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SOME ECONOMIC IMPACTS OF SELECTED TYPES OF LEGISLATION
ON FOOD WHOLESALING AND RETAILING

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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1961

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CHAPTER I
INTRODUCTION

Importance of Food Wholesaling and Retailing

Food wholesaling and retailing make up an important part of all distributive trades in this country. Total value of goods and services merchandised by food wholesalers and retailers in this country in 1960 amounted to $55 billion.¹

Marketing functions performed by these firms are very important initiating forces for creating additional industrial and commercial products throughout the total economy. A high percentage of all individuals and households in this country are vitally dependent upon these firms as a source of important consumer goods.

How efficiently² food wholesalers and retailers perform their functions is important, therefore, to the total economy. And how these firms organize and manage their operations within the limits of an enterprise economy determine to a great extent the efficiency with which they can operate.


²Efficiency, in this context, means outputs in relation to inputs, both of which can be reasonably quantified.
Environment of Food Wholesaling and Retailing

There are many environmental forces in an economic system as complex as the contemporary system in this country that tend to deter or to facilitate efficiency in the organization, operations, and management of firms such as firms operated by modern food wholesalers and retailers. Through an intricate system of laws, government defines and maintains the fundamental framework in which the economic system operates. But the central or leading role in the economy of the United States today is played by privately owned and managed businesses. Included among these businesses are virtually all of the food wholesaling and retailing firms.

Some environmental conditions that affect the efficiency with which food wholesale and retail firms operate are enforced by some of the laws in the framework in which the economic system operates. Others are due to custom, mores of people involved, and other influences which have never become "law" through which government regulates enterprises but which may exert as much influence on developing objectives and on operations of business firms as if they were law.


Furthermore, there are many forces which influence the organization, management, and operations of food wholesale and retail firms -- through both law and custom -- the objectives of which are not "efficiency" at all. The objectives of many of these forces may lie in moral, ethical, religious, political, aesthetic, or social considerations. And the goals of these considerations may be in sharp conflict with those of economic efficiency.

In the development of the legal framework in which food wholesaling and retailing functions are performed, therefore, conflicts between efficiency goals and goals based on other considerations sometimes occur. Some of the objectives of laws enacted to protect and enhance competition, for instance, conflict with efficiency objectives. The economic impacts of some laws may vary considerably in respect to short-run versus long-run considerations.

Economic theoreticians may view such laws, therefore, in a different light from that of lawyers, moralists, sociologists, and others who place higher priorities on goals that conflict with efficiency.

In some instances, even, economic analysis of laws that purport

6Wilson, T. A. and E. F. Baumer, Trade Practice Regulations, Ohio Agricultural Experiment Station, Wooster, pp. 16, 35.

7See Chapters V, VI, and VII of this dissertation.

8Also pointed out in Chapters V, VI, and VII.

to enhance the goal of efficiency reveals that little if any increase in efficiency actually can be expected from the results of these laws.10

Competition

Competition or rivalry11 between individuals and firms is the mechanism through which markets are kept "in line with one another at different levels, in different places, at different times, and for different commodities."12 The following brief quotation sums up the role usually assigned to competition in the interplay of economic forces that tends to assure maximum efficiency in the performance of such functions as food wholesaling and retailing in an enterprise economy:

Competition in the performance of any marketing function generally assures that charges for performing it do not get far out of line with the costs involved. If based on accurate information, competition will cause the goods to flow from one market to another whenever the price differential between them exceeds the intervening costs.13

The body of economic theory in which the concept of competition, efficiency, and other economic considerations are founded has been

10Ibid., p. 329.

11Competition, as defined in Webster's Collegiate Dictionary is: "The efforts of two or more parties, acting independently, to secure the custom of another party by the offer of the most favorable terms.


13Ibid.
developed through the accumulation of ideas throughout many centuries. Since it has never been an easy task to segregate "economic" ideas from ideas that relate more specifically to other areas such as morals, ethics, religion, politics, and sociology (in fact in some eras little attempt was made to differentiate between them), the laws that regulate many aspects of food wholesaling and retailing often are based on a very complex combination of these ideas.

Competition, for example, involves much more than the simple quotation above may indicate. The "elements" of competition have been formed into different configurations by students of economics and related disciplines of different time periods. Competition to people under the influences of one type of environment or during one time period has not seemed the same to them as it has to people living under the influences of a different type of environment and in a different time period.

Since competition is so vitally involved in the performance of functions of food wholesaling and retailing in an enterprise economy, economic ideas about competition are explored throughout three chapters of this dissertation. In Chapter II, economic ideas that provide the framework for a model of "perfect" or "pure" competition are traced. In Chapter III, ideas that challenge some of the abstractions of the perfectly competitive model are explored and a model of

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"workable" or "effective" competition is constructed from them. Then in Chapter IV, an attempt is made to measure the competitiveness of the modern food wholesaling-retailing industry by the model of workable competition.

Objectives of This Study

Briefly stated, the principal objectives of this dissertation are to:

1. Develop a historical basis for understanding some of the conflicting goals that have resulted in the complexities existing in the legal framework of modern food wholesaling and retailing.

2. Appraise the relationship between a model of workable competition and the performance of the modern wholesaling and retailing industry.

3. Explore some of the economic impacts of three different important types of laws involved in the legal framework of the modern food wholesaling and retailing industry which economic theory would predict.

The three types of laws explored in this dissertation are:

1. Laws regulating the procurement practices of food wholesaling-retailing firms. The Robinson-Farman Anti-discrimination Act is the specific law studied in this type.

2. Laws regulating the purity and identification of merchandise handled by food wholesaling-retailing firms. The Pure Food, Drug, and Cosmetic Act is the specific law studied in this type.
3. Laws regulating resale practices of food wholesaling-retailing firms. Fair Trade Laws constitute the specific group of laws studied in this type.

Limitations of This Study

Although various influences other than economic aspects of these laws are recognized, no attempt is made in this dissertation to analyze their effects on food wholesaling and retailing. It is confined to an analysis of some of the most important economic impacts of these laws on the marketing functions performed by food wholesalers and retailers. The analysis is theoretical rather than empirical and, therefore, does not take into account the varying effects of different enforcement activities exercised by administrative and judicial authorities in relation to the laws.
CHAPTER II

RELATIONSHIPS BETWEEN THE IDEA OF AN AUTOMATIC
IDENTITY OF SELF AND SOCIAL INTERESTS AND
THE PERFECT MARKET MODEL

Early History of Economic Ideas

The free market -- or the perfectly competitive market -- as an
arbiter in the economic affairs of a society has long held a prominent
place in the thoughts, if not the actions, of men in some areas of the
world. It has been widely claimed that the greatest good for the most
people in a society will result from an economic system in which each
individual is granted the political right of competing with every
other individual with virtually no legal restraints.¹

There can be little doubt that the idea of an automatic identifi-
cation of self-interests and of social interests in a market economy
has played an important role in the development of the free enterprise
economy which has characterized the political history of the United
States of America. As a part of economic thought in various cultures
and in many eras of human history long before the establishment of
this country, fragments of thought that eventually were put together

¹Smith, Adam, The Wealth of Nations (Modern Library Edition),
New York, 1937, p. 423. The "invisible hand" idea expressed in this
reference by Smith is perhaps the best-known summation of this idea.
Many others before and after Smith expressed the same idea in various
ways.
as a concept of the automatic identity of self-interest and social interest can be observed. In many instances it is difficult to differentiate sharply between the purely "economic" and the religious, moral, aesthetic, ethical, political, and social aspects of such thought.

Economic thought in early Greece and Rome had in it strong elements of private enterprise in which the social interest was closely identified with the interests of individuals. Aristotle thought that common ownership of property was not in the best interest of the individual, and that such ownership robbed the society of values arising from individual pride in private property and the generous impulses of the individual owner toward the community. Roman property law tended to move more, in much of the period of Rome's greatest strength, toward individual ownership of property and the "natural rights" associated with private ownership.

Although economic communism was a recorded practice of the early Christian movement, in many respects the individual was held in high regard through the equality-of-man ideals of the movement. Some of the teachings of Christ would indicate strong opposition to materialistic gain for the individual -- God would provide the needs of man


If man sought first the Kingdom of God and his righteousness. Many have reasoned that this attitude in no way relieves the individual of his responsibilities to the social group, since Christianity's rewards are based on the behavior of the individual, much of which relates to the group.

Some, but far from all, writers from at least as early as Clement of Alexandria have explained that the teachings of Christ and his Apostles on riches were aimed at greed and the love of power more than at wealth in and of itself. Others throughout the period since Christ uttered his teachings have held that he condemned riches as full of peril and the root of seductive evils.

With the decline of the Roman Empire and its spirit of commercialism, the medieval system of village rules, and later the guilds, provided little opportunity for men to improve their lots by their own efforts. The efficiency of the regulatory systems of the medieval era depended upon the social appeals to individuals through penalties and rewards, both in this world and hereafter.

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6 Ibid., pt. ii, 193-197.

Economic Development in the Middle Ages

As mankind became more mobile and trade within and between states increased, as capital accumulations released men more and more from the necessity of eking out a living by hand labor, and as a growing respect for science led to questioning of the old order of things, the restraints that feudalism had imposed upon the individual became less binding.

Economic thought revealed the effects of these changes. The idea of natural rights of individuals became more prominent as a part of thought relating to many aspects of human affairs. Development of greater respect for natural laws gained momentum as scientific deduction and induction brought new light on natural phenomena. The Roman Catholic Church, which had been the strongest unified force in all Europe for several centuries, found more pressures from individuals for information on prices, wages, profits, interest, and other similar facets of a growing commercialism. Theologians, of whom Thomas Aquinas was perhaps the most outstanding, turned to Aristotle for much of the foundation they needed upon which to merge current socio-economic thought and ecclesiastical ideas.5

Aquinas held that individual ownership of property had been proved best by experience of man, but that use of such property should be shared in order that the needy may have access to it. His doctrine regarding individual "rights" went to the extreme of asserting that

the needy have a "natural" right to superfluous income. So, out of private ownership, he could see social good, provided the use of all goods should be shared freely.\(^9\)

In Mercantilism, some ideas about the usefulness of laws that applied social pressures to the self-interest of individuals were apparent as early as the sixteenth century. In an attempt to make the promotion of state welfare a paying proposition, the author of the *Discourse of the Common Wealth of this Realme of England* argued that the profit of the plow should be made, through legal restrictions, as good as the profit of "graisiers" and "sheepmasters."\(^{10}\) The author, perhaps the English statesman John Hales, also implied that all things relating to the individual's responsibility to the commonwealth should be encouraged by "allurement and rewards."

**Age of Industrial Awakening**

The advancement of the commercial revolution and the beginning of the industrial revolution brought still further emphasis upon various ideas about "natural" law and how men as individuals are related to the natural order of things. Hobbes reasoned that in the natural state all individuals were free and independent. But, he used the idea of a social contract -- which was used by others to establish

\(^9\)Ibid.

\(^{10}\)Hales, John, *A Discourse of the Common Wealth of This Realme of England*. Reprinted, ed. E. Lamont, Cambridge 1893, re-issued 1929. Cambridge University Press. (In addition to Hales, Hugh Latimer, an English Bishop and Protestant Martyr, has been given some credit in respect to this work. See: Whittaker, *A History of Economic Ideas*, op. cit., p. 92).
the identity of self and social interests -- as the basis for the absolute state.\textsuperscript{11}

In the realm of the physical sciences, Newton and others had demonstrated profound orderliness in nature.\textsuperscript{12} These scientific developments had suggested that much more could be learned about the world of nature through rational deduction and induction. Why would not the same rational approach to economic and political matters result in correspondingly rewarding results? Does a "natural" order prevail in these areas comparable with that which Newtonian methods were discovering in the physical realm? These questions became stimuli to seekers of answers in economic and political matters.

Locke and Rousseau, later in the seventeenth century, insisted that the individual has natural rights to life, liberty, and property.\textsuperscript{13} It was not a great leap from this to the "inalienable right to life, liberty, and the pursuit of happiness" bestowed upon man by nature and the God of nature found in the American Declaration of Independence, since Thomas Jefferson and other authors of this document were acquainted with the ideas of Locke and Rousseau.\textsuperscript{14}


\textsuperscript{13}Ibid, pp. 212 and 584.

Mandeville indicated that he believed the selfish attempts on the part of individuals to benefit themselves redounded to the benefit of all. His ideas that private vices resulted in public virtues attracted a great deal of attention in the early part of the eighteenth century. Then, near the middle of the century, came Cantillon’s assertion that, in the absence of government direction or interference, production would regulate itself in a manner beneficial to society. Supplies and prices of meats were the example used by Cantillon to illustrate his ideas. Sir James Steuart also stated his belief that it is the "combination of every private interest which forms the public good" and that good government comes from a "system of administration, the most consistent possible with the interest of every individual."  

Natural Laws of Economics

The influence of the Physiocrats upon the development of the idea that self-interest and social interest are closely related cannot be overlooked. The belief that a natural law exists which, in the absence of government interference, would ensure the proper working of the economic system was one of the important tenets of Physiocracy.  

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Commerce was seen by the Physiocrats as an exchange of superfluities and was impeded by artificial restraints. Gournay, a member of this group, was perhaps the first to express the idea as laisser-faire in suggesting that government should leave individuals alone in their economic affairs. 19

But the world remembers Adam Smith as the chief protagonist for economic liberalism that places a high premium upon allowing each individual to pursue his own interest in order that the maximum social good may result. 20 It was Smith, more than any other person, who pieced together the various facets of individualism -- social, political, ethical, moral, and economic -- to form a well-integrated theory of the automatic identity of self-interest and social welfare. And it was Smith who put this all into a market context which was, and still is, so important to many analysts who would undertake to explain how economic ideas are related to and are affected by all environmental conditions including social, political, ethical, moral, and other aspects of human existence in a commercial society. Smith and such of his followers as David Ricardo, Thomas Malthus, J. B. Say, James Mill, Nassau Senior, and J. S. Mill -- along with Alfred Marshall and his Neo-classical followers -- perhaps have had a stronger influence on economic thought in some of Western Europe and the English-Speaking areas of the world than any other group of men.


20 Newman, P. C. et al., Op. cit., p. 120.
Smith also was strongly influenced by at least two other men, Francis Hutcheson and David Hume. Perhaps mainly through Smith, they have had an impact on economic thought. Hutcheson, Smith's teacher at the University of Glasgow, argued that individuals "were so constituted that they approved actions on the part of others that were useful" to society, even when the actions did not directly benefit the individuals themselves. The good from such actions would accrue to the individuals, however, since they were a part of the human race and would receive their share of the general benefit. Smith turned this point around and insisted that men, seeking their own best interests, promoted the interests of other men, too.

Hume, also an older friend of Smith, put the matter in the form that benevolence on the part of one man bred benevolence on the part of others through example that met with social approval. He believed that, if left alone, men would consider the interests of others as well as of themselves and that social benefits would result.

With the building blocks represented by ideas from many of the sources cited above, plus a rich experience in travel and study in which no doubt many ideas from persons not mentioned in this dissertation came to his attention, Smith synthesized the most complete treatment of economics ever published in one volume prior to 1776. His discussion in *The Wealth of Nations*, published in 1776, seems

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22 Ibid., p. 97.
always to improve upon the ideas of others, although little of it represents entirely original thought on his part. 23

In general outline, here is Smith's approach to economic problems in *The Wealth of Nations*:

1. The wealth of a nation is the produce of its labor.

2. This product depends on
   a. the skill, dexterity, and judgement in the use of labor
   b. the proportion of productive and unproductive labor employed.

3. The basic means by which products of labor are increased are the division of labor and the introduction of machinery.

4. Division of labor comes from the propensity of man to truck, barter, and exchange.

5. The market, then, becomes the mechanism by which the exchange of products of labor can occur in the response to this propensity to truck, barter, and exchange.

6. Parsimony is necessary if machinery is to be provided to aid in increasing the product of labor.

7. Both the propensity to truck, barter, and exchange and the parsimony necessary for capital accumulation are based on self-interest of the individual.

8. This means, then, that wealth for all can be increased -- or that the social good may be advanced -- only through the operation of the principle of self-interest in improving the position of the individual.

Since Smith believed that the market played such an important role in permitting the self-seeking of individuals to create a better social whole, he was led to explore the nature of markets. The real

or natural value of a product lay in the labor devoted to making it, Smith thought.24 (Sometimes he did not make a clear distinction between labor embodied in a product and the labor it would command in exchange as an explanation of its value.) He postulated that no one would produce anything unless he thought it worthwhile. If he could buy something for less cost in labor than would be involved in making it himself, he would buy it. This he would do by exchanging a product of his own or another's labor that the other participant of the trade could buy with less labor than he (the other participant) would use in producing it. Thus, mutual gains resulted from this specialization arising from division of labor.

Smith saw a "natural price" or "real value" around which the market would fluctuate, always tending to average the natural price.25 When supply and demand relative to any article were in equilibrium at any price, that price was the natural one and represented the point at which everyone could get the most at the lowest price. Thus everyone would be most benefited. This allowed everyone to keep busy at the thing he could do best, and productive resources would be apportioned according to the wants of consumers.

This resulted in Smith's idea that when a man directs his productive processes to create the greatest possible value, "he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which is no part of his intention"

25Ibid., pp. 28-63.
and thus "by pursuing his own interest, he frequently promotes that of society more effectively than when he really intends to promote it."^{26}

His contention that "all systems either of preference or restraint being taken away, the obvious and simple system of natural liberty establishes itself of its own accord"^{27} has provided one of the most frequently-used slogans of private enterprise enthusiasts since 1776.

The Classical School

Smith and others of the "Classical School" built around his theory refined and elaborated various parts of the theory of the automatic-identification of self-interest and the general welfare. David Ricardo and Thomas Malthus cast a more pessimistic light upon it than Smith's quite optimistic outlook. Some broadening of Smith's original doctrine was done by the Frenchman, Jean Baptiste Say, principally by modifying the idea of productive labor to include more types than Smith would accept as productive. His law of markets also went somewhat beyond Smith.^{26}

Ricardo was more concerned with distribution than Smith seemed to be. He and Malthus also refined and, to some extent, changed Smith's doctrine on rent. Nassau Senior carved out a peculiar place for the economist from Smith's much broader coverage, asserting that the

^{26}Ibid., p. 424.

^{27}Ibid., p. 651.

^{28}Bell, J. F., op. cit., p. 241.
economist must exclude welfare or moral opinions in order to be completely objective in his economic analyses.\textsuperscript{29} By and large however, little change occurred in the basic premise that individual self-seeking results in the greatest good for society as a whole.

The Classical viewpoint of the market, as it evolved from contributions of these men and others too numerous to mention, was a somewhat simple one and could be stated in rather precise terms. To some extent this was true because of the nature of production and distribution patterns prevailing in even the most advanced industrial economies of the eighteenth century. The industrial revolution was in its early stages and many technologies which have been associated with development of very complex production and distribution systems in more recent times were largely unknown to the developers of Classical economic thought.

The Perfect Market Model

Some of the preciseness of the market mechanism as an arbiter in economic matters, according to the Classical economic model, also rested upon the assumptions made by the Classicists. Among the characteristics of the economic community assumed explicitly or implicitly in Classical economic thought, the following are among the most important:

\textsuperscript{29}\textit{Ibid.}, p. 255.
1. All factors of production are perfectly mobile. They may be removed from one employment and placed in another with no appreciable lapse of time.30

2. All buyers and sellers in the market have essentially the same amount of knowledge about the nature and quantity of each article of commerce in the market.31

3. Each buyer and seller intends to promote his own self-interest through exercising his "right" to make choices from among the articles of commerce. This is assumed to be the most "rational" action he can take.32

4. No one buyer or seller offers to buy or sell enough of any commodity to appreciably affect the supply-demand-price relationship on the market.33

5. Each article of particular commodity in commerce is simple, very similar to each other article in its classification, and is small enough or may be divided into units small enough that each buyer or seller may trade it.34

30Smith, A., op. cit., pp. 57 and 105.


6. The state of the arts remains essentially fixed. No technological change occurs often enough nor rapidly enough to render changes necessary in the usual market procedure. 35

Although the realism of these and other assumptions of the classical concept of the market has been challenged by students of economics from their inception, a massive body of theory has been developed around them through the contributions of scholars of every generation since they first became a framework of economic analysis.

Adherence to the "principles" involved in these assumptions and the general body of theory built upon them has contributed to much of the economic (and perhaps some non-economic) reasoning leading to passage of various laws affecting food wholesaling and retailing. But, since precise economic models are not enough to fulfill all objectives desired by all segments of society, and since objectives of societies change, much economic and non-economic reasoning involved in the total legal structure of the food industry also has been based on less precise economic postulates which may vary quite widely from the ideas based upon the general Classical market concept.

Tracing the development of some of these less precise ideas and reviewing some of the major conflicts between them and the Classical idea of the market is the objective of the following chapter.

CHAPTER III

THEORETICAL DEVIATIONS FROM THE PERFECT MARKET MODEL

Classicism Not Final Answer

In a more comprehensive coverage of the development of economic thought than space will permit in this dissertation, it could be pointed out that many facets of Classical economics were not concerned as much with a precise description of the "perfect market" as the limited number of features describing the market used in the previous chapter would indicate. Classicism is quite a comprehensive description of a socio-economic system that involves much more than an optimum adjustment mechanism for regulating the buying and selling of goods and services.

But, as a prelude to some effort toward dealing with "economic impacts" of laws regulating buying and selling of a limited range of goods and services -- those traded by food wholesalers and retailers -- it seems desirable to limit the discussion of Classicism and the doctrines that oppose it to ideas bearing directly on the market concept.

How economic ideas relative to the market have differed from those of the Classicists and how changes in environment have been associated with these differing ideas is the principal subject matter
of this chapter. Classical economists ushered in the idea expressed in more recent times as negotiational or bargaining transactions.\(^1\) In the system described by the Classicists which was dominated by such transactions between many individuals acting independently, the Classical market mechanism perhaps operated more nearly as an arbiter in the economic affairs of men than it is able to operate in most situations now. In this day of big business, big labor, and big government, most of the explicit and implicit assumptions upon which the Classical view of the market rested no longer are as valid as they were believed by Classicists to be before the replacement of individual bargainers or small firms with these large groups.\(^2\) To the extent this is true, it results, at least in part, from two major differences: (1) the size or scope of the "market" is so much larger now than at the time of the early Classicists that traders cannot know as much about it as presumably they could then, and (2) more influences exogenous to the market are imposed by institutional activities now than in a more nearly atomistic structural situation.

Actually, however, few of the assumptions upon which the idea of an automatic identification of self and social interest was based were valid even at the time of the publication of the Wealth of Nations, according to critics living then as well as later. Lord

\(^1\)Commons, J. R., Institutional Economies, Macmillan Company, New York, 1934, p. 4.

Lauderdale (James Maitland) attacked Smith's contention that capital was always an aid to labor in production. He said that capital is sometimes a substitute for labor and, thereby, becomes an enemy of labor. He feared an accumulation of too much capital, thereby challenging the validity of the idea that capital is a perfectly mobile resource. Scarcity as a determinant of value was seen by Lauderdale to indicate that the assumption of ease of entry was unrealistic.

Along with an attack on several other phases of the Classical model, Fredrick List was not able to agree that factors of production were highly mobile. He recognized and approved institutional restraints exercised by governments against free mobility of capital and labor from one country to another as well as within the domain of a particular government. Of perhaps greater significance in modifying Classical thought to more nearly represent the real world was his recognition of the changing nature of technology and its pervading effects in differentiating national economies. From a viewpoint of historical development, List described five distinct stages through which a nation's economy moves: (1) savage, (2) pastoral, (3) agricultural, (4) agricultural-manufacturing, and (5) agricultural-manufacturing-commercial. The market model of Classical economics, according to List's reasoning, would not be sufficient as an arbiter in economic matters when the fourth and fifth stages were reached.

3Bell, J. F., op. cit., pp. 302-305.
4Ibid., pp. 306-313.
Rather he believed that protection by government was necessary to enable "infant" manufacturing industries to compete for markets with established suppliers in other more highly developed national economies.  

Historicism and Romanticism

Reacting against the simplicity, directness, and exactness of the Classical concepts, a group of philosophers known today as Romanticists pointed out that people do not always act on an individual self-interest basis. They saw people acting as parts of groups -- first the family, then the community or church, finally the nation. Behavior, then, reflected group interests. They believed that a mystical involvement of the individual with some group was a stronger influence than rational individualistic behavior in trying at all times to maximize satisfaction of an individual by self-seeking. These ideas opposed the perfectly rational assumption of the classical model.

Adam Mueller, a German economist-philosopher and one of the leading Romantic theorists, suggested that wealth of a nation actually includes moral and intellectual elements as well as the material characteristics of want satisfaction. The "spiritual capital" involved in aggregative value systems was even important in creating material wealth, he said. This made the state "continuous with past

6 Ibid., p. 302.
and future generations" and made individuals only servants of the group, not the self-seeking entities seen as the rational beings of Classical thought.\footnote{Ibid.}

An American contemporary of List, Henry Carey, explained how diminishing costs result from changes in the state of the arts "as nature is forced to labor more and more with man."\footnote{Ibid. , p. 320.} This was in conflict with the assumption in Classicism that the state of the arts is constant. The rationality of Classicism, especially as it affects rents, also was questioned by Carey. He pointed out that the best-quality land is not always utilized first and disagreed with the idea that rent is a differential resulting from higher costs through the use of inferior-quality land.\footnote{Gide, C. and C. Rist, op. cit., pp. 571-572.}

The Neo-classicists

The Neo-classicists continued to refine many of the concepts of Classicism, striving always for greater exactness. Much abstraction from reality naturally was the consequence of this and the gap between theoretical models and what seemed by many analysts to characterise the real world continued to grow. The ideas of perfect competition gained the status of a model with which to compare economic structures and behavior of markets. The idea of perfect competition, as it
evolved through Neo-classical thought, depends upon at least two major premises. In the first place, the commodity exchanged in the market must be a relatively simple, homogeneous substance that can be graded into a small number of grades and sold in bulk. This permits perfect substitutability. Secondly, the most profitable output of the product must be small in quantity in order that many firms can produce it and none of them can produce enough to affect the market. This also implies easy entry into and exit from the market. Perfect knowledge perfectly distributed was assumed in this model by early Classicists but later modified by some Neo-classists. Marshall, for instance, assumed that "free competition" relied on "sufficient knowledge of price . . . . on both sides so that the resulting price will be neither high nor low, but is equilibrium, in which case only one price can prevail in one market at one time." Perfect rationality of each "decision maker" is implied in marginal analysis which forms a prominent part of Neo-classical doctrine.

The almost complete absence of regulation by any authority operating outside of the market is assumed to be necessary. In fact, such interference is incompatible with the perfectly competitive market structure. This, then, is the model implied by the Classical and

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Neo-classical doctrines of the operation of self-interest for social good. This *laissez-faire* concept was assumed by economic analysts of the Classical school and its successors as the model that would result in an optimum allocation of resources and distribution of income. Thus, free competition became a cardinal tenet of a system designed to provide the maximum in contributions to society.

**Competition Not All Perfect**

Counterposed against perfect competition is the idea of "natural" or "perfect" monopoly. This implies output by one firm rather than by many firms of all the supply needed with the consequent "control" this one firm can exercise over the market as a result of owning the entire supply of a particular good or service. This type of market structure was not possible under the assumptions upon which Classical economics was founded. To all who could see perfect competition as providing the optimum economic system, the controls inherent in monopoly rendered it very undesirable for optimum social welfare.

Although the perfectly competitive model has never been regarded by many economists as strictly applicable to any very broad segment of industry and commerce, its simplicity plus its general preference over monopoly, has tended to retain the idea of competition as a strong element in economic reasoning today. This fact perhaps has been responsible for many laws affecting industry and commerce in the United States today.\(^\text{14}\) To avoid the ill effects foreseen if a

segment of the economy moves toward monopoly, efforts are made to keep the segment as nearly perfectly competitive as possible.

Between perfect competition and perfect monopoly there are various stages of imperfect competition and imperfect monopoly. Intermediate types of market structure have been discernible to keen observers for many years. Monopolistic competition is a concept applied to much of the market activity in an economy characterized by the enterprise system of Western Europe and America. Oligopoly is usually placed still further along the continuum from perfect competition to perfect monopoly. But careful observers are usually willing to accept the fact that competition may be sharp between firms in an oligopolistic industry.

Workable Competition

In recent years, economists who have felt a need for developing a more meaningful understanding about competition in an ever-changing economic environment have undertaken to delineate a concept of "workable" or "effective" competition. This concept purports to

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18 Claire E. Griffin suggests "socially useful competition" as a more descriptive term of the concept needed than "workable" or "effective" competition. See "Needed: A Realistic Antitrust Policy," *Harvard Business Review*, Vol. 34, No. 6, November-December 1956, p. 79.
define a set of principles relative to competition which, when applied
to an analysis of industry and commerce in the real world, will describe
it accurately. At the same time, it should be acceptable to policy
makers concerned with maintaining a type of competition best for a
nation dedicated to maintaining maximum personal freedom in the polit-
ical and economic system.19

Some of the principal elements usually enumerated in a description
of workable or effective competition are:20

1. The number of effective, competitive buyers and sellers must
be sufficient and have sufficiently equal strength to result
in a degree of self-interested independent rivalry in any
given market necessary to preclude collusion that would result
in any monopoly power.

2. Opportunity for entry of new rivals in the market must be
present to provide at least a threat to firms in the market
that will result in competitive performance throughout the
market.

3. Rivals must act independently as business units in an in-
dustry, each firm pursuing its individual advantage as its
management determines it on the basis of predicted developments
in the market.

19 Levin, Harvey J., (editor), Business Organization and Public

20 The elements listed here are adaptations of statements by
Edward S. Mason and others quoted in Business Organization and Public
Policy, op. cit., pp. 4-36.
4. Products must be nearly enough alike that customers have little hesitancy in purchasing from any one seller in the market. The fact that customers can shop around, however, enhances competitiveness in the market.

5. Uncertainty as to rivals' reactions to competitive actions must prevail. This stimulates innovation needed to keep the market and the economy in a relatively progressive condition.

6. Each firm must be granted the privilege of meeting or even undercutting the prices of rivals as its own self-interest would dictate.

7. Some excess capacity is desirable since this enables an industry to expand rapidly in response to increased demand without pushing prices up. Unless an industry responds to increased demand and profit, some evidence of restraints, exercised by the firms in the industry or otherwise, is suggested.

8. Price differentials designed to reflect differences in costs in prices charged must be permitted. This encourages innovations needed to keep the industry and the economy in a relatively "strong" condition. 21

9. All traders in the market must possess sufficient knowledge as to price, supply, demand, and other facets of the relevant

21 Clair Griffin, op. cit., says, "Nor would all say that a price which is close to cost is an evidence of good competition, for it might well be that a rather substantial profit at present or in prospect is the requirement for risk-taking innovation," p. 80.
market to prevent the exercise of monopolistic controls by one trader who may have excessive knowledge of the market.

Careful analysis of these elements will indicate a general lack of preciseness in the statement of them and even conflicts in some respects between one element and another. This has led some analysts to assert that the entire concept of workable or effective competition is only a "rough and ready judgement by some economists, each for himself, that a particular industry is performing reasonably well -- presumably relative to alternative industrial arrangements which are practically attainable. There are no objective criteria of workable competition, and such criteria as are preferred are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition." 22

As was pointed out in Chapter I, there are many other goals than that of economic efficiency as measured by competitiveness which are sought by our society through the laws passed and enforced by this society. Freedom to develop and nurture personal prestige, stability, and various ethical, aesthetic, moral, religious, and political values is one of them. 23 The goal of efficiency for an individual and that of freedom for society to engage in other things often go hand in hand. At other times they are conflicting goals. In a period of rapidly changing technology which is accompanied by and often initiates


changing value systems for individuals and society as well as entirely new structures of business enterprise, perhaps it is not realistic to attempt more than a "rough and ready judgement" in establishing criteria for workable competition.

The following chapter is devoted to an attempt to analyze the "competitiveness" of modern food wholesaling and retailing by using some of the criteria outlined in the nine elements listed above. In Chapters V, VI, and VII, three types of laws affecting the economics of food wholesaling and retailing are analyzed and some of the economic impacts of these laws on these two marketing functions are measured by the use of the nine criteria of workable competition.
CHAPTER IV

FOOD WHOLESALING AND RETAILING IN A FRAMEWORK
OF WORKABLE COMPETITION

Nature of Food Wholesaling-Retailing Industry

With a model of workable or effective competition as described in
Chapter III established as a pattern for use in this dissertation, an
effort is made in this chapter to fit the modern food wholesaling-
retailing complex to it. This is done in an attempt to answer several
important questions in respect to the effects of changes in structure,
conduct, and performance\(^1\) on competitiveness of food wholesaling-re-
tailing firms. This chapter, too, presents additional introductory
material for the remainder of this dissertation which deals with ef-
fects of three types of laws on competition in food wholesaling and
retailing.

An explanation of what is covered here by the term "food whole-
saling and retailing" may be in order. Most foods distributed through
retail food stores are procured by the retail stores from wholesale

\(^1\)Walter Adams defines structure as the organizational anatomy of
a market; conduct as the behavioral interaction of firms -- their
strategy, tactics, and practices; and performance as market results
measured in terms of efficiency, progressiveness, etc. See his dis-
cussion of "Changing Structure of the American Economy: Its Impli-
cations for Performance of Industrial Markets," *Journal of Farm
distributors. These wholesale distributors in some cases are a part of a corporate chain which also owns and operates the retail stores. In other cases, the wholesalers are affiliated through cooperative ownership of, or voluntary agreement with, the retail stores they serve. In still other cases the wholesale firm may have no formal affiliation at all with the retail firms it serves. Recent estimates indicate that about 65 per cent of all sales by grocery stores were made in 1958 by corporate chains and cooperative and voluntary groups combined. Although total sales by all the retail stores in these groups were not represented by purchases through the wholesaling firms associated with the retail stores, this serves to illustrate the very close tie between food wholesaling and retailing in modern food distribution. For this reason, the functions of wholesaling and retailing are treated in this publication as joint functions and the analysis of their competitive behavior is viewed, in most cases, as though they are essentially one function.

Fitting the Industry to the Model

Number and relative strength of firms in an industry are the principal criteria for gauging the competitiveness under element 1 of the

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model of workable competition in Chapter III. The appropriate question for this chapter relative to this element of the model relates to the number of food wholesaling-retailing firms in the industry and their relative strength. If there are enough individual firms in the industry whose relative strength result in "a degree of self-interested independent rivalry in any given market necessary to preclude collusion that would result in any monopoly power," the industry is characterized by workable competition on this point, at least.

Although it is not possible to ascribe a given degree of competitiveness to an industry on the basis of numbers alone,¹ most relevant theory applicable to perfect competition, various degrees of imperfect competition, and even to perfect monopoly is based solidly on numbers of firms. Since there are still some 275,000² or more grocery stores in this country and at least several rival stores of one size or another in virtually every hamlet, there seems to be ample evidence that there is a sufficient number to result in a self-interested independent rivalry among food retailers which may preclude collusion that can in the foreseeable future result in monopoly power.

This conclusion may not take into full account the impact of national or local chains -- which represent higher concentration and thus fewer independent self-interested stores -- on local markets.

Mueller and Garoian estimated that in 1957 each of the twenty largest


chains accounted for about 16 per cent of the sales in cities in which they operated. These investigators expressed a "judgement" that "the four largest retail firms and the four largest voluntary and/or co-operative chains typically account for over 55 per cent of total retail grocery store sales" in cities of over 25,000 population. They also found that the twenty largest chains are increasingly "competing with one another in the same markets as a result of their geographic expansion." In 1942, three or more of the twenty largest chains operated in only 16 per cent of 211 large cities. But by 1957, this number of chains was operating in 61 per cent of these cities.

In order to conclude from these facts that the number of firms is not large enough to ensure competitiveness, however, it must be assumed that some degree of collusion is practiced, advertently or inadvertently, and that each firm does not act independently in pursuing its own self-interest as viewed by its management. Validity of this assumption could be questioned by anyone acquainted with the actions of food firms, even where only two share the market. Furthermore, barriers to entry are so low for food retailing that a constant threat would exist from would-be entrants in any location where monopoly profits were enjoyed by firms in the industry. More is said about that in the analysis of the next element.

The second element in the model of workable competition as constructed in Chapter III deals with opportunity for new rivals to enter

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the market which will provide a threat to established firms resulting in competitive performance throughout the market. Barriers to entry into food retailing are relatively low. It may be true that many markets are "overbuilt" and that there is not enough food retail business in some markets to allow some of the firms already selling foods in them to operate at optimum scale. But venturesome entrepreneurs break into such markets constantly and some of them succeed, even experiencing profitable growth and eventually becoming dominant firms in the particular market. In respect to this element, then, food retailing fits well into the model of workable competition.

The third element is closely related to the first but places emphasis on conduct rather than structure. On a local market basis, the conduct of individual firms in food retailing is usually of the nature of independent action with each firm pursuing its individual advantage as its management determines it on the basis of predicted developments in the market. Such action involves prices, differentiation of merchandise and service, and local advertising.

Some studies of price competition would suggest that some type of price leadership may be involved among the largest corporate chains. Even if this is true and the largest cooperatives and other affiliated


groups of wholesalers and retailers fall under the same leadership umbrella, only casual study of the conduct of food firms would reveal that prices are manipulated feverishly on a local basis if individual management of one of the complexes or of a strong independent firm believes its advantage will be served by so doing. In fact, this is one reason why pressures mount high enough to secure the passage of and maintain the several laws having to do with price competition. This is explored much more fully in Chapters V and VII.

Hundreds of products found in practically all food stores are identical. This is true because of the strong marketing program of national regional food manufactures. Element four of the workable competition model, therefore, describes many of the products sold by food wholesalers and retailers. Even in products that are highly differentiated by label, there are very close substitutes and consumer indifference in the aggregate toward such close substitutes is generally recognized in just about all kinds of theoretical models of competition. For every private label merchandised by one chain or affiliated group, there are usually several other private labels and at least one or more national or regional brand labels to compete in a very close manner. Since most customers shop a number of retail stores weekly, it is apparent that even the entire package of goods and services -- regardless of the effort each firm may make to differentiate its own particular package -- is not greatly differentiated in the minds of most customers. At least it seems that very few firms have

so distinct a package of goods and services that they can command the allegiance of most customers to the extent of preventing the customers from "shopping around" a great deal.

Element five impinges upon the same general area as elements one and three. When the number of firms in an industry is great enough to permit self-interested independent actions of rivals, and when rivals so act, there can be little certainty as to reaction of rivals to competitive actions. Students of actions and reactions of rivals in the food industry seldom can be more certain as to how one firm will react to competitive actions by one of its rivals than merely to expect each firm to try to offset the advantage its rival stands to gain by its competitive action. The direction and degree of this reaction is usually very uncertain.

Much of the food wholesaling-retailing industry perhaps deviates from element six in the model of workable competition as much as from any other element. This deviation is dictated to a great extent by legal restraints, however, and there is little definite information upon which to base judgement as to how far individual firms in the industry would meet or under-cut prices if the legal restraints were not present. The fact that price competition has reached the point in times past to stimulate the food industry to lobby such legislation as Robinson-Patman and various fair trade laws into existence indicates that, left to its own devices, some firms in the industry would meet and undercut prices to a considerable degree.10 In an industry

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characterized by as low net returns as reported by most publicly owned food firms, however, price cutting in the aggregate likely would not reach large absolute magnitudes even if no laws limited price cutting. Since much of Chapters V and VII deal with various aspects of this matter, further analysis as to how this element of the workable competition model fits the real world of food wholesaling-retailing is omitted here.

There are many evidences of excess capacity in the modern food wholesaling-retailing industry. Casual observation of the capacity of retail food stores to provide needed goods and services in any market of, say, 25,000 consumers and, then, a simple estimate of the total amount of money spent by this number of consumers in food stores provides a sufficiently sophisticated analysis of capacity in relation to sales to indicate considerable excess capacity. Estimates made by food wholesaling-retailing firms and published periodically by trade associations and magazines relative to sales per square foot of display space indicate a declining rate. Supermarkets represent the most important group of stores by size. Management of supermarkets in a recent survey indicated that a "typical" supermarket served a trading area inhabited by 25,000 people in 1959 as compared with an area inhabited by 33,000 people in 1938. When competing supermarkets were


12 Retail food stores with sales of $375,000 or more per year, whether chain or independent, is regarded as a supermarket in this dissertation.
considered, this amounted to an average of 7,300 people per supermarket in 1959 as compared with 9,300 in 1958.\(^3\) Since the capacity of supermarkets for providing varying amounts of goods and services needed in a community is perhaps greater than that of smaller stores they are replacing, this is further indication of an excess capacity.

Element eight is very similar to element six in that legal restraints are greatly involved. This involvement is treated more fully in Chapters V and VII. The adjustment of prices in relation to costs is limited or prohibited by some laws governing the operation of food wholesaling-retailing firms.\(^4\) Such adjustments are expressly permitted and even enhanced by other laws. Theoretically, to say the least, in an industry characterized by as high a degree of competitiveness as the analysis of food wholesaling-retailing in this chapter would indicate, the tendency is strong to reflect costs in prices, at least to the extent that exogenous influences will allow the industry to move its prices toward minimum unit costs. Further analysis of this facet of the competitiveness of food wholesaling-retailing firms is deferred, however, to the following chapters.

Element nine of the model of workable competition may fail in describing the actual situation characterizing food wholesaling and retailing more due to endogenous influences than is true of any of the


other elements. Knowledge regarding supply, demand, price, and other conditions of the market has been developed to a highly specialized degree by some firms in the food wholesaling-retailing industry. Some of their rivals have not kept pace in such development of knowledge and, therefore, are operating at a competitive disadvantage in their particular markets. Greater concentration through cooperative and other affiliated groups; activities by trade associations comprised mainly of the firms having inferior knowledge; and educational programs of colleges, universities, and other public education agencies are being utilized by firms in an effort to more nearly equalize the knowledge needed for competitive reasons.
CHAPTER V

ECONOMIC RELATIONSHIPS OF THE FOOD WHOLESALING–RETAILING INDUSTRY TO THE ROBINSON-PATMAN ACT

Industrial Age Presents New Problems

As the nineteenth century came to a close, many changes were occurring in the business structure of this country. New technologies in manufacturing had pyramided many industrial firms into giants that could turn out an ever-growing flow of both producer and consumer goods. Capital markets had reached huge proportions in comparison with any former period. Mass production which resulted from all this "began to force attention upon the development of equally large-scale methods of distributing its products." ¹

The growth in the economy reached a point where the chronic scarcity of goods and services was replaced by a greater abundance of goods and services available for consumption. This was accompanied by a greater relative scarcity of opportunities for opening up new production facilities. ² Industrial firms with great productive power could, under these circumstances, make greater profits by producing less and selling it on a more or less "controlled" market. When this


²Ibid., p. 239.
had occurred, businessmen themselves were in a position to create re-
straints of trade similar to the limitations that governments had used
in earlier periods and still used in many instances. This was regarded
by many in the rapidly expanding population in the United States as
inimical to the free competition concept upon which the business com-
munity had relied since early in the history of this country.

The seemingly unlimited demand for goods and services that had
existed for most of the last half of the nineteenth century had stimu-
lated investment in many firms in most types of industry. Inventions
and technological improvements have grown rapidly in response to this
demand. The rate of this type of change is indicated by the fact that
during the period of 1860 to 1869, the United States Patent Office
granted 77,355 patents whereas in the period of 1890 to 1899, the
number of patents granted was 234,749.3

Since many firms in each industry, including the food manufactur-
ing industries, had expended through these innovations to a scale at
which they could produce more than they could market at customary
prices, price cutting was an attractive method of getting enough
business at least to meet variable costs. Many small producers found
their costs so high that price cutting by larger producers tended to
drive them out of business. Even large firms soon felt the effects of
price cutting and the best way out seemed to be the formation of
combinations or "trusts" through which the combined membership could

Schribner's Sons, 1949, p. 356.
put up a solid front against the onslaughts of competition from firms that were not parts of the combination. This effectively reduced the number of self-interested independent rivals in the market and, in some cases, soon resulted in monopolistic control by the combinations of much of the market relating to particular goods and services.

New Business Methods and New Laws

General public opposition arose to the effects of marketing through combinations as various segments of the populations felt the effects of this new industrial structure. The Interstate Commerce Act of 1887, aimed principally at regulating monopolistic powers of railroads, was one of the first laws passed in response to an aroused public to try to stem the tide of power arising from business combinations and other types of monopolistic structures in industry. Three years later, in 1890, the Sherman Anti-Trust Act was passed by Congress and signed by President Benjamin Harrison. This law was quite general and "no definitions were given. As a matter of fact, it did not do more than provide a specific statute for the United States out of the principles of the English common law on monopoly."4

Through the period from 1890 to 1914, the Sherman Anti-Trust Act was invoked in several important issues involving combinations and their effects on competition. General dissatisfaction with "loopholes" in the anti-trust law resulted in the passage in 1914 of the Clayton

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Anti-Trust Act which labeled specific practices as monopolistic. Price discrimination, formation of holding companies, and interlocking directorates were important types of practices forbidden by this act. In 1914, also, the Federal Trade Commission Act became law, creating the Federal Trade Commission as a continuous policing body empowered to ferret out violations of anti-trust laws and issue cease and desist orders when violations were found.

As technological change marched relentlessly on and most firms found their optimum rate of output growing larger and larger, much of the business community as then structured felt that legal restraints exercised by government through the operation of the Interstate Commerce Act, the Sherman Anti-Trust Act, the Clayton Anti-Trust Act, and the Federal Trade Commission Act were not capable of preventing monopolistic restraints from destroying competition. This was especially true in respect to the food distribution industries as a few large wholesaling-retailing firms utilized the new technologies in physical materials handling and business methods available to them and the ever-increasing mobility of the total population which was becoming more urbanized to increase the scale of their individual retail outlets and their entire distribution system.

The market power such firms could wield in both the purchasing and selling phases of their operations became the focus of legal, social,

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and economic attacks from hundreds of smaller rivals in the food wholesaling-retailing industry. This was a clear case of new structures threatening the existing order in which many individuals, businessmen and small firms could see nothing but extinction facing them. Whether or not these larger firms were using resources more efficiently or were actually decreasing competition made little difference to their small rivals. They could clearly see that competition from the growing giants was of such a nature that they could not meet it and meet their own costs of doing business at the same time.

The result of this concern by so many "small businessmen" was agitation first to study the effects of the changing structure of business on competition and later to enact legislation designed to prevent these effects from becoming too severe. Price discrimination was a practice charged to chain stores and laws then in the statute books had been found ineffective in dealing with it. By the early 1930's, "concern over the growth of chain stores, unrest arising from the depression, dissatisfaction with the existing law of price discrimination, and the experimental bent of the New Deal combined to make legislation politically possible."6

The Robinson-Patman Act

In 1935, Senator Joseph Robinson of Arkansas and Congressman Wright Patman of Texas introduced a bill which was drafted by H. B.

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Teegarden, Attorney for the United States Wholesale Grocers' Association and designed to prohibit "discrimination in prices or terms of sale on commodities of like grade and quality, with no test of the effect on competition such as was contained in the existing law." Testifying in favor of the bill Mr. Teegarden explained that it was "directed at unreasonable quantity discounts, dummy brokerage allowances, and pseudo-advertising allowances, because in the experience of the food trades these were the three principal ways in which price concessions were granted to buying organizations."

Not all spokesmen from the food trade who appeared at hearings on the bill favored its passage. Most non-food industry spokesmen strongly opposed it, among which were representatives of coal dealers, chemical dealers, dry goods retailers, and mail order distributors. This resulted in delays, alterations, additions of new considerations, and passage by each house of widely varying versions that had to be reconciled in conference committee.

Corwin Edwards, who as an economist, a former staff member of the Federal Trade Commission, and a student of regulatory practices has delved into the intricacies of this Act, sums up the matter in this manner: "As a result of the haphazard way in which the bill was developed, there are unusual difficulties in ascertaining the intent of

7Ibid., p. 22.
8Ibid., p. 22.
9Ibid., p. 24.
Congress from a study of the legislative history. In regard to some matters, no explanation was offered for the version finally adopted by Congress. As to others, conflicting expression of opinion were reconciled in ways susceptible to varying interpretations . . . 10

Since the primary objective of this Act, according to the statement of the House Judiciary Committee in reporting on it, was to "suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them," 11 the meaning of discrimination is important in understanding this objective. Congressman Utterback, who was one of the strong proponents of the Robinson-Patman Act in the House of Representatives, defined the concept of discrimination as follows:

In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary cost and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too,

10 Ibid., p. 25.

11 Ibid., p. 29. The report also stated: "The existing law has in practice been restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas, the more important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result," op. cit., p. 30.
a relationship may exist upon which to base the charge of
discrimination. But where no such relationships exists,
where the goods are sold in different markets and the
conditions affecting those markets set different price
levels for them, the sale to different customers at those
different prices would not constitute a discrimination
within the meaning of this bill. 12

Writing in the American Law Institute on "Price Discrimination and
Related Problems under the Robinson-Patman Act," Cyrus Austin of the
New York Bar says, "This definition is ambiguous and misleading and
has been too often accepted without analysis . . . ." 13

Austin further states:

The primary meaning of discrimination is a difference or
distinction in treatment (Webster). It is in this pri-
mary sense that the terms "discriminate" and "discrimi-
nation" are used in Section 2(a), not in the secondary
and more common sense of an unfair or unjust difference
in treatment. This is true because section 2(a) con-
tains its own standard of what differences in price
treatment are unfair or unjust. Unequal price treat-
ment which may have any of the stated effects on
competition, and otherwise falls within the affirmative
prohibitions of Section 2(a), is discrimination in
price within the meaning of that section and is un-
lawful unless it can be justified by cost differences
or otherwise. 14

Austin continues to point out difficulties in arriving at accurate
definitions of discrimination and other words that are important to
the meaning of the various provisions of the act. He says that some
terms do not have the same meaning in various parts of the act and
"must be interpreted in the context in which used." 15

12 Congressional Record, Vol. 80, Pt. 9, p. 9416.
13 Austin, Cyrus, op. cit., p. 18.
14 Ibid., p. 19.
15 Ibid., p. 21.
In addition to these difficulties in understanding the meaning of terminology, another "closely related difficulty lay in the uncoordinated application of different principals of illegality to different ranges of business conduct."\(^{16}\) Still another weakness that has been pointed out in this act was its "general focus on the conduct of sellers rather than the power or conduct of buyers . . . ." while the stated "purpose of the Congress was to use the law of price discrimination to curb the buying power of chain stores and other large buyers."\(^{17}\)

Despite these ambiguities and inconsistencies, the Robinson-Patman Act "is one of the principal federal regulatory statutes governing commercial transactions"\(^{18}\) and has great impact on the food wholesaling-retailing industry.

As finally passed, the Robinson-Patman Act contains four principal sets of prohibitions:

1. **Forbids sellers to engage in price discrimination and buyers to receive unlawful price concessions.**

2. **Forbids buyers and sellers alike to participate in the payment of brokerage by a party on one side of a transaction to a party on the other side of the transaction or his agent.**

3. **Prohibits sellers from making payments for selling services and from providing selling services unless the payments and services are available to all competing customers on proportionally equal terms.**

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4. Forbid any person engaged in commerce:

a. To be party to or assist in any transaction of sale or contract to sell which discriminates to his knowledge against competitors of the purchaser in which any discount, rebate, allowance, or advertising service charge is granted the purchaser over and above what is available to any competitor on like grade, quality, and quantity.

b. To sell or contract to sell goods in any part of the United States at prices lower than those charged elsewhere in the United States for the purpose of destroying competition or eliminating a competitor.

c. To sell or contract to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.\(^{19}\)

Each of these prohibitions has important impacts on food wholesaling and retailing. Some impacts are greatest on rivalry between wholesaling and retailing firms. Some are greatest on relationships between wholesaling-retailing firms and their suppliers - the producers referred to in Chapter I. And still other impacts are greatest on the relative values of goods and services provided to consumers.

In the remainder of this chapter, each of the prohibitions is analyzed on the basis of the economic impacts it has on: (1) rival wholesaling-retailing firms, (2) suppliers versus wholesaling-retailing firms, and (3) consumers.

\(^{19}\) Edwards, C. D., op. cit., p. 16. Also see op. cit., page 61 for more information on point 4 in this outline. A complete copy of the Robinson-Patman Act is reproduced in the Appendix of this present publication.
Price Discriminations

Sections 2(a) and 2(f) both relate directly to price discriminations. The price involved in discriminations prohibited by Section 2(a) is principally that charged by a seller to two or more buyers. The price involved in discriminations forbidden by Section 2(f) is that induced or received by a buyer. In many respects the economic impacts of both are the same. In other respects, the implications, at least, are somewhat different. For this reason, the two sections are analyzed separately in this dissertation.

Section 2(a), in general, forbids any seller to "discriminate in price between different purchasers of commodities of like grade and quality" if the effect "may be substantially to lessen competition or tend to create a monopoly."20

There are three important modifications of this general prohibition written into the act, the first one of which also has an important modification. Since the forbidden discrimination involves differences in prices charged different customers, the first modification is permissive in that it allows differentials that make "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."21 This, in turn, is modified in the act by permission for the Federal Trade Commission

20 Quotation from Section 2(a) of the Act. See Appendix.

21 Ibid.
to establish quantity limits and to revise them from time to time. This is allowed in cases where available purchasers in large quantities are so few as to render differentials based on quantity unjust or promotive of monopoly.

The second modification of the general prohibition against price discrimination is that of permitting sellers to choose their customers. The third permits price change over time in order that deterioration and obsolescence may be prevented or distress sales may be held by firms that plan to discontinue handling the goods concerned.

Perhaps the greatest impact of this general prohibition is more ethical than economic. As is true of the Robinson-Patman Act in total, this section purports to "curb the buying power of chain stores and other large buyers." Economic reasons for so doing may be more difficult to find than would ethical reasons, since selling to various purchasers at different prices could result in more nearly optimum allocation of resources than selling at the same price. (How this may occur is discussed more fully in the section below on eliminating competition). This would especially be true if full effects of differences in costs were reflected in the differences in prices charged to purchasers of different quantities or by different methods. Ethically however, it may be desirable to prevent the business failures of some competitors due to the effect of the differences in price in allocating resources more and more to firms that are operating at greater efficiency.

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The expected economic impact of Section 2(a) on rival firms is of the nature principally of modifying the allocation of resources by controlling the price mechanism. In the absence of the prohibitions on price differentials imposed by Section 2(a), rival purchasers who purchased different quantities and by different methods, resulting in different costs, likely would be charged different prices to compensate for all cost differences. This would permit the purchasers who were accorded lower prices to compete more favorably for resale of the goods handled. As a natural consequence, the volume of business of the lower-price firms would increase and that of the higher price firms would decrease, other things remaining equal. Theoretically this would result in the allocation of more land, labor, capital, and management to the firms who are able to purchase at the lower prices from the original supplier and to sell at correspondingly lower prices.23

Prohibitions of Section 2(a) may at least slow down this sequence of events. As a result, allocation of resources may follow a different pattern than that dictated by short-run efficiency considerations. This modification of economic processes may thwart the attainment of maximum efficiency at as rapid a rate and to the extent that it could be attained in the absence of these prohibitions. This can result in higher prices for goods and services to consumers in the short-run.

On the other hand, it is argued that if price discrimination is allowed on a basis of full cost differentials, the relatively lower-cost firms in an industry may gain enough advantage through attracting customers to their lower prices to eventually appropriate to themselves all custom in the market. Theoretically, this could drive the relatively higher-cost firms out of the industry, resulting finally in a one-firm industry. This firm could then exercise "pure monopsony" power as a purchaser and "pure monopoly" power as a seller. The long-run results could be lower efficiency, monopoly profits for the firm remaining in the industry, and a strong probability of lower prices to the supplier and higher prices to the purchaser than would prevail in a competitive market.24

The ethical impacts of such long-run developments are perhaps much more significant than the economic impacts. Furthermore, barriers to entry for firms into the food wholesaling-retailing industry are low enough to substantially deter monopolistic tendencies in this industry.25 The short-run economic impacts that result in sacrificing efficiency through limiting price discrimination, therefore, is more important within the context of this dissertation than the long-run economic impacts.

Economic relationships between seller and purchaser are modified also by Section 2(a) prohibitions. Since sellers are not permitted to


25See the discussion of element two of the model of workable competition in Chapter IV.
reflect, in the prices they charge, all costs associated with quantities purchased and methods used by different purchasers, some purchasers may be stimulated to develop their own sources of supply. This can result in increased competition for supply firms originally in the industry. To the extent that suppliers are prohibited from reflecting all cost differences in the prices they charge, on the other hand, they may realize greater profits than would accrue to them without the prohibitions of Section 2(a).

Section 2(f) forbids a purchaser from knowingly inducing or receiving prices on goods and services he buys that results in price discriminations which are prohibited in Section 2. Congressman Utterback explained this sub-section as a provision that "makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by" the Robinson-Patman Act.26 He continues: "This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier to resist the demand for sacrificial price cuts coming from mass buyer customers . . . . by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers."27

The economic impacts of the prohibitions contained in Section 2(f) are very closely related to those of 2(a) insofar as direct price

26Austin, C., op. cit., p. 142.

27Ibid., pp. 142-143.
discriminations are concerned. As the last prohibition in Section 2, sub-section (f) also has implications for other sub-sections which deal with indirect price discriminations. This is evident from the brief but all-encompassing text of sub-section (f), i.e. "That 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 in this section." These implications will become more apparent as sub-sections (c), (d), and (e) are analyzed below.

Some of the loss of efficiency from the restraints of Sections 2(a) and 2(f) presumably could be off-set by greater efficiency in firms that were motivated by requirements of these sub-sections to determine more accurately the nature of their cost-price relationships. This could result in a generally sharper approach to the use of cost accounting as a management tool, and consequently, in lower costs in firms that were successful in adjusting to the new information thus gained by eliminating wasteful practices. But this, in turn, may also be off-set in the total economy by firms that, deprived of the privilege of saving money through using more economical methods of buying, resort to relatively wasteful buying practices and even to buying "phantom" services to avoid legal risks.

Legal counsel needed by many firms to enable them to avoid legal difficulties also is expensive and theoretically could result in less efficiency in their total output of goods and services.
Brokerage

Section 2(c) of the Robinson-Patman Act forbids a seller or buyer to "pay 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" to the other party or an agent, representative, or other intermediary of the other party.

The purpose of incorporating this sub-section in the act "was directed at certain specific and well-understood practices which had been one of the chief subjects of attack in committee hearings" as this legislation was being developed. These practices were alleged to have been used by and in behalf of larger buyers to enable them, in effect, to purchase at lower prices. This, if allowed, would result in indirect price discrimination in favor of the larger buyers.

But Section 2(c) is the only part of the Robinson-Patman Act that does not deal with direct discriminations of price, allowances, services, or facilities. It was declared by Circuit Court of Appeals in passing judgment on the first case to come before it under this subsection that "Congress intended to prohibit such payments as an unfair trade practice." A brokerage payment or a concession in lieu of a brokerage payment is forbidden when direct sales are made even if it would result in savings in selling costs through the direct sales.

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25Quotation from Section 2(c). See Appendix.
29Austin, Cyrus, op. cit., p. 101.
30Ibid., p. 102.
Under Section 2(c), the economic impact is considered by at least one economist to be a type of enforced discrimination.\(^3^1\)

The discrimination in Section 2(c) lies in the fact that the integrated buyer, who has eliminated the brokerage expense from the seller's cost, must pay the same price as the buyer who cannot perform this function. For example, if the price of an article is one dollar and the customary brokerage fee is 3 per cent, the seller collects 97 cents when he sells through a broker, but receives a full dollar from the direct or integrated buyer -- a price which includes 3 per cent for "phantom" brokerage, i.e., brokerage never paid for by the seller. A buyer is clearly discriminated against when he must pay a price of one dollar which includes a fee for brokerage, though the buyer himself is performing this function and incurring its expense.

In addition to this economic relationship between buyer and seller, the same types of economic impact that are involved in Section 2(a), discussed above, also are involved in Section 2(c). The price mechanism may not be given full play in the allocation of resources, the full effect of efficiency may not be permitted to develop, and consumers may thus be denied lower prices which could result if prices paid the seller by the integrated buyer were allowed to reflect the absence of the brokerage cost.

Implicitly, Section 2(c) also tends to create a "phony demand" for unnecessary services since the cost for them must be paid even if they are not utilized in the transaction between seller and buyer.

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\(^3^1\)Adelman, M. A., op. cit., p. 337.
Merchandising Allowances and Services

Sections 2(d) and 2(e) are very closely related. They deal with discrimination in furnishing merchandising services and facilities, and in payments and allowances for such services and facilities. These sub-sections forbid sellers to furnish such services except on a basis of equally proportional terms to all purchasers.

The purpose of these prohibitions was set forth in the Committee reports to the House and Senate on the Robinson and Patman bills:

Still another medium for granting oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customer agrees to render with reference to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.

Sections (c) and (d) of the bill address this evil by prohibiting the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment for such services or facilities when undertaken by the buyer except when accorded or made available to all competing customers on proportionally equal terms.

The principal services involved in these prohibitions are advertising, promotional, and selling services furnished as cooperative-

32"Services" as used here includes all the terms involved in Sections 2(d) and 2(e) such as payment, facilities, allowances, compensation, and consideration. See a copy of the Act in the Appendix.

33Austin, C., op. cit., pp. 111-112.
merchandising services by manufacturers to aid in resale of consumer goods. They include newspaper, radio and television advertising; window and counter displays; demonstrators; samples or premiums; special payments to salesmen; and free goods with quantity purchases.\(^\text{34}\)

If the provision of such services is out of proportion to their reasonable value, this action may be regarded as indirect price discrimination and become an offence under Section 2(a). But the proportionality provisions in Sections 2(d) and 2(e) refer to making services available on proportionally equal terms to all purchasers. These provisions completely ignore the value the seller would hope to realize from providing the services. Nor do they define the meaning of "proportionately equal terms." The ambiguity involved in this terminology has led Professor S. C. Oppenhein of the George Washington University Law School to label Sections 2(d) and 2(e) as "a legislative monstrosity."\(^\text{35}\)

Assuming that "proportionally equal" is related to size, volume of business, or some other quantitative measure, the major impact of these phases of the Robinson-Patman Act is based more in equity than in economics. But there are definite economic impacts of these subsections on food wholesaling and retailing. Rival food wholesaling-retailing firms are prohibited by these phases of the Robinson-Patman Act from competing strictly on the basis of relative efficiencies with

\(^{34}\text{Ibid.}, pp. 112-113.\)

which they can perform selling services. Their suppliers are prohibited from allocating resources to the provision of advertising and promotional services in the manner calculated to return maximum value to them. This can result in higher prices and lower values to consumers due to a misallocation of resources used in informing them about products available and in actually providing the goods and services in the most efficient manner.

Eliminating a Competitor

Section 3 of the Robinson-Patman Act forbids any seller to sell in one geographic location at prices lower than the same seller receives for goods of like grade, quality, and quantity in another geographic area for the purpose of destroying or eliminating a competitor. Sellers are forbidden to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. Sellers also are forbidden to discriminate in any manner between purchasers similar to the various ways that Section 2 prohibits discrimination. Most, if not all, these prohibitions are included either in Section 2 of the Sherman Anti-Trust Act or Section 2 of the Robinson-Patman Act. Enforcement of Section 3 could result, however, "in the capricious application of criminal penalties to particular discriminations that were not more serious in their consequences than others that were immune from such penalties."36

Since a rigorous interpretation of the economic impacts of Sections 2 and 3 simultaneously would necessarily depend upon the basis of enforcement used (whether penalties were exacted under Section 2 or Section 3), perhaps little could be added here to the economic analysis of Sections 2(a), 2(c), 2(d), 2(e), and 2(f) above.

The economic impact of one part of Section 3, the prohibition to sell at different prices in different locations, may have special significance, however. The general context of competition varies in different geographic areas or different "markets." In one market, competition for a given seller may not be severe due to the lack of business acumen possessed by management of other marketing firms in the area, or for various other reasons. In another market, competition may be extremely intense due to one or more aggressive and well-managed rivals or to other reasons. The demand for the products of this seller in this particular market would be more elastic than for the one in which competition was not severe. A seller who is concerned with maximizing total sales in all markets in order to operate at optimum costs covering his entire production may desire to sell at different prices in the two markets. Yet, if this seller resorts to a dual-pricing system, it may be difficult to avoid penalties under Section 3 of the Robinson-Patman Act since no provisions are made for meeting competition in good faith in Section 3. Should this occur, the seller desiring to market goods in both areas may be prevented by Section 3
from realizing maximum profits that would otherwise result from a strictly "economic" organization of a total production and sales program. 37

This principle actually is involved in various other marketing conditions that fall under prohibitions of Section 2. If the elasticity of demand for a good or service varies by "types of markets" which are differentiated on the basis of such things as cash versus credit, package sizes, different brands of the same quality, basic materials going into various uses, and the same goods with superficial differences in physical qualities, this principle may be utilized in maximizing total sales. To the extent that prohibitions of the Robinson-Patman Act prevent this type of manipulation of these varying markets by use of price differentials, efficiency in providing goods and services may be impaired. The seller thus prevented from reaching maximum efficiency may be the real victim of discrimination. Wholesalers and retailers who could purchase at the lower prices, if allowed, would be able to compete more favorably in their markets. Their consumer customers also could purchase goods and services from retailers at lower prices.

All this reasoning, of course, is based on the assumption that sufficient competition exists in each market to ensure uncertainty as to reaction of rivals to competitive actions and, therefore, that each

firm will pursue its own self interest independently according to the prediction of market conditions by its own management.35

Cooperatives and Institutions

Section 4 of the Robinson-Patman Act provides that no prohibitions of the act shall prevent a cooperative from returning net earnings or surpluses to its members in proportion to their sales or purchases through the cooperative. It also provides that schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions which are not operated for a profit shall be exempt from limitations of the act.

Since cooperatives often engage in identical business transactions either as sellers or buyers, as other types of business firms in a particular market, this provision could result in discriminatory treatment of cooperatives and other types of firms.

If a cooperative wholesale purchasing firm, for instance, is enabled through Section 4 to make rebates to its member retailing firms while competing retailing firms that are not members of a cooperative are not permitted the same kind of rebates from their wholesale supplier, discrimination in favor of the retailing members of the cooperative will occur, ceteris paribus. This may enable the members of the cooperative to compete more favorably in resale of the goods or services in which they deal in their respective market areas than

35See Elements 3 and 5 of the model of workable competition, Chapter IV, this publication.
competing retail firms. Consumers who purchase from the cooperative retailers may be able to purchase at lower prices than consumers who purchase from rivals of the cooperative retailers. The analogy here of sales through a cooperatively owned wholesaler to cooperative member retailers may apply also to sales through a cooperatively owned manufacturer to wholesale and/or retail members.
CHAPTER VI

PURITY AND HONESTY ON GROCERY SHELVES

Early Regulations

Regulations as to quality or purity of foods date back to at least several hundred years B.C. The law under which Moses governed the Israelites excluded some species of animals under all circumstances and all species when death was caused by disease from the diet of this group of people as early as about 1500 B.C.\(^1\) Egyptian laws also governed the handling of meats at least this early.\(^2\) In 200 B.C., both India and China punished adulterators of foods and makers of spurious articles for defrauding purchasers.\(^3\)

In a more direct line of heritage and development of laws in this country, "the Magna Charta contained a provision of dealing with honest weights and measures, and in the thirteenth century laws attempting to protect the public with respect to food were passed in France and Germany. In the fourteenth century, numerous incidents are recorded

\(^1\)Leviticus, Chapter 11


\(^3\)Ibid.
of punishment by pillory for the short weighting of foods and for selling adulterated bread, beer, and meat.\(^4\)

Foods in commerce were few and simple in these earlier days as compared with the modern American situation. Fraud in handling food was more easily detected by customers. Foods were grown at home or by nearby producers whose pastures, fields, and orchards were seen daily by many of their customers.

As trade in foods and related goods took on a world-wide nature, as cities increased in size, and the degree of industrial specialization became more pronounced, the maintenance of a supply of wholesome food became a social problem and laws were enacted to facilitate it. In this country, the development of large-scale food manufacturers who distribute food to all parts of the nation created needs for public regulation to protect the rank and file of citizens against their own ignorance of this complex system.\(^5\)

States Pass Food Laws

"The first general food laws in the United States were enacted by the states, Massachusetts leading the way in 1784.\(^6\) By 1900 most states then in existence had passed laws of the same general type.


\(^5\)Ibid., p. 2.

\(^6\)Marketing, The Yearbook of Agriculture, op. cit., p. 213.
Some of the laws were enacted as much for the protection of farmers' commodities against competition from adulterated substitutes as for any other reason. As late as 1875, New York inspectors "found 52 per cent of the butter, 56 per cent of the olive oil, and 64 per cent of the brandy they examined to be adulterated."\(^7\)

Facing difficulties in interstate food trade due to lack of uniformity of state laws, "State chemists were among the first to advocate a Federal law to bring order into the chaos," and Dr. Harvey W. Wiley, chief chemist of the United States Department of Agriculture focused attention on interstate difficulties through publications from his office.\(^8\) Dr. Wiley and others campaigned for adequate laws for protecting honest producers and manufacturers against the unscrupulous, both in this country and abroad, as well as for the protection of consumers.

This campaigning was not confined to adulteration of foods. Drugs also were sold in almost totally unregulated commerce. Many drug-like materials were used also in adulterated foods. As a result of work by chemists who conducted a crusade against such use of dangerous materials, the public became aroused. This is attested by the following:

Stories about medicines in national magazines alarmed every mother and homemaker -- reports of infant's soothing sirups containing morphine and opium, of people who became narcotic addicts from the use of medicines with an

\(^7\) Ibid.

\(^8\) Ibid.
innocent appearance, of women's tonics that depended on alcohol for their bracing effects, of the tragic consequences of those depending on the cure-all promises of the patent medicines on every drug store shelf.  

Laws of National Scope

In 1879 the first Federal food and drug bill was introduced, but it was not until 1906 when the first law was passed by Congress. A total of 103 bills dealing with various aspects of the fraudulent practices in food and drug commerce were considered during this period. Only a few of limited scope were enacted into law. These laws mostly "had the self-interest of industry at heart, for reform was imperative in many instances to safeguard sales, particularly to the export trade." A tea importation act was passed in 1883 and an act against importation of adulterated food was passed in 1890. Opposition from food manufacturers who had developed large businesses and who gave little emphasis to sanitation and product purity had to be met and overcome. The doctrine of *caveat emptor* had long prevailed and, naturally, it was distasteful to businessmen who had lived well by this doctrine to have to face the enforcement of laws that put the public interest first.

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9Ibid.
10Ibid.
11Kleinfeld, V. A., op. cit., p. 3.
13Ibid., p. 214.
In general, the Federal Food and Drug Act of 1906 provided that:

1. It was unlawful for any person to engage in the sale of adulterated foods and drugs in interstate commerce.

2. It was unlawful for any person to engage in the sale of misbranded foods or drugs in interstate commerce.

Detailed definitions for adulteration and misbranding were written into the original law. Other details were added from time to time as new materials associated with foods and drugs and new methods of handling them in commerce were developed. By the early 1930's officials charged with the enforcement of the Federal Food and Drug Act had found many deficiencies in the law, despite repeated amendments. Some of the reasons for deficiencies have been summed up by Kleinfeld, as follows:

And that type of regulation which met the chief problems present in 1906 did not suffice to cope with the changing problems of the subsequent decades. In addition to the fact that there were serious omissions in the Food and Drugs Act of 1906, even when passed, economic and social changes were rapid. The truck began to weaken the importance of state boundaries. It was not only the strumpet or courtisan who added to her beauty, or concealed her plainness, by paints and rouges. It became important to be informed, not merely not to be misinformed. The span of life increased, with a commensurate growth in the so-called diseases of modern civilization. The vitamin discoveries were made. People began to read newspapers and periodicals more widely, and the discoveries which were to give us "Portia Faces Life" and other soap operas were thrust upon a credulous world.

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As a result of these economic and social changes, Congress passed the Copeland bill as the Federal Food, Drug, and Cosmetic Act of 1938. It retained the "best features of the 1906 act ...", but the new law covered new conditions that had developed and put teeth into the enforcement provisions that had proven weak in the past. This act has been amended to deal with changing conditions as they arise. But the essential features -- forbidding adulteration and misbranding -- are the same as in the original act of 1906. These features relate to foods for humans and animals, drugs, and cosmetics, all of which are merchandise handled by food wholesalers and retailers. The provisions of this act have greater impacts on food producers and manufacturers on the one hand and consumers on the other hand than they have on food wholesalers and retailers. But there are various types of direct and indirect economic relationships of food wholesalers and retailers with provisions of this act. Some of the most important relationships are discussed in the remainder of this chapter.

More Perfect Knowledge

Perhaps more than in any other way, the effects of this law on equalizing the knowledge various persons may have about the goods and services under consideration are the most important from an economic standpoint. In the absence of accurate information on the labels of


many foods — an accuracy assured by penalty of punishment of the person responsible for it — food wholesalers and retailers would likely not be able to command sufficient confidence of their customers to facilitate mass merchandising of these foods to the extent of common practice in modern supermarkets. The type and scope of food wholesale and retail trade we have in this country, therefore, are facilitated by the types of "controls" exercised under the provisions of this act.

Armed with the knowledge that virtually all the products it can buy for resale to its customers are wholesome enough to be acceptable to the customers, the individual wholesaling-retailing firm in the modern food industry, can purchase its supplies from various sources. This broadens its supply base and increases its bargaining power with any one supplier. Pricing efficiency is thus enhanced and the "market power" of the wholesaling-retailing firm in respect to its suppliers is more nearly equalized.

The provisions against adulteration and mislabeling of this law apply to all products in interstate commerce. This assures any wholesaling-retailing firm that the supplies it can buy are not inferior in wholesomeness and accuracy of labeling to the supplies available to competing wholesaling-retailing firms. This also enhances competition.


19 Ibid., p. 855.
The fact that manufacturers who cater to food faddists must face the same penalties for violations of the provisions of this law as the more orthodox food handlers must face tends to increase "fair" competition in food wholesaling and retailing. House-to-house vendors, firms that do not handle full lines of foods, and others who, without having to limit their activities in order to conform to the provisions of this law, could sell many inferior products that would compete sharply with products sold through wholesaling-retailing firms. Thus, "unfair" competition is partially controlled by the provisions of this law.

Operational efficiency is also enhanced by the safeguards of this law. Individual buyers of an ever-increasing number of foods and other products handled by food wholesalers and retailers need not possess as much technical knowledge about them as they would without the assurance of accurate labeling and purity of contents provided by this law. Many items can be purchased and heavy expenditures of money can be committed in a very short period by buyers who have confidence that goods delivered will correspond with descriptions upon which purchases were based.  

Some Problems

From an economic standpoint, both in the long-run and short-run, the enforcement of the provisions of the Food, Drug, and Cosmetic Act

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20Ibid., p. 854.
can be unfavorable as well as favorable to food wholesalers and retailers. In the short-run, at least, vigorous enforcement accompanied by considerable fanfare can even result in a limit in variety of goods from which consumers may want to choose their purchases. In the long-run, such enforcement may limit the variety available to customers and, thus, reduce the number of products that may be handled by wholesalers and retailers.

A 1960 amendment to the Food, Drug, and Cosmetic Act provided, among other things, that "... no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal."21

Commenting editorially on this amendment, *Food Field Reporter* said on August 1, 1960:

During the various hearings which led to the approval of this legislation, it became apparent that many spokesmen for the food industry felt strongly that the Delaney clause inhibits judgment in determining the safety of certain food additives. Opinions were voiced that perhaps some additives could be judged on the basis of safety in the amount used rather than on tests in which larger than commercially used amounts were thought to be harmful.22

Reported further in the same publication were statements from various food manufacturers regarding the economic effects of such amendments. One said: "Almost certainly in the flavor field a


22 Ibid.
totally new food additive could not possibly justify the risks and expenses involved in assembling the information required in a petition (to Congress to change the amendment). We must rely largely upon those ingredients with a history of use whether they are used intentionally as such or occur naturally in foods. 23

Extremely restrictive measures in the enforcement of the Federal Food, Drug, and Cosmetic Act can result in fewer innovational activities by food manufacturers and thus in less progress in the introduction of new food products. 24

Vigorous enforcement, on the other hand, can result in the long-run accumulation of knowledge that "the law of the land" guarantees wholesome levels of purity and accuracy of information about the merchandise available in food stores. The long-run effects could result in more efficient distribution, even if variety is more limited, in accordance with the reasoning presented earlier in this chapter.

23 Ibid., p. 9.

24 Harris, Paul L., op. cit., p. 862.
CHAPTER VII

RETAIL PRICE MAINTENANCE

The Property of Goodwill

"Goodwill is the friendly regard, usually created by merit, reputation, attractiveness, and advertising, which attracts and holds customers to the benefit of a particular business entity or product."

"And goodwill is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Goodwill is a valuable contributing aid to business -- sometimes the most valuable contributing asset of the producer or distributor of commodities."

Upon the validity of this definition and description of goodwill most of the provisions of fair-trade laws rest. Fair trade laws or, as commonly called, retail price maintenance laws, are laws that permit wholesalers and retailers to establish minimum retail prices on branded products by entering into contractual arrangement with manufacturers of these products. They are usually state laws, and in this


respect they differ from the other two major types of legislation analyzed in this publication. But they are so similar in content as to have almost national application, they have been strengthened by national legislation, and they have a generally favorable record of decisions handed down by the United States Supreme Court.

Furthermore, there are several aspects of these laws that have a common core of objectives and influences from state to state. They purport to accomplish essentially the same things, although the language and minor provisions may vary from one state to another. For these reasons, the analysis of some of their economic impacts on food wholesaling and retailing in this chapter will follow very closely the same format it has followed regarding the Robinson-Patman Act in Chapter V and the Pure Food, Drug, and Cosmetic Act in Chapter VI.

Fair-trade legislation was enacted by medieval merchant guilds. At the beginning of the thirteenth century "craft guilds prescribed


5See: How to Fair Trade in Ohio Under the New Ohio Law. A Memorandum, Ohio Fair Trade Committee, Columbus, 1959, p. 2. "Although the legal theory on which the new statute rests differs from the former Ohio fair trade law, the end which it is seeking to achieve is the same, and the practical mechanics for a manufacturer to fair trade his product in Ohio will not be much different than they were under the old Ohio law or under the laws of most of the other states where fair trade legislation is still effective." See also: Weigel, S. A., op. cit., p. 40.
standards of quality and schedules of prices, often subject to municipal approval, employing officials or searchers to see that these were observed." Businessmen have long brought pressure upon one another "not to spoil the market."  

Names for Sale

In the complex industrial and commercial systems that have developed in this country, trade-marks, brands, and other identification of the products of manufacturers have become increasingly important. These types of identification are the symbols of "goodwill" which have been declared by the United States Supreme Court to be property with the rights of protection accorded any other property. Their importance is described by Stanley Weigel as follows:

It may not be reasonably contradicted that these symbols of goodwill play a tremendous part in our commerce. They exist in every field of commercial activity. Everything from thumb tacks to locomotives is now sold under trade-marks, brands, or names. The advent of radio and television as new advertising media have heightened the efforts of individual producers to win favor for their respective symbols of goodwill.

Such favor is valuable. There may be debate as to the merits of advertising and as to the wisdom of public acceptance of goods identified by trade-marks, brands, and names. But there can be no debate as to the ultimate fact that one of the most priceless assets

6Whittaker, Edmund, A History of Economic Ideas, op. cit., p. 413.

7Marketing, The Yearbook of Agriculture, op. cit., p. 286. This suggests that the nature of fair-trade laws is generally protective to the trader.

of thousands upon thousands of businesses is a consumer-favored symbol of goodwill.

To protect these symbols of goodwill through the channels of trade of modern commerce, many producers and retailers have chosen the method of undertaking resale price maintenance. This has enabled them, they believe, to protect their rights in property just as patent, trade-mark, and copyright laws protect other types of property rights. The laws these producers and retailers have favored are usually permissive only in character and do not attempt to directly coerce wholesalers and retailers into compliance against their wills.

In about half of the states that have fair-trade laws, any seller can "specify the minimum resale price of his product" whereas in the other half" only the owner of a trade-mark or brand or his authorized distributor may do so.'

Broadly speaking, the typical fair-trade law provides that:

1. A proprietor may retain a proprietary interest in any commodity which is identified by his trade-mark or trade name because of his interest in stimulating demand for it through effective distribution to customers and in maintaining and protecting the goodwill associated with his trade-mark or trade-name.

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12The two general statements here are adapted from the present Ohio law and are quite similar to provisions in laws in most other states. See also: Weigel, S. A., op. cit., pp. 89-160.
2. A proprietor may establish and control by contract with or notice to distributors stipulated minimum resale prices for a commodity of which he is proprietor and which is in free and open competition with similar commodities produced by others.

Food wholesale, and retail trade traditionally has been affected less by fair-trade legislation than many other types of trade since many items sold under fair-trade contracts normally have not been handled by food wholesalers and retailers. Conversely, most of the merchandise handled by food wholesalers and retailers has been supplied by processors and distributors who do not engage in fair-trade contracts.

Modern food wholesalers and retailers, however, handle more drugs and cosmetics, electrical appliances, and other items that are supplied by processors who sell their merchandise under resale price maintenance contracts than has been true in the past. Other types of distributors also are handling more foods and other merchandise once handled exclusively by food wholesalers and retailers. This is causing a merging of competitive relationships at the boundaries of the food wholesaling-retailing industry and several other distributive industries. Resale price maintenance, therefore, is becoming more important to food wholesaling and retailing firms.

The remainder of this chapter is devoted to an analysis of some of the economic impacts of fair-trade legislation on food wholesaling and retailing. The three areas of economic relationships -- between

\[^{13}\text{Marketing, The Yearbook of Agriculture, op. cit., p. 258.}\]
wholesaling–retailing firms, between these firms and their suppliers, and between these firms and their customers — as explored in the previous two chapters are used in the analysis in this chapter, also.

Pricing Efficiency

Perhaps the most obvious area in which to search for economic impacts of fair-trade legislation is in the effects of such laws on pricing efficiency\(^{14}\) since this legislation is aimed at price "manipulation" or, more accurately price "stabilization." But, since a somewhat intangible concept of "property rights" is integrally associated with the usual package of goods and services that enter into commerce under the purview of fair-trade law, the general objectives of such laws are much broader than the promotion of economic efficiency.\(^{15}\) Stanley Weigel, writing about efforts to make fair-trade laws economic panaceas, pointed out:\(^{16}\)

It seems appropriate to suggest that the more sanguine advocates and opponents of the legislation make a common mistake. They debate the merits of the Fair Trade Acts on the false assumption that the statutes are, or purport to be, economic cure-alls. This leads such opponents into predicting that the Fair Trade Acts will artificially increase prices, provide cover for price-fixing combinations, aid exploitation of consumers, and interfere with normal operation of sound "economic

\(^{14}\) Pricing efficiency as used here refers to the effect prices have on influencing supply through cost relationships and on demand through utility relationships. Efficiency is high if supply and demand are highly responsive to price and, alternately, if price is highly responsive to the relationship between supply and demand.

\(^{15}\) Bain, J. S., *op. cit.*, p. 448.

\(^{16}\) Weigel, S. A., *op. cit.*, p. 87.
laws." The same assumption leads enthusiastic advocates to predict, contrarily, that the Fair Trade Acts will lower price levels, impede monopolistic practices, protect consumers against exploitation and enhance the functioning of sound "economic laws."

The significance of the Fair Trade Acts in all these broad and general respects is prone to be over-emphasized. After all, the statutes obviously are not, and are not intended to be, economic panaceas. They are limited in scope and effect, as well as in purpose. They merely sanction the protection of goodwill against damage by those who do not own it. In doing so, the Fair Trade Acts go no further than is necessary to provide an effective remedy against an illusive form of unfair competition.

From such a description, it is obvious that matters of equity were perhaps of greater significance in the development of the fair-trade concepts than matters of economics. The major grounds for the consideration of public interference in matters such as this were to "protect" competitors who were losing out in the competitive struggle to new types of business organization which were proving to be more efficient. 17

Just what effects the interference of such laws have on price, however, is of considerable importance in assessing economic impacts. Pure price theory would suggest that any artificial restraint -- imposed by laws or other influences -- on the movement of price in response to supply and demand relationships will result in a less efficient pricing system. An analysis of some of the elements listed in Chapter III in a model of workable competition also would suggest that restraints such as are permitted by fair-trade laws seriously limit

17 Bain, J. S., op. cit., p. 447.
the efficiency of price in its contribution to workable competition. Element three which provides for independent rivals, element four involving homogeneity of products, element five in which rivals are uncertain as to competitive activities among them, element six which would grant rivals the privilege of meeting and undercutting prices, and element eight involving price response to cost differences all are limited by arbitrary price fixing permitted under fair-trade legislation.

Measured by most theoretical models, therefore, the pricing policies of a fair-trade economy would not be conducive to a high degree of pricing efficiency. Also, on the basis of objective research, reasons can be found to support a belief that price increases may be the result of fair-trade. For instance, Gault reported the following as a result of a study he conducted in 1939: 18

There can be no doubt that consumers in Michigan who formerly purchased drug products at cut prices are paying 15 to 30 per cent more for price-controlled items under fair trade. Michigan's present fair trade prices are higher than the same items in the state of Missouri where there is no fair trade.

Competitive Reactions

Some of the competitive reactions to fair-trade by chains and other mass merchandising distributors which have tended to mitigate the effects that theory would predict on pricing efficiency perhaps

18Marketing, The Yearbook of Agriculture, op. cit., p. 287. Professor E. H. Gault of the School of Business Administration of the University of Michigan is the author of a report, Fair Trade, from which this paragraph is quoted.
are of even greater significance than either the expected or the actual results of fair-trade. The economic impacts of these reactions are probably more important to the competitive relationships among wholesaling-retailing firms, between these firms and their suppliers, and between them and their customers than the effects of fair-trade.

Two of the most important ways in which wholesaling-retailing firms have reacted to minimize the adverse influences of fair-trade laws is through vertical integration and merchandising "private labels." The two may actually be combined when a wholesaling-retailing firm buys manufacturing facilities and converts the output to private label merchandise. Another method that may result in the same thing is the purchase of the entire output of a manufacturer by a wholesaling-retailing firm and the resale of the output either as the original brand or as a private label at a price determined by the wholesaling-retailing firm. Historically, non-food wholesaling-retailing firms probably have utilized these methods of combating fair-trade to a greater extent than has been true with food wholesaling-retailing firms. But the principles involved apply to food distribution and

19Vertical integration, of course, is not used only as a means of avoiding the effects of fair-trade. There may be other more compelling economic reasons for a wholesaling-retailing firm to integrate into manufacturing than to obtain its own merchandise, private label or not, with which to compete with fair-traded merchandise. But this has been one development that no doubt has limited the deleterious effects of fair-trade on some mass distributors. See: Mueller, W. F. and Leon Garoian, Changes in the Market Structure of Grocery Retailing, University of Wisconsin Press, op. cit., p. 71. Also see: Bain, J. S., op. cit., p. 448.
become more applicable as many industries, including food distribution, become more conglomerate in structure and the various industry boundaries tend to merge.

The economic impact of these counter-measures to fair-trade on competition between wholesaling-retailing firms would tend to favor the firms that were more successful in utilizing the counter-measures. The impact on the relationship between wholesaling-retailing firms and their suppliers likely also would favor the wholesaling-retailing firms that were successful since they would stand to gain economic power as compared with suppliers. The impact on the relationship between wholesaling-retailing firms and their customers would depend upon how much the integrating wholesaling-retailing firms (or those who purchased the entire output of manufacturers and converted it to private label merchandise) found it possible and chose to sell merchandise at lower prices. So long as a sufficient number of firms remained in the industry in a relevant market, or the threat of entry was effective enough to result in at least a workably competitive market, customers should be able to purchase merchandise at relatively lower prices as a result of the successful "avoidance" of fair-trade by wholesaling-retailing firms.

Some Pros and Cons

The resultant market structure with fair-trade versus no fair-trade is another interesting area to explore relative to economic
impacts of fair-trade. Due to the fact that fair-trade fosters the setting of prices that are favorable to producers and handlers, the charge is sometimes made that fair-trade is monopolistic -- that fair-trade gives private parties power over prices. The counter-charge by proponents of fair-trade is that fair-trade laws permit the setting of minimum resale prices only on merchandise sold in open competition with other similar merchandise, and that usually some of the competitive merchandise is not retailed under fair-trade contracts.

There are numerous other economic arguments about resale price maintenance. In addition, there also are many aspects that are definitely more a matter of equity than of economics. One author has listed 24 brief charges and counter-charges about fair-trade.20 This list indicates the ease with which sides may be taken by advocates and opponents who do not subject their views to objective analysis of all factors involved. And it also illustrates that a perfectly sound economic analysis often is completely inadequate in solving problems based principally in equity considerations.

CHAPTER VIII
SUMMARY AND CONCLUSIONS

Summary

In this study an attempt was made to determine some of the expected economic effects of three important types of laws on the performance of food wholesaling and retailing firms. The analysis was theoretical and no primary empirical data were collected and analyzed specifically for this study. Secondary data, as analyzed by authors from whom many ideas were integrated into this dissertation, naturally provide the foundation for much of this theoretical analysis.

Many moral, ethical, religious, political, aesthetic, and social aspects of the three laws were encountered in making an analysis of the economic impacts of the laws. How these features of laws may influence even the economic impacts of the legal framework in which food is handled by wholesalers and retailers was recognized as limiting influences in making an analysis such as this. No effort was made, however, to analyze the impact of these aspects of the laws on food wholesaling and retailing.

From the analysis made in this study, it is obvious that the economic impact of one law on food wholesaling and retailing often varies from that of another, and that the short-run economic impact of one law may vary from the long-run impact of the same law. It also is
apparent that the economic impacts which logically may be expected may fail to materialize to the degree that economic theory would predict due to economic counter-measures taken by some of the affected firms. These variations result in conflicts of economic objectives with other objectives society seems to place high in its aggregate value system. The objective of economic efficiency, for instance, conflicts through the application of laws such as the three analyzed in this dissertation with providing equal opportunity to all traders in the food wholesaling and retailing industry in purchasing supplies from the same seller. The analysis of the economic impact of the Robinson-Patman Anti-discrimination Act; the Pure Food, Drug, and Cosmetic Act; and the Fair Trade Laws in this dissertation illustrates these facts.

Most of the provisions of the Robinson-Patman Act, for instance, result in less than maximum short-run efficiency in the allocation of scarce resources among firms operating in the food wholesaling-retailing industry. This is due to the limits placed by the act on the fullest possible exercise of price differentials which theoretically would result from differences in costs of selling by different methods or in different quantities. Prices are not allowed, therefore, to play their full role in allocating resources. Thus, efficiency is not maximized in the wholesaling-retailing functions and society is not permitted the full benefits which presumably would accrue if prices were more positively related to costs.

On the other hand, analysis made in this study of prohibitions against mislabeled and adulterated foods -- such as the prohibitions
in the Pure Food, Drug, and Cosmetic Act -- indicates that the efficiency of food wholesaling and retailing functions is enhanced by these prohibitions. This is due principally to the effects of these legal provisions on the confidence buyers have that the products they buy are wholesome and are truthfully represented by information on labels. Such confidence, in turn, is based on more "perfect" knowledge than would obtain in the absence of legal restraints against adulteration and mislabeling.

Knowledge that suppliers must truthfully represent the merchandise they sell and that they are under penalty of law to sell only wholesome merchandise aids buyers in minimizing their buying costs. Knowledge these legal guarantees provide for ultimate consumers of merchandise they purchase from food wholesalers and retailers facilitates mass merchandising which can result in lower distribution costs.

Knowledge this law provides to both wholesaler-retailer purchasers and ultimate consumers that purity and accuracy are required in the labeling of merchandise purchased from any source encourages greater price competition, ceteris paribus. This results from the confidence buyers have that their decisions to purchase from various sources need not be limited by non-price considerations of purity and accuracy of labeling. Shopping for price, then, can result in a more competitive market than probably would prevail in the absence of the provisions of this law.

To the extent that prices are not permitted to reflect differentials in the merchandise affected, the economic impacts of fair-trade laws are largely of the nature of limiting pricing efficiency. And to
the extent that this occurs, the competitive position of the firms selling merchandise under retail price maintenance contracts are "protected" against the full impacts of workable competition as described in relation to element six of the model of workable competition in Chapters III and IV. This can result in higher prices to consumers and actually a reduction in competition, rather than protection to competition.

Theoretically, fair-trade restraints may fail in their intended effectiveness due to the counter-measures business firms may use to avoid their economic impacts. The use of vertical integration and of private label merchandising are two examples of economic counter-measures firms may use to avoid the price restraints fair-trade laws inflict. This indicates that the laws restrain competitive pricing and thus impair economic efficiency. Firms desiring to buy and sell merchandise without resorting to retail price maintenance provided by fair-trade laws may integrate into the production of merchandise which competes in use with items sold under retail price maintenance contracts. In other cases, wholesaling-retailing firms may contract with one or more manufacturers for a supply of merchandise bearing the private label of the wholesaling-retailing firm. This merchandise may then be sold at prices which are not directly affected by resale price maintenance provisions of fair-trade laws.
Conclusions

Since laws usually represent a focus of many types of social values, only one of which is economic values, it is not an easy task to completely isolate the economic impacts of the laws on a segment of industry and commerce such as food wholesaling and retailing. The fact that value systems of a society, including the economic objectives, are constantly changing adds even more difficulties to an effort to isolate the economic impacts.

Conflicts that exist between theoretical short-run and long-run economic impacts also result in difficulties in appraising the desirability of provisions of laws even when theory is useful in predicting the economic results of them either in the short-run or the long-run. Because the theoretical framework of economic analysis at this point in time still must rely upon highly simplified models, the elements of which change rapidly, it is more difficult to predict long-run economic impacts than short-run economic impacts of laws on food wholesaling and retailing.

When conflicts that obviously exist between economic objectives such as the effect of competition on efficiency and objectives of other values such as providing equality of opportunity for all who buy from the same seller are taken into account, the analysis of the economic impacts of laws that attempt to further both objectives is, at best, crude and inconclusive.

Despite these various difficulties, however, the remainder of this chapter is devoted to suggestions for "improving" the laws
analysed in this dissertation, especially in respect to food wholesaling and retailing. These suggestions are based on the belief of this author that changes could be made in each of the three laws that would enhance the attainment of their economic objectives without diminishing their socially desirable effects in respect to other types of objectives.

The Robinson-Patman Act - In the Robinson-Patman Anti-discrimination Act, the following changes are recommended:

1. Eliminate Section 2(c) which prohibits the payment or receipt of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof" by one trader or his representative to or from the other trader or his representative. If such payment or receipt is a type of indirect price discrimination, it is unlawful under Section 2(a) and penalties are provided for such violations in Section 2(b). The special treatment as now provided in Section 2(c), therefore, is not necessary as a part of a law forbidding price discrimination.

Since Section 2(c) makes no allowance for differences in cost and is regarded as a prohibition against the payment and receipt of commissions and brokerage as unfair trade practices, theoretically it can be imposed in restraint of trade between buyers and sellers both of whom are so small as to have no harmful effect on competition because of the commissions or brokerage. Or, restraints can be imposed in situations in which there are no effects on competition even when trading is done by relatively large firms. This can result in the use
of brokers by firms who do not need them and, in other cases, to the
failure to use brokers when they are needed if such use may later be
construed as a pattern from which the firm may not deviate without
risking legal involvement.

2. Eliminate or modify Sections 2(d) and 2(e) which provide for
proportionate treatment of all buyers in the granting of merchandising
allowances and services. Any disproportionate payment of allowances
or provision of services for merchandising which may be proved to be
indirect price discrimination is subject to penalty because it violates
Section 2(a). If it is not a form of price discrimination, but merely
an effort by a seller to maximize profits through the most judicious
use of resources, such disproportionate payment of an allowance or
provision of service should be treated like any other resource allo-
cative process in order that greater efficiency may result. The re-
straints exercised by these sub-sections at present are not selective
as to whether the disproportionate allocation of resources for mer-
chandising may or may not result in harmful effects on competition.
If they are not eliminated, at least they should be modified to the
extent that violations occur in disproportionate granting of mer-
chandising aids only when it can be demonstrated that such inequality
may actually result in harmful effects on competition.

3. Provide for more positive and direct legal procedures against
buyers who exploit buying power. The present law was enacted prin-
cipally for the purpose of restraining buying power that prevents or
lessens competition. But most of it deals in restraints against
activities of sellers. Some of the restraints provided now against buying power are enforceable only if knowledge on the part of the buyer that discrimination is involved can be proved. Obviously, this is not a very positive and precise method of attack. Buying practices that would likely prevent or lessen competition could be prohibited in much the same manner as selling practices that tend to harm competition are prohibited by various anti-trust laws.

4. Eliminate Section 3. It adds little to provisions of Section 2(a) of this Act and to provisions of the Sherman Anti-trust Act. Its penalties do not seem appropriate to most price discrimination violations since the principal impact of price discrimination is on changes that may occur in the condition of competition in the future, not on the basis of events that already have happened.

The Pure Food, Drug, and Cosmetic Act - The major change affecting the Pure Food, Drug, and Cosmetic Act recommended in this dissertation is in the nature of avoiding alarmist tactics in the passage of amendments and in enforcement of the provisions of the act. In general, provisions of the act tend to enhance competition in food wholesaling and retailing. But, due to the fact that food store customers are highly sensitive to information about foods that creates doubts as to their purity and wholesomeness, sales volume can be greatly influenced in the short-run by the dissemination of such information. From an economic standpoint, the impact of information of this nature results, therefore, on less efficiency in the wholesaling and retailing functions.
**Fair-Trade Laws** - Since, according to the analysis made in this dissertation, fair-trade or resale price maintenance laws tend to suppress competition rather than enhance it, and since they can result in higher prices to consumers than would prevail in the absence of the restraints they impose, they seem inappropriate to this author as elements in the legal framework in which food wholesaling and retailing functions are performed in an enterprise economy. In the aggregate, the "economic" reasons advanced in favor of such laws seem less valid than the "economic" reasons that can be advanced in opposition to them.

The usual stipulation in fair-trade laws that items sold under resale price maintenance contracts must be sold in "free and open" competition indicates that there must be close substitutes for them in the market and, presumably, free of the restraints of such contracts. If this is true, it further indicates that such contracts have not been deemed necessary by the producers and retailers of the freely competing substitutes. Logically, then, the appeal for resale price maintenance for any particular item is an appeal for protection by law of the producer and retailers of the item under resale price maintenance contract and not protection of competition as a market phenomenon.

Protection to property rights producers have in trade-marks, brands, and trade-names is justified, both for economic reasons and equity reasons. But if such protection must be provided by laws that restrain freedom of contract, which also is important in respect to both economic and equity considerations, the protection may be questioned. Since most laws provide that all retailers in a state
are automatically under resale price maintenance contracts regarding the sale of a particular item when a contract is executed between the producer of the item and one retailer in the state, such laws restrain freedom of contract.
APPENDIX
(Sec. 1.) (49 Stat. 1526, 15 U. S. C. sec. 13) That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

Sec. 2. (a) That 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 benefits 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: Provided,
however, that the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, 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: And provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

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

(c) That 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.

(d) That 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.
(e) That 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.

(f) That 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.

Sec. 2. (Omitted).

Sec. 3. (49 Stat. 1528, 15 U. S. C. sec 13a). It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell,
goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Sec. 4. (49 Stat. 1528, 15 U. S. C. sec 13b) Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

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*Public No. 550, 75th Congress, Chapter 283, approved May 26, 1938, provides "That nothing in the act approved June 19, 1936 (Public Numbered 692, Seventy-fourth Congress, second session), known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."
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Gospel according to Matthew, King James Version.


Leviticus, Chapter 11, King James Version.


I, Austin Benson Ezell, was born on a farm in Franklin County, Alabama March 14, 1915. My secondary education was received in the public schools of Franklin County, Alabama. In 1946 I received the degree of Bachelor of Science in Agriculture from The Alabama Polytechnic Institute, now Auburn University. In 1956 I received the degree of Master of Science in Agricultural Economics from Michigan State University. From 1937 to 1956 I was employed by the Agricultural Extension Service of the Alabama Polytechnic Institute in various capacities on county and state staffs, the latter ten years of which was in agricultural marketing. I was on military leave in 1945 and 1946 and on sabbatical leave for advanced study in 1955 and 1956. In 1958 I was employed as a Specialist in Food Merchandising on the staff of the Cooperative Extension Service of the Ohio State University with the privilege of continuing advanced study toward the degree of Doctor of Philosophy.