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Section 5 of the Federal Trade Commission Act, A Deus Ex Machina in the Tragic Interpretation of the Robinson-Patman Act

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SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT, A *DEUS EX MACHINA* IN THE TRAGIC INTERPRETATION OF THE ROBINSON-PATMAN ACT

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I

Good taste prohibits further maligning the deformed body of law known as the Robinson-Patman Act.[1] When it becomes the subject of judicial controversy, allowances are normally made for the apparent incongruity of its appendages and charitable attempts are made to view it as though it were properly developed. Some belated surgical treatment has, in fact, had some effect in producing better co-ordination.[2] On the whole, though, malignancies thrive and the prognosis is poor. Experts urge euthanasia as the best alternative both for the antitrust family as a whole and for the ill-conceived offspring.[3]

On the other hand, hardly a voice is raised against the antitrust power granted the Federal Trade Commission in section 5 of the act creating the commission. The simplicity of expression that interdicted "unfair methods of competition," coupled with general agreement that unfair methods should be eradicated, make it difficult to find fault with the principle of the section.

Until recently, the Trade Commission, which has taken primary responsibility for the enforcement of the Robinson-Patman Act and, of course, has exclusive authority over the development of the Trade Commission Act, has used both relatively independently. The Robinson-Patman Act has been developed and expanded until today it approaches rendering unlawful any financial concession made by a seller to some, but not all, of his customers. In order to accomplish that expansion, the Trade Commission has had to interpret the act very strictly; and, predictably, strict construction of a poorly drafted act has led to at least one absurd loophole. The Commission has chosen to use section 5 as a *deus ex machina* to preclude the undesired result. In so doing, it has raised the question of the future of both acts. The contrast between the broad, simple lines of section 5 and the prolix, inarticulate construction of Robinson-Patman throws into dramatic relief some of the problems of each. This article will briefly sketch the acts as they interrelate and suggest some of the problems raised by their joint application to the problem of discriminatory pricing.

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1. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a)-(f) (1958). "The Robinson-Patman Act has been belabored . . . by speakers too numerous to count." *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra,* Statement by Earl W. Kitner, then Chairman of the FTC before the New York State Bar Association Section of Antitrust Law, Jan. 26, 1961.

2. *E.g.,* notes 16 through 20 *infra* and accompanying text.

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

II

In 1935, the Federal Trade Commission was awaiting an anti-price-discrimination amendment of rather simple proportions.[4] What it got instead (the Robinson-Patman Act) was a very extensively developed section which appeared, at first glance, to be capable of accomplishing all that the Commission had wanted and more. Even before its first application, however, the language of the act seemed awkward at best. For example, section 2(a)[5] prohibited discriminating in price without clarifying whether to "discriminate" meant more than to charge a different price. The section was limited to "commodities of like grade and quality." Fortunately "of like grade and quality" never developed into the formidable cavity that the word "like" had introduced into the earlier Interstate Commerce Commission Act.[6] The clause concerning the requisite injury to commerce was inarticulately formed.[7] By comparison with other legislation, however, it was not a bad sub-section, forming a good nucleus for the act.

The sub-sections were more deformed. Section 2(b)[8] devoted 125 words

4. The Federal Trade Commission had studied the problems created by the emerging national chain stores and had requested an amendment to section 2 of the Clayton Act. Its proposal was contained in a bill, introduced by Rep. Mapes, which would have made it unlawful to discriminate in the price of commodities, either directly or indirectly, "unfairly or unjustly." In the wake of the fallen Blue Eagle, Schecter Poultry v. United States, 295 U.S. 495 (1935), the "unfairly or unjustly" standard was feared too vague and abandoned by the Committee. *Hearings Before the House Committee of the Judiciary on Bills to Amend the Clayton Act,* 74th Cong. 1st Sess. (1935).

5. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing [herein] contained . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

6. Interstate Commerce Commission Act § 2, 24 Stat. 379 (1887), as amended, 49 U.S.C. § 2 (1958), prohibits receiving from a customer "a greater or less compensation for any service rendered . . . for doing . . . a like and contemporaneous service . . . under substantially similar circumstances . . ." than received from other customers. ICC v. Baltimore and O.R.R., 145 U.S. 263 (1892) (different rates could be applied for group travel over same route since not *like* service as individual travel). For interpretation of "commodities of like grade and quality" under the Robinson-Patman Act see: ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 156-159 (1955).

7. The Robinson-Patman amendment appended the words: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them," to the pre-existing standard of substantial lessening of competition or tendency toward monopoly. The meaning of the words is still disputed. See: Anheuser-Busch v. FTC, TRADE REG. REP. (1961 Trade Cas.) ¶ 69904 (7th Cir. January 25, 1961).

8. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958):

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the

to an explanation of the allowable affirmative defenses to the prohibited conduct. This relatively simple segment was so poorly conceived that the Trade Commission and the Supreme Court have disagreed to the present day whether the mentioned affirmative defenses were complete defenses[9] and many cases have been required to resolve that the sub-section did not lower the government's burden of proof of competitive injury.[10] In addition, since the section referred to "discrimination in price or services or facilities furnished" whereas 2(a) referred only to discrimination "in price," the sub-section seemed broader in scope than 2(a). Taken literally, the section granted an affirmative defense to two of the four types of discriminatory conduct prohibited, although there appeared no rational basis for singling out those two.

Section 2(c)[11] was so complex in its wording that courts would ultimately find that it almost absolutely prohibited the payment of brokerage fees where the recipient was identified with the buyer.[12] Worse yet, the sub-section, inexplicably, prohibited the receiving of the outlawed fee as well as its granting. Since neither 2(d) nor 2(e) contained a clause directed at receipt and since the provisions of 2(f) only prohibited *knowing* receipt of a "discrimination in price,"[13] the added flourish would complicate the interpretation of the later sections.

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

9. Standard Oil v. FTC, 340 U.S. 231 (1951) (complete defenses); Exquisite Form Brassiere, Inc. TRADE REG. REP. ¶ 29195 (FTC Oct. 31, 1960) (holding 2(b) inapplicable to a 2(d) charge included a gratuitous barb: "In that case [Standard Oil v. FTC, *supra*] *despite a legislative history clearly indicating that Congress felt that the defense was to be construed as strictly procedural,* the Supreme Court held that the language of section 2(b) was clear and provided a complete defense to a charge of price discrimination." *Id.* at 37588, 37589 (Emphasis supplied).

10. The Trade Commission contended that the words: "*prima facie* case thus made . . ." established that it could prove violation, *prima facie,* without proof of competitive injury. This contention was seemingly laid to rest in Automatic Canteen v. FTC, 346 U.S. 61 (1953).

11. 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1958):

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

12. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188-189 (1955). Even independent brokers seem to fall within the ambit of the sub-section under certain circumstances, FTC v. Henry Brock, 363 U.S. 166 (1960), though there is some question as to the propriety of blaming the statute in this regard.

13. 49 Stat. 1526 (1936), 15 U.S.C. § 13(d)-(f) (1958).

Section 2(d),[14] by contrast, seemed clear indeed, but 2(e)[15] more than compensated for the apparent clarity. While the two prior sections carefully began by prohibiting payment by a person engaged in commerce, 2(e) ignored the commerce qualification entirely and added the verb "discriminate" apparently to qualify the operative verb "furnish," thus raising at least two questions: in light of the exclusion of "discriminate" in the two prior sections, did 2(e) require something more than a mere furnishing and, by the same token, would 2(a)'s use of "discriminate" in "discriminate in price" have to be re-examined in light of the implications of its use in 2(e). Furthermore, 2(e) in referring to the recipient of the services called him "purchaser," leaving the reader to wonder how this person differed from the "customer" who was the recipient in 2(d). Finally, the omission of limiting words seemed to make the section applicable whenever a service was accorded to *any* purchaser regardless of whether that purchaser was competing with the other purchasers from the supplier.

Of all the sub-sections, 2(e) was probably the most inexcusably sloppy. That judicial interpretation made it workable suggests that the ultimate degeneration of the other sub-sections might have been more preventable. In fact, viewing the miracle that replaced "purchaser" with "customer"[16] and "accorded" with "available"[17] appended the commerce qualification[18] and the competing customer requirement[19] and shrank the "discriminate" provision to insignificance,[20] it is difficult to understand the limited use of the judicial scalpel on adjacent verbiage.

Had the Federal Trade Commission initially taken a long-range view, it would likely have decided that the act could be adapted to the purpose

14. 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958):
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.

15. 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (1958):
It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

16. Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945) a careful opinion, discussing both sub-section (d) and (e) uses the terms "customer" and "purchaser" interchangeably. This interchangeability has, apparently, never been questioned.

17. No case to date has suggested any difficulty in finding the two terms synonymous.

18. Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945).

19. Chicago Sugar Co. v. American Sugar Refining Co. 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950).

20. FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959). "Discriminate" in 2(a) has also been interpreted so as to divest it of overtones. ". . . [A] price discrimination . . . is merely a price difference." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

of the less complex proposal, giving the commission a rather flexible tool in discriminatory pricing. In fact, the act seems better adapted to such interpretation than to the one ultimately forced upon it. Section 2 begins, as it began prior to the Robinson-Patman amendment, by declaring it unlawful "either directly or indirectly to discriminate in price" under certain circumstances. It would have seemed unduly restrictive for a court to have held, prior to the addition of the other sub-sections, that a firm which gave selected customers a discount in the form of services was not *indirectly* discriminating in price against other purchasers. More controversial still would have been a holding that labeling the discount "brokerage" when, in fact, no brokerage service was performed, would take the transaction beyond the purview of the section. Since the quoted language is apparently sufficient to cover the collateral evils prohibited by the later sub-sections in the present act and since, in fact, "indirectly" makes little sense if 2(a) is taken as limited entirely to *price* differences, 2(a) could quite easily have been interpreted as controlling the later specific enumerations of indirect discriminations. Thus, with a single bold incision to the heart, the sub-sections might have been made to function in coordination. All forms of discriminatory sales would have been judged by the same standards and most of the problems which were later to plague the act could have been avoided.[21]

Under the above suggested interpretation, the language of 2(b) relating to "discrimination in price or services or facilities furnished" would be interpreted as synonymous with direct and indirect price discrimination in the prior sub-section. Thus, the justification based on meeting a competitor's price would be uniformly applicable whether the violation alleged was a discriminatory price or another form of discrimination. All prohibitions in the act would be modified by the competitive injury standard and cost justification defense of the first sub-section and, conversely, recipients of all types of discriminatory allowances, whether in price or its equivalent, would be governed by sub-section (f).[22]

The Trade Commission decided on an alternative approach. Each sub-section, treated without regard to the whole, could be developed to accomplish specific tasks more easily. Blinded to the competitive injury requirement, (c), (d) and (e) could be made to strike out at brokerage and advertising allowances, striking them down without regard to any plea that in use they were really competitively innocuous.[23] By a careful excision

21. An alternative approach to the same conclusion is suggested by Loughlin, *Investigation and Trial of Robinson-Patman Act Cases Before the Federal Trade Commission (Part I)*, 4 ANTITRUST BULL. 741, 776 n.170 (1959). *But see* Morton and Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer*, 37 MINN. L. REV. 227 (1953) (suggesting that the act was conceived as it has been interpreted and that the competitive injury standard of 2(a) was intentional "double-talk").

22. § 2(f) prohibits knowing receipt of a discriminatory price. See note 32 *infra*.

23. Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938) (brokerage payment illegal irrespective of effect on competition); *accord*, Southgate Brokerage Co., Inc. v. FTC, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S.

of 2(d) from the proviso of 2(b),[24] an interpretation calling for an incredible predilection for literalness, the act could be made impervious to the meeting of competition defense when advertising allowances were compensated rather than furnished.[25] By comparison to the skill required to accomplish this result, the prior removal of 2(c) from the scope of 2(a)[26] seems far less dramatic than it must have seemed at the time it was accomplished. The result was, of course, the development of an act far stronger than it would otherwise have been, but also far more grotesque.

Much of the abuse heaped upon the act is traceable to the effect of its interpretational development. While the act was bound to the consideration of competitive injury, it bore a relationship to its brethren antitrust laws that could not be denied. Although going much further than they did in prohibiting some types of potentially monopolizing conduct, it was nonetheless attuned to the Sherman Act[27] prohibitions as strengthened by the Clayton Act[28] and Trade Commission Act[29] emphasis on earlier enforcement. When it became blinded to competitive injury, and in some cases to the force of actual competitive pressure on the seller, many abandoned the act as a traitor to the antitrust family. The results, under present interpretation of the act, are truly amazing. The distinctions in result are traceable to the sub-section which happens to have been chosen to smite the conduct. A, a manufacturer sells to his favorite customer (F.C.), allowing him a five per cent reduction from the usual selling price. If this reduction is treated as a 2(a) offense, A may defend on the basis of lack of competitive injury, cost justification or meeting of competition. If it turns out that no independent broker interceded in the transaction and that five per cent approximates the usual brokerage fee, A may be condemned summarily—and so may F.C.—by classifying the allowance as a false brokerage fee.[30] Without much additional information the action can be classified an advertising allowance and thus struck down again.[31] Probably the most peculiar aspect of such a curious result is that as the government begins to

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774 (1945); Great Atlantic and Pacific Tea Co. v. FTC, 106 F.2d 667 (3d Cir.), *cert. denied*, 308 U.S. 625 (1940); Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939); as to subsections (2d) and 2(e) the Court in *FTC v. Simplicity Pattern Co., Inc.* said, "Subsections (c), (d), and (e) . . . unqualifiedly make unlawful certain business practices other than price discrimination" 360 U.S. 55, 65 (1959) (dictum as to 2(c) and 2(d), holdings as to 2(e)).

24. Note 8 *supra*. The viable portion removed allowed meeting a competitor's offer.

25. Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 29195 (FTC Oct. 31, 1960); *contra*, Delmar Constr. Co. v. Westinghouse Elec. Corp.,—F. Supp.—(S.D. Fla. 1961).

26. Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

27. 26 Stat. 209 (1890); as amended, 15 U.S.C. §§ 1-7 (1958).

28. 38 Stat. 730 (1914); as amended, 15 U.S.C. §§ 12-27 (1958).

29. 38 Stat. 717 (1914); as amended, 15 U.S.C. §§ 41-51 (1958).

30. The FTC has even applied 2(c) provisions to a reduction in seller's *salesmen's* commissions where the reduction was passed on to the buyer, Thomasville Chair Co., No. 7273, FTC, March 15, 1961.

31. The Attorney General's Committee points out: "Virtually identical trade practices have been termed 'allowances' in one case and 'indirect discriminations' in another." ATT'Y GEN. NAT'L COMM., ANTITRUST REP. 191-192 (1955).

prove facts which would seem to mitigate the undesirability of the conduct, on the cost justification theory, by proving that the seller was compensating for at least some service rendered, the defense of cost justification is lost to the seller and the government is relieved of the burden of proving competitive injury. Further confusion is created by the recent assertion by the Trade Commission that while a seller may provide advertising for favorite buyers under certain competitive pressures, the meeting of competition defense is lost if, instead, the seller pays the buyer to provide the identical services.[32]

If the Trade Commission were able to enforce 2(a) in all cases where the sales practices threatened the competitive integrity of the relevant market and found itself powerless to enjoin practices cleverly hidden under equivalent conduct somewhat beyond the scope of the statute, one might be disposed to overlook the "nit-picking issues so dear to the hearts of some scholars" and the "carping and sniping and moaning and groaning by clever and hard-working members of the Bar" as the last chairman of the Commission proposed.[33] In fact, critics charge, the commission has neither consistently prohibited the conduct most inimical to the economy nor sought the giants at whom the antitrust weapons seem aimed.[34] What 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 *sina qua non* of free competition.[35]

But the monstrous act has an Achilles' heel. By restricting each subsection to independent interpretation, the prohibition against receipt of discriminatory allowances (2(f))[36] is limited to price discriminations and cannot be applied to discriminatory furnishing or compensating of services. The result is no more horrendous than the other results that come from the schizophrenic development with one exception. This aberration weakens rather than strengthens.

Rather than attempt a cure, the Trade Commission abandoned the act to its weakness and, with pragmatic thoroughness, covered the weakness with another act: a rejuvenated version of the act which created the Com-

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32. Exquisite Form Brassiere, Inc., TRADE REG. REP. ¶ 29195 (FTC Oct. 31, 1960).

33. *The Role of Robinson-Patman in the Antitrust Scheme of Things—The Perspective of Enforcement Officials,* Statement by Earl W. Kitner, then Chairman, FTC, Before the Section of Antitrust Law, American Bar Association, Washington, D. C., Aug. 30, 1960.

34. EDWARDS, THE PRICE DISCRIMINATION LAW 74-78 (1959); Loughlin, *Investigation and Trial of Robinson-Patman Act Cases Before the Federal Trade Commission (Part II),* 5 ANTITRUST BULL. 45 (1960).

35. The most apparent instance is the insulation of brokers from the competitive pressures of integrated industries. For a general appraisal of the effect of the law, see EDWARDS, THE PRICE DISCRIMINATION LAW 628-630 (1959).

36. 49 Stat. 1526 (1936), 15 U.S.C. 13(f) (1958):

> It 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.

mission.[37] If Robinson-Patman is not physically violated by the receipt of an illegal discriminatory allowance, the Commission reasoned, such a receipt, nonetheless, does injury to the spirit of the act. Such spiritual injury, in turn, is an "unfair method of competition"[38] and thence illegal.

III

The power to suppress unfair methods of competition is one of the original powers granted to the Trade Commission. It is, probably an almost ideal grant of administrative power encompassing the minimal prejudgment of results and allowing the Commission the maximal scope of application of its expertise. Searching through the legislative history of the act, one finds that there was general unanimity that the act was designed to combat an ill-defined grey zone of conduct which Congress felt itself incapable of interdicting legislatively.[39] Hardly any better reason for empowering an administrative agency to create standards suggests itself. Despite its careful imprecision, it was to face hostile courts chary of approving any grant of power to the newly conceived administrative agencies, and, under the doctrine of the *Gratz* case,[40] which usurped the ultimate power for the courts, it was to go through a somewhat stunted development for many years. Even in those early days, when the Supreme Court proclaimed, "The words 'unfair competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts not the Commission, ultimately to determine as a matter of law what they include,"[41] there seemed little doubt that a violation of the Sherman Act was an unfair method of competition. A more difficult problem then, and now, was whether a violation of the Clayton Act[42] was also a section 5 violation.

The Clayton Act[43] and the Federal Trade Commission Act[44] were in many ways complimentary acts. The former, by its more explicit standards and its easier test of illegality was phrased to arrest illegal conduct short of its development into a Sherman Act violation. The Trade Commission Act was, by the power to prohibit unfair methods of competition, also aimed at fringe and incipient violations. Read together, they form a considerable barrier to the major antitrust problems. Since the Clayton Act was the later of the two,[45] it is, of course, impossible to claim that Clayton Act violations were considered when the section 5 enforcement power was granted to the

37. Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1958).
38. Federal Trade Commission Act § 5(a)(1), 38 Stat. 721, as amended, 15 U.S.C. § 45(a)(1) (1958) prohibits: "Unfair methods of competition in commerce. . . ."
39. See Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).
40. FTC v. Gratz, 253 U.S. 421 (1920).
41. *Id.* at 427.
42. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958).
43. *Ibid.*
44. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-51 (1958).
45. It was passed September 26, 1914 while the Clayton Act was passed on October 15, 1914.

Commission. Since, however, the Congress did not limit the Commission to acts previously condemned, it should not be too important that it later brought other acts within the pale of illegality. In fact, a cogent argument can be made that the Clayton Act, by establishing new antitrust policy, was also giving direction to the section 5 mandate to eradicate acts deemed opposed to free competition. Probably the most confusing aspect of the problem is that the Commission was given the power to enforce the Clayton Act,[46] never having had a comparable power directly to enforce the Sherman Act.

To date, the encompassing of Clayton violations under section 5 orders has not been settled on its own merits. Dictum in Supreme Court cases would seem to attribute sufficient scope to the Trade Commission Act but it is difficult to interpret the applicable portions of the relevant opinions. Perhaps the apparent obscurity is an indication that the Court has not, as yet, turned its full attention to the problem.

In *Fashion Originator's Guild v. FTC*,[47] the Court said: "If the purpose and practice of the [defendants] run 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."[48] If the sentence means that the Commission has the power to prohibit acts violative of the purpose while outside the language of the Clayton Act, it is gratuitous advice in light of the finding that the conduct in question both violated the spirit of the Sherman Act and the letter of Clayon's section 3. Even more puzzling, if one is inclined to find a broad recognition of power in the statement, is the footnote supporting it. The court cites its language in *Beech Nut*[49] which reaffirms the Commission's power to prohibit conduct inimical to the policy of the Sherman Act; it cites the Sherman, Clayton and Trade Commission Acts, and concludes, ". . . the Federal Trade Commission is expressly given authority to enforce the Clayton Act."[50] Nothing either in the opinion or in the language of the supporting note goes directly to the question of present concern.

The next, and last, applicable restatement to come from the Court came in *FTC v. Motion Picture Advertising Serv. Co.*[51] In language which seems to summarize the totality of prior determinations, it said:

> It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (See *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441, 453)—to stop in their incipiency act and practices which, when full blown, would violate both those Acts (see *Fashion Guild v. Federal Trade Commission*, 312 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691.[52]

46. § 11, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958).
47. 312 U.S. 457 (1940).
48. *Id.* at 463.
49. FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).
50. Fashion Originator's Guild v. FTC, 312 U.S. 457, 463 n.4 (1940).
51. 344 U.S. 392 (1953).
52. *Id.* at 394.

Since the opinion concludes that the unfair method of competition involved in that case was a violation of the Sherman Act, and since even the dictum quoted only included acts which would violate *both* the Sherman and Clayton Acts when completed, the opinion would be irrelevant to the instant problem but for Justice Frankfurter's dissent.

An interesting facet of the dissent is that Justice Frankfurter both establishes and criticizes a novel rule of law. He writes, "The Federal Trade Commission Act was designed, doubtless, to enable the Commission to nip in the bud practices which, when full blown, would violate the Sherman *or* Clayton Act."[53] He finds the rule distasteful: "But it is another thing to suggest that anything in business activity that may, if unchecked, offend the particularizations of the Clayton Act may now be reached by the Federal Trade Commission Act. The curb on the Commission's power, as expressed by the series of cases beginning with the Gratz case, *supra,* so as to leave to the courts rather than the Commission the final authority in determining what is an unfair method of competition, would be relaxed, and unbridled intervention into business practices encouraged."[54] The majority opinion having decided the case on the basis of an actual violation of the Sherman Act, one wonders why Justice Frankfurter was motivated to flay the dubious point of law he espoused.

Justice Frankfurter's opinion aside, the only determination of the scope of power attributable to section 5 in cases dealing solely with actions potentially violative of the Clayton Act is the dictum in *Fashion Guild*.[55] It is submitted that the Court's assertion that section 5 encompasses acts which "run counter to the public policy declared in the Sherman and Clayton Acts"[56] is correct, but that it means something far different from Justice Frankfurter's assertion. The provisions of the Clayton Act (Robinson-Patman excepted for the moment) are provisions which the courts have consistently interpreted as making Sherman Act prohibitions effective at a time when the danger is merely incipient. To the extent that activities have been singled out for special treatment, the fact that they were chosen would seem to indicate a greater Congressional concern with them and it may be argued that the public antitrust policy has been affected by the emphasis. In other words, in light of section 3 of the Clayton Act,[57] for example, it might be argued that there is a strong public policy opposing tying and requirements contracts but, basically, these contracts are either present or incipient violations of the Sherman Act. So analyzed, there is little novel about the assertion that the Trade Commission has prohibitory power—and the court's footnote relating to the direct power to enforce the Clayton

53. *Id.* at 400-401.
54. *Id.* at 405.
55. Fashion Originator's Guild v. FTC, 312 U.S. 457 (1940).
56. *Id.* at 463.
57. 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1958). Section 3 prohibits sales made on condition that the buyer not deal in goods of a competitor when such transactions have the requisite anti-competitive effect.

Act is meaningful. So analyzed, Justice Frankfurter's fear that the power granted will be a power to prohibit incipiently incipient conduct is unjustified.

More significantly, requiring a relationship of all antitrust enforcement to the Sherman Act gives some direction and symmetry to the policies therein expressed. Again excepting the Robinson-Patman amendments, the Clayton Act prohibitions supplement and bolster Sherman Act violations, by prohibiting acts in their incipiency.[58] So also, may the power of the Trade Commission, through section 5, supplement the Sherman Act. To allow the section 5 power to go beyond the gravitational pull of Sherman, however, into a nebulous area where an act *may become* an incipient violation does raise the type of problem adverted to by Justice Frankfurter: "unbridled intervention into business practices" by the Trade Commission. It also tends to degenerate the specific provisions of the Clayton Act into vague guidelines.

To conclude that the Trade Commission has no power to prohibit the incipient Clayton Act violations, is not to say that it is powerless to act when a violator has escaped the letter of the Clayton Act and, nonetheless, committed an act which is fully as anti-competitive. Ultimately, anti-competitive acts find their way into the broad language of the Sherman Act, and, undoubtedly, section 5 may legitimately halt them short of fruition.[59]

It may be that section 5 has been judicially limited in scope to acts which are prohibited under the Sherman or Clayton standards of competitive injury. At least one writer so reads the early cases.[60] Certainly the *Gratz*,[61] *Curtis*[62] and *Sinclair*[63] decisions refused to allow a broader scope to section 5 than would have been applicable had the cases been tried under the standard of competitive injury expressed in section 3 of the Clayton Act.[64] No court has approved a section 5 antitrust order which was not founded in conduct found incipiently or actually anti-competitive. The Trade Commission has, in fact, until very recently, required a showing of anti-competitive effect at least sufficient to meet the Clayton Act standard as a prerequisite to invocation of section 5 sanctions.[65] A disturbing trend in the opposite direction is, however, probably in progress.

The *Grand Union*[66] case is a rather good example. In that case an action was brought against the grocery chain defendant for receipt of discriminatory advertising allowances. Neither the trial examiner nor the full

58. See Standard Fashions Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).
59. FTC v. Cement Institute, 333 U.S. 683 (1948); Fashion Originator's Guild v. FTC, 312 U.S. 457 (1940); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).
60. Howrey, *Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law*, 5 ANTITRUST BULL. 161, 166 (1960).
61. FTC v. Gratz, 253 U.S. 421 (1920).
62. FTC v. Curtis Publishing Co., 260 U.S. 568 (1923).
63. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923).
64. Note 57 *supra*.
65. Howrey, *supra* note 60 at 173-175, 178, 179.
66. TRADE REG. REP. ¶ 28980 (Sept. 1, 1960).

Commission was disturbed by the fact that, as the Commission had interpreted the Robinson-Patman Act, receipt of discriminatory advertising allowance was not a violation of that act. Section 5 was thought sufficiently applicable. Since, again through its interpretations of the Robinson-Patman Act, the *granting* of discriminatory allowances was illegal regardless of the effect on competition, the order was issued without taking proof of competitive injury.

This amazing levitation has to be analyzed to be appreciated. After *Sinclair*[67] and before *Grand Union,* the Trade Commission had avoided the issue of the interplay of section 5 and the Clayton Act, since each decision which reached the courts could rest on the incipient Sherman Act violation. Raised in the posture of the *Grand Union* case, however, the only justification for section 5 censure was that the act was similar to an act prohibited by the Clayton Act, specifically, Robinson-Patman section 2(f). Without proof of anti-competitive effect, it is difficult to make out a theory of incipient Sherman Act violation. The issue is put squarely. Ironically, the case arises in a manner which makes it unprofitable for the defendant to appeal to the courts. Since the Grand Union suppliers who had previously provided the discriminatory price scale have been ordered to cease and desist under the letter of Robinson-Patman,[68] little advantage could be gained by Grand Union even if it upset the Trade Commission's ruling. With one masterful stroke, the Commission has both asserted a most controversial power and found an escape from the interpretational limitations of 2(f).

IV

Both the Robinson-Patman Act and section 5 have now been interpreted in a manner which makes them applicable to acts which may or may not be anti-competitive. Perhaps this would only be an academic concern if the issue were being considered by the Trade Commission, which is, after all, charged with expertise in trade regulation. What is disturbing, however, is that the Commission is apparently applying both acts not as a matter of its own conclusion that the prohibited conduct is anti-competitive but, rather, on the basis that it violates a Congressional mandate.

If the courts are still intent on making the antitrust laws consistent, a motive they have espoused in a number of cases,[69] and if the *Gratz* assertion that the courts retain the ultimate control over the content of "unfair methods of competition"[70] has currency, the time seems propitious for a reexamination. The logical place to begin would seem to be in those places

67. FTC v. Sinclair Ref. Co., 261 U.S. 463 (1923).

68. Swanee Paper Corp., No. 6927, FTC, April 13, 1960 (order to cease & desist); General Mills, Inc., No. 6926, FTC, Sept. 10, 1959 (order to cease & desist); Judson Dunaway Corp., No. 6925, FTC, July 24, 1958 (consent order to cease & desist).

69. *E.g.,* Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), in which the Court held it its "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress." *Id.* at 73, 74.

70. Note 40 *supra* and accompanying text.

in the Robinson-Patman Act which have become divorced from the mainstream of antitrust: the provision that an illegal act must have an adverse effect on competition.[71] How much progress can be made in that direction, in light of the numerous cases which have supported the vivisectionist interpretation of the act, is not clear. The Attorney General's National Committee to Study the Antitrust Laws dispaired of judicial salvation for 2(c)[72] and it may be, since that time, 2(d) and 2(e) have shared 2(c)'s fate.[73] Certainly, even if the act is to be left in its present state of interpretation, little justification appears for a determination that section 5 of the Trade Commission Act should also be divorced from competitive injury requirements.

It is precisely the competitive injury question that was originally delegated to the expertise of the Trade Commission.[74] It seems strange, indeed, now to have an administrative agency applying *per se* provisions of a discriminatory pricing act. As has been mentioned, *per se* interdiction is precisely the result of using sections of Robinson-Patman in isolation from the competitive injury requirements of 2(a) and, in some instances, from the meeting of competition defense of 2(b). It is submitted that, if the Robinson-Patman Act is reducible to *per se* rules then the time for administrative intervention is over and enforcement should be left to the Justice Department and to private litigation in order to allow the Trade Commission to concentrate on problems which are more in need of expert economic analysis. As presently applied to many discriminatory pricing cases, the act would seem to presuppose an investigative rather than economic expertise.

It has been suggested that the Robinson-Patman Act be repealed in light of its grotesqueness and the fact that the Sherman Act can be used, in those cases which are economically significant, to accomplish the same result.[75] One sub-section seems without champion.[76] Whatever the outcome, it would seem that in section 5, the Trade Commission has an appropriate weapon in the discriminatory pricing field.

Without resolving the controversy over the application of section 5 to incipient Clayton Act violations, it is clear that in those cases in which price

71. The mainstream may have been somewhat diverted by the recent Radiant Burners v. People's Gas Light and Coke Co., 81 Sup. Ct. 365 (1961), but it seems unlikely that the ultimate direction will be much changed.

72. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 190-191 (1955).

73. FTC v. Simplicity Patterns, 360 U.S. 55 (1959); if the courts ultimately uphold the Exquisite Form Brassiere determination (see notes 23 and 24 *supra*, and accompanying text) 2(d) will become as rigid as 2(c).

74. This appears from the debates accompanying passage of the Federal Trade Commission Act. On the one hand there was discussion of the body of law known as "unfair competition," not here relevant. On the other, the emerging antitrust policy was discussed. While the discussion showed little consensus on how the Commission's power was circumscribed, there was almost unanimity that the Commission would be enabled to ferret out anti-competitive conduct. See Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20 (1915).

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

76. § 2(c). See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 190-191 (1955).

discrimination is used either by the seller or by the customer in such a way as to create a monopoly, the act is violative of section 5, because violative of the Sherman Act. It is equally clear that the conduct may be apprehended during the incipiency of the monopoly. In appropriate cases, section 5 also enables the Commission to prohibit pricing arrangements under the standard of section 1 of the Sherman Act. In any of these cases, based as they are on economic findings in determinations that types of conduct tend to be anti-competitive, the FTC might well make real contributions to the rather befuddled field of discriminatory pricing. Instead of hiding behind a misinterpreted act to strike down conduct without apparent examination of its economic justification, it might supply the one facet of its expertise that is not equally available to the courts through other means.

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