Furthermore, such abdication ultimately involves the Court in many more policy judgments than would an adherence to the so-called "activist" or "absolutist" position. Thus, it is submitted that the balancing of rights protected by the Constitution sends the Court down the exact path that Professor Mendelson finds Justice Black traveling. Of course, the Court cannot avoid the balancing process in defining what is protected—*e. g.*, speech. I believe, however, that potential judicial meddling is at a low ebb when the Court goes through the balancing process in defining liberty and that the interest demonstrated by the Founding Fathers in the individual's protection is more certain to be followed in this manner.[10]

Justices Black and Frankfurter is rather one-sided in its treatment of the issues and personalities that divide the Court today. For Professor Mendelson there are no in-betweens. The uninitiated reader is led to the inescapable conclusion that a great struggle between truth and error is proceeding. This review has, I think, made clear who, according to the author, possesses the truth.

I believe that this book is in the nature of a brief rather than a study and, as such, I cannot recommend it to the serious student of constitutional law.

WILLIAM B. GOULD†

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT. By Frederick M. Rowe. Boston: Little, Brown and Company. 1962. Pp. xxx, 675. $22.50.

This book, published in The Trade Regulation Series and edited by S. Chesterfield Oppenheim, the distinguished scholar of Michigan University, represents a major contribution to the Series and to antitrust literature in general. Written by a practising attorney highly experienced in the field, it is destined to remain a most useful tool for lawyers concerned with the perplexing problems of the Robinson-Patman Act.

Among the chief virtues of the book are depth of analysis, completeness of material and clarity of expression. Separate chapters are devoted to each provision of the Act, which is dissected in the light of its legislative history, economic significance and pertinent adjudications of the F.T.C. and the Courts.

Born as an effort by grocery wholesalers to curb the aggressive expansion of the A. & P. Tea Co., the Robinson-Patman Act was given

10. See Charles Black, *Mr. Justice Black, The Supreme Court and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 63.

† Assistant General Counsel, United Auto Workers AFL-CIO.

antitrust respectability by transforming it into an amendment of the Clayton Act. The author does not share the views of those who praise the Robinson-Patman Act as the Magna Carta of small business, fighting against economic giants, but regards the Act as "a product of the economic crisis of the thirties, with its pessimistic outlook for competitive enterprise."[1] He challenges the effectiveness of the Act in the attainment of its avowed goals. On the one hand, Rowe points out that the share of the total retail business held by retail chain stores is not appreciably different in 1960 than it was in 1929. On the other hand, smaller concerns have been victimized by the administration of the Act; for instance, Section 2(c), the brokerage clause, has been expansively applied to impede cost-cutting forms of distribution.

The only unanimity among writers, the F.T.C. and courts is found in the recognition that the Act is characterized by "elusive uncertainty" and lacks reliable guideposts to insure safety of compliance. As Mr. Justice Jackson pointedly remarked, construction of the Act is troublesome for the Court once a term, but for the businessman it is "trouble . . . every day."[2] Hence, few will quarrel with the author's conclusion that the Act "never mustered sufficient respectability in the business world to ensure effective self-policing."[3]

Throughout the treatise, two recurrent refrains reassert themselves in connection with the analysis of the specific provisions of the Act. One is the inherent conflict in the underlying economic philosophies of Robinson-Patman with those of the Sherman and Clayton Acts. The other is the criticism of the F.T.C.'s enforcement policies leading to price rigidities which would sharpen rather than lessen that basic conflict. Thus, the critical function of reconciliation is devolved upon the Supreme Court, which time and again halted the Agency's efforts to expand Robinson-Patman principles at the cost of a corresponding contraction of traditional antitrust concepts.

The basic tenet of antitrust legislation is the protection of competition in the interest of the consuming public. The essence of competition being the contest between sellers for the business of buyers, it seems hardly consistent to make underselling illegal. If identical pricing may violate the Sherman Act and price differentials violate the Robinson-Patman Act, an economic dilemma is coupled with dangerous legal inconsistency. Price reduction to meet competition is sheer self-defense, and therefore basic to the survival of competition.

1. P. 534. [References are to pages of PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT.]

2. Transcript of Oral Argument, p. 88, Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951); cited in Rowe at xi, n. 10.

3. P. 550.

Yet without the chrism of the Supreme Court in *Standard Oil Co. v. F.T.C.*,[4] this essential competitive practice would have been outlawed by the F.T.C.

Two years later the clash in the underlying economic theories of the two Acts again reached the Supreme Court in *Automatic Canteen.*[5] Warning against enforcement policies of Robinson-Patman which would lead to "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation,"[6] the Supreme Court found a "duty to reconcile"[7] Robinson-Patman with the traditional antitrust policies expressed by Congress.

While the F.T.C.'s effort to expand the burden of the buyer under Section 2(f) was halted in *Automatic Canteen,* the F.T.C. fared better in the 1960 *Broch* decision,[8] where the Supreme Court upheld the agency's construction of Section 2(c) to outlaw payments by independent brokers of the seller. The Court's condemnation of a reduction in brokerage fee to obtain a particular contract is scored by the author as freezing brokerage commissions at artificially high levels in destruction of competition.

Further criticism is directed at the F.T.C.'s illogical distinction in making the "meeting competition" defense available to a supplier's discriminatory furnishing of promotional services or facilities under Section 2(e), but not to the supplier's disproportionate payments to a customer for the same promotional services or facilities under Section 2(d). Invalidated by a Court of Appeals, this doctrine is now abandoned by the F.T.C. in a ruling made after Rowe's book was published.[9]

The enforcement policies and the record of the F.T.C.'s administration of the Robinson-Patman Act in the quarter of a century of its existence are brought into sharp focus in what is probably the most provocative chapter of the book. There statistical data are used to evaluate various facets of the F.T.C.'s work, and to develop, as a striking illustration, the Parkinson's Law of F.T.C. enforcement. In Rowe's felicitous expression, "Robinson-Patman proceedings proliferate with the ease of making a case."[10] Evidence are the 175 complaints brought under Section 2(d) in the period 1956 - 1961, compared with the 19 proceedings instituted under Section 2(e) in the same period.

Rowe's criticism has already provoked the written retort of at least one former F.T.C. chairman, who attributes responsibility for some

4. 340 U.S. 231 (1951).
5. Automatic Canteen Co. v. F.T.C., 346 U.S. 61 (1953).
6. *Id.* at 63.
7. *Id.* at 74.
8. Henry Broch & Co. v. F.T.C., 363 U.S. 166 (1960).
9. F.T.C. v. Max Factor & Co., No. 7717, ct of decision Nov. 2, 1962.
10. P. 539.

of the "erratic and inconsistent" policies of the F.T.C. to its being "buffeted by cross-currents flowing from the legislative, executive and judicial branches."[11] Perhaps the ultimate responsibility for the uncertainties of the administration of the Act and inconsistencies of F.T.C. policies may be traced primarily to the inherent vices of the Act. As the author himself concludes:

> Congress never resolved the latent contradictions of protecting a particular business class from the competitive inroads of modern marketing methods while professing to promote the process of competition. The mixed marriage between antitrust and NRA gave the Act a split legal personality from its inception.[12]

PAUL B. RAVA†

11. Howrey, Book Review, 48 A.B.A.J. 760, 761 (1962).
12. P. 534.

† Partner, Lashly, Lashly & Miller.