

RESALE PRICE MAINTENANCE:

**ECONOMIC THEORIES
AND EMPIRICAL EVIDENCE**

BY

Thomas R. Overstreet, Jr.

**Bureau of Economics Staff Report
to the Federal Trade Commission**

November 1983

**RESALE PRICE MAINTENANCE:
ECONOMIC THEORIES AND EMPIRICAL EVIDENCE**

by

Thomas R. Overstreet, Jr.

**Bureau of Economics Staff Report
to the Federal Trade Commission**

November 1983

FEDERAL TRADE COMMISSION

JAMES C. MILLER, III, Chairman
MICHAEL PERTSCHUK, Commissioner
PATRICIA P. BAILEY, Commissioner
GEORGE W. DOUGLAS, Commissioner
TERRY CALVANI, Commissioner

BUREAU OF ECONOMICS

WENDY GRAMM, Director
RONALD S. BOND, Deputy Director for Operations and Research
RICHARD HIGGINS, Deputy Director for Consumer Protection and
Regulatory Analysis
JOHN L. PETERMAN, Associate Director for Special Projects
DAVID T. SCHEFFMAN, Deputy Director for Competition and Antitrust
PAUL PAUTLER, Assistant to Deputy Director for Competition and
Antitrust
JOHN E. CALFEE, Special Assistant to the Director
JAMES A. HURDLE, Special Assistant to the Director
THOMAS WALTON, Special Assistant to the Director
KEITH B. ANDERSON, Assistant Director of Regulatory Analysis
JAMES M. FERGUSON, Assistant Director for Antitrust
PAULINE IPPOLITO, Assistant Director for Industry Analysis
WILLIAM F. LONG, Manager for Line of Business
PHILIP NELSON, Assistant Director for Competition Analysis
PAUL H. RUBIN, Assistant Director for Consumer Protection

This report has been prepared by an individual member of the professional staff of the FTC Bureau of Economics. It reflects solely the views of the author, and is not intended to represent the position of the Federal Trade Commission, or necessarily the views of any individual Commissioner.

ACKNOWLEDGMENTS

I would like to thank former FTC Commissioner David A. Clanton whose interest in resale price maintenance issues and requests for factual information about the practice prompted this research. I would also like to recognize the contributions to this report of numerous current and former FTC staff members. Helpful comments on earlier drafts were provided by Richard Craswell, Jack Kirkwood, and Robert Lande of the Bureau of Competition. The report benefitted considerably from numerous discussions on resale price maintenance issues and extensive comments on earlier drafts provided by Douglas Dobson, Alan Fisher, John Hilke, Ron Lafferty, Michael Lynch, Robert L. Steiner, and Robert Stoner of the Bureau of Economics. Thanks are also given to the other Bureau of Economics staff members, too numerous to mention, who took the time to read and comment on earlier drafts. Ieva Cucinelli read an earlier draft and was very helpful in preparing the final manuscript. Delores Munson, Susan Painter, Carolyn Samuels, and Cheryl Williams provided valuable research assistance. Word processing was ably performed by Betsy Zichterman, Dianne Jones, Angela Newsome, and Deborah Ruggles.

TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
I. INTRODUCTION	1
(A) Purpose of the Report	1
(B) Organization of the Report	2
(C) Historical Background: Ambivalent Rules of Law	3
(D) Historical Background: Economists' Ambivalence	7
(E) The Policy Debate: Should RPM Be Per Se Illegal?	9
II. ANTICOMPETITIVE THEORIES OF VERTICAL PRICE RESTRAINTS	13
(A) Retailer Collusion	13
(B) Manufacturer Collusion	19
(C) Life Cycles and Marketing Inertia or Mistakes	25
III. EXPLANATIONS FOR VERTICAL PRICE RESTRAINTS WITH AMBIGUOUS WELFARE EFFECTS	33
(A) Price Discrimination	33
(B) Relational Governance and Bilateral Monopoly	35
IV. EFFICIENCY OR PROCOMPETITIVE EXPLANATIONS FOR VERTICAL PRICE RESTRAINTS	45
(A) Outlets or Availability	45
(B) Special Services	49
(C) Generalized Free-Rider Effects (Quality "Signaling")	56
V. FTC RESALE PRICE MAINTENANCE CASES: 1965-1982	63
(A) Information Frequently Not Available	67
(B) Size of Firms	68
(C) Structure of Markets	71
(D) A Comparison With Markets From the Fair-Trade Era	76
(E) Dealer Concentration	80
(F) Summary and Conclusion	80
VI. EMPIRICAL STUDIES OF RPM	106
(A) Price Surveys	106
(1) Before and After	107
(2) Fair-Trade and Nonfair-Trade Price Changes	109
(3) Cross-Section Price Comparisons	110
(4) "Price-Related" Surveys of the Cost of Fair Trade	113
(5) Usefulness of Price Surveys	116
(B) Other Surveys	117
(C) Case Studies	119
(1) Light Bulbs	119
(2) Fine China and Televisions	119
(3) Jeans	120
(4) Shoes	122
(5) Stereo Components	123
(6) Beer and Bread	125
(7) Repeal of Fair Trade in Rhode Island: Various Products	126
(D) Previous FTC Studies of RPM	129
(1) 1929/31 FTC Study	129
(2) 1945 FTC Study	135

TABLE OF CONTENTS--Continued

<u>Section</u>	<u>Page</u>
(E) Effects of RPM on Innovation and Efficiency in Distribution	148
(1) United Kingdom	149
(2) Canada	155
(3) Sweden	156
(4) Denmark	157
(5) Other Countries	157
(6) A Word of Caution	157
(F) Summary of Empirical Evidence	160
 VII. SUMMARY AND SUGGESTIONS FOR POLICY DEVELOPMENT	 164
(A) Rule-of-Reason: Several Possible Versions	171
(1) Evidence Must Support One and Only One Interpretation	172
(2) The "Preponderance of the Evidence" Must Support the Finding	172
(3) A More Narrowly Focused Rule-of-Reason	173
(4) Reverse the Burden of Proof	174
(B) Per Se With Exceptions or Exemptions from Prosecution	174
(C) Simple Market Share Rule	175
(D) Conclusion	176
 APPENDIX: Examples of Firms That Have Used Resale Price Maintenance and Products Involved	 177
 BIBLIOGRAPHY	 199

LIST OF TABLES

<u>Table</u>	<u>Page</u>
V-1 Size of Firms Involved in FTC RPM Cases: 1965 to 1982	70
V-2 Size of Firms Involved in FTC RPM Cases 1965-1982 Based Upon Sales in Constant Dollars	70
V-3 Size Distribution of Active Manufacturing Corporations Based Upon 1978 Corporate Income Tax Returns	72
V-4 Percentage Distribution of Four-Digit S.I.C. Industries Involved in FTC RPM Cases 1965-1982 by Concentration Ratios	73
V-5 Percentage Distribution of Five-Digit S.I.C. Product Classes Involved in FTC RPM Cases 1965-1982 by Concentration Ratios	74
V-6 Percentage Distribution of Four-Digit S.I.C. Industries Involved in FTC RPM Cases 1965-1982 by 1972 Adjusted Concentration Ratios	75
V-7 Distribution of 450 Four-Digit Manufacturing Industries in 1972 by Four-Firm Sales Concentration Ranges	75
V-8 Distribution of 448 1972 Four-Digit Manufacturing Industries by Four-Firm Adjusted Concentration Ratios	76
V-9 Distribution of Four Digit S.I.C. Industries by 1954 Four-Firm Concentration Ratios	78
V-10 Joint Distribution of Four-Firm Concentration and Firm Size	79
V-11 FTC RPM Cases: 1965-1982	83
VI-1 Industrial Distribution of the Fair-Traded Merchandise of 175 Firms, 1954	115
VI-2 Size Distribution of 175 Fair-Trading Manufacturers, by Value of Goods Sold Under Fair-Trade Contracts, 1954	116
Effects of the Repeal of Fair-Trade in Rhode Island	130
A-1 Data on Fair Trade and Competitive Prices Compiled by Schwegmann Brothers Giant Supermarket, New Orleans, 1952	17
A-2 Data on Fair Trade Prices and "Discount" Prices Compiled by Julius Gutman and Company, Baltimore, June 4, 1952	17
A-3 Price Comparisons Prepared by the Maryland Pharmaceutical Association and the Baltimore Retail Druggists Association	17
A-4 List of Fair-Traded Products Prepared by the National Jewelers Association	18
A-5 List of Fair Traded Merchandise: Submitted by Samuel Rosenthal	18

LIST OF TABLES--Continued

<u>Table</u>		<u>Page</u>
A-6	Partial List of Manufacturers Whose Products Were Fair-Traded at Both Wholesale and Retail Levels . . .	189
A-7	Fair Trade Merchandise Sold by Hardware Stores	191
A-8	Industries Represented by Members of the American Fair-Trade Council	198

I. INTRODUCTION

(A) Purpose of the Report

The purpose of this report is to review and evaluate the current economic theories and the available empirical evidence concerning vertical price restraints or resale price maintenance (RPM). In light of this review, the appropriateness of the current legal treatment of the practice is considered and contrasted with several policy options.

What should become clear from the following discussion is that neither the economic theories nor the existing empirical evidence currently offer overwhelming support to any single view concerning RPM. A single view is simply not tenable on the basis of current economic theory. Neither is it well supported by available empirical evidence.

The general conclusion drawn here is that the current rigidly applied standard of per se illegality appears to be unnecessarily costly when evaluated in terms of economic efficiency. Further, if sufficient economic evidence can be obtained, it is possible to analyze RPM matters and make reasonable judgments whether particular uses of RPM are, on balance, more likely to be beneficial or harmful to competition or consumers. This suggests the appropriateness of adopting a policy which recognizes explicitly that RPM can have both desirable and undesirable competitive effects. A rule-of-reason standard is one such policy option.

Clearly, a rule-of-reason approach should dominate per se rules in terms of the potential for minimizing application errors, and in the abstract seems the most desirable policy option.¹ Obtaining the information necessary to implement a rule-of-reason could be difficult and costly, however, and theoretical limitations might confound unambiguous interpretations. In addition,

¹ Assuming the purpose of per se illegality is to deter anti-competitive and welfare-diminishing uses of RPM, from an efficiency perspective, an application error results if the rule of law also deters a procompetitive or welfare-increasing use of the practice. Similarly, if the rule were per se legality, an application error would result if an anticompetitive or welfare-diminishing use of RPM were allowed.

"rule-of-reason" is a vague concept, and as applied by the courts might differ significantly from a reasonably complete and sophisticated economic analysis. If so, then another policy option, such as articulating explicit exemptions or exceptions to the strict standard of per se illegality, designed to reduce the frequency of application errors while maintaining the litigating efficiencies and clarity of a per se rule, might be a more appropriate policy option.

Each of the policy alternatives considered here has certain imperfections. However, all have the virtue of potentially moving policy closer to the goal of maximizing economic efficiency, because all are more consistent with the theories and the evidence concerning RPM than is the current standard of strict per se illegality.

(B) Organization of the Report

In the next three sections the various theoretical explanations for RPM are discussed in some detail. Section II presents three theories explaining how RPM can be harmful. Two of these theories explain RPM as a device which might facilitate collusion, either among dealers or among suppliers. The third explanation suggests that RPM can be harmful to consumers if suppliers use RPM for longer than is necessary to enhance demand or procure dealer services. In Section III two theories with ambiguous welfare effects are presented. The first concerns RPM as a device which might be used to facilitate price discrimination. The second concerns how RPM might be used to facilitate contractual integration of vertical functions, and/or to eliminate successive monopoly markups in bilateral monopoly situations. Section IV discusses the procompetitive theories of RPM. The first of these explanations suggests that RPM might be useful as a device to obtain shelf space in a wide variety of resale outlets. Two theories are presented which suggest that RPM can be used to correct free-rider problems. The first concerns special dealer services. The second concerns quality certification based upon product availability in outlets with particular characteristics which provide valuable information to consumers. When possible, empirical tests for distinguishing between or among the various

explanations are identified. Section V reviews recent FTC enforcement efforts in RPM cases. Section VI analyzes the existing empirical literature on RPM. Finally, Section VII summarizes the theoretical and empirical evidence and suggests policy options to the strict application of per se illegality.

Before turning to the economic theories, a summary of the history of resale price maintenance in the U.S. and of the ongoing policy debate is presented. This background material helps to put the discussion which follows into perspective.

(C) Historical Background: Ambivalent Rules of Law

Although the U.S. Supreme Court has rather consistently found RPM to be illegal, the practical legal status of the practice has, in fact, vacillated in the United States between the extremes of per se legality and illegality since the turn of the century. Prior to 1908 RPM was legal.¹ From 1908 until the early 1920's the legality of the practice was largely uncertain. Although the Supreme Court had declared RPM contracts per se illegal in the Dr. Miles case in 1911,² contradictory and close lower court decisions, divided opinions, lack of a general rule for non-contractual forms of RPM, and uncertainty as to the exact meaning of the Clayton Act of 1914 precluded consensus. From 1921 to 1929

¹ The Supreme Court first broke with common law precedent and curtailed manufacturers' rights to maintain resale prices in two cases decided in 1908 (*Bobbs-Merrill v. Strauss*, 210 U.S., 399; *Scribner v. Strauss*, 210 U.S., 352). These decisions related to copyrighted goods and RPM notices. The court indicated its ruling did not apply to patented goods, and avoided the issue of the legality of RPM contracts. In *J. D. Park and Sons v. Hartman* (March 1907, 6th C.C.A., 153 Fed., 24, reversing 145 Fed., 358) a lower court ruled for the first time that a system of RPM contracts was illegal under common law and the Sherman Act in the absence of proof showing the necessity for such a system. Then in *Dr. Miles Medical Co. v. J. D. Park and Sons* (January 1911, 220 U.S., 373) the Supreme Court, with the Hartman case as precedent, held that RPM contracts were illegal. This decision, however, did not settle the question of the legality of RPM contracts on patented goods or on true agency sales. The legal history of RPM in the United States through the early 1930's is discussed in detail in E.R.A. Seligman and R.A. Love, Price Cutting and Price Maintenance, (New York: Harper and Brothers, 1932).

² *Dr. Miles Medical Co. v. John D. Park and Sons, Co.*, 220 U.S., 373 (1911).

various court and FTC decisions narrowed the scope of permissible RPM to virtual per se illegality.¹

Even as the court decisions were restricting manufacturers' rights to maintain resale prices, beginning in 1914, legislative proposals to reestablish those rights were being introduced annually in Congress.² In 1931 California enacted the first state fair-trade act legalizing RPM contracts. This act was amended in 1933 to include a nonsigner provision.³ Other states subsequently passed similar acts and by 1937, the year in which the Miller-Tydings Act was passed as a rider to the District of Columbia appropriation bill, 42 states had enacted state fair-trade laws. Of the fifty states, only Missouri, Texas, Vermont, and Alaska never legalized RPM achieved through fair-trade contracts.⁴

With the Miller-Tydings Act⁵ Congress amended Section 1 of the Sherman Act to permit RPM contracts affecting interstate commerce if such contracts were valid under state laws. This

¹ See Seligman and Love (op. cit.). RPM achieved through agency (consignment) sales, or by unilateral refusals to supply price-cutters, under the "Colgate" doctrine (U.S. v. Colgate & Co., 253 U.S., 300 (1919)), has sometimes been permitted by the courts as an exception to the general rule of per se illegality. The legal status of alternative methods of implementing RPM in the mid-1950's is summarized in Walter Adams, "Resale Price Maintenance: Fact and Fancy," 64(7) Yale Law Journal, 967 (June 1955). For a summary of the current state of the law see, ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intra-brand Competition (1977); or P. Areeda, Antitrust Analysis, 3rd edition, (Boston: Little Brown, 1981).

² Report of the Federal Trade Commission on Resale Price Maintenance U.S. G.P.O., Washington, 1945, pp. 39-43. From 1933 to May 27, 1935 resale prices were established under the various NRA codes. There were no efforts to pass a federal law allowing RPM during these years. Such efforts resumed in 1935 after the NRA was declared unconstitutional and culminated in passage of the Miller-Tydings Act in 1937.

³ The nonsigner provision allowed enforcement of RPM contracts against price cutters, whether or not they had signed a fair-trade contract with a supplier, so long as some reseller in the state had agreed to such a contract. Prior to this modification suppliers could enforce fair-trade prices only against dealers willing to sign a contract.

⁴ The District of Columbia has never had a fair-trade law. The Miller-Tydings Act amended Sherman Section 1, whereas RPM contracts in the District are governed by Sherman Section 3. Alaska never had a valid fair-trade law as a state. The Congressional Record of December 2, 1975 at 38,050 reports that 40 of the states adopting fair-trade did not hold hearings, and those that did kept inadequate transcripts.

⁵ 50 Stat. 693, 15 U.S.C.A. §1 (1937).

amendment was intended to remove federal antitrust obstacles to effective enforcement of RPM contracts sanctioned by the states. However, the Supreme Court's Schwegmann Brothers¹ decision in May 1951 limited the application of the Miller-Tydings Act to actual parties to an RPM contract, i.e., not enforceable against non-signers. The following year Congress passed the McGuire Act² amending section 5(a) of the FTC Act to allow enforcement against both signers and nonsigners of RPM contracts affecting interstate commerce. Thus, from 1952 until the repeal of the Miller-Tydings and McGuire Acts in December 1975³ RPM contracts affecting interstate commerce were enforceable in states with valid fair-trade statutes.⁴ RPM again became per se illegal subsequent to the repeal of these enabling statutes.

The political agitation for both fair-trade and anti-price-discrimination laws occurred contemporaneously in the U.S. during a period in which there were major economic disruptions in traditional channels of distribution. Many in the distributive trades, particularly those with relatively high costs, felt threatened by new and unfamiliar competition which frequently involved aggressive price cutting. The political pressure for protection against such competition culminated at the state level in enactment of various "unfair practices" acts and the state fair-trade laws, and at the federal level in passage of the Robinson-Patman Act in 1936, and the Miller-Tydings Act in 1937. Both laws were enacted to protect high-cost distributors from price-cutting competition.

¹ Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S., 384 (1951).

² 66 Stat 631, 15 U.S.C. §45 (1952).

³ Consumer Goods Pricing Act of 1975, Public Law 94-145, 89 Stat. 801 (1975).

⁴ By the end of 1975 24 states plus the District of Columbia, Puerto Rico, Samoa, and the Virgin Islands had no valid fair-trade law. This left 26 states with fair-trade statutes of which only 10 had valid nonsigner clauses. For an historical summary of legal developments concerning state and federal fair-trade laws see, Legal and Economic Issues in Price Maintenance and Occupational Licensing, The National Association of Attorneys General Committee on the Office of Attorney General, June 1975.

In defense of the fair-trade laws, there were two major arguments advanced to reconcile protection of high-cost distributors and the public interest. The first held that RPM was necessary to protect manufacturers' property rights in the goodwill associated with their trademarked or branded products. The second held that "loss-leader" selling was a form of monopolistic predation upon "legitimate" full-service retailers. By preventing price competition among dealers, RPM was viewed both as a means of protecting manufacturers' goodwill, and small, independent, full-service retailers from the "predatory" tactics of discounters.¹

However, even during the era of the fair-trade laws, when the legal environment in the U.S. was most favorable for RPM, no more than a tiny fraction of manufacturers ever employed RPM contracts. Edward S. Herman concluded that "there is little doubt that fewer than 1 percent of the total number of manufacturers in the United States have [used fair-trade contracts] in any one year."² Estimates of the volume of goods which have been sold under fair-trade contracts in the U.S. generally range between 4 and 10 percent of

¹ The term "free riding" (see Section IV) did not appear in the literature until sometime later. However, while the jargon of the day was different, the substance of the arguments is easily reconciled with contemporary notions of a "free-rider" problem. The belief that the fair-trade laws could protect both manufacturers' goodwill in trademarks and small dealers is amply documented in numerous sources. See J. C. Palamountain, The Politics of Distribution, (N.Y.: Greenwood Press, 1968); E. T. Grether, Price Control Under Fair Trade Legislation, (N.Y.: Oxford U. Press, 1939); C. Edwards, The Price Discrimination Law, Brookings Institute, Washington, D.C., (1959); 1945 FTC Report; and Seligman and Love (op. cit.); E. W. Hawley, The New Deal and the Problem of Monopoly, (N.J.: Princeton U. Press, 1966), especially ch. 13; 81 Congressional Record 7,487-97 (1937) and 98 Congressional Record 4,896-5,026 (1952). The view that price cutting could actually be contrary to the public interest received judicial recognition in Justice Holmes' vigorous dissent in the Dr. Miles case. He wrote, "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus impair, if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

² E. S. Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bulletin, 583 (1959), p. 583-4. Herman's data were derived from returns of a 1956 Senate questionnaire survey of all firms known or believed to have been fair-trading.

retail sales.¹ Although including noncontractual forms of RPM would undoubtedly inflate these estimates somewhat, RPM does not appear ever to have been very pervasive in the U.S.

These estimates suggest that even if the current legal environment for RPM were made far more permissive, the vast majority of firms would be unlikely to find RPM attractive. This implies that two common assertions concerning the effects of changing the legal status quo to permit some RPM are exaggerated: (1) that it would facilitate large numbers of supplier and/or dealer cartels, and (2) that it would result in enormous efficiency gains in distribution.

(D) Historical Background: Economists' Ambivalence

Among economists the "consensus" view of appropriate public policy concerning RPM also seems to have varied considerably through time, although perhaps not as dramatically as has the legality of the practice. Economists in the United States were aware as early as 1916 that RPM could have socially beneficial consequences.² Yet, the results of an early 1930's questionnaire survey of members of the American Economic Association, conducted by Carroll W. Doten of M.I.T., showed economists in substantial

¹ Herman (ibid.), p. 586; E. T. Grether, Price Control Under Fair Trade Legislation, (New York: Oxford University Press, 1939), p. 322; John W. Anderson, "Interview on Voluntary Fair Trade," (Pamphlet, 1950), pp. 5-6; Fair Trade: The Problem and the Issues, House Report No. 1292, 82nd Congress, 2nd Session (1952), pp. 20-21; Fair Trade Laws, Hearings before the Senate Committee on the Judiciary on S. 408, February, April, and May 1975; and Fair Trade, Hearings before the House Committee on the Judiciary on H.R. 2384, March 25, and April 10, 1975. During the 1975 hearings various estimates of the cost of fair trade to consumers were presented. The largest estimate placed the annual sum at 6.5 billion dollars. However, even this estimate amounts to only 1.2 percent of 1975 personal consumption expenditures on durable and nondurable goods. These results are discussed in Section VI.

² F. W. Taussig, "Price Maintenance," 4 American Economic Review Supp., 1916, pp. 170-84. In England Alfred Marshall's classic, Principles of Economics, published in 1890, was the first major publication sold subject to RPM. Marshall's ambivalent attitude concerning the benefits of price maintenance is reflected in a series of letters to his publisher. See C. W. Guillebaud, "The Marshall MacMillan Correspondence Over the Net Book System," The Economic Journal, September 1965, pp. 518-38.

opposition (401 to 87) to granting manufacturers blanket legal rights to maintain resale prices.¹

Subsequent developments in the economics literature, however, have tended to place much more emphasis on the likelihood of beneficial competitive effects (efficiencies) from all vertical restraints including RPM.² Nonetheless, during Congressional hearings on fair trade in 1952, seventeen University of Chicago faculty members from the law school and the economics department signed a letter urging Congress to repeal the fair-trade laws; in a separate letter to Congress, sixteen professors of law and economics from various other U.S. colleges and universities also urged repeal.³ In 1975 the balance of economist testimony again favored repeal of the federal fair-trade enabling statutes.⁴ Of course, dissatisfaction with the effects of RPM under the fair-trade laws does not necessarily imply approval of a strict rule of per se illegality. Since 1975 the prevailing consensus among economists, to the extent that it can be inferred from the current literature, would appear to have moved somewhat further toward the view that the current rule of law is overly restrictive and for

¹ Reported in 81 Congressional Record, p. 7,490 (1937).

² An example which has had a major influence on contemporary economic views of RPM is L. G. Telser, "Why Should Manufacturers Want Fair Trade?" III J. of Law and Economics, 86 (October 1960). See also F. R. Warren-Boulton, Vertical Control of Markets (Ballinger Publishing Co., 1978).

³ The Chicago faculty members were Walter Blum, Ward Bowman, W. W. Crosskey, Aaron Director, Allison Dunham, Milton Friedman, Earl J. Hamilton, W. G. Katz, H. G. Lewis, Bernard D. Meltzer, L. A. Metzler, Robert W. Ming, L. W. Mints, Margaret G. Reid, T. W. Shultz, Malcolm Sharp, and Rosco Steffen. The other letter was signed by M. A. Adelman, Ralph S. Brown, Kenneth S. Carlston, J. K. Galbraith, Harold G. Havighurst, Edward S. Mason, Fritz Machlup, W. Rupert Maclaurin, John P. Miller, Frank Kennedy, Carl Fulda, James A. Rahl, Lloyd G. Reynolds, Eugene V. Rostow, O. Glenn Saxon, Louis B. Schwartz, George W. Stocking, James Tobin, John Thompson, Jesse W. Markham, and John P. Frank.

⁴ Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, February 1952 (Serial No. 12), pp. 868, 881; Congressional Record, Senate: December 2, 1975, January 27, 1975, and House: July 21, 1975.

reasons of economic efficiency should be modified to allow manufacturers some legal rights to impose RPM.¹

(E) The Policy Debate: Should RPM Be Per Se Illegal?

It is currently firmly established that vertical price restraints are per se illegal.² The courts (or Congress), therefore, either implicitly or explicitly, have made a number of policy judgments concerning RPM. First, vertical price and nonprice restraints are sufficiently dissimilar in either causes or effects to justify differing legal treatment. Second, a full

¹ O. E. Williamson, "Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach," 127 University of Pennsylvania Law Review, 953 (1979); L. J. White, "Vertical Restraints in Antitrust Law: A Coherent Model," The Antitrust Bulletin, Vol. 26, No. 2 (Summer 1981); W. J. Liebler, "Intrabrand 'Cartels' Under GTE Sylvania," 30 U.C.L.A. Law Review, 1 (1982); R. A. Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality," 48 U. of Chicago Law Review (1981); R. H. Bork, The Antitrust Paradox, (Basic Books, 1978); M. Schwartz and D. Eisenstadt, "Vertical Restraints," Department of Justice E.P.O. Discussion Paper 82-8, December 2, 1982; Wm. F. Baxter, "Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law," 60(4) Texas Law Review, 661 (April 1982); "Vertical Restraints and Resale Price Maintenance: A 'Rule of Reason' Approach," 14(4) Antitrust Law and Economic Review, 13 (1982); and, Brief for the United States as Amicus Curiae, No. 82-914, U.S. Supreme Court, October Term 1982, Monsanto Company v. Spray-Rite Service Corporation. These are recent examples of analyses which advocate a move away from a standard of per se illegality. Such a conclusion, however, while increasingly popular among economists and legal commentators, is not accepted universally. For example, F. M. Scherer in Industrial Market Structure and Economic Performance (1980), p. 593, n. 103 indicates his view that the empirical significance of "free-rider" problems justifying RPM appears modest; H. Michael Mann, in a recent draft, "Resale Price Maintenance, Antitrust and Per Se Illegality: Reason for a Change?", concludes that the case for allowing RPM is "frail"; and former FTC Commissioner Robert Pitofsky recently supported continuation of per se illegality in a statement before the subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, March 9, 1983.

² The legal status of vertical nonprice restraints changed from a virtual per se prohibition under the Schwinn doctrine (U.S. v. Arnold, Schwinn & Company, 388 U.S., 365 [1967]) to an apparent rule-of-reason approach following Continental TV, Inc. v. GTE-Sylvania, Inc., 433 U.S., 36 (1977). In the latter case the per se prohibition of vertical price restraints was explicitly supported. "The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy [than are involved with nonprice restrictions]." 433 U.S. at 51, n. 18. The Supreme Court recently repeated the rule of law in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S., 97, 102 (1980). However, the Supreme Court has not given guidance as to exactly how price and nonprice vertical restrictions are to be distinguished in practice.

accounting of all the benefits and costs associated with the doctrine of per se illegality would support this approach to RPM.¹

Many economic and legal scholars, however, are highly critical of the current legal approach. They do not accept the argument that the causes and consequences of vertical price and nonprice restraints are different. The critics argue that because firms can compete (or avoid competing) by employing both price and nonprice variables, any potential procompetitive effects associated with nonprice restraints, justifying a rule-of-reason approach, may also be associated with price restraints, which should therefore be accorded similar treatment under the law.²

¹ Assessing the benefits and costs associated with any per se rule involves consideration of a number of factors. If, as economic theory suggests, there can be procompetitive effects associated with vertical price restraints, then a doctrine holding all vertical price restraints per se illegal implies that the benefits from prohibiting anticompetitive price restraints exceed any costs incurred by concurrently prohibiting procompetitive price restraints. The costs of making procompetitive vertical price restraints illegal might be small if such instances are relatively unusual, or if the desirable competitive effects of the restraints can be achieved in other ways without unreasonable increments in costs. Additional benefits of a per se doctrine exist to the extent that fewer litigation resources are required than under a rule of reason. And if per se rules are simple and clearly understood, there may be benefits in terms of predictability for both the business community and the enforcement agencies.

The resolution of the benefit-cost tradeoffs, and, thus, one's evaluation of a per se rule, will also depend importantly upon the goal(s) of the antitrust laws. One solution might be appropriate if the promotion of maximum economic efficiency is the chosen goal. (See R. H. Bork, The Antitrust Paradox (Basic Books, 1978); and R. A. Posner, Antitrust Law: An Economic Perspective (U. of Chicago Press, 1976)). A somewhat different balance might be appropriate if the antitrust laws were also intended (by Congress) to promote nonefficiency goals. (See, Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 Hastings Law Journal (1982)).

² Justice White in his separate but concurring opinion in GTE-Sylvania explicitly recognized the argument that there are analytical similarities between price and nonprice restraints. He wrote that "it is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of vertical non-price restraints generally apply to vertical price restraints as well Indeed, the Court has already recognized that resale price maintenance may increase output by inducing 'demand-creating activity' by dealers These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their 'social utility and economic soundness' . . . and as a justification for judging them under the rule-of-reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established per se rule against price restraints." See Antitrust Trade Regulation Reporter, No. 819, June 23, 1977, p. H-9.

Critics also reject the contention that per se illegality could be sustained on the basis of a benefit-cost analysis. Even if the currently applied standard of per se illegality yields net benefits, the critics contend that alternative policies exist which would produce a greater surplus of benefits over costs. The alternatives advocated range from a change to a rule-of-reason standard to a standard of per se legality for all purely vertical (price and nonprice) restraints.¹

Economic theory tends to support the critics of the current policy approach. Generally accepted economic wisdom holds that vertical restrictions (both price and nonprice) cannot automatically be presumed either to be motivated by or to result in anti-competitive effects.² The basis for this position is that there are plausible procompetitive as well as anticompetitive theories "explaining" both types of vertical restraints.³

Since there are numerous competing hypotheses which might explain the motivations for and effects of RPM, determining which offers the most compelling explanation in a particular instance (or in general) is an empirical matter. As we shall see below, the available empirical evidence concerning RPM simply does not offer overwhelming support to a policy which presumes that RPM will always or almost always be injurious to competition. Therefore, the resolution of the debate between supporters and critics of current policy depends crucially upon whether any policy approach other than a rigidly applied rule of per se illegality is administratively workable.

It is true that application of the theories to specific instances of RPM is not always operationally transparent. In a number of ways the theories themselves are deficient. They cannot be said to be sufficiently refined to have strong predictive

¹ See, for example, Richard A. Posner (op. cit.; 1981); and Robert H. Bork (op. cit.; 1978).

² This point has been rather steadfastly maintained for many years by the Bureau of Economics of the FTC.

³ The economic theories of RPM are discussed in detail in sections II, III, and IV.

capabilities. Furthermore, many of the theories are not precise enough to generate distinctive testable hypotheses. Thus, a great deal of often complex factual evidence can be consistent with more than one hypothesis, and it may be difficult, if not impossible, effectively to discriminate among the theories on the basis of their major implications. The analysis can also be complicated because vertical restraints, whether they are on balance beneficial or harmful to competition, will frequently come in bundles, rather than as a single price or nonprice restriction standing in isolation. Unfortunately, economic theories are also not sufficiently developed to fully understand the interactions or effects of various possible combinations of vertical restrictions.

Any specific case of RPM, therefore, could involve analytical difficulties because of ambiguities of theory, and complex and/or incomplete factual evidence. Yet, the task of solving these problems is not hopeless. While the theories have their weaknesses, and the "real world" often is very complex, in principle it is still possible to eliminate many of the alternative hypotheses and make sound judgements as to which hypothesis makes the most sense in a specific case.

Distinguishing among alternative hypotheses will usually require enough detailed evidence to do a reasonably complete market analysis, and may involve determining the probabilities of various possible future outcomes. Although such an approach clearly will involve more time and effort than required by simple per se rules, it is not really a process much different from that used in many other areas of antitrust. Further, a policy approach which explicitly recognizes that RPM can provide economic benefits as well as injure competition would (a) make policy more consistent with economic theory and available evidence, (b) make the legal treatment of vertical price and nonprice restraints the same, and (c) represent a largely untested middle ground between the extreme views of the practice which have dominated policy throughout this century.

II. ANTICOMPETITIVE THEORIES OF VERTICAL PRICE RESTRAINTS

(A) Retailer Collusion

The most popular, and historically possibly the most important, explanatory hypothesis for resale price maintenance (RPM) is related to the existence of retailer collusion. Traditional retailers, wanting to protect themselves against discounters and wanting to find a way to prevent destabilizing cheating from within their own group, are hypothesized to combine to coerce manufacturers into the establishment of an RPM program.¹ Under this theory, the manufacturer is induced into instituting a resale-pricing scheme that yields retailers a higher margin than otherwise would be the case. More efficient retailers, or retailers who otherwise would be inclined to compete on a lower price basis, are prevented from offering prices lower than the

¹ "Retailers" is used for expositional convenience. The hypothesis could apply equally to any group of distributors. Many contemporary economists will no doubt be skeptical of the empirical relevance of a dealer collusion theory. Nevertheless, support for the statement concerning historical importance is contained in B. Yamey, "Origins of Resale Price Maintenance," 62 Economic Journal (1952); J. R. Gould and L. E. Preston, "Resale Price Maintenance and Retail Outlets," Economica (August 1965): 302 n. 1; W. S. Bowman, Jr., "Resale Price Maintenance--A Monopoly Problem," XXV(3) Journal of Business of the University of Chicago, 141 (1952); W. S. Bowman, Jr., "The Prerequisites and Effects of Resale Price Maintenance," 22(4) University of Chicago Law Review 825 (Summer 1955); J. C. Palamountain Jr., The Politics of Distribution (Cambridge: Harvard University Press, 1955); S. M. Lee, "Problems of Price Maintenance," 23 Journal of Marketing 274 (January 1959); and R. E. Caves, "Vertical Restraints as Integration by Contract: Evidence and Policy Implications," Harvard Institute of Economic Research Discussion Paper No. 754 (April 1980). For inferential support, see FTC Report on Resale Price Maintenance, Parts I and II (1929), and Report of the FTC on Resale Price Maintenance (1945). Both documents were submitted to Congress, and both contain information on who the advocates of RPM were in the past. This is not rigorous or conclusive evidence, but it does seem to be the case that retailers, primarily through their trade associations, were the major proponents of the fair-trade laws. See also E. Raymond Corey, "Fair Trade Pricing: A Reappraisal," XXX(5) Harvard Business Review 47 (September/October 1952); Edward S. Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bulletin 583 (1959); L. W. Weiss, Case Studies in American Industry, 2d ed. (New York: Wiley and Sons, 1967) ch. 5, "Monopolistic Competition--Retailing;" and Study of Monopoly Power, Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, Second Session, on Resale Price Maintenance, February 1952, Serial No. 12.

maintained price.¹ Resellers who deviate from the maintained price can then be detected, either by the manufacturer or the colluding retailers, and subjected to some form of discipline from the manufacturer. The manufacturer could discontinue selling to the price cutter or adopt some means short of this if it were

¹ RPM could be viewed by "traditional" or "full-priced" dealers not as a vehicle to monopoly returns,² but as a means of preventing the emergence of more efficient forms of distribution. With RPM, neither the dealer who cuts costs nor the new entrant with a better business method can grow by reducing prices on price maintained brands. Thus, widespread use of RPM could inhibit initiative and innovation at the distribution level. Several analysts have reviewed the historical evidence concerning the involvement of dealers' trade associations in advocating fair trade, and concluded that the dealers were motivated to some extent by a desire to prevent the growth of more efficient types of distribution. See, for example, Palamountain, Yamey, and the 1945 F.T.C. report (ibid.). The examples cited in these sources involve organized dealer activities which apparently were successful only temporarily in preventing the growth of their perceived competitors. RPM, therefore, may not be a very effective long-run means of deterring the growth of discounters. If discounters have lower costs, *ceteris paribus*, than traditional retailers, and if agreeing to maintain resale prices is the only obstacle to obtaining desirable brand-name product lines, then discounters who sell at the maintained prices will earn efficiency rents on each unit sold. These rents can then be utilized to finance the discounters' expansion and growth. Indeed, it is hard to explain how high-cost distributors could successfully predate upon their more efficient rivals indefinitely. A similar argument is contained in R. H. Bork, "A Reply to Professors Gould and Yamey," 76 Yale Law Journal, 731 (1967). However, discounters and traditional dealers might differ in ways other than simply the levels of their average costs. For example, the volume of sales necessary to achieve minimum efficient scale of operation (MES), and the rate at which per unit average costs rise with sales volumes less than MES could also differ between the two types of distributors. If the inability to discount price-maintained goods and expand sales and achieve lower average costs disadvantages the discounters relative to the traditional dealers, then RPM could effectively inhibit the rate of growth of the new type of dealers, at least in the short run. For this scenario to apply, RPM must be sufficiently widespread to disadvantage discounters by adversely affecting their scale of operation and preventing their average costs from falling. Thus, RPM either would have to be enforced upon a number of brands which collectively could account for a substantial amount of a dealer's total sales, or on an individual brand with a very large market share sold primarily through narrow-line specialty outlets. Otherwise consumer and/or supplier substitution possibilities would undermine the effectiveness of such a collusive scheme. Whether would-be discounters are able to offer lower prices because they are technically more efficient than traditional dealers (in which case inhibiting discounters' growth is inefficient), or because the discounters have merely cut corners to take a "free ride" (in which case inhibiting their growth is efficient), it is not hard to see that the inability to lower prices on desirable brand-name product lines could raise the costs of establishing a reputation as a discounter. However, Herman's information on the U.S. fair-trade experience (see Section VI), and the information on recent FTC RPM cases (see Section V), reveal that RPM frequently has been utilized independently and for short periods of time by relatively small firms selling in structurally competitive markets, implying that dealer collusion explanations for RPM lack generality.

satisfied that the offending reseller would be more cooperative in the future. Thus, a detection and punishment mechanism, which it is hoped will deter price cutters, is set in place that uses the manufacturer (vertically) to police the RPM and stabilize the retailers' (horizontal) collusion.¹

The fact that retailers must coerce the manufacturer into imposing RPM strongly suggests that the manufacturer is acting differently than would be the case in the absence of a threat of some adverse consequence for noncooperation. This has at least two important implications. It implies that the retailers must have the necessary market (monopsony) power to impose their will upon the manufacturer. It also implies that the manufacturer, assumed to be attempting to maximize his profits, is forced to accept a distribution margin that is not optimal from his perspective. The RPM-enhanced margins will not necessarily result in the provision of special reseller services desired by the manufacturer, but presumably will result in higher prices to final

¹ As a conceptual matter, retailer-induced RPM is a plausible hypothesis. How important this hypothesis might be for explaining RPM today, subsequent to the repeal of fair trade and with the circumscribed Colgate doctrine, is unknown. However, repeal of the fair-trade statutes should have reduced the prevalence of this variety of RPM. Without the legal sanctions of the fair-trade laws, the ability legally to discipline detected price cutters should be reduced. This would tend to raise the expected benefits from such cheating (discounting) and thus tend to make collusive arrangements featuring RPM harder to form and maintain. However, as an historical matter, the literature contains numerous examples where analysts have attributed the existence of RPM to pressure from organized dealer trade groups, rather than to manufacturers' attempts to deal with "free-rider" problems. Some examples are: grocery distribution and the distribution of drugs (Palamountain, op. cit.); retail druggists, liquor and jewelry dealers, cosmetics, optical supply dealers, and booksellers (Bowman, op. cit.); groceries, drug and patent medicines, and tobacco (Yamey, op. cit.); and non-prescription drugs and liquor (S. C. Hollander, "Dealer Margins Under Resale Price Maintenance," 3 Quarterly Review of Economics and Business, 25 (1963)). The 1979 FTC case against the Appliance Dealers Cooperative (ADC) might have involved a collusive scheme among retail dealers which featured RPM. About 25 retail appliance dealers had formed ADC as a joint buying agency. ADC then imposed RPM on the items it bought for and sold to its member dealers. In this case, the RPM was not imposed by the manufacturers as normally required by the efficiency explanations.

consumers, fewer units of the product sold, and lower profits for the manufacturer.¹

Collusive retailers are buyers with respect to their manufacturer-suppliers. Therefore, under the retailer-collusion hypothesis the extent to which the retailers can exercise any buying (monopsony) power to extract concessions (RPM) from the manufacturer(s) is at issue. Presumably the collusive retailers' most potent threat is to boycott the manufacturer's product, denying the manufacturer a channel of distribution to final consumers.² A manufacturer yielding to such pressure must believe that it will be better to capitulate to the retailers' demands than to seek alternative means of distribution. A profit maximizing manufacturer-supplier would not concede to the demands of collusive dealers, whether they are selling in limited or widespread portions of the manufacturer's market, if more profitable distribution alternatives exist.

If it would be more profitable or less costly for the supplier to adjust the price (or nonprice terms of trade) to noncollusive dealers (or potential dealers) than to concede to the collusive dealers' demands, the supplier rationally would be willing to reject the dealers' demands for RPM, and entirely forego sales through the colluding dealers' outlets. For example, collusive retailers effectively monopolizing distribution in market A will not be able to extract RPM from an unwilling manufacturer who considers market A a trivial portion of his total

¹ If collusive resellers are unable to restrict entry or to limit all forms of non-price competition among themselves, then any supracompetitive collusive returns eventually will be competed away. The resulting equilibrium price-service mix, however, will not necessarily be socially optimal because the resale price and margin are set collusively. Thus, the existence of some service competition among dealers, or an apparent ease of entry into distribution, are not sufficient by themselves to dismiss the possible existence of a dealers' cartel. Dealers, unable to restrain entry or all non-price dimensions of competition, and, therefore, unable to attain long-run excess returns, might nevertheless find the short-run transitory gains sufficient to justify colluding.

² The ultimate purpose of collusion is to achieve the market position of a monopolist (or monopsonist). The analysis of this section, therefore, could also apply to cases of retailer monopoly (monopsony), or to situations where there are dominant retailers in particular market areas.

market. There is no reason in general why a manufacturer must sell in each and every retail market area. However, the manufacturer's calculations of the relative profitability of his alternatives could result in a somewhat different decision if the concessions could be isolated to dealers in market A. If concessions can be isolated, the costs of conceding to the dealers' demands would be lower than if they must also be made available to dealers in other resale market areas.

To support the dealer collusion hypothesis, one must demonstrate either that the collusive retailers are able to affect a significant portion of the manufacturer's total sales, or that manufacturer concessions, i.e., RPM, somehow can be isolated to dealers in limited portions of the supplier's market, and (in either case) it should also be possible to demonstrate that the supplier lacks superior alternatives.¹ This, in turn, will require an analysis of the market from the manufacturer's perspective.

In attempting to reject the retailer-collusion hypothesis for RPM, the characteristics of the price maintained product(s) must also be considered. If the manufacturer's brand is not significantly differentiated from other brands, then an RPM-induced price increase will cause consumers to substitute a relatively lower-priced competing brand. Collusive retailers would have little incentive to extract RPM from manufacturers of products which are not significantly differentiated, i.e., where the manufacturer does not have some market power, unless the dealers are able to induce RPM on all or most competing brands as well. Even if it were possible for the retailers to obtain RPM on all brands in a product class, their incentives to do so would appear to be limited largely to situations where the market (as opposed to brand) demand is also relatively inelastic.

However, if the product in question is differentiated enough to have a very strong consumer franchise, the manufacturer may be

¹ A full analysis should also address the question of why the dealers use their collusive monopsony power to obtain a protected margin instead of lower prices from the supplier(s).

able to substitute away from the collusive retailers. Noncollusive retailers (if there are any) may be available and willing to distribute a highly differentiated popular brand, and the manufacturer always has other options for distributing the product, e.g., by forward integration into retailing or by direct mail. Thus, consumers may be able to substitute away from relatively higher priced brands, and manufacturers away from collusive retailers. A full-market analysis should consider whether the various substitution possibilities are sufficient to negate concern with the possibility of an effective dealer cartel.

Some Testable Implications of the Theory

Placing retailers suspected of collusion into any well-defined product market may be difficult. They may compete in well-defined geographic areas, but they will most likely carry many products, and there may be many relevant product markets to consider. Nevertheless, a complete analysis must establish which manufacturers and which products are believed to have used RPM because of coercion by the suspected collusive retailers. Those products whose resale prices have been influenced by the collusive retailers should yield higher retail margins than the products of suppliers which the dealers have been unable to influence. It should be possible to determine if this is factually correct. Further, suppliers of brands with well-established consumer franchises should be better able to resist the colluders' demands for RPM than suppliers of less popular brands. Therefore, one might also expect an inverse relationship between the collusively obtained resale margins and brands' market power as proxied by market shares. If the dealer collusion is limited to portions of a supplier's total geographic market, resale margins in the collusive areas should exceed resale margins in the noncollusive areas.

Suppliers should be able to provide direct evidence concerning whether there is a dealer cartel or not. If the manufacturer has been coerced into imposing RPM by collusive retailers, the manufacturer would be better off if the collusion were

eliminated.¹ Manufacturer cooperation (testimony), or documentary evidence from the manufacturer's records, should be helpful in establishing a factual basis for demonstrating the retailers' influence, if any, in the manufacturer's decision to vertically restrict prices.

In sum, it seems likely that any inference of retailer collusion will be misplaced if (a) collusion among resellers capable of affecting a substantial amount of a manufacturer's distribution cannot be proven or inferred, or (b) a mechanism for isolating manufacturer concessions to limited areas of the manufacturer's market cannot be identified, and (c) the manufacturer (or his business records) does not indicate that any dealer coercion was a factor in the imposition of the restraint.²

(B) Manufacturer Collusion

Manufacturers also may impose RPM programs to facilitate collusion. In contrast with the retailer-collusion hypothesis, collusive manufacturers would not intentionally set resale prices and margins which allow their resellers more than a competitive return. Instead, the manufacturers are hypothesized to collusively set noncompetitive manufacturers' prices, and they use RPM

¹ This needs to be qualified somewhat. Collusive retailers may nonetheless compete to sell the price-maintained brands by means of nonprice competition (such as point-of-sale recommendations). Unilateral removal of RPM on a single brand could result in the collusive retailers merely dropping the brand, or never suggesting or disparaging the brand to consumers. This would not likely benefit the individual manufacturer-supplier. Thus, if RPM has resulted from pressure by collusive retailers, and numerous competitive products are price maintained, individual suppliers may be reluctant to implicate the collusive dealers. In such circumstances, it may also be undesirable to bring a vertical case against a single manufacturer.

² Critics of existing RPM enforcement efforts argue that the retailer-collusion hypothesis, if it is ever applicable, can be dealt with as a horizontal problem and that separate vertical sanctions are not needed. The alternative argument is that, if prosecuting such horizontal cases is both difficult and expensive (perhaps because of the burdens of proving an "agreement"), and yet there is credible evidence of effective retailer collusion, the most efficient use of enforcement resources may require bringing the case as a vertical matter if the elimination of the vertical practice(s) will destabilize or unravel the horizontal collusion. Implicit in this view is a belief that enforcement agencies will be able to exercise proper discretion in choosing which cases to prosecute under such a theory.

to facilitate the detection of destabilizing price shading (cheating) by manufacturers.

In the absence of RPM, even if all manufacturers maintain the collusive prices, resellers are free to determine and vary their markups as local market conditions dictate. If some manufacturers also cheat (i.e., discount) and some portion of their price reductions are passed through to consumers by resellers, detecting such cheating could be complicated. Variable resale prices (and the associated gains or losses of sales and market shares for the manufacturers) could be the result of resellers independently varying their margins, cheating by some collusive manufacturer(s), or both.

RPM can eliminate part of this problem by fixing resale prices.¹ With RPM, if a manufacturer cheats, resellers will be unable to pass the discounts through to their customers without deviating from the maintained prices. Any observable deviations from the RPM prices could destabilize the collusion by signalling to the collusive manufacturers either that cheating is occurring, or that RPM prices are not being enforced effectively.² Even with RPM prices enforced, however, manufacturers' incentives to cheat are not totally eliminated. Manufacturers' discounts will allow larger resale margins even at the maintained resale prices, and resellers, therefore, would still have incentives to substitute in

1 The following discussion is in terms of minimum resale prices because this form of RPM appears to be the most prevalent. However, RPM prices could be stipulated, or maximum resale prices could be specified. Given particular demand schedules, how "fixed" the quantities sold and market shares will be depends upon the extent to which the RPM prices actually reflect transactions prices. Unless RPM prices are stipulated, transactions prices could differ from RPM prices. For example, with minimum resale prices, resellers can still charge more than the maintained minimum prices. Under any form of RPM the extent to which transactions prices diverge from the RPM prices also depends crucially upon the extent to which the maintained resale prices are enforced by the manufacturers.

2 The RPM prices must, of course, be enforced to facilitate the collusion effectively. The analysis applies whether the resellers are wholesalers or retailers. However, it would seem to apply better to maintained retail prices because retail prices are (probably) easier to observe than are wholesale prices.

favor of the discounter.¹ However, because the resellers cannot pass the discounts through to their customers without revealing the cheater to the other manufacturers, the gains to a manufacturer from discounting are limited by the RPM. Furthermore, because RPM eliminates a source of destabilizing market share variation, smaller variations in market shares are likely to arouse suspicion that there is cheating. Thus, the RPM is expected to increase the likelihood that cheating will be detected and traced to the source, thereby reducing the incentives to cheat in the first place.²

It is important to note that under this hypothesis RPM is a facilitating device because it enhances the likelihood of detecting manufacturer price shading. How effectively RPM can perform this function depends directly upon how vigorously manufacturers enforce their RPM programs and discipline their resellers. Presumably the collusive manufacturers can boycott resellers who will not maintain prices. The more important are individual resellers, or the more widespread is reseller price cutting, the more costly manufacturers' refusals to sell will be for the manufacturers. However, under this hypothesis RPM is not part of a mechanism for punishing collusive manufacturers who cheat. RPM facilitates detection of such cheating, but it does

¹ If each retailer carried but a single brand (i.e., the case of exclusive dealing), there would be little reason to increase purchases from the price-cutting supplier, since the retail price and quantity are fixed. The manufacturer would therefore have little incentive to cheat unless the resulting higher resale margin induced the retailer to more aggressively "push" the product generating greater sales. Thus the presence of exclusive dealing and RPM could be evidence of manufacturers' efforts to obtain retailer services, or it could be an additional feature of a cartel's attempt to remove incentives to cheat. See Telser (op. cit.), for a discussion of the numerous complications involved in cartel maintenance.

² Those suppliers gaining more than random increments in market share will be the suspected culprits.

not explain how the cheating manufacturer is disciplined. That explanation must come from some other practice or mechanism.¹

The first step in establishing the applicability of this hypothesis to a specific case would be to demonstrate that there is credible evidence of manufacturer collusion. The second step would be to demonstrate that the RPM is facilitating the collusion.² An important aspect of this hypothesis is that collusion is suspected among manufacturers selling products that are sufficiently similar for the manufacturers to view their interests as interdependent, i.e., they compete in the same relevant market. Presumably, those colluding would have to account for a significant fraction of the relevant market; otherwise, noncollusive manufacturers would be able to expand their sales and market shares because they could induce consumer substitution with relatively lower prices. Any evidence of a significant fraction of noncolluding firms in the market (i.e., under this hypothesis noncollusive firms are those not using RPM) requires an explanation of the barriers such firms face in expanding their market shares.

Even if all existing suppliers of a particular type of product collude, they may still be unable effectively to elevate prices above the competitive level without losing substantial sales volume. Other manufacturers (potential entrants) may be able to undermine the collusion by shifting into the production of substitutes for the collusively priced goods. Dealers can also

¹ Because collusive manufacturers' problems of disciplining cheaters within their own group are apparently undiminished by the use of RPM, if they can overcome their own "discipline" problem effectively, it is not clear that RPM will actually contribute much to the cohesion of the collusive scheme. RPM seems likely to do so to the extent that it eases detection problems, but any RPM program simultaneously introduces enforcement problems at a different vertical level.

² The economics literature contains several examples of possible collusion among manufacturers which may have been facilitated by RPM. For example, Telser (op. cit.), mentions spark plugs, enameled ironware, ethyl compounds, and light bulbs. Bowman (op. cit.), describes what may be such a situation in the marketing of spark plugs and enameled ironware. A. McLaughlin, "An Economic Analysis of Resale Price Maintenance," Ph.D. Dissertation, U.C.L.A. (1979), concludes that The Bakers of Washington was probably such a case.

undermine supplier collusion by offering lower-priced private label or house brand substitutes for the collusively-priced products.¹ Finally, the dealers could undermine the cartel by reallocating their available shelf space away from the collusively priced products. If the products turn over too slowly at collusive prices for the dealers to earn an adequate return on their investments in selling those products, the dealers will presumably substitute away from those products. A complete analysis of suspected RPM-facilitated manufacturer collusion must, therefore, explain why potential entry (by other manufacturers or by dealers), or other possible dealer counter strategies will not effectively undermine the cartel.

Some Testable Implications of the Theory

Many of the opponents of RPM contend that the practice facilitates a great deal of concerted action among manufacturers that is not easily detected.² Whether or not this concern has been well founded in the past, if a specific use of RPM is suspected of facilitating manufacturer collusion, economic theory does suggest several tests for establishing this. First, evidence of price patterns over time should reveal coordinated pricing. Prices charged by the suspected colluders (or their resellers) that deviate persistently or by large amounts from the allegedly collusive prices would tend to cast doubt on the hypothesis that there is effective collusion, unless there is also evidence that the deviates were disciplined.

¹ A sudden rise in private label activity by dealers, if not explained by other factors, could signal the existence of supplier collusion, if all the other conditions necessary for effective collusion also exist.

² The extent to which this assertion is valid is unknown. RPM opponents have alleged this during hearings on fair trade in the 1930's, 1950's, and 1970's. The 1945 FTC report on RPM concluded that RPM achieved via fair-trade contracts facilitated widespread supplier collusion, and that such collusion was very difficult to detect. The Justice Department of that era took the same position as the FTC. However, many supporters of RPM have just as consistently argued that RPM does not support collusion but instead promotes efficiency in distribution. It is safe to say that this issue is still unresolved.

If there is collusive pricing, there should be some evidence of excess returns to the colluding manufacturers.¹ Theory suggests a profitability test for distinguishing between manufacturer collusion and efficiency explanations for RPM if profits can be measured correctly conceptually and all factors affecting profits other than RPM can be held constant. If all manufacturer in a market collude and impose RPM at the same time, and if they are equally efficient and capital intensive and none cheat, they should have equal and relatively high profitability. Unfortunately, the same result would follow in the short run if RPM had been used competitively for efficiency reasons. But, if some collusive manufacturers cheat by shading the collusive price, according to cartel theory, the cheater's profits should exceed those of noncheaters because the cheater benefits from the output restrictions of the noncheating firms, and from the resulting supracompetitive prices.

If there are firms in the market that either have never used RPM or that have discontinued the practice, then they are analogous to "cheaters" and (all else being equal) their profitability should exceed the profitability of the collusive manufacturers using RPM. However, if the manufacturers imposed RPM noncollusively for efficiency reasons, then those using RPM should be more profitable than those who do not, and those who first imposed RPM should be relatively more profitable than those who subsequently adopted the practice. Thus, if all the requisite evidence can be assembled, it is possible to use profitability to distinguish between the supplier collusion hypothesis and the efficiencies hypotheses for RPM.²

¹ Using profitability to infer the existence of collusion entail all of the problems inherent in measuring and interpreting profitability data and presupposes that any excess returns have not been competed away through nonprice forms of competition.

² The profitability prediction of the efficiencies hypotheses (that those suppliers using RPM will be more profitable than those without RPM) is also consistent with the retailer-collusion hypothesis. If retailers collude effectively they might be able to disadvantage suppliers that will not impose RPM while favoring cooperative suppliers.

(C) Life Cycles and Marketing Inertia or Mistakes

Another explanation of possible welfare-diminishing effects caused by RPM relates to manufacturers' adopting or persisting in nonmaximizing strategies for the distribution of their products.¹ In contrast to the collusive hypotheses, this hypothesis applies to the conduct of single firms and derives largely from risk-averse behavior and inertia on the part of manufacturers. In this analysis, a product which can be sold most effectively in one way during an early stage of its life cycle (for example, through traditional department stores with RPM to protect these outlets from competition with discounters) may at a later stage of its life cycle be sold most effectively in another way.² Manufacturers, however, because they have been doing reasonably well

¹ This section will describe and evaluate hypotheses principally attributable to Robert Steiner, formerly FTC staff economist in the Division of Consumer Protection of the Bureau of Economics. See Robert L. Steiner, "Vertical Restraints and Economic Efficiency," FTC Bureau of Economics Working Paper, Number 66, June 1982.

² Presumably the hypothesis could also apply to a distribution and marketing strategy which was nonmaximizing at its inception. For example, a firm with a dual distribution system could impose RPM to protect the margins of company-owned retail stores from competition with independent retailers. If the independent retailers are more efficient, but the manufacturing division and the retailing division are each profit centers, intra-company conflict could result in a suboptimal decision to protect the company-owned retail outlets with RPM, i.e., the company could make a nonmaximizing mistake. Or, a nonmaximizing mistake could result from incompatible incentive structures of principal and agent. For example, a supplier would rationally refuse a local dealer's demand for RPM if it could more profitably adjust the terms of trade somewhat and move the goods elsewhere through other dealer's without RPM. However, individual sales agents could be adversely affected if the supplier's adjustments are not confined to a particular sales territory. Thus, a sales agent might con- cede to local dealer pressure for RPM to avoid losing local sales commissions even though doing so is not optimal for the manufacturer supplier. A principal's failure to properly monitor and discipline its sales agents could result in suboptimal market- ing decisions. However, the analysis of marketing "mistakes" generally relies on a life-cycle concept in which once-beneficial distributional policies outlive their competitive usefulness, but manufacturers fail to make the appropriate adjustments. For example, department stores at one time may have provided point- of-sale demonstration services which efficiently enhanced demand for a product and were useful to consumers unfamiliar with the product and/or the manufacturer. With increased public recogni- tion of the brand name, or experience with the product, advertis- ing could eventually become a more effective marketing method than in-store services. The Congressional Record of July 21, 1975 (at page 23659), reports that when Corning Glass Works abandoned its fair-trade program the company found that it "had met the enemy, and it was itself." Other manufacturers such as General Electric, (footnote continued)

with their existing distributional policies, may be reluctant to change them, either because they are overly risk averse, because they tend to underestimate the long-run price elasticity of demand for their products, and/or because they mistakenly succumb to pressure from their traditional dealers.

This hypothesis is most likely to apply in cases where, through experience with the manufacturer's product, consumers have developed firmly established expectations of the product's quality. If the product has not established a strong consumer franchise of its own, RPM may be an effective way to insure adequate distribution or to obtain dealer services.¹ However, once a product has developed a strong consumer franchise of its own, it may no longer be in the manufacturer's or the consumer's best interest to continue protecting resellers' margins with RPM to induce them to "sell" the product.² Manufacturers who persist in their old practices may not be maximizing their profits.

If the RPM has become ineffective or obsolete as a marketing tool, then the manufacturer and consumers have the same interests in lowering resale margins. If the manufacturer has underestimated the elasticity of demand for his product or mistakenly succumbed to pressure from traditional dealers, by removing RPM and allowing the product to be sold through discounters, the manufacturer's sales and profits will increase. Because consumers already are familiar with the product's attributes, when the (obsolete) RPM is discontinued, even if the more traditional outlets drop the product because they are reluctant or unable to compete with the discounters on a price basis, the additional

(footnote continues)

Sheaffer Pens, Lionel, and Kodak also found that their sales and profits increased when they abandoned RPM on well-known items. See S. M. Lee, "Problems of Resale Price Maintenance," 23 Journal of Marketing, 274 (January 1959). Whether or not these firms had made mistakes and persisted in using RPM for longer than was optimal remains an open question.

¹ Efficiency explanations for RPM are discussed in Section IV below.

² L. G. Telser (op. cit.), discusses the life-cycle feature at page 95.

sales through discounters at lower prices will more than compensate for such losses. Consumers will benefit because they will get a product of known quality at a lower price.¹

An example may be helpful. Suppose a manufacturer initially believed (correctly) that it was important to distribute a new, high-quality product through the types of outlets that have invested in and cultivated reputations for trading in high-quality merchandise. Availability in such outlets is viewed by consumers as a guarantee that the product is indeed of high quality, because consumers do not believe that the store would let its reputation be harmed by offering the public shoddy merchandise. At some point, the manufacturer's brand name may be able to replace the type of outlet as a quality guarantee to consumers. This could happen as consumers through experience come to believe that the brand name itself signals quality. Consumers may then feel that the manufacturer has too much invested in the brand name to risk it by debasing the product's quality. The type of outlet in which the product is distributed will have become irrelevant to the manufacturer and consumers because quality guarantees now inhere in the manufacturer's trademark. The manufacturer will sacrifice sales and profits by failing to adjust its distribution system to accord with consumers' altered perceptions of a product's quality. If the change can be imposed--for example, through governmental intervention--there will be no incentives for the manufacturer to debase quality as in a "free rider" hypothesis, because the manufacturer will be made better off as a result of the intervention.²

¹ Recent FTC action against Levi Strauss which led to removal of RPM on Levi's established brand name jeans was apparently followed by rising revenues, profits, and stock value as consumer prices fell. See, Sharon Oster, "The FTC v. Levi Strauss: An Analysis of the Economic Issues," March 1982. William A. McEachern and A. A. Romeo, "Vertical Restraints in the Audio Components Industry: An Economic Analysis of FTC Intervention," adopt the mistakes explanation for the use of RPM in low-end audio components. This study and Oster's study were part of a vertical restraint cases impact evaluation project funded by the FTC, and are discussed in more detail in Section VI.

² Free riders will be discussed in section IV.

Two additional benefits are possible as a result of intervention to correct a manufacturer's mistaken use of an obsolete vertical restraint. First, as the price of the product in question falls after removal of RPM, the prices of competitive products might also decline, i.e., interbrand price competition could be stimulated. Consumers would benefit from these lower prices as well.¹ However, unless the other products had been priced noncompetitively, their prices could not fall in the long run unless the price declines result from changes in the products consistent with attaining a lower price equilibrium. Second, after removal of the RPM, discounters could benefit directly from the status or goodwill associated with carrying the previously price-maintained product(s). The availability of previously price-maintained high quality branded goods at discount outlets might even have demonstration or spillover effects which could result in a major shift in consumer attitudes and purchasing behavior.²

Implications of the Theory for Public Policy

These possibilities raise a host of interesting questions of public policy concern. First, however, it must be emphasized that the welfare-diminishing potential associated with this hypothesis can only apply to products that have developed a strong consumer franchise. Otherwise, if the manufacturer removes RPM and loses distribution in the traditional outlets due to price competition with discounters, there may not be enough residual demand even at the lower prices to leave the manufacturer at least as well off as before. This could be the result if the manufacturer were not in fact mistaken and one of the alternative (efficiencies) hypotheses (discussed in section IV) is applicable. This clearly limits the

¹ See the discussion of the study of the effects of repealing the fair-trade laws in Rhode Island (in Section VI below) for evidence that the removal of RPM on certain products had no effect on the prices of products which were not price maintained.

² Implicit in this view is that at some point in the product life cycle discounters become more efficient distributors than traditional resellers because consumers no longer attach significant value to the mix of price and services offered by the traditional outlets.

potential applicability of this hypothesis to a subset of all consumer goods. How to define this subset appears to defy generalization, apparently requiring a full analysis of the particulars of specific products.

Second, and probably more important, however, is the presumption that manufacturers do not know how to choose the distributional strategy which is in their own best interests. Implicit in the mistake hypothesis is the idea that governmental enforcement agencies can determine a better marketing strategy for the manufacturer than he can choose for himself, given his risk preferences. Action on the basis of this hypothesis clearly places the manufacturer in a position of being forced by government to adopt a strategy the manufacturer believes to be excessively risky.¹

Third, the effect of intervention under this theory upon the reputation of discounters appears to rely upon an idea analytically similar to the concept that advertising can create a barrier to entry. The goodwill and other reputation advantages which traditional outlets enjoy relative to discounters were developed at some cost, and discounters can also develop reputations of their own at some cost. The fact that discounters have to incur costs to establish quality reputations does not automatically translate into entry or expansion barriers any more than having to advertise a product means an advertising barrier to entry exists. The resources needed to establish a reputation might be simply a necessary capital cost of entering into a particular segment of the consumer-goods industry. High capital costs, however, are not generally thought by economists to constitute entry barriers of public policy concern, though they may well limit the number of potential entrants. In order to establish a concern, one needs to

¹ Manufacturers may very well pursue policies which do not produce maximum profits, i.e., they can make mistakes. If they are in fact mistaken, then governmental correction of those mistakes could benefit both manufacturers and consumers. However, while an obsolete RPM program may diminish consumer welfare (in which case eliminating it will be beneficial), it may not be obsolete and could have efficiency justifications (in which case eliminating it will do unintended harm). As a policy matter, enforcement agencies should decide explicitly whether they are willing to intervene on a theory which presupposes that they can judge superior marketing strategies better than a manufacturer.

extend the analysis to include explanations of capital market failures, extra risk to entrants¹ which may be the result of incumbent firms' behavior, predation, first-mover advantages, or some other feature capable of creating cost asymmetries between the discounters who want to cultivate a quality reputation and their more traditional competitors.

Under the mistakes hypothesis, the competitive "barrier" confronting discounters is their inability to get enough established brands to develop a quality reputation because manufacturers refuse to sell to discounters due to inertia and/or poor judgment. For manufacturer mistakes to seriously reduce consumer welfare by inhibiting the growth of more efficient distributors, the affected products must be quite important to the would-be discounters. Thus, the mistakes either must be committed simultaneously by numerous suppliers, or by the supplier of a single dominant brand which typically is vended through narrow-line outlets. Otherwise, market forces should induce at least some profit-maximizing suppliers to sell to the discounters even if others (mistakenly) refuse to do so, thus reducing any welfare-diminishing potential of supplier mistakes.

A Digression on Monopsony

However, a variant in Steiner's hypothesis suggests that RPM also may diminish welfare by retarding the emergence and growth of more efficient types of distributors, even when manufacturers do not make mistakes. Under this scenario, advances in the efficiency of distribution can be retarded as long as conventional high-cost distributors greatly outnumber their more efficient distributor competitors. When the new, more efficient distributors are relatively small, manufacturers make the privately rational (correct) decision not to sell to them, because by doing so they may risk losing a larger account(s), i.e., the traditional distributor(s) may drop the manufacturer's product(s). The manufacturer does not make a mistake, and the traditional

¹ Discounters who wish to enhance their images to compete with the traditional outlets can be viewed as new entrants into that segment of the retail market.

retailers may even provide distributional services valuable to the manufacturer and consumers. Yet, from a social (rather than private) perspective, widespread use of RPM could inhibit the growth of the more efficient distributors, thus perpetuating a high-cost form of distribution and diminishing social welfare.

However, this result follows in only two situations. The first involves dealer collusion. There the suppliers make the correct profit-maximizing decision to concede to the dealers' demands for RPM, but welfare is reduced because the dealers are colluding. The second situation requires dealer monopsony in a significant number of the supplier's local resale markets. If most resale markets are characterized by dominant dealers (monopsonists) who independently demand RPM from suppliers, then privately rational supplier decisions to use RPM to protect the monopsonists' margins could be detrimental without actual dealer collusion. In both of these situations the RPM facilitates the maintenance of monopsony power.

As a factual matter, many brand names currently are available to discounters, but apparently restrictions are also frequently placed upon the discounters as a condition of obtaining the brands.¹ For example, many discount retailers can get brand-name merchandise only by agreeing to locate some distance away from traditional "full-price" outlets carrying similar brands, and/or by agreeing not to advertise brand names and prices too aggressively. While restrictions on discounters of this sort could be symptomatic of a manufacturer's attempt to placate high cost resellers or to discriminate, they could also reflect an efficient equilibrium in an imperfectly competitive market in which suppliers are able to minimize, but not eliminate, free-rider distributional problems which might arise largely because of the different marketing strategies deliberately adopted by various resellers. In any case, the more widely available are brand-name

¹ See, for example, Isadore Barmash, "How They're Selling Name Brands Off-Price," Stores, March 1981, pp. 9-14. Barmash discusses the marketing strategies of several successful "upscale" discounters.

items to discounters, the less likely is any single manufacturer's nonmaximizing distributional choice (mistake) to affect discounters' reputations adversely and/or diminish social welfare.¹

Summary

In this section we have discussed two theories of how RPM might facilitate horizontal collusion and result in anti-competitive effects, and one which suggests that RPM can diminish consumer welfare when manufacturers fail to adopt profit-maximizing distributional strategies. In section III, we will discuss two theories of RPM which yield ambiguous predictions of the welfare effects of RPM. Then in section IV we will end the survey of the various theories of RPM with a discussion of three economic theories which explain how RPM can promote distributional efficiency and be procompetitive.

¹ If there is a policy decision to attempt to enhance consumer welfare by bringing cases which may raise the reputation of discounters, a number of simultaneous suits could be necessary. If only one case at a time is brought, and unrestricted availability of several brand names is needed to improve discounters' reputations, the chances are much greater of unintentionally harming the first manufacturer without corresponding consumer benefit. This same point was raised under the retailer-collusion hypothesis. Intervention focusing upon manufacturers, but designed to affect retailers' ability to collude, could be counterproductive if limited to a suit against an individual manufacturer.

III. EXPLANATIONS FOR VERTICAL PRICE RESTRAINTS WITH AMBIGUOUS WELFARE EFFECTS

(A) Price Discrimination

RPM could be a feature of a manufacturer's attempt to price-discriminate. For price discrimination to be profitable to the manufacturer, there must exist two or more distinct classes of customers with different price elasticities of demand for the product, and those customers receiving relatively lower prices must be prevented from diverting or reselling the product to the other group or groups.¹ For example, suppose a manufacturer sells a product directly to both individual consumers and large industrial customers. If the manufacturer sells to the industrial customers at relatively lower prices (because their demand is relatively more elastic), they must be prevented from reselling the product to individuals at prices which undercut the manufacturer's price. By imposing a minimum (or stipulated) resale price on the industrial customers which equals or exceeds the manufacturer's price to individual consumers, the manufacturer attempts to insure that his relatively high price will not be undercut by the industrial buyers. However, even with RPM the industrial buyers would still have profit incentives to divert their purchases to individual consumers if profits can be earned by reselling at (or near) the maintained price. Although individual consumers would have little incentive to prefer purchasing either from the manufacturer or the diverters, since both charge at least the maintained price, RPM by itself may not be able adequately to prevent diversion of the product.

¹ A dual distribution system is a familiar example where a manufacturer may have two distinct types of customers. In a typical dual distribution situation, the manufacturer sells directly to one group of consumers who are unlikely to resell the product (for example, final consumers through manufacturer-owned retail outlets), and to another group of buyers who are expected to resell the product (for example, other retailers who sell from their own outlets to final consumers). However, a dual distribution system is not necessary to support the hypothesis discussed here. All that is required is that there be consumer groups with different price elasticities of demand. The RPM is used to help prevent those consumers who have more elastic demand, and are charged lower prices, from diverting their purchases to the other consumers at prices which arbitrage the manufacturer's discriminatory prices.

To demonstrate that RPM is a part of a manufacturer's price-discrimination scheme, one must be able to show that there are two or more distinct and separable types of consumers with differing demand elasticities. Price discrimination would be bolstered as an explanation for the existence of RPM if additional restrictions on reselling and/or manufacturer efforts to police and discipline reselling also are present.¹ For example, a manufacturer could require dealers to agree to explicit contractual restrictions on reselling to certain classes of customers. These restrictions, also designed to prevent diversions, would augment any protection of the price-discriminating scheme afforded by RPM.²

Another form of economic discrimination exists when different customers who can be serviced only by incurring different levels of transactions costs are charged the same price. RPM can contribute to this type of discrimination because not all consumers will necessarily require the same amount of dealer selling effort to make a purchase, although with RPM all will pay the same price. In addition, RPM could be found together with other vertical restrictions with similar effects. For example, territorial restrictions coupled with RPM could facilitate this form of discrimination by inducing distributors to cultivate their territories intensively and possibly incur higher costs in selling to small or remote customers. The territorial restrictions are supposed to keep the various distributors from selling outside of their own selling areas and thereby taking a free ride on other dealers' selling efforts. Without RPM, even if all dealers stay

¹ See Ward S. Bowman, Jr., "The Prerequisites and Effects of Resale Price Maintenance," 22 University of Chicago Law Review, 825 (Summer 1955), for a discussion of General Electric Company's attempt to price-discriminate in the sale of light bulbs to industrial and domestic buyers which included an RPM program. Telser (op. cit.), however, found a manufacturers' cartel theory a more valid explanation for the use of RPM in this instance.

² R. Caves (op. cit.) discusses cases in which price discrimination involving the use of RPM to keep distributors and manufacturers from competing for sales to selected accounts may have been present, i.e., in the markets for mechanic's tools (Snap-On Tools Corp. v. FTC, 321 F.2d 825 [1963]), trucks, (White Motor v. U.S., 372 U.S. 253 [1963]), and drugs (U.S. v. Parke, Davis and Co., 362 U.S. 29 [1960]). Passenger automobiles could be another example, see L. J. White, The Automobile Industry Since 1945 (Harvard University Press, 1971).

within their designated selling areas, discounting by a dealer can still create free-rider problems for other dealers and the supplier if consumers are very mobile. RPM might complement the nonprice restraints by reducing customers' incentives to shop across territories for better prices. Thus, RPM and territorial restraints could be associated either with efficiently obtaining dealer selling effort or with discrimination.¹

The welfare consequences of systematic price discrimination are theoretically ambiguous. Depending upon the shapes of the demand curves of the separable consumer groups, price discrimination can either have no effect upon the quantity sold, decrease it, or increase it toward the competitive level.² Because it is difficult in practice to determine accurately the shapes of particular demand functions, it is difficult to be certain how price discrimination will affect quantity sold. However, for price discrimination to increase welfare it is necessary for the quantity sold to increase. If quantity sold increases sufficiently to increase total surplus, and if those discriminated against do not fully offset the gains in total surplus by expending a comparable amount of real resources attempting to avoid the discrimination, then price discrimination will increase welfare.³

(B) Relational Governance and Bilateral Monopoly

Contracts govern economic relations and facilitate market exchange, whereas factors which raise the costs of contracting inhibit market exchange. A commonly recognized impediment to contracting arises when economic agents with ongoing exchange relations can profitably engage in short run opportunistic

¹ See Caves (ibid.), at pp. 18-19, and 22, for a discussion of discrimination involving different selling costs not reflected in different prices.

² If demand curves are straight lines, price discrimination will not affect quantity sold. However, welfare as measured by total surplus will fall.

³ Equity issues are also raised by price discrimination, since some purchasers may pay higher (and some lower) prices compared to a nondiscriminatory single-price situation, but economists' standard welfare measures ignore equity issues. See F. M. Scherer, Industrial Market Structure and Economic Performance, 2nd edition (Chicago: Rand McNally, 1980), ch. II, for a general discussion of the welfare effects of price discrimination.

behavior at the expense of the other. There are numerous market solutions to opportunistic behavior ranging from nonintegrated impersonal spot-market transactions to full vertical integration where exchange is internalized.

However, some of the contractual devices which might be used to limit opportunism and reduce contracting costs are prohibited as per se violations of the law (RPM and tying), and others may be prohibited depending upon the circumstances (nonprice vertical restraints such as territorial restrictions, exclusive dealing, etc.). Although profit maximizing firms subject to a legal constraint prohibiting the use of particular contractual devices still will select the most privately efficient organizational form, because of the legal constraint the firms may adapt their contractual arrangements to accomplish the same objective legally, but at higher costs than otherwise would be the case. Unless the potentially increased costs of contracting caused by the legal constraint are offset by (at least) comparable benefits, the firms' adaptive choices will be socially inefficient.¹

Reducing the Incentives to Behave Opportunistically

There are a variety of ways in which vertical restraints including RPM can be bundled together contractually to harmonize the potentially divergent interests of upstream and downstream firms. Suppose, for example, that downstream dealers can effectively cultivate consumer goodwill for a supplier's product by aggressively promoting the brand to consumers. The supplier and the dealers potentially will be able to share an intangible asset, consumers' goodwill for the supplier's brand, which will derive

¹ For example, suppose that vertical integration is a more costly (imperfect) substitute for contractual integration involving RPM and nonprice restraints. If RPM is legally proscribed, the optimal decision for the firm may then be to integrate vertically. This decision will presumably be profit maximizing for the firm, but only because the legal constraint has raised the cost of integrating contractually. Unless the elevated contracting costs are offset by some other benefits, such as deterring the use of RPM to facilitate cartels or discrimination, the overall effects of the legal constraint will be detrimental. Unfortunately, we do not have any good empirical measures of the relative efficiencies or costs of the various possible combinations of vertical restraints.

its value from the investments of both, and which may yield quasi-rents over time to both.¹ However, the time horizons, discount rates, and the objective functions of the supplier and dealers could differ.² Even though discounting, for example, might not balance harm the supplier by disrupting the supplier's relations with other promoting dealers (as in free-rider situations), a dealer might nevertheless find it privately profitable to risk termination and slash prices on the supplier's brand as a short-run promotional device to draw consumer traffic and build goodwill for the dealer. Or, the supplier could behave opportunistically toward the promoting dealer(s) by allowing discounters to cut prices on the brand before the promoting-dealers have recouped their original investments in building goodwill for the brand.

RPM and non-price vertical restraints can be used to reduce the incentives for either supplier or dealer to behave opportunistically. By agreeing to enforce RPM, the supplier can assuage the dealers' fears that the supplier will allow discounters to free-ride upon dealer investments in building the brand's goodwill. Implicit or explicit supplier contractual commitments to protect dealer margins with RPM (perhaps bolstered

¹ For definitions of terms and a general discussion of contracting problems see B. Klein, R. G. Crawford, and A. Alchian, "Vertical Integration, Appropriable Quasi-Rents, and the Competitive Contracting Process," 21 Journal of Law and Economics, 297 (October 1978); B. Klein and K. B. Leffler, "The Role of Market Forces in Assuring Contractual Performance," 89 Journal of Political Economy, 615 (1981); and see R. E. Caves' (op. cit.) discussion at pp. 3-6 of the ongoing contractual nature of supplier-dealer relations, intangible assets and appropriable quasi-rents.

² For example, most retailers handle the products of many suppliers. A retailer's profits will depend upon the pricing and promotional policies for all its products. The optimal solution for a retailer will depend upon the jointness of demand for the various products offered, and on the jointness in the retailer's capacity to promote the products. Retailer efforts to promote the sales of one product could reduce the retailer's overall profits because of interdependencies with other products offered for sale. See R.E. Caves (op. cit.), at pp. 7-8, for a discussion of how jointness in consumer demand and retailer services can create some scope for supplier-dealer bargaining.

by provisions for markdown allowances) could be a means of making such supplier assurances credible.¹

The supplier will also want the dealers to make credible commitments not to behave opportunistically. The supplier might insist upon dealer acceptance of territorial restrictions and short termination notices. The territorial area provisions will insulate the dealers from intrabrand competition, and thus increase the dealers' incentive to promote the product. The supplier's ability to impose losses by terminating dealers, or altering their territories, serves to discourage opportunistic dealer behavior. Thus, vertical restraints including RPM can facilitate contracting by providing a means by which each contracting party can demonstrate its commitment to the other.²

There is currently no well developed theoretical literature which makes strong predictions of which restraints will be found bundled together for different products under varying economic circumstances. It seems quite reasonable to expect that there

¹ A markdown allowance is a device (common in the apparel industry) by which a supplier can guarantee vendors a particular resale margin, and could be a means to implement RPM. If the vendor has to cut price to sell a supplier's brand, the supplier will pay the vendor a markdown allowance (either directly with cash, or by credits on future purchases) so that the agreed upon resale margin will be realized. Such allowances can (among other things) be a means for suppliers and dealers to share risks on products with uncertain demand. They can also be useful in discouraging suppliers from allowing free-riding upon those dealer's that promote the brand. The markdown allowances reduce the supplier's incentive to sell to discounters (or not to enforce RPM) because any discounter-induced price competition with full-service dealers will cause payment of the allowances to increase. The markdown allowances thus help assure the dealers that the supplier's commitment to maintain resale margins is credible. Markdown allowances might also serve as a means of direct payment to dealers for services rendered. The markdown allowances, therefore, could be the equivalent of a performance-allowance alternative to RPM. A supplier who wants its product sold through both high and low service dealers could use markdown allowances to compensate the servicing dealers for the costs of their services, while allowing price competition among all the dealers. As long as the high service dealers are as efficient as the low service dealers in other respects, the allowances (like RPM) will eliminate any free-rider problems.

² For a general discussion of contracting problems related to opportunism or "hold-ups" see B. Klein, R. G. Crawford, and A. A. Alchian; and B. Klein and K. B. Leffler (op. cit.). For related discussions see Oliver E. Williamson, "Transaction Cost Economics: The Governance of Contractual Relations," 22 Journal of Law and Economics, 233 (October 1979); and B. Klein, "Transaction Cost Determinants of 'Unfair' Contractual Arrangements," 70 American Economic Review, 356 (May 1980).

will be many different bundles of restrictions found in practice, and that they will differ by product, by upstream and downstream market characteristics, by the relative bargaining skills of upstream and downstream firms, as well as by the idiosyncratic personalities of the bargaining parties. It is important, therefore, to recognize that in any particular case it is likely to be the bundle of restraints (and perhaps other contractual arrangements or devices) which represents the solution to a vertical "problem," and that the solution will reflect both economic and individual considerations. The legal distinction between price and nonprice vertical restrictions notwithstanding, the competitive effects of a bundle of vertical restrictions will not automatically be undesirable (from an efficiency perspective) merely because the bundle contains a price restraint.¹

Eliminating Successive Monopoly Markups in Bilateral Monopoly Situations

In bilateral monopoly situations the profit maximizing interests of suppliers and distributors can also diverge because of the "successive monopoly" nature of their relationship. When both supplier and dealer have the market power to raise price above marginal costs, they will fail to maximize joint profits if they individually attempt to charge monopoly prices, and a Pareto superior solution will exist.² To see this, consider that for any given consumer demand curve for a product, profits are maximized by equating the marginal costs of production and distribution with the marginal revenues associated with the consumers' demand

¹ Virtually all nonprice vertical restrictions have an indirect effect upon price. If the courts choose incorrectly to view the indirect price effect as the primary reason for the nonprice restraints, they could characterize these restraints as sham devices for achieving RPM. In the extreme, misclassification errors of this sort could have the effect of making all vertical restraints per se illegal, not because of demonstrable anticompetitive effects, but rather because of the choice of a particular label, thus compounding any efficiency losses attributable to the legal standard of per se illegality for explicit vertical price restraints.

² Pareto superior means that at least someone can be made better off without anyone being made worse off. Pareto optimal solutions are those where no one can be made better off without making someone worse off.

curve.¹ However, if the supplier's price to the dealers includes a markup over the marginal cost of production, the dealers will view the supplier's price as part of their marginal costs. If the dealers then equate the marginal revenue under the consumers' demand curve (which they face) with the dealers' marginal costs, joint profits from production and distribution will not be maximized because the dealers' marginal costs will exceed the marginal costs of production and distribution by the supplier's markup over marginal production costs.

The successive monopoly problem can be solved in several ways. One way is to allow the supplier to impose stipulated or maximum resale prices upon dealers just sufficient to cover marginal distribution costs.² Alternatively, the supplier could sell to the dealers at marginal production costs, and the dealers then could equate marginal production and distribution costs with marginal revenues under the consumers' demand curve, thus maximizing joint profits. Any additional profits gained by eliminating the successive monopoly markups, and moving to the joint profit maximizing price and output, can be shared by the supplier and dealers.

The actual distribution of the incremental profits is indeterminate, and will depend upon the relative bargaining power and skills of the upstream and downstream firms. Consequently, one should also expect to find some mechanism for distributing the incremental profits between the firms when the use of the restraints was motivated by bilateral monopoly, i.e., the

¹ It is assumed here that there are only production and distribution costs, and that the consumers' demand curve is fixed.

² Or the supplier could impose minimum sales quotas upon dealers to insure that resale prices do not rise above marginal distribution costs.

restraints might be bundled and might include an extraction or distribution mechanism.¹

Welfare Implications

If one makes normal assumptions about the shapes of demand and cost curves, vertical restraints which either contribute to eliminating successive monopoly markups, or which reduce contracting costs, will result in an increase in total surplus, and thus an increase in this common welfare standard.² This is true even under circumstances where, because of vertical restraints, the supplier and dealers jointly create rents or profits by shifting the demand curve out while simultaneously making it less elastic.³ Although joint profits and (perhaps) price will increase, consumer surplus and total surplus (and, therefore, welfare) also will increase.⁴

¹ For example, suppose a supplier with market power sells at marginal cost to distributors who in turn charge consumers the profit maximizing price and collect the profits. The supplier will insist on some type of sharing arrangements which will leave the supplier at least as well off as it would be otherwise. Devices which could be used to share the profits include lump-sum fees to become a distributor, requirements that the distributors purchase certain inputs from the supplier, per unit royalties paid to the supplier, etc. The fact that RPM could be among such a bundle of vertical restraints also raises the question of how the bundle will be viewed legally. If RPM exists with other vertical restraints, narrowly focusing upon RPM is unlikely to lead to a clear understanding of the purpose of the restraints or their net effects. See Caves' (op. cit.) discussion of the interdependence of various vertical restraints in achieving particular objectives, especially pp. 21-23 and 28-31.

² For a discussion of consumer surplus and total surplus measures of welfare see, Robert D. Willig, "Consumer's Surplus Without Apology," 66 American Economic Review, 589 (September 1976); and A.C. Harberger, "Three Basic Postulates for Applied Welfare Economics: An Interpretive Essay," 9 Journal of Economic Literature, 785 (September 1971).

³ If interbrand competition is strong, the extent to which a brand's price can be elevated over the prices of competitive brands will tend to be constrained to the value that consumers place upon the brand's perceived unique qualities. The higher product price which might accompany the vertical restraints will reflect both compensation for the provision of promotional services, and superiority rents if a product is perceived by consumers to be better than competitive brands. With effective interbrand competition there are no true monopoly profits.

⁴ For an interesting recent theoretical treatment of RPM which considers the welfare effects of RPM in a world of imperfect information see, G. F. Mathewson and R. A. Winter, "The Incentives for Resale Price Maintenance Under Imperfect Information," XXI(3) Economic Inquiry, 337 (July 1983).

Some economists do not agree with these welfare conclusions. W. S. Comanor¹ (discussing territorial restraints) has written that vertical restraints can be anticompetitive because, although they can be utilized to obtain effective dealer selling efforts, the selling efforts contribute to "excess" product differentiation and product differentiation barriers to entry, and thus ultimately to worsened industry performance. B. S. Yamey² (discussing RPM) has argued a similar point. These authors apparently view some of the effects of vertical-restraint-induced selling efforts, i.e., increased "market power" due to enhanced and possibly less elastic demand, not as an incidental byproduct of successful demand enhancement, but rather as something to be weighed against it.³ The welfare criteria used to support these anticompetitive conclusions about the differentiating effects of vertical restraints are not clearly specified. Rather, the supporting bases appear to be mostly assertion.⁴

If, however, dealer provided information induced by vertical restraints misinforms or confuses consumers, then the welfare consequences of effective dealer promotion are not necessarily beneficial. Or if dealer promotion alters tastes in "socially

¹ William S. Comanor, "Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath," 81 Harvard Law Review (1968).

² B. S. Yamey (op. cit.); also see the exchange between Professors Yamey and J. R. Gould and Professor Robert H. Bork in the Yale Law Journal, volumes 76 and 77 (1967 and 1968).

³ See O. E. Williamson, "Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transactions Cost Approach," 127 University of Pennsylvania Law Review, 933 (1979) for a discussion of possible efficiency and market power tradeoffs.

⁴ As mentioned earlier, unless one hypothesizes unusual demand and cost curves, most promotion which effectively shifts out demand will result in an increase in total surplus, and thus an increase in this commonly used welfare measure even if price-cost margins also increase. The authors cited above do not specify their welfare criteria, so one cannot tell whether the authors had in mind commonly used or idiosyncratic welfare measures. Others have also argued that vertical restraints, and RPM in particular, can be anticompetitive, at least in part because the restraints do induce effective selling efforts. See, Peter M. Gerhart, "The 'Competitive Advantages' Explanation for Intrabrand Restraints," Duke Law Journal, 417 (June 1981); and St. John Barrett, "Restrictive Distribution and the Assault of the 'Free Riders,'" Journal of Corporation Law, 467 (Spring 1982). These authors also fail to specify the welfare criteria which they have used.

undesirable" ways, then the benefits of effective dealer selling efforts could be illusory. These possibilities, however, are also concerned with the social implications of promotion in general. There is no logical reason why selling efforts procured through restrictive distribution or with RPM should be any more likely than other types of selling efforts, such as manufacturers' advertising, to misinform or confuse consumers, or to twist their values in undesirable ways. Although there is as yet no satisfactory resolution of the economic debate over the effects of advertising, neither is there any solid theoretical or empirical basis for singling out advertising or promotional efforts obtained with RPM (or any other vertical restraint) as unique justifying per se prohibition under the antitrust laws.¹

A more traditional antitrust concern, however, could be raised. Successful contractual integration, like effective formal vertical integration, might make it necessary for subsequent entrants to enter at two vertical stages rather than one, or to time entry to coincide with simultaneous entry of others at a different vertical level. This could raise the capital costs of entry. Elevated capital cost requirements will tend to reduce the number of potential entrants, perhaps making each less willing to risk a larger sum on the chance of entry, and might increase the time required to enter a market successfully. However, elevated capital cost requirements are not usually considered entry barriers by economists because they generally do not create asymmetries between incumbent firms and potential entrants.

A word of caution

If the bundled vertical restraints can be shown to produce an outcome which is considered undesirable, the next question to address is the existence of an appropriate remedy. It may not

¹ There is substantial disagreement among economists concerning advertisements' effects and whether advertising contributes to raising barriers to entry. For an overview of the issues see, Industrial Concentration: The New Learning, ed. by H. J. Goldschmid, H. M. Mann, and J. F. Weston (Little, Brown and Co., 1974) especially chapter 3, "Advertising as an Impediment to Competition." For a more recent survey, see, W. S. Comanor and T. A. Wilson, "The Effect of Advertising on Competition: A Survey," XVII Journal of Economic Literature, June 1979.

always be possible to alter the vertical relations through intervention so that a more desirable or more competitive outcome will result. Changing one or more elements of the vertical arrangements may not affect the underlying market power, but may shift the relative bargaining power between upstream and downstream firms merely resulting in a redistribution of profits or rents between them. Or the firms may adapt by substituting advertising or formal vertical integration.¹ Because RPM is per se illegal and nonprice restraints are not, the obvious temptation to avoid difficult analytical questions (such as discovering an effective remedy) by isolating RPM for per se condemnation, or viewing the entire bundle of restraints as automatically ancillary to RPM and, therefore, illegal per se should be resisted.

¹ The necessary and sufficient conditions for various combinations of vertical restrictions to produce particular effects have not been thoroughly developed in the economic literature. Until this is done, it is not possible to be certain exactly how individual restraints contribute to a particular outcome when they interact with a number of other restraints. See the related discussion in Caves (op. cit.).

IV. EFFICIENCY OR PROCOMPETITIVE EXPLANATIONS FOR VERTICAL PRICE RESTRAINTS*

(A) Outlets or Availability

Under certain circumstances manufacturers may have incentives to impose RPM when the total demand for their product is positively related to the density of retail distribution. RPM is not imposed under the outlets hypothesis to encourage dealers to compete through the provision of "services." Rather, these circumstances or conditions all relate to instances where manufacturers have more to gain from obtaining additional outlets through RPM-induced subsidization of relatively high cost retailers than they have to lose through any demand-reducing effects of higher prices associated with the protected resale margins.¹

* There is an economic literature which is concerned with what is generally referred to as the theory of second best. This literature suggests that where not all markets are perfectly competitive (perhaps because of patents, or natural monopolies), it is not possible to be unambiguously certain that making any one market more competitive will improve social welfare. Thus, in theory it is possible that social welfare can be improved by making some markets less competitive or less efficient. Examples from this literature include S. C. Salop, "Second-Best Policies in Imperfect Competition: How Improved Information May Lower Welfare," CAB Working Paper 124, January 1978; A. Michael Spence, "Product Differentiation and Welfare," 66(2) American Economic Review, 407 (May 1976); R. G. Lipsey and K. Lancaster, "The General Theory of Second Best," 24(1) Review of Economic Studies, 11 (1956); F. M. Scherer, Industrial Market Structure and Economic Performance, 2nd edition (New York: Rand McNally, 1980), pp. 24-29; A. Abbott, "Paradox Regained--A 'New Economic Approach' to Vertical Restraints Policy," 48 George Washington University Law Review, 565 (1980). The actual relevance of the theory of second best for antitrust policy is quite unclear and is mentioned here primarily for completeness of coverage. Just as in theory it cannot be unambiguously proven that the free market produces a maximum of social welfare in a second-best world, neither is it possible to prove that intervention on such a theory will necessarily yield the desired results. The theory of second best appears to be a poor guide either as a case selection device or as an argument supporting either per se legality or illegality.

¹ This discussion derives in large part from a model discussed in detail in J. R. Gould and L. E. Preston, "Resale Price Maintenance and Retail Outlets," Economica, 302 (August 1965). Several conditions have been added to their basic model which seemed necessary to demonstrate its practical applicability to the major issue in the RPM debate, i.e., the conflict between traditional resellers and discounters who have lower costs and usually operate with different technologies. This situation is emphasized. However, if there are scale effects at the reseller level, and all resellers are equally efficient, then only condition two is really necessary for RPM to be advantageous to a supplier for availability or density reasons.

The first necessary condition requires that there be at least two types of retail outlets with different levels of costs. If all retailers were equally efficient, they would attach uniform markups in a competitive equilibrium¹, and the use of RPM to specify a minimum price would be unnecessary. That is, if all retailers have the same level of costs, none will need to be protected by a manufacturer imposed price floor.²

Second, availability in a wide variety of retail outlets must be more effective at enhancing product demand for the manufacturer (shifting the demand schedule outward) than are lower prices with no restraints on distribution margins. Otherwise, the manufacturer would prefer to sell only through the most efficient retailers and RPM would be undesirable for availability reasons.

Third, there must be both consumers who primarily patronize only one type of retailer as well as price-sensitive consumers who patronize more than one type of retail outlet. If there were no overlap of consumers, each retailer would effectively face a distinct market demand curve and there would be no need for RPM. If there were complete overlap of consumers, all retailers would face the same demand curve, and items presumably would be purchased where the price is lowest, and RPM would not be needed.³

If the foregoing three conditions exist, then the manufacturer may want to protect the higher cost retailers' margins by imposing RPM. This could be sensible if higher cost retailers would lose enough sales volume without RPM due to price competition with other retailers to cause them to drop the product from their shelves. The higher cost retailers would lose sales to those overlapping price-sensitive consumers who shop for the

1 This abstracts from locational advantages which could cause retail margins to differ.

2 The possibility that some retailers can free-ride upon other equally efficient retailers by cutting corners, i.e., shirking, is ignored.

3 If the product is typically purchased on pure impulse, variations in retail prices (within some range) would not matter, and RPM would be unnecessary.

lowest price. The total sales to the nonoverlapping consumers, who tend not to "shop", may be insufficient for the higher cost retailers to justify continuing to carry the product. If the product is dropped, the manufacturer will then lose sales to those consumers who patronize the higher cost retailers and do not shop other retail outlets. Thus, because many consumers will not shop for a lower price, selling only through the lower cost retailers may not maximize demand for the manufacturer.

RPM is one way for the manufacturer to avoid the problem described above by guaranteeing minimum retail margins in order to purchase shelf space in higher cost retail outlets. However, RPM will allow lower cost retailers more than they minimally require to stock the product. Thus the manufacturer must calculate the tradeoffs between the higher retail margins and the wider availability. Presumably an astute manufacturer will impose RPM only when on balance the gains from wider distribution more than offset the effects of the higher margins and (possibly) higher consumer prices.

Since under this hypothesis RPM increases reseller margins at the same time it increases demand, the net effect on consumer prices will depend upon cost differences between or among retailers, scale effects at the manufacturer level, and upon how increased availability affects the elasticity of demand for the product. On the one hand the higher reseller margins will tend to raise final product price. How large a margin must be allowed through RPM to insure distribution through higher cost outlets will depend upon the degree to which these outlets suffer a relative cost disadvantage. The larger their cost disadvantage, the larger the protected margin must be.

On the other hand, however, the increase in demand in response to additional outlets might allow the manufacturer to realize cost savings associated with economies of scale. This will tend to reduce final consumer prices. As the demand schedule

shifts outward, the elasticity of demand also could be altered.¹ The net effect on price of imposing RPM will depend upon the interaction of the changes induced in the elasticity of demand, scale effects at the manufacturer level, and the magnitude of the resale margin necessary to protect higher cost retailers. If scale effects at the manufacturer level outweigh the effects of the RPM-enhanced resale margins and any price increasing effect associated with altered demand elasticity, the net effect of RPM would be lower consumer prices.²

Even a higher price would not necessarily mean that consumer welfare is reduced, however. If interbrand competition is vigorous, substitutes will be available to consumers, and the manufacturer's ability to raise (either invoice or resale) prices will be constrained. Thus, if the interbrand product market is reasonably competitive, consumers are unlikely to be harmed by RPM imposed for availability reasons, even if it should result in a higher price for a particular brand. Those consumers who would have purchased the brand at the lower price (without RPM) will be forced with RPM to pay a higher price or to purchase a substitute brand. But, because the effect of RPM under this hypothesis is to increase the quantity of the brand sold, consumers as a group cannot be said to be worse off even though the RPM will have caused the product's price to rise. Of course, if the net effect of RPM is to reduce the final price to consumers, even if the manufacturer possesses significant market power, consumers will clearly benefit from the imposition of RPM.

Even in instances where the manufacturer possesses significant market power, and the effect of RPM is to raise final consumer prices, the net effect of the RPM under the outlets

¹ Because, under this hypothesis, RPM is imposed to obtain distribution in higher cost retail outlets where some price-insensitive consumers shop, it might be expected that the demand schedule would become less elastic over some range of prices.

² The scale effect at the manufacturer level which could result in lower consumer prices is an explicit feature of the Gould-Preston model. This effect would seem to be applicable to all other models of RPM as well, but it is not an explicit feature of any of them.

hypothesis is to increase the quantity sold. This is not the output restricting behavior typically associated with the exercise of monopoly power. No well-developed basis now exists for a policy concern with RPM (under this hypothesis) grounded in terms of economic efficiency.¹

(B) Special Services

Perhaps the most widely recognized efficiency justification for RPM is that manufacturers impose price restraints upon their resellers to insure the provision of special services.² Where the demand for a product can be enhanced by the provision of services offered by dealers in conjunction with the physical product, and where it is not possible or practical to charge separately for the services, an RPM program may be the most efficient way to encourage the dealers to provide the desirable services.

Resellers who provide services to consumers, and who incur the costs associated with the provision of such services, can in certain circumstances be taken advantage of by other resellers who provide no services, incur fewer costs, and are therefore able to offer the product for sale at a lower price. Without some mechanism to prevent this occurrence, resellers will have little incentive to continue to provide the desired level of services because they may be unable to recoup the costs incurred in providing them. In effect, others may be able to take a "free ride" at their expense. This could cause the unfettered market to underprovide valuable services or not to provide them at all. In such circumstances manufacturers may want to impose restraints such as RPM which have the effect of eliminating the opportunity

¹ This assumes that the concerns related to "excess" product differentiation and capital cost barriers discussed in Section III are not yet well developed. Of course, if nonefficiency goals are considered important, then it is possible to consider RPM objectionable even though the net effect may be to increase the quantity sold. On this point see R. Lande (op. cit.).

² The best known version of this hypothesis is probably Lester G. Telser, "Why Should Manufacturers Want Fair Trade?," III Journal of Law and Economics, 86 (October 1960). Earlier analyses which contain similar reasoning include T. H. Silcock, "Some Problems of Price Maintenance," 48 Economic Journal, 42 (1938), and Professor F. W. Taussig, "Price Maintenance," 4 American Economic Review, Supplement, 170 (1916).

to free ride, thereby encouraging resellers to provide services which both manufacturer and consumers value.

With RPM, resellers are in effect guaranteed a minimum margin over the price they pay the manufacturer. Consumers will no longer be able to shop in one store where services are provided and purchase in another which provides no services and offers lower prices. The resellers, unable to compete on the basis of price, are offered an attractive minimum resale margin as an incentive for them to attempt to expand their sales of the product. Their efforts to compete for extra sales will now be limited to various forms of nonprice competition referred to as services. These sales efforts or services should be forthcoming as long as the resulting sales are sufficient to cover the selling costs incurred.

The manufacturer, because he is interested in maximizing his own profits, should set the reseller's margin at a level which is just sufficient to encourage them to provide the desired level of services. Too low a margin calls forth too few services and the manufacturer will sell less of his product than is optimal from his perspective. Too high a margin will produce redundant services, allow the resellers to profit at the manufacturer's expense, or unduly restrict retail consumption of the affected product(s). Self-interested manufacturers and competition among resellers through the provision of services can thus produce a market equilibrium in which consumers get the product together with the optimal level and mix of services provided in the most efficient manner.¹

Under the special services hypothesis the manufacturer imposes the RPM program to eliminate a potential market failure, i.e., the potential "free ride" at the retail level, and relies upon competitive market forces at the retail level to channel competition into the provision of services which benefit the

¹ This assumes that resellers are more efficient at providing consumers information about a product than alternative information sources, and that resellers do not deceive consumers.

manufacturer and consumer.¹ In such circumstances the price restraints are desirable because they enhance competition in an imperfect market.

For what type of products would this hypothesis seem to be most plausible? The most important element of the story is that the product in question can best be marketed with a service that is most efficiently provided by the resellers. This . . . "service [must] be specific to the commodity and unrelated to the retailers' methods of generally doing business."² Further, it must be inefficient or impractical to charge separately for the service.³ Finally, without some form of price restraint the opportunity to free ride must cause the underprovision of the service.⁴ Therefore, to determine if a particular instance of RPM

¹ Consumers who do not value the service, and who cannot substitute a competitive brand offered with a different mix of services, will pay for something which they might prefer to forego. However, because of the opportunity to "free ride," without some restraints services would tend to be underprovided regardless of the intensity of some consumers' demand for them. As the empirical review in Section VI will show, empirical support for the free-rider on special services hypothesis currently is rather meager. This appears to be due at least in part to poorly specified tests used in many of the older studies, and more importantly to the standard of per se illegality which has required exceedingly thin factual records to be developed during litigation or retained.

² Telser (op. cit.) was quite specific on this point. See p. 89.

³ It may be hard to charge separately for services because consumers cannot accurately gauge how valuable the services are to them before the service is provided. In addition, once the service has been provided, consumers have very obvious incentives to understate how valuable those (already consumed) services were.

⁴ The most important point in the free-rider hypothesis is that there are valuable services which can be consumed for free in one store while the product can be purchased at a lower price in another store which provides fewer services. Thus, the granting of credit or the provision of return privileges are not easily subject to a free ride. In contrast, point-of-sale demonstrations and the provision of technical advice by knowledgeable salespersons could be consumed without charge in one store while the product could be purchased at another store. Post-sale repair services will not ordinarily be subject to a free ride because they are difficult to consume without paying for the services. However, it is possible for free-rider problems to exist where post-sale repairs are sold with two-part pricing in which a repair-service fee is bundled together with the initial sales price so that consumers can be charged lower prices for subsequent repair services than would otherwise be possible. Consumers in effect will be able to "self-insure" against future repair costs by paying part of the cost of repairs "up front" at the time of purchase. This could be the most effective way for a supplier to
(footnote continued)

could be explained by the "special services" hypothesis, it is necessary to determine if the essential elements needed to support the hypothesis have any factual basis.

A useful starting place is to ask under what circumstances a product might need to be offered for sale in conjunction with services. One circumstance is in the case of new products with which consumers are unfamiliar or complex products which need point-of-sale demonstrations. Another circumstance is where products require proper handling by resellers to insure safety or preserve the product's quality attributes. If a plausible case can be made for the necessity of selling the physical good together with the dealer service, the next question is whether a potential free-rider situation exists. If the analysis of the factual record reveals a plausible free-rider explanation with respect to the provision of services; if, in addition, the free-rider problem seems important enough to be of concern to the manufacturer; and there is no evidence of collusion or other market failures at the supplier or dealer level, then the effect

(footnote continues)

sell its product if consumers are uncertain about the amount of repair services they will need and are risk averse. Consumers then may generally prefer to pay for the product and some "repair insurance" simultaneously. Without some mechanism to prevent free riding such as RPM, some dealers might cut corners and free-ride by underproviding repair services and offering lower initial purchase prices to consumers. Subsequently, dealers providing good repair services could be overloaded with repair work. At their customary prices for repairs, these dealers may not be able to fully cover the cost of providing the repairs. Or, the dealers could give priority to their "regular" customers forcing others to queue up for repair services. Either of these outcomes could create a problem for manufacturers of products for which post-sale dealer repair services are important to consumers, where a substantial fraction of consumers prefer to "insure" against future repair costs, and where due to consumer mobility a servicing dealer network is needed. RPM is one way to solve such problems.

of the RPM is likely to be procompetitive.¹ This result would be especially likely if the analysis reveals a considerable number of substitutable products and a variety of marketing methods offered by competitors.

However, the services which are induced by the restrained price competition could also be observed if the RPM had been imposed in response to pressure from a retailers' cartel. Collusive retailers might be unable to stop entry at their level, or they might compete away the attractive resale margin by offering services, some of which might have free-rider aspects. The question then becomes whether these observed services are optimal for either the manufacturer or consumer. Manufacturers who succumb to pressure from a dealer cartel are not adopting a course of action which they unilaterally consider to be in their own best interest. Determining where the decision to impose the restraints actually originated should help shed light upon whether or not the services are considered optimal by the manufacturer.

It is important to emphasize, however, that evidence of influence by retailer organizations on a manufacturer's decision to employ vertical restraints does not automatically translate into proof of a retailers' cartel. Retailers individually or through their trade groups may initially discover a legitimate free-rider problem and bring it to the attention of the manufacturer. The manufacturer could then impose RPM (or other vertical restraints) to avert the free-rider problem. The manufacturer would not necessarily be conceding to cartel coercion but could be acting in his own self interest. Superficially, however,

¹ It is also possible, of course, that the services could be procured from resellers in some other way without using RPM. For example, the manufacturer may be able to offer those resellers providing services a functional allowance which fully compensates them for the costs incurred in providing the services. This would eliminate the free-rider problem for the full-service resellers, and may be a legally "less restrictive" alternative for the manufacturer. However, it may also be more costly to monitor and police the functional allowance alternative than it is to monitor and police RPM. Presumably, if both options can effectively deal with the free-rider problem, the manufacturer will select the method which is the most cost effective. The potential problems of implementing allowances instead of RPM, and why manufacturers might prefer RPM are discussed in Telser (op. cit.).

this chain of events would resemble the circumstances described under the retailer collusion hypothesis. Therefore, it may be quite wrong to conclude that collusion exists merely because there is evidence that retailers had some influence upon the manufacturer's decision to employ RPM.

Additional evidence is required to discriminate between the collusion hypothesis and the free-rider hypothesis. In particular, the manufacturer's explanation should be especially helpful in distinguishing between these alternatives.¹ Further, if there is vigorous upstream interbrand competition, the reseller collusion hypothesis will be unlikely to apply unless the collusive dealers have obtained RPM on enough products to account for a substantial portion of the relevant product market. Although suppliers with little or no market power are likely to be more vulnerable to dealer coercion than are suppliers of brands with substantial market shares, the dealers would have little incentive to collusively obtain RPM on individual brands for which consumers have readily available substitution possibilities.

If the free-rider-services explanation seems compelling, and there is no evidence of reseller collusion, or other important market failures, intervention proscribing RPM may produce unintended harmful results.² If RPM is banned, the supplier's competitive viability could be adversely affected since the services which enhanced the demand for the product--and increased sales at the expense of competitive products--will be unlikely to

¹ See the analysis of the retailer collusion hypothesis in Section II for a discussion of the evidence required to support that explanation for RPM.

² Even if the free-rider story is found plausible, it is often argued that less restrictive alternatives exist which are legally less offensive. This point will be discussed more fully below. Examples where such alternatives are offered can be found in R. Pitofsky, "The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions," 78(1) Columbia Law Review, 1 (January 1978); and "The Coca-Cola Co. et al" in 91 Federal Trade Commission Decisions, 517; see especially pp. 589-679.

continue to be provided.¹ Or, the supplier may seek an alternative way to procure dealer services which is less offensive legally--serving the same purpose in a "less restrictive" way--but which may also be less efficient, requiring more resources. Such adaptive moves may result in a new equilibrium where the effects of the dealer services on competition are unchanged, but in which an element of technical inefficiency has been introduced as an unintended result of the remedy. Such consequences are undesirable, and their possibility should be given consideration in the

¹ This raises the complication that competition through RPM-induced services could result in a type of prisoners' dilemma. Consider a situation in which a manufacturer imposes RPM to encourage retailers to push his product more aggressively by making point-of-sale recommendations. This is done independently and purely as a competitive move to gain extra sales at the expense of competitive brands. Suppose the other manufacturers then react with competitive countermoves and also impose RPM to encourage similar point-of-sale promotion by retailers. If there are few manufacturers and their brands tend to be sold in the same retail outlets, the RPM-induced sales efforts could be self-canceling. Clearly the retailers will not be able to effectively recommend every brand in the product market as the "best" brand, nor will they have financial incentives to push particular brands if they all have similar RPM-protected margins. As a result of the reactions of competitors, the demand-enhancing benefits expected by each manufacturer may not be forthcoming. Neither the manufacturers nor consumers will necessarily benefit under such circumstances. Yet, unilateral removal of RPM by any one manufacturer may not be desirable either because it could result in retailers dropping the affected brand, or in adverse point-of-sale comments by resellers who will earn more on sales of competing brands with maintained prices. Thus, the manufacturers may be faced with a prisoners' dilemma. The benefits expected from the RPM have been nullified by others' competitive reactions, and yet unilateral attempts to return to the original situation could be counterproductive.

Superficially the prisoners' dilemma could appear very similar to what might be observed under the manufacturer or retailer collusion hypotheses, i.e., all or most competitive brands sold with manufacturer initiated RPM, perhaps with no obvious demand-enhancing services being provided to offset the higher consumer prices. However, in the prisoners' dilemma situation the retailers would receive higher than competitive margins, whereas they would not in the manufacturers' collusion hypothesis. Furthermore, the manufacturers should be able to help distinguish between the retailers cartel and the prisoners' dilemma explanations. Nevertheless, intervention under either prisoners' dilemma or cartel hypotheses could offer efficiency benefits. If a prisoners' dilemma equilibrium actually exists, by simultaneously attacking the RPM programs of all manufacturers, a new equilibrium could result in which consumer prices are lowered without adverse effects on individual manufacturers. Ultimately, the credibility of a prisoners' dilemma story depends upon whether or not there are other retailers willing to sell the product with a lower markup, and/or whether other options are available to the suppliers to somehow break out of the dilemma without being harmed.

decisionmaking process of where and how to attack particular instances of RPM.

(C) Generalized Free-Rider Effects (Quality "Signaling")

The concept of a free-rider problem as a justification for the imposition of vertical price restrictions is not limited to the case of presale services. Plausible situations having nothing to do with presale services in which there is the potential to free ride at another's expense also may exist.

Free-rider possibilities may exist in a number of situations in which consumers, confronted with imperfect information, face positive costs of searching for a product with the characteristics they desire. In such circumstances, consumers who value their time may use rules-of-thumb to identify the product expected to have the characteristics they desire. Consumers may believe, or may have learned by experience, that availability in certain stores or at a certain price level, for example, are highly correlated with other valuable but hard-to-observe-or-measure variables, such as product quality. In such cases, it may be very reasonable for consumers to use the observable variables as "signals" of those things which they cannot observe but which they consider to be important.¹ In contrast to the special services hypothesis, the quality signaling hypotheses is related to retailers' general methods of doing business.

The way in which such "signals" may be related to potential free-rider justifications for RPM requires some elaboration. The concept of a perfectly competitive market, where each firm acts as though its demand curve were perfectly elastic and sells all it can produce of a homogeneous product at a market-determined price, does not generally apply to most real-world markets.

Most manufacturers compete in differentiated product markets, and, in addition, most resellers are not perfectly substitutable

¹ A. Michael Spence "Job Market Signaling" 87 Quarterly Journal of Economics, 355 (August 1973), discusses signals in the context of labor markets. The analysis can be applied to situations other than labor markets where signals can be used to efficiently convey relevant information. Phillip Nelson, "Advertising as Information," 82 Journal of Political Economy (July/ August 1974) suggests that advertising can act as a signal of value.

from the manufacturer's point of view. The resellers may be differentiated because they have chosen different physical layouts, selling methods, credit terms, refund policies, repair facilities, because they have created different shopping environments, or have attempted to distinguish themselves from their competitors in a number of other ways. In differentiating themselves, resellers will develop certain reputations or images among consumers. In doing so they will incur costs. Incurring these costs and devoting resources to the cultivation of a particular image is a form of investment in an intangible asset--goodwill.

If consumers learn through experience that resellers with particular images provide them with the mix of goods and services which correspond well with their preferences, then a market equilibrium can exist in which resellers with different images coexist to serve diverse consumer tastes. Consumers may then efficiently utilize their perceptions of a store's image as a "signal" which effectively allows them to minimize their search time. To the extent that cultivating a high-quality image requires resources (i.e., costs are incurred), resellers with images of higher quality can be expected to require higher markups over the manufacturer's price relative to resellers with lower quality images.

The manufacturer may rely on RPM under these circumstances because having products available in the type of reseller outlets which present consumers with a correct signal of the products' quality and relative value may be an efficient way of stimulating demand for the products.¹ Consumers will benefit because the availability of the products in certain outlets will enable them to reduce their uncertainty, or the time they would otherwise have to spend searching for their desired products. The higher prices which the RPM program produces will not necessarily exceed the

¹ Other forms of vertical control, for example selective distribution, may also accomplish the same objectives for the manufacturer. If these options have been rejected by a manufacturer in favor of RPM, and no cartels, corporate mistakes, or other market failures can be identified, RPM presumably accomplishes the desired objectives most efficiently.

value to consumers of their reduced uncertainty and search costs.¹

Without RPM (or other vertical restraints), by contrast, a free-rider problem might emerge. Quality signaling by resellers will only occur to the degree that they can be remunerated for their investments. Without RPM, however, consumers can shop to observe which products are carried in "high quality" department store A (which has invested resources in cultivating an image of offering high-quality merchandise), and, believing that availability in store A insures high quality, they can then go to discounting store B and purchase identical products for a lower price.

In such circumstances an unstable situation very likely exists. Consumers will have utilized the "signal" provided by availability in store A, but because they purchase the products from store B, store A will be unable to earn a return on the investment in creating the signal. Store B will be free-riding on the investment made by store A. Since store A will notice that it is not selling a particular product at the rate it had expected, it may decide to drop the product and offer a substitute instead,² thus leaving the manufacturer with distribution only through lower quality store B. This in turn may leave the manufacturer with insufficient demand for his product to earn a normal return and cause him to exit from the market.

¹ Different stores may signal different levels of "value" for manufacturers and consumers. The manufacturer's use of RPM will typically involve setting a price floor below which others cannot resell. The manufacturer then has to determine a minimum price which is sufficient to obtain distribution in outlets he considers to be capable of conveying at least a minimal amount of useful information to consumers.

² It is not necessary for store A to know why it is not selling the product as expected, although it might very well be aware that discounters are selling the same product for lower prices. All that is required is that B's activities have an effect on A's sales and that A be aware that the product is not moving as expected. Store A can be acting independently and communication between A and B or the manufacturer is not a necessary part of the story. On the other hand, if this story accurately describes what is in fact happening in the market, communication between A and B or the manufacturer does not necessarily negate the efficiency benefits of RPM.

Alternatively, the manufacturer may be inclined to debase the quality of his product so that the lower costs associated with the debased quality allow a normal return at the reduced level of demand. It may also happen that the product, once dropped by store A, will no longer be desired by store B either, assuming B's interest in the product was predicated on the opportunity to free ride on store A. In this case the manufacturer will have lost all of his distribution, and both the manufacturer and consumers who valued the product will be harmed.

The inability to be fully compensated for the investments in a high-quality image which acts as a signal may also cause fewer resources to flow into such investments.¹ Under the quality-signaling hypothesis the reduced investments in quality signals will result in a decline in resale prices that will be offset by an increase in consumer search costs and uncertainty, and/or the possibility that product quality will be debased. An RPM program may be an effective way to avoid this free-rider potential by guaranteeing resellers a margin sufficient to compensate them for their investment in the quality signal.²

¹ This possibility would seem most plausible if the free-rider problem extends over a substantial portion of the total product line available in high-quality stores. By contrast, limited to some small portion of total sales, it seems more realistic to expect those products which are associated with free riding at the store's expense simply to be dropped from the shelves. By extension, intervention under the mistakes hypothesis (discussed previously) could also lead to the product being dropped by the high-quality outlets. However, it is not inevitable that the product will be discontinued by high-quality stores if the mistakes hypothesis applies. If the product is so well known and popular that consumers will regularly ask for it and the store can reduce selling costs on the product, or if the store had previously earned supracompetitive margins on the item, it may not be dropped. Regardless of the dealers response, if the manufacturer were in fact mistaken, he would be better off subsequent to removal of RPM. However, if intervention were premised upon the mistakes hypothesis, and the manufacturer were not mistaken, the manufacturer and consumers would be harmed as high quality outlets either drop the product or respond in other ways.

² Restrictive distribution is also a possible way to correct a free-rider on a quality signal problem. However, restrictive distribution may not be sufficient if there are at least some mobile price sensitive consumers that will search, and/or not all dealers have the same level of costs. RPM could bolster restrictive distribution in such circumstances, or perhaps substitute for it.

It is important to emphasize that the signal that certain outlets provide is the subject of the free ride. If, for example, some consumers merely like shopping in stores with thick rugs and glamorous salespersons, that in itself does not present a free-ride potential. The stores catering to those consumers will incur more costs and charge higher prices, but there is no need for RPM, because stores offering different amenities will be selling a different product/ambience bundle to consumers who have various intensities of demand for these other amenities sold in conjunction with the physical product. However, if the "thick rugs and glamorous salespersons" act as a signal, then the potential for a free ride as previously described can exist.¹

To what types of products might the quality signal variation of the free-rider hypothesis be applicable? The central feature of the theory is that product quality cannot be evaluated easily--hence the need to rely upon signals. This implies that products whose quality can be evaluated prior to purchase (for example, by visual inspection), frequently purchased items for which experience can be relied upon as a guide to expected quality, or highly differentiated products which have been on the market for a substantial amount of time--implying in all cases a diminished need for a signal of quality--are unlikely candidates for application of this hypothesis.

Fashion items seem to be plausible candidates, even though current fashion content often can be evaluated by visual inspection. If certain stores are believed by consumers to have a comparative advantage in following fashion trends, availability in these outlets can "showcase" a suppliers product and may signal

¹ As a practical matter, however, defendants in RPM cases will almost always be able to point to some reseller service which could be subject to a free ride conceptually (for example, although virtually all apparel resellers have dressing rooms, even dressing rooms offer the chance to insure fit, while purchases can be made elsewhere), and they can almost always allege a quality image problem which may be very difficult to prove or disprove. Therefore, in practice, assessing the validity of free-rider explanations for RPM (both services and other types) will involve determining whether those effects which seem plausible are significant, and whether other concerns exist which might outweigh the free-rider problem.

consumers that these products are indeed fashionable or "in." If consumers can shop in these stores, utilize the signal, and purchase elsewhere from a discounter, a free-rider potential exists.

Although it seems very likely that the signal hypothesis could apply in a number of instances, identifying the characteristics of products where signaling is important, or the store traits which inhere in products carried by those stores, requires knowledge of how consumers come to associate certain observable attributes as signals of quality, how those perceptions may change over time with informational feedback, and other issues concerning how consumer preferences are structured and how they can be influenced. Rather than attempting to offer a list of characteristics which might be used to identify such products, it seems more reasonable to admit that this is an area in which our knowledge is quite limited, and to suggest that when a particular instance of RPM is observed, the possibility of free-rider problems connected with quality signals be seriously considered.¹

Summary

We have now summarized eight economic theories of RPM and a number of associated variations. Three of these theories concerned anticompetitive or welfare diminishing effects of RPM (supplier or dealer collusion, and mistakes), two produced ambiguous welfare effects (price discrimination and bilateral monopoly), and three explained RPM as a procompetitive practice

¹ This analysis of informative signals to consumers is quite similar to an analysis of advertising which suggests that advertising can act as a signal of value; see Phillip Nelson (op. cit.). How realistic either theory is depends upon particular circumstances and upon the dynamics of consumer learning. One example that may illustrate the complexity of this issue concerns snob appeal. High prices might signal quality, but they might also be valued in their own right because of the perceived status associated with a branded item known to be expensive. Disentangling these two effects may prove quite difficult in practice. However, in the snob appeal case it is not obvious why RPM would be necessary because the manufacturer could insure high prices without RPM. For recent examples where the quality signal might have been plausible, see Victor P. Goldberg, "Resale Price Maintenance and the Federal Trade Commission: The Magnavox Investigation" 23 William and Mary Law Review, 439 (1982); and V. P. Goldberg "Enforcing RPM: The FTC Investigation of Lenox" 81 American Business Law Journal, 225 (1980). In Lenox, the signal issue might have applied, though cartel behavior could not be ruled out on the basis of available evidence. These cases are discussed in the empirical review in section VI.

(outlets, special services, and quality signaling). In Section V we will review recent FTC cases which have involved RPM. Then in Section VI, we will review the remainder of the existing empirical evidence on RPM. Although much of the empirical evidence is not very useful for discriminating among hypotheses or assessing the welfare effects of RPM, the available evidence does indicate that a single view of RPM cannot explain many uses of the practice.

V. FTC RESALE PRICE MAINTENANCE CASES: 1965-1982

Because there are both procompetitive and anticompetitive economic theories explaining the use of RPM, determining the net effects of the practice (in general or in particular instances) is essentially an empirical question. Because the FTC has actively enforced the legal sanctions against RPM, FTC case files were consulted to determine whether available data were sufficient to make possible an ex post assessment of the most plausible explanation for the use of RPM in individual situations, or in general, and of the subsequent effects of Commission intervention.

The FTC resolved 68 RPM cases from July 11, 1965 through December of 1982 either by a consent agreement or by a Commission decision.¹ Legal records indicate that 56 of these 68 cases (82.4 percent) were resolved by consent agreements.² Thirty-seven of these sixty-eight matters were finalized prior to repeal of the federal fair-trade laws in December 1975.³ Of these 37 cases, 29 (78.4 percent) were settled by simultaneous complaints and consent agreements, 8 were docketed and resulted in Commission orders or settlements. Of the 31 cases settled or decided by the Commission from January 1976 through December 1982, 27 (87.1 percent) were settled by simultaneous complaints and consent agreements. Only

¹ These cases were identified by searching through various volumes of Federal Trade Commission Decisions and CCH. This list was cross-referenced with the computerized legal records of the Commission's Management Information System (MIS). RPM cases resolved between July 11, 1965 and December 31, 1982 are included in this sample regardless of when the cases were initiated. Cases initiated during this interval which had not been resolved by December 31, 1982 are omitted. This time interval was selected arbitrarily, but is assumed to be long enough to allow some assessment of Commission intervention in RPM matters.

² That is, 56 cases were recorded in legal records with a case number preceeded by C, indicating that the consent agreement and the complaint were entered at the same time. The remaining 12 cases were docketed matters with the case number preceeded by D. A number of the matters designated as D resulted in the respondents settling and ultimately signing consent agreements. The other docketed matters resulted in litigated orders. The Commission's order in Russell Stover Candies, Inc. (D-9140) was recently reversed by the Eighth Circuit Court of Appeals.

³ The Consumer Goods Pricing Act of 1975, a bill repealing the Miller-Tydings and McGuire Acts, was signed in December of 1975. Ninety days later manufacturers attempting to enforce RPM on goods moving in interstate commerce risked violating federal antitrust laws.

four cases were docketed, and they resulted in settlements or Commission orders. Therefore, as might have been expected, following the repeal of the federal fair-trade statutes there was an increase in the relative number of RPM cases settled by consent agreements without litigation.

As can be seen from Table V-11, which contains considerable information on each case and is attached at the end of this section, there has been substantial year to year variation in the number of RPM cases resolved by the FTC both before and after the repeal of the federal fair-trade laws in December 1975. From mid-1965 through 1975 an average of 3.5 RPM cases were resolved each year, although the actual numbers vary from zero in 1967 and 1969 to eight in 1971. From 1976 through 1982 an average of 4.4 RPM cases were resolved annually, but they range from ten in 1979 to one in 1981. While the number of RPM cases resolved each year increased on average following repeal, because of the year to year variation one can identify different combinations of years before and after repeal of the federal fair-trade laws (e.g., 1, 2, 3, 6) in which the average number of cases resolved per year prior to repeal exceeds the average post-repeal.

It is probably more significant, however, to note that a substantial proportion of the Commission's RPM cases are clustered around the date of repeal. It is well known that the legal structure supporting fair trade had started to crumble at the state level prior to the repeal of the federal enabling statutes. Many of the state fair-trade laws had been repealed or held unconstitutional prior to December 1975.¹ As the number of states with valid fair-trade laws declined, more RPM violations might be expected because firms which had legally benefitted from fair trade could be expected to attempt to continue protecting resale

¹ As of May 12, 1975, 17 states and the District of Columbia had no valid fair trade law, 26 states had valid fair trade laws, but only 10 of these had valid non-signers clauses. Eight additional state laws repealing fair trade became effective between May and December of 1975 or within 90 days of adjournment of the state legislature.

margins in some way other than state sanctioned fair-trade contracts.

Similarly, following repeal of the federal fair-trade laws there might be an expected increase in RPM violations as some firms could be expected to substitute illegal alternatives to fair-trade contracts to protect resale margins. The time pattern of FTC cases seems to be roughly consistent with this expectation. Over 55 percent of the Commission's RPM complaints since 1965 were resolved during the seven year period from 1973, three years prior to repeal, through 1979, a period accounting for only 40 percent of the total of our sample years.

If we are to use information about actual FTC cases to describe RPM in general, we must assume that FTC cases are representative of the whole population of RPM practices. There is no way of knowing with certainty whether or not this is true. Furthermore, the preponderance of consents in FTC RPM cases confounds interpreting the available information. Because the law with respect to RPM is clear, there is some reason to suspect that the sample of FTC cases may be biased.

Whether a firm was detected by the FTC with a vigorously enforced RPM program, or a rarely enforced (or even nonexistent) RPM program, the incentives to sign a consent agreement could very well be the same. For example, firms which either had actively enforced an RPM program in states without state fair-trade statutes or in any state without fair-trade contracts prior to 1976, or on goods sold in interstate commerce after March 1976, would clearly have been in violation of the law.¹ If detected, by entering into a consent they could avoid the costs of litigation including the risk of private suits subsequent to a litigated FTC order. However, firms which were thought to have had an RPM program, but in fact had none, would also have incentives to sign a consent agreement. They would lose nothing (or very little) by agreeing to discontinue a practice which they had never (or

¹ This assumes that attempting to defend RPM on the basis of the "Colgate Doctrine" would be unsuccessful.

rarely) used, and they too could avoid the expenses of litigating the issue.¹

The increase in the relative number of RPM cases settled by consents after 1975 implies that this feature of potential sample bias might have changed. But because the incentives to litigate RPM cases after 1975 might also have changed, for both the FTC and respondents, we cannot be certain whether this aspect of possible sample bias increased or decreased. Therefore, because the case records generally contain only limited information concerning the scope of particular RPM programs and the extent to which they were enforced, it is difficult to support any definitive conclusions concerning the welfare effects of RPM, or of Commission intervention from such a sample.

Nevertheless, the review of available data from the 68 case files makes possible some tentative assessments. First, the information generated and retained for this sample of RPM cases is, in most instances, inadequate to determine rigorously whether the associated economic conditions correspond best with pro-competitive or anticompetitive hypotheses about the use of RPM.²

¹ Obviously, there must have been some evidence of at least the appearance of an RPM program, or these instances would not likely have come to the attention of the Commission. However, the standards of proof required to demonstrate the existence of actionable RPM can vary with enforcement philosophies. For example, under a very aggressive enforcement philosophy any act or practice which might conceivably facilitate stabilizing resale prices, such as suggested resale prices, might be viewed as RPM if there is any evidence of price stability in the product line in any retail market area. Under a different enforcement philosophy, evidence of resale price stability across all resale market areas with little or no variance of prices might be required before an RPM allegation could be sustained. To assess the effects of RPM it is important to know the extent to which RPM was enforced, but it is not always possible to make this determination from the case files. This sample of FTC cases spans 17.5 years and appears to include RPM complaints supported by quite different levels of relevant factual evidence.

² This is perhaps understandable given the per se illegality of RPM, at least since 1975. Gathering relevant economic data which might allow an assessment of the effects of RPM in a particular case has not been relevant from a purely legal perspective. This is unfortunate, however, because it makes it extremely difficult to empirically evaluate the effects of RPM or of Commission intervention in RPM cases from readily available information. However, several more recent FTC cases have been subjected to rather extensive economic analysis by outside economic consultants under contract to the Commission. The results of these impact evaluations are presented in Section VI.

Second, information on the size of firms, which usually is produced in the course of investigations, and other information on structural market conditions, in many cases cannot be readily reconciled with anticompetitive or welfare diminishing uses of RPM.

(A) Information Frequently Not Available

Some of the most basic economic variables, which theory suggests are relevant to discriminating among various hypotheses of the causes and effects of RPM, frequently are not available in the case records. A few examples will illustrate the information problem. A major indicator of the successful exercise of market power is profitability.¹ Yet, in less than 25 percent of the RPM matters is relatively uncontaminated profit data available either in the case file or from public sources.²

The pricing practices of rival firms in an industry can help in interpreting the use of RPM by an individual firm. This is particularly true in the most theoretically plausible cases in which RPM can result in anticompetitive effects, i.e., where its use facilitates collusion at the manufacturer or reseller level. But in over half of the files (41) there is no description of the RPM practices of competitors. The 27 cases where information is available on other firms' RPM practices are, for the most part, cases that were brought simultaneously against several firms in the same industry.

Information on a firm's advertising expenditures may help determine the extent to which its product is differentiated through the manufacturer's efforts rather than through the (potentially free-ridable) promotional efforts or goodwill of

¹ See F. M. Fisher and J. J. McGowan, "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 American Economic Review, 82 (March 1983). They discuss various reasons why accounting profit data may say nothing about economic profits.

² There are only 13 cases with series (of variable length) of profit data without overwhelming contamination, i.e., without major sales areas not covered by the complaint. This is accounting profitability data not adjusted for bias. The relevance of profits for distinguishing between efficiency and anticompetitive explanations of RPM is discussed in Section II.

distributors. Yet, advertising data are not available in most of the files, nor are they publicly available in many instances. Advertising data were found for at least one year in only 34 cases. Only 21 of these cases involved firms with annual advertising expenditures in excess of \$25,000.

An alternative way of examining the procompetitive or anti-competitive effects of RPM would be to make an ex post analysis of the effect of intervention proscribing the use of the practice. Put most simply, if RPM had been used in a procompetitive manner, for instance to facilitate entry or to encourage the demand-enhancing provision of information or services for customers, then preventing RPM should have resulted in a contraction of the firm's output, or (possibly) in an elevation of product price if a less efficient substitute for RPM subsequently had been employed. By contrast, if RPM had been used in an anticompetitive fashion to restrict output and elevate prices, then preventing RPM should have resulted in expanded output. Unfortunately, for the most part these alternative hypotheses must also remain untested. None of the settlements or decisions provided for submission of such data as part of the compliance process subsequent to dismantling the firms' RPM systems. Public data are generally too aggregated to be of much use in such a tabulation. In only 17 cases are time series of sales data available without overwhelming contamination due to inclusion of sales of products not covered by the complaint.¹

(B) Size of Firms

One piece of information which is fairly consistently supplied in the case files is at least one observation of annual

¹ The output test suggested above also requires that things which could affect sales other than the removal of RPM be held constant. The 17 time series which are available are often not extensive, and the data necessary to hold other factors constant is also generally not contained in the case records. See the discussion of the FTC case impact evaluations in the empirical review in Section VI below for a discussion of recent efforts to analyze various FTC vertical cases from case files and other public information sources.

sales, typically at the time of settlement.¹ The anticompetitive hypotheses for RPM can be given the greatest credence when the firm engaging in RPM has significant prospects of possessing and exercising monopoly power, or when the market structure suggests that effective collusion at either the manufacturer or reseller level (which RPM might facilitate) is a significant possibility.

As Table V-1 below demonstrates, many of the FTC's RPM cases have involved firms that are quite small. Furthermore, because these sales figures sometimes include sales of products whose resale prices were not maintained, to some extent they actually overstate the size of the firm relevant to an analysis of RPM. If one makes the usual assumption that market power is generally associated with having a prominent market position, then the assertion that many of these cases have improved competition at the manufacturing level is probably dependent upon the relevant markets being very small, or upon the existence of collusion among dealers.

Table V-1 indicates that over 52 percent of the FTC's RPM cases for which sales data exist have involved firms with annual sales (usually) at the time of settlement of \$25 million or less. Over 67 percent of the cases have involved firms with annual sales of \$50 million or less, and over 81 percent have involved firms with annual sales of \$100 million or less. One comparison which might help put this information in some perspective is to contrast the firm sizes from our sample to the large U.S. firms listed in the 1979 Fortune Double 500 Directory. To make the comparison meaningful it was necessary to convert all the sales figures to 1978 constant dollars. Table V-2 presents the size distribution of firms involved in FTC RPM cases on this constant dollar basis.

¹ Of the 68 cases reviewed, it was possible to determine the size of firm based on annual sales at the time of settlement in 65 cases. The FTC records themselves contained at least one observation on annual sales in 63 cases. In the other two cases firm size was obtained from public reference sources. However, there is some ambiguity in the data due to the fact that the sample includes multiproduct firms, and in some cases firm size may overstate the sales of product line(s) sold subject to RPM. The records do not always make it clear exactly which product lines were involved.

Table V-1

Size of Firms Involved in FTC
RPM Cases: 1965 to 1982

Annual Sales* (\$ millions)	Number of Cases	Percentage**	Cumulative Percentage
0-10	19	29.2	29.2
11-25	15	23.1	52.3
26-50	10	15.4	67.7
51-100	9	13.8	81.5
101-250	5	7.7	89.2
251-1,000+	7	10.8	100.0
Not available	3	--	
Total	68	100.0	

* Based upon sales, typically, at the time of settlement.

** Based upon the 65 cases for which sales data are available.

Table V-2

Size of Firms Involved in FTC
RPM Case 1965 - 1982
Based Upon Sales in Constant Dollars*

Annual Sales (\$millions)	Number of Cases	Percentage**	Cumulative Percentage
0-10	14	21.5	21.5
11-25	13	20.0	41.5
26-50	13	20.0	61.5
51-100	10	15.4	76.9
101-250	7	10.8	87.7
251-1,000+	8	12.3	100.0
Not available	3	--	
Total	68	100.0	

* Sales figures were converted to 1978 constant dollars using the Producer Price Index for total consumer goods, Table B-55, Economic Report of the President (January, 1981).

** Based upon the 65 cases for which sales data are available.

The firm listed by Fortune as the 500th largest in 1978, Data General of Westboro, Mass., had 1978 sales of \$379,948,000. Only 8 of the 65 cases, or approximately 12 percent, have involved firms which would have made the Fortune 500 Directory in 1978. The firm listed by Fortune as the 1,000th largest industrial corporation in 1978, Virginia Chemicals of Portsmouth, Va., had annual sales of \$110,358,000. Only 14 of the 65 cases, or approximately 22 percent, have involved firms that would have made the 1978 Fortune list of the 1,000 largest industrials.

Table V-1 and V-2 suggest that the Commission's cases have involved relatively small businesses, but this does not appear to be out of proportion to the relative presence of small business in the economy as a whole. Table V-3 sheds some light on this point when compared to Table V-2. Whereas firms with no more than \$10 million of sales (in 1978 dollars) accounted for 21.5 percent of all FTC cases, 95.3 percent of all manufacturing corporations reported total 1978 returns of less than \$10 million. Thus, while the Commission's RPM cases have been skewed toward smaller firms, they have not been disproportionately concentrated upon small businesses relative to the number of small businesses within the overall economy. Nevertheless, the substantial percentage of FTC RPM cases involving relatively small firms does suggest that, unless the relevant economic markets are also very small, the market power on the supplier side necessary to sustain economic hypotheses of competitive harm from RPM might not have been present in many of these cases.

(C) Structure of Markets

To distinguish among economic explanations of RPM it is also desirable to consider the structural characteristics of the markets in which the price-maintained products are sold. One cannot determine the likelihood of effective collusion at the supplier or dealer level without structural information on the relevant product and geographic market(s). Because reliable data on the structure of economically relevant markets typically are not available in the case files, we have instead grouped the firms' products into four- and five-digit S.I.C. industries based upon a

Table V-3

Size Distribution of Active Manufacturing
Corporations Based Upon 1978 Corporate Income
Tax Returns*

Total Returns (\$ millions)	Percent	Cumulative** Percentage
0-10	95.3	95.3
11-50	3.6	98.9
51-100	0.5	99.4
101-250	0.3	99.7
251-1,000+	0.3	100.0

* Source: 1978-1979 Statistics of Income, Corporate Income Tax Returns, Table 1.7.

** The distributions for all industries and for wholesale and retail trade are even more skewed than the distribution for manufacturing. Corporations with total returns of \$10 million or less accounted for over 98 percent of all corporations and over 97 percent of wholesale and retail corporations.

combination of information from the case files and other public reference sources.¹ These S.I.C. industries and product classes offer the only sources of structural information by which the product "markets" in which the price-maintained products compete can be compared on any consistent basis.²

Table V-4 shows the percentage distribution of the four and eight-firm concentration ratios of the various four-digit S.I.C. product markets into which the price-maintained products were classified. Almost 59 percent of these markets had four-firm concentration ratios of 40 percent or less. Over one half had eight-firm concentration ratios of 50 percent or less. Only 21 percent of these markets had four-firm concentration in excess of 50 percent, and only 22.7 percent had eight firm concentration ratios in excess of 70 percent.

¹ The case files, Dunn and Bradstreet, and the Census of Manufacturers were used to place the products into various S.I.C. industries.

² In most cases the four-digit S.I.C. industries are probably too broad to qualify as well defined relevant product markets, and the five-digit product classes are frequently too narrow. Thus, actual market concentration could differ from concentration in the "markets" as defined by the Census.

Table V-4

Percentage Distribution of Four-Digit S.I.C. Industries
Involved in All FTC RPM Cases 1965-1982 by
Concentration Ratios*

Concentration Ratio Range (Percent)	Percentage of Total Census Industry Classifications**			
	Based Upon Top Four Firms		Based Upon Top Eight Firms	
	(%)	(Cumulative %)	(%)	(Cumulative %)
1-10	5.4	5.4	0.8	0.8
11-20	22.5	27.9	14.8	15.6
21-30	17.8	45.7	16.4	32.0
31-40	13.2	58.9	12.5	44.5
41-50	20.2	79.1	6.3	50.8
51-60	9.3	88.4	20.3	71.1
61-70	7.0	95.4	6.3	77.4
71-80	3.1	98.5	15.6	93.0
81-90	1.6	100.1	5.5	98.5
91-100	--		1.6	100.1
Total***	100.1		100.1	

* Concentration from census year nearest date of consent or decision.

** From the Commission's RPM cases it was possible to classify the various price maintained products into a total of 129 four-digit S.I.C. manufacturing industries. There were, however, only 68 distinct four-digit S.I.C. industries, as different cases often involved products grouped in the same S.I.C. industry. The percentages in the table are based upon the 129 total classifications, except for the eight-firm percentages which are based upon 128, as one value was withheld to avoid disclosure. Concentration ratios are on an establishment basis.

*** Totals do not add to 100 due to rounding.

Table V-5 shows the distribution of concentration ratios for the five-digit S.I.C. product classes. With these more narrowly defined markets, the distribution is slightly less skewed toward unconcentrated structures than were the four-digit S.I.C. markets. Still over 51 percent of the five-digit product classes had four-firm concentration of 40 percent or less, and over 41 percent had eight-firm concentration of 50 percent or less. Only 24.4 percent of these narrowly defined product markets had four-firm concentration in excess of 50 percent, and only 25.2 percent had eight-firm concentration in excess of 70 percent.

Table V-5

Percentage Distribution of Five-Digit S.I.C. Product
Classes Involved in FTC RPM Cases 1965-1982 by
Concentration Ratios*

Concentration Ratio Range (Percent)	Percentage of Total Census Industry Classifications*			
	Based Upon Top Four Firms		Based Upon Top Eight Firms	
	(%)	(Cumulative %)	(%)	(Cumulative %)
1-10	2.8	2.8	1.6	1.6
11-20	14.5	17.3	2.4	4.0
21-30	17.3	34.6	14.4	18.4
31-40	16.9	51.5	11.2	29.6
41-50	24.1	75.6	11.6	41.2
51-60	8.8	84.4	17.6	58.8
61-70	5.6	90.0	16.0	74.8
71-80	5.2	95.2	9.2	84.0
81-90	4.4	99.6	10.4	94.4
91-100	0.4	100.0	5.6	100.0
Total	100.0		100.0	

* Concentration from census year nearest date of consent or decision.

** The various price-maintained products involved in FTC RPM cases were classified into a total of 253 five-digit S.I.C. product classes. There were, however, only 142 separate product classes because some products from different cases were grouped into the same product class. The denominators for the reported percentages are 249 for four-firm concentration, and 250 for eight-firm concentration, as several numbers were not reported by the Census for disclosure and other reasons.

Table V-6 presents a distribution of the concentration ratios based upon still another measure of market structure: adjusted concentration ratios for 1972. In this table 1972 concentration levels are adjusted to bring the S.I.C. markets into closer conformity with economically relevant markets. This distribution is a somewhat closer approximation to the distribution in Table V-4 than Table V-5. When viewed from any of these three different structural perspectives, the same basic pattern seems to exist. A substantial portion of the Commission's RPM enforcement efforts have been concentrated in markets which appear to be structurally competitive.

To put this structural information into some perspective, the S.I.C. markets which have involved products sold with RPM were compared to all the S.I.C. markets in the manufacturing sector. Tables V-7 and V-8 present unadjusted and adjusted distributions,

Table V-6

Percentage Distribution of Four-Digit S.I.C. Industries
Involved in FTC RPM Cases 1965-1982* by
1972 Adjusted Concentration Ratios

Concentration Ratio Range (Percent)	Percentage of Total Industry Classifications Based Upon Top Four Firms	
	(%)	Cumulative (%)
1-10	4.7	4.7
11-20	26.6	31.3
21-30	14.1	45.4
31-40	14.1	59.4
41-50	21.9	81.4
51-60	7.8	89.2
61-70	6.2	95.4
71-80	3.1	98.5
81-90	1.6	100.1
91-100	--	
Total**	100.1	

* Source: L. W. Weiss and G. Pascoe, Adjusted Concentration Ratios in Manufacturing - 1972. Census data for four-digit product shipments were adjusted for foreign trade, noncompeting subproducts, geographic markets other than national, and inter-industry competition more closely to approximate economically relevant markets. Of the 68 separate Census S.I.C.'s into which the FTC RPM products were grouped, 64 had corrected concentration ratios for 1972, the other 4 industries had been redefined and no 1972 data are available. Therefore, the percentages above are based upon the 64. Concentration ratios used here are on a product shipments basis.

** Does not total to 100 due to rounding.

Table V-7

Distribution of 450 Four-Digit Manufacturing Industries in
1972 by Four-Firm Sales Concentration Ranges*

Four-Firm Concentration Ratio Range	Percentage of all Industries	Cumulative Percentage
0-19	19.3	19.3
20-39	37.3	56.6
40-59	26.2	82.8
60-79	12.2	95.0
80-100	4.9	99.9

* Source: F. M. Scherer, Industrial Market Structure and Economic Performance, 2nd ed., Table 3.6, p. 68.

Table V-8

Distribution of 448 1972 Four-Digit Manufacturing
Industries by Four-Firm Adjusted Concentration Ratios *

Four-Firm Concentration Ratio Range (Percent)	Percentage of all Industries	Cumulative Percentage
1-10	3.8	3.8
11-20	14.5	18.3
21-30	20.3	38.6
31-40	20.3	58.9
41-50	17.0	75.9
51-60	8.9	84.8
61-70	8.0	92.8
71-80	4.2	97.0
81-90	2.9	99.9
91-100	0.0	
Total**	99.9	

* Source: L. W. Weiss and G. Pascoe, Adjusted Concentration Ratios in Manufacturing - 1972. The census data were adjusted for foreign trade, noncompeting subproducts within an industry classification, geographic markets other than national, and inter-industry competition more closely to approximate economically relevant markets. The adjustments were made to four-digit product shipments data.

** Does not equal 100 due to rounding.

respectively, of all four-digit S.I.C. manufacturing industries by 1972 four-firm concentration ratios. Both of these distributions are quite similar to the distributions of the four-digit S.I.C. markets which have been involved in the Commission's RPM cases.

The similarity of the distributions of the markets involved in the FTC's RPM cases and the distributions for all manufacturing S.I.C.'s is consistent with the hypothesis that the FTC's RPM enforcement efforts reflect a random case selection process. In contrast, a case selection process targeted to those circumstances which economic theory suggests are most likely to be associated with potentially detrimental effects of RPM would display more cases in concentrated industries.

(D) A Comparison With Markets from the Fair-Trade Era

Unfortunately, we do not know the universe of current uses of RPM either in terms of product or market characteristics, and because of the illegality of the practice we are unlikely to be

able to discover it easily. There is, however, one comparison which can shed at least some light upon the questions of whether or not our sample of FTC RPM cases is representative of the universe of current uses of RPM, and whether the enforcement efforts have been essentially random. In 1956 a committee of the U.S. Senate conducted a voluntary survey of firms known or believed to be using fair-trade contracts to achieve RPM. This survey undoubtedly suffers from response bias, as do most voluntary surveys. However, it is the only relatively current study which attempted to determine the scope of fair-trade activities comprehensively. The survey returns were analyzed by E. S. Herman, and from his work some further analysis was possible.¹

Herman's classifications of fair-traded goods identified in the survey returns were used to group the products into various four-digit S.I.C. industries using the S.I.C. classifications appropriate to the 1954 Census of Manufactures. The S.I.C. markets in which fair-traded products were sold were then compared structurally with all 1954 four-digit S.I.C. markets in U.S. manufacturing, as shown in Table V-9. The distributions are very similar. It appears as though the markets in which products were sold with RPM contracts in the mid-1950's, when such contracts were legal, structurally were distributed in much the same way as were market structures in manufacturing generally. This is exactly the same result we obtained when making similar comparisons of markets based upon recent FTC RPM cases.

¹ E. S. Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bulletin, 583 (1959). Unfortunately, the original survey questionnaires have since been destroyed by the Senate Select Committee that conducted the survey.

Table V-9

Distribution of Four-digit S.I.C. Industries
by 1954 Four-firm Concentration Ratios

Concentration Ratio Range (Percent)	Percentage of Total Census Industry Classifications*			
	All Manufacturing (%)	S.I.C.'s (Cumulative %)	Industries with Fair Trade* (%)	(Cumulative %)
1-10	5.9	5.9	5.9	5.9
11-20	22.0	27.9	24.2	30.1
21-30	16.4	44.3	16.0	46.1
31-40	15.0	59.3	14.0	60.1
41-50	13.3	72.6	12.2	72.3
51-60	7.5	80.1	10.5	82.8
61-70	7.3	87.4	9.1	91.9
71-80	4.2	91.6	3.8	95.7
81-90	3.7	95.3	1.2	96.9
91-100	4.7	100.0	3.0	99.9**

* Source for the fair-trade industries is E.S. Herman, "A Statistical Note on Fair Trade", 4 Antitrust Bulletin, 583 (1959).

** Does not total to 100 due to rounding.

Before turning to the dealers' side of the markets, a final suppliers' side structural view of the FTC RPM cases is presented in Table V-10. This table shows a joint distribution of market concentration and firm size. From this it is apparent that a good deal of the RPM reflected in FTC cases has occurred among small firms selling in markets that are structurally competitive.¹ Twenty one of the 64 cases which could be charted in Table V-10 involve firms selling \$50 million or less annually (in 1978 dollars) in markets with four-firm concentration of 50 percent or less. This is approximately one third of the FTC's RPM cases. However, 8 of these cases were associated with industry-wide

¹ Small as used here means annual revenues of \$50 million or less. Structurally competitive is defined as four-firm concentration of 50 percent or less. It is unlikely that changing these definitions somewhat will affect the general validity of the limited conclusions drawn here.

investigations in which the smaller firms could have been discovered using RPM during an investigation into a larger firm's activities. Even if these are eliminated, over 20 percent of the cases fall into the small firm competitively-structured market category.

Table V-10

Joint Distribution of Four-firm Concentration and Firm Size

Concentration Ratio Range	Annual Revenues, \$ Millions							
	1-10	10-25	25-50	50-100	100-250	250-500	500-1000	1000 +
91-100				1				
81-90	1	1	2		4		1	
71-80		1	1 ^d					1
61-70	5 ^a	1	1		1		3	
51-60	1 ^b	2 ^e	2 ^{c,d}	1	1 ^c	2 ^e		1 ^e
41-50	2	3 ^b	3 ^{c,d}	3 ^{d,e}	2			
31-40	2 ^{b,c}	2 ^c	2 ^c	1 ^d				
21-30	3	1 ^b		1 ^d				
11-20		1		1				
0-10		1	1	1				

* Concentration is by five-digit S.I.C. product class from the census year nearest settlement or decision. For firms with products sold in more than a single product class, the product class with the highest concentration ratio was chosen. Revenues are (1978 constant dollar) for firms as reflected in Table 11. There are 64 total entries. Four cases did not have both values available.

^a Three of these five cases resulted from the hearing aids investigation.

^b One case from each of these cells (total of four) resulted from the ski industry investigation.

^c One case from each of these cells (total of six) resulted from the "stereo" industry investigation. JBL is not included among these six.

^d One case from each of these cells (total of six) resulted from the investigation of the customers of the Advertising Checking Bureau.

^e One case from each of these cells (total of four) resulted from the women's apparel investigation.

(E) Dealer Concentration

Numerical information concerning the structure of resale distribution systems exists in 47 of the 68 RPM cases. In only 4 of these 47 cases (8.5 percent) were there fewer than 100 resellers at either the wholesale or retail level. There were only four more cases with fewer than 200 resellers at either level of distribution. Thus, of the 47 cases with data on the number of distributors, over 80 percent involved in excess of 200 dealers. Widespread dealer collusion involving more than 100 (or 200) decision makers seems unlikely to be effective or persistent in the absence of restrictions on entry such as licensing requirements or some mechanism for overt coordination such as an active trade association.

It seems reasonable to conclude that for the majority of these (47) cases the use of RPM was not likely motivated by collusive dealers who had successfully coerced their suppliers into using RPM to facilitate a widespread dealers' cartel. Dealer collusion or monopsony could, of course, exist locally. Whether local dealer collusion (or monopsony) could explain particular instances of RPM cannot presently be determined from the general information in the case files.

(F) Summary and Conclusions

In the 1950's as well as in more recent FTC cases well over half of the observed RPM has taken place in markets in which the top four sellers account for 40 percent or less of total sales (see Tables V-4 and V-9). We also know (see Tables V-1 and V-2) that a substantial proportion of the FTC's RPM cases have involved relatively small firms. This was also true of firms using fair-trade contracts in the 1950's.¹

We do not know whether contemporary uses of RPM are distributed across markets exactly as they were in the 1950's, and we do not know exactly how the changed legal status of the practice

¹ Herman (op. cit.), p. 588. The median-sized manufacturer in Herman's study sold fair-traded merchandise valued at \$2 million in 1954. This would be about \$4 million in 1978 constant dollars

the structural "snapshot" from the 1950's, comparing fair-trade markets to all manufacturing markets, combined with our finding that recent FTC RPM cases have involved markets which structurally are distributed in about the same way as are all manufacturing markets, suggests that the FTC case sample may provide a fairly reasonable basis for drawing some limited general conclusions.

First, relatively small firms selling in structurally competitive markets will often find RPM advantageous. Unless there is collusion among manufacturers or their dealers, these instances of RPM are not likely to be associated with the conditions which economic theory suggests are necessary for RPM to be welfare-diminishing.

Second, RPM is likely to be utilized in all types of markets in terms of structure. It is unlikely that there is effective manufacturer collusion featuring RPM in all or even most of these markets. Third, available information also suggests that the use of RPM is unrelated to widespread dealer collusion in most instances.

Fourth, the similarity between the market structure distributions from the fair-trade classifications and all manufacturing, and the FTC RPM cases and all manufacturing is consistent with the view that the FTC has probably done a good job of locating and prosecuting RPM where it exists, apparently by employing a case selection mechanism which randomizes enforcement efforts across markets. This in turn is consistent with the strict enforcement of a rigid standard of per se illegality.

Fifth, if, however, the enforcement goal had been to enforce the per se standard in a manner more consistent with anticompetitive economic theories of RPM, then the Commission's overall

¹ However, we do know that the types of products sold with RPM have changed somewhat over time. In the 1950's, RPM was most prevalent among suppliers of drugs and related products, cosmetics, hardware, tobacco, alcoholic beverages, and electrical appliances. The most prevalent uses of RPM among the FTC cases reviewed here involve suppliers of clothing, cosmetics, electrical appliances and stereo equipment, and sporting goods. See, Herman (op. cit.), and Table 11 below.

performance is more ambiguous. Economic theory suggests RPM is most likely to be detrimental to consumers in circumstances that require market power and/or collusion. Had economic criteria been employed to select RPM cases, either there would be better evidence suggesting the likelihood of effective dealer collusion, or the market structure distributions from the cases would most likely be skewed toward oligopolistic market structures instead of relatively unconcentrated markets.

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line (s)**
Paillard, Inc. C-914 (7-11-65)	Photographic equipment and supplies	19.0 (10-1965)	N/A
Freeman-Toor Corp. C-1007 (10-25-65)	Shoes and shoe accessories (including laces, polish, rubbers, trees, and house slippers)	57.1 (30-1965)	N/A
Armstrong Cork Co. C-1010 (11-3-65)	Linoleum, linoleum tile, asphalt tile, rubber tile, and related floor covering products	654.4 (342-1963)	23% of asphalt floor tile sales in 1962
Powernail Co., et. al. C-1028 (1-7-66)	Power nailing equipment and nails (cleats)	N/A	N/A
Ovation Cosmetic, Inc. C-1056 (4-8-66)	Cosmetics and toiletries	2.9 (1.5-1965)	N/A
Lenox, Inc. D-8718 (4-9-68)	Fine china dinnerware, giftware (vases, ashtrays, bowls, etc.), artware	17.8 (9.3-1963)	Largest seller of fine china dinnerware in the U.S.
Head Ski Co., Inc. C-1323 (4-19-68)	Skis, ski accessories, ski clothing	16.9 (9-1966)	N/A
Vanity Fair Mills, Inc. C-1390 (7-25-68)	Women's lingerie and foundation garments	98.9 (52-1965)	N/A
Donahue Sales Corp. C-1713 (3-25-70)	"Talon products" of packaged zippers, spooled thread, tape and braid	86.4 (48-1968)	N/A
James B. Lansing Sound, Inc. C-1785 (8-24-70) (modified 5-20-81)	High fidelity loudspeaker equipment	8.2 (4.8-1970)	No more than 7% of U.S. sales in a loudspeaker market

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio		
Restrictions on advertising and transshipping	Over 2000 franchised dealers	3861 (63)	499	63	76	
N/A	Over 100 retail subsidiaries, and through independent retail stores	3141 (63)	784	25	32	
Price discrimination by type of customer	Through 84 wholesalers to 40,000 retailers, and to mail order houses	3996 (63)	15	87	98	
N/A	Patented product sold through approximately 5,000 dealers	3546 (72) ¹	71	48	70	
N/A	Through wholesale distributors	2844 (67) ²	628	38	52	
Restrictions on advertising content and transshipping	Through about 2,100 franchised retail dealers (department stores, jewelery, speciality and gift stores) and direct sales to the public from two of its own plants	3263 (67) 3262 (67)	20 35	61 70	87 88	
Restrictions on advertising content and transshipping; reserves distribution to certain customers for itself	Franchised retail dealers	3949 (67) 2329 (67) 2339 (67)	1,304 517 1,048	28 23 16	35 30 21	
Restrictions on advertising content	Direct sales to over 2,000 retail department stores and specialty shops	2254 (67) 2341 (67)	99 778	36 15	54 22	
Exclusive distributor; reserves certain customers for itself; and has purchased all the stocks of competitors' products and removed them from the shelves in some markets	To 95 retail chains, 3,000 retail stores, and 300 wholesalers	5034 (67) ² 2284 (67) 3964 (67)	— 63 262	— 62 47	— 81 58	
Restrictions against transshipping and restriction on sales territories, dealers had to make their sales records available for scrutiny by JBL	N/A	3651 (67)	303	49	69 ³	

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line(s)**
Dejur-Amsco Corp. C-1787 (8-27-70)	Magnetic tape recording, dictation and transcription devices	13.3 (7.8-1970)	N/A
Yardley of London, Inc. C-1832 (12-7-70)	Toiletries, perfumes and cosmetics	45.9 (25-1967)	N/A
Bulova Watch Co. C-1887 (4-1-71)	Watch and clock products	179.9 (100-1968)	N/A
Ithaca Gun Co. C-1926 (5-26-71)	Sporting firearms and firearm accessories	19.3 (11-1969)	N/A
Magnavox Co. D-8822 (6-9-71)	Consumer electronics (television, radios, phonographs, and tape recorders)	852.9 (464.3-1967)	9.2% of U.S. color TV market 1965-1969
Gamble-Skogmo, Inc. (Mode O'Day Co.) C-1944 (6-14-71)	Women's and children's ready to wear apparel (dresses, lingerie, sportswear)	52.7 (30-1969)	N/A for Mode O'Day. Parent was 14th largest retailer in 1969
Barton Candy Corp. C-1985 (7-21-71)	Chocolates, other candies and confections, baked goods, and nuts	28.1 (16-1969)	N/A

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio	
Exclusive dealing; territorial and customer restrictions; advertising restrictions, uniform trade-ins	Exclusive U.S. distributor sells through over 500 independent franchised dealers	5081 (67) ² 3579 (67)	— 170	— 63	— 74
Territorial and customer restrictions	Purchases and sells products of its parent corporation. Sells direct to about 12,000 retail outlets and, from 1956 to 1969, to 1,000 wholesale sales representatives	2844 (67)	628	38	52
Advertising restrictions; restrictions on which products dealers could carry and on guarantees	Through a dealer organization	3871 (67)	153	47	63
Customer restrictions	Direct sales to about 7,000 authorized dealers	3484 (72) ⁴	75	53	74
Location and advertising restrictions; exclusive dealing and full-line requirements; limits on trade-ins; and tied sales	Sells direct in continental U.S. to about 3,000 franchised retailers	3651 (67)	303	49	69
Exclusive dealing	Through 55 company-owned stores and 660 dealer stores	2335 (67) 2341 (67) 2339 (67)	5,008 778 1,048	7 15 16	9 22 21
Required franchise operators to purchase certain fixtures	Franchised candy stores, department and drug stores with candy departments, wholesalers, and some company stores. About 3,000 total retail outlets.	2071 (67) 2072 (67)	1,091 27	25 77	35 89

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line (s)**
Erie Foundry, Co. (Van-Air, Inc.) C-2003 (8-10-71)	Compressed air dryers, oil scrubbers, filters, and related air and gas treating equipment	4.9 (3-1971)	30% of U.S. deliquescent air dryer market, 70% of desiccant air dryer market. World's largest air dryer manu- facturer
Ronne Bell, Inc. C-2019 (8-25-71)	Cosmetic and toilet products	17.5 (9.5-1967)	N/A
Benge Corp. C-2069 (10-26-71)	Musical instruments and accessories (trumpets)	0.2 (0.146-1970)	N/A
Browning Arms Co. C-2212 (5-4-72)	Firearms and accessories	55.1 (32.3-1970)	Ranked third in U.S. firearm sales in 1969
Corning Glass Works D-8874 (6-5-73) (Amended Final Order 6-17-75)	Glass household food preparation, serving and storage products (Pyrex, Corning Ware and Corelle)	1,006.3 (590-1970)	N/A
Sonotone Corp. C-2414 (6-19-73)	Hearing aids	5.1 (3.0-1970)	In 1970 was fifth in U.S. sales with about 6% of the market
Radio Ear Corp. C-2419 (6-26-73)	Hearing aids	3.9 (2.3-1970)	In 1970 was eighth in U.S. sales with about 4.4% of the market
Adolph Coors Co. D-8845 (7-24-73) (modified 2-4-75)	Beer	377.6 (215-1969)	Ranked fifth in U.S. in 1968, fourth in 1969, but was first in 10 of 11 states where it sells with shares of 31 to 67%
Chuck Full of Nuts D-8884 (10-2-73)	Coffee, frozen cakes, and other fast foods sold through its restaurants	75.5 ⁶ (43.0-1969)	N/A

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio
Territorial and customer restrictions; profit passovers; and exclusive dealing	Through dealers and distributors throughout U.S.	3569 (67)	725	10 19
Restrictions on advertising and customers	Through about 8,000 franchised dealers	2844 (67)	628	38 52
N/A	Through 51 dealers throughout the U.S.	3931 (67)	304	35 58
Customer restrictions	Through about 10,500 authorized dealers	3484 (72)	75	53 74
Customer restrictions on resales to non-signers of Corning's fair-trade agreements	Through over 300 wholesalers in 1971 and not to retailers	3229 (72) 3231 (72)	211 842	66 82 43 53
Customer, territorial and advertising restrictions, exclusive dealing. Required dealers to furnish customers' names and addresses to Sonotone	Through 296 dealers throughout the U.S.	3842 (72) ⁵	780	41 54
Customer, territorial and advertising restrictions; exclusive dealing. Required dealers to furnish customers' names and addresses to Radio Ear	Through 222 authorized dealers throughout the U.S.	3842 (72) ⁵	780	41 54
Customer and territorial restrictions, exclusive dealing, and exclusive on-tap draught sales	Through about 170 wholesale distributors and not to central warehouses	2082 (72)	108	52 70
Tying of food and supplies sales to licensees by licensor	Through 38 licensed restaurants and 45 company-owned restaurants mostly in New York	2051 (67) 2095 (67)	3,445 206	26 38 53 71

TABLE V-11—Continued

Company and case number : (Date of consent or decision) :	Price-maintained product line :	Sales* (millions of dollars) :	Firm's rank or market share in price maintained product line (s)** :
Hammermill Paper Co. C-2513 (4-24-74)	Printing paper, fine paper products (including coated and uncoated book papers, offset papers, text and cover papers, sulphite bond, ray or cotton content paper, mimeograph and duplicator papers, onionskin, ledger papers and bristols)	600.4 (352-1970)	Sixth largest producer of printing and fine paper. About 5% of U.S. shipments in 1967. Their Watermarked paper sales were less than 1% of total U.S. shipments
Colt Industries Operating Corp. C-2520 (7-12-74)	Sporting firearms and accessories	29.2 (17.1-1970) ⁷	Firm ranked fifth in U.S. sales in 1969
Dahlberg Electronics, Inc. D-8929 (8-6-74)	Hearing aids and related articles	7.2 (4.2-1970)	Third in U.S. in sales in 1970 with about 8% of U.S. market
Holiday Magic, Inc. D-8834 (10-15-74)	Cosmetics, toiletries, cleaning products and associated items	26.3 (15.4-1970)	0.34% of U.S. cosmetics sales in 1970, 1.4% of door-to-door cosmetics sales ⁹
Duofold Inc. C-2632 (2-10-75)	Two-layer underwear, regular and quilted underwear, sportswear, pajamas, parkas and related items	7.0 (4.5-1973)	Number one ranked firm in sale of 2-layer underwear in U.S. (formerly patented)
Cubco Inc., et. al. C-2670 (5-22-75)	Ski bindings and related items	1.1 (0.7-1972)	Ranked sixth in U.S. ski bindings market in 1973/74, was third in 1970, had been first when product was patented.
Food Fair Stores, Inc. (Anterre Development) D-8935 (9-30-75)	Shopping center leases, real estate development	29.7 (18.0-1971)	Largest publicly held shopping center development company in U.S. in 1971
TEAC Corp. of America C-2752 (10-24-75)	High fidelity audio components (tape decks, amplifiers and tuners, speakers and professional recording equipment)	33.1 (25.0-1974)	N/A ¹⁵

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio
Customer restrictions, limited agents' ability to carry other companies' product lines, if they were priced at or below Hammermills' prices for equivalent products.	About 72% of products sold through wholesale distributors (agents) throughout the U.S.	2621 (72)	194	24 40
		2641 (72)	366	36 49
		2648 (72)	405	34 45
Customer restrictions on resale to other dealers; refusals to deal	Directly to about 7,000 authorized dealers throughout the U.S.	3484 (72) ⁸	75	53 74
Customer, territorial and advertising restrictions; exclusive dealing. Required dealers to furnish customers' names and addresses to Dahlberg.	Through 402 authorized dealers throughout the U.S. in 1970	3842 (72) ⁵	780	41 54
Purchase restrictions, customer restrictions, territorial allocations, advertising restrictions, price discrimination ¹⁰	Through over 94,000 distributors in a multi-level marketing program ¹¹	2844 (67) ¹²	628	38 52
		2841 (67)	599	70 78
		2842 (72)	1,022	43 54
Customer restrictions	Through over 5,000 retail accounts	2254 (72) 2253 (72)	74 882	46 61 16 26
Customer restrictions, advertising restrictions	Through about 1,000 carefully selected retail outlets specializing in ski products	3949 (72)	1,441	28 37
Restrictive lease provisions excluding discounters, and advertising restrictions ¹³	Operates 48 shopping centers in Eastern U.S. and 35 free-standing commercial properties	1542 ¹⁴ 6512		
Customer restrictions, advertising restrictions	To retail dealers through salespersons and sales representatives	3651 (72) ¹⁶	343	49 71

TABLE V-11--Continued

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line (s)**
Sherwood Electronic Laboratories, Inc. C-2753 (10-24-75)	High fidelity audio components (amplifiers, receivers, tuners and speakers)	18.6 (12-1973)	Ranked third in U.S. sales of receivers in 1975 with 8% share. ¹⁷
Sansui Electronics, Corp. C-2754 (10-24-75)	High fidelity audio components (full line of components)	33.1 (25-1974)	N/A ¹⁸
U.S. Pioneer Electronics Corp. C-2755 (10-24-75) (modified in 1983)	High fidelity audio components (full line of components)	106.0 (80-1974)	Ranked first in U.S. sales in 1974 in receivers (15%), amplifiers (20%), and tuners (21%). ¹⁹
Shaklee Corporation C-2790 (2-18-76) (modified 6-1-81)	Food supplements, cosmetics, toiletries and fragrances, household and industrial cleaners	116.2 (75-1973)	N/A
Rubbermaid Inc. D-8939 (4-13-76) (modified 8-17-78)	Rubber, plastic, and rubber- coated wire household products	165.1 (102-1972) ²⁰	N/A
United Audio Products, Inc. C-2828 (7-12-76)	High fidelity audio components (Dual and PE record changers and cassette tape decks)	36.0 (30-1975)	Ranked first in sale of record changers in 1974 with 34.6%. ²¹
Nikko Electric Corp. of America C-2829 (7-12-76)	High fidelity audio components (amplifiers and tuners)	6.0 (5-1975)	N/A
Pande Cameron & Co. of New York, Inc. C-2850 (11-3-76)	Handmade rugs and carpets	8.0 (6-1974)	Among largest sellers of imported oriental rugs in the U.S.

Other vertical restraints***	How the products were distributed	SIC industry (census year)	Four digit SIC : firms in SIC	Number of firms : in SIC	Four and eight firm concentration ratio
Customer restrictions, advertising restrictions	To retail dealers through salespersons and sales representatives	3651 (72) ¹⁶	343	49	71
Customer restrictions, advertising restrictions	To retail dealers through salespersons and sales representatives	3651 (72) ¹⁶	343	49	71
Customer restrictions, advertising restrictions	To retail dealers through salespersons and sales representatives	3651 (72) ¹⁶	343	49	71
Customer restrictions, no sales from fixed retail locations	Through over 100,000 independent distributors	2099 (72)	1,856	26	36
	in a three level marketing system	2834 (72)	680	26	44
		2842 (72)	1,022	43	54
		2844 (72)	593	38	53
		2841 (72)	577	62	74
Customer restrictions, advertising restrictions	Direct to wholesalers and to some retailers	3069 (72)	967	16	24
		3079 (72)	6,762	8	12
Customer restrictions, advertising restrictions	To retail dealers through salespersons and sales representatives	3651 (72) ¹⁶	343	49	71
Customer restrictions, advertising restrictions	Through salespersons and sales representatives	3651 (72) ¹⁶	343	49	71
Advertising restrictions	Through about 150 major retail dealers and 250-300 other dealers throughout the U.S.	2279 (72) ²²	80	78	88
		2271 (72)	64	78	91

TABLE V-11—Continued

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price-maintained product line(s)**
Medalist Industries, Inc. ²³ (Allen-A Co.) C-2851 (11-9-76)	Thermal underwear, parkas, ski pants, ski sweaters, tennis-wear, and related items	18.6 (12-1973)	A leading manufacturer of thermal underwear and ski related apparel items
Salomon/North America, Inc. C-2859 (1-6-77)	Ski bindings and related ski accessories	14.8 (13-1976) ²⁴	Ranked first in world in sales of ski bindings in 1974. Share of U.S. ski binding sales over 40%
Olin Ski Co., Inc. C-2895 (7-19-77)	Skis, ski boots, and related items	N/A	N/A
Copco, Inc. C-2900 (9-7-77)	Gourmet cookware	6.4 (5.3-1975)	Ranked third in U.S. in sales of gourmet cookware ²⁶
Performance Sailcraft, Inc. C-2922 (5-2-78)	Fiberglass sailboats and sailboat accessories	2.4 (2.0-1975) ²⁸	N/A
Levi Strauss & Co. D-9081 (7-12-78)	Men's, women's, and children's jeans; co. also sells slacks, shirts, jackets, and related items	646.0 (569-1976)	About 30% of an all jeans market ²⁹
Interco, Inc., et. al. C-2929 (9-26-78)	Footwear and wearing apparel ³⁰	1,218.6 (1073.3-1976) ³¹	N/A
Advertising Checking Bureau, Inc. C-2947 (1-4-79)	Administrator and auditor of cooperative advertising programs for manufacturers of wearing apparel, footwear, cosmetics, watches, etc.	N/A	N/A

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio	
Customer restrictions, advertising restrictions	Through selected retail dealers throughout the U.S.	2322 (72) 2329 (72) 2339 (72) 2341 (72)	67 481 1,247 608	49 20 18 15	71 27 25 23
Customer and advertising restrictions ²⁵	About 2,400 retail dealers throughout the U.S.	3949 (77)	1,757	21	28
Customer and advertising restrictions	Through authorized dealers throughout U.S.	3949 (77)	1,757	21	28
Customer and advertising restrictions	To selected retail dealers throughout the U.S.	3469 (77) ²⁷	2,544	9	16
Territorial and advertising restrictions	Throughout Canada and the Eastern U.S. through independent dealers	3732 (77)	2,148	11	19
Advertising restrictions, including restrictions on use of Levi's name in ads for irregular or second-line products; customer restrictions; tying	Direct sales to over 15,000 retail dealers	2328 (77) 2339 (77)	347 1,625	49 14	60 20
Advertising restrictions, exclusive dealing, discrimination	Dual distribution of footwear through company-owned and independent retailers. Apparel is distributed through subsidiaries to retailers throughout U.S.	2385 (77) ³² 3143 (77) 3144 (77) 3149 (77)	157 115 243 159	41 31 29 24	52 46 39 41
This firm's services which included media monitoring, providing tearsheet services, and preparing advertising reports were believed to facilitate its clients' use of RPM; and discriminatory advertising allowances	Performed cooperative advertising services for over 1,000 clients, and for over 400 prominent manufacturers of branded products. Of these, 40-50 were believed to have legally offensive advertising programs				If classified, ACR would be in Major Group 73-Business services, and not in a manufacturing industry

TABLE V-11--Continued

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line(s)**
Huk-A-Poo Sportswear, Inc., et. al. (Pranx Fashions, Inc.) C-2962 (4-25-79)	Wearing apparel and accessories, primarily women's apparel	74.7 (70-1977)	N/A
Anway Corp., Inc., et. al. D-9023 (5-8-79)	Various household products: home care and cleaning, personal care products (cosmetics), food supplements, cookware and cutlery, commercial and agricultural products, catalog sales of a variety of products, and safety products (smoke detectors & fire extinguishers) ³³	191.9 (169.0-1976)	1.7% of U.S. sales of soaps and detergents in 1974. No more than 1.7% in any of its other U.S. product markets. ³⁴
Appliance Dealers Cooperative, et. al. C-2969 (6-7-79)	Buying cooperative for resellers of electrical appliances such as television sets, washing machines, dryers, air conditioners and record playing equipment	21.3 (20-1977) ³⁶	N/A
Motherhood Maternity Shops, Inc. C-2974 (6-21-79)	Maternity wearing apparel and related products; women's, children's, and infants' clothing and accessories	15.9 (14-1976)	Less than 5% of a maternity apparel market
Hartz Mountain Corp. C-3008 (6-25-79)	Pet supplies, e.g., collars, shampoos, medicinals, toys, leashes, feeding dishes, books, bird and small animal cages, etc.	233.9 (206-1976)	Industry leader, in 1970 had about 50% of a pet products market
Jonathan Logan, Inc. C-2977 (7-25-79)	Women's apparel such as dresses, suits, sportswear, rainwear, children's wear, leather goods and men's rainwear ⁴¹	433.3 (381.6-1976)	Largest supplier of women's apparel in U.S.

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio	
Advertising restrictions	To retail dealers throughout the U.S.	2341 (77)	548	22	29
		2342 (77)	150	36	52
		2331 (77)	1,292	12	18
		2335 (77)	6,753	8	12
		2337 (77)	1,558	15	20
		2339 (77)	1,625	14	20
Customer restrictions, exclusive dealing rights to certain customers, advertising restrictions, location restrictions on dealers ³⁵	Through about 2,500 direct buying distributors and over 360,000 house-to-house independent distributors	2834 (77)	655	24	43
		2841 (77)	554	59	71
		2842 (77)	946	41	56
		2844 (77)	644	40	56
		2099 (77)	1,872	28	36
Advertising, customer, and territorial or location restrictions, "holdbacks" of rebates and allowances due members. ³⁷	Buying cooperative for 22 member companies, and 5 affiliated firms, all of whom were N.J. retailers selling primarily to customers in the NY metro area	3585 (77) ³⁸	731	41	51
		3633 (77)	21	89	N/A
		3651 (77)	546	51	65
Advertising restrictions	Through retailers throughout the U.S., and through about 270 company owned outlets. (90 percent through company stores) ³⁹	2331 (77)	1,292	12	18
		2335 (77)	6,753	8	12
		2341 (77)	548	22	29
		2361 (77)	455	15	23
		2369 (77)	307	24	36
Customer and territorial restrictions, location restrictions, price discrimination; tying, sought exclusive dealing by retailers	Direct to consumers from 9 retail outlets, and through 600-700 distributors to supermarkets, pet shops, variety stores, discount stores and jobbers. Supermarkets and variety stores sell about 80% of Hartz products as measured by dollar sales	2047 (77) ⁴⁰	218	58	74
		2833 (77)	153	65	78
		3199 (77)	512	13	24
		3231 (77)	1,000	31	39
		3499 (77)	3,142	13	13
Advertising restrictions, including restrictions on the use of the brand name in discount advertising	Direct to about 17,000 retailers throughout the U.S., and to retailers through show-rooms in eight cities. Company has about 300 salesmen	2331 (77)	1,292	12	18
		2335 (77)	6,753	8	12
		2337 (77)	1,558	15	20
		2339 (77)	1,625	14	20
		2361 (77)	455	15	23
		2385 (77)	157	41	52

TABLE V-11--Continued

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line (s)**
Pendleton Woolen Mills, Inc. C-2985 (7-31-79)	Men's, women's, and children's apparel, blankets and wool fabric	40.0 (40-1978)	N/A
Gant, Inc. C-2996 (11-6-79)	Men's, women's, and children's wearing apparel including dress and sports shirts	50.0 (50-1978)	N/A
Jaymar-Ruby, Inc. C-2997 (11-8-79)	Men's wearing apparel and related accessories (dress and sports slacks)	63.0 (63-1978)	Nation's largest manufacturer of men's "quality" slacks
Clinique Laboratories, Inc. C-3027 (7-23-80)	High fashion, dermatologist- developed line of cosmetics, perfumes, and other toilet prepara- tions.	N/A ⁴⁴	A leading manu- facturer of "quality" cosmetics, may rank second in such a market
Towle Manu- facturing Co. C-3029 (7-29-80)	Silverware, platedware and stainless steelware, including sterling silver flatware and holloware, silverplated and pewter holloware, stainless steel flatware, cutlery, sterling silver jewelry, candle- sticks, hurricane lamps, napkin rings, table trays and mats	34.1 (30-1976)	N/A (but Towle was not one of the largest silver manufacturers)
Darvel, Inc. ⁴⁶ C-3034 (8-12-80)	Wearing apparel and accessories including men's and women's jeans (Zepplin brand)	6.0 (6.0-1978)	A new entrant with an insignificant national market- share
totes, Inc. C-3040 (9-12-80)	Rubber and plastic foot- wear, umbrellas, hats, scarfs, and other wearing apparel	N/A ⁴⁷	N/A
Tingley Rubber Corp. C-3041 (9-12-80)	Molded rubber footwear	12.0 (12-1978)	Largest manu- facturer of molded rubber footwear in the U.S.

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio
Advertising restrictions. Required dealers who discount not to use the Pendleton name in advertising or selling the product	Direct sales to over 5,000 retail dealers	2231 (77) ⁴²	153	31 47
		2321 (77)	669	17 28
		2328 (77)	347	49 60
		2331 (77)	1,292	12 18
Advertising restrictions, required dealers who do discount not to use the Gant name in advertising or selling the product	Direct sales to over 5,000 retail dealers	2311 (77) ⁴³	619	21 32
		2321 (77)	669	17 28
		2327 (77)	404	25 40
		2331 (77)	1,292	12 18
Advertising restrictions. Dealers could not use trademark in advertising or selling at discount	Direct sales to over 5,600 retail dealers some of whom are company owned	2327 (77)	404	25 40
Advertising restrictions	Through about 230 retail accounts, some of whom have multiple outlets	2844 (77)	644	40 56
Advertising and customer restrictions ⁴⁵	Through over 10,000 retail dealers, about 60% of whom are small jewelers	3914 (77)	247	51 67
Advertising restrictions, including restrictions the use of the brand name in discount advertisements	Direct sales to over 2,000 retail dealers	2328 (77)	347	49 60
		2339 (77)	1,625	14 20
Advertising restrictions, including restrictions on the use of the totes name in discount advertisements ⁴⁸	Through over 3,000 retail dealers	3021 (77)	67	58 73
		3069 (77)	1,127	16 24
Advertising restrictions including restrictions on the use of the brand name in discount advertisements ⁴⁹	Through over 100 footwear wholesalers, also private label sales to Sears and Penney's	3021 (77)	67	58 73

TABLE V-11—Continued

Company and case number (Date of consent or decision)	Price-maintained product line	Sales* (millions of dollars)	Firm's rank or market share in price maintained product line (s)**
Palm Beach Company C-3073 (8-4-81)	Men's wearing apparel and related accessories	52.9 (60-1979)	N/A
Russell Stover Candies, Inc. D-9140 (7-1-82)	Boxed chocolate candies	111.0 (125.8-1979)	One of largest U.S. manufacturers of boxed chocolates
Onkyo U.S.A., Corporation C-3092 (7-2-82)	High fidelity audio components	18.5 (25-1980)	Ranked between 10-15 among 30-35 audio components manufacturers. ⁵⁰ Market share of 2.5-3%
Germaine Monteil Cosmetiques Corporation C-3098 (11-19-82)	Cosmetics	29.6 (40.0-1980)	12-15% of a "prestige" cosmetics market in which the firm ranked

Other vertical restraints***	How the products were distributed	Four digit SIC industry (census year)	Number of firms in SIC	Four and eight firm concentration ratio
Advertising restrictions, including restrictions on use of brand name in advertisements	Through over 4,000 retail dealers throughout the U.S.	2311 (77) 2327 (77)	619 404	21 32 25 40
Advertising restrictions	Through over 18,000 dealers, primarily, drug, card, gift, and department stores	2065 (77) 2066 (77)	867 47	38 49 73 88
Advertising restrictions, including restrictions on the use of brand name in discount advertisements	N/A	3651 (77) ¹⁶	546	51 65
Advertising restrictions, including restrictions on the use of brand name in discount advertisements	Through about 800 retail accounts mostly department and specialty stores ⁵¹	2844 (77)	644	40 56

FOOTNOTES

* The numbers in parentheses are nominal annual sales revenues and the year in which those sales were realized. The other number is constant 1978 dollar sales converted by using the Producer Price Index for finished consumer goods. Unless otherwise indicated these are the total company sales associated with the product lines believed sold subject to RPM.

** The rank and share figures reflect the market definition(s) as reported in the case files. No attempt was made here to determine if these are economically relevant markets.

*** The other restraints reflect the allegations in the complaints and decisions as well as supplemental information from the case files.

N/A -- Not available.

1 In 1967 power driven handtools were classified in S.I.C. 3548 Metalworking machinery, n.e.c., and the subsequent census years are not comparable. The choice was between the wrong industry and the correct census year, and the wrong census year and a better industry definition. The latter was chosen.

2 Company does not manufacture products itself but distributes for the manufacturer. The manufacturing S.I.C.'s listed are those the product(s) would be classified into if the firm had been a manufacturer, i.e., they are intended to approximate a "product" market.

3 S.I.C. 3651, Radio and TV receiving sets excludes substantial foreign competition. Although actual market share data are sketchy, McEachern and Romeo ("Vertical Restraints in the Audio Components Industry: An Economic Analysis of FTC Intervention") report the results of a 1975 consumer study showing the top four firms selling speakers with 27 percent of the U.S. market in 1975. In this study, JBL ranked fourth with an estimated share of 4 percent.

4 S.I.C. 3484 Small arms was classified as S.I.C. 1951 in 1967 and earlier years, but no concentration data are available prior to 1972.

5 Commission records indicate that the 1970 four and eight-firm concentration ratios for U.S. hearing aid sales were 49.3 percent and 68.5 percent respectively.

6 Chock's sales of supplies and non-Chock food items to its licensees were \$1.2 million in 1972 and \$2.4 million in 1968. The \$43 million in 1969 sales includes sales of canned coffee to other outlets for resale which were not alleged to have been involved in RPM or tying.

7 1970 domestic gross sales of firearm products by Colt Industries Operating Corporation which is a subsidiary of Colt Industries, Inc.

8 Small arms were classified in S.I.C. 3484 in 1972, in S.I.C. 1951 in prior years. Data prior to 1972 are not available.

9 Shares are estimates calculated from information in the Initial Decision.

10 It was alleged that the entire marketing system of Holiday was essentially a deceptive pyramid scheme. The RPM was not the central focus of the case, but the presence of RPM did influence the view adopted by the Commission of the marketing system.

FOOTNOTES--Continued

- 11 Total distributors is the sum of Holiday Girl distributors, Organizer distributors, and Master distributors for 1969. The data are contained in the Initial Decision.
- 12 Holiday Magic, Inc. was not actually a manufacturer of cosmetics, but marketed products manufactured by others under Holiday labels. S.I.C. 2841, 2842, and 2844 indicate the concentration of shipments by cosmetics manufacturers. Data for 2842 are not available in 1967.
- 13 This case involved both horizontal and vertical price-fixing allegations in that the restrictive lease provisions allegedly controlled leasees' resale prices and thereby also restricted price competition among leasees within a given shopping center.
- 14 S.I.C. 1542 is General contractor - nonresidential buildings, other than industrial buildings and warehouses. S.I.C. 6512 is Operators of nonresidential buildings. Concentration ratios are not available for these S.I.C. codes, nor are there reasonably approximate manufacturing S.I.C.'s into which this firm could be classified.
- 15 TEAC's market shares in its respective product lines are not available. From McEachern and Romeo's study (see fn. 3) TEAC was not among the top four firms selling speakers in the U.S. in 1975. The top four speaker sellers accounted for 27 percent of speaker sales in 1975.
- 16 S.I.C. 3651 excludes substantial imports and consequently overstates actual market concentration.
- 17 Estimate is reported in McEachern and Romeo's study (see fn. 3). Estimates of Sherwood's shares in its other product lines are not available. Sherwood was not among the top four sellers of speakers in 1975. 1975 four-firm concentration ratio of sales for speakers was 27 percent, for receivers 44 percent.
- 18 McEachern and Romeo (see fn. 3) report that Sansui was not among the top four U.S. sellers of record changers, speakers, receivers, or headphones. 1975 four-firm concentration ratios of sales for these products were 88 percent, 27 percent, 44 percent and 52 percent respectively.
- 19 McEachern and Romeo (see fn. 3). The shares of Pioneer in other product lines are not available. An estimate of Pioneer's 1975 share of receivers is reported as 19 percent.
- 20 In 1970 Rubbermaid had sales of \$69 million of which approximately \$40 million was fair-traded. Their 1971 sales were in excess of \$78 million. The amount fair-traded in 1971 and 1972 is reported as substantial, but no amounts are given.
- 21 McEachern and Romeo report a 1975 survey indicating Dual was ranked second in record changer sales with a share of 23 percent and four-firm concentration of 88 percent. United's sales had fallen from \$30 million in 1975 to \$13 million in 1977, apparently due to increased import competition.
- 22 Pande, Cameron & Co. were actually importers of handmade oriental rugs not manufacturers. They are classified here in S.I.C. 2279 and 2271 only for comparative purposes.
- 23 Although both Medalist and its subsidiary Allen-A were respondents, only Allen-A manufactured and sold products subject to the Order. The sales figures used here are for Allen-A only. Medalist's 1974 sales were in excess of \$95 million.

FOOTNOTES--Continued

24 These are U.S. sales. In 1974 Salomon's U.S. sales were only \$5 million. The worldwide sales of Salomon in 1976 were almost \$40 million.

25 Salomon maintained that its RPM was legal in fair-trade states prior to 1975, and that RPM was not used in other states at all. Commission documents do show price cutting in free-trade states, and there was no evidence that any dealer in a free-trade area had been terminated for price cutting.

26 Other firms identified as being in the gourmet cookware market were Dansk and Le Creuset, both of which had more than twice Copco's annual sales volume.

27 Copco of Denmark produced enameled cast iron steel pots and pans which Copco, Inc. imported and sold in the U.S. Thus inclusion in S.I.C. 3469 is for comparison purposes only, as the U.S. firm did not actually produce the products.

28 The Canadian company's total 1975 sales were \$3.6 million, but only \$2.0 million of sales were in the U.S.

29 This figure comes from Sharon Oster's study, "The FTC v. Levi Strauss: An Analysis of the Economic Issues."

30 Interco sold Florsheim and Thayer McNeil footwear, and London Fog, Clipper Mist, Queen Casuals, Devon, and College-Town wearing apparel among others.

31 This is 78 percent of Interco's annual sales. Apparently 78 percent of Interco's sales came from footwear and apparel. In 1977 Florsheim alone had sales of \$419.9 million.

32 These S.I.C. industries include footwear and raincoats. Other apparel items sold by Interco could not be classified because the public records do not specify the types of apparel with enough detail.

33 Amway manufactures and sells about 150 products, mostly cleaning and personal care items. In 1974 soaps and detergents accounted for 41 percent of sales, polishes and sanitation goods 20 percent, toiletries 7 percent, and pharmaceutical preparations 6 percent. Various other items accounted for the remainder.

34 The four-firm concentration of U.S. soaps and detergents sales in 1974 was 86 percent according to the ALJ's initial decision. This was Amway's principal product market in terms of its own sales. However, Amway's share of this market was less than 2 percent, and its leading product (SAB Plus) accounted for only 0.78 percent. The "personal care products" market had four-firm concentration of sales of 49 percent, and Amway's share was less than 1.7 percent.

35 The Commission found Amway guilty of RPM, found one aspect of their advertising restrictions legally offensive, and held that some of the earnings-potential claims were false and misleading. Other alleged violations were dismissed.

36 ADC's sales to affiliated and member companies for fiscal 1977 were estimated at \$15 to \$20 million in Commission documents. Member sales to the consuming public were "substantially higher".

37 This case could also have involved horizontal price fixing.

38 ADC was not a manufacturer of the products sold to their members. For comparison purposes the products sold by ADC members have been included in these S.I.C. industries.

- 39 The company stopped sales to independent retailers sometime after July 1976.
- 40 None of these S.I.C. industries is a close approximation to an economically relevant market for Hartz products.
- 41 The evidence supporting the RPM charge was mostly related to Misty Harbor rainwear. However, the consent covers all Jonathan Logan lines except footwear and accessories. Information concerning all product lines was not sought, as respondent had offered to enter consent negotiations.
- 42 As a manufacturer of woolen fabric, this company would be classified in S.I.C. 2231. The additional S.I.C. industries are included for comparison purposes as Pendleton sells men's, women's, and children's shirts and other apparel items in addition to fabric and blankets.
- 43 Gant itself only manufactures men's shirts. Other products sold under the Gant label are manufactured by others, e.g., men's and boy's tailored clothing and slacks, and women's shirts.
- 44 Clinique's sales are confidential.
- 45 Towle was apparently guilty of a "technical" or paper violation. There was evidence of retail price variations for Towle products, and the firm had not vigorously enforced RPM even though its dealer contracts contained legally offensive language from the fair-trade era.
- 46 Darvel was incorporated in 1976. The complaint which led to investigation of RPM activities was received in 1978.
- 47 Sales figures are confidential.
- 48 Totes was evidently not auditing cooperative advertisements for discounting, but this had not been communicated directly to all the dealers. This case may not have involved RPM, but only an advertising program which may have had the potential to effectuate RPM. Even though the restrictions were evidently not being enforced, the respondent entered into consent negotiations.
- 49 Other than the restrictions on cooperative advertising, there was evidence that Tingley did not actively enforce RPM, and no retailer had ever been terminated for discounting.
- 50 Among different types of components Onkyo's share ranged from 1.3 to 4 percent. There is evidence that there are more than 35 branded manufacturers, and that private label activity exists, although it was not counted in the measured market shares. Onkyo entered the U.S. market in 1975.
- 51 Applying standard discounts off a manufacturer's suggested retail price is apparently a widespread method of determining actual dealer prices in the cosmetics trade. The question of whether such common pricing behavior facilitated collusion was not pursued.

This section presents a review of empirical studies of RPM. These studies are classified primarily on the basis of the methodology used: (A) price surveys, (B) other surveys, and (C) case studies. Then in (D) two previous FTC studies of RPM are reviewed, followed in (E) by a survey of studies concerning the effects of RPM on distributional efficiency, and in (F) by a summary of the entire section.

(A) Price Surveys

The majority of empirical studies of the effect of RPM have used price surveys. These studies are quite diverse as to the time period covered, the products included in the survey, and the data collection method used, but all suffer from the same defect: they do not necessarily tell us anything conclusive about the welfare effects of RPM because the results are generally consistent with both procompetitive and anticompetitive theories for the imposition of RPM.

The studies using price surveys are categorized according to the approach used: (1) comparison of prices before and after passage of fair-trade legislation, (2) comparison of changes in prices of fair-traded and nonfair-traded items, (3) comparison of prices in fair-trade areas with those in nonfair-trade areas, and (4) "price-related" surveys of the cost to consumers of fair trade.¹ The price survey section ends with a short discussion of the limited usefulness of these studies.

¹ There also exist several studies of the effect of RPM on the price of liquor: Leonard Weiss, Case Studies in American Industry, 2nd ed. (Wiley, 1971), pp. 270-281; J. E. Diamond, "State Monopoly and Price Fixing in Retail Liquor Distribution," Wisconsin Law Review (1962); New York State Moreland Commission on Alcoholic Beverage Control Laws: Report and Recommendations Number 3, (1964); A. Oxenfeldt, Industrial Pricing and Market Practice (Prentice-Hall, 1955), pp. 445-88. These studies are not reviewed here because the pervasive restriction on entry into liquor retailing greatly restricts their applicability to other industries. An illustrative example is a recent working paper by James M. Ferguson, "Who Benefits from Liquor Regulation in New York?", University of Rochester, Graduate School of Management (April 1982), which addresses the question of who benefits from liquor regulations explicitly. He compares supplier, wholesaler, and retailer liquor prices in New York and in other states before and after major changes in New York liquor regulation in 1964. Ferguson concludes that "retailers were primarily responsible for
(footnote continued)

(1) Before and After. Several price studies comparing the "before" and "after" prices of certain items were carried out after the passage of fair-trade laws in several states. E. T. Grether¹ surveyed a group of discount drug retailers, and Wolff and Holthausen² checked prices on 50 drug products in New York State. These studies indicated that, compared to the pre-fair-trade period: (1) prices of nationally advertised drug items rose in discount stores, (2) prices of nationally advertised drug items in non-discount stores fell slightly, and (3) prices of drug items not nationally advertised did not seem to be affected.³ The price rise in discount stores is an expected result of the imposition of RPM, and the lack of change in non-nationally advertised brand prices is expected if they are poor substitutes for the fair-traded items. The fall in prices of fair-traded items in traditional stores is not a generally expected result and is not explained.

Edgar Gault⁴ compared the prices advertised by two drug chains in the Kansas City Star, circulated in a free-trade area, with the manufacturers' maintained minimum prices in Michigan for 43 brand name drug products. He found that advertised prices

(footnote continues)

the significantly higher liquor prices in New York [and that] mandatory fair trade and a seventeen year moratorium on the issuance of additional liquor store licenses made possible an effective retailer cartel." In the discussion of the 1945 FTC study of RPM there is some additional reference to the use of RPM in the liquor trade.

¹ E. T. Grether, "Experience in California with Fair Trade Legislation Restricting Price-Cutting," 24 California Law Review, 640 (September, 1936).

² R. P. Wolff and D. Holthausen, "The Control of Retail Prices Under the Fair Trade Laws," 46 Dun's Review, 15 (July 1938).

³ Summary by W. A. Sandridge, "The Effects of Fair Trade on Retail Prices of Electric Housewares in Washington, Baltimore, and Richmond, 1952-1959," Ph. D. Dissertation, University of Virginia, 1960, pp. 38-39.

⁴ Edgar H. Gault, "Fair Trade with Special Reference to Cut Rate Prices in Michigan," 9 Michigan Business Studies (1939).

were lower for 28 products. Marvin Frankel¹ points out that because of the use of advertised prices in these surveys, the results do not necessarily tell us anything about average drug prices, but merely confirm that without fair trade "some items [can] be sold as loss leaders." One would expect, therefore, that the lowest [advertised] prices in a free-trade area would be lower than the price minimums of a fair-trade area."²

C. W. Lewis³ attempted to determine the effect of the Tennessee Fair Trade Act on "cut-rate" drug stores, and "orthodox" drug stores that followed the manufacturers' suggested retail prices. Lewis found that the prices in orthodox drug stores actually fell a small amount from January 1937 to April 1939, while prices rose on fair-traded commodities in cut-rate drug stores. The study suffers from two methodological shortcomings. The price data were obtained from druggists relying on their memories, and thus may be subject to error (which might explain the fall in price). Furthermore, there is no control for other variables that could have affected prices.

Ostlund and Vickland's study may be both the most ambitious, and the most criticized, statistical study of fair trade.⁴ The study covered fifty well-known, fair-traded drug, toiletry, and cosmetic products. Questionnaires were sent to drugstores in all but one state (Alabama was excluded because its fair-trade law was too recent). Two prices were requested for each product: the price at which most of the sales were made before fair trade, and the price at which most current sales were being made (March to September, 1939). Returns of adequate sample size were received

¹ Marvin Frankel, "The Effects of Fair Trade: Fact and Fiction in the Statistical Findings," 28 Journal of Business, 182 (July 1955).

² Ibid., pp. 185-186.

³ C. W. Lewis, Price Maintenance in Knoxville, Tennessee Under the Tennessee Fair Trade Act, Division of University Extension Study No. 7, University of Tennessee, 1939; also see "Economic Effects of Price Maintenance in Knoxville, Tennessee", 4 Journal of Marketing, 139 (1939).

⁴ H. J. Ostlund and C. R. Vickland, Fair Trade and the Retail Drug Store (Druggists Research Bureau, 1940).

from 42 fair-trade and two free-trade states. The weighted-average sales prices of the 50 items were lower in 1939 than before fair-trade prices were imposed.

This study has been extensively criticized.¹ Two of the major criticisms are similar to those of the Lewis study. — Druggists' memories were the source of data: the druggists were asked to remember prices of 50 items charged one to three years previously. Despite the authors' claim that druggists had perfect recall,² the accuracy of the data is in doubt. The study also can be criticized because it does not control for other factors that affect prices over time. This problem is made more critical because the "before fair-trade price" is from different points in time in different states. The third major criticism of the study is the possibility of biased price reporting. Study sponsorship by the Druggists' Research Bureau, and support in a druggists' trade journal stating "cast your vote for fair trade" raises the question of the accuracy of reporting by the druggists.³

(2) Fair-Trade and Nonfair-Trade Price Changes. Two empirical studies have compared the change in prices of fair-traded and nonfair-traded items. A National Association of Chain Drug Stores' Survey⁴ found that the fair-trade prices of 250 manufacturers, on 7,334 drug products, rose 3.1 percent from 1939 to 1947. These results were contrasted with a BLS estimate of the rise in the cost of living during the same period of 59.3 percent. The contrast is exaggerated, however, in that the BLS retail price index for drugs shows a 13 percent rise for the period.⁵

¹ For example, see Frankel (op. cit.), pp. 186-190, and Sandridge (op. cit.), pp. 39-45.

² Ostlund and Vickland (op. cit.), p. 145.

³ See Frankel (op. cit.), pp. 187-188, and Sandridge (op. cit.), pp. 44-45.

⁴ Results reported by F. J. Griffith, the Association's secretary, in Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, on Resale Price Maintenance (U.S. Government Printing Office, 1952).

⁵ Frankel (op. cit.), p. 184.

More importantly, as the survey was started after fair trade was imposed, the results say nothing about the extent of actual price rises caused by the imposition of RPM. The result is not inconsistent with either the idea that fair-trade prices were imposed by a cartel with interest in maintaining stable prices, or that the fair-trade prices were already at noncompetitive levels, and, as such, would be expected to rise less than competitive prices, because cost increases would be adjusted along a marginal revenue curve rather than along a demand curve.¹

The McKesson and Robbins Company carried out a study of the wholesale price of 207 items.² The wholesale price of nonfair-traded items surveyed rose by over 24 percent while fair-traded items' prices rose less than 14 percent. This study suffers from the same problem as the N.A.C.D. study. It can also be criticized because the fair-trade and nonfair-trade items chosen for study are not very comparable, and because wholesale prices do not necessarily provide useful information about retail prices.³

(3) Cross-section Price Comparisons. The third type of empirical study of fair-trade pricing compares the price of the same item in fair-trade and nonfair-trade areas. E. T. Grether⁴ compared 1934 California minimum contract prices of drug items with prices in two stores in nonfair-trade states. Prices were lower in the nonfair-trade stores, but the "failure to weight the data and the small sample of stores forbid generalizations about the relationship of average prices under free trade to minimum prices under fair trade"⁵

The results of other comparisons of the level of prices in fair-trade and nonfair-trade areas are:

¹ Frankel (op. cit.), p. 184; and Andrew McLaughlin, "An Economic Analysis of Resale Price Maintenance," Ph.D. dissertation, UCLA, 1979, p. 44.

² Reported in the Newsletter of the Bureau of Education on Fair Trade, March 18, 1952.

³ Frankel (op. cit.), pp. 184-185.

⁴ E. T. Grether, Price Control Under Fair Trade Legislation (Oxford University Press, 1939).

⁵ Frankel (op. cit.), p. 186.

Alfred L. Seelye found that in Kansas City, Missouri (free-trade state) the chain stores undersold their counterparts in Kansas City, Kansas (fair-trade state) by 22.8 percent. Samuel Rosenthal, an owner of discount drug stores in Washington, D.C., found that the composite price of 208 items purchased in a fair trade area was \$945, whereas these same items could be purchased in a free trade area for \$740. A study undertaken by the St. Louis Star Times found similar results from a survey of fifty drug items in Missouri and Illinois. It was observed that forty-two products sold at a lower price in Missouri, seven sold at the same price, and one sold at a higher price. Prices on the individual products were higher by as little as 2.3 percent to as much as 47.4 percent.¹

These studies did not, however, survey all drug stores or take random samples of drug stores, so the results do not necessarily represent average differences in prices paid in fair and nonfair-trade areas.

Two comparative price surveys took place at a time when the effects of nullification and reinstatement of the nonsigner's provision of the fair-trade laws, by the Schwegmann Bros. vs. Calvert Corp. decision² and the McGuire Act³ respectively, could be evaluated. Ward Bowman used the consumer panel reports for January 1951 to January 1953 of the Market Research Corporation of America to compare prices paid for toothpaste, both over time, and between a nonfair-trade area (Texas and Missouri) and a fair-trade area (Alabama, Louisiana, Oklahoma, and Minnesota). Bowman found that fair-trade area prices were always higher than prices in nonfair-trade areas, but that the prices fell in fair-trade areas when nonsigners clauses were invalidated. Interestingly, "this result was not counteracted during the six-month period following the passage of the McGuire Act."⁴ The study has the advantage of

¹ McLaughlin (op. cit.) p. 46. The Rosenthal and St. Louis Star Times results are presented in the U.S. Congress, House of Representatives, Report of the Judiciary, Report No. 1516, March 13, 1952. Seelye presented his results in "Drug Prices in Cities Without a Fair Trade Law," Vol. 6, Journal of Marketing, p. 16 (July 1941).

² 341 U.S., 384 (1951).

³ 66 Stat., 631 (1952).

⁴ Ward S. Bowman, Jr., "The Prerequisites and Effects of Resale Price Maintenance," U. Chicago Law Review, Vol. 22, No. 4 (Summer 1955).

getting actual transaction prices, but this is at a cost or a small sample: "Professor Bowman's sample included only 293 purchases within a six month period in cities of more than 10,000 population in four [fair-trade] states".¹

Sandridge compared advertised prices over a similar time period in the fair-trade cities of Baltimore and Richmond, and the nonfair-trade city of Washington, D.C. Sandridge's results were similar to those of Bowman in that prices were lower in the nonfair-trade areas (by 35-40 percent on most items), and prices fell (by 25 to 30 percent) in the fair-trade areas after the Schwegmann decision. Unlike Bowman, however, Sandridge found that prices rose to their previous levels after the nonsigners provision was restored. Sandridge also found that the Virginia State Supreme Court's voiding of Virginia's fair-trade act in 1956 caused Richmond prices to fall.²

The Department of Justice also conducted several studies of the effects of fair trade. Two of these focused upon prices. In a 1956 study the prices of 119 items sold in fair-trade and non-fair-trade areas were compared. The prices in nonfair-trade areas were as much as 27 percent lower than in fair-trade areas. For all 119 items the prices in nonfair-trade areas were on average 10 percent less than in fair-trade areas. In a 1970 study the Justice Department found that prices on comparable items were from 0.2 to 37.4 percent lower in free-trade than in fair-trade areas.³

¹ Sandrige (op. cit.), p. 52.

² Interestingly, neither the Bowman nor Sandridge study found that prices rose following invalidation of the nonsigners clause, nor did prices rise in Richmond following invalidation of the states fair-trade law. If RPM had been the most efficient way to correct serious free-rider problems, and less efficient mechanisms were implemented to deal with the problems when enforcement costs of RPM were escalated (due to invalidation of the nonsigners clause), or when RPM was ruled illegal, the prices should have increased. In the absence of bilateral monopoly this would be a sufficient test for the free-rider hypothesis. Unfortunately, we cannot be certain whether this means that the free-rider explanation was not valid for these products, or whether it was valid but no other mechanisms were available to substitute for RPM.

³ These results are reported in the House of Representatives Report No. 94-341, 94th Congress, 1st Session, July 9, 1975; Senate Report No. 94-466, 94th Congress, 1st Session, November 20, 1975; and the Congressional Record-Senate, December 2, 1975 at 38050.

Several price-related surveys attempted to estimate the "cost" of the fair-trade laws to consumers by aggregating the price estimates across all fair-traded goods. The American Fair Trade Council, an organization of manufacturers of products other than drugs and liquor which actively promoted fair trade, estimated that approximately 5 percent of U.S. retail trade in the early 1950's was in fair-traded merchandise.¹ E. T. Grether, John W. Anderson, and E. S. Herman also estimated the volume of goods which have been sold under fair-trade contracts. These estimates are for different time periods and range from 4 to 10 percent of retail sales.²

Herman's study, which relied upon returns of a U.S. Senate Committee questionnaire survey,³ also reports that "although estimates of the size of the population of fair-trading manufacturers have been few in number and of somewhat uncertain accuracy and meaning, there is little doubt that fewer than 1 percent of the total number of manufacturers in the United States have fallen into this category in any one year."⁴ Although fair trade was

¹ The actual date of the estimate is somewhat unclear, but the AFTC presented these figures before the Antitrust Subcommittee of the Committee on the Judiciary on Resale Price Maintenance, House of Representatives 82nd Congress, 2nd Session, 602 (February 1952). In 1939 the AFTC was composed of members manufacturing the following products: kitchen utensils, photographic equipment, fishing tackle, automotive heaters, tires and chains, vision and ignition products, glassware and pottery, household electrical appliances, silverware, books, paints and varnishes, luggage, etc. They were apparently supported by four manufacturer associations representing over 1,600 members, and 93 dealer organizations representing over 152,000 individuals. See the appendix to this paper and Fulda (op. cit.) for more details.

² E. T. Grether, Price Control Under Fair Trade Legislation, (New York: Oxford University Press, 1939); J. W. Anderson, "Interview on Voluntary Fair Trade," (Pamphlet, 1950); and E. S. Herman, "A Statistical Note on Fair Trade," 4 Antitrust Bulletin, 583 (1959).

³ Report of the Select Committee on Small Business on a Study of Fair Trade, Based on A Survey of Manufacturers and Retailers, Sen. Rep. No. 2819, 84th Congress, 2nd session (1956). Herman also had access to the actual questionnaire returns which have since been destroyed.

⁴ Herman (op. cit.), pp. 583-4. Of this approximately 1 percent of manufacturers, there appears to have been both a large number of smaller manufacturers who used RPM only temporarily and a more "stable core of manufacturers who have given fair trade a major role in their merchandising policies, who account for the bulk of the aggregate sales of fair-trade goods, and who tend to adhere to fair-trade programs for extended periods."

from Herman (reproduced below) shows that it nevertheless had significant effects in certain trades, particularly the drug trade. Herman observed that "the three categories most closely associated with the drug store, drugs and medicines, druggists' sundries, and cosmetics and perfumes, account for 45.7 percent of the number and 42 percent of the fair-traded volume Tobacco products and smoking accessories, also sold heavily through the drug store, contributed another 4.6 percent of the numbers and 6.6 percent of the sales The other categories accounting for significant percentages of fair-trade volume are electrical appliances and housewares, alcoholic beverages, and photographic equipment and supplies."¹

The size distribution of sampled firms using RPM in the 1950's is shown below in Table VI-2 from Herman.² From this information Herman concluded: "This distribution confirms the view that smaller manufacturers comprise a substantial majority of the number of firms utilizing fair trade: 36 percent of sample numbers had sales of fair-trade goods totalling less than \$1 million in 1954, and 71.4 percent of the firms in the sample had fair-trade sales below \$5 million during that year On the other hand, this size distribution also indicates that a very substantial number of large manufacturers utilize the fair-trading privilege, and that these large firms account for the lion's share of the sales of fair-traded merchandise. The 63 firms with fair-trade volume below \$1 million accounted for only 1.4 percent of the fair-trade volume of sales of our sample members, while the 19 concerns with a fair-trade volume of \$25 million or more contributed 62.8 percent of the sample total for 1954 [Thus, while] many small manufacturers undoubtedly have a stake in fair-trade legislation, . . . in terms of volume of sales of goods under fair-trade contracts, fair trade would appear to be of primary benefit to large firms."³

1 Ibid., p. 586.

2 Ibid., p. 588.

3 Ibid., pp. 588-9.

Table VI-1

Industrial Distribution of the Fair-Traded
Merchandise of 175 Firms, 1954

Industry	Number of Manufac- turers	Percent of Manufac- turers	Volume of Sales (Millions)	Percent of Sales
Drugs and medicines	26	14.9	\$ 271.2	20.0
Druggists' sundries	23	13.1	200.1	14.6
Electrical appliances and housewares	6	3.4	186.0	13.6
Alcoholic beverages	7	4.0	131.4	9.5
Cosmetics and perfumes	31	17.7	100.8	7.4
Tobacco products and accessories	8	4.6	90.0	6.6
Cameras and photo supplies .	4	2.3	65.5	4.8
Boats and outboard motors ..	2	1.1	49.8	3.6
Firearms and ammunition	2	1.1	48.9	3.6
Automotive supplies	7	4.0	38.0	2.8
Clocks and watches	4	2.3	36.2	2.6
Clothing	5	2.9	35.2	2.6
Shoes and other footwear ..	2	1.1	29.9	2.2
Hardware	11	6.3	19.5	1.4
Books	7	4.0	16.2	1.2
Hosiery	3	1.7	16.0	1.2
Food products	2	1.1	5.2	0.4
Sporting goods	4	2.3	2.7	0.2
Other	21	12.0	25.9	1.9
TOTALS	<u>175</u>	<u>100.0</u>	<u>\$1,368.4</u>	<u>100.0</u>

Size Distribution of 175 Fair-Trading Manufacturers,
by Value of Goods Sold Under Fair-Trade
Contracts, 1954

Size Class	Number of Manufac- turers	Percent of Manufac- turers	Volume of Sales (Millions)	Percent of Sales
0-less than \$1 million	63	36.0	\$ 18.7	1.4
\$1 million-less than \$5 million	62	35.6	135.9	9.9
\$5 million-less than \$10 million	14	8.0	96.9	7.1
\$10 million-less than \$25 million	17	9.7	258.2	18.9
\$25 million and up Totals	<u>19</u> 175	<u>10.9</u> 100.0	<u>858.7</u> \$1368.4	<u>62.8</u> 100.0

There are also several more recent estimates of the "cost" of fair trade. One estimate, reported in the 1969 Economic Report of the President, puts the total at 1.5 billion dollars annually.¹ A 1975 Library of Congress study estimated the annual amount to be about 3 billion dollars.² Professor L. G. Shepard in 1975 estimated the amount to be 6.5 billion dollars annually.³ Even this latter estimate is but 1.2 percent of 1975 personal consumption expenditures on durable and nondurable goods.

(5) Usefulness of Price Surveys. Each of the price or price-related surveys can be criticized for various technical, statistical or methodological deficiencies. The most important point, however, is that the studies are not specified to distinguish between alternative hypotheses for the imposition of RPM, and they do not necessarily tell us anything about RPM that we did not

¹ See 1969 Economic Report of the President, p. 108. The source of this estimate is not clear.

² House Report No. 94-341 (op. cit.).

³ Ibid.; and L. G. Shepard, "The Economic Effects of Repealing Fair Trade Laws," 12 Journal of Consumer Affairs, 220 (Winter 1978).

successful enforcement of RPM, whether imposed for efficiency or anticompetitive purposes, will very likely raise prices. Therefore, these studies cannot help us determine conclusively which hypothesis concerning RPM is applicable. They do not necessarily tell us anything about the welfare effects of RPM or of the fair-trade laws, but only that enforcement of minimum prices was at least partially successful.² These studies do, however, give some indication of the size of the price effects which have been associated with the imposition of RPM.³

(B) Other Surveys

Several survey studies of RPM were concerned with aspects other than price. The Economic Research Division of the Eli Lilly Company studied operating costs of drug stores. Leonard Weiss analyzed the size of drug stores. Other studies have investigated small business failure rates. However, like the studies using price surveys, these studies tell us nothing conclusive about the welfare effects of RPM.

In a study using 1948 information from 1,051 drug stores in fair-trade areas and 71 drug stores in nonfair-trade areas, Eli Lilly found the operating revenue as a percent of sales to be 26.17 percent in fair-trade areas and 27.57 percent in nonfair-trade areas. The Bureau of Education on Fair Trade⁴ interpreted this difference to mean that stores in fair-trade areas were more

¹ Prices would be predicted to fall with RPM by the Gould-Preston "outlets" theory (see Section IV), if the scale effects at the manufacturer level dominate the RPM-enhanced resale margins; and the use of stipulated or maximum resale prices to eliminate successive monopoly markups in bilateral monopoly situations could lower retail prices (see Section III).

² Two price studies dealt with the compliance issue directly. R. J. McEwen, W. J. Smith and C. J. Scully, "Fair Trade Prices," 9 Boston College Guidepost, 6 (October 1956); and R. H. Oakes, "Resale Price Maintenance in Chicago, 1953-55," 30 Journal of Business, 109 (1957).

³ An appendix attached at the end of this paper contains several lists of fair-traded products from various sources. The reader is invited to consider which hypothesis most likely explains the use of RPM in these instances.

⁴ Bureau of Education on Fair Trade Bulletin, "Current Research Studies on Fair Trade." (See Frankel (op. cit.), p. 190 for reference to this study.)

efficient. This interpretation does not follow, or course, because the prices in fair-trade areas are likely to be higher, and thus could yield a lower operating revenue as a percent of sales, even if the stores are less efficient than those in non-fair-trade areas.¹

Leonard Weiss² reported that the 1963 Census of Retail Trade showed that sales per drug store in six of seven large metropolitan areas that had never had fair-trade laws were substantially larger than the sales per drug store in other large metropolitan areas. Although Weiss admits that "there are many reasons why some areas should have drug stores with higher volume than others,"³ he interprets the data to be consistent with the hypothesis that drug stores in fair-trade states were an example of a retail cartel with free entry. Unfortunately, the results are also directly consistent with the Gould-Preston outlets hypothesis, and all of the remaining hypotheses give no predictions about the effect of RPM on store size. Thus, Weiss' results are not necessarily inconsistent with any of the various hypotheses.

Three other studies using Census data attempted to determine the effects of fair trade upon small business failure rates. A 1965 study by S. M. Lee compared 1933-58 business failure rates in fair-trade and free-trade areas.⁴ A 1962 Justice Department study and a 1975 Library of Congress study addressed the same issue. All three studies found that small business failure rates were higher in fair-trade areas.⁵ However, like Weiss' results, these studies do not necessarily tell us anything conclusive about the welfare effects of RPM primarily because none of the economic hypotheses make clear predictions of how RPM will affect small

¹ See Frankel (op. cit.), pp. 190-191.

² Leonard Weiss, Case Studies in American Industry, 2nd ed. (John Wiley, 1971), pp. 261-167.

³ Ibid., p. 265.

⁴ S. M. Lee, "The Impact of Fair-Trade Laws on Retailing," 41 Journal of Retailing, 1 (Spring 1965).

⁵ Reported in the Congressional Record-Senate, December 2, 1975 at p. 38050.

business failure rates. Thus, while the results of these studies are consistent with the dealer collusion hypothesis if entry is not barricaded, they are not inconsistent with any of the efficiency hypotheses.

(C) Case Studies

Many of the case studies presented in this section are not "empirical" in the sense that extensive data were collected for rigorous hypothesis testing. They are "empirical" in the sense that the distribution system of a specific industry or product was evaluated, more or less rigorously, in an attempt to determine if empirical evidence of the type predicted by the various RPM theories was present. These studies are more useful than those discussed above because some attempt was made in most of them to determine which RPM theory was most applicable to the particular case under study, thereby indicating the probable welfare effects of the practice.

(1) Light Bulbs

Bowman¹ and Telser² present short analyses of the United States v. General Electric Co. case involving light bulbs.³ After a short discussion, Telser concludes that the use of RPM by G.E. and Westinghouse mainly existed to aid a manufacturers' cartel.⁴ In an even shorter analysis, Bowman concludes that RPM was mainly used to support a price discrimination scheme.⁵

(2) Fine China and Televisions

Other case studies have involved substantially more detailed analysis. Victor Goldberg analyzed two FTC cases involving RPM:

¹ Ward S. Bowman, "Resale Price Maintenance -- A Monopoly Problem," 25 Journal of Business, 141 (July 1952).

² Lester G. Telser, "Why Should Manufacturers Want Fair Trade?" III Journal of Law and Economics, 86 (October, 1960).

³ 272 U.S. 476 (1926).

⁴ Telser (op. cit.), pp. 99-105.

⁵ Bowman (op. cit.), pp. 153-155. Bowman also suggests that the Soft-Lite and Univis cases (321 U.S. 707 (1942); and 316 U.S. 241 (1941)) were examples of what he calls "mutual dependence" (p. 152), but almost no supporting analysis is presented.

Lenox (fine china) and Magnavox (televisions).¹ Goldberg notes that while the practices of Lenox's largest competitors appear to be similar, the case record treated the competitors "only tangentially," so he could make no judgment as to the possibility of collusion existing. Similarly, the case developed insufficient information to judge if RPM was likely to have been a part of an efficient distribution system needed for marketing this prestige product.

Whatever the true explanation for the application of RPM, Goldberg concludes that the FTC intervention is likely to have had little or no effect. Since Lenox and its competitors sold through the same limited number of prestige retail outlets, Goldberg suspected "that conventional markups could be utilized [substituted] instead of RPM with essentially no change."

In the case of Magnavox Goldberg speculates that the FTC most likely created social harm by hampering Magnavox's efforts to establish a distinct marketing style. As Magnavox was the third largest seller of color televisions with a market share of around 9 percent, and was unique among large sellers in using RPM, Goldberg concludes "that Magnavox's RPM policy was not an element of a broader industry attempt at cartelization. Nor was Magnavox the reluctant cat's paw of a dealer cartel." Thus, Goldberg believes the FTC's action probably created social harm by hindering Magnavox's efforts to reach the segment of the consuming public interested in expensive lines sold through heavy dealer selling efforts.

(3) Jeans

Several analyses of the use of RPM by Levi Strauss exist. Although differing considerably in detail, Robert Steiner's¹

¹ Victor P. Goldberg, "Resale Price Maintenance and the FTC: The Magnavox Investigation," 23 Wm. and Mary Law Review, 439 (1982); and "Enforcing Resale Price Maintenance: The FTC Investigation of Lenox," 18 American Business Law Journal, 225 (1980).

² Robert Steiner, "Understanding the Consumer Goods Economy," Paper presented at the FTC Bureau of Economics, March 16, 1978; and Brand Advertising and the Consumer Goods Economy (Manuscript).

analyses and Sharon Oster's¹ study conclude that Levi Strauss continued to use RPM for longer than was optimal for both the public and Levi Strauss. Steiner and Oster feel that the margins necessary to induce high quality retailers to carry Levi's jeans may have been justified initially, because the offer of a product by these retailers would be a signal of quality to consumers. But, they believe that by the late 1970's, the Levi Strauss brand name had gained sufficient consumer acceptance that "signaling" quality by distribution through high cost retailers was no longer needed. Thus, both Steiner and Oster conclude that the FTC action was beneficial because it caused Levi Strauss to more quickly abandon their obsolete RPM policy. Both consider the fall in retail prices and the increase in Levi's jeans sales occurring after the FTC action to be beneficial to the public and to Levi Strauss. Dr. Oster concludes that a "conservative" estimate of the benefits from the case to be approximately \$75 million per year, of which \$3 million would be an efficiency gain and the rest a gain to consumers in the form of lower jeans prices.²

In contrast, William Baxter concluded that Levi's use of RPM (specifying a minimum resale price) benefited customers because it actually tended to act as a ceiling-price during the early 1970's, a period of "extraordinary and unanticipated demand."³ Baxter suggests that Levi feared that the 1972-1975 demand rise was "temporary," and that Levi did not want to risk dissipating consumer goodwill by attempting to charge all that the market would bear in a time of shortage. However, no evidence is presented that Levi Strauss tried to enforce a retail ceiling price.

¹ Sharon Oster, "The FTC v. Levi Strauss: An Analysis of the Economic Issues," March 1982. Dr. Oster's study is one of several funded by the FTC. These studies are contained in a report, currently in its final stage of preparation, compiled by R. N. Lafferty, R. H. Lande, and J. Kirkwood, Impact Evaluations of F.T.C. Vertical Restraints Cases.

² Professor Steiner concludes that the consumer benefits from the case were substantially greater than Dr. Oster's estimate.

³ "Memorandum Re Effect of Suggested Pricing Practices During Period of Product Shortage." This memorandum was "contracted for" by Levi Strauss "in connection with the California class action proceedings against it."

The Steiner-Oster theory seems more plausible, but their interpretation of the Levi's sales increase occurring after RPM removal can also be criticized. The theory that select retailers created a quality image for Levi's jeans would also predict a short term rise in Levi's sales after the FTC action. This rise would be expected because the "image" is not likely to disappear instantaneously.¹ Thus, a short term sales increase might be the result of free riding by consumers and by retailers with a lower-quality image.

On the other hand, Dr. Oster presents data showing that, over the three years following the removal of RPM, Levi's total sales, profits, and stock price approximately doubled, and that its sales and stock price increased relative to those of the next largest jeans producer. Dr. Oster feels that the persistence of these increases imply that Levi benefited from the FTC intervention. However, in subsequent years the company's performance has deteriorated. Thus, it may be that a test that conclusively distinguishes between the "Levi's mistake" and the "free riding on image" theories would have to involve a longer-run analysis than Steiner and Oster made.²

(4) Shoes

Timothy Greening³ analyzed the FTC case against Florsheim shoes. He argues that four plausible hypotheses exist as to why

¹ Although the company could no longer protect resale margins, the FTC order permitted Levi to continue to confine sales to outlets able to meet nonprice criteria determined by Levi, and to prohibit transshipment of jeans to unauthorized accounts. Also, about the time of the suit, Levi increased its media advertising substantially. These factors should tend to offset any image deterioration caused by the forced removal of RPM.

² There is, however, a body of literature which deals with the way that market events are rapidly incorporated into stock prices. The efficient markets/rational expectations hypothesis suggests that stock prices reflect all available information, and that unanticipated events will result in a current change in stock prices. The price change is supposed to represent an unbiased estimate of the discounted net present value of the event to the firm. For a nice survey of this literature and various empirical applications see, G. William Schwert, "Using Financial Data to Measure Effects of Regulation," XXIV Journal of Law and Economics, 121 (April 1981).

³ "Analysis of the Impact of the Florsheim Shoe Case," July, 1981. Dr. Greening's analysis is contained in the report compiled by R. N. Lafferty, et al. (op. cit.).

Florsheim engaged in RPM: (1) high quality stores create a strong signal of product quality, and this store image is subject to free riding, (2) price is a signal of quality, and RPM aids in maintaining the sales-maximizing retail price necessary for quality signaling, (3) the expensive services provided by high-quality stores are not necessary, and Florsheim made a mistake in its marketing strategy, or (4) Florsheim's company stores were protected by RPM even though this company-store protection policy did not maximize profits for the corporation. Greening concludes that:

As it is, all four hypotheses remain viable candidates. Just as governments are often formed by coalitions of parties, none of which has a majority, so the "true" explanation of Florsheim's conduct may prove to be comprised of parts of all four hypotheses.

However, my own opinion is that the mistake hypothesis and company-store protection hypothesis will be rejected if the FTC surveys both prices and quantities in sufficient detail to determine the effect of the consent decree on each. Both the store-image free-riding explanation and the quality signalling explanation are analytically plausible, and supported by the evidence available from an industry study.

If the mistake hypothesis is correct, then virtually every major apparel retailer and manufacturer in the country is following an inappropriate marketing strategy. This is not impossible, but it is unlikely.¹

(5) Stereo Components

William A. McEachern and Anthony A. Romeo analyzed the effects of a series of consent agreements prohibiting RPM by seven audio components manufacturers.² McEachern and Romeo believe that during the early stages of the audio components industry manufacturers had new, unfamiliar products for which they needed access to retail shelf space, point-of-sale demonstration

¹ Ibid., p. 70.

² "Vertical Restraints in the Audio Components Industry: An Economic Analysis of FTC Intervention," contained in the report compiled by R. N. Lafferty, et al. (op. cit.). The firms were James B. Lansing Sound, Inc. (JBL), Sherwood, Sansui, TEAC, Pioneer, United Audio Products and Nikko Electric Corporation. Two of these firms were specialized: JBL - speakers, and United Audio - Dual and PE record changers. The other five sold somewhat fuller lines of components. Some of these firms were industry leaders, but Nikko certainly was not.

capabilities, and quality certification for their components. RPM was adopted to induce retailers to produce these services by providing the needed retailer margin and protection from free riding. However, RPM became both less important and more difficult to enforce as consumer exposure to audio components, and increased familiarity with the characteristics and quality reputations of various brands, reduced the need for retailer services.

McEachern and Romeo believe there are two relevant audio components submarkets in which the optimal marketing strategies differ. One consists of "low-end" audio components in which sales of prepackaged systems are common. Since these prepackaged systems are usually made up of several manufacturers' components, it is difficult for a manufacturer to determine if the minimum price is being charged on a particular component, especially if a house brand component is included. System sales also make it difficult for the consumer to free ride because available systems tend to differ across retailers.

McEachern and Romeo concluded that by the time of the FTC interventions RPM had become an inefficient marketing strategy for suppliers of low-end components, due at least in part to the increasing use of system sales. Yet, RPM programs were not abandoned voluntarily. The authors suggest mistakes, inertia, risk aversion, and a prisoners' dilemma as possible explanations. They conclude that, whatever the correct explanation, the FTC orders caused manufacturers to abandon a restraint on the distribution of low-end products that was no longer efficient.

The second submarket consists of "high-end" audio components. Consumers of these more expensive components generally seem to upgrade their systems by purchasing individual components. Free riding upon retailers' presale services seems much more likely in this segment of the market. In high-end components the authors

conclude that the FTC interventions likely had a significant, but not overwhelming, detrimental effect on consumer welfare.¹

McEachern and Romeo conclude that the FTC interventions were beneficial when gains and losses at both ends of the components market are considered. In the low-end, the FTC action caused RPM to be abandoned sooner than it otherwise would have been. This created savings in the form of lower prices, and by eliminating the "wasteful subterfuges" used by retailers to circumvent RPM restrictions. The low-end of the market accounts for an estimated 85 to 90 percent of total audio component units sold. Consequently, they conclude that the positive effects of the FTC actions in the low-end outweigh the negative effects in the high-end. In their view, therefore, the overall effect of the consent orders was to improve social welfare.²

(6) Beer and Bread

Andrew McLaughlin analyzed two FTC cases involving the application of RPM: Adolph Coors and Bakers of Washington

¹ Audio components manufacturers appear to have instituted alternative vertical restraints subsequent to the FTC actions, such as exclusive dealing and limited distribution, to ensure the provision of point-of-sale information and other free-ridable services. Since the manufacturers had preferred to use RPM, however, these alternative arrangements are likely to be an inferior way to procure the desired services.

² Howard Marvel, "Vertical Restraints in the Hearing Aids Industry," contained in the report compiled by R. N. Lafferty, et al. (op. cit.), evaluated the effects of vertical restraints in the hearing aids industry. He evaluated the cases against Dahlberg, Sonotone, Radioear, and Maico, all of which involved numerous vertical restraints. Although all these suppliers but Maico were put under conventional FTC orders prohibiting RPM, Marvel's analysis focuses upon the nonprice vertical restraints, i.e., exclusive territories, exclusive dealing, cooperative advertising, volume-forcing, customer restrictions, submission of customers names to manufacturers, and short duration dealer-termination clauses, rather than RPM. Marvel did not believe that "RPM is ... an important issue in this analysis." Interested readers should see Marvel's analysis. In short, his conclusion is that "the most likely explanation [for the restrictive distribution] is that manufacturers wished to protect their rights to profit from sales generated by their own efforts, ... [and] assessed in terms of the goal of promoting competition, the proceeding was counter-productive." However, he adds that because of the quality of information available to consumers of hearing aids ... "the question of whether society benefitted is much more [difficult]."

Association.¹ Empirical comparison of pre-decision and post-decision sales volumes of Coors was not possible, and rigorous hypothesis testing could not be carried out. However, McLaughlin's analysis of the FTC proceeding, and the available information of Coors' post-decision behavior, led him to conclude that RPM was an efficient and socially beneficial method of promoting dealer services of refrigeration and product rotation which enhanced the quality of Coors' unpasteurized beer. Apparently improper handling of Coors beer by dealers could lead to spoilage and a resulting loss of consumer goodwill for Coors.

McLaughlin's analysis of the Bakers of Washington case is perhaps the most rigorous and complete empirical evaluation of an application of RPM. McLaughlin determined what the expected post-decision changes in bread prices and quantity sold would be if RPM were a procompetitive device to gather information (as claimed in the Bakers' defense), as opposed to an anticompetitive device to effect a manufacturers' cartel. The results of his linear regression analysis of price and quantity showed that the price of bread fell due to the FTC action, and that the quantity of bread consumed was not adversely affected. These results are consistent with the cartel theory, and inconsistent with the procompetitive information theory. McLaughlin concluded that "the evidence supports the FTC assertion that the Bakers of Washington Association effected a cartel from 1955 through 1964."²

(7) Repeal of Fair Trade in Rhode Island: Various Products

Anthony P. Hourihan and Jesse W. Markham studied the impact of the repeal of fair trade in Rhode Island in 1970 on the marketing of previously fair-traded products.³ Case studies of nine manufacturing companies were conducted. Although the companies are not specifically named, they are identified as two

¹ Andrew McLaughlin, "An Economic Analysis of Resale Price Maintenance," Ph.D. Dissertation, UCLA, 1979.

² Ibid., p. 74.

³ A. P. Hourihan and J. W. Markham, The Effects of Fair Trade Repeal: The Case of Rhode Island, Marketing Science Institute of Cambridge, Mass., and the Center for Economic Studies, Washington, D.C. (August 1974).

garden products manufacturers, two tableware manufacturers, three housewares suppliers, one watches and clocks manufacturer, and one specialty items (gifts) manufacturer. The research methodology involved interviews with top management personnel from each company. In addition, 33 wholesalers and retailers doing business in various parts of the state were interviewed. The general results of these case studies are more qualitative than quantitative, and can be summarized as follows:¹

1. The repeal of Rhode Island's fair-trade law did not lead to universal reductions in the retail prices of all products which had previously been fair traded. The prices of five of the nine product lines surveyed were virtually unaffected by the demise of the fair-trade law.

2. In three out of the four cases where retail prices did decline, the availability of that product to consumers was reduced significantly, usually by a decline in the average depth (inventory) and width (selection) of the product line carried by retailers, and in two instances there was a reduction in the number of retail outlets that carried the product.

3. The extent to which manufacturers were significantly affected by the repeal of Rhode Island's fair-trade law depended on the type of control they had over their channel of distribution. In cases of manufacturers that used two-step or dual channels of distribution (i.e., wholesalers) the retail prices of products declined following the repeal of fair trade. The retail prices of the five companies that used a single step (direct selling) channel of distribution (or, in one case, exclusive wholesaler dealerships) were unaffected by the demise of fair trade.

4. Six of the nine manufacturers ... felt that their company's position in Rhode Island had not been adversely affected by the repeal of fair trade. Moreover, the prices of all but one of these six manufacturers' product lines had been unaffected by the repeal of the law. A seventh manufacturer stated he felt that

¹ For the most part, this summary is taken directly from Hourihan and Markham, pp. I-6 to I-11.

fair trade's repeal alone had not really mattered--other factors were more important. The eighth manufacturer thought that problems were developing due to his inability to control the retail prices of his product The ninth manufacturer was the only one to state that fair trade's repeal had definitely adversely affected his company's sales and market position in Rhode Island.

5. For those companies whose products' retail prices did decline, the magnitude of retail price reductions ranged from 20 percent to 40 percent off the regular fair-trade price. The upper limit of the range had been the initial reaction to the demise of fair trade with retail prices eventually settling at 20 percent off for three of the four companies, and 30 percent off for the fourth. These price reductions were by no means found in most stores; many smaller retailers held their prices unchanged and simply reduced their inventories and selections of the product line. This was specifically true in the case of independent hardware dealers who switched out of previously fair-traded houseware lines to avoid the risks inherent in dealing with products whose retail prices were unstable.

6. Fourteen of the 19 retailers (74 percent) who responded unequivocally to the questions indicated that the repeal of fair trade had not substantially adversely affected them one way or the other.

7. No evidence suggested that the repeal of fair trade caused any decline in the retail prices of products that were not previously fair traded.

8. The interviews held with both the manufacturers and retailers of the previously fair-traded products led the researchers to conclude that most of the people interviewed did not consider the absence of fair trade in Rhode Island a really important matter.

9. One manufacturer, of the nine surveyed, had encountered a decline in his Rhode Island sales following the demise of the fair-trade law which he attributed to fair trade's repeal.

10. Of the 33 retailers or wholesalers interviewed, 31 indicated that manufacturers of previously fair-traded products did not offer any new means of (marketing) support following the repeal of the Rhode Island fair-trade law.

11. Some evidence existed, especially in the case of hardware dealers, that retailers shifted away from emphasizing the previously fair-traded products whose prices were significantly reduced, and sought to emphasize products which were more profitable to them.

These results are summarized in tabular form below. This table is a slightly modified version of Table 5 (p. II-56) in Hourihan and Markham. Although no attempt was made in this study to identify a specific economic hypothesis applicable to each of the nine manufacturers, the results illustrate that the effects of RPM (or its removal) can, in fact, be quite diverse.

Although few in number, the case studies of RPM reviewed here seem more useful than the far more numerous "survey" studies. The case studies usually give some indication of the probable welfare effects of RPM, and can help to distinguish among the alternative hypotheses. The probable effects indicated from the case studies are that RPM sometimes reduces and sometimes enhances social welfare.

(D) Previous FTC Studies of RPM

(1) 1929/31 FTC Study

The Federal Trade Commission has published two extensive studies of RPM. The first was published in two parts, Part I in 1929, and Part II in 1931.¹ This study was based upon the results of questionnaires sent out to various groups believed interested in RPM.²

¹ Federal Trade Commission, Report on Resale Price Maintenance, Part I (submitted to the Speaker of the House of Representatives, January 30, 1929), and Part II, (submitted to Congress, June 22, 1931).

² Around 22,000 questionnaires were mailed to consumers, of which 1,990 replies were received. About 3,200 questionnaires were sent to economists and statisticians, and 6,500 to lawyers. About 10 percent of these were answered and returned. Questionnaires and separate financial schedules were sent to about 6,000 (footnote continued)

Effects of Repeal of Fair Trade in Rhode Island

Name of company (Product type)	Type of distribution channel employed	Were there substantial changes in the retail prices of your products following April 1970?	Were products used as loss leaders?	Were there substantial changes in the availability (to consumers) of your products due to the repeal of Fair Trade?	Were substantial changes in your company's sales caused by the repeal of Fair Trade?	Has repeal of Fair Trade substantially affected your company?
Company A (Garden)	Direct	No	No	No (Number of dealers up slightly)	No	No
Company B (Tableware)	Two-step (Wholesale-salers and retailers)	Yes (20% price reductions)	Yes	Yes (Reduction of numbers and breadth and width of line)	Yes (Although other factors were also involved)	Yes (Sales volume down 15%)
Company C (Watches & Clocks)	Direct	No	No	No	No	No
Company D (Gifts)	Two-step (Dual)	Yes (30% price reductions)	No	No	No	Yes (Jewelry accounts are a problem)
Company E (Housewares)	Direct	No (Used selective distribution)	No	No	No (Several factors affected sales volume changes)	No
Company F (Housewares)	Two-step (Wholesalers and retailers)	Yes (20% price reductions)	No	Yes (Reduction, though no change in number of dealers)	Yes (Sales had increased)	No

Effects of Repeal of Fair Trade in Rhode Island—Continued

Has fair trade substantially affected your company's sales of Fair Trade?	Were there substantial changes in your company's sales of Fair Trade caused by the repeal of Fair Trade?	Were there substantial changes in the sales of your products to the repeal of Fair Trade?	Were products used as leaders?	Were there substantial changes in the retail prices of your products following April 1970?	Type of distribution channel employed	Name of company (Proprietor)	Type of salesperson	Used selective distribution?	No	No	No	No	No
Has fair trade substantially affected your company's sales of Fair Trade?	Were there substantial changes in your company's sales of Fair Trade caused by the repeal of Fair Trade?	Were there substantial changes in the sales of your products to the repeal of Fair Trade?	Were products used as leaders?	Were there substantial changes in the retail prices of your products following April 1970?	Type of distribution channel employed	Name of company (Proprietor)	Type of salesperson	Used selective distribution?	No	No	No	No	No

This study was conducted at a time when RPM was illegal, but while legislation which would have legalized RPM was under consideration in the Congress. The price and other data collected, therefore, do not necessarily reflect results applicable to RPM. Rather the results relate to the effects of manufacturers' suggested resale prices. This information was then compared to information concerning items sold without suggested resale prices in an attempt to draw conclusions that could be applied by extension to the issues raised by RPM.

The basic methodology was to collect information from the various groups surveyed concerning what they saw as advantages and disadvantages of RPM. These attitudinal results were then compared with financial data in an attempt to relate various indicia of economic performance to particular positions on RPM. From the results of this study the Commission eventually took the position that "no legislation permitting resale price maintenance is at present called for."¹

Because RPM as such was not legal at the time of the surveys, the questionnaires solicited information on suggested resale prices. However, little or no information concerning manufacturers' enforcement of their suggested prices was obtained. These are two major deficiencies of the study. Consequently, the statistical data are of no use in quantifying the effects of RPM. Nevertheless, the study is of some value because the opinions expressed by the various surveyed groups shed at least some light upon the motivations for imposing RPM.

Manufacturers were among the early advocates of legalized RPM according to the results of the FTC survey, yet they were apparently not the major proponents. Of 691 manufacturers submitting

(footnote continues)

manufacturers. They returned 849 questionnaires, but only 691 reported financial and commercial data. Questionnaires and financial schedules were sent to 2,325 wholesalers, of which approximately 15 percent responded. Over 36,000 retailers received questionnaires of which about 3,000 responded with 2,334 useable replies.

¹ FTC Report, Part II (1931), p. 6.

financial data, 61 percent expressed no preference, 10 percent were opposed, and 29 percent favored legalized RPM. The average rate of return on investment of those in the group favoring RPM was larger than for those opposing the practice. Of a larger group of 849 manufacturers who returned questionnaires, only 14 percent had no preference, 17 percent were opposed, and 69 percent favored RPM. The most frequently stated reason for advocating RPM was that it was "desirable in order to protect goodwill built up by heavy advertising expenditures."¹

Wholesalers were almost unanimously in favor of RPM. At the time of this report, department stores, supermarkets, chain stores, and mail order retailing were relatively new innovations and growing rapidly. Many of them were able to integrate the wholesaling function within their new and apparently more efficient operations. Wholesalers, therefore, might have viewed RPM as a way to deter the competitive threat posed by these newer types of distributors since RPM would undercut their ability to discount. The FTC report adopted this view: "With a narrowing market and decreasing profits, he [the wholesaler] is fighting for existence in business and favors resale price maintenance as a defense against further inroads upon his trade."²

Among retailers the results were varied. Druggists, grocers, jewelers, stationers, and hardware retailers generally favored RPM. Among druggists and grocers support was more prevalent among smaller stores than larger ones, while the reverse was true for the later three groups. Chains, department stores, and dry goods stores were generally opposed to RPM.

¹ FTC Report, Part II (1931), p. 1. The apparent discrepancy is explained at p. 18. The argument that RPM was necessary to protect manufacturers' "goodwill," which is one of the classic rationales for imposing the practice, is similar to free-rider-on-quality-reputation explanations often advanced today, if one assumes that the quality image is jointly created by manufacturer advertising and distribution through select high quality outlets.

² FTC Report, Part I (1929), p. 59. The accuracy of this assessment can be subject to some doubt. However, the influence of the National Wholesale Grocers Association in writing the original Robinson-Patman bill tends to support the notion that wholesalers faced more efficient competitors whose growth they sought to deter. See, Corwin Edwards, The Price Discrimination Law (Washington, D.C.: Brookings Institute, 1959).

The principal argument advanced in support of RPM was related to the "problem" of leader price cutting on certain branded products.¹ Manufacturers expressed concern that the goodwill of their trademarks would (or could) be debased by widespread discounting from the manufacturers' suggested price. At that time the advertising of price was a common feature in national advertising copy. Many manufacturers were concerned that their images would be harmed if large discounts from their advertised prices were available. They felt that consumers would view the manufacturer as charging (or sanctioning) exorbitant prices in certain outlets, and that, as a consequence, the manufacturer's goodwill would be diminished.

Both manufacturers and retailers expressed concerns that such discounting would also cause manufacturers to lose distribution through numerous retail outlets. This concern was typically expressed in terms of discounters "cream-skimming" by discounting well-known and heavily advertised brands. It was feared that this would have an especially deleterious effect upon full-service and specialized distributors, and, over a longer time horizon, on the manufacturer as well.

The conclusion which it now seems warranted to draw from this inquiry is that some advocates of RPM were motivated by efficiency considerations, and others were not. The leader and loss-leader arguments expressed by some manufacturers are quite similar to "free-rider" arguments advanced today in support of RPM, although the manufacturers in the 1920's expressed themselves in different terms. The arguments of the wholesalers (in particular) and some of the retailer groups, however, are harder to reconcile with efficiency considerations.

¹ FTC Report, Part II (1931), p. 5. The term "leader" selling is usually not well defined. Typically though leader selling seems to refer to pricing at less than average total cost, whereas loss-leader selling often seems to refer to selling below invoice price.

(2) 1945 FTC Study

The second major FTC study of RPM was published in 1945.¹ The study methodology consisted partly of sampling to obtain information on particular lines of trade sold in various geographic areas. Retail price studies were restricted to selected items in the drug, food, and men's clothing lines in selected cities.² Information was obtained from dealers regarding their prices before and after RPM became effective in their respective areas, and again in 1939 through actual visits by FTC field representatives.

Except for the 1939 prices, the price information was obtained by asking dealers to recall past prices. This required the dealers to rely on their memories in many cases. As is true of some other RPM price survey studies, "as a means of measuring the effects of RPM on consumer prices, the complete reliability of these prices, except in 1939, is not certain, because of the lack of adequate dealer records of prices charged in the past."³ The method by which the remaining information was obtained for this report was as follows:

Information respecting the general economic phases of the inquiry was obtained from many sources. Conferences were had with numerous manufacturers, wholesalers, and retailers, including both those favoring and those opposing resale price maintenance. Many conferences were also held with trade association executives representing both proponents and opponents of resale price maintenance, and in some cases detailed examination of the files and records of trade associations and fair-trade committees was made, especially in the drug, hardware, and food trades. In addition, careful examination was made of a large quantity of published material prepared by both Government and private agencies and individuals, and special study was made of material contained in numerous legislative hearings, court cases, advertising material, catalogs, etc.

¹ Report of the Federal Trade Commission on Resale Price Maintenance, pp. 1-872, submitted to Congress, December 13, 1945.

² Many of these items would be considered convenience goods for which free-rider arguments are likely to be of relatively minor importance.

³ 1945 FTC Report (op. cit.), p. 12.

The data obtained from retailers and wholesalers by field visitation included not only prices before the specified products were put under resale price maintenance, immediately thereafter and at time of visit, but also the laid-down costs to the dealers and the volumes in which they had been sold and were selling. Like data were obtained, guided by the same dates with reference to nonprice-maintained competitors. Facts were also obtained in special reports by manufacturers showing the quantities of and net sales values of the same products sold to their respective classes of direct customers in the same communities in which the data were collected from wholesalers and retailers and in several additional communities. Most of the reporting manufacturers also furnished information on either actual, or relative, factory costs. These data were reported for specified periods before the specified dates on which the selected products, or their price-maintained competitors, were originally put under resale price maintenance and for specified periods thereafter.¹

For the price surveys on items sold in groceries and by the retail drug trade, data were obtained in the following way:

Data were collected from retail grocers in Columbus and Mansfield, Ohio--two cities in price-maintenance areas--and in Indianapolis and Richmond, Ind., Baltimore, Md. and Atlanta, Ga.--four cities in nonprice-maintenance areas for grocery products. Data were collected from retail drug stores not only in these six cities, all of which were price-maintenance areas for many products handled by such stores but also in eight other cities in price-maintenance areas--Easton, Md., Chester, Pa., Concord, N.H., Madison, Wis., Litchfield and St. James, Minn., Kansas City, Kansas, and Olathe, Kansas--and in six cities in nonprice-maintenance areas--Washington, D.C., Willmington and Dover, Del., Burlington, Vt., and in Kansas City and Harrisonville, Mo. The data were collected with reference to more than 40 brands of groceries and more than 90 brands of products handled by drug stores, these brands being divided between brands that had been put under minimum-price maintenance in designated price-maintenance areas and competing brands that had not been put under minimum price maintenance. Data were also obtained with reference to competing private brands from retail stores handling such brands.²

(i) Price Survey Results

The results of this portion of the study indicate that for grocery products, the limited number of manufacturers who used RPM

¹ Ibid., pp. 12-13.

² Ibid., p. XLV.

generally specified minimum prices which were very near the resale prices previously being charged by their larger customers. The prices of vegetable oil shortenings increased with RPM in chain and department stores, but declined somewhat in individual stores. The prices of soap powders, chips, flakes, or granules increased with RPM in supermarkets and fell in individual stores. Cake flour prices rose with RPM in chains and supermarkets, but fell in individual stores.

For other grocery products there was no observable change in prices following imposition of RPM. Most of the observed price increases occurred in cash and carry stores, while most of the price decreases occurred in credit and delivery stores. With the exceptions of the "outlets" hypothesis, where scale effects at the supplier level are very important, and the bilateral monopoly situations, where RPM eliminates successive monopoly markups, the declines in prices following the imposition of RPM are not predicted by any of the other economic theories of RPM.¹

In most cases there was no visible effect of RPM on the volumes of either price maintained or nonprice-maintained items. However, pancake flours and breakfast cereals experienced volume increases which were attributed to RPM-induced extra dealer sales efforts. The volume growth of prepared cake flour was apparently hampered by the use of RPM, but the evidence was considered inconclusive. In the case of other commodities, no effects upon volume were apparent.²

For products sold through the retail drug trade, the effects of imposing RPM were varied. In small cities, mostly those with populations of 5,000 or fewer, the prices of various goods sold with RPM decreased, while prices of goods sold in these cities without RPM were unchanged. Nearly all of these stores were individual stores, and most of the data came from the memory of

¹ There is speculation that the price declines occurred because the minimum RPM prices became well known to consumers. Retailers who were previously charging prices above the RPM prices then lowered their prices to the specified minimum levels, while also promoting themselves as dealers "who would not be undersold."

² 1945 FTC Report (op. cit.), pp. XLVI-XLVII.

druggists.¹ In medium-sized and large cities, individual stores reported price decreases following imposition of RPM, while chain stores and department stores generally reported price increases.

The prices of beauty creams sold with RPM rose in RPM areas by 9.6 and 11.0 percent in chain and department stores respectively, while they fell by 4.1 percent in individual stores. During the same time period, the prices of these same brands of beauty creams in non-RPM areas declined 2.2 and 6.9 percent in chain and department stores respectively.

The prices of tooth pastes and powders sold with RPM rose in RPM areas by 6.7 and 11.0 percent in chain and department stores, and fell by 3.1 percent in individual stores. In non-RPM areas the prices of the same brands of tooth pastes and powders declined by 1.0 and 2.9 percent in department stores and individual stores.

The prices of shave creams sold with RPM rose in RPM areas by 6.8 and 6.1 percent in chain and department stores and fell by 3.6 percent in individual stores. In large cities without RPM, all classes of stores were reducing their prices on these same brands, but the amount is not specified.

The prices of hair tonics and shampoos sold with RPM rose in RPM areas by 1.9 and 1.0 percent in chain and department stores and fell by 3.5 percent in individual stores. Brands of hair tonics and shampoos sold without RPM in these same RPM areas showed no change in prices. The prices of the brands which were sold with RPM where it was legal, showed either no change or slight (but unspecified) price declines in non-RPM areas in all types of stores.

The prices of face powder sold with RPM rose in large cities in RPM areas an unspecified amount in all types of stores. In medium-sized cities in RPM areas, the prices of these brands rose by 16.3 and 2.1 percent in chain and individual stores respectively. In large cities where there was no RPM, the prices

¹ The reliability of the data is subject to doubt, and there is also a question of reporting bias due to admonitions to druggists from the Druggists Research Bureau to "cast your vote for Fair Trade." (Ibid.), p. XLVIII.

of these brands fell by 0.2 and 0.7 percent in department and individual stores, but rose by 3.5 percent in chain stores.

The effects of RPM upon the retail volumes of brands sold with and without RPM were generally too obscured by other causes to allow reliable estimates. The study reported, however, that volume effects could be inferred for certain commodities. RPM led to volume increases in large cities for beauty creams. For tooth pastes, powders, and brushes, RPM caused the volumes of competitive brands to rise. For shave creams, shampoos, hair tonics, and laxatives, other causes "obscured completely" the effects of RPM.¹

(ii) Effects on Manufacturers' Volumes

The study also obtained data on the effects of RPM upon manufacturers' volumes. The data were categorized to avoid revealing the identity of the manufacturers, or the brands.² There are eight commodity classes for which data are presented in the study. In three commodity classes, the brands sold without RPM gained volume relative to the brands sold with RPM. In two of these three commodity classes, the gain was more apparent in price-maintenance areas than in non-RPM areas. For the third commodity class, however, the relative volume increase was less rapid in price-maintenance areas, which is consistent with an efficiency explanation of RPM for a product with a declining sales trend.

In the case of two different commodity classes, all the data obtained were for brands sold with RPM. In these, the manufacturers' volumes were sustained better in RPM areas than in non-RPM areas. For the remaining three commodity classes, there was either no evidence of the effects of RPM upon volume, or the evidence was inconclusive.

These results indicate that the effects of imposing RPM have been quite varied at both the supplier and dealer levels. For the most part the imposition of RPM has been followed by increased

¹ Ibid., pp. XLVII-XLIX.

² Ibid., p. 716.

prices to consumers on price-maintained brands, although some prices have actually fallen. With the exceptions of the outlets and bilateral monopoly hypotheses mentioned earlier, the economic theories, both procompetitive and anticompetitive, predict that RPM will tend to raise retail prices of brands sold with RPM.

The effects of RPM upon quantity sold per retail outlet have also varied, but the economic theories are ambiguous as to the expected effect of RPM upon retailer volumes. However, with respect to supplier volumes, the efficiency theories suggest that RPM will result in increased quantities sold, whereas the anti-competitive theories suggest the opposite. The FTC report reveals evidence that sometimes the quantity effects have been consistent with the predictions of the efficiency hypotheses, and sometimes the opposite has been true.

(iii) Involvement of Organized Dealer Trade Groups

The study also contains a detailed account of the involvement of various organized trade groups in advocating the legalization of fair trade, and summarizes some of the effects of these efforts in various product lines.

The study reports that the National Association of Retail Grocers, using Ohio as a test state, had apparently influenced 55 manufacturers to impose RPM on 200 items by March 1940. These efforts were not very successful from the Association's viewpoint, apparently because manufacturers were not very interested in or enthusiastic about RPM. They tended to set RPM prices which allowed retail margins not too different from those previously obtained by larger grocers. Apparently, manufacturers were concerned that RPM would induce competitive private label activity by their distributors. Also, a large component of the cost of many grocery items consists of agricultural commodities whose prices fluctuate frequently. This tends to make RPM impractical in the grocery trade, and its use was never very widespread, particularly outside of Ohio.

The National Retail Hardware Association also advocated RPM, but apparently was never very successful in obtaining it. As summarized in the study:

The trade-marked or branded hardware articles that are usually sold under resale price maintenance contracts are mostly specialty items such as sporting goods, electrical appliances, small household hardware, fishing baits, fishing rods and reels, cooking utensils, kitchen wares, electrical goods, such as electric shavers and electric clocks and small garden tools. Articles of hardware to which resale price maintenance is not applicable are those articles with no particular identity, those having a slow turn-over, those involving contract specifications and services of installation, and those involving trade-ins. With respect to the latter, the practical difficulty of determining the true value of a trade-in furnishes a means of evading the minimum resale prices whenever desired on products so covered, and the realization of this has done much to discourage the adoption of resale price maintenance by other manufacturers of products usually involving trade-in when sold at retail.¹

In the tobacco trade, wholesaler and retailer trade groups were never very successful in obtaining RPM. There are relatively few manufacturers of tobacco products, and large numbers of wholesalers and retailers for whom tobacco products are typically only a small portion of their total business. The manufacturers advertise heavily, and apparently do not see any great advantage to protecting retail margins. Cigarettes, snuff, chewing and smoking tobacco amounted to almost 85 percent of all tobacco products sold in 1939. RPM on these products was found to be "negligible." Cigars accounted for the remaining 15 percent. The proportion of cigars sold nationally under RPM could not be determined, but in some states over 75 percent of cigars were sold with maintained prices.

Perhaps the most active trade group advocating RPM was the National Association of Retail Druggists (NARD). They were very

¹ Ibid., p. XXXV. The study also reports the following concerning hardware items: "The number of manufacturers who had placed products under resale price maintenance in one or more of the 43 States in 1938, ranged from 12 in Mississippi to 37 in California, and of the 44 States in 1939, the range was from 18 companies in Alabama to 40 in California. Of the 49 companies having products under resale price maintenance in 1938, 27 had such contracts effective in from 1 to 5 States, and 12 companies had contracts effective in from 41 to 44 States, while in 1939, of the 53 companies having products under resale price maintenance, 23 had contracts effective in from 1 to 5 States and 19 in from 41 to 44 States."

facturers to finance association activities. Their objective was to obtain a 33.33 percent protected gross margin. They were most effective in obtaining RPM on proprietary drugs and medicines, surgical and related supplies, and toilet goods not sold extensively by other types of stores. In 1938, 78 manufacturers had placed their products under RPM contracts in each of 43 states where it was legal; 108 had placed their products under RPM in 40 or more states; and 350 manufacturers had RPM contracts on their products in three or more states. In 1939, the Illinois Pharmaceutical Association listed over 400 manufacturers with RPM contracts in Illinois, while over 300 manufacturers had been listed as maintaining prices by the Ohio Fair Trade Committee-Drug Division.¹

Trade group activities promoting the use of RPM were also extensive in the sale of liquor and other alcoholic beverages. Apparently, some liquor companies actually placed RPM on "by the drink" sales of their products in Kentucky, California, and Minnesota. In these states, rules were promulgated which would have made RPM mandatory for all distilled alcoholic beverages. California, New Jersey, Arizona, and Minnesota could suspend or revoke licenses for those found violating RPM prices. Rhode Island, Minnesota, and Kentucky provided for specified minimum markups for both wholesalers and retailers. In Kentucky, the state assessed a tax on wholesalers to be used by the state to police and enforce RPM on liquor products. Dealer associations were apparently quite powerful in New York, Massachusetts, and California, and sought a 40 percent guaranteed markup on their cost.²

¹ Ibid., p. XXXIV.

² Ibid., pp. XL-XLI. The study also notes that "a survey of a limited number of State and local retail dealer associations indicates that they have accomplished a number of things desired by their members. The different State and local associations have printed lists of the names of firms operating under resale price maintenance contracts in other States, and asked their members to insist that these manufacturers place their products under minimum resale price maintenance contracts in their State. In Illinois, retailers were admonished to study the published list carefully and to ask those who refused to grant their desired mark-up what incentive there was for a retailer to sell their brands."

In 1937, the National Association of Package Stores was apparently able to induce a large manufacturer to reimpose RPM upon three (unspecified) brands of liquor. The company was going to replace its existing RPM contracts with ones specifying lower minimum prices. Because of association pressures, however, the previously announced new prices were rescinded, and prices more acceptable to association members were substituted instead.

The National Retail Package Liquor Store Association, facing manufacturer resistance to imposing RPM, developed a plan to force distillers and importers to place their brands under RPM. In 1940, the FTC filed a complaint essentially alleging a horizontal price-fixing conspiracy. The national association apparently admitted to the allegations in the complaint.¹ The Wholesale Liquor Distributors Association of Northern California was also charged by the FTC with what amounted to a horizontal price-fixing arrangement. In this case, the Commission issued a cease and desist order.

The Northern Ohio Retail Druggists Association, in 1939, sponsored a series of meetings in Cleveland which were attended by liquor retailers and representatives of wholesalers and brewers of malt beverages. It was alleged that horizontal price-fixing agreements were entered into at these meetings. Apparently, all the local brewers and most of the wholesale distributors in Cleveland placed their beer under RPM agreements. Many of the wholesalers did not have the authorization of the owners of the trademarks or brands to enter into such RPM contracts. One wholesaler stated:

Retailers actually set the price of the local beers as per price list. Practically black-mailing distributors into accepting the suggested prices because it was either you file your products under fair trade or else (sic). The "or else" being that they (retailers) would not handle the products of those not listing.²

¹ Ibid., p. XLII. At the time of that study, this proceeding had not been closed.

² Ibid., p. XLIV.

Apparently, in Cleveland and Toledo, the prices of light beers were fixed at identical levels, and the prices of heavy beers at somewhat higher but also identical levels.¹

Dealer organizations also attempted to obtain RPM on certain brands of farm machinery, radios, and household electrical appliances. However, the common practice of trade-ins in these lines made enforcement of RPM virtually impossible. The dealers' organizations then attempted to specify standardized trade-in values in conjunction with RPM. These efforts were apparently unsuccessful because manufacturers generally were unreceptive.²

It was also reported in the study that there was a tendency for different manufacturers of certain classes of competitive products to set identical RPM prices for brands in the same product class, and for price changes within each product class to become effective upon the same dates. The product classes specifically mentioned were soaps, canned milk, flour and cereal products, and vegetable shortenings.³ However, the study does not indicate the extent to which this pattern of similar price levels and trends differs from patterns for the same products prior to the use of RPM, or whether the specified minimum prices were set at supracompetitive levels.

(iv) Evaluation of the Fair-Trade Statutes

The 1945 study also contains an extensive analysis of the state and federal fair-trade laws. The basic conclusion of the study is that the fair-trade statutes, as enacted and interpreted by the courts, were contrary to the public interest. The reasoning supporting this conclusion can be summarized as follows:

1 Ibid., p. XLV.

2 Ibid., p. LVI.

3 Ibid., p. XXXI.

The significance of the resale price movement cannot be properly interpreted without taking into consideration its fundamental origin, namely, that it was the manufacturers who were in the vanguard in advocating and using it on the ground that they had a proprietary interest in goods carrying their trade name or brand. Later, with the development of the department store, the consumer cooperative, the chain store and last of all, the super market or "giant store" types of distribution, the older types of merchandisers who progressively lost business to each new type of distributor that developed, turned to manufacturers, demanding price protection. Since about 1920, the development of new types of distributors has been rapid and the leadership in the resale price maintenance movement has been transferred from the manufacturers, of whom a small proportion, producing trade-marked commodities, actively promoted resale price maintenance, to distributors seeking protection in a maintained resale price.¹

When finally enacted by the States, and by the Congress, . . . [legalized RPM] . . . was urged almost entirely by a few well-organized dealer groups as a means of eliminating price competition both of dealers using the same methods of distribution and of dealers using new and different methods of distribution.

[Thus, while] both State and Federal resale price maintenance laws are entirely permissive in their application to manufacturers, merely granting permission to them to place their identified products under price maintenance if they so desire, [in] practice, . . . resale price maintenance serves as a focal point for dealer cooperative effort to bring pressure to bear on manufacturers to place products under price maintenance at prices yielding dealer margins satisfactory to cooperating organized dealer groups. In some lines of trade, where the individual manufacturer has faced strongly organized dealer group pressure, the extent of his freedom of choice as to whether he will place his brands under resale price maintenance has been extremely limited.²

¹ Ibid., p. XXVII.

² Ibid., p. LIV. One of the more blatant examples of the pressure organized retailers could apply is the "Pepsodent" incident summarized at page 143 of the FTC study.

"During . . . 1935, the Pepsodent Co., upon advice of counsel, withdrew its products from resale price maintenance in California. As a result of this action, the organized retail druggists of the State waged such an aggressive fight against the company that it again placed its products under resale price maintenance contracts in that State. The methods used by the California druggists were described by the executive secretary of the Northern California Retail Druggists Association, at the thirty-seventh annual convention of the National Association of Retail Druggists, held in Cincinnati, in September 1935, as follows:

'Mr. Chairman, fellow druggists, the Pepsodent Co. was operating in the State of California under the California Fair
(footnote continued)

The study identifies nonsigner clauses, which generally were contained in the state fair-trade statutes, as relatively important elements in producing noncompetitive results. Although in principle these clauses are a formality, merely granting the manufacturer the right to enforce an RPM program if he so chooses, as enacted into law the nonsigner clauses seem to have facilitated horizontal collusion among dealers. The study concludes that:

The demonstrated ineffectiveness of purely voluntary resale price maintenance agreements to control the price competition of dealers who refrained from signing contracts led to the amendment of the California law of 1931 by the addition of section 1 1/2, commonly known as the nonsigner clause. This clause makes the price stipulated in any contract lawfully entered into under the act binding upon all dealers in the State by declaring that any person, signer or nonsigner, who willfully and knowingly advertises, offers for sale, or sells any commodity at a price less than that stipulated in any contract entered into under the law, commits an act of unfair competition actionable at the suit of any person damaged thereby. This clause, which effectively throttles all competition from nonsigners, has been copied in the laws of each of the 45

(footnote continues)

Trade Act. In all the time that they were operating under the Fair Trade Act they made no attempt to enforce their contract and like a bolt of lightning from the blue sky, they informed us that the California fair trade contract was canceled and the general sales manager, Mr. Kermott, came out to California, called upon me in the California office to make excuses and he had with him one of the California salesmen. I expressed my heartfelt sympathy to the two young men who were in my office because I told them they would have the toughest time any salesmen had had in any territory. We passed a resolution at our meeting and we published that resolution in our journal, and we sent that resolution to every member in California in which we urged and advised them to discontinue the sale of any product that had canceled their fair-trade contract. Brothers, it was a slap in the face of our Fair Trade Act. It makes no difference what firm it was. It was unwarranted. It was the first cancellation. And to my great delight and the great delight of our executive committee all the druggists in California refused to sell Pepsodent toothpaste or Pepsodent products. They put them in the basement. Some were enthusiastic enough to throw them into the ash can. I wouldn't bring this out except that I want you to really understand how the sales of Pepsodent products in all of California dropped off.'

After reinstating RPM the Pepsodent Co. donated \$25,000 to the National Association of Retail Druggists to be used in behalf of resale price maintenance legislation. The Pepsodent Co. gave wide publicity to this donation. Following this gesture on the part of the Pepsodent Co., several other manufacturers of drugs and pharmaceuticals voluntarily contributed to the fund while still others were solicited for donations to further the enactment of resale price maintenance laws."

States that have enacted resale price maintenance laws.¹

[Furthermore, there was] an important defect in the Tydings-Miller Act. ... [the] right to enter into minimum resale price contracts [was] not explicitly limited to the brand owner or to a distributor authorized by him to place the manufacturer's product under such contracts. In those States having laws which also omit this explicit limitation, the resale price maintenance contract has been used in attempts by cooperating groups of wholesalers, or of both wholesalers and retailers, to fix prices to be maintained for branded goods without the consent, and sometimes against the will, of manufacturers or producers who own the brands.² Such wholesaler-retailer contracts likewise [were] being interpreted by some groups as enforceable under the nonsigner clause, likewise without the consent or assistance of the brand owner. So used, resale price maintenance obviously may be perverted from its announced purpose of protecting the brand owner's interest against unrestrained dealer price competition, and be made the means of effectuating price enhancement and restraint of dealer competition by horizontal agreements among dealers, the existence of which it may be difficult to prove.³

In retrospect, whether or not one accepts the conclusion that the fair-trade laws were contrary to the public interest, many of the competitive problems associated with RPM as legalized under the fair-trade statutes appear to have been related more to specific defects in the statutes than to the principle of vertical price restraints as discussed in the economics literature.

Economic theories which predict efficiency benefits resulting from RPM are concerned with independent marketing decisions by suppliers of brand name products. In these theories, the supplier will estimate the benefits to him of imposing RPM net of monitoring and enforcement costs. If these net benefits are sufficiently

¹ Ibid., pp. LXI-LXII, emphasis added. The impact of lobbyists in passing various state fair trade laws is also discussed in E. S. Herman, "Fair Trade: Origins, Purposes, and Competitive Effects," 27 George Washington University Law Review, 621 (1959). Herman also reports that the same typographical error appeared in 11 state fair trade statutes before sponsors of the bill caught up with it.

² There were 25 states where resellers could enter into RPM contracts without the consent of the owner of the brand or trademark (p. XXXVIII). In Minnesota, Utah, and Wyoming RPM contracts could be enforced with the aid of state governments (see Fulda (op. cit.), pp. 205-6).

³ 1945 FTC Report, p. LX.

large relative to other marketing options, then the supplier will choose to impose RPM. None of the economic theories which suggest that consumers benefit from RPM contemplates dealers being able to enforce RPM over a manufacturer's objections, nor do they include provisions for direct state aid in enforcing RPM contracts. Therefore, in discussing vertical price restraints it is important to distinguish between the economic principles involved and the actual effects observed under the fair-trade statutes.

(E) Effects of RPM on Innovation and Efficiency in Distribution

A few analysts have viewed RPM primarily as a means by which organized groups have been able to retard advances in the efficiency of distribution. This view is premised principally upon an extension of the theories of Joseph Schumpeter to wholesaling and retailing.¹ Schumpeter hypothesized that major advances in efficiency typically do not originate within an existing competitive structure, but are instead a consequence of the entry of competitors with fundamentally different products and/or more efficient processes, which result in radical changes in the competitive environment. Applied to distribution, Schumpeter's theory suggests that major improvements in distributional efficiency will be associated primarily with the emergence of new methods of distribution, and not from competition for market share among existing competitors operating with a given distributional technology.

As discussed in the section presenting the retailers' collusion hypothesis, RPM can be used to prevent price cutting which reflects greater efficiency. Existing resellers, therefore, may attempt to insure their economic survival by exerting both economic and political pressure to persuade manufacturers to

¹ Joseph A. Schumpeter, Capitalism, Socialism and Democracy, 3rd ed. (New York: Harper and Row, 1975).

impose RPM to deter the entry or growth of more efficient competitors.¹ Thus, according to this view, the desire to impose RPM does not originate with manufacturers attempting to enhance distributional efficiency through vertical controls, but rather from organized resellers attempting to do exactly the opposite.

The empirical literature does contain some examples which appear to be consistent with this view. The studies evaluating the experience with legalized RPM in the United States have already been discussed, and will not be repeated here.² The remaining empirical studies directly concerned with this issue have attempted to evaluate the effects of RPM in other countries.

(1) The United Kingdom

In the last quarter of the 19th century there was an increase in manufacturers' brand advertising, and, at the same time, the emergence of newer forms of retailing (the cooperative stores, department stores and chains) challenged the traditional retailers. The branding and packaging of goods previously sold in bulk apparently led to increased competition among different types of resellers, i.e., intertype competition. For example, grocers with no specialized knowledge could sell proprietary (branded) goods which they previously had not carried because, as branded goods became more prevalent and well-known to consumers, store reputations for quality and in-store services became less important. This competition resulted in price cutting on leading advertised brands and on staples such as sugar.³

¹ A detailed discussion of this view with applications to the distribution of groceries, drugs, and automobiles in the U.S. is contained in J. C. Palamountain, The Politics of Distribution (New York: Greenwood Press, 1968). Palamountain also discusses the political influence of organized distributors in advocating special taxation of chain stores, passage of the Robinson-Patman Act, and the U.S. fair-trade statutes. Also see the previous discussion of the 1945 FTC study of RPM.

² In addition to the 1945 FTC study of RPM, which concluded that fair trade was basically an instrument of organized resellers, see, Carl H. Fulda, "Resale Price Maintenance," 21(2) University of Chicago Law Review (Winter 1954) for a summary discussion of the U.S. experience with the legalization of RPM; and R. Steiner's FTC Bureau of Economics Working Paper (op. cit.).

³ About the same period, Alfred Marshall in Industry and Trade noted that retailers were forced to sell these goods at "prices that barely covered expenses," p. 302.

In the food trade, the Federation of Grocers was founded in 1891 with the agenda of improving the margins of "traditional" grocers and eliminating the price cutting on the sale of sugar and certain other commodities. Not only food chains, but department stores and even variety chains were becoming major (inter-type) competitors to traditional food stores. According to Pennance and Yamey, although many manufacturers' lines were "price maintained," price-cutting dealers had little difficulty in obtaining many of these same lines. RPM was not sufficiently widespread or sufficiently enforced to impede price competition in the retailing of branded grocery products, despite the efforts of the grocers' federation.¹ Pennance and Yamey note that attempts by retailers "to substitute better service for less competitive prices were not successful to any appreciable extent in the aggregate."²

According to Yamey, the combination of intertype competition from new forms of retailing and price cutting on advertised brands led to other efforts at cartelization by independent retailers. As a result of these efforts, the Proprietary Articles Trade Association (PATA) was established in 1895.³ Pressure from independent retailers was said to be responsible for the founding of PATA, although it was eventually composed of manufacturers, wholesalers, and retailers.⁴

Yamey, and Pennance and Yamey evaluated the effects of RPM in the trade of groceries, proprietary drugs and tobaccos.⁵ Manufacturers apparently had ambivalent attitudes about RPM, and many resisted the efforts of PATA. In deciding whether or not to adopt RPM, not surprisingly, manufacturers would calculate whether,

1 F. G. Pennance and B. S. Yamey, "Competition in the Retail Grocery Trade, 1850-1939," 22 Economica, 303 (November 1955); see pp. 314-315 in particular.

2 Ibid., p. 317.

3 B. S. Yamey, "The Origins of Retail Price Maintenance: A Study of Three Branches of Retail Trade," 62 Economic Journal, 522 (September 1952).

4 Ibid.; and F. G. Pennance and B. S. Yamey (op. cit.), see pp. 303-317.

5 Ibid.

without RPM, the benefits of distribution at lower retail prices in the emerging chains, department stores and cooperatives would offset the business to be lost by having their lines down-played or boycotted by the traditional trade.

PATA was most successful with firms dealing mainly through chemists (druggists). Apparently, once a number of manufacturers in a trade had signed price maintenance agreements with PATA, those who had previously been afraid to do so (fearing they might lose sales to nonprice-maintained substitute brands) also conceded to sign price maintenance contracts. As PATA became better organized, many new brands tended to be introduced with RPM. It was estimated, however, that only 3 percent of consumer goods expenditures were on price maintained items during the 1890's.¹

In the book trade, strong retail price cutting by larger scale discount book dealers and department stores brought pressure from "legitimate" book stores for resale price maintenance. The "net book" agreement, an RPM program in the sale of books, went into effect around the turn of the century. Interestingly, Sir Alfred Marshall's, Principles of Economics, was the first popular book sold subject to the net book agreement.²

According to Yamey, by 1938 approximately 30 percent of all consumer goods and services bought by households in the U.K. were being sold at resale prices fixed or recommended by the manufacturer.³ RPM had become well-established in books, stationary,

¹ J. F. Pickering, "The Abolition of Resale Price Maintenance in Great Britain," 26 Oxford Economic Papers (March 1974), p. 44.

² For an historical view of this RPM program see, Sir Frederick MacMillan, The Net Book Agreement of 1899 and the Book War of 1906-1908 (Pamphlet, 1924). Also see, C. W. Guillehaud, "The Marshall MacMillan Correspondence Over the Net Book System," The Economic Journal (September 1965), pp. 518-538. The correspondence between Marshall and his publisher establishes that Marshall was not opposed to the principle of RPM, and that Marshall's concerns with price maintenance transcended issues of allocative efficiency. According to Guillehaud, "The general impression left by this correspondence would appear to be that Frederick MacMillan, the publisher-businessman, had his feet more firmly on the ground than Alfred Marshall, the economist-moralist; but subsequent events have shown that in some respects it was Marshall who was the more discerning" (p. 537).

³ B. S. Yamey, ed., Resale Price Maintenance (Chicago: Aldine Publishing Company, 1966). This estimate appears to include both stipulated and minimum maintained prices.

drugs, photographic goods, phonograph records, motor vehicles, tobacco, confectionary, and groceries.

J. F. Pickering estimated that in 1956, 44 percent of consumer expenditures on goods alone were on price-maintained items. This estimate would appear to include maintained minimum and stipulated prices. Manufacturers collectively enforced RPM on about 40 percent of these items, with the remainder individually enforced by manufacturers.¹

In 1956, the Restrictive Trade Practices Act was adopted in the U.K. It eliminated the collective enforcement of RPM, but sanctioned for the first time individual enforcement of nonsigner clauses. Selective price cutting on branded grocery items followed in early 1957. Apparently the entry into the British market by American manufacturers of branded food items not sold with maintained prices was also a factor which contributed to the breakdown of RPM in the grocery trade.²

Pickering concluded that the Restrictive Trade Practices Act contributed to the "breakdown of RPM in the grocery trade and this encouraged a rapid expansion of self-service."³ In 1956 there had been approximately 3,000 self-service food stores, and few "true" supermarkets. By 1962, self-service food stores had grown to 10,830, and there were 854 "true" supermarkets. Self-service grocery stores accounted for approximately 10 percent of the grocery trade in 1961, and 40 percent by 1964, with supermarkets alone accounting for 14 percent.⁴

Pickering noted that "the problem facing manufacturers who wanted to retain RPM was whether or not the traditional retailers would compensate for sales loss through cut price outlets."⁵ A

¹ J. F. Pickering (op. cit., 1974), see p. 48, n. 2, and p. 121, n. 1.

² Ibid., n. 1.

³ J. F. Pickering, Resale Price Maintenance in Practice, (London: George Allen and Unwin Limited, 1966), p. 126.

⁴ Ibid., p. 128.

⁵ Ibid., p. 120.

1959 survey by the National Grocers' Federation "found that independent traders failed to compensate manufacturers who continued to enforce RPM, and they therefore decided that the Federation 'cannot with honesty ask manufacturers to support us by a price maintenance policy when we fail to offer any tangible return'".¹

Pickering estimated the fall in resale prices (from manufacturers' previously recommended prices) following the passage of the Restrictive Trade Practices Act. From a sample of 26 food and nonfood products, he estimated that resale prices fell by 8 percent. Reductions were greatest in supermarkets and chains, but virtually all other food retailers also reduced prices. Pickering states that "the effect of price cutting has been to lower the gross margin taken on certain branded groceries from about 20 to 14 or 15 percent."² He also estimated that the resale prices on various nonfood items fell by about 7 percent.

Pickering concluded that "there are three types of products on which resale price maintenance broke down between 1956-1964: branded groceries, toiletries and household goods, and tires. In each instance, the same basic reasons can be given--the growth of a new type of distributor for the product able to operate on a lower margin, and the realization of manufacturers that to ignore this development would cause them to lose sales to other manufacturers who would supply [their products]. . . . By contributing to the growth of supermarkets through the breakdown of RPM in the grocery trade, the Restrictive Trade Practices Act also created the situation where the encroachment of supermarkets into the distribution of nonfood household items and the breakdown of resale price maintenance of these products, too, became inevitable."³

Yet, Professor Yamey estimated that in 1960, 25 percent of goods and services were still sold subject to RPM in the U.K. By

1 Ibid.

2 Ibid., p. 131.

3 Ibid., pp. 157-8.

contrast, P. W. S. Andrews and F. A. Friday¹ calculated the figure for 1960 to be only 23 percent, but an additional 17 percent of goods and services were sold subject to direct price maintenance, i.e., with stipulated prices.

If Pickering's estimate of 44 percent of goods sold in 1956 with minimum and stipulated prices is compared to the sum of the goods and services sold with minimum and stipulated prices estimated by Andrews and Friday (a total of 40 percent), then four years after the passage of the Restrictive Trade Practices Act, price maintenance was still rather pervasive in the U.K.²

The Resale Prices Act of 1964, which actually became effective in 1965, outlawed individual RPM and refusal to supply on the grounds that a dealer is likely to cut prices. However, under this law, manufacturers can cut off dealers who sell below costs, and the Restrictive Practices Court can allow price maintenance if a product class is granted an exemption to use RPM.

Pickering notes that price maintenance had fallen in importance from an estimated 44 percent of consumer goods expenditures in 1956 to about 33 percent in 1964. These estimates indicate that there was a further decline in the prevalence of price maintenance between 1960 and 1964, but that RPM remained more pervasive than it has ever been in the U.S. By 1974, price maintenance remained only on books and prescription and ethical drugs, accounting for less than 2 percent of consumer expenditures.³ Apparently electrical goods, paint, wine and spirits, and phonograph records have also had price and margin declines from 1965 to 1974.

Obviously, these various studies of RPM in the U.K. are not sufficiently rigorous that we can be certain what the influence of RPM, or its subsequent removal, was on distributional efficiency. The time periods covered are quite long and many factors

¹ P. W. S. Andrews and F. A. Friday, Fair Trade: Resale Price Maintenance Re-examined, (London: MacMillan & Co., 1960).

² It is unclear what the ratio of price-maintained goods to services was at the different time periods.

³ Pickering (op. cit., 1974), see p. 120.

other than RPM undoubtedly were at work. It is not even clear what the direction of causality actually was in all cases. That is, we cannot be certain in every case whether the removal of RPM led to the rise of new and more efficient methods of distribution, or whether the rise of new types of distribution led manufacturers to abandon RPM which previously may have been efficient for them.

It may be that some combination of the foregoing explanations is most likely correct, i.e., the initial rise of new methods of distribution led manufacturers to acquiesce to traditional dealers' demands for continued or expanded RPM which later became untenable as the new forms of distribution grew. Manufacturer abandonment of RPM, in turn, contributed to this growth trend. However, none of these hypotheses can be explicitly verified through the studies of the authors cited above. Although they may have interpreted the direction of causation correctly, we cannot be positive of this. Further, the failure to account for other significant causal factors, makes it extremely difficult to have much confidence that RPM or its removal actually caused all of the reported changes in methods of distribution. The studies for other countries (which are reported below) all suffer from the same deficiencies; but they are based upon even less actual data and more superficial analyses, and the soundness of the conclusions is, therefore, likely to be correspondingly diminished.

(2) Canada

Based on a brief analysis of the history of RPM in Canada,¹ it appears that there were successful efforts by both individual manufacturers and retail trade organizations to impose RPM. An estimated 20 percent of goods sold through grocery stores and 60 percent of goods sold through drug stores were price maintained. In 1951 Parliament overturned RPM and instituted a duty-to-deal with price-cutting dealers. A later amendment permitted the cutting off of dealers for loss-leader selling.

¹ L. A. Skeoch, in B. S. Yamey, ed., Resale Price Maintenance, (Chicago: Aldine Publishing Co., 1966). See also, L. A. Skeoch, "The Abolition of Resale Price Maintenance: Some Notes on Canadian Experience," 31 Economica, 260 (August 1964).

There is some evidence presented that gross margins in price-maintained categories escalated less than nonprice-maintained categories after 1951. However, the welfare implications of the pervasiveness of RPM, or of the post-1951 price trends, cannot be determined from this analysis. Skeoch's principal conclusion was that the abolition of RPM does not assure, but appears to encourage, the development of more efficient forms of distribution and production.¹

(3) Sweden

In Sweden, government sanctioned RPM developed during the 1930's. About 30 percent of consumer goods purchases were subject to these controls.² Following extensive study, RPM was abolished in Sweden in 1954. Dealer margins appear to have come down in grocery retailing and in certain nonfood categories, but suggested retail prices continued to be followed on a large number of articles.

In the following decade there was a major change in the structure of distribution, for which the removal of RPM may have been partially responsible. In the early 1950's there had been 80,000 retail outlets, of which 63,000 were single-ownership units. There were only a few hundred self-service food stores, and no "true" supermarkets. Mail order firms accounted for less than 1 percent, and department stores for only 3 to 4 percent of sales in the Swedish retail market.

By 1965 the number of retail outlets had dropped to 60,000, and chains featuring low prices were developing in various fields. There were 8,500 self-service food stores in operation accounting for 70 percent of retail food volume. Of these, 400 were "true" supermarkets accounting for 15 percent of the Swedish food business. Mail order firms had grown to 3 to 4 percent of retail sales volume, and department stores to 15 percent. Trolle also reports a substantial decrease in the number of wholesalers, and

¹ Ibid., p. 61.

² By U. af Trolle, pp. 101-145, in B. S. Yamey, ed., Resale Price Maintenance, (Chicago: Aldine Publishing Co., 1966).

an increase in their average size and efficiency during the decade following the removal of RPM.

(4) Denmark

RPM was removed in Denmark in 1955. The developments there are reported to have followed the same general pattern as in Sweden.

"The establishment of new firms, organized on nontraditional lines and operating new sales methods, can be a decisive factor in converting a trade to more competitive conditions. The prohibition of RPM contributes to the rise in growth in such enterprises In some trades, the ban on RPM has helped to make it easier for nontraditional and new shops to obtain supplies of goods, and owing to their efficiency goods are being sold in them at correspondingly lower prices."¹

Yet, in other fields, Kjolby concedes that the ban on RPM had little effect, apparently due to the widespread observance of recommended resale prices, continuation of exclusive dealing, boycotts, and other restrictions that impeded the entry of price cutting merchants.

(5) Other Countries

A number of different approaches to RPM have apparently been tried in France, The Netherlands, Belgium, Italy and Germany.² No real analysis, however, is provided. It is asserted that the French efforts to remove RPM have contributed to the growth of discount retailing in both food and nonfood trades. In Holland, it is asserted that legal attempts to remove RPM have been motivated primarily by "the desire to open the way for new sales channels and more efficient methods of distribution."³

(6) A word of Caution

The "good fit" between the "retailer-collusion-delay-innovation" view of RPM and the facts surrounding the use RPM presented so far in this section should not be oversold. There

¹ H. Kjolby, in B. S. Yamey, ed., Resale Price Maintenance, (Chicago: Aldine Publishing Co., 1966), p. 176.

² F. D. Boggis in B. S. Yamey, ed., Resale Price Maintenance, (Chicago: Aldine Publishing Co., 1966), pp. 181-216.

³ Ibid. p. 202; also see the chapter on RPM in Ireland by Catherine Brock, pp. 219-248.

are indications that the hypothesis is not capable of explaining numerous events. For example, the Schwegmann decision, which invalidated the use of nonsigner clauses in the U.S., touched off a price war in June, 1951. "For more than ten weeks, Macy's, Gimbel Brothers, Abraham and Straus, and many smaller stores competed against each other in price cutting on all kinds of merchandise but particularly on fair-traded goods."¹ At that time there were not a sufficient number of innovative stores in this type of merchandising to have caused either the imposition of RPM or the price war. Thus, the retailer-collusion-delay-innovation theory does not seem applicable in this instance.

As another example, Steward Munro Lee² discusses the decisions concerning fair trade made by various firms in the late 1950s:

Westinghouse, Lionel, and Sheaffer abandoned fair trade over two years ago. Eastman Kodak, Revere, and Bell & Howell followed last year; and 1958 has seen some of fair trade's staunchest proponents such as General Electric, Sunbeam, McGraw-Edison, and Revere abandon this form of price control.

But these firms did not abandon fair trade for the same reasons. Many of them felt that adequate enforcement was too costly, and that adverse court decisions had weakened the entire fair-trade structure. Towle and Parker Pen companies are still maintaining fair-trade programs. These are not the only two, but their programs have been enforced with particular effectiveness in recent years.³

It is not clear that innovative retailers had much to do with either the imposition or abandonment of RPM by these firms;⁴ so, here too, the applicability of the retailer-collusion-delay-innovation theory is questionable.

In addition, there are indications that the hypothesis is not as applicable to the U.S. as it may have been elsewhere. The

¹ E. Raymond Corey, "Fair Trade Pricing: A Reappraisal," 30 Harvard Business Review (September 1952), p. 49.

² Steward Munro Lee, "Problems of Resale Price Maintenance," 23 Journal of Marketing, 274 (January 1959).

³ Ibid., p. 275.

⁴ In fact, the causation may well have been reversed, the abandonment of RPM could have made possible the rise of "innovative discounters." See discussion above on this point.

primary reason for this inference is that the amount of commerce affected by RPM was substantially higher in many other countries than it ever was in the U.S. Another reason relates to the relatively dynamic nature of the U.S. economy. For example, it has been stated that the U.S. faces less of a threat of retailer cartelization than do other countries:

In a small, homogeneous country [i.e., Canada] where suppliers tend to be limited in number, there may very well develop a degree of conservatism and mutual restraints in competitive relationships which will exercise a serious check on important types of dynamic economic conduct. Innovations which disturb established relationships and routines will tend to be discouraged. The longer-run consequences of restrictive practices will have a greater chance of becoming established in persistent and enduring fashion than in a larger and more dynamic economy where they will be uprooted in the early stages of their growth. Thus, the Canadian economy which has had a reputation--at least partly deserved--of being protectionist, imitative and unprogressive, is likely to suffer more from a given type and degree of noncompetitive practice than will an aggressive, dynamic economy, such as the United States.¹

This conclusion, based upon an inter-country comparison, may also have validity when applied within the same country over time. To the extent that retailing in the U.S. is more competitive now than in the 1930's, or even the 1950's, the threat of an effective retailer cartel is similarly less of a concern than it may have been in the past.

A final reason relates to the limited power retailers have over manufacturers. For example, although Stanley Hollander and others seem to believe that the fair trading of drugs was the result of a retail cartel, in a 1963 article Hollander determined that the available data concerning dealer margins under RPM "... suggests that resale price maintenance is simply one of the factors that manufacturers consider in formulating their marketing strategies" and "... indicate that maintained margins can be and

¹ L. A. Skeoch, "Canada," in Resale Price Maintenance, B. S. Yamey, editor (Chicago: Aldine Publishing Company, 1966), p. 34.

have been reduced when manufacturers find that other considerations overrule the dealers' desires for increased markups."¹

These events and analyses can be interpreted to mean that the retailer-collusion-delay-innovation theory may not be applicable to all (or even most) instances of RPM. Despite the "good fit" of the theory to the fair trading of many drug items in the U.S. and in the U.K., the theory should not automatically be assumed to fit other RPM applications without careful study of the relevant circumstances.

(F) Summary of Empirical Evidence

The majority of the empirical work has evaluated the effect of RPM upon product prices. The price surveys indicate that RPM in most cases increased the prices of products sold with RPM, although this was not always the case. Unfortunately, because both procompetitive and anticompetitive economic theories of RPM predict that price maintenance will usually raise product prices, we cannot tell conclusively from these studies whether RPM was competitively harmful or beneficial.

Other survey studies have evaluated the effects of RPM upon small business failure rates and operating cost per retail outlet, while other studies have aggregated the cost of resale price maintenance nationally. Like the price surveys, these studies contribute little to our understanding of RPM because the results are not necessarily inconsistent with any economic theory of vertical price restraints.

The surveys of the overall pervasiveness of price maintenance during the fair-trade era are interesting primarily because some of them reveal substantial diversity in the relative and absolute sizes of firms using RPM, in the length of time resale prices were maintained, and in the competitive environments in which RPM has been utilized. This diversity suggests the inappropriateness of trying to explain all RPM with a single hypothesis.

¹ Stanley Hollander, "Dealer Margins Under Resale Price Maintenance," 3 Quarterly Journal of Economics and Business (1963), p. 33.

With the exception of the 1945 FTC study, the surveys provide little or no direct evidence of the effects of price maintenance upon the quantities sold of price-maintained products. Even in the FTC study, in most instances the effects of RPM upon quantities sold were too obscured by other causes to be evaluated. ~~But,~~ in those product lines where quantity effects could be discerned, we have a mixed picture.

The study of the effects of the repeal of the fair-trade laws in Rhode Island also reveals substantial diversity of effects on the quantities sold of previously fair-traded products. If the quantity effects of RPM are indicative of the welfare effects of the practice (as suggested by Bork and Posner), then the foregoing evidence suggests that the welfare effects of RPM have varied considerably.

Although relatively few in number, the case-specific analyses of RPM are more useful than the surveys for discerning the welfare effects of price maintenance because they attempt to identify the economic hypothesis most likely to "explain" the price restraint. Here too the results are mixed.

Sometimes economic analysts conclude that the use of RPM was motivated by efficiency considerations and resulted in enhanced competition (for example, Coors beer and Magnavox televisions). In other cases analysts believe that RPM was collusively motivated and resulted in anticompetitive effects (for example, Bakers of Washington and electric light bulbs as manufacturer collusion, and drugs and liquor as dealer collusion). In other cases some analysts believe that RPM was initially imposed for competitive business reasons, but the practice was (mistakenly) not abandoned once it became obsolete as a competitively beneficial marketing device (for example, Levi's jeans and low-end audio components).

The available evidence from the surveys and case-specific analyses (plus the evidence concerning recent FTC RPM enforcement efforts) also suggests that many small firms have found RPM advantageous. On the basis of existing evidence one cannot conclusively dismiss the possibility that at least some of the relatively small suppliers were influenced by their dealers to

impose RPM. However, the support for fair trade by groups of suppliers such as the American Fair Trade Council, the substantial number of (non-drug) product lines where RPM was utilized, and the fact that many small firms used RPM for a short time and then abandoned it, suggest that many of these firms chose to impose RPM, not because of dealer coercion, but rather because they unilaterally believed it to be a competitively beneficial marketing device. Furthermore, several of the studies of the effects of RPM in particular trades suggest that the ability of dealers to influence and/or coerce the larger suppliers of popular branded merchandise to impose RPM against their will is quite limited. These results suggest that a manufacturer-specific explanation for RPM is often applicable.

It also seems to be true that RPM has sometimes been used on products for which any straightforward application of either the services or signaling efficiency hypothesis seems strained. And sometimes all or most suppliers in particular product classes have imposed similar RPM programs, as would be expected if either the supplier or dealer collusion explanation were valid. Nevertheless, the evidence that, outside of the drug and liquor trades, RPM has been used more or less extensively by so many different suppliers of products with diverse characteristics, selling in markets which also vary considerably at least in terms of structure, suggests that neither supplier nor dealer collusion explanations are likely to apply to all or even most instances of price maintenance.

Some studies of RPM, particularly the 1945 FTC study and the work of Pickering and Yamey, conclude that RPM has been associated primarily with dealer cartelization efforts. Pickering, Yamey, and others who have evaluated the effects of RPM in other countries conclude that RPM has hampered advances in distributional efficiency. However, the available evidence on this issue is in many respects quite thin, and the direction of causality is not always clear. Furthermore, even though this is a major conclusion in several of these studies, the authors do not assert that this effect is either universal or a necessary consequence of

to the anticompetitive rationale for RPM which these authors emphasize.

In sum, it appears that the empirical evidence on the effects of RPM validates the implications of current economic theory. Theory suggests that RPM can have diverse effects, and the empirical evidence suggests that, in fact, RPM has been used in the U.S. and elsewhere in both socially desirable and undesirable ways.

Since RPM is no longer legal in the U.S., the estimates presented in this section of the pervasiveness of RPM under fair trade are likely to be extreme outer bounds for its current importance in the U.S. economy. Thus, RPM is not now likely to affect a very large proportion of total retail sales, and past experience indicates that even if RPM were again made legal, it is also unlikely that it would be adopted in the U.S. by more than a distinct minority of manufacturers. In contrast, the experience of other nations indicates that substantial volumes of commerce can be affected by RPM.

If the legal prohibitions on the use of RPM were relaxed, past experience indicates that the practice might be concentrated in a relatively small number of product markets with substantial effects in those markets. However, past experience also indicates that it is extremely unlikely that any single hypothesis for RPM would be able to explain all uses of the practice either in general or in those particular markets where the practice might become prevalent.

We have now surveyed the major economic theories and the existing empirical literature on RPM. With this perspective, we will now analyze several policy options for dealing with RPM.

VII. SUMMARY AND SUGGESTIONS FOR POLICY DEVELOPMENT

Throughout this report it has been assumed that promoting maximum economic efficiency is the proper goal of the antitrust laws. From this perspective the economic theories and the available empirical evidence rather clearly suggest that the rigid application of a strict standard of per se illegality for RPM is inappropriate.

One reason for this conclusion is that economic theory predicts that vertical price and nonprice restrictions can have similar effects upon competition and consumer welfare. Therefore, legal rules which hold all vertical price restraints per se illegal while vertical nonprice restraints are judged under a rule-of-reason standard are inconsistent. Furthermore, certain forms of nonprice vertical restraints such as exclusive dealing, or territorial allocations, actually appear to be more restrictive than RPM. While RPM prevents intrabrand price competition, it creates incentives for dealers to engage in various forms of nonprice competition. However, some nonprice vertical restraints not only reduce intrabrand price competition, but they can limit nonprice forms of intrabrand dealer competition as well.¹

Another reason for this conclusion is that while economic theory predicts that RPM can be anticompetitive or welfare diminishing, theory also predicts that RPM can be procompetitive or welfare enhancing. Indeed, in sections II, III, and IV we reviewed eight separate theories of RPM and a number of related

¹ This point has also been made by FTC Chairman J. C. Miller, III. See his comments in "Letters from Washington," 2(4) Journal of the ABA Forum Committee on Franchising, 3 (Spring 1983).

variations. A single view of RPM is simply not supportable on the basis of current economic theory.¹

Despite the theoretical ambiguity about the merits of RPM, a per se rule holding RPM illegal might be good policy if empirical evidence showed either that the procompetitive uses of RPM were relatively unusual, or that the benefits from efficient uses of RPM could be obtained without unreasonable increments in cost by using nonprice alternatives. This would be especially true if the costs of administering alternatives to the current per se rule are very high.

Efficient Uses of RPM Do Not Seem to Be Unusual or Rare

The well documented history of the conflicts between the groups advocating and opposing resale price maintenance, which in the U.S. goes back at least to the turn of the century, reveals substantial diversity of opinion concerning the motivations for and expected benefits from RPM.² The variations in the legal status of RPM in the U.S. suggests that neither the extremely permissive view of RPM, which prevailed during the fair-trade era, nor the extremely restrictive view, as reflected in the strict application of per se illegality, has proven to be fully satisfactory in practice.

Prior to the Dr. Miles decision in 1911 RPM was legal under the common law. From Dr. Miles until the early 1930's the courts

¹ Even in the case of explicit horizontal price fixing agreements, economic theory cannot say that the effects are always adverse. In horizontal matters, however, there is a more solid theoretical basis for assuming that most, if not all, attempts to "control" market forces will result in allocative inefficiencies. Consequently, the appropriateness of per se illegality for horizontal price fixing is rarely questioned, and effective substitutes for explicit horizontal agreements might also be challenged as illegal. Yet, there are critics of antitrust enforcement policy who advocate a more lenient approach even to explicit horizontal price fixing in some situations. See, for example, Donald Dewey, "Information, Entry, and Welfare: the Case for Collusion," 69(4) American Economic Review, 587 (September 1979). But also see the numerous replies to this view in 72(1) American Economic Review, 256 (March 1982).

² The issue of the desirability of resale price maintenance appears to antedate the turn of the century in the U.S. by a considerable amount of time. G. B. Hook, "The History of Price Maintenance," 13 Journal of the American Pharmaceutical Association, 709 (October 1952), traces RPM back to the Hindu Code of Manu, approximately 200 years B.C.

increasingly found that RPM was illegal under most (if not all) circumstances. Then in 1937 with the passage of the Miller-Tydings amendment to the Sherman Act, Congress legalized RPM contracts in those states where the practice was sanctioned by state law. Since Congress repealed the federal fair-trade enabling statutes in 1975, RPM is again illegal, although the Supreme Court will have the opportunity to reconsider the rule of law in the current term in Monsanto v. Spray-Rite Service Corp.

The fact that there has never been a lasting policy consensus supporting either side of the price maintenance debate suggests that there very likely is merit in the arguments advanced by both sides. Although the rules of law that have applied at different times have treated RPM as though it were either all good or all bad, the theories and evidence reviewed here indicate that, in fact, RPM can be both.

RPM Has Not Always Been Associated With Dealer Collusion

The available evidence does not suggest that RPM has always, or almost always, been associated with dealer collusion. The early advocacy of price maintenance in the U.S. originated with manufacturer-suppliers. Throughout the fair-trade era groups of manufacturers from diverse trades, such as the members of the American Fair Trade Council, actively supported the efforts to establish legal rights to maintain resale prices. Such supplier support for RPM suggests that RPM is not always desired as a means to placate collusive dealers.

Likewise, the empirical evidence from the 1950's shows that RPM was frequently used temporarily by many small firms in diverse lines of trade. That such firms eventually abandoned RPM unilaterally also suggests that in many circumstances RPM was not imposed because of collusive dealers' demands for price protection, or that the economic leverage of dealers over their suppliers is often extremely limited. The numerical information concerning the distributional systems of firms recently prosecuted for RPM violations by the FTC also suggests that many of these instances appear to be inconsistent with dealer collusion explanations for RPM.

RPM Has Not Always Been Associated With Supplier Collusion

The evidence from the fair-trade era also reveals that, outside of certain trades such as drugs and alcoholic beverages, RPM typically was not used pervasively by competing suppliers. This suggests that, even during the fair-trade era, it is very unlikely that RPM was always, or almost always, imposed to facilitate supplier collusion. The review of recent FTC RPM cases also reveals substantial diversity in the economic circumstances under which manufacturer-suppliers have more recently found RPM advantageous. Based upon several different structural views of the suppliers' side of these markets, it appears that RPM is often utilized in markets which are structurally competitive, where the concerns with effective supplier collusion (which RPM might facilitate) seem unwarranted. Moreover, in the empirical case studies, where analysts have reviewed specific instances of RPM in some detail, no single explanation for the practice predominates. In some cases RPM appears to have been used anticompetitively to facilitate collusion, in other instances firms appear to have continued to employ RPM after it had become obsolete as an effective marketing device, and in still other cases RPM appears to have been used for efficiency reasons with beneficial competitive effects. In sum, the available empirical evidence suggests that procompetitive instances of RPM, while certainly not the only possibility, are unlikely to be rare.

Alternatives to RPM May Not Be Good Substitutes

There is also some indication from past experience that alternatives to price maintenance such as consignment selling, exclusive dealing, and forward integration are not readily substitutable for RPM in many cases. For example, the manufacturers of electrical appliances were among the more strident advocates of fair trade. These manufacturers apparently concluded that available alternatives to RPM are not necessarily good substitutes ". . . and, [the substitutes might] involve a drastic [costly] shift in the structure of marketing relationships that would necessitate a corresponding alteration of selling strategy and tactics. The limited substitutability of these price maintenance

alternatives is indicated by the failure of the electrical appliance and housewares manufacturers to adopt such alternatives on any significant scale over a year after the collapse of fair trade in those fields."¹

Andrews and Friday also report that as fair trade collapsed some manufacturers who had previously used RPM were directly harmed by the subsequent price cutting of their advertised and branded products. For example, in 1958, apparently due to price cutting, the number of dealers selling Schick shavers fell from 35,000 to 7,000. In 1951, price cutting on Sunbeam products resulted in Macy's, Gimbels, and Bloomingdale's increasing their share of the New York market in these products from 4.2 percent to 74.1 percent during a 10 week period. However, Sunbeam's share of the New York market in 1951 fell by 18 percent, compared to a 9 percent sales decline nationally (including New York). Similar results are reported for Johnson and Johnson, Co., Hamilton Cosco, Inc., and Argus Cameras, Inc.²

Researchers also found that manufacturers of numerous previously fair-traded products failed to substitute other forms of marketing assistance to retailers and wholesalers following the repeal of the fair-trade laws in Rhode Island. This evidence is consistent with the view that the available alternatives may not be very good substitutes for RPM. Thus, it is not clear that other (legally less objectionable) vertical restrictions will always be available as viable substitutes if per se illegality continues to be the rule of law for RPM.

Per Se Illegality as a Deterrent

Perhaps a more compelling argument for continuing to hold RPM per se illegal is that while there may be procompetitive rationales for RPM, the deterrent effect of per se illegality on the formation of supplier or dealer cartels offsets society's need to protect procompetitive instances of RPM. There are those who believe that many more cartels than currently exist would be

¹ Herman (op. cit.), p. 592.

² Andrews and Friday (op. cit.), pp. 27-29.

formed because of the expanded "exemptions" which would exist under a more lenient rule of law. It is also feared that these cartels would be extremely difficult to detect and attack legally because many would result from oligopolistic interdependence rather than from provable agreements.¹

The 1945 FTC study, for example, concluded that the fair-trade laws had encouraged cartel activity. Quoting from a contemporaneous Justice Department statement, the study reports that the fair-trade laws had "...[become] a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment . . . [and if the] Antitrust Division had sufficient men and money to examine every [RPM] contract written under State and Federal legislation, and to proceed in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts, and that, in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction."² The report then notes that "the F.T.C. . . . likewise finds both its personnel and funds insufficient to adequately investigate and proceed in all matters involving possible use of resale price maintenance contracts in violation of law."³

Both the accuracy of these assessments, and their relevance to the issue of the current enforcement of sanctions against RPM can be questioned. As noted earlier, based upon a number of estimates by several researchers, no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed RPM in any single year in the U.S.,

¹ For a discussion of this view see, for example, J. B. Kirkwood, "The Per Se Rule Against Resale Price Maintenance: A Time for Change?" Remarks before the Antitrust Section of the A.B.A., August, 1981. Kirkwood does nonetheless suggest that policymakers should explore the possibility of exceptions or other variants on the strict per se approach. Also see R. E. Caves (op. cit.).

² 1945 FTC Study (op. cit.), pp. LX-LXI.

³ Ibid., p. LXI.

even at its height under the fair-trade statutes.¹ While the evidence implies that the druggists and alcoholic beverage dealer groups may well have used RPM to facilitate their collusion, it is quite unlikely that the same was true for many others who used the practice. The earlier assessments may have substantially overstated the general importance of RPM as a device which facilitates collusion, perhaps because of a failure to distinguish between those effects attributable to the practice of RPM, and those more properly attributable to specific defects in the fair-trade enabling statutes such as the failure to limit enforcement of RPM to the manufacturer-suppliers, and the court interpretations which allowed fair-trade contracts to be enforced over the objections of the owner of a brand or trademark. Critics of current enforcement policy, such as Professors Bork and Posner, argue that in any case the horizontal sanctions of the law are adequate to deal with cartel activities, even those which might arise under a more relaxed doctrine toward RPM.

In sum, the rigid application of a standard of per se illegality for RPM is not consistent with economic theory. Neither is it well supported by available empirical evidence. Efficient uses of RPM are evidently not unusual or rare. Legally less objectionable alternatives for RPM are not economically viable substitutes in many instances. Furthermore, the evidence revealing the general lack of pervasiveness of RPM in most lines of trade, even during the fair-trade era, implies that the concern with deterring the use of RPM as a device for facilitating collusion has been exaggerated.

Alternatives to Strict Per Se Illegality

If, as has been suggested here, the rigid application of a strict rule of per se illegality is not well supported by existing theories or available evidence, are there workable policy alternatives? Several policy options are more consistent with the implications of economic theory and, in principle, are capable of

¹ See the empirical review in Section VI.

ency. Each of the policy options has certain potential practical problems, but these problems do not appear to be so intractable that they render the options unworkable.

(A) Rule of Reason: Several Possible Versions

The rule-of-reason is a less extreme way of dealing with RPM matters than a rigid per se approach. The rule-of-reason treatment for RPM would seem to be the most consistent with economic theory, since it explicitly recognizes that the effects of the practice can be either beneficial or adverse. Rule-of-reason would also make the legal treatments of vertical price and non-price restraints the same.

The most obvious benefit of the rule-of-reason approach is that, relative to the alternatives, application errors can potentially be minimized. Beneficial uses of RPM can be allowed by the courts, and the objectionable uses of RPM can be prohibited.¹ The efficiency benefits of reduced errors under a rule-of-reason approach must also be weighed against any additional litigation resources which might be required. Whether increasing the resources required to litigate RPM cases under a rule-of-reason is desirable or not depends partly upon the indirect effects of the policy. For example, increased resource requirements for enforcement agencies and private plaintiffs might encourage new attempts to use RPM anticompetitively. Alternatively, enforcement agencies and private plaintiffs might allocate their own resources more efficiently and select "better" cases to litigate.

A rule-of-reason approach to RPM might also increase uncertainty. Presumably there would be some increased uncertainty, relative to a per se standard, as to exactly when the use of RPM might be challenged. This uncertainty level could fluctuate over time as different administrations showed varying levels of enthusiasm for attacking vertical matters. However, the

¹ This implies that the enforcement agencies will not prosecute the wrong cases, and the courts will not make consistent application errors.

degree of uncertainty under a rule-of-reason approach would depend upon how explicitly the criteria for successfully challenging RPM were articulated. If the instances in which RPM could be challenged successfully were made clear, it is not obvious that uncertainty must rise substantially or that the costs associated with increased uncertainty would be large.

Before unequivocally advocating a rule-of-reason as the optimal policy, however, one should consider exactly what a rule-of-reason would amount to in practice. As a number of legal commentators have noted, the law imposes no necessary structure on a rule-of-reason inquiry. Four possible versions of a rule-of-reason approach are considered below.

(1) Evidence Must Support One and Only One Interpretation.

Suppose that the courts will actually implement a rule-of-reason by requiring prosecutors and plaintiffs in RPM cases to prove that one and only one economic hypothesis is applicable. Such a rule implies that the prosecutors or plaintiffs will (almost) always lose.¹ This is because some of the major implications of the efficiency and anticompetitive economic theories of RPM are mutually consistent. Therefore, some factual evidence will almost always be consistent with more than a single possible explanation.

(2) The "Preponderance of the Evidence" Must Support the Finding. Even though economic theory does not offer a simple test which courts can rely upon in all cases, this does not necessitate that we abandon the inquiry and instead adopt a single (e.g., per se) view of the practice. There are many areas of antitrust where the tests suggested by economic theory are not simple or unambiguous, where courts must evaluate complex fact patterns where some evidence is consistent with more than a single possible explanation, and determine what, on balance, makes the most sense. This is true, for example, of merger, predatory pricing, monopolization, and nonprice vertical restraints cases. Each of these areas

¹ Experience with blanket legal rights to impose RPM during the fair-trade era suggests that this outcome is not very desirable.

is governed by what in practice amounts to a rule-of-reason standard. Thus, the lack of simple tests for conclusively distinguishing among hypotheses in RPM matters does not necessarily imply that a rule-of-reason approach is unworkable.

It does imply, however, that courts will very likely have to evaluate all of the evidence, including that which turns on such subjective factors as witness demeanor and credibility, and determine whether, in light of all the theories, a challenged use of RPM seems likely, on balance, to diminish consumer welfare. There is no obvious reason why such an approach would be any less workable in RPM matters than it is in other areas of antitrust law.

(3) A More Narrowly Focused Rule-of-Reason. Suppose that instead of either searching for the single conclusive explanation for a given use of RPM or balancing the evidence in light of all the theories, that a rule-of-reason were more narrowly focused. This focused approach would essentially involve determining whether RPM is being used to facilitate collusion among suppliers or dealers and/or price discrimination. These are the uses of RPM which in theory are most likely to result in harm to consumers. Although there are other ways in which RPM might reduce consumer welfare, for example, supplier mistakes and prisoners' dilemmas, the theoretical basis for concern in these other instances is much weaker than in the case of collusion or discrimination, and much more difficult to distinguish from possible efficiency promoting uses. Therefore, under this focused approach these "other" explanations would not be available to plaintiffs and enforcement agencies.

The courts could require those challenging a particular use of RPM first to establish the existence of the conditions which theory indicates are necessary for a concern with collusion or discrimination to be well founded. This would involve consideration of market structure measures and/or documentary evidence of actual or attempted collusion or discrimination. If the necessary (threshold) conditions were established, then judges would have to continue the inquiry and determine whether or not the available evidence is also sufficient to find that RPM is

tion. If so, the use of the restraint would be prohibited. If not, the complaint would be dismissed.

(4) Reverse the Burden of Proof. Another option is to follow the British example, at least partially, and reverse the burden of proof. Under such an approach it is presumed that RPM is objectionable, but manufacturers are permitted to present evidence that they face distributional problems which RPM can most efficiently correct. By reversing the burden, manufacturers (who presumably are in the best position to do so) must present a positive case that the effects of RPM are desirable, instead of enforcement agencies or private plaintiffs having to demonstrate the opposite. How effective this option would be in practice depends upon exactly what burden the courts place upon the manufacturer, and how well judges balance the evidence and make sensible decisions.

(B) Per Se With Exceptions or Exemptions from Prosecution

Another approach is to continue to view RPM as presumptively per se illegal, but to allow certain exceptions or exemptions to the general rule. If the exemptions or exceptions to the general rule were defined clearly and in conformity with the implications of the economic theories, this option might yield the efficiency benefits of a rule-of-reason while also preserving the benefits of reduced resource requirements associated with actually litigating cases under a per se standard.

The preceding analysis of theory and evidence suggests a number of possible exemptions or exceptions. Each of these exceptions would apply unless there is good evidence that the supplier(s) were coerced into imposing RPM by collusive (or monopsonistic) dealers. (1) Firms with small market shares are unlikely to possess market power, and they are, therefore, unlikely to be able unilaterally to employ RPM with anticompetitive effects. Unless there is evidence that all or most other firms in the market also employ RPM, from which some inference of supplier collusion seems proper, a presumption that a firm with small market share is motivated to impose RPM by efficiency considerations

is probably correct. (2) If the manufacturer's horizontal product market is not concentrated, then regardless of the market share or rank of the firm using RPM, it is unlikely that the effects will be adverse. Again without evidence that there is little diversity in manufacturers' distributional strategies, from which some inference of supplier collusion seems reasonable, it is likely that the firms's use of RPM is motivated by efficiency considerations. (3) The use of RPM by new firms (entrants), and by firms introducing new products or attempting to expand into new market areas can be presumed to be motivated by an attempt to expand sales and enhance competition. This inference is no doubt easier to support the more complex is the new product, or the more firmly established are the existing competitors' distributional systems and/or brand franchises, implying in both instances that entrants may want to use RPM to "purchase" either shelf space, retailer selling efforts or quality certification.

These three exemptions are rather straightforward. Their acceptance would contribute to enhancing economic efficiency by eliminating many of the application errors which result under a rigidly applied standard of per se illegality.

(C) Simple Market Share Rule

A more limited alternative to these exemptions could be the establishment of a simple market share guideline. Firms falling below this market share level would be presumed to be motivated by efficiency considerations and could not be prosecuted successfully unless of course there is evidence of collusion. The major drawback to this approach is that it would, of necessity, be based upon an arbitrary market share criterion. However, it should also contribute to reducing the prevalence of cases with little economic merit, it is consistent with the first exemption suggested above, and it is likely to be consistent with the second and third exemptions in many instances as well. In the merger area, where a similar problem of identifying beneficial and detrimental business decisions exists, the publication of enforcement guidelines has provided some degree of certainty for the business community. A similar policy could apply to RPM enforcement.

(D) Conclusion

While each of the possible alternative approaches mentioned has certain imperfections, all have the virtue of potentially moving policy closer to the goal of maximizing economic efficiency by reducing the number of cases with little or no economic merit. The purpose of this discussion has not been to develop each of the policy options in exhaustive detail. That is another task. Rather, the purpose has been to denote several alternatives more consistent with the theories and the evidence concerning RPM than the current legal standard of strict per se illegality.

Public policy toward RPM has oscillated between extreme views of the practice several times in this century. As indicated by these policy shifts neither extreme has proven satisfactory. Perhaps it is now time that we finally attempt to develop policies that recognize explicitly that RPM can, in fact, provide economic benefits as well as injure competition. The RPM status quo is extremely difficult to defend on economic logic, especially when the middle ground between full legal rights to use RPM and strict per se illegality has never really been tested.

APPENDIX

Examples of Firms That Have Used Resale Price
Maintenance and Products Involved

TABLE 1

Data on Fair Trade and Competitive Prices Compiled by
Schwegmann Brothers Giant Supermarket,
New Orleans, 1952

Product	Price (dollars)		
	Fair Trade	Competitive	Saving
Kotex	1.47	1.05	.42
Kleenex (200's)	.19	.13	.06
J & J baby powder	.49	.38	.11
J & J baby oil	.49	.38	.11
Cartose tablets	29.50	22.00	7.50
Aureomycin	49.80	33.66	16.14
Prenatal capsules	4.12	3.30	.82
ABDEC drops	3.51	2.85	.66
Bayer aspirin	.59	.47	.12
Arrid, with Federal tax	.76	.58	.18
Colgate tooth paste	.63	.48	.15
Large Alka-seltzer	.54	.44	.10
Pepsodent tooth paste	.63	.47	.16
Vitalis, with Federal tax	.59	.49	.10
Cartose	.58	.47	.11
Mayenberg goat milk	.51	.38	.13
Toni refill permanent	1.66	1.20	.46
Phillips milk of magnesia	.59	.47	.12
Listerine	.79	.68	.11
Seagram 7 Crown	4.74	3.73	1.01
All	.43	.35	.08
Esso motor oil	.45	.30	.15
Dial soap	.25	.16	.09
Shakespeare reel	17.00	12.24	4.76
Johnson wax	.98	.56	.42
Cook Kill, quart	1.19	.68	.51
Western shotgun shells	3.10	2.67	.43
Champion spark plugs	.85	.50	.35
Wearever aluminum pot	1.29	1.00	.29
Toastmaster	23.00	18.77	4.23
Theragran vitamins	9.45	7.56	1.89
TOTAL	160.17	118.40	41.77

Source: W. A. Sandridge, "The Effects of Fair Trade on Retail Prices of Electric Housewares in Washington, Baltimore, and Richmond, 1952-1959," Ph.D. Dissertation, University of Virginia, 1960, p. 28, taken from Hearings before the Senate Committee on Interstate and Foreign Commerce, on H.R. 5767, An Act to Amend the Federal Trade Commission Act with Respect to Resale Price Fixing, 82nd Congress, 2nd Session (Washington, D.C., Government Printing Office, 1952).

TABLE 2

Data on Fair Trade Prices and "Discount" Prices Compiled by
Julius Gutman and Company, Baltimore, June 4, 1952

Product	Price (dollars)		
	Fair Trade	Gutman's	Saving
Johnson's baby powder	.49	.44	.05
Kleenex	.28	.23	.05
Barbasol shaving cream	.59	.54	.05
Coty perfume	2.00	1.64	.36
Arrid deodorant	.63	.49	.14
Mennen skin bracer	.59	.49	.10
Arrow shirt	3.95	3.39	.56
Community silverplate	77.50	49.50	28.00
Benrus elegance watch	100.00	75.00	25.00
Ronson lighter	7.25	5.75	1.50
Dulane fryryte	29.95	19.95	10.00
Dormeyer fri-well	29.95	22.95	7.00
Toastmaster	23.00	18.21	4.79
Curity diapers	3.75	2.99	.76
Bayer's aspirin	.59	.49	.10

Source: W. A. Sandridge, "The Effects of Fair Trade on Retail Prices of Electric Housewares in Washington, Baltimore, and Richmond, 1952-1959," Ph.D. Dissertation, University of Virginia, 1960, p. 31, taken from Hearings before the Senate Committee on Interstate and Foreign Commerce, on H.R. 5767, An Act to Amend the Federal Trade Commission Act with Respect to Resale Price Fixing, 82nd Congress, 2nd Session (Washington, D.C., Government Printing Office, 1952).

TABLE 3

Price Comparisons Prepared by the Maryland Pharmaceutical Association and the Baltimore Retail Druggists Association*

Product	Fair Trade Prices	D.C. Free-Trade Prices	Product	Fair Trade Prices	D.C. Free-Trade Prices
Aspirin:			Liquid shampoo		
100 Bayer	\$0.59	\$0.46	continued		
100 Squibb	.54	.47	Laco	.43	.39
100 St. Joseph	.49	.43	Conte Castille	.49	.33
100 APC Co.	.39	—	Packers	.48	.43
Toothpaste:			Watkins Coconut	.48	.39
Colgate	.47	.33	Richard Hudnut	1.00	.79
Ipana	.47	.33	Wildroot	.48	.44
Pepsodent	.47	.39	Woodbury's	.43	.29
Phillips	.39	.27	Halo	.57	.43
Squibb	.47	.39	Fitch	.59	.47
Lyons	.47	.33	Deodorants:		
Amidient	.53	.47	Veto	.59	.53
Clordent	.69	.53	Arrid	.63	.47
Afco	.47	.39	Fresh	.59	.43
Pebamo	.49	.39	Sanite	.39	.38
Shaving cream:			Chad	.43	.39
Colgate	.53	.47	Coty	1.00	—
Barbasol	.39	.33	Hush	.49	.43
Palmolive	.53	.41	Mum	.59	.39
Burmashave	.40	.33	Odorono	.48	.37
Molle	.43	.37	Barz	.39	.33
Noxzema	.59	.47	Five-day pads	.59	.47
Mennen	.53	.43	Ydoro	.59	.43
Gillette	.43	.37	Zipp	.50	.47
Williams	.47	.37	Stoppette	.60	.47
Hair tonics:			Dyrad	.49	.37
Wildroot	.48	.43	Mennens	.59	.41
Kreml	.57	.43	Amolin	.59	.47
Vitalis	.49	.33	Heed	.59	.47
Vaseline	.47	.39	Hand lotions:		
Jeris	.49	.39	Hinds	.49	.39
Lucky Tiger	.48	.39	Italian Balm	.45	.37
Liquid shampoo:			Cashmere Bouquet	.43	.37
Admiration	.49	.43	Frostilla	.47	.43
Breck	.60	.53	Jergens Lotion	.49	.31
Wonder	.48	—	Trushay	.49	.33
Drene	.57	.47	Pacquin	.49	.39
Kreml	.59	.47			

Source: Standard Drug Co., Washington, D.C.

* Study of Monopoly Power, Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, p. 124.

List of Fair-Traded Products Prepared by the
National Retail Jewelers Association*

Fair-Traded Lines

Watches

Louis Aisenstein & Bros., Inc., New York	Harvel Watch Co., New York
Benrus Watch Co., New York	Helbros Watch Co., New York
Bulova Watch Co., New York	Jules Jurgenson Corp., New York
Cort Watch Co., New York	Longines-Wittnauer Watch Co., New York
Concord Watch Co., New York	Mido Watch Co., New York
Croton Watch Co., New York	Norman M. Morris Corp., New York
Cyma Watch Co., New York	Movado Watch Agency, Inc., New York
Elgin National Watch Co., Elgin, Ill.	Ollendorff Watch Co., New York
Glycine Watch Co., New York	Jules Racine & Co., New York
Gotham Watch Co., New York	Rolex American Watch Corp., New York
Gothic Jar-Proof Watch Co., New York	Semca Watch Corp., New York
Jean R. Graed, Inc., New York	Henri Stern Watch Agency, New York
Gruen Watch Co., Cincinnati	United States Time Corp., New York
Gubeline International Corp., New York	Vacheron & Constantin, New York
Hamilton Watch Co., Lancaster, Pa.	Vulcain Watch Corp., New York
	Wyler Watch Agency, Inc., New York

Pens and Pencils

Norma Pencil Co., New York
Parker Pen Co., Janesville, Wis.
W. A. Sheaffer Pen Co., Fort Madison, Iowa

Lighters, Compacts, Etc.

Alfred Dunhill, New York	Ronson Art Metal Works, Newark
Elgin American, Elgin, Ill.	Volupte, Inc., New York
Evans Case Co., New York	Zippo Manufacturing Co., Bradford, Pa.

Silverware (Sterling and Plate)

Alvin Corp., Providence	Rockwell Silver Co., Meriden
Ellmore Silver Co., Meriden	Schofield Co., Inc., Baltimore
Friedman Silver Co., Flushing, NY	Frank Smith Silver Co., Gardner, MA
Gorham, Co., Providence	Towle Silversmiths, Newburyport, MA
International Silver Co., Meriden	R. Wallace & Sons Manufacturing Co., Wallingford
Samuel Kirk & Son, Baltimore	
Lunt Silversmiths, Greenfield, Mass.	

List of Fair-Traded Products Prepared by the
National Retail Jewelers Association*

Silverware (Sterling and Plate)--Continued

Manchester Silver Co., Providence	Watson Co., Attleboro, MA
National Silver Co., New York	Webster Co., North Attleboro, MA
Poole Silver Co., Taunton, MA	Weidlich Bros. Manufacturing Co., Bridgeport, CT
Prisner Silver Co., Wallingford, CT	Frank M. Whiting & Co., Meriden
Quaker Silver Co., North Attleboro	National Silver Depositware Co., NY
Reed & Barton, Taunton	

Watch Attachments

Bruner-Ritter, Inc., NY	Jacoby-Bender, Inc., NY
Forstner Chain Corp., Irvington, NJ	Kestenman Bros. Manufacturing Co., Providence
Flex-Let Corp., East Providence	Jacques Kreisler Manufacturing Co., North Bergen, NJ
Gemex Co., Union, NJ	Speidel Corp., Providence
Hadley Co., Providence	

Clocks

Chelsea Clock Co., Chelsea, MA	Howard Miller Clock Co., Zeeland, MI
General Electric Co., Bridgeport	New Haven Clock Co., New Haven
Wm. L. Gilbert Clock Co., Winsted, CT	Revere Clock Co., Cincinnati
Herschede Hall Clock Co., Cincinnati	Sessions Clock Co., Forestville, CT
Ingraham Co., Bristol, CT	Telechron, Inc., Ashland, MA
Mercury Clocks, Inc., New York	

China and Glass

Anchor Hocking Glass Corp., Lancaster, OH	Edwin M. Knowles China Co., Newell, WV
Blenko Glass Co., Milton, WV	Lenox, Inc., Trenton, NJ
Edward Boote, New York	Maddock & Miller, New York
Cambridge Glass Co., Cambridge, OH	Meakin & Ridgway, New York
Carbone, Inc., Boston	Midhurst Importing Co., New York
Castleton China, Inc., New York	Meakin & Ridgway, New York
Stanley Corcoran, Inc., New York	Midhurst Importing Co., New York
Copeland & Thompson, New York	Ondondaga Potteries, Syracuse, NY
Corning Glass Works, Corning	Rickard, Inc., Antioch, IL
Doulton & Co., Corning	Red Wing Potteries, Red Wing, MN
Duncan & Miller, Corning	Val St. Lambert, Inc., New York
Dunbar Glass Corp., Dunbar, WV	Scammell China Co., Trenton, NJ
Hugh C. Edmiston, New York	Shenango Pottery Co., New Castle, PA
Fisher, Bruce & Co., Philadelphia	Stangl Pottery, Trenton, NJ
A.J. Fondeville Co., New York	Steubenville Pottery Co., Steubenville, OH
	Paul A. Straub Co., Inc., New York

TABLE 4--Continued

List of Fair-Traded Products Prepared by the
National Retail Jewelers Association*

China and Glass--Continued

Fostoria Glass Co., Fostoria, OH	Justin Tharaud, Inc., New York
Flintridge China Co., Pasadena, CA	U.S. Glass Co., Tiffin, OH
Haviland & Co., New York	Josiah Wedgwood & Sons, New York
T.G. Hawkes & Co., Corning	Westmoreland Glass Co., Grapeville, PA
A.H. Heisey Co., Newark, OH	Royal Worcester Porcelain Co., New York
Imperial Glass Corp., Bellaire, OH	Sterling Glass Co., Cincinnati

The following information was obtained from the Philadelphia members of the National Wholesale Jewelers Association:

1. All of the members questioned stated that at least 90 percent of the merchandise sold was fair-traded.
2. The following lines were fair-traded completely: (a) Flat silverware, (b) electrical appliances, (c) clocks, (d) watches, (e) lighters, (f) pens and pencils.
3. In addition, two stated that they fair-traded some hollowware, such as Community and 1847 Rogers Bros.
4. Two also fair-traded such jewelry items as Ronson and Speidel merchandise.
5. The majority felt that most jewelry items could not be fair-traded, because of the diversity of each product and the value placed on each.

*Source: Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, pp. 246-48.

TABLE 5

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Johnson Glo-coat	\$0.59	\$0.49
Johnson paste wax	.59	.54
Gold Seal glas wax	.59	.47
Mentholatum	.39	.29
Musterole, regular	.54	.43
Vicks salve	.33	.29
Vicks drops	.37	.29
Serutan granulars	.95	.89
Scotts emulsion	.63	.53
Creomulsion	.57	.47
Pertussin	.57	.47
Agarol, with phenolphthalein	1.29	1.09
Phillips milk of magnesia	.39	.33
Bisodol powder	.59	.49
Bromo Seltzer	.57	.49
Sal Hepatica	.33	.29
Fletcher Castoria	.36	.32
Pepto Bismol	.59	.46
Pinkham Vegetable Compound liquid	1.39	1.19
S.S.S.	1.19	.98
Aika Seltzer	.54	.47
Anacin tablets	.19	.17
Anahist tablets	.55	.42
Bayer Aspirin	.59	.49
Carters Little Liver Pills	.33	.27
Cystex	.89	.69
Exlax	.28	.22
Groves Bromo Quinine	.39	.29
Heet liniment	.49	.39
Baume Ben Gay	.79	.67
Meads cod liver oil	.57	.49
Meads Oleum Percomopheum	.84	.77
J & J band aids	.33	.24
Dayamin caps, 30	1.65	1.39
Dayamin caps, 100	4.95	4.09
Vi Daylin, 90 cubic centimetererrrs	.98	.89
Vi Daylin, 8 ounces	2.35	2.04
Vi Daylin, 16 ounces	3.97	3.44
Amphojel tablets, 60	1.13	.97
Amphojel, liquids, 12 ounces	1.29	1.07
Tyrozets	.68	.57
Siblin, 4 ounces	1.21	1.09
Siblin, 16 ounces	3.42	2.87
ABDEC drops, 15 cubic centimeters	1.26	1.08
ABDEC drops, 50 cubic centimeters	3.50	2.79
Cluco Fedrin, 1 ounce	.73	.67
Heptuna caps, 50	1.60	1.49
Heptuna caps, 100	3.15	2.69

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Heptuna Plus caps, 100	5.45	4.59
Vi-Terra caps, 100	3.96	3.90
Vi-Penta drops, 15 cubic centimeters	1.19	.89
Vi-Penta drops, 30 cubic centimeters	2.19	1.63
Vi-Penta drops, 60 cubic centimeters	3.95	3.19
Vi-Penta Pearls, 25	1.13	.93
Vi-Penta Pearls, 100	1.13	.93
Syntrogel tablets, 100	1.49	1.29
Syntrogel tablets, 50	.82	.73
Empirin compound tablets, 12	.25	.21
Empirin compound tablets, 25	.45	.37
Empirin compound tablets, 50	.75	.59
Empirin compound tablets, 100	1.35	.98
Stuarts Formula tablets, 96	2.60	2.29
Stuarts Formula liquid, pint	2.60	2.29
Vi-Syneral drops, 15 cubic centimeters	1.10	.89
Vi-Syneral drops, 30 cubic centimeters	1.75	1.75
Vi-Syneral drops, 45 cubic centimeters	2.95	2.47
Vi-Syneral caps, adult, 50	2.50	2.19
Vi-Syneral caps, adult, 100	4.50	4.09
Feosol tablets, 100	1.25	.98
Moliron tablets, 100	1.10	.89
Moliron liquid, 12 ounces	1.65	1.59
Creamalin tablets, 50	.74	.59
Creamalin tablets, 200	2.66	2.19
Neosynephrine solution, 1/4 percent, 1 ounce	.90	.69
Neosynephrine solution, 1 percent, 1 ounce	1.22	.98
Privine, 1 ounce	1.00	.79
Unicaps, 24	.95	.79
Unicaps, 100	3.11	2.87
Unicaps, 250	6.96	5.47
Theragran caps, 100	9.45	7.95
Kaopectate, 10 ounces	.98	.84
Clinitest tablets, 36	.57	.49
Clinitest tablets, 100	.96	.78
Gelusil liquids, 6 ounces	.97	.87
Gelusil liquid, 12 ounces	1.49	1.19
Gelusil tablets, 50	.97	.79
Gelusil tablets, 100	1.53	1.29
Desenex ointment, 1 ounce	.69	.67
Desenex powder, 1 1/2 ounces	.69	.67

TABLE 5--Continued

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Desenex liquid, 2 ounces	\$0.69	\$0.67
Lilly's insulin U40, 10 cubic centimeters, regular	1.26	0.98
Lilly's insulin U80, 10 cubic centimeters, regular	2.47	1.79
Lilly's insulin U40, protamine zinc, 10 cubic centimeters	1.48	1.09
Lilly's insulin U80, protamine zinc, 10 cubic centimeters	2.83	2.19
Lilly's insulin NPH U40, 10 cubic centimeters	1.48	1.09
Lilly's insulin NPH U80, 10 cubic centimeters	2.83	2.19
Lilly's insulin Homicebrin, 120 cubic centimeters	1.22	1.05
Lilly's Homicebrin, 120 cubic centimeters	1.22	1.05
Lilly's Homicebrin, pint	3.78	2.98
Lilly's Reticulex Pulvules, 100	5.85	4.87
Lilly's Multicebrin Gelseals, 100	4.86	3.98
Old English paste wax	.65	.49
666 Liquid, small	.29	.24
B. C. Powders	.19	.16
4-Way cold tablets	.23	.19
Phillips Milk of Magnesia tablets, 30's	.19	.16
Stanback powders	.19	.16
J&J adhesive, 1/2-inch by 5 yards	.20	.17
J&J cotton	.17	.13
J&J bandage	.27	.19
Amident tooth paste, economy	.69	.63
Colgate tooth paste, economy	.63	.54
Colgate tooth paste, giant	.47	.39
Amident tooth powder	.47	.43
Fasteeth, medium	.59	.49
Fasteeth, large	.98	.79
Polident, small	.33	.27
Polident, large	.59	.47
Barbasol shave cream, tube	.39	.34

TABLE 5--Continued

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in —Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Palmolive shave cream, lather	.57	.49
Palmolive shave cream, brushless	.41	.39
Noxzema shave cream, jar, large	.59	.43
Williams lather shave cream, large	.53	.39
Aqua Velva, 60 cents	.59	.43
Old Spice shave lotion	1.00	.87
Cashmere Bouquet talc, Gt	.43	.37
J&J baby talc.	.25	.19
J&J baby talc.	.49	.37
Tampax, regular, 10's	.39	.32
Kleenex, 300's	.28	.23
Kotex, regular, 12's	.39	.29
Mennen Skin Bracer	.59	.43
Gillette Blue Blades, 10's	.49	.39
Gillette Blue Blades, 20's	.98	.79
Gillette Thin Blades	.25	.19
Shick Injector Blades, 20's	.73	.63
Lavoris, large	.79	.69
Listerine, medium	.49	.39
Listerine, large	.79	.69
Lysol, small	.27	.23
Lysol, medium	.55	.47
Zonite, large	.89	.69
Arrid, large	.63	.54
Mum, medium	.39	.33
Mum, large	.69	.53
Stoppette spray	.59	.59
Stoppette spray	1.25	1.09
Noxema Boudoir	.59	.53
Ponds cold cream, 35 cents	.31	.27
Ponds cold cream, 55 cents	.55	.47
Ponds vanishing cream, 35 cents	.31	.27
Ponds vanishing cream, 55 cents	.55	.47
Breck shampoo	.60	.53
Breck shampoo	1.00	.79
Breck shampoo	1.75	1.59
Drene shampoo, 60 cents	.57	.47
Toni refill, No. 81	1.00	.79
Prell shampoo, medium	.57	.47
Prell shampoo, large	.89	.69

TABLE 5--Continued

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Jeris tonic, medium	\$0.74	\$0.63
Vitalis, medium	.49	.39
Vaseline tonic, large	.47	.39
Vaseline tonic, gt	.79	.67
Wildroot Cream Oil, 60 cents	.59	.49
Wildroot Cream Oil, \$1	.98	.88
Jergen Lotion, 50 cents	.49	.43
Pacquins Handcream, 50 cents	.49	.43
El Producto (Boquet), box of 50	5.50	4.89
El Roi-Tan, box of 50	4.40	3.89
Phillies (Perfectos), box of 50	4.40	3.89
Muriel (Senators), box of 50	4.40	3.89
White Owl, box of 50	4.40	3.89
Sunbeam razor	26.50	19.79
Schick razor	24.50	18.89
Rolls razor	15.00	9.89
Ronson lighter	12.25	9.88
Remington razor	25.50	17.79
A.S.R. lighter	13.95	9.88
A.S.R. pocket lighter	6.50	4.69
Remington 60 electric shaver	27.50	21.89
Ronson pocket lighter	8.25	5.89
Ronson table lighter	12.25	9.69
Lionel freight train	29.95	22.98
G.E. vacuum cleaner	59.95	39.99
Waring Blender	37.95	31.19
Son Chief "Pop-up" toaster	14.95	8.88
G.E. alarm clock	4.95	2.99
Universal Coffeematic	29.95	21.89
G.E. grill and Waffle	16.95	13.69
G.E. "Pop-up" toaster	23.95	17.69
G.E. mixer	39.95	31.89
Sunbeam mixmaster	46.50	34.79
G.E. steam iron	18.95	15.39
Toastmaster	23.00	18.69
G.E. heating pad	5.95	3.99
Infrared broiler	16.95	12.69
Fryrite	28.75	21.89
38-piece tool set	17.95	15.95
G.E. iron	12.95	9.79
Presto cooker	15.95	11.39
Universal scale	7.95	7.95

TABLE 5--Continued

List of Fair Traded Merchandise: Submitted by Samuel Rosenthal*

Name of product	Fair-trade price in 45 fair-trade States	Available prices in Texas, Missouri, Vermont, and the District of Columbia where no fair-trade laws exist
Sunbeam coffee maker	\$37.50	\$31.89
Westinghouse mixer	42.50	27.89
Le John hair dryer	6.69	4.89
Westinghouse iron	12.95	9.79

*Source: Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, pp. 433-35.

Partial List of Manufacturers Whose Products Were Fair-Traded
at Both Wholesale and Retail Levels*

[From Yahr Lange, Inc., Tomorrow, Milwaukee, Wis.]

Fair Trade Avenue is Paved With Good Intentions

Wholesale fair-trade contracts are just as necessary as retail fair-trade contracts. Both were created for the same purpose.

Manufacturers alone, cannot do a perfect job of enforcement any more than our Government alone, could make price controls stick--retailers and wholesalers must make contributions, too.

There must be--

A willingness of merchants to respect the wholesale and retail minimum prices and discount policies.

A refusal of retailers to connive with wholesalers who are fair-trade violators.

Remember there can be no violators or chiseling without customers--he, who patronizes fair-trade violators, helps defeat the common effort, and in the long run, defeats his own interests.

Just in case you don't know it, here is a partial list of manufacturers whose products are covered by their stabilized distribution policies, at both the retail and wholesale level:

Eli Lilly & Co.	Anihist Co., Inc.
International Cellucotton	Washburn Products Co.
Products Co.	Barbasol Co.
Mead Johnson Co.	American Safety Razor Co.
Johnson & Johnson	Becton-Dickinson Co.
Smith Kline & French	Block Drug Co.
Bauer & Black	Grove Laboratories
Miles Laboratory	Blue Jay Products Co.
Coty, Inc.	Bourjois, Inc.
Bristol-Myers Co.	Centaur-Caldwell Co.
Gillette Safety Razor Co.	Campana Sales Co.
Toni, Inc.	Chamberlain Sales Corp.
E. R. Squibb & Sons	Chillicott Laboratories
Burroughs Wellcome & Co.	Clean Home Products Co.
Wyeth, Inc.	J. B. Williams Co.
G. D. Searle Co.	Creomulsion Co.
Lederle Laboratories	DeVilbiss Co.
Mennen Co.	Emerson Drug Co.
The Bayer Co.	Cummer Products Co.
Pepsodent Co.	Pyramid Rubber Co.
Personal Products Corp.	Ex-Lax Corp.
Hoffman-La Roche Co.	Sales-Builders
Hudnut Sales Co.	(Max Factor)
Colgate-Palmolive-Peet Co.	Pharmaco, Inc.
Vick Chemical Co.	F. W. Fitch Co.
Coca Cola Sales Co.	H. Clay Glover Co.
Winthrop-Stearns, Inc.	Lanteen Medical Laboratories
Abbot Laboratory	Lehn & Fink Products Corp.
Upjohn Co.	Lavoris Co.
Weco Products Co.	Lucky Tiger Manufacturing
Procter & Gamble Co.	Co.
Whitehall Pharmacal Co.	Mentholatum Co.
Charles Phillips Co.	Miller Forge Rubber Co.
Schering Corp.	Murine Co.
Wild Root Co.	Musterole Co.
CIBA Pharmaceutical	Noxema Chemical Co.
Products, Inc.	Ortho Pharmaceutical
Prophylactic Brush Co.	Products
Lambert Pharmacal Co.	Pearson Pharmaceutical Co.
Julius Schmid, Inc.	Pharma Craft Corp.
Davol Rubber Co.	Dr. Pierce Medical Co.
White Laboratories	Pinex Co.

TABLE 6--Continued

Partial List of Manufacturers Whose Products Were Fair-Traded
at Both Wholesale and Retail Levels*

Youngs Rubber Corp.	Lydia E. Pinckham Medicine Co.
Amity Leather Products Co.	R. B. Semlar Inc.
Lamont Corliss Co.	Tek Hughes, Inc.
Potter Drug & Chemical Corp.	Tampax Corp.
Remington Rand Inc.	H. K. Wampole & Co.
Sunbeam Corp.	William R. Warner & Co.
Schick, Inc.	R. L. Watkins Co.
Ritchie Janvier, Inc.	Westinghouse Electric Co.
Union Pharmcal Co.	Zonite Sales Corp.
Minnesota Mining Co.	Norwich Chemical Co.

If you find any wholesaler offering you extra discounts or special quantity prices on the above lines: he is a violator--he is not a builder--he's a member of the wrecking crew.

*Source: Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, pp. 600-601.

Fair Trade Merchandise Sold by Hardware Stores*

This is not intended as a complete list, but is as full and accurate as possible. Manufacturers are urged to inform Hardware Age of any of their products which should be added.

Note: The numerals or words within parentheses indicate the States in which fair-trade contracts are in effect. The word (All) after the product denotes that the item is fair traded in all States where such contracts are legal, i.e., all except Texas, Vermont, Missouri, and the District of Columbia.

All Power Mfg. Co.
 Dripless sink strainer (Cal.)
 Aluminum Cooking Utensil Co.
 "Wear-Ever" 4-qt. & 7-qt. pressure cooker (all)
 "Wear-Ever" cooking utensils (7)
 Aluminum Goods Mfg. Co.
 "Mirro" aluminum cooking utensils (all)
 American Rubber Products Corp.
 "Coprtop" plumbing tank balls (all)
 Animal Trap Co. of America
 "Victor," "Oneida" and "Newhouse" animal traps (all)
 Balcrank, Inc.
 Balcrank lubrication equipment (all)
 Barber Mfg. Co.
 "Stor-A-Way" brackets for windows and screens (1)
 Bissel Carpet Sweeper Co.
 "Bissell's carpet sweepers," various models (all)
 Bostwick Laboratories, Inc.
 "Hep" insect killer (all)
 "Hero" fire extinguisher (all)
 Bostwick "Safe-le" insect killer (all)
 Bostwick Air Conditioner, household deodorant (all)
 Bostwick Plastic Spray (all)
 Bostwick "Super Aerosal," insect killer (all)
 Bostwick Moth Proofer (all)
 Brearly Co.
 "Counselor" scales (all)
 Burroughs, W. C., Co., Inc.
 "Thread A Matic" automatic needle threader
 Camfield Mfg. Co.
 Camfield automatic toaster (all)
 "Toastess" toaster serving set (all)
 "Toastette" toaster serving set (all)
 Carbine & Carlson Chemicals Corp.
 "6-12" insect repellent and suntan lotion (all)
 Century Products Works, Inc.
 "Glide-O-Matic" electric iron (all)
 "De Luxe" electric iron (all)
 "Century De Luxe" broiler (all)
 Chamberlain-Haber Chemical Co.
 "Nip-on" Roach Powder (all)
 "Presto" pipe opener, bowl cleaner,
 tile & porcelain cleaner (all)
 "Puritox" moth crystals (all)
 Chicago Electric Mfg. Co.
 "Handyhot" electrical appliances (all)
 Cincy Products Co.
 Cincy Wallpaper Cleaner (all)
 Cleveland Cleaner & Paste Co.
 "Walvet" Wallpaper Cleaner (13)
 Coleman Co., Inc.
 "Coleman" lamps and lanterns (all)
 "Coleman" irons (all)
 "Coleman" camp stoves (all)
 "Coleman" mantles, generators and other pressure appliances,
 accessories, etc.

Converse Rubber Co.
 "All Star" basketball shoe (all)

Corning Glass Works
 "Pyrex" overware and flameware

Cory Corp.
 Cory glass coffee brewers (all)
 Cory electric knife sharpeners (all)
 Glass coffee brewing equipment (all)

G. N. Coughlan Co.
 "Liquid Chimney Sweep" chemical soot destroyer (all)
 "Powder Chimney Sweep" (44)
 De-Moist" de-humidifier (44)

Dazey Corp.
 "Dazey" kitchen helps (all)

Detecto Scales Inc.
 "Detecto" bathroom scale (all)

Detroit Vapor Stove Div., Borg-Warner Corp.
 "White Star" gas ranges (NY, Iowa)

Doepke, Charles Wm., Mfg. Co.
 Five model toys (23)

Dominion Electric Corp.
 "Pop-O-Matic" toaster (all)
 No. 1009 automatic flat iron (all)
 No. 1417, 1418, 1419, 1420 and 1421 table stoves (all)
 "Grid-O-Matic" table cooker (all)

Dow Chemical Co.
 Laws barrow (2)
 "Sunday Night Chief" magnesium griddle (3)

Du Pont de Nemours, E.I., & Co.
 Du Pont No 7 automotive and household chemical specialties (all)
 Du Pont seed disinfectants and turf fungicides, 11 products
 (all)
 Du Pont home and garden products, 9 products (all)
 "Zerone" Anti-Rust Anti-Freeze (all)
 "Zerex" Non-evaporating Anti-Freeze (all)

Dupli-Color Products Co.
 "Dupli-color" automotive touch-up (all)
 "Dupli-color" household touch-up (all)
 "Dupli-color" pigmented car polish (all)
 Spray guns (all)

Duralux Co.
 "Duralux" vacuum coffee makers (all)

Durst Mfg. Co.
 "Aerator" water strainer (all)
 "Herculean Seat" toilet seat (all)

Edmont Mfg. Co.
 "Swaggerettes" ladies house and garden gloves (all)
 "Redmont" industrial safety gloves (all)

Embree Mfg. Co.
 "Wipe-on" plastic base finish (all)
 "Zoff" surface preparative (all)

Everedy Co.
 Everedy "Tater Baker" top-of-stove oven (NY)
 Everedy "Ovenola" top-of-stove oven (NY)

Federal Seat Corp.
 Federal "Pearluster" toilet seat (all)

Firestone Industrial Products Co.
 "Velva-Flo" faucet aerator (all)

Forsberg Mfg. Co.
 Forsberg Power Tool (18)

General Chemical Division, Allied Chemical & Dye Co.
 "Airex" moth killer (20)
 Airex" insect killer (20)

Fair-Traded Merchandis Sold by Hardware Stores*

General Electric Co.
 Clocks (all)
 Fans (all)
 Heating devices (all)
 Automatic blankets (all)
 Heating pads (all)
 Heat lamps (all)
 Portable heaters (all)
 Vacuum cleaners (Metropolitan New York and Newark, NJ)
 General Mills, Inc.
 General Mills "Tru-Heat" electric iron (all)
 General Mills steam ironing attachment (all)
 General Mills "PressureQuick" saucepan, 4-qt (all)
 Geuder, Paeschke & Frey Co.
 "Met-L-Top" standard ironing table (all)
 "Met-L-Top" adjustable height ironing table (all)
 Gladding, B. F., & Co., Inc.
 Fishing lines (NY State)
 Glidden Co.
 "Spred Flat" resin emulsion (5)
 "Spred Lustre" resin emulsion (5)
 Gold Seal Co.
 "Gold Seal" floor waxes & floor polishes (8)
 "Glass Wax" cleaner for glass and metals (all)
 Goodrich, B.F., Co.
 "Koroseal" play pond (all)
 "Koroseal" garden hose (all)
 Griffon Cutlery Works, Inc.
 Griffon "Tru-Pink" pinking shears (all)
 Guaranteed Products
 "Shox-Stock" fence controllers (all)
 Hamilton Beach Co., Div. of Scovill Mfg. Co.
 "Hamilton Beach" food mixer (7)
 Hamilton Mfg. Corp.
 "Cosco" metal stools (all)
 "Cosco" metal utility tables (all)
 Harker Pottery Co.
 "Cameo" semi-porcelain dinnerware & ovenware (8)
 "Chesterton" dinnerware (7)
 Hawkins Co.
 "Blake & Lamb" steel animal traps (all)
 Heller Brothers Co.
 "Nucut" files--American pattern (3)
 "Heller" horse rasps (3)
 Hodgman Rubber Co.
 "Coolapak" portable refrigerator bags (all)
 Hollingshead, R.M., Corp.
 "Whiz" automotive chemical products, approximately 45 fair
 traded (all)
 Hoover Co.
 Hoover electric cleaner (all)
 E. Ingraham Co.
 "Click" pocket watch (all)
 "Autocrat" pocket watch (all)
 "Cameo" wrist watches (all)
 "Diamond" wrist watches (all)
 "Princess" alarm clocks (all)
 "Liberator" 8-day alarm clocks (all)
 "Prince" alarm clocks (all)
 International Appliance Corp.
 "Broilking" portable electric broiler (all)
 "Silv-A-King" food slicers for home use (all)
 Jackson of London Products
 "Reviva" spot remover furniture polish (all)
 "Patina" English Type Wax (all)

Fair-Traded Merchandis Sold by Hardware Stores*

Johnson Motors
 "Johnson Sea Horse" outboard motors (all)

Kay-Tite Co.
 "Kay-Tite" waterproofing compound (all)
 "Primer" primer coat (all)
 "Asbestos-Life" coating for asbestos shingles (all)
 "Hydroxin" dust proofing for floors & cement hardener (all)

Kellogg Brush Mfg. Co.
 "Kellogg Quality" household brushes (all)

Kemode Mfg. Co.
 "Quik-Shot" soldering irons (all)

Lakeside Aluminum Co.
 "Streamliner" pressure saucepans & cooker-canners (all)

Landers, Frary & Clark
 "Universal" washers and ironers, vacuum cleaners, traffic appliances & household specialties (all)

Langley Corp.
 Casting reels--8 models (all)
 Fly reels--4 models (all)
 "Fisherman's De-Liars" (all)

O. E. Linck Co., Inc.
 "Tat" ant traps (all)
 "Tat" ant bait (all)
 "Tat No-Fogg" anti-dim cloth (most F.T. states)
 "Hot Spray" windshield de-icer (Most F.T. states)

Lincoln Engineering Co.
 "Lincoln" lubricating devices (all)

Lincoln Metal Products Corp.
 "Beautycan" step-on disposal can (all)

Lionel Corp.
 "Lionel" electric trains and accessories (all)
 "Trainmaster" transformer (all)
 "Lionel" construction sets (all)

Locke Stove Co.
 "Warm Morning" coal-burning space heater (all)

Magic Mirror Associates, Inc.
 "Magic Mirror Door Detective" door hardware (all)

Magna Engineering Corp.
 "Shopsmith" multi-purpose woodworking power tool (all)

Master Rule Mfg. Co., Inc.
 "Lady's Man" white tape rule (all)

Minnesota, Mining & Mfg. Co.
 Masking tape (9)
 Coated abrasives (9)

Miracle Adhesives Corp.
 Miracle "Black Magic" adhesive, general purpose structural cement (11 Western states)

Modglin Co., Inc.
 "Whisk-off" plastic whisk brooms (all)
 "Perma-Broom" plastic house broom (all)

Monark Silver King, Inc.
 "Monark" 2-wheel steel bicycle (all)
 "Silver King" 2-wheel aluminum bicycle (all)

Moore Plush Pin Co.
 "Moore" picture hangers, push pins, map tacks, screen tacks and thumb tacks (Cal.)

Mossberg, O.F., & Sons, Inc.
 "Mossberg" .22 cal. rifles (all)
 "Mossberg" 410 and 20 gauge shotguns (all)
 "Mossberg" telescope sights (all)

Mystic Foam Co.
 "Mystic Foam" rug and upholstery cleaner (all)

National Pressure Cooker Co.
 Presto Cooker and cooker-canners (all)

Fair-Traded Merchandis Sold by Hardware Stores*

National Silver Co.
 "King Edward" silverplated flatware (all)
 "Guildcraft" silverplated flatware (all)
 "National Sterling" silver flatware (all)

Nicro Steel Products, Inc.
 "Nicro" No. 2508 automatic coffee maker (all)
 "Nicro" No. 472 vacuum coffee maker (all)
 "Nicro" No. 572 electric vacuum coffee maker (all)
 "Nicro" No. 1512, 12-cup vacuum coffee makers (all)
 "Nicro" non-electric percolator (all)
 "Nicro" electric percolator (all)
 "Nicro" electric egg cooker (all)
 "Nicro" mixing bowls (all)
 "Nicro" drip coffee makers (all)

Norris Stamping & Mfg. Co.
 "Thermic Ray" cookware (all)

Ocean City Mfg. Co.
 No. 2000 level wind bait casting reel
 No. 1999 "Zephaloy" bait casting reel, 100 yd.
 No. 993 wide spool, surf reel
 No. 112 "Bay City," 250 yd.
 No. 113 "Bay City," 300 yd.
 No. 165 "Bay City," 400 yd.
 No. 167 "Bay City," 600 yd.
 No. 76 "Plymouth," 60 yd.
 No. 77 "Plymouth," 100 yd.
 No. 78 "Plymouth," Plymouth Salmon reel, 150 yd.
 No. 110 "Seattle," 250 yd. narrow spool
 No. 920 "Imperial," level wind reel, 150 yd.
 No. 910 "Imperial," 150 yd., no star drag
 No. 921 "Imperial," 150 yd. light spool reel
 No. 250 Inductor, magnetically controlled surf reel, 200 yd.

O-Cel-O, Inc.
 "O-Cel-O" cellulose sponges (all)

Orchard Industries, Inc.
 "Actionrod" steel casting rod (all)
 "Actionglas" glass fishing rod (all)
 "Actionbait" artificial lures (all)

Pal Blade Co.
 "Pal" Safety Razor Blades (all)

Patent Cereals Co.
 "Dic A Doo" paint cleaner (all)

Personna Blade Co., Inc.
 "Personna" safety razor blades (all)
 "Personna DeLuxe" carving sets (all)

Phoenix Table Mat Co.
 Three stove and utility mats (all)

Pincor Products
 "Pincor" power lawn mower, electric hedge trimmers & hand mowers (all)

Pioneer Rubber Co.
 "Ebonettes" neoprene household gloves (all)

Plastic Toys, Inc.
 15 plastic toys

Plough Sales Corp.
 "Major's" Cement (all)

Ranger, Inc.
 "Prizewinner" fishing reels, 11 models (1)

Reardon, The., Co.
 "Bondex" cement paint (all)
 "Bondex" primer (all)
 "Bondex" hydraulic (all)
 "Firex" fire retardant paint (all)
 "Dramex" one coat interior finish (all)

Remington Arms Co., Inc.
 Remington shotguns, center fire & rim fire rifles (all)

- Remington Rand, Inc.
 "Remington" electric shavers (all)
- Renuzit Home Products Co.
 "Renuzit" home dry cleaner (45)
 "Renuzit" self-polishing wax (18)
 "Renuzit" spot & stain remover (45)
- Revere Copper & Brass, Inc.
 "Revere Ware" copper-clad stainless steel kitchen utensils and chromium plated copper tea kettles, 18 products (all)
- Rittenhouse, The, Co., Inc.
 "Rittenhouse" electric door chimes (all)
- Robeson Cutlery Co., Inc.
 83 products including household cutlery, carving sets, steak sets, self-sharpening knife cases, gift-packaged cutlery sets
- Sandee Manufacturing Co.
 "Sandee Feather-Lite" 1/2-in. plastic garden hose (all)
- Schick Inc.
 "Schick" electric shavers (all)
 "Schick Shaverest" automatic wall holder for shaver (all)
 "Schick" travel kit (all)
- Shakespeare Co.
 "Shakespeare" fishing reels, rods, lines, baits. All principal products fair-traded (44)
- Sherwin-Williams Co.
 "Kem-Tone" oil emulsion paint (all)
 "Kem-Glo" enamel (all)
 "Lin-X" wax, polish and varnish (all)
 "Pestroy" insecticide (all)
 Agricultural "Weed-No-More" (14 products). Herbicide (all)
 "Bug Blaster" insecticide and fungicide (all)
- Silex Co.
 Steam iron (all)
 Household electric and complete kitchen glass coffee makers (all)
 Coffee warmer (all)
 Replacement parts and accessories
- Simoniz Co.
 "Simoniz" automobile finisher (all)
 "Simoniz Cleaner" automobile finisher (all)
 "Self-Polishing Simoniz for Floors" (all)
 "Paste Simoniz for Floors" (all)
 "Household Simoniz" (all)
 "Window Glaze" (all)
 "Ez-2 chrome and metal cleaner (all)
 "Whiteside" for cleaning white wall tires (all)
- Solventol Chemical Products, Inc.
 "Solventol" household cleaner (30)
- Sprain
 "Sprain" flowers and lawn sprinkler (all)
- Steelcote Mfg. Co.
 "Damp-Tex" wet surface enamel (all)
 "Damp-Tex No 2" industrial enamel (all)
 "Lay Tite" rubber base floor coating (all)
 Rubber enamel (all)
- Stewart-Warner Corp.
 "Alemite" lubricating equipment (all)
 "South Wind" automobile heaters (all)
 "Golden Meteor" bicycle speedometers (all)
- Swartzbaugh Mfg. Co.
 "Everhot" roasters, broilers, "Roasterettes," heaters, blankets, timer clocks, (Cal. Wash, Oreg.)
 "Everhot Rangette (NY)
- Telechron, Inc.
 Telechron clocks (household) (all)
- Textile Mills Co.
 "Tex-Knit" ironing cover and pad set (all)

Fair-Traded Merchandis Sold by Hardware Stores*

Thompson, The Henry G., & Son Co.
 "Milford" hack saw blades and assortments (30)
 Toastmaster Products, Div. of McGraw Electric Co.
 "Toastmaster" automatic toaster (all)
 Tobacco By-Products & Chemical Corp.
 "Black Leaf 40" agricultural insecticide (all)
 "Black Leaf Garden Dust" insecticide (all)
 "Black Leaf Mosquito-fumer" outdoor mosquito control (all)
 United State Plywood Corp.
 "Weldwood" Glue, woodworking adhesive (all)
 United States Time Corp.
 "Ingersoll" watches and clocks (all)
 "Kelton" watches and clocks (all)
 "Timex" watches (all)
 "Saga" watches (all)
 Waltco Products
 "Stubcaster" fishing rod (42)
 "Longcaster" fishing rod (42)
 "Saf T Sheath" knife (37)
 Waring Products Corp.
 "Waring Blender" food and drink mixer (all)
 "Waring" steam iron (all)
 Webb Products Co.
 "Arrowhead" cement, waterproof fabric, glue, porcelain glaze (all)
 "Duratite" Wood Dough, surfacing putty, painters' spachtling putty, elastic seam compound (all)
 Metal Surfacer (all)
 West Bend Aluminum Co.
 "Trig" whistling tea kettle (44)
 "West Bend" bottle sterilizer (44)
 Westinghouse Electric Corp.
 Roaster oven RO-81 (all)
 Broiler grid, RG-81
 Cabinet-roaster, RC-61
 Timer clock, TC-81
 Irons, 3 1000-watt models
 Sandwich grill, STC-54
 Waffle grids, STW-2
 Waffle baker, WSA-24
 Coffee maker, CM-81
 Hot plate, PH-204
 "Cozy Glow," ZR-44A
 Warming pads; wetproof and moisture-resistant models
 Toasters, pop-up and turn-over models
 Food mixer, FM-81
 Juicer, FJ-81
 Comforter, EC-61
 Sheet, ES-71
 Winchester Repeating Arms Co., Division of Olin Industries
 "Winchester" rifles and shotguns (all)
 Zippo Mfg., Co.
 "Zippo" lighters flints and fluid (all)
 Zonite Products Corp.
 "Larvex" mothproofers (all)

*Source: Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82 Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, pp. 899-906.

TABLE 8

Industries Represented by Members of American Fair Trade Council*

Kitchen utensils	Razors and razor blades
Photographic equipment	Automotive tires and chains
Automotive vision products	Kitchen furniture (stoves)
Fishing tackle	Jewelry
Outboard motors	Automotive chemicals
Cutlery, personal	Sanitary and facial tissues
Abrasives	Silverware
Tapes and dispensers and glue	Hosiery
Sweepers, mops, and brooms	Firearms
Scales	Smokers' requisites
Hair toiletries	Fabrics
Insecticides and household chemicals	Toilet requisites
Cleansers, polishes, and soaps	Automotive lubricating equipment
Clocks, watches and bands	Hardware and tools
Cosmetics and perfumes	Office accessories and supplies
Dentist supplies	Books and greeting cards
Automotive ignition products	Rubber specialties
Camping equipment	Floor covering
Knit goods and underwear	Bicycles
Glassware and pottery	Gloves
Lighting equipment	Shoe cleansers and polishes
Proprietary medicines	Paints and varnishes
Compacts and cases	Luggage
Mattresses	Automotive heaters
Pens and pencils	Sporting goods
Household electric applicances	Leather goods
	Farm equipment and supplies
	Clothing (suits and coats)

*Source: Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82 Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12, February 1952, p. 722.

- Abbott, A. "Paradox Regained--A 'New Economic Approach' to Vertical Restraints Policy," 48 George Washington University Law Review, 565 (1980).
- Adams, W. "Resale Price Maintenance: Fact and Fancy," 64(7) Yale Law Journal, 967 (June 1955).
- Akerlof, G. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," 84 Quarterly Journal of Economics, 488 (1970).
- Amending the Sherman Act with Respect to Resale Price Maintenance. Report of the Committee on the Judiciary, House of Representatives, to Accompany HR 6925 (March 13, 1952).
- Anderson, J. W. "Interview on Voluntary Fair Trade", Pamphlet (1950).
- Andrews, P. W. S., and F. A. Friday. Fair Trade: Resale Price Maintenance Re-examined, MacMillan & Co. (London, 1960).
- Areeda, P. Antitrust Analysis, 3rd ed., Little Brown (Boston, 1981).
- Barmash, Isadore. "How They're Selling Name Brands Off-Price," Stores, March 1981, pp. 9-14.
- Barrett, St. J. "Restrictive Distribution and the Assault of the 'Free Riders,'" Journal of Corporation Law, 467 (Spring 1982).
- The Basis and Development of Fair Trade, 3rd ed., The National Wholesale Druggists Association (New York, March 1955).
- Baxter, W. F. "Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law," 60(4) Texas Law Review, 661 (April 1982).
- _____. "Vertical Restraints and Resale Price Maintenance: A 'Rule of Reason' Approach," 14(4), Antitrust Law and Economic Review, 13 (1982).
- Behoteguy, W. C. "Resale Price Maintenance in the Tire Industry," 13 Journal of Marketing, 315 (January 1949).
- Boggis, F. D., in B. S. Yamey, ed., Resale Price Maintenance, Aldine Publishing Company (Chicago, 1966).
- Bork, R. H. "A Reply to Professors Gould and Yamey," 76 Yale Law Journal, 731 (1967).
- _____. "Resale Price Maintenance and Consumer Welfare," 77 Yale Law Journal, 950 (1968).
- _____. The Antitrust Paradox, Basic Books (New York, 1978).
- Bowman, Ward S., Jr. "Resale Price Maintenance--A Monopoly Problem," XXV(3) Journal of Business of the University of Chicago, 141 (1952).
- _____. "The Prerequisites and Effects of Resale Price Maintenance," 22(4) University of Chicago Law Review, 825 (Summer 1955).
- Brandeis, L. D. "Cutthroat Prices," Harper's Weekly, November 15, 1913.

- Business Brief, "RPM - Four Fears Later," 230 The Economist, 56 (March 29, 1969).
- Cady, J. F. "Reasonable Rules and Rules of Reason: Vertical Restrictions on Distributors," 46 Journal of Marketing, 27 (Summer 1982).
- Caves, R. E. "Vertical Restraints as Integration by Contract: Evidence and Policy Implications," Harvard Institute of Economic Research Discussion Paper No. 754 (April 1980).
- Caves, R. E., and W. F. Murphy II. "Franchising: Firms, Markets, and Intangible Assets," 42(4) Southern Economic Journal, 572 (April 1976).
- Comanor, W. S. "Vertical Territorial and Customer Restrictions: White Motor and its Aftermath," 81 Harvard Law Review (1968).
- _____, and T. A. Wilson. "The Effect of Advertising on Competition: A Survey," XVII Journal of Economic Literature (June 1979).
- Corey, E. Raymond. "Fair Trade Pricing: A Reappraisal," XXV(5) Harvard Business Review (September/October 1952).
- Dargavel, J. W. "Revolution in Distribution - Druggists Must Fight for Survival," 76 N.A.R.D. Journal, 36 (October 4, 1954).
- Dewey, D. "Information Entry and Welfare: The Case for Collusion," 69(4) American Economic Review, 587 (September 1979).
- Diamond, J. E. "State Monopoly and Price Fixing in Retail Liquor Distribution," Wisconsin Law Review (1962).
- Dixit, A. "Vertical Integration in a Monopolistically Competitive Industry," International Journal of Industrial Organization, to appear in 1983.
- Douek, B. J. "A Proposed Rule of Reason Analysis for Restrictions on Distribution," Comment in 47, Fordham Law Review, 527 (1979).
- Easterbrook, F. H. "Maximum Price Fixing," 48(4) University of Chicago Law Review, 886 (Fall 1981).
- Edwards, C. The Price Discrimination Law, Brookings Institute (Washington, D.C., 1959).
- _____. "Grounds for the Repeal of the Miller-Tydings Amendment which Authorizes Resale Price Contracts," Memorandum for Assistant Attorney General, Antitrust Division, Department of Justice (February 10, 1941).
- Eli Lilly Co. - Economic Research Division. "Current Research Studies on Fair Trade," reported by the Bureau of Education on Fair Trade.
- Fair Trade: The Problem and The Issues. Report of the Select Committee on Small Business, House of Representatives, 82nd Congress, Pursuant to HR 33, House Report No. 1292, (February 4, 1952).

- Fair Trade. Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives, 94th Congress, 1st Session, on HR 2384, Serial No. 10 (March 25 and April 10, 1975).
- Fair Trade Laws. Hearings before the Senate Committee on the Judiciary on S. 408 (February, April, and May 1975).
- The Fair Trade Question, National Industrial Conference Board, Studies in Business and Economics, No. 48 (1955).
- Federal Trade Commission Decisions. "The Coca-Cola Co. et al," 91 FTC 517 (1978).
- Ferguson, J. M. "Who Benefits from Liquor Regulation in New York?", Graduate School of Management Working Paper, University of Rochester (April 1982).
- Fisher, F. M., and J. J. McGowan. "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits," 73 American Economic Review, 82 (March 1983).
- Frankel, M. "The Effects of Fair Trade: Fact and Fiction in Statistical Findings," 28 Journal of Business, 182 (July 1955).
- Fulda, C. H. "Food Distribution in the United States: The Struggle Between Independents and Chains," 99 University of Pennsylvania Law Review, 1051 (June 1951).
- _____. "Resale Price Maintenance," 21(2) University of Chicago Law Review, 587 (Winter 1954).
- Gallini, N. T., and R. A. Winter. "A Note on Vertical Price Restraints in Monopolistic Competition," Working Draft, University of Toronto (April 1982).
- Gammelgaard, Soren. Resale Price Maintenance, Project No. 238, The European Productivity Agency of OEEC (Paris, 1958).
- Gault, E. H. "Fair Trade with Special Reference to Cut Rate Prices in Michigan," 9 Michigan Business Studies (1939).
- Gerhart, P. M. "The 'Competitive Advantages' Explanation for Intra-brand Restraints," Duke Law Journal, 417 (June 1981).
- Goldberg, V. P. "The Law and Economics of Vertical Restrictions: A Relational Approach," 58 Texas Law Review (February 1980).
- _____. "Enforcing Resale Price Maintenance: The FTC Investigation of Lenox," 18 American Business Law Journal, 225 (1980).
- _____. "Resale Price Maintenance and the FTC: The Magnavox Investigation," 23 William and Mary Law Review, 439 (1982).
- Goldschmid, H. J., H. M. Mann and J. F. Weston, eds. Industrial Concentration: The New Learning, Little, Brown and Co. (1974).
- Gould, J. R., and L. E. Preston. "Resale Price Maintenance and Retail Outlets," Economica, 302 (August 1965).
- _____, and B. S. Yamey. "Professor Bork on Vertical Price Fixing," 76 Yale Law Journal, 722 (1967).
- _____. "Professor Bork on Vertical Price Fixing: A Rejoinder," 77 Yale Law Journal, 936 (1968).

- Greening, Timothy. "Analysis of the Impact of the Florsheim Shoe Case," (July 1981), in Impact Evaluations of F.T.C. Vertical Restraints Cases, ed. by R. N. Lafferty, R. N. Lande, and J. B. Kirkwood (forthcoming).
- Grether, E. T. "Experience in California with Fair Trade Legislation Restricting Price Cutting," 24 California Law Review, 640 (September 1936).
- _____. Price Control Under Fair Trade Legislation, Oxford University Press (New York, 1939).
- _____. "Round Table on Price Control Under 'Fair Trade' Legislation," 30(2) American Economic Review (Part 2) 112 (March 1940).
- Guilleband, C. W. "The Marshall MacMillan Correspondence Over the Net Book System," The Economic Journal, 518 (September 1965).
- Handler, M., H. M. Blake, R. Pitofsky and H. J. Goldschmid. Trade Regulation: Cases and Materials, Ch. 8, "Maintaining Resale Prices and Otherwise Restricting Competition in Distribution," pp. 556-663, The Foundation Press (Mineola, N.Y., 1975).
- Harberger, A. C. "Three Basic Postulates of Applied Welfare Economics: An Interpretive Essay," 9 Journal of Economic Literature, 785 (September 1971).
- Hawley, E. W. The New Deal and the Problem of Monopoly, Princeton University Press (New Jersey, 1966).
- Herman, E. S. "Fair Trade: Origins, Purposes, and Competitive Effects," 27 George Washington University Law Review, 621 (1959).
- _____. "A Statistical Note on Fair Trade," 4 Antitrust Bulletin, 583 (1959).
- Hills, C. A., J. T. Halverson, T. J. Campbell, C. J. Ware, J. F. Rill and J. W. Martin, Jr. "Vertical Restraints After GTE Sylvania: Current Confusions," Symposium at 31st Annual Spring Meeting, Washington, D.C., March 23-25, 1983, 52 Antitrust Law Journal, 45, Part II.
- Hollahan, William L. "A Theoretical Analysis of Resale Price Maintenance," 21(3) Journal of Economic Theory, 411 (December 1979).
- Hollander, S. C. "Discount Selling, Retail Price Cutting, and Resale Price Control," A special interest bibliography, No. 3, American Marketing Association, Inc. (1956).
- _____. "Dealer Margins Under Resale Price Maintenance," 3 Quarterly Review of Economics and Business, 25 (1963).
- Holthausen, D., and R. P. Wolff. "Effects of Fair Trade Acts in the Drug, Liquor, Tobacco and Gasoline Trades," 2 Trade Regulation Review, 2 (Fall 1938).
- Hourihan, A. P., and J. W. Markham. The Effects of Fair Trade Repeal: The Case of Rhode Island, Marketing Science Institute and Center for Economic Studies (August 1974).

- Hook, G. B. "The History of Price Maintenance," 13 Journal of the American Pharmaceutical Association (Practical Pharmacy Edition), 709 (October 1952).
- Kirkwood, J. B. "The Per Se Rule Against Resale Price Maintenance: A Time for Change?" Remarks before the Antitrust Section of the A.B.A. (August 1981).
- Kjolby, H., in B. S. Yamey, ed., Resale Price Maintenance, Aldine Publishing Company (Chicago, 1966).
- Klein, B. "Transaction Cost Determinants of 'Unfair' Contractual Arrangements," 70 American Economic Review, 356 (May 1980).
- _____, and K. B. Leffler. "The Role of Market Forces in Assuring Contractual Performance," 89(4) Journal of Political Economy, 615 (1981).
- _____, R. G. Crawford and A. Alchian. "Vertical Integration, Appropriable Quasi-Rents, and the Competitive Contracting Process," 21 Journal of Law and Economics, 297 (October 1978).
- Kleinfield, N. R. "Fair-Trade Laws Fall in State After State, but Impact is Small," Wall Street Journal, June 11, 1975, p. 1.
- Lande, R. H. "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," 34 Hastings Law Journal (1982).
- Lee, S. M. "Problems of Price Maintenance," 23 Journal of Marketing, 274 (January 1959).
- _____. "The Impact of Fair-Trade Laws on Retailing," 41(1) Journal of Retailing, 1 (Spring 1965).
- Legal and Economic Issues in Price Maintenance and Occupational Licensing, National Association of Attorneys General, Committee on the Office of Attorney General (June 1975).
- Lewis, C. W. "Economic Effects of Price Maintenance in Knoxville, Tennessee," 4 Journal of Marketing, 139 (1939).
- _____. Price Maintenance in Knoxville, Tennessee Under the Tennessee Fair Trade Act, Division of University Extension Study No. 7, University of Tennessee (1939).
- Liebler, W. J. "Intrabrand 'Cartels' Under GTE Sylvania," 30 U.C.L.A. Law Review, 1 (1982).
- Lipsey, R. G., and K. Lancaster. "The General Theory of Second Best," 24(1) Review of Economic Studies, 11 (1956).
- Louis, M. B. "Vertical Distributional Restraints Under Schwin and Sylvania: An Argument for the Continuing Use of a Partial Per Se Approach," 75 Michigan Law Review, 275 (December 1976).
- Mann, H. M. "Resale Price Maintenance, Antitrust and Per Se Illegality: Reason for a Change?" Unpublished Draft, Boston College, (no date).
- Marvel, H. P. "Vertical Restraints in the Hearing Aids Industry" (April 1981), in Impact Evaluations of F.T.C. Vertical Restraints Cases, ed. by R. N. Lafferty, R. H. Lande, and J. B. Kirkwood (forthcoming).

- _____, and S. McCafferty. "Resale Price Maintenance and Quality Certification" Ohio State University, Draft Manuscript, April, 1983.
- Mathewson, G. F., and R. A. Winter. "The Incentives for Resale Price Maintenance Under Imperfect Information," XXI(3) Economic Inquiry, 337 (July 1983).
- _____. "An Economic Theory of Vertical Restraints," forthcoming, Bell Journal of Economics.
- * MacMillan, Sir F. The Net Book Agreement of 1899 and the Book War of 1906-1908. Pamphlet published in 1924.
- McEachern, W. A., and A. A. Romeo. "Vertical Restraints in the Audio Components Industry: An Economic Analysis of FTC Intervention," in Impact Evaluations of F.T.C. Vertical Restraint Cases, ed. by R. N. Lafferty, R. H. Lande, and J. B. Kirkwood (forthcoming).
- McEwen, R. J., W. S. Smith and C. J. Scully. "Fair Trade Prices," 9 Boston College Guidepost, 6 (October 1956).
- McHenry, L. A. "Price Stabilization Attempts in the Grocery Trade in California," 2 Journal of Marketing, 121 (October 1937).
- McKesson and Robbins Co. Study reported in the Newsletter of the Bureau of Education on Fair Trade, March 18, 1952.
- McLaughlin, Andrew. "An Economic Analysis of Resale Price Maintenance," Ph.D. Dissertation, UCLA (1979).
- Meehan, J. W., and R. J. Lerner. "A Proposed Rule of Reason for Vertical Restraints on Competition," XXVI(2) Antitrust Bulletin, 195 (Summer 1981).
- Miller, III, James C. "Letters from Washington," 2(4) Journal of the ABA Forum Committee on Franchising, 3 (Spring 1983).
- Minimum Resale Prices. Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 82nd Congress, 2nd Session, on HR 5767 (February 1952).
- Monsanto Company v. Spray-Rite Service Corporation, Brief for the U.S. as Amicus Curiae, No. 82-914, U.S. Supreme Court (October Term, 1982).
- Mund, V. A. Government and Business, 3rd ed., Harper and Brothers (New York, 1960).
- Murchinson, C. T. Resale Price Maintenance (Columbia University Studies in History, Economics, and Public Law, No. 192), Columbia University Press (New York, 1919).
- National Association of Chain Drug Stores Study, reported by F. J. Griffith in Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, on Resale Price Maintenance (U.S. Government Printing Office, 1952).
- Neale, A. D. The Antitrust Laws of the U.S.A., Cambridge University Press (London, 1970).
- Nelson, Phillip. "Advertising as Information," 82 Journal of Political Economy (July/August 1984).

- N.Y. State Moreland Commission on Alcoholic Beverage Control Laws: Report and Recommendations, Number 3 (1964).
- Oakes, R. H. "Resale Price Maintenance in Chicago, 1953-55," 30 Journal of Business, 109 (1957).
- Oster, S. "The FTC v. Levi Strauss: An Analysis of the Economic Issues," (March 1982) in Impact Evaluations of FTC. Vertical Restraints Cases, ed. by R. N. Lafferty, R. H. Lande, and J. B. Kirkwood (forthcoming).
- Ostlund, H. J., and C. R. Vickland. Fair Trade and the Retail Drug Store, Druggists Research Bureau (Chicago, 1940).
- Oxenfeldt, A. R. Industrial Pricing and Market Practices, Prentice Hall (New York, 1955).
- Palamountain, J. C. The Politics of Distribution, Greenwood Press (New York, 1968).
- Pennance, F. G. and B. S. Yamey. "Competition in the Retail Grocery Trade, 1850-1939," 22 Economica, 303 (November 1955).
- Pertschuk, M. "Should We Grant the Right to Fix Prices?", Statement before the National Mass Retailing Institute, New Orleans, La. (May 16, 1983).
- Pertschuk, M., and E. Correia. "Resale Price Maintenance - Why the Per Se Rule Should be Enforced," National Journal, July 4, 1983.
- Pickering, J. F. Resale Price Maintenance in Practice, George Allen and Unwin Limited (London, 1966).
- _____. "The Abolition of Resale Price Maintenance in Great Britain," 26 Oxford Economic Papers 120 (March 1974).
- Pitofsky, R. "The Sylvania Case: Antitrust Analysis of Non-price Vertical Restrictions," 78(1) Columbia Law Review, 1 (January 1978).
- _____. Statement before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, House of Representatives (March 9, 1983).
- Porter, M. E. Interbrand Choice, Strategy, and Bilateral Market Power, Harvard Economic Studies (1976).
- Posner, R. A. Antitrust Law: An Economic Perspective, University of Chicago Press (Chicago, 1976).
- _____. "The Next Step in the Antitrust Treatment of Restricted Distribution: Per se Legality," 48 University of Chicago Law Review, 6 (1981).
- Preston, L. E. "Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards," 30(3) Law and Contemporary Problems, 506 (Summer 1965).
- Priest, G. L. "Cartels and Patent License Arrangements," 20 Journal of Law and Economics, 309 (1977).
- Report of the FTC on Resale Price Maintenance, Parts I and II (1929).
- Report of the FTC on Resale Price Maintenance (1945).

- Report on an Inquiry into Loss Leader Selling, Restrictive Trade Practices Commission, Department of Justice, Canada, Queen's Printer (Ottawa, 1955).
- Report of the Select Committee on Small Business on a Study of Fair Trade, Based on a Survey of Manufacturers and Retailers, Sen. Report No. 2819, 84th Congress, 2nd Session (1956).
- "Resale Price Maintenance by an Integrated Firm: The McKesson and Robbins Case," Comment in 24 University of Chicago Law Review, 533 (1957).
- Rosenthal, S. Study reported in U.S. Congress, House of Representatives, Report of the Judiciary, Report No. 1516 (March 13, 1952).
- Salop, S.C. "The Noisy Monopolist: Imperfect Information, Price Dispersion and Price Discrimination," XLIV(3) Review of Economic Studies, 393 (October 1977).
- _____. "Second-Best Policies in Imperfect Competition: How Improved Information May Lower Welfare," CAB Working Paper 124 (January 1978).
- _____, and J. E. Stiglitz. "Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion," XLIV(3) Review of Economic Studies, 493 (October 1977).
- Sandridge, W. A. "The Effects of Fair Trade on Retail Prices of Electric Housewares in Washington, Baltimore, and Richmond, 1952-1959," Ph.D. Dissertation, University of Virginia, (1960).
- Scherer, F. M. Industrial Market Structure and Economic Performance, 2nd ed., Rand McNally (Chicago, 1980).
- Schumpeter, J. A. Capitalism, Socialism and Democracy, 3rd ed., Harper and Row (New York, 1975).
- Schwartz, M., and D. Eisenstadt. "Vertical Restraints," Department of Justice E.P.O. Discussion Paper 82-8 (December 1982).
- Schwert, G. W. "Using Financial Data to Measure Effects of Regulation," XXIV Journal of Law and Economics, 121 (April 1981).
- Seelye, A. L. "Drug Prices in Cities With and Without a Fair Trade Law," 6 Journal of Marketing, 16 (July 1941).
- Seligman, E. R. A., and R. A. Love. Price Cutting and Price Maintenance, Harper and Brothers (New York, 1932).
- Shapiro, Carl. "Consumer Information, Product Quality and Seller Reputation," 13(1) Bell Journal of Economics, 20 (Spring 1982).
- _____. "Premiums for High Quality Products as Rents to Reputation," FTC Bureau of Economics Working Paper No. 43 (August 1980).
- Shepard, L. "The Economic Effects of Repealing the Fair Trade Laws," 12(2) Journal of Consumer Affairs, 220 (Winter 1978).
- Silcock, T. H. "Some Problems of Price Maintenance," 48 Economic Journal, 42 (1938).

- Skeoch, L. A. "Resale Price Maintenance in Great Britain," 19 Canadian Journal of Economics and Political Science, 81 (February 1953).
- _____. "The Abolition of Resale Price Maintenance: Some Notes on the Canadian Experience," 31 Economica, 260 (August 1964).
- _____ in B. S. Yamey, ed., Resale Price Maintenance, Aldine Publishing Company (Chicago, 1966).
- Special Report on Price Maintenance, Compiled for the Federal Trade Commission by The Business Bureau International, Inc. (New York, July 5, 1917).
- Spence, A. M. "Job Market Signaling," 87 Quarterly Journal of Economics, 355 (August 1973).
- _____. "Competitive and Optimal Response to Signals: An Analysis of Efficiency and Distribution," 7 Journal of Economic Theory, 296 (1974).
- _____. "Product Differentiation and Welfare," 66(2) American Economic Review, 407 (May 1976).
- St. Louis Star Times. Study presented in U.S. Congress, House of Representatives, Report of the Judiciary, Report No. 1516 (March 13, 1952).
- Steiner, R. L. "Brand Advertising and the Consumer Goods Economy" (Manuscript).
- _____. "Understanding the Consumer Goods Economy," Paper presented at the FTC Bureau of Economics, March 16, 1978.
- _____. "Vertical Restraints and Economic Efficiency," FTC Bureau of Economics Working Paper, No. 66 (June 1982).
- Stern, L. W. "An Economic Analysis of the Policy of Resale Price Maintenance from the Point of View of Consumer Goods Manufacturers," Ph.D. Dissertation, Northwestern University (1962).
- Strasser, K. A. "Vertical Territorial Restraints After Sylvania: A Policy Analysis and Proposed New Rule," 1977(4) Duke Law Journal, 775 (October 1977).
- Study of Monopoly Power. Hearings Before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 82nd Congress, 2nd Session, on Resale Price Maintenance, Serial No. 12 (February 1952).
- Taussig, F. W. "Price Maintenance," 4 American Economic Review Supp., 170 (1916).
- Telser, L. G. "Why Should Manufacturers Want Fair Trade?" III Journal of Law and Economics, 86 (October 1960).
- Tennant, R. B. The American Cigarette Industry, Yale University Press (New Haven, 1950).
- Tosdal, H. R. "Price Maintenance," 8 American Economic Review, 28 (March 1918).
- Trolle, U af, in B. S. Yamey, ed., Resale Price Maintenance, Aldine Publishing Company (Chicago, 1966).

BIBLIOGRAPHY - Continued

Vertical Restrictions Limiting Intra-brand Competition, ABA Section of Antitrust Law, Monograph 2 (1977).

Warren-Boulton, F. R. Vertical Control of Markets, Ballinger Publishing Co. (1978).

Weisberg, David. "A Model of Vertical Sales Restrictions," unpublished Stanford University Working Paper (Fall 1981).

Weiss, L. W. Case Studies in American Industry, 2nd ed., Wiley and Sons (New York, 1967), Ch. 5, Monopolistic Competition - Retailing.

Westfield, F. M. "Vertical Integration: Does Product Price Rise or Fall?" 71(3) American Economic Review, 334 (June 1981).

White, L. J. The Automobile Industry Since 1945, Harvard University Press (Cambridge, 1971).

_____. "Vertical Restraints in Antitrust Law: A Coherent Model," 26(2) The Antitrust Bulletin, 327 (Summer 1981).

Williamson, O. E. "Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transactions Cost Approach," 127 University of Pennsylvania Law Review, 933 (1979).

_____. "Transaction Cost Economics: The Governance of Contractual Relations," 22 Journal of Law and Economics, 233 (October 1979).

Willig, R. D. "Consumer's Surplus Without Apology," 66 American Economic Review, 589 (September 1976).

Wolff, R. P., and D. Holthausen. "The Control of Retail Prices Under the Fair Trade Laws," 46 Dun's Review, 15 (July 1938).

Yamey, B. S. "The Origins of Resale Price Maintenance: A Study of Three Branches of Retail Trade," 62 The Economic Journal, 522 (September 1952).

_____. The Economics of Resale Price Maintenance, Sir Issac Pitman (London 1954).

_____. "Notes of Cases: The Net Book Agreement," 26 Modern Law Review, 691 (November 1963).

_____, ed. Resale Price Maintenance, Aldine Publishing Company (Chicago, 1966).