand, an allowance to a single retail grocer proportionally based on his volume of purchases might be sufficient merely for a window poster, obviously of relatively little value to the supplier. However, based on the value of the promotional contribution to the supplier, the grocer would probably be entitled to no allowance.[28] Herein lies the value of criteria which weigh both important factors: volume of purchases and value of the contribution. Thus, such a formula is both workable and desirable in that it takes into account the economic subtleties which are overlooked in many other areas.

Defining "Competing Customer"

Having arrived at a somewhat satisfactory formula for the proportionality clause we must turn to a much more thorny question—one that appears to be the Achilles heel of the section—What is a competing customer?

The *Guides* define "customer" as "... someone who buys directly from the seller or his agent or broker...." [29] The Commission thus formally established its position earlier expressed in

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[24] Lever Bros. Co. v. Procter & Gamble Distrib. Co., Colgate-Palmolive-Peet Co., 50 F.T.C. 494 (1953).

[25] F.T.C. v. Simplicity Pattern Co., 360 U.S. 55 (1959).

[26] GUIDES.

[27] Hickey, *The Fred Meyer Case—Its Implications Under Section 2(d) of the Robinson-Patman Act*, 9 ANTITRUST BULL. 255, 266 (1964).

[28] Where a competitor can furnish the services in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. S. REP. No. 1502, 74th Cong., 2d Sess. 8 (1936); H.R. REP. No. 2287, 74th Cong., 2d Sess. 16 (1936).

[29] GUIDES.

the *Atlanta Trading* case [30] and contrary to the district court's decision in the *Krug* case.[31] There had to be some privity between the two parties unless circumstances existed calling for the invocation of the so-called "indirect purchaser" doctrine.[32]

Originally, parties were considered competing customers only if they were on the same functional level (*i.e.*, wholesalers, retailers). It was realized, however, that labels could be deceiving since a supplier could arbitrarily classify its customers irrespective of true functional differences. Thus, in the *Ruberoid* case [33] the Commission disregarded what it considered ambiguous labels and phrased its order in terms of "purchasers who in fact compete." The Supreme Court felt that approach to be unobjectionable.

Here again we run into another problem. Customers with a multiproduct line may compete with respect to many products, but this does not necessarily mean they compete with respect to the distribution of the product bought from a particular supplier (*e.g.*, where they distribute that product in different geographical areas). Thus, a national chain store may purchase a product from the same supplier as a small retail grocer. The chain store may have an outlet in the same locality as the grocer and the two are actual competitors, but the chain does not sell the product purchased from the common supplier in that locality. Are they competing customers? The Commission says no. In its *Ligget & Meyers* ruling it stated that, "[t]he proportional equality required by Section 2(d) relates to customers competing in the distribution of the *products involved*...." [34]

Rowe would base an identification of competing customers on a finding of geographic *and* functional competition.[35] Alternatively, Mr. Daniel J. Baum considers these criteria to be too narrow and favors a simple determination of whether or not competition is actually affected by the grant of an allowance or service to one customer and not to another.[36] The latter's criticism of the former as being too narrow seems unwarranted; rather, the latter's premise might be too broad. It is difficult to see how a precise determina-

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[30] Atlanta Trading Corp. v. F.T.C., 258 F.2d 365 (2d Cir. 1958).

[31] Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230, 236 (D.N.J. 1956) held that a "[v]iolation of Section 3(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer."

[32] This doctrine is discussed fully *infra*.

[33] F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952).

[34] Ligget & Meyers Tobacco Co., No. 6642 (F.T.C., Sept. 9, 1959); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 397 (1962).

[35] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 394 (1962).

[36] D. BAUM, THE ROBINSON-PATMAN ACT 54 (1964).

tion can be made as to whether two parties are competing when the only criterion used is the effect of the allowance upon competition.

Although a supplier need only make his allowances available to competing customers, there are situations where an indirect-buying competitor of a direct-buying customer is also considered eligible for the allowances or payments. Such a situation arises where there is a "course of direct dealing" between the supplier and indirect-buying retailer, and control by the supplier over the terms of the ensuing purchase transaction.[37]

The rule was first set forth in *Kraft-Phenix Cheese Corp.*,[38] where the Commission stated:

> A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys.[39]

The basic rationale in all "indirect purchaser" doctrine situations is that the exertion of control or the direct dealing between the supplier and the indirect-buying retailer relegates the function of the wholesaler or distributor to that of a "mere conduit" for the supplier's products.[40] Consequently, the indirect purchaser who is in competition with the direct purchaser is as much a "customer" as if he had in fact purchased directly and had no dealings with the distributor. Alternatively, if there were no "course of direct dealing" or control there would be no substantial relationship between the parties, they being only remotely linked in the distributive chain.[41] To hold a purchaser in such a situation to be a "customer" would contravene the "Colgate Doctrine." [42]

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[37] American News Co. v. F.T.C., 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); K.S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (S.D.N.Y. 1961); Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954); Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937).

[38] 25 F.T.C. 537 (1937). Here the Commission was dealing with an alleged 2(a) violation by a respondent who manufactured and distributed cheese products. Most retailers did not buy directly, but the Commission found that respondent exercised a control over the distributing channels through which its products moved.

[39] *Id.* at 546.

[40] Hickey, *The Fred Meyer Case—Its Implications Under Section 2(d) of the Robinson-Patman Act*, 9 ANTITRUST BULL. 255, 268 (1964).

[41] *See, e.g.*, Klein v. Lionel Corp., 138 F. Supp. 560 (1956), where the court refused to hold that an indirect-buying retailer was a "customer" because there were no direct dealings between the manufacturers and retailer nor any measure of control by the former over the latter. *See also* American News Co. v. F.T.C., 300 F.2d 104, 109 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

[42] The essence of the doctrine is the right to select customers and to

The "indirect purchaser" doctrine is essential for the achievement of the legislative objectives.[43] If the requirement that protection only be afforded to those actually purchasing directly from the supplier were rigidly adhered to, suppliers could avoid giving proportional allowances to competitors of their direct-buying favored retailers by utilizing "dummy" wholesalers.[44]

It is readily apparent that a delicate balance has been established so as to give some continuity to the inconsistent provisions of the Act while at the same time striving to achieve its ultimate objective. The objective, though of dubious value, was always within reach, but by a circuitous route. Today, that route is no longer available, it having been diverted to a "dead end" by *Fred Meyer*.[45]

THE FRED MEYER CASE

Fred Meyer, Inc. operates a sizable supermarket chain in the Portland, Oregon area.[46] It has conducted an annual promotional campaign since 1936 whereby coupon books are distributed to its customers for the nominal sum of ten cents per book. The coupons entitle them to a price reduction of one-third or more on each item featured when the appropriate coupon is surrendered upon making a purchase. Each supplier is charged at least $350 for each coupon-page advertising his product.[47] Certain suppliers also replace a percentage of the goods sold by Meyer during the campaign at no charge, or by redeeming coupons in cash.[48]

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refuse to deal. Discussed fully *infra*. *See also* D. BAUM, THE ROBINSON-PATMAN ACT 53 (1964).

[43] [The "indirect customer" doctrine] seems to stem from a fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of direct or indirect price discrimination. . . . The method chosen to reach this goal was to forbid *sellers* to make direct or indirect discrimination in price between one purchaser or customer and another, save in certain limited situations. American News Co. v. F.T.C., 300 F.2d 104, 109 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

[44] *Id.* at 110. Suppose, for example, that a supplier was giving allowances to a favored direct-buyer and wished to avoid making allowances available to its competitors. Instead of dealing directly with the purchaser, it could insert a "dummy" wholesaler and consequently could avoid making similar allowances available to non-favored competitors because, technically, they would no longer be competing on the same functional level.

[45] F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968).

[46] It handles groceries, drugs, variety items, and a limited line of clothing. Its 1960 prospectus indicated that it made one-fourth of all retail food sales in the Portland area and was the second largest seller of all goods in that area. *Id.* at 344.

[47] Meyer sold 138,700 books in 1957 and 121,270 in 1958. In 1957 it made a "clear profit" of $13,870 on consumer purchases of the books. *Id.* at 345.

[48] This gave rise to a 2(a) violation which is not discussed here.

Initially, the Commission held that a supplier who grants promotional allowances to direct-buying retailers must also make them available to *wholesalers* whose retail customers compete with the direct buyer.[49] Discarding the "indirect purchaser" doctrine, the Commission reasoned that the statutory purpose warranted protection of an indirect-buying retailer even though he had no direct dealings with his supplier.[50]

The Ninth Circuit reversed in part with respect to this construction of 2(d) holding that the section only applied to customers competing on the same functional level.[51]

The Supreme Court, in attempting to reach a solution consonant with the objectives of the Act, while remaining within its restrictive framework, adopted what it considered a pragmatic approach.[52] It reversed the court of appeals and rejected the measure adopted by the Commission of treating the wholesalers as "competitors." Rather, it adopted the suggestion of a dissenting Commissioner of treating the indirect-buying retailers as "customers," even though they never dealt directly with the suppliers.[53] Thus, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who compete with the direct buyer in resales but who buy the products through wholesalers.

The functional and theoretical problems presented are numerous and somewhat disconcerting.

CRITICISMS

On first inspection one is confronted with the perplexing realization that the Court has literally redefined "customer" in terms of the Act. Although there is no definition propounded in the legislation, the Commission, which was originally intended to administer the Act,[54] established one which became part of the aforementioned delicate balance.

No longer need there be privity or a "course of dealing" between the parties for one to be considered a "customer." As long as a retailer who purchases through a wholesaler competes with a direct buyer in resales, he is considered a "customer" of the supplier.[55] This is based on the rationale that a narrower con-

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[49] Fred Meyer, Inc., No. 7492 (Mar. 29, 1963).
[50] *See* 390 U.S. 341, 347 (1968).
[51] Fred Meyer, Inc. v. F.T.C., 359 F.2d 351 (9th Cir. 1966).
[52] *See* 390 U.S. 341, 348-49 (1968).
[53] Nor was there any "course of direct dealing" or control exerted by the supplier.
[54] *See, e.g.,* F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 355 (1968).
[55] *Id.* at 352.

struction ". . . would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers. . . ." [56] Large direct-buying retailers who also assume the wholesaling function would be protected from any discriminatory allowances which might otherwise be granted to their direct-buying competitors, while the smaller retailers who buy indirectly would not.

The immediate pragmatic objection to the decision is that to a large extent it will be impossible for the business executive to make necessary decisions with respect to this section. For years he had been closely following the decisions, trying to determine piecemeal the Act's meaning.[57] The precedents regarding definitions of "customer" were largely confirmed by the 1960 *Guides* which were meant to aid in this effort. The decision is a "wrench in the works," to say the least. No longer can there be executive reliance on Commission pronouncements. Rather, the businessman must now follow each and every case through the courts awaiting some new interpretation which might well take the form of a Divine Revelation. (And beware he who attempts to anticipate!)

On closer inspection the objection becomes more fundamental. As was stated by Baum, "... the right to refuse to deal, the statutory embodiment of the 'Colgate Doctrine' permeates the entire Robinson-Patman Act. One who is not a customer cannot claim the allowance or services which flow from sections 2(d) and (e)." [58]

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[56] *Id.* What about small suppliers who must now make allowances available to a much greater number of purchasers? See discussion *infra.*

[57] Cut loose from original legislative objectives, recent proceedings reach out into all sectors of the economy to strike down business practices previously thought competitive. Decisions superimpose ambiguities on uncertain statutory language.

Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman,* 60 YALE L.J. 929, 972 (1951).

It remains difficult for any seller to determine the legal bounds of what is proportional, or when there is proper availability as a written or oral offer, or what are appropriately shared costs and credits in cooperative advertising and promotion.

Austern, *Isn't Thirty Years Enough?,* 30 A.B.A. ANTITRUST SECTION 23 (1966).

The cause of the trouble is the [Robinson-Patman] Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks.

Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman,* 60 YALE L.J. 929, 941 n.66 (1951), *citing* Clark, J., in Ruberoid Co. v. F.T.C., CCH TRADE REG. REP. '48-'51 Dec. ¶62, 847 (2d Cir. 1951).

[58] D. BAUM, THE ROBINSON-PATMAN ACT 53 (1964).

The "Colgate Doctrine" is simply that:

In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.[59]

There was certainly no finding that either Fred Meyer, Inc. or his supplier were attempting to "create or maintain a monopoly." Therefore, the decision is clearly contrary to the "Colgate Doctrine," for the Court is, in effect, directing that the supplier deal with the indirect-buying retailers with whom he never before had any transactions. The possible counter argument that he will not necessarily have to deal with the retailer has no validity.[60] Even if the supplier need only have contacts directly with the wholesaler, to order that the allowance be passed on to the retailer is to create a transaction between the two.[61] Furthermore it is stated in the Act itself:

. . . That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.[62]

Although this provision appears in section 2(a) there is no reason to suspect that it is not applicable to section 2(d). As was often stated in the legislative history, section 2(d) was enacted to prevent disguised 2(a) violations,[63] and, therefore, the sections are so closely related that what is basic to (a) cannot be denied (d) when the purpose of the clause in question is so central to the Act *in toto*. Similarly, in *Bird & Son, Inc.*,[64] the Commission, concerned with a 2(a) question, stated that the Act

. . . does not purport to interfere with the right of the seller to select his customers. He may discriminate in the choice of his

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[59] United States v. Colgate, 250 U.S. 300, 307 (1919).

[60] One such argument would be that the supplier need only grant the allowance to the wholesaler, requiring that it be passed on to the retailer. There are important Sherman Act implications in this argument which will be discussed fully *infra*.

[61] This is not being overly technical for a dealing does not require a face-to-face confrontation, but may be carried on through intermediaries.

[62] Robinson-Patman Act, 15 U.S.C. § 3(a) (1964). *See also* C. EDWARDS, THE PRICE DISCRIMINATION LAW 40 (1959). Edwards states that this provision was included to make sure that certain practices were not to be regarded as unlawfully discriminatory.

[63] *See, e.g.*, S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

[64] 25 F.T.C. 548 (1937).

customers. Not until there is a discrimination in price among those chosen does section 2(a) of the Act have any application.[65]

Applying this reasoning to section 2(d), the supplier may discriminate in his choice of customers. If the court then finds that an allowance was not proportionally granted to one who is a customer (or must be considered a customer because of a *course of direction dealing*) there is a 2(d) violation. It is not sufficient to first make a determination that all those who compete with respect to the products involved are "customers," even though remotely related in the distributive chain, and through this device find that a violation has been committed.

The repudiation of the "indirect-purchaser" doctrine, although coming not as a complete surprise, directs new attention to the weaknesses of section 2(d) and the Act generally. Undoubtedly there is something basically wrong with a statute which necessitates reliance on such a doctrine to accomplish its successful implementation.[66] Fundamental weaknesses aside, however, it was earlier pointed out that the doctrine was, in fact, a significant factor in a delicate balance. While on the one hand the nonfavored indirect purchaser must be protected, on the other, one having no contacts with the supplier cannot be considered a "customer." [67] The Court felt that such an analysis resulting in a doctrine requiring some direct dealing was giving too narrow a construction to the statute.[68] Thus, it is unnecessary to find any direct dealing unless the doctrine is being used ". . . to pierce a supplier's unrealistic claim that a reseller favored by him is actually the customer of an intermediate distributor." [69] The ramifications of such a holding warrant closer examination.

Exempting the requirement of direct dealing places a tremendous burden on suppliers. Suppose, for example, that a small supplier grants an allowance to a direct-buying retailer for the promotion of a particular product which it also sells to a number of wholesalers. Each wholesaler might conceivably distribute the product to hundreds of independent retailers. The supplier is in a position where he must make the allowance available to *each and every* indirect-buyer who resells the product. The financial burden on a small supplier could be overwhelming. Moreover, the functional problem of determining who the resellers are and in what proportions they are to receive the allowances approaches

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[65] *Id.* at 553.
[66] *Supra* note 43.
[67] *Supra* note 41.
[68] 390 U.S. 341, 354 (1968).
[69] *Id.* at 353.

a magnitude which becomes ludicrous.[70] It requires of the supplier an advanced information feedback system which large firms have difficulty maintaining within their own corporate structures. In the final analysis, the small supplier will find it easier to simply avoid giving any promotional allowances, while the large supplier who can better afford the increased costs and responsibilities will be able to continue. Needless to say, the effect on competition and the small supplier will not be salutary.

Prior to the decisions in question a definite trend had developed away from the former reliance on functional levels and labels as determinative factors of the Act's applicability.[71] Moreover, the *Report of the Attorney General's National Committee to Study the Antitrust Laws* indicated that the ". . . proliferation of modern marketing units defies neat nomenclature and descriptive labels." [72] The decision of the Commission [73] was in line with this trend. It was found that the wholesalers did in fact compete with Fred Meyer, Inc., and, therefore, they would have to be granted the allowances; not the retailers to whom they resold. Functional labels were disregarded with good reason. Fred Meyer, Inc. assumed the wholesale distributive function, as well as the retail; therefore, it *did* technically compete with the wholesalers and such a finding was entirely reasonable. The Court, however, resurrected the old artificial barrier and said that Meyer and the wholesalers were on different functional levels and thus could not compete. Instead of treating Meyer as a wholesaler, which was feasible, it elected to treat the indirect-buyers as "customers," which they were not. This renewal of the importance of functional levels and labels merely serves to retard progressive enforcement of the Act and encourages the resort to an unrealistic rationale.

The Court's reliance on Section 5 of the Federal Trade Commission Act as the means to enforce its finding of a 2(d) violation deserves attention. As was mentioned earlier, although section 2(d) was intended to minimize the advantages of large buyers,[74] it only deals with sellers. Furthermore, the only section

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[70] Also, as Justice Harlan points out in his dissent, "the supplier risks treble damages if his guess as to what is even handed treatment turns out to be erroneous." *Id.* at 362.

[71] *See, e.g.,* F.T.C. v. Simplicity Pattern Co., 360 U.S. 55 (1959); F.T.C. v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956).

[72] REPORT OF THE ATTORNEY GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 204 (1955).

[73] 63 F.T.C. ———.

[74] *Supra* note 16.

of the Act which is aimed at buyers is section 2(f) which provides that

> [i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.[75]

Unfortunately this section is concerned only with discriminations in price and not promotional allowances.[76] Consequently, nothing in the Act focuses on the inducement of a violation or receipt of unlawful payments under 2(d) by a buyer.[77] As to why such an omission was made there has been a great deal of debate, but the general consensus seems to indicate that it was inadvertant.[78] In order to compensate for this defect, resort has been made to Section 5 of the Federal Trade Commission Act,[79] which provides that

> [u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

In *Grand Union v. FTC*,[80] the Second Circuit stated that the Federal Trade Commission Act

> . . . was intended to give the Commission the power to 'hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.'[81]

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[75] Robinson-Patman Act, 15 U.S.C. § 13 (f) (1964).

[76] *See* C. EDWARDS, THE PRICE DISCRIMINATION LAW 486-87 (1959); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 432-33 (1962).

[77] In two cases, Miami Wholesale Drug Company (Dkt. 3377), and Atlantic City Wholesale Drug Company (Dkt. 4957), the Commission proceeded against buyers who had received advertising allowances, but found that these were subterfuge arrangements for violations of 2(a). *See* C. EDWARDS, THE PRICE DISCRIMINATION LAW 487 (1959).

[78] American News Co. v. F.T.C., 300 F.2d 104, 108 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union v. F.T.C., 300 F.2d 92, 94 (2d Cir. 1964). *See* Dunn, *Section 2(d) and (e)*, New York State Bar Ass'n Robinson-Patman Act Symposium 55, 61 (CCH 1946). *But see* Judge Moore's dissent in Grand Union v. F.T.C., 300 F.2d 92, 101 (2d Cir. 1962).

[79] 15 U.S.C. § 45(a)(1) (1964). *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 432-36 (1962).

[80] 300 F.2d 92 (2d Cir. 1962) dealt with a cooperative advertising arrangement between Grand Union, a group of its suppliers and an advertising firm.

[81] *Id.* at 98, *citing* F.T.C. v. Cement Institute, Inc., 333 U.S. 683, 693 (1948).

Consequently it affirmed the finding of the Commission that

> it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate the *spirit* of the amended Act. . . .[82]

Thus, the buyer's inducement of a 2(d) violation and knowing receipt of the benefits thereof was an "unfair method of competition" under Section 5 of the Federal Trade Commission Act.[83] Moreover, in the *American News* case, the court indicated that a buyer must see first whether payments are offered or otherwise made available to his competitors.[84]

Strongly dissenting in both *Grand Union* and *American News*, Judge Moore pointed out in the latter that this holding would be detrimental to the bargaining position of buyers.[85] Since a buyer could not accept better terms unless he first inquired of the seller as to whether the terms were made available to others and then verified any such assurance, the magnitude of this burden would probably preclude the buyer from even asking for better terms. He further points out that there was possibly good reason for not extending the provisions of section 2(d) to buyers:

> [A] seller is in a unique position to know whether he is giving proportionally equal allowances to his customers. The customers could not possibly have such facts available.[86]

This reasoning seems to be much more solidly based than that of the majority. Indeed, more discussion and comment is needed from the Court.[87] What is truly disturbing in light of these developments is the fact that the *Fred Meyer* Court relied on section 5 without any discussion of the issue whatsoever. Thus, criticism is well-directed on this point.

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[82] F.T.C. Dkt. 6973, at 10-11 (emphasis added).

[83] Grand Union v. F.T.C., 300 F.2d 92 (2d Cir. 1962). *Accord,* American News Co. v. F.T.C., 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962). *See also* R.H. Macy & Co. v. F.T.C., 326 F.2d 445, 447 (1964), where the court stated:

> [w]here activity runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.

Citing Fashion Originators Guild of America v. F.T.C., 312 U.S. 457, 463 (1941).

[84] American News Co. v. F.T.C., 300 F.2d 104, 111 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962).

[85] *Id.* at 112.

[86] *Id.* at 113.

[87] *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 435 (1962).

The functional problems which will undoubtedly arise through the implementation of this construction of section 2(d) are of some significance. The Commission's decision [88] raised serious doubts about this construction. Rowe pointed out that although the decision had established the wholesaler's eligibility for promotional allowances it did not specify the obligations of the wholesaler ". . . including any potential duty of 'passing on' the benefit to his retail customers who are the prime object of the FTC's concern." [89] So too, Mr. Austern prophetically indicated that the Commission's decision seemed "headed for collision" with the Sherman Act.[90] The decision of the Court assumes an even more precarious position; it leaves two alternatives for compliance by suppliers, both of which are on the collision course described above.

Firstly, one method which the Court suggests [91] is for suppliers to impose restrictions on wholesalers to insure that the allowances are passed on to retailers. The supplier would have to establish maximum resale prices to prevent the wholesaler from absorbing the allowances. As Justice Harlan points out in his dissent, this would involve a conflict with the resale price maintenance prohibitions of the Sherman Act.[92] Under *Albrecht v. Herald Co.*,[93] resale price fixing is a per se violation of antitrust law whether done by agreement or combination.[94] Specifically, agreements to fix maximum resale prices as well as minimum prices are illegal.[95] In

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[88] 63 F.T.C. ———.

[89] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), (Supp. 1964) at 89-90.

[90] Austern, *Isn't Thirty Years Enough?*, 30 A.B.A. ANTITRUST SECTION 23 (1966).

[91] 390 U.S. 341, 358 (1968). The Court suggests that

> [t]he supplier takes responsibility, under the rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.

But how can a supplier take responsibility based on those rules when the Court itself ignores them?

[92] *Id.* at 361, *citing* Albrecht v. Herald, 390 U.S. 145 (1968).

[93] 390 U.S. 145 (1968).

[94] *Id.* at 151, *citing* United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[95] Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold.

Id. at 152-53.

Kiefer-Stewart Co. v. Seagram & Sons,[96] holding illegal a combination of liquor distributors to set maximum resale prices, the Court said that agreements to set maximum prices ". . . no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." [97] The basic problem created by any such price restriction is that transactions which might have otherwise taken place are foreclosed.[98] Other vices of such restrictions are numerous.[99] Another consideration is that of determining what the maximum price will be. A supplier is in no position to set a wholesaler's prices for the mere fact that he cannot know the intricacies of each individual firm's pricing policies and the factors which determine prices. If he decides to peg a specific amount onto the wholesaler's own price the probability exists that the wholesaler will cut his prices to compensate for this stated increase.

A likely argument by the Court would be that such resale price maintenance is necessary to protect the small retailer and therefore not illegal. This argument is necessarily precluded by the Court's own statements. It rejected the reasoning of the court of appeals in *Kiefer-Stewart* that a price ceiling was necessary to protect the public,[100] and in *Albrecht* it stated unequivocally that

> [t]he assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distributive practice is unpersuasive. If . . . the economic impact . . . was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under Section 1 of the Sherman Act.[101]

The second alternative for compliance is that the supplier bypass the wholesaler altogether and make the allowances directly

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[96] 340 U.S. 211 (1951).

[97] *Id.* at 213, *cited in* Albrecht v. Herald Co., 390 U.S. 145, 152 (1968).

[98] Comment, *Antitrust—Newspaper's Maintenance of Fixed Maximum Retail Price Held Not to be Combination in Restraint of Trade or Commerce*, 47 B.U.L. REV. 274, 288 (1967).

[99] Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.
Albrecht v. Herald, 390 U.S. 145, 153 (1968).

[100] *Id.*

[101] *Id.* at 154.

available to the retailers. As Justice Harlan again points out in his dissent, this alternative too is impracticable.[102] A single large supplier might deal with hundreds of wholesalers who in turn deal with hundreds of small retailers. This factor might make it less than feasible for the supplier to deal directly with the retailers. However, there exists the distinct possibility that to avoid violation of section 2(d) large suppliers might find it increasingly desirable to integrate forward and absorb the wholesaling functions themselves. In such a capacity they would then find it easier to administer the allowances directly. This is not at all unlikely as the pressure to avert the prospect of treble damage actions mounts, since the logistical costs would probably be considerably less expensive. Here again there exist Sherman Act complications, as any such direct dealing or forward integration could be considered a conspiracy in restraint of the wholesalers.[103] Also, mention must again be made of the fact that suppliers will find it quite difficult to determine what is proportional.[104]

In addition to the enforcement problems there are many theoretical problems viewed from the economic perspective. The Robinson-Patman Act itself is fraught with such problems, and they must be considered generally along with the specific ones inherent in the *Fred Meyer* decision.

The fundamental purpose of all antitrust law is to protect competition. Competition per se is valuable because theoretically it guarantees the correct price adjustments in a free market economy. However, in an advanced market and even in an optomistic one the effect of competition is to wipe out marginal firms. To allow true competition to take its natural course we would have to adhere to the laissez-faire policy advocated by Adam Smith. Of course, such an attitude is impractical in an advanced economy. All forms of price discrimination have some deleterious consequences. But to the extent that discriminatory practices are curtailed, marginal firms are preserved at the expense of the more efficient large firm.[105] "Moreover, economists do not condemn discrimination per se. On the contrary, they find it contributes to an efficient use of resources." [106]

To elaborate further, a large firm grows because it is efficient. The economies of scale make it more efficient and enable it to

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[102] 390 U.S. 341, 361 (1968).

[103] *Id.*

[104] See discussion of "proportionality" *supra.*

[105] "The Act has a single unifying principle: to enforce discrimination against the lower-cost buyer or the lower-cost method of distribution." Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 4 (1953).

[106] Backman, *An Economist Looks at the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTIONS 343, 345 (1960).

grow larger. Because it can buy in large quantities it receives certain discounts. These discounts are not considered discriminatory because they are "cost justified." [107] However, the large firm also receives promotional allowances which may or may not be disguised price discriminations. These can never be "cost justified" and are illegal per se unless they are made available on proportionally equal terms to all the large firm's competitors.[108] In effect, this is rewarding the marginal firm for its inefficiencies. The avowed purpose of the Robinson-Patman Act is to protect the small firm regardless of efficiencies,[109] and this is where it runs directly counter to other antitrust law, the purpose of which is to protect competition, not competitors.[110]

We must examine the true objectives. We do not want to protect competition merely for competition's sake, but because of the salutory effects in a free market economy. Thus, the countervailing forces will adjust through competition so as to establish optimum efficiency in the economy, letting the marginal firms fall by the wayside [111] and resulting in lower prices to the ultimate

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[107] *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT ch. 10 (1962); C. EDWARDS, THE PRICE DISCRIMINATION LAW ch. 18 (1959).

[108] It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment, service, or facility, could be justified through savings in the cost of manufacture, sale or delivery. GUIDES. *See also* Corn Ref. Prods. Co. v. F.T.C., 166 F.2d 211, 219 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945). *Accord*, R. H. Macy & Co. v. F.T.C., 326 F.2d 445, 450 (2d Cir. 1964); Elizabeth Arden, Inc. v. F.T.C., 156 F.2d 132 (2d Cir. 1946); United Cigar-Whelan Stores Corp. v. H. Weinreich Co., 107 F. Supp. 89 (S.D.N.Y. 1952); D. BAUM, THE ROBINSON-PATMAN ACT 50 (1964); C. EDWARDS, THE PRICE DISCRIMINATION LAW 164 (1959).

[109] According to Rep. Patman, ". . . it is one of the first duties of Government to protect the weak against the strong and prevent men from injuring one another. . . ." 80 CONG. REC. 3447 (1936).

[110] To the extent that the Robinson-Patman Act inhibits price and service competition generally, it may often conflict with the objective of the antitrust laws of protecting and fostering vigorous competition for the benefit of the public (and not for the benefit of the individual competitors). The Supreme Court has indicated that, where Congress has left the courts free to make the determination, this conflict is to be resolved in favor of the "broader policies" of the antitrust laws. Automatic Canteen Co. v. F.T.C., 346 U.S. 61, 74 (1953).

[111] To the extent that competition is effective, it must hurt someone. Presumably, those who are the less efficient and render the poorer service are hurt and hence on balance the economy benefits from vigorous competition. Clearly, hurting competitors and hurting competition are not synonymous.

Backman, *An Economist Looks At the Robinson-Patman Act*, 17 A.B.A. ANTITRUST SECTIONS 343, 352, *citing* Boles, Jr., *Marketing and the Robinson-Patman Act*, PROCEEDINGS OF THE 1958 INST. ON ANTITRUST LAWS, 12-13 (1958).

consumer. To protect the small firm just because it is small is illogical and, from a pragmatic viewpoint, harmful to the market mechanism.[112] Furthermore, the Act is aimed specifically at firms which are the epitome of efficiency in the market, the integrated chain store. In evaluating the integrated firm, Professor Adelman stated that

> successful integration, vertical or horizontal, consists in the saving of overhead, and results in doing a given job more cheaply. Thus it is like any superior method of doing business in that it permits the more efficient firm to displace its rivals. This is of course the way that competition is supposed to increase output and lower prices. . . .[113] The vice of integration, therefore [from the point of view of the Robinson-Patman Act], is its superior efficiency, for that makes it impossible for nonintegrated concerns to be 'able to compete.'[114]

He characterized the "displacement of inferior by superior business methods" as the "essence of competition."[115]

The true objective of antitrust policy should necessarily be the protection of the public. "The [Robinson-Patman Act] . . . strikes directly at the primary interest of the public by denying consumers the assurance of obtaining the benefits of the lowest prices, the most efficient methods and equipment can bring about under free, but fair, competition."[116] In the long run the consumers are the ones who are being hurt most by this statute.[117]

The *Fred Meyer* decision, in broadening the reach of the Act, is helping to proliferate the evil. This can be seen by examining the *Kay Windsor* case.[118] There, a dress manufacturer granted advertising allowances to some customers without making them available to all others competing in the distribution of the goods. The Commission held that a retailer making purchases through a purchasing syndicate was a "customer" under the "indirect purchaser" doctrine.[119] Directing attention to the dress industry,[120] it

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[112] I have never found a situation in which an order or a treble-damage judgment grounded on this statute resulted in any greater volume of production at lower prices for the ultimate consumer.
Austern, *Isn't Thirty Years Enough?*, 30 A.B.A. ANTITRUST SECTION 24 (1966).

[113] Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 48 (1949).

[114] *Id.* at 53.

[115] *Id.* at 50.

[116] H.R. REP. No. 2287, 74th Cong., 2d Sess., pt. 2, at 27 (1937).

[117] The consumers owe no business a living; laws like the instant one intended to preserve any business at the expense of the consumer will in the end prove harmful. *Id.*

[118] Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954).

[119] *Id.* at 96.

[120] *See* C. EDWARDS, THE PRICE DISCRIMINATION LAW 180-82 (1959).

is evident that advertising plays a central role in all stages of distribution. From the manufacturer's point of view, his sales to small stores are facilitated if he can show that prestige stores are carrying his line.[121] Consequently, manufacturers compete for advertising by influential stores, and offer this advertising selectively.[122]

The Commission found a violation of section 2(d). The problems engendered by this decision are readily apparent. An overabundance of advertising might make the dresses seem too common to be desirable.[123] After Windsor's discontinuance of allowances, interviews with customers indicated they had been adversely affected by the decision.[124] The small customers admitted that advertising of a particular dress by a large store generated sales for the smaller stores; moreover, some of them based their orders on dresses which were so advertised. Furthermore, small customers were reluctant to obtain proportional allowances because they were impracticable.[125] One customer suggested the change in policy reduced his willingness to buy Windsor dresses.[126]

The *Windsor* case is important here because it demonstrates what actually happens as the result of such a decision. We see at first hand the economic consequences. Although it can be argued that the dress industry is totally unrelated to the food industry, the basic problems resulting from such a decision or order are basically the same. The *Fred Meyer* decision would have much more widespread consequences, however, because of the size of the class of "customers" it creates.

Another important point which has been conspicuously neglected in discussions of section 2(d) and relevant cases, is the fact that although the Act is aimed at the protection of the small retailer the cases under section 2(d) and especially *Fred Meyer* serve to undermine the position of the small supplier. Advertising is vital to the small supplier and his limited budget places him in a precarious position with respect to his large competitors. *Fred Meyer* says that whenever such a supplier makes an advertising allowance to one retailer he must make it available to *all* retailers who compete in the distribution of his product. Spreading his allowances thin in such a manner might make it impractical for him to advertise at all. As Edwards puts it,

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[121] *Id.* at 181.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 182.
[125] A small buyer cannot claim a small promotional allowance because he does not find it practicable to advertise by brand name a dress of which he may have bought only six copies. *Id.*
[126] *Id.* at 204.

[t]his requirement necessarily impairs the opportunity for the producer to limit his promotional budget by centering his campaign on certain strategic points, to focus his promotion on the prestige of particular distributors, and to experiment locally with new types of promotion.[127]

His advertising having been seriously curtailed, the position of the small supplier is truly precarious. Indeed, Fulda suggests that he may go bankrupt in the process of trying to make proportionate payments to all his customers.[128]

The economic consequences of the Act and the instant case are best summarized by Rowe:

Recent cases highlight the dangerous effects of a statute that regulates a competitive economy but perverts the economics of competition. Because the universals of the statute have swallowed up original aims, decisions strike into all sectors of the industry. No coherent pattern of business regulation emerges. The cases' undercurrent of protecting some competitors, however, increasingly conflicts with public policy of competition itself.[129]

Conclusion

The Robinson-Patman Act undoubtedly has its remunerative features. As a deterrent to firms which would otherwise utilize superior market positions to effectuate monopolistic practices, it is valuable in protecting competition. Specifically, the salubrious quality of section 2(d) is that it forces firms to make public their advertising practices, thus discouraging sinister schemes. Surely small firms must be protected from monopolies, but not from competition.[130] Robinson-Patman apparently is trying to shelter small firms from anything which might be detrimental whether the net effect be beneficial to the long-range economy or not.

Advocates of this position base their arguments on the necessity of protecting the entrepreneur whose "ingenuity and daring" is essential to our system.[131] Although this may be true to an extent, there is no reason why they should not be subjected to the natural influences of the competitive system. If the firm is

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[127] *Id.*

[128] Fulda, *Food Distribution in the U.S.*, 99 U. PA. L. REV. 1051, 1089 (1951).

[129] Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 942 (1951).

[130] *But see* Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 77 (1949).

[131] Van Cise, *No Thirty Years Are Not Enough*, 30 A.B.A. ANTITRUST SECTION 28, 30 (1966).

truly efficient, it will survive because its own inherent advantages will balance those of the large firm. Moreover, today the ingenuity comes not from small firms but from large firms whose extensive research and development departments produce the significant technological innovations.

Departing from the realm of generalities and focusing on the instant case, how can the sheltering of a small retail grocer from the advantages of a large chain be justified? What form of "ingenuity and daring" does this small grocer possess? The answer simply is that he might carry products and perform specialized services which the large store cannot. If this is true he will be able to compete successfully on his own. If it is not, he does not deserve governmental coddling. Although this economic Darwinism might seem harsh, it is a fundamental fiber in the method of competition upon which our free market system is based.

During the 1930's the small firm did embody daring entrepreneurial qualities. Today, however, elements of our economic system have changed almost beyond recognition. In tracing the development of the Act, Professor G. Alexander feels that

> [w]hat may have resulted is an act which perpetuates an outdated economic distribution system for the benefit of unnecessary intermediaries and simultaneously, in the name of a competitive economy, perpetuates the inefficient whose eradication is the *sine qua non* of free competition.[132]

The implementation of the inconsistent and vague provisions of the Act, particularly section 2(d), leads to a good deal of judicial legislation. The *Fred Meyer* Court, confronted with the task of enforcing the most confusing section of the Act, took it upon itself to use a definition which it considered necessary to reach what it perceived as a desired end. Nothing serves to confuse an issue more than a court or administrative agency taking it upon itself to discern what the legislature intended. In attacking such judicial legislation by the Commission, Professor Handler expressed it thusly:

> Congress vested the Commission with a broad and flexible mandate. But it did not endow it with the power to legislate. In the final analysis a democracy cannot permit its laws to be rewritten by administrative agencies or the executive. Where administration discloses defects or limitations in the laws drafted by Congress with which the

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[132] Alexander, *Section 5 of the Federal Trade Commission Act, A Deus Ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317, 323 (1961).

techniques of interpretation are unable to cope, the remedy is to request supplemental legislation from the elected representatives of the people who, under our system of government, are the final arbiters of national policy. This has been the settled practice in the anti-trust field where numerous legislative changes have been made over the years.[133]

Needless to say, such a characterization applies equally to the rewriting of laws by the courts. Such practices merely serve to magnify inconsistencies, make it harder for the Commission to perform its function, and leave businessmen in the dark. A better method would be to leave enforcement entirely to the Commission. Inequitable decisions would ultimately result in supplemental legislation to modify the Act.

From a perplexing Act have come confusing interpretations, but nothing appears to have been more off track than the *Fred Meyer* decision. The Court accomplished no more than did the Commission in enforcing the objectives of section 2(d), but reached the same result in a way which added unnecessary complications in view of the fact that similar results had been achieved by a more direct route in earlier cases. It would have been more logical to treat the wholesaler in the case as a competitor of Fred Meyer on that particular level. In the final analysis, however, even the Commission's decision would have been unsatisfactory in light of the economic ramifications discussed earlier. These indicate quite clearly that the decision has gone too far in its interpretation of section 2(d).

It would be exceedingly difficult, if not futile, to attempt to surmise the true reasoning of the Court. What is beyond doubt, however, is the fact that this judicial *tour de force*[134] has given a broader interpretation to an already broad statute.[135] It has increased its scope to a breadth beyond the visions of its founders and stretched it so thin as to approach functional insignificance. This type of decision will lead to similar discordant interpretations of the Act by the Commission and lower courts. The Act was intended to be flexible, but when rubber is stretched too far it breaks. The true test may possibly be at hand.

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[133] American News Co. v. F.T.C., 300 F.2d 104, 114 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962), *citing* Handler, *Review of Antitrust Developments, The Record, Association of the Bar, New York City*, Vol. 17, No. 7 at 408.

[134] 390 U.S. 341, 359 (1968).

[135] Rep. Utterback, Chairman of the Senate-House Conferees, characterized the prohibitions of the bill as intentionally broad. 80 CONG. REC. 9418 (1936).