# DISCRIMINATION AND THE ROBINSON-PATMAN ACT*

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## I

THE history of the anti-trust problem furnishes an aid to understanding the nature and importance of current treatments of discrimination. Some features of this history may usefully be recalled at the present time.

The words "anti-trust" are a reminder that some early problems appeared to involve principally the form of business organization chosen by great combinations of capital. In particular, we are apt to forget that it was a decision of some importance and difficulty, that holding companies were condemned by the Sherman Act. In the *Northern Securities* case in 1904 Mr. Justice Holmes dissenting apparently thought that the holding company there involved was about as much an individual, and as little a combination, as "Mr. Morgan." In the same opinion Mr. Justice Holmes indicates the doubt which he always entertained about severe construction of the anti-trust laws. His opinion is a classic expression of the view that competition will take care of itself, if the way is open for newcomers to enter an industry.

Since that decision there have been indications, in decrees at least, that the concentration of control in the hands of natural persons might after all amount to a combination in restraint of trade. It appears now that any legal form which accomplishes the results condemned by the Acts falls within their scope. Limits on the use of the holding company device itself are indeed now proposed as a means of taking precautions against the dangers to which corporate growth may lead.

A second great date is of course 1911. The rule of reason, then announced as the law, was later applied in the *Steel* and *Harvester* cases to protect famous combinations. On the record in those cases, independents appeared to control a very substantial share of production in the industries in question. Moreover the government failed, in the opinion of the courts, adequately to prove the kind of price domination on the part of

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the combinations there in question, which is commonly supposed in fact to have existed.

The difficulties of proving the elimination of effective competition, appeared clearly in the cases. It is now proposed, again as part of a precautionary program, to set specific limits on how far a group can go in controlling named fractions of the production of any commodity.

In relation to such large problems of industrial organization, the problem of discrimination must find its place. As a result of the great Pittsburgh Plus proceeding, and subsequent discussion of the problem which that raised, there has been a tendency in some quarters to identify the problem of competition or monopoly with the problem of discrimination. It appears to be said that monopoly is always discriminatory and that discrimination is always monopolistic; and that if only discrimination can be controlled, this will solve the problem of monopoly.

As will appear from what follows, I myself as an amateur, am convinced by what reading of economists I have done, that this is not the case. Differentiation and discrimination are often very difficult to distinguish; and even when one has spotted discrimination, it seems to me often to appear in highly competitive situations. If this is so, it is a matter of some importance for the conservation of industrial, legislative and administrative energy.

## II

We may approach the subject rather indirectly by considering the difficulties which efforts to eliminate the worst kind of discrimination, may create. Secret discrimination was treated as an evil throughout the opinions of the District Court and the Supreme Court in the recent *Sugar Institute* case.[1] In view of the evils of secret discrimination, an industry's non-anonymous open price system, without a waiting period, was held legal by the courts. Secrets about concessions cannot of course be kept if prices are in fact public.

First consider the familiar dangers of such an open price system. A limit on secret discrimination is apt to be thought of as a limit on all discrimination; and when this step is taken, the troublesome line between differentiation and discrimination has to be drawn. In a doubtful case this line will be drawn by business men in the interest of their profits. Quantity discounts in fact related to cost have even been attacked as discriminatory by sponsors of open price systems.

Again open prices, whether in the sugar industry or in retail stores,

[1] 297 U.S. 553 (1936).

exert some pressure against the price cutter. If his cut becomes promptly known, it will be promptly met. He may thus have gained little volume and "spoiled" his own market. In view of this danger he will of course hesitate to cut prices.

Again price cutters are apt to be regarded by their fellows in the trade as destructive and unethical personalities. Social pressure against price cutting is thus built up. It is said that one price-cutter, of national reputation, after a particularly effective cut, found it agreeable to take a vacation abroad rather than have to talk to his fellow executives. However this may be, the social pressure resulting in the case of known cuts has been generally recognized; and is a reason for what was thought by some to be an insistence on anonymity in the trade association cases prior to the *Sugar* case.

Again the difficulty of enforcing gentlemen's agreements as a business matter, is probably a great though imponderable aid to the government in its efforts to enforce the anti-trust laws. It is plain that gentlemen's agreements will be at once promoted and made more effective by any device which makes it easier to detect their violation.

In view of all of these objections to an open price system, it may be said that they ought not to be permitted except under supervision by specialized government experts observing their effect in each industry; and it is pointed out that no such specialized supervision exists in the case of most open price agreements.

On the other hand, as a device to prevent secret discrimination, there are considerations which weigh in favor of flexible open price systems.

Secret discriminations commonly depend on and invite fraud in the simple sense of lying. Sellers who grant secret concessions lie to buyers who do not get them. Buyers are tempted to lie to sellers about concessions which they claim to have been offered. The inquisitive salesman trying to see the papers on his customer's desk is a familiar figure in some trades.

As Mr. Eugene Grace is reported to have said, at a time when the national administration was helping him with his business, the steel trade in the absence of an open price system has all the characteristics of an oriental bazaar. A lusty individualism, like that of Mr. Justice Holmes, may not be overanxious about a certain admixture of commercial fraud. But on the whole we all of us object to it more or less.

In the second place informed sellers and buyers are supposed to be necessary features of an orderly and classically competitive market. It is apparent that secret discrimination defeats information.

Moreover, an open price system if carefully scrutinized may furnish useful information about competitive conditions in an industry. Leads and lags in price changes, the presence of greater or smaller extras charges, and the persistence of geographical differentials are examples of phenomena which may appear clearly in open price filings.

Again the experience of open price associations and their executives may lead eventually to constructive steps on the part of industry and credit institutions for alleviating some of the ill effects of booms and crises.

As far as the necessity of supervision goes, it is to be hoped that gradually a staff of qualified experts is being developed in the Trade Commission and the Department of Commerce, who will be capable of understanding the phenomena disclosed by open price systems, and protecting the public against the abuse of such systems.

On a balance I myself should be in favor of such limited efforts to eliminate secret discriminations as are exemplified by flexible open price systems. It may be that this judgment reflects only an attitude toward competition which has been described by Dr. Horney as one feature of "the neurotic personality of our time." If so, the significance of the reaction would still require further consideration. I am of course inclined myself to think that this judgment reflects some more "rational" process. But it would take a large book to defend such a thesis; and I do not propose to do it here.

Moreover, I should insist again that the development of open price systems imperatively requires the parallel development of adequate administrative observation and supervision. A large element in the prices of steel products consists of charges which are described as extras, items added to quoted base prices, and often aggregating more than base prices. Each company has its own voluminous and intricate extras book. The members of the industry engaged under the steel code in efforts to make extras uniform. Some of these efforts, going back to the inspiration of Mr. Hoover's work as Secretary of Commerce, were doubtless scientific and useful. Various observers have, however, noted a tendency on the part of members of the industry in cases of doubt to revise extras upward.

The publicity given to extras books, plus an open price system, puts the members of the industry in a strategic position to exert vigorous upward pressure on prices. It would take a very unusual expert, perhaps better qualified than any single expert in the steel industry, to understand and check the industry's entire extras policy. Nevertheless, there should be somewhere in the government a group which invites protests from customers, and which is equipped to protect protesting customers from retaliation, in cases of prejudice resulting from extras practices. Such a group might be in the Department of Commerce; but it would seem more appropriate that it should be associated with a group in the Trade Commission specializing on the study of the effects of the steel industry's present open price practices. This is only one example of the need for scrutiny and supervision on the part of administrative officers.

## III

With considerations pro and con so nicely balanced, when it is a question of preventing only secret discrimination, it must be apparent that to me, at any rate, the problem of efforts to eliminate all discrimination is even more troublesome. In fact the objections to open price systems are multiplied and the advantages divided when it comes to efforts to eliminate discrimination generally which stop short of the creation for each major industry of something like an Interstate Commerce Commission. It will be recalled indeed that the original Interstate Commerce Act was directed primarily toward the elimination of discrimination by railroads, and not to the maintenance of reasonable rates.

It has been thought by some that the Robinson-Patman Act inaugurated an effort to eliminate all commercial discrimination. I myself on the other hand am in substantial agreement with Professor McLaughlin's argument that the words about competition and monopoly in the new Act let in the rule of reason embodied both in the Sherman Act and in other, supplementary anti-trust Acts.[2]

It seems to me further, as Mr. McLaughlin says in other words, that differentiation must be sharply distinguished from discrimination; and that anything which may legitimately be called mere differentiation, will not under any circumstances come within the condemnation of the new Act. Differentiation means variations in practice suited to variations in circumstances. Discrimination means variations in practice in the same circumstances.

Even in the railroad industry, under the elaborate supervision provided for by the Interstate Commerce Act, designed in the first instance to prevent discrimination, considerable differentiation is still allowed. Market equalization by differentiation may still be permitted.[3] Special rates on products subject to fabrication in transit are "mildly discrimina-

[2] McLaughlin, The Courts and the Robinson-Patman Act, 4 Law and Contem. Prob. 410 (1937).

[3] U.S. v. C.M. & St.P.R.R., 294 U.S. 499 (1935). Compare Texas and Pacific Ry. Co. v. U.S., 289 U.S. 627 (1933). See Mansfield, The Lake Cargo Coal Rate Controversy (1932).

tory," but they have been permitted from an early date.[4] The long and short haul clause authorizes relief from its strict provisions, perhaps primarily to enable carriers by rail to meet competition.

Thus it seems likely, both as a matter of first impression and as a matter of experience, that a careful distinction will have to be made between legitimate differentiation and discrimination.

The proceedings under the Robinson-Patman Act which are now most in the public eye further illustrate the necessity for this distinction. These proceedings are attacks on what the Trade Commission describes as basing point practices in the cast iron soil pipe and cement industries. While there are perhaps elements of basing point practice in the cement industry, involved in the more important of the two cases, the Commission has extended its attack to include all delivered price practices as well.

A basing point system is one whereby prices are named for products at specific points other than mill locations and billed to include freight from these points to points where the products are taken and used by buyers. A delivered price system is of course simply a system of quotation and billing f. o. b. the buyer's location.

The classical example of a basing point system was Pittsburgh plus; and the multiple basing point system now in vogue in the steel industry has been more recently the system most commonly discussed.

Superficially any basing point system involves an element of discrimination. The producer may, it appears, add freight from a remote basing point to a point freight-wise nearer his location. If he sells at the basing point, the result will accordingly be a greater net yield on products sold nearer home than on products sold farther away. It is further argued by some that such "discrimination" is necessarily a mark of monopoly; since each sale must bear its equal share of "costs"; and the sales nearer home must thus be considerably above costs; and so above normal and competitive price.

On examination the argument appears dubious.

A producer or group of producers may not produce any excess beyond the needs of their local market, may not sell at the basing point at all, and the practice may be merely an accounting one. In some situations this is the fact. A single producer may have an advantage of location which in the absence of competition at that location he could hardly be expected to give up.

[4] Central R.R. Co. v. U.S., 257 U.S. 247 (1921); Union Wire Rope Corp. v. Atchison, T. & S.F.R.R. Co., 66 F. (2) 965 (C.C.A. 8th 1933), *cert. den.*, 290 U.S. 686 (1933). See Report of National Recovery Administration on the Operation of the Basing Point System in the Iron and Steel Industry 93-97 (1935).

But apart from these odd cases, it is further true that even a group of competing producers, producing an excess beyond the needs of their local market and so selling in remote areas, will have advantages of location in their nearby markets. It will cost their competitors something to get into those markets; and it is to be expected that they will take advantage of the fact.

Their advantage is indeed in the nature of rent. It could be eliminated by sufficiently intense competition, a strong buyers' combination, or a government order, which would give all advantages of location to buyers. These advantages would perhaps be passed on to ultimate consumers; and that of course would be a good thing. It would, however, be the same sort of gain as that which would result from the abolition of all rent.

There is a less geometrically theoretical and more serious practical difficulty with the argument for a uniform mill net yield. Charging the home folks more than the foreigners may yield a "freight profit" to a mill. It may on the other hand occasion net "freight loss." In either case it may be expressed as "freight absorption." This freight absorption is apt to be designed to enable the mill to sell in remote markets in competition with mills located nearer those remote markets.

If freight absorption were eliminated some uneconomical cross-hauling would doubtless be prevented. There are nowhere any good dollars and cents figures on the wastes of cross-hauling in any industry. Even the Trade Commission's old figures for the cement industry were vitiated by failure to consider the quantities of production at various sources of supply. In other industries small differences in product classifications add a difficulty to examination of the problem. Assuming, however, as is perhaps the fact, that the wastes of cross-hauling are considerable, it is not at all clear that their elimination would be worth the cost, to both mills and buyers, of destroying the competition which mills offer in markets remote from their location.

It is to be observed that the argument for a uniform mill net yield on all prices takes no account of differences between fixed and variable costs. All that the most rigorous classical theory should require, however, is that shipments to remote markets, netting less than shipments to nearer markets, should bear their share of variable costs with perhaps a little over as some contribution to the payment of fixed costs.

In any event it is probable that a uniform mill net yield, if it could be obtained at all, would have to be enforced by a scheme which could only be described as price-fixing. Such a scheme would run into serious administrative difficulties which are only partly reflected in a decision that an effort completely to eliminate discrimination violates due process of law.[5]

With all these qualifications, it remains true that basing point practice may under some circumstances be objectionable. It may open the way for the collection of monopolistic "phantom freights," "freight profits," going beyond the rent which results normally from advantages of location, by producers remote from basing points. It may mask a system of freight absorption, perhaps on the part of producers located anywhere, which is objectionable on the same grounds as the classic underselling practices of the old Standard Oil trust. It may reflect a fear on the part of producers located remote from basing points, that if they start cutting prices to nearby customers, they will find themselves in a dangerous price war.

These objections may be real. The more sensational charges against basing point practices as such seem more dubious. A basing point system may indeed greatly facilitate the use of an open price system, by making normal price quotations mean something. A producer who is fixing mill or delivered prices to meet competition from anywhere will have some difficulty in posting a price that means much. So far as basing point practice supports unduly rigid open price systems, it is to this extent objectionable.

But the further charge that basing point practice whenever it appears is the great mark of sensational monopoly seems quite unwarranted. The most striking basing point practice now in operation, though not the most famous, is that in the automobile industry. Though competition in the automobile industry may be peculiar, it may also be more or less effective. In the steel industry, whose multiple basing point practice has attracted so much attention, one curious contrast has seldom been noted. Of all the steel products sold on a basing point basis, sheets have the fewest basing points. Nevertheless, sheets include some of the products sold to the automobile industry, whose prices fluctuate in as competitive a fashion as anyone could wish; and in whose sale vigorous sellers' competition apparently obtains. On the other hand steel rails, whose rigid but perhaps not very profitable price is a by-word, are not sold on a basing point basis. This is doubtless a coincidence. Tin plate is perhaps the outstanding example in the industry of prices which are both rigid and profitable; and tin plate is sold on a basing point basis. At the same time the comparison is a warning against identifying monopoly with basing points.

In dealing with a phenomenon of this complexity, both the steel industry and the Trade Commission have taken extreme positions. Offered a solution designed to introduce some flexibility into basing point practice

[5] Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927).

without unduly upsetting its established methods of doing business, the Steel Institute and its lawyers indulged in specious defenses of every feature of the industry's practices. For example the practice of charging rail freight on inland water shipments has been defended by high sounding but absurd talk about fair competition. The one real argument for the practice, based on the necessity for giving customers protection against erratically fluctuating rate schedules, has not been publicly stressed. This is perhaps because if this argument were sufficiently pressed, it could be taken care of by those responsible for barge line policies. While the tonnage affected is relatively small, the practice and its defense are glaring examples of the extent to which the industry obstinately clings to its habits.

On the other hand, the Trade Commission and its lawyers have clung tenaciously to the geometry of the uniform mill net yield theory. They have not hesitated indeed to argue in opposite directions at the same time, insisting that both freight absorption and systematic efforts to limit it are objectionable on the ground that they are monopolistic.

Between two extremes, a member of the public should naturally prefer that of the Trade Commission. For one thing, while the industry's theory if extended might produce serious results, there seems to be no possibility whatever that the Trade Commission could enforce its theory in its simple and primitive form. Moreover in attempting to enforce its theory, it is likely that the Trade Commission will exert a pressure in the direction of developments required by the public interest.

Thus the present proceedings against basing point and delivered price practices indicate a legitimate and desirable function of the Robinson-Patman Act. As has been said, basing point practice in its extreme form, whether resulting in net freight profits or net freight losses, has objectionable features. These objectionable features come properly under the heading of monopoly and discrimination. Moreover efforts to curb them are not open to the objection that efforts to extend open price practice meet. In attempting to discourage discrimination, open price systems and similar devices may contribute seriously to objectionable rigidities. On the other hand, it is difficult to see how an attack on basing point and delivered price practices can of itself intensify such rigidities.

Thus extreme forms of basing point practice may well be attacked under the Robinson-Patman Act. It seems desirable that this attack should be more discriminating than some recent anti-trust proceedings. For example, it was found in 1934 that only about six percent of the capacity of the United States Steel Corporation for manufacturing steel code products was more than fifty miles from an existing applicable basing point; while forty-four percent of such capacity of the Bethlehem Corporation was more than fifty miles from an applicable basing point.[6]

Conditions of supply and demand may indeed explain at least some of this feature of Bethlehem's practices. Moreover, in so far as this is not the case, a number of possible explanations of motive would need to be considered. Is Bethlehem interested in freight profits, afraid of a price war, or merely concerned not to introduce uneasiness in the trade? In any event the figures suggest prima facie the possibility that a proceeding against Bethlehem would be more effective than a proceeding against the entire industry.

In so far as pending proceedings against the cement industry are directed to the elimination not only of basing point practice but of delivered price practice generally, they suggest what may well be a useful policy in dealing with geographical discriminations and near discriminations. A delivered price system is, as has been said, not the same thing as a basing point system. It is, however, an essential element in a smoothly organized basing point system. The prohibition of delivered prices contained in the Wheeler Bill would thus be an attack on basing point practice at a fairly vital point. It would be directed against a phenomenon more easy to observe and recognize than the somewhat problematical monopolistic discrimination which has thus far been the basis of attacks on basing point systems. Combined with a somewhat revised Robinson-Patman Act, the enactment of the Wheeler Bill would seem to furnish the best solution available, apart at least from a degree of government regulation.

If what has been said about the uniform net yield theory is true, it follows that in the new scheme of legislation considerable latitude of freight absorption must be allowed producers. Thus far this allowance has been justified under the heading of differentiation "in good faith to meet competition"; or, as in the Robinson-Patman Act, "in good faith to meet an equally low price of a competitor. . . ." Practically strengthened by the enactment of the Wheeler Bill, the Robinson-Patman Act would still condemn freight profits and freight absorption in so far as they reflect or encourage monopoly, and in so far as they are in a proper sense discriminatory.

With freight absorption thus limited, and delivered prices prohibited, one real practical difficulty remains, and another specious practical difficulty will be urged.

The specious difficulty which industry will insist upon may first be disposed of. It is indeed true that if the reform of basing point practice were

[6] Report, *op. cit. supra* note 4, at 43.

to do at once all that the enthusiasts wish, there would be considerable danger of serious and rather unpredictable dislocation among the users, fabricators, and sellers of such products as steel. Though a Toledo buyer might gain a lower price on some products by the creation of a new basing point at Detroit, his Detroit competitors might gain so much more that the result would be to destroy the relationship between prices on which the Toledo buyer's business depends for its existence. Inasmuch as the present system has at any rate been tolerated for many years by the government, the Toledo buyer in question has some reason to urge that he should at least be given some time to make the necessary adjustments. It is to be noticed that in the case put, the buyer is not necessarily one who is not performing an economic function, who is simply trying to hold his place against improvements in method, like some distributors. He is performing an economic function at a location chosen partly because the government has at least tolerated existing price differentials.[7]

The answer to the argument based on such cases, is an answer also to those who make extreme claims for the possibility of great and striking advantages by the quick elimination of basing point practice. Members of the steel industry have not always found it necessary promptly to make use of new basing points formally established by posting low base prices at such points. There is reason to suppose that producers will be able by maintaining existing geographical differentials, at least temporarily, to protect customers in the position of the Toledo buyer just referred to. The danger of unforeseen dislocations is indeed greater in a depression than in good times. It is to be remembered that fears of such dislocation at the time of the Pittsburgh plus order, proved groundless.

The other difficulty of the proposed new scheme of control would be serious, if it could not be provided against. A relatively low price f.o.b. mill might be designed to enable a producer to make some profit over variable costs while developing business in remote markets. It would thus be neither monopolistic nor discriminatory but a differentiation for the purpose of "meeting" competition. Experience has indicated, however, that buyers in nearby markets would be alert to find ways to take advantage of this lower price for their own purposes. A product would be sold ostensibly destined for a remote market; but it would in fact be diverted to a nearby market, where it could be sold at a considerable price advantage.[8]

At present in some instances diversion of this sort is prevented in part by agreements with carriers, supplemented by retention of the kind of control that is associated with "title" on the part of sellers. Traditionally

[7] *Id.* at 78–87.

[8] *Id.* at 97–98.

the seller retains "title" under a delivered price system until delivery at the point of destination.

It is not clear that the magic of title makes any real difference in the effectiveness of agreements between shippers and carriers, with respect to diversions. Agreements to control diversions might be effective in any event. At the same time, if the state of title to goods has any magical consequences in such cases, it would be quite easy for a seller to retain "security title" by taking bills of lading running to his own order His security title would secure the buyer's observance of the parties' arrangements that the buyer is to have the benefit of low prices and freight absorption only on goods actually reaching the remote market. The use of such bills of lading might be made effective with, and perhaps even without, the intervention of banking services

The effect of diversions in creating real discrimination, or something like it, in nearby markets, suggests that such an arrangement would be not only permissible but required by the scheme of legislation in question. The price differentiation in favor of remote buyers would perhaps be legitimate if, and only if, it were in fact used to "meet competition" in the remote market, and not to give an irregular advantage in a nearby market.

It may be that the necessity or desirability of controlling diversion should be recognized by explicit provisions in any new legislative scheme. A simple legislative enactment requiring truck and water carriers in interstate commerce, as well as railroads, to observe agreements with respect to diversion, would perhaps be the simplest solution of this question.

## IV

After a great deal of study and uncertainty we may thus be on the way to a healthy solution of the problem of secret discrimination and open prices; and the other most troublesome problem of open discrimination, the problem resulting from such practices as basing point arrangements, and from the geographical "imperfections" of competition generally.

A final word on perspective may be in order. It will have been noticed that it seems possible to overestimate both the significance of discrimination and the practical possibility of controlling it. A considerable amount of discrimination, and perhaps even fraud, may be the price we pay for the elements of competition which persist in our industrial system. Moreover even if we were to turn to the most rigid regulation, the history of railroads suggests that it would be impossible even then entirely to eliminate practices which are at least close to the line between differentiation and discrimination.

It seems likely that the questions with which those who originally attacked the trust problem first concerned themselves will prove more important than the problem of discrimination. It is theoretically possible that a greater use than has yet been made of the notion of "conspiracy" would lead to an intelligible and relatively severe meaning of that word as used in the Sherman Act. The development of such a meaning would perhaps do something to counteract the ill effects which may have resulted from the rule of reason. An intent at any time amounting to something more than an idle dream, and accompanied by overt acts, all directed toward gaining advantages dependent entirely upon the elimination of competition, might prove to be the meaning of conspiracy in restraint of trade.

Such a definition would be significant, however, only in criminal proceedings. It would retain considerable vagueness. And if it is desirable to return to the policy which the Supreme Court at first thought embodied in the Sherman Act, it is proper to do so by clearly defined legislation. Legislation condemning industrial holding companies and specifically limiting the share of production of any commodity which any group might control would serve the purpose. It seems likely that such legislation would have much more effect than efforts to deal with the problem of monopoly by eliminating discrimination. The injustice of monopoly price requires vigorous precautions; whatever its significance in the large interactions of economic forces.

It may be appropriate to observe finally that the importance of the whole problem of monopoly is perhaps being overestimated. The most serious objections to bigness are psychological and political. There are also serious administrative problems which must be solved by a great corporation, lest it remain "too big too long." Monopoly price yields nonfunctional, unearned returns, unjust enrichment. Moreover it is likely that a great trust-busting campaign will have some effect on price rigidities; though it seems to me that the practical possibility of substantial effect has been overestimated.

On the other side it must be remembered that great areas of economic activity, and serious economic problems, may be left almost or wholly untouched by such a campaign.

The curse of smallness is now referred to less commonly than the "curse of bigness." Anyone, however, who will reflect on the farmers, the miners of bituminous coal, the producers of crude oil, clothing and cotton cloth manufacturers, and lumber mills, will be reminded that the problems in these industries are of a different order from the problems in the anthracite industry, in oil refining, in automobiles, steel, and rails.

Again it has been observed recently by many that the labor policies of some of our relatively small employers have been less enlightened than the policies, for example, of the United States Steel Corporation. I know there is a theory that the Steel Corporation is playing a Machiavellian game; but my observation leads me to doubt this theory. The position of General Motors is more ambiguous.

Again, recognizing the evils of monopolistic practices, one must also recognize that cumulatively a large share of these evils occur in connection with practices in local communities which it is difficult for any government to reach. One who has over a period of some months watched a state commission struggle conscientiously and intelligently over a local lumber yard monopoly, has a vivid sense of the extent to which serious monopolistic rigidities tend to be immune from effective government attack. While bituminous coal prices, textile prices, and lumber mills' prices were hopelessly demoralized by cut-throat competition, one found local groups of middlemen in many localities engaged in efforts to maintain prices which were difficult to prove and cumulatively seemed almost to defy effective governmental treatment.

At this point also Mr. Justice Holmes' sturdy Manchester confidence in the vitality of competitive instincts needs to be remembered. The local situations to which I refer have probably as their most effective check the fear of newcomers and substitutes; which may operate apart from, though in aid of, governmental efforts.

In the great front page major monopolies, so far as I have been able to observe them, there are more effective "natural" checks than the cartoonist always recognizes. I have seen the mention of "scrappies" produce what appeared to be genuine and unsynthetic fear on the faces of great captains of our copper mining industry. The progress of independents in the steel industry appears to have been more or less authentic and inexorable.

Again, as an amateur economist, it seems to me that there is little that could fairly be called monopoly in the forces producing many of our rigid prices. I have heard an intelligent small town banker criticize retail merchants in his community for not cutting the price of men's shirts during the depression. Here is an open price effect which perhaps has something to do with what the economists tell us about the lag in adjustment of retail prices.

Again I have heard the same banker attacked by one of his friends, and admitting the justice of the attack, with respect to high interest rates on mortgage loans. In fact the inflexibility of interest charges and interest rates has generally been recognized as of first-rate importance. Thus it seems to me possible that the rigid though apparently not very profitable price of steel rails had less to do with railroad purchases during the depression than the fixed interest charges which railroads were trying to carry.

This illustration suggests a further and very important possible limitation on trust-busting as a panacea. Casual observers and some students have come to think that rigid prices of some steel products, for example, are the cause or a principal cause of the instability of steel operations. Against these observers many of the steel executives insist that there is a marked negative elasticity in the demand for their products. I use elasticity in a rough sense, and mean that a declining market greatly discourages buyers while a rising market greatly stimulates them. In fact no one knows enough to say anything whatever with confidence about any such cause and effect relationships. It seems, from rough experience, very unlikely that elasticity of demand for some steel products is anywhere near as great as some people have thought. Would a greater reduction in structural steel prices have led to heavy skyscraper building during the depression? It seems most unlikely.

Rigidities should indeed be discouraged and unexpected good results may follow. The experience of electric power rates is an example of how fruitful experiment in this direction may prove. So, the price policy of the steel industry in 1934 and 1937, dependent perhaps less on monopoly than on irrational cost-price and boom reactions, is an example of practices to be avoided and prevented. Just a year ago, in a paper at an American Statistical Association round table, I warned against the repetition of the 1934 experience which has since taken place in steel.

At the same time it seems likely, as some of our most careful observers are saying, that the production of cement and steel and similar products is at the mercy of a rhythm in the production of "durable goods" which proceeds quite independently of purchasing power, speculation, and perhaps even war. The relation of the present recession to a rhythm in automobile production and financing suggests the larger significance of similar long-time rhythms. Had last winter's boom continued upward, there would doubtless soon be an urgent necessity for checking it. The fluctuation in durable goods production seems to me at any rate the major problem which our industrial society faces. The most promising lead for its solution seems to me, not trust-busting, but the development of an orderly system of private and public credit facilities for durable goods industries; and particularly a unified and orderly mortgage banking and construction finance system.