UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 38 | Number 3 Article 5

4-1-1960

Book Reviews

North Carolina Law Review

BOOK REVIEWS

Cost Justification. By Herbert F. Taggart. Ann Arbor: Bureau of Business Research of the University of Michigan, 1959. Pp. 590. $12.50.

This volume fills an important gap in antitrust literature, as the first full-length review of the cost defense provided by section 2(a) of the Robinson-Patman Act against a charge of price discrimination—the defense that the price difference makes "only due allowance for differences in the cost of manufacture, sales, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." The author's reputation in the field was recognized in 1953 by Chairman Edward F. Howrey of the Commission, who appointed him to head its Advisory Committee on Cost Justification. That Committee's report, dated February 1956—on which the Commission took no action except to make it available to interested parties—is printed as the Appendix to the present volume.

There are 480 pages of text dealing with the cost aspects of price discrimination proceedings brought by the Commission, and forty-five of the remaining seventy-five pages discuss treble damage suits. In other words this comes close to being a casebook on the relation of cost accounting to the law. For lack of information the author can say nothing of the larger number of company presentations of cost data that were not made part of formal proceedings.[1] Such presentations have been used during Commission investigations in the hope of forestalling complaints, or after issuance of complaints and prior to hearings, with the result either that the complaint was dismissed or that the respondent, its cost presentation being found insufficient, accepted a consent order.

Chapter 1 covers the *Goodyear Tire & Rubber Co.* case brought under section 2 of the Clayton Act in 1933. The Commission held that the discount given by Goodyear to Sears Roebuck was not justified, and the disclosures in the case "sparked the passage of the Robinson-Patman Act." Chapters 2 to 15 review the fourteen cases under that statute in which cost justification has been fought out in Federal Trade Commission hearings. The next chapter says what is possible to say about the seven Commission cases in which cost justification was discussed, or is known to have played a decisive role, without the details being spread on the records. Chapters 17 and 18 review the three treble damage suits (two against American Can Co., and one against

[1] See EDWARDS, THE PRICE DISCRIMINATION LAW 587 (1959).

Harper & Brothers) taken to court by customers who had suffered from price discrimination. Chapter 19 gives the history of the two fruitless suits brought by the Commission against buyers—here, by contrast with those against sellers, the burden of proof as to costs was placed on the Commission, which could not of course carry it. The book concludes with two short chapters discussing general principles, followed by the Advisory Committee report and an eight-page bibliography of books, reports and articles.

The author disagrees with the Attorney General's National Committee to Study the Antitrust Laws (whose comments on the cost defense he reprints) and with former Chairman Howrey—both having called cost justification "largely illusory." He himself believes this defense to be "the most practical and available" by comparison with five other defenses indicated in section 2(a), and suggests that sellers prepare their cost justification "before a complaint is issued." In this advice he appears to differ also with a Commission accountant who testified in 1945 that the cost of a current system of accounts "in sufficient detail to answer a Robinson-Patman question" would be "enormous."

Those who have called the cost defense illusory have considered it successful only three times (*Bird & Son, B. F. Goodrich Co.* and *Sylvania Electric Prods.*) and partially successful twice (*Minneapolis-Honeywell Regulation Co.* and *U. S. Rubber Co.*). Professor Taggart agrees that his own review of fifteen litigated cases tends to support this position, and adds: "The fact that substantially all treble damage suits are settled out of court is eloquent testimony that defendants generally share the opinion that the cost defense is 'illusory'." Nevertheless, he is optimistic. First, he strikes "partially" from the partially successful cases (to which he adds *Goodyear*), since the companies did successfully justify some price differences—although less than the ones at which they had sold. Then he adds four cases which lacked extensive cost litigation, the complaints having been dismissed because the respondent showed the Commission staff a satisfactory justification. Furthermore, the Thompson Products Co., in 1958 and 1959, cost-justified some of its prices, though not all. Thus the defense "batting average" is lifted to "not less than .500."[2] Finally, he is encouraged by the fact that a cost defense has been successful in "an unknown number of informal proceedings."

The book constitutes a thorough piece of research, which undoubtedly involved all the "drudgery" in preparation that the author mentions.

[2] As a batting average this is unprecedented. As a fielding average—perhaps more applicable to a company which considers any trip to court as an unwanted "error"—it is low for any league above the Cub Scouts. But Professor Taggart feels that respondents' techniques can be improved, which would raise the average.

For an accountant experienced in cost analysis, it is probably easy to read. For an economist, presumably for a lawyer, and possibly even for many accounts, it is hard work, requiring sustained concentration and some mental rest between cases. For a lawyer called in to pass on the legality of a company's discount schedule or to represent a firm in a cost justification case, most of the details in the book will have to be mastered.

Especially important are the eight "rules of the game" derived by the author from the case material. For example, respondents cannot justify charging less of the overhead costs to the favored buyer on the theory that his order is the differential (marginal) one, nor can they allocate overhead costs according to total dollar sales made to different classes of customers (thus automatically reducing the cost per unit where the price is lower). On the other hand, the use of samples (*e.g.*, three sales branches only, for U.S. Rubber Co.) is acceptable, and current advertising or selling expense need not be charged to sales of unbranded products provided there is "no appreciable general knowledge that the particular manufacturers made the unbranded or private-brand articles in question."

Although Professor Taggart avoids "second-guessing the courts or the Commission" occasional differences between his views and those of the Commission accounts do appear in the discussion of cases and in the Appendix. That these are not vital is clear from the opinion of the book held by the Commission's accounting staff—that it will be a very valuable tool for all private practitioners dealing with cost justification.[3]

SIMON N. WHITNEY.
Director, Bureau of Economics
Federal Trade Commission.

The Supreme Court as the Final Arbiter in Federal-State Relations (1789-1957). By Paul Schmidhauser. Chapel Hill: University of North Carolina Press. 1958. Pp. 252. $5.00.

No judicial tribunal in the world is surrounded with as much mystery and misunderstanding as the United States Supreme Court. Despite all the attention and analysis thrust upon it through the years, the Court remains for most people an enigma wrapped in darkness. Many of its outspoken critics and defenders show little real comprehension of the Court's functions, powers, limitations and responsibilities. The Court's written opinions, which few people bother to read, are sub-

[3] The Commission's own report, *Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling* (1941), is the other important work dealing with cost justification. It is out of print, though available in many libraries.

jected too often to attack or defense in apathetic disegard of the institutional mosaic.

These public misconceptions about the Court are nowhere more dramatically underlined than in relation to its significant and sometimes critical role in the effectuation of our federal form of government. Areas of conflict and doubt as between federal and state power are inevitable within the broad constitutional framework. Some agency, some final authority, must exist to resolve those situations of doubt. Neither the President nor Congress can operate effectively to decide the nice constitutional problems thus created; they can do little more than assert or withhold federal power. And state agencies and courts provide weak reeds to support the creation of uniform, binding declarations as to the constitutional interplay of the competing forces. Thus when the two powers collide only an institution possessing pervasive influence over both areas of action can effectively bring to bear all the concepts of federal-state relations established by the Constitutional framers. That body is the Supreme Court of the United States.

Perhaps a failure to recognize the absolute necessity for an umpire to call the plays in the federal game of government lies at the heart of much of the unfounded criticism of the Court in this area of its functions. Professor Schmidhauser performs a valuable service, therefore, in pointing once again to the debate leading to the adoption of the Constitution and to the recognition given by the framers to the need for designating the Supreme Court as the final arbiter in federal-state matters. The shrill cries of the modern states' righters that the Court has usurped its function in dealing with problems of state power find their quiet and definitive answer in the great debates in and around the Philadelphia Convention. Indeed, the advocates of a strictly limited central government were the strongest proponents in 1787 of the establishment of federal judicial power to resolve federal-state conflicts. As Thomas Jefferson put it, "Would not an appeal from the state judicatures to a federal court in all cases where the act of Confederation controlled the question, be as effectual a remedy, and exactly commensurate to the defect?"

The great bulk of Professor Schmidhauser's volume is devoted to a sketch of the manner in which the Court has performed its historically sanctioned role of arbiter. He divides the Court's history in this respect into eight segments following the first formative decade, segments which are designated by the name of one or more of the Chief Justices of these periods. He describes in rather hasty and sometimes unsatisfactory detail the relevant and outstanding opinions of those eras, rendering a judgment as to whether the Court in each period exhibited a balanced

statesmanship in recognizing the proper scope of state power while giving effect to the cardinal principle of federal supremacy.

Acknowledging "the essentially political aspect of the Supreme Court's role in federal-state relations," the author finally concludes that "like its immediate predecessor [the Hughes Court], the Stone-Vinson-Warren Court treated questions of federal competence within the broad constructionist tradition, while generally enforcing the constitutional limitations on the states in such a manner as to avoid the substitution of federal judicial for state legislative wisdom." While the Court in its checkered career has consistently demonstrated a "potentiality for engendering conflict" it has succeeded in becoming a "tremendous influence" as arbiter in "shaping social policy in the name of American federalism."

Professor Schmidhauser's thesis is essentially accurate. The Supreme Court is, in a very real sense, a political institution in this realm of federal-state relations. It is a political institution in the very finest and most judicial sense of that term. And because the Court's function here is so essentially political the Court's activities have been both debatable and politically explosive. But this thesis is not easily understood or accepted by those who tend to pass quick and loud judgment on the Court. Professor Schmidhauser, unfortunately, does little to demonstrate the underlying foundations of this thesis.

True, he exhibits an awareness of some of the major factors implicit and explicit in the performance of the Court's necessarily political role as judicial umpire, such as: (1) the generality of the Constitution and its susceptibility to more than one interpretation; (2) the vast discretion and responsibility thereby given to the individual Justices in fulfilling their functions; (3) the very nature of the judicial process with its coexistent emphases upon logical symmetry, continuity with the past, and adaptation to meet changing conditions; (4) the conscious and unconscious predilections which influence individual members of the Court despite their lip-service to complete impartiality; (5) the serious problems stemming from the nature of the selection and tenure of the Justices; and (6) the propensity of litigation within the boundaries of American federalism to mirror "practically every major political, economic, or sociological question which has been of importance in the United States since 1789."

But the author does little more than bow in the direction of these factors; he concludes rather than analyzes or explains. To understand the Court as federal-state arbiter is to understand the basic nature of the Court in our form of government. And that understanding requires a deep synthesis of the elements of the Supreme Court processes with the

decisions that are rendered, a synthesis of the problems faced by the Court and the alternative solutions available to it. Such a synthesis is not present in this book and the result is that those committed to more superficial and erroneous concepts of the Court's functions will remain unconvinced.

Still, this book does perform a valuable function in bringing together in short, readable form the panorama of Court decisions in this most vital area of litigation. Valuable hints and bits of information are supplied as to the continually evolving nature of the Court's functions and activities in federal-state relations. But the basic explanations of why the Court has acted and will continue to act as a political institution in this respect, and why the Court must of necessity so act, await another day.

EUGENE GRESSMAN

Member of the Washington, D. C., Bar.