1979

State Gasoline Divorcement Statutes: Legal and Economic Implications

Katharine R. Boyce

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
STATE GASOLINE DIVORCEMENT STATUTES: LEGAL AND ECONOMIC IMPLICATIONS

Deliberate oil policies and unexpected political upheavals of the oil-rich Arab nations have more than diminished supplies of low-cost petroleum to the United States.\(^1\) They also have prompted public inquiry into the power of the major integrated oil companies\(^2\) to affect the price and availability of petroleum.\(^3\) While the Congress has never agreed that dissolution of the companies' integrated structure will loosen their stranglehold on oil

---

1. Prior to October, 1973, the United States' petroleum market was rarely affected by the international oil market. When the Organization of Petroleum Exporting Countries (OPEC) successfully embargoed oil shipments to the West, however, they realized the full extent of their bargaining power and commanded a 130% increase in oil prices two months later. See Senate Comm. on the Judiciary, Report on the Petroleum Industry Competition Act of 1976, S. Rep. No. 1005, 94th Cong., 2d Sess. 36-41 (1976) for a background discussion of the international oil market.

2. As used in this comment, "integrated" refers to vertical integration or the extent to which an oil company simultaneously controls and operates the four successive levels of the petroleum industry: production, refining, transportation, and marketing. See Ritchie, Petroleum Dismemberment, 29 Vand. L. Rev. 1131, 1132 n.2 (1976).

supplies, several state legislatures have seized on partial vertical divestiture as a means of protecting constituent small independent gasoline dealers and the public from alleged supply and price squeezes.

Maryland was the first state to enact legislation requiring oil producers and refiners to divorce themselves from direct gasoline retailing operations. Distinct from strict divestiture, Maryland's functional divorcement approach requires all retail gasoline outlets to be operated by independent retail service station dealers and further mandates uniform grants of "voluntary allowances" by suppliers to each retail service station dealer they supply. Shortly after the statute's enactment, major and independent oil producers and refiners operating in Maryland challenged its constitutionality in court. The companies alleged that the statute discriminated

4. On September 15, 1976, the Senate tabled S. 2387, the Petroleum Industry Competition Act of 1976, which would have required the 18 major integrated oil companies listed in note 2 supra (excluding American Petrofina) to separate their producing, refining, transportation, and marketing operations. 122 CONG. REC. S15817 (daily ed. Sept. 15, 1976). All pipelines would have become common carriers owned and operated by companies having no interest in the crude oil or refined products transported through them. See S. REP. NO. 1005, supra note 1, at 5. In October, 1975, an amendment containing similar provisions was offered during Senate debate of S. 2310, natural gas deregulation legislation, but the Senate rejected the measure by a vote of 53 to 39. 121 CONG. REC. 533, 635 (daily ed. Oct. 22, 1975). Subsequent vertical divestiture proposals have received no action.

Legislation requiring oil producers and refiners to divest themselves only from their gasoline marketing operations has also received little Congressional action. For example, H.R. 8117, introduced but never considered during the 94th Congress, would have prohibited major refiners from acquiring, operating, or controlling, through an affiliate or otherwise, any wholesale or retail outlet for marketing all petroleum products. 121 CONG. REC. 20011 (1975). The bill also empowered the Small Business Administration to make loans to dealers to continue, re-establish, or purchase a station divested by their refiners. Id. Another measure, S. 3369, introduced in the 95th Congress, would have imposed a moratorium on the opening and operation of retail gasoline stations or home heating oil outlets by the major oil companies. See note 168 infra.

5. Divestiture requires a person or a corporation to sell or otherwise dispose of ownership of property, securities, or other assets. See O'Connor, The Divestiture Remedy in Sherman Act § 2 Cases, 13 HARV. J. LEGIS. 687, 693 n.20 for discussion of divestiture, divorcement, and dissolution.

6. Functional divorcement, as used in this comment, refers to the separation of oil companies from the operation of their retail outlets. Producers and refiners may retain ownership of their gasoline stations but must divorce themselves from direct operation of them by leasing them, for example, to independent retail service station dealers, wholesalers, or chain marketers.

7. MD. ANN. CODE, art. 56, § 157E(b) through (d) (Supp. 1977). Voluntary allowances take many forms. Most typical are price discounts, rent rebates and other assistance given by a supplier to a retail gasoline dealer.

8. The oil companies joining in consolidated actions were: Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil, Incorporated, Continental Oil Company and its subsidiary Kayo Oil Company, and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation.
against company-operated stations in favor of independent dealers violating the equal protection clause\(^9\) and the commerce clause,\(^10\) and also conflicted with federal energy and antitrust laws\(^11\) in violation of the supremacy clause.\(^12\) Although the oil companies' arguments prevailed at trial,\(^13\) they were rejected by the Maryland Court of Appeals.\(^14\)

The United States Supreme Court affirmed this judgment in *Exxon Corp. v. Governor of Maryland*.\(^15\) Maryland's divorcement statute did not deny the oil companies equal protection of the laws, the Court held, since it reasonably related to the state's legitimate interest in controlling the gasoline retail market.\(^16\) Even though the divorcement provisions applied only to producers and refiners, all of whom operated interstate, the Court concluded that the statute neither discriminated against nor impermissibly burdened interstate commerce.\(^17\) Although the Court recognized that the law might favor Maryland independent gasoline dealers, it nevertheless found no barrier to the entry of interstate independent dealers in the Maryland market nor any impediment to the interstate flow of gasoline.\(^18\)

---

9. *U.S. Const.* amend. XIV, § 1 provides that "No State shall . . . deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10. *U.S. Const.* art I, § 8, cl. 3 states that "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ." See Part II-A of the text infra discussing judicial review of a state statute applying the "negative implications" theory of the commerce clause.


12. *U.S. Const.* art. VI, cl. 2 states, "This Constitution, and the laws of the United States . . . shall be the supreme law of the land . . . ." Absent an express or implied congressional intent to preempt a field so as to exclude any state regulation, courts will look to whether the state law is in conflict with federal law. For a discussion of the challenge to the Maryland statute on supremacy clause grounds, see Part II-B of the text infra and cases cited therein.


16. *Id.* at 125.

17. *Id.* at 127.

18. *Id.* at 125-26. The Court distinguished *Exxon Corp.* from other cases in which the flow of interstate goods was affected by state regulation. See, e.g., *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (North Carolina labeling statute effectively barring sales of Washington apples); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)
The Court reasoned that absent an express congressional declaration of policy, the commerce clause could not preempt the states’ power to regulate the gasoline retail market, even through divestiture.19 The Court also rejected the oil companies’ contention that the Maryland requirement of uniform “voluntary allowances” offended the supremacy clause by conflicting with the price discrimination and “meeting competition” provisions of the Robinson-Patman Act.20

While upholding the constitutionality of the Maryland gasoline retail divestiture statute, however, the Supreme Court declined to rule on its economic wisdom.21 As more states consider the Maryland approach, the economic implications of retail divestiture must not be overlooked. This comment examines the relationships between gasoline producers and marketers, state retail divestiture statutes, and the implications of the Supreme Court’s validation of such laws. It assesses whether these laws actually enhance competition, or merely protect competitors, in the gasoline retail market.

19. 437 U.S. 128-29. The Court noted that divestiture was not a novel method of economic regulation and was found in both federal and state statutes. Id. at 124 n.13. For enumeration of federal and state divestiture laws, see Comment, Gasoline Marketing Practices and “Meeting Competition” Under the Robinson-Patman Act: Maryland’s Response to Direct Retail Marketing by Oil Companies, 37 Md. L. Rev. 323, 329 n.44 (1977). But see Private Divestiture: Antitrust’s Latest Problem Child, 41 Fordham L. Rev. 569, 579 n.73 (1973) (citing the Report of the Att’y General’s Nat’l Comm’n to Study the Antitrust Laws 354 (1955)), which noted that in the prior 60-year history of the Sherman Act, only 24 litigated cases resulted in divestiture, divestiture, or dissolution decrees). Since that time, over 300 complaints charging antitrust violations have been filed by the Justice Department and the Federal Trade Commission, entering orders of divestiture in 60% of those cases. Id. at 580. One of the largest antitrust suits was filed by the FTC on July 18, 1973, against the top eight domestic oil companies. Still pending, it charges the firms with maintenance and reinforcement of a noncompetitive market structure in the refining industry on the East and Gulf Coasts through control of crude oil and crude transportation. In Re Exxon Corp., 83 F.T.C. 223 (1973).

20. 437 U.S. at 130-34. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), prohibits any person engaged in commerce from discriminating in price, either directly or indirectly, between different purchasers of commodities of like grade and quantity when the discrimination may substantially “lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.” Section 2(b) of the Act, known as the meeting competition defense, permits a seller to raise an absolute defense to a charge of price discrimination by showing that his lower price was made in good faith to meet a competitor’s equally low price. 15 U.S.C. § 13(b) (1976).

21. 437 U.S. at 124, 128.
I. DYNAMICS OF PETROLEUM MARKETING

A. The Major Market Directors

The major integrated oil companies have long dominated the petroleum industry by virtue of their crude oil holdings, refinery capacity, and oil pipeline ownership. In 1974, the top eight oil companies controlled about fifty-four percent of the total U.S. crude oil production, sixty-four percent of all interstate pipeline shipments, and an estimated sixty-five percent of proven oil reserves in the United States and Canada. Of the total United States' retail gasoline sales in 1976, the top eight companies accounted for almost fifty percent.

Market domination is often tested by concentration ratios comparing the percentage of a particular market held by the top four or eight firms. Although the major oil companies appear to have normal concentration levels, their control of crude oil production and output has been increasing:

<table>
<thead>
<tr>
<th></th>
<th>1955</th>
<th>1965</th>
<th>1974</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 top</td>
<td>21.2%</td>
<td>27.9%</td>
<td>31.1%</td>
</tr>
<tr>
<td>8 top</td>
<td>35.9%</td>
<td>44.6%</td>
<td>54.0%</td>
</tr>
<tr>
<td>20 top</td>
<td>55.7%</td>
<td>63.0%</td>
<td>76.9%</td>
</tr>
</tbody>
</table>


Some contend that the oil industry is competitive because concentration levels are lower than other major industries. See Ritchie, supra note 2, at 1138. But see S. Rep. No. 1005, supra note 1, at 20 n.3, in which the Senate Judiciary Committee argues that:

Even if concentration in crude production and refining were both low (and they are not) it would be of little significance if the crude transportation system were in the hands of a few large refiners (and it is) who thereby were able to control crude inputs of their rivals . . . . Second, naked concentration ratios do not take into account a vast system of joint arrangements which interlock the industry's leading firms . . . .

Concentration ratios also may be inadequate to test true market shares in the retail gasoline market since the major oil companies are not evenly represented throughout the nation's markets. Concentration at the regional level, such as in heavily populated areas like New England, is much greater than national statistics indicate. Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 Vand. L. Rev. 1277, 1281 (1975). See also F. Allvibe & J. Patterson, *Competition Ltd.: The Marketing of Gasoline* 11-21 (1972).


23. The companies' gasoline market shares ranged from Texaco's 8.1 billion gallons, or 7.5% of the total nationwide sales, to Atlantic Richfield's share of 4.3 billion gallons, or 4% of sales. Lundberg's National Share of the Market Report (Aug. 4, 1977) (unpublished, available at the American Petroleum Institute in Washington, D.C.). Gasoline sales by the 18 major refiners increased from 74.0 billion gallons in 1972 to 79.1 billion in 1976, a 7% increase. Small refiners increased their sales in the same period by 5.1 billion gallons—a 28% increase. The large refiners' increase was 600 million gallons, or 7%. These changes represent a decline of 3% in the majors' market shares, an increase of 3% for the small
The major companies attained market dominance by controlling crude oil supplies. From the early days of oil production, the "rule of capture" prevented producers from taking legal title to petroleum unless they physically removed it from the ground. The race to capture the crude before it flowed to a reservoir below a competitor's leased land resulted in extensive overdrilling, excessive producing rates, and an inability of producers to reduce production from fields during periods of oversupply. Expensive refineries built to process the crude into gasoline and other petroleum products had to operate at or near full capacity to stay profitable. To manage this chronic overproduction, the major producers marketed gasoline through their vast, loosely controlled networks of retail outlets. The vertically integrated structure assured adequate oil supplies for each successive level to purchase its requirements from other divisions free from the vagaries of the open market. Just as security of supply minimized risks, it also allowed the majors to maximize their profits by controlling the price and oil availability for their competitors deficient in crude. Certain oil tax benefits also encouraged the companies to increase their crude oil profits, and no change in the large independents' shares. U.S. DEP'T OF ENERGY, AN ANALYSIS, supra note 2, at 13.

24. The rule derived from the English common law dealing with the possession of wild animals and water resources. Presidential Task Force, supra note 22, at D7.

25. Id. at D8.


27. Upstream or backward, vertical integration insures supplies of raw materials for production, while downstream or forward integration affords greater sales predictability and complementary uses of the existing skills, experience, facilities, and resources of successive production stages. ENERGY RESOURCES COUNCIL, ANALYSIS OF VERTICAL DIVESTITURE 20-24 (1976). See also Ritchie, supra note 2, at 1133-34. Cf. Adams, Vertical Divestiture of the Petroleum Majors: An Affirmative Case, 30 VAND. L. REV. 1115, 1140 (1977) (arguing that there is no continuous flow of petroleum products through the integrated structures). In practice, a major's crude oil does not flow from its field to its own refinery, through its own marketing organization, and into its own branded gas pumps. Instead, the major companies routinely exchange crude oil as well as refined products through a system of simultaneous purchase and sale agreements. Id. For classic works on petroleum industry integration, see M. DE CHAZEAU AND A. KAHN, INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY (1973); J. MCLEAN AND R. HAIKH, THE GROWTH OF INTEGRATED OIL COMPANIES (1954).

28. Note, supra note 21, at 1283. Profit maximization has been difficult to quantify, however, since the oil companies report their profits on an integrated firm basis, rather than by functional level. One study by an economist at the Federal Trade Commission analyzed profitability by using "disaggregated" financial statistics to test downstream performance (all domestic operations beyond exploration and production). It found that between 1970 and 1974, the downstream segment produced only 10% to 25% of pretax earnings, although it had 55% to 60% of net investment in fixed assets. The result was a pretax return on upstream (exploration and production) operations of 22% to 34%, while only 2% to 5% was earned downstream. J. Phelps, Subsidization and Inefficiency in the Downstream Petroleum
The oil depletion allowance, for example, permitted oil companies to subtract from pre-tax profits a large portion of the gross value of production, thus enabling them to recover many times their initial investments.\textsuperscript{29} With incentive to make more money at the crude level, the majors posted high prices on crude sold to refiners. The vertically integrated companies' refineries entered the transaction in their books but passed on the cost increase to their customers. Conversely, independent refiners were forced to pay the higher prices or lose refining business.\textsuperscript{30}

By competing among themselves for larger market shares, the major companies avoided the price competition that might have depressed crude oil prices and profits.\textsuperscript{31} Nonprice competition resulted in the form of expensive advertising, massive promotional campaigns, high profile brand names, automotive accessories, credit cards, and conveniently located multiservice retail stations. The majors employed a market saturation theory, believing that the firm operating the greatest number of outlets within a given market would attract the most business. Since the financial outlay for thousands of retail outlets was enormous,\textsuperscript{32} the majors generally leased their stations to independent dealers under franchise agreements.\textsuperscript{33} They


Other federal incentives for crude oil production, such as foreign tax credits and oil import quotas, are discussed at length in the Senate Judiciary Committee's report on S. 2387, the Petroleum Industry Competition Act of 1976. S. REP. NO. 1005, supra note 1, at 83-95 (1976).

\textsuperscript{30} Adams, supra note 22, at 1133-34.

\textsuperscript{31} ALLVINE & PATERSON, supra note 22, at 29.

\textsuperscript{32} According to a recent study, marketing investments by the majors were as high as $1.45 billion in 1970. PETROLEUM INDUSTRY RESEARCH FOUNDATION, INC., THE IMPACT OF GASOLINE DIVESTITURE ON COMPETITION 10-12 (1978).

\textsuperscript{33} Retail gasoline outlets, thought to number over 200,000 in 1976, are defined by the Department of Energy as service stations deriving more than 50% of their dollar volume from the sale and service of petroleum products. AMERICAN PETROLEUM INSTITUTE, GASOLINE MARKETING STRUCTURE, FACTS, DEMOGRAPHICS 3-4 (1976). The majority of these stations, 154,700, are operated by local independent businessmen and women who lease their stations from suppliers, buy and sell gasoline on their own account as dealers, wholesalers, or wholesaler/retailers, and display the refiner/supplier's brand name. Branded dealers receive gasoline either from the refiner directly or from a jobber or similar wholesaler. Lessee dealers determine their own selling prices for gasoline, hire their own employees and set their own business policies. An estimated 54,000 contract dealers own their service stations, and are free to enter sales contracts with any supplier of branded or private brand gasoline. Most "major" refiner/marketer companies directly operate a portion of their stations with company employees on a salaried or commissioned basis. The estimated number of major brand company-operated stations was 7,800 in 1976. Of the balance, 7,700 stations were owned by smaller refiners, 9,400 stations were owned and operated by jobbers, and
also used secondary brands to market their gasoline which, though identified by consumers as independent, were actually operated by employees of the major firms. Thus, the majors became “dual distributors,” selling gasoline directly through a few company-operated major and secondary brand stations as well as supplying their branded franchisees gasoline for resale.

The major branded independent dealers always have marketed their greatest percentage of gasoline through leased stations, often called “porcelain palaces.” The characterization is more than just a pejorative or architectural description. It suggests the importance of these business entities to their parent companies, proprietors, and the local communities they serve. They are outlets for petroleum products refined from the majors’ big profit maker—crude oil. The dealers who lease or own the stations have vested interests in them because they earn their livelihood from them. Local communities enjoy the stations’ services and tax revenues. Although some stations may be uneconomic or only marginally profitable to operate, oil companies have kept them in business through rent discounts or other subsidies. Changes in marketing techniques favoring fewer, more efficient gasoline outlets thus have been slow in coming, resisted primarily by the retail dealers.

B. The Independent Sector

The attitude of nonbranded independent marketers to major integrated companies has shifted in recent years from one of peaceful coexistence to one of self determination. During the Depression, many independent

11,500 stations are owned and operated by private brand independent retailers. Newcomers to gasoline retailing are large department store chains such as Sears and J.C. Penney, convenience stores, independent repair garages, car dealerships, parking garages, and other businesses which derive most of their dollar volume from their nonpetroleum sales. See U.S. DEP’T OF ENERGY, AN ANALYSIS, supra note 2, at 27.

34. Small Business Petroleum and Petrochemical Marketers Protection Act of 1975: Hearings on H.R. 8117 Before the Subcomm. on SBA and SBIC Legislation of the House Comm. on Small Business, 94th Cong., 1st Sess. 346 (1975-1976) (statement of T. J. Oden) (hereinafter cited as Hearings on H.R. 8117). Some major-secondary brand relationships are: Exxon-Alert; Gulf-Economy; Red Top; Mobil-Sello; Shell-OK; Ride; Super; Sun-DX; Kenco; Travelers; Texaco-Gulf; Star Bar. Id. at 241, 347 (reprinting the testimony by Gorman C. Smith of the Federal Energy Administration, who stated that the major companies’ primary motivation for using secondary brands was to retain their ability to compete in different markets without sacrificing the benefits of their major brand identification).

35. During Congressional hearings, a Chevron representative testified that his company did not fully recover on rental property, and that Chevron also provided an “investment” allowance to nonlessee dealers, designed to put them on a more even footing with lessee dealers without higher station expenses. Hearings on H.R. 8117, supra note 34, at 319, 339 (statement of D. L. Mulit of Standard Oil of California).
crude producers were forced to sell their producing properties to major companies. To stay in business, they had to rely on “farmed out” leases from the majors, abandoned oil fields, and crude oil purchased directly from the majors. Independent marketers likewise have had to purchase petroleum products from both independent and major refiners.

The retail marketing methods of the independents and the majors differ significantly. Unlike the “branded” independent dealers competing through brand recognition and other advantages derived from their major oil company supplier, nonbranded independent marketers generally compete by offering lower gasoline prices. Independent refiners have established their own network of retail stations to utilize fully their refinery capacity, and they augment their refining income through high volume gasoline sales at stations operated by salaried employees rather than franchise dealers. By experimenting with a few high-volume, limited service stations, the independent refiner/marketers have demonstrated the effectiveness of streamlined price competitive marketing techniques. Independents generally have sold twice as much per month through their direct operated stations as the majors have sold through their lessee dealers. The independent marketers’ aim has been to minimize labor and overhead costs and sell retail gasoline at a price close to their own purchase price in order to underprice their branded dealer competitors. They have sacrificed a larger profit margin for profits from high volume sales. From 1968 to 1972, the independents advanced so successfully into gasoline retailing that the ten major marketers’ shares fell from 66.1 per-

---

37. Id. at D12. The major producers would sublease properties if they had too many leases to capture crude with adequate speed. See note 23 supra and accompanying text. In exchange for the right to drill, the independent had to promise to test the extent of the field’s oil reserves by a certain date. Id.
38. Id. at D13.
39. Independent marketers often make short-term purchases at low cost on the “spot market.” A spot market purchaser buys crude oil at the best price from the source available at a particular time, rather than under a contractual agreement. F. Allvine & J. Patterson, Highway Robbery: An Analysis of the Gasoline Crisis 117 (1974). In 1976 the major and non-major refiners sold 90.9 billion gallons of gasoline to independent marketers including both wholesalers and retailers, representing 43% of all gasoline sold. U.S. Dep’t of Energy, An Analysis, supra note 2, at 20.
41. About half of all 15,000 company-operated stations are owned by independent refiner/marketers, and from November, 1974 to January, 1977, the total number of nonbranded independent retail outlets grew from 8,400 to 11,400. Most of the outlets were directly operated. Letter from David J. Bardin, Economic Regulatory Commission, to Senator Henry M. Jackson (Mar. 20, 1978), reprinted in S. Rep. No. 731, supra note 26, at 119-20.
Independents have moved gasoline from the supply terminal to the motorist's vehicle for about five cents per gallon, as compared to the ten to twelve cents spent by major refiners who market through branded independent retailers. In the aftermath of the 1973 oil embargo, direct operation of gasoline outlets by refiners increased in appeal. Heavy reliance on higher priced OPEC oil, stricter environmental standards for those refineries and the gasoline they produced, and reduction of several oil tax benefits gradually made crude oil production less lucrative. Due to an unrelated shortage of refining capacity preceding the embargo, no crude oil products were produced beyond that needed to supply the refiner/marketers' own distribution networks. Consequently, sales in the spot market declined, and product prices rose as supplies diminished. In response to customer and dealer outcry, the federal government introduced gasoline allocation and price regulations. These constraints were designed to assure adequate supplies at reasonable prices for disadvantaged firms and their customers. While staving off closure of countless retail outlets threatened by supply interruptions, however, the controls also perpetuated many inefficient, noncompetitive marketing arrangements.

42. F. Allvine & J. Patterson, Highway Robbery, supra note 39, at 77.
43. Presidential Task Force, supra note 22, at D36.
44. OPEC is an acronym for the Organization of Petroleum Export Countries. See discussion at note 1 supra.
45. New environmental regulations restricted the use of oil with a high sulfur content and required an increase in gasoline lead content, necessitating a shift in refining processes. Presidential Task Force, supra note 22, at D30.
46. The depletion allowance and the 7% investment tax credit for oil were phased out by Pub. L. No. 94-12, 89 Stat. 47 (1975).
47. The majors felt in 1969 that they had adequate refinery capacity and initiated no new construction or expansion. There was also uncertainty about the volume of imports to be allowed under the Mandatory Oil Import Program. The shortage of refinery capacity began to be felt by 1972 and 1973, just as the OPEC countries imposed their embargo. Presidential Task Force, supra note 22, at D29.
49. Note, supra note 22, at 1289 (referencing an estimate by the American Petroleum Institute that nearly 5%, or 100,000, of the nation's retail outlets closed in 1973 alone). Between November, 1974 and November, 1976, the total number of retail stations declined from 199,800 to 180,273. U.S. Dep't of Energy, An Analysis, supra note 2, at 3.
50. U.S. Dep't of Energy, Competitive Analysis of the Motor Gasoline Price and Allo-
C. Problems of Dual Distribution

As the cost of crude oil and gasoline has risen, consumers increasingly have switched from branded gasoline to lower priced private brands, prompting the major refiner/marketers to increase the number of their direct company-operated retail outlets. These stations are strategically located, offer limited or self-service, and are geared toward high volume sales. The major oil companies use these outlets to test new marketing techniques, train new employees and prospective franchisees, and introduce their brand into new markets where it may be unknown. Company-operated stations also enable the majors to avoid restrictions imposed by the increasing number of state franchising protection laws and possibly federal antitrust laws as well. Thus, the majors enjoy dual benefits: they can capitalize on their brand name by marketing through


55. Producer/refiners that market directly can control the price at which they retail their gasoline. Since the transaction is considered an intracompany transfer rather than a

Annexation Regulations (1978, unpublished). According to the study, buyers have been foreclosed from numerous sources of supply due to the regulations' requirement that suppliers meet the demand of base period customers. Id. at 1. All surplus gasoline which would normally be sold on the spot market is offered to refiners' base period customers. Smaller, independent marketers are virtually foreclosed from obtaining what gasoline is available since its spot price is high and the inaccessibility of supply terminals creates excessive transportation costs. Id. at 2.

The Energy Department study also found that federal oil pricing restrictions coupled with regulations controlling classes of purchasers, could result in refusals to deal with certain classes and create excessive distribution costs. They may also foster "cross-subsidization." For instance, a refiner selling more than 5% of its gasoline through directly operated outlets must treat its costs on an integrated firm basis. The product and nonproduct cost increases at all four functional levels are aggregated on a weighted-average basis. The resulting average figure is then uniformly added to the base period price at each marketing level, for each class of purchaser. By this scheme, retailing cost increases reflect the wholesale prices paid by independent marketer/dealers who must compete with the refiner's directly operated stations unburdened by these costs. The inability of refiner/marketers to allocate costs to the marketing level where they are incurred is a powerful federal incentive for cross-subsidization of refiners by independent marketers. Id. at 4-6.

A refiner can also pass through to purchasers certain justifiable nonproduct costs as well as marketing operations costs not in excess of a maximum level per gallon. See 10 C.F.R. § 212.83 (1978). Thus, the refiner can integrate forward by building or expanding retail outlets and pass many costs on to its wholesaler customers.

51. Allvine & Patterson, Highway Robbery, supra note 39, at 45-46. See also note 41 supra.

52. Note, supra note 22, at 1289.

53. Id. See also Brief for Appellants at 39, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (citing affidavits filed by several major oil companies).

54. Note, supra note 22, at 1290. See also Brief for Appellants at 39, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (citing affidavits filed by several major oil companies).
franchised independent dealers while they retail in high volumes at low cost through directly operated stations.

The majors' "dual distribution" practices have spawned illwill among the independent branded dealers, who contend that their major refiner-suppliers are forcing them out of the market by charging a discriminatorily high "dealer tank wagon" price to cover gasoline costs as well as the charges for rent, brand name, credit card and other accessories. They point out that gasoline is delivered to direct-operated stations without a price markup for rent and other business costs. Absent the markup, the refiner/marketer can undersell its own branded dealers as well as independent private brand marketers.

The independent branded dealers have tried for years to convince the federal government to curb dual marketing activities which they perceive as predatory. A 1967 Federal Trade Commission (FTC) study of anticompetitive practices in gasoline marketing resulted only in suggested guidelines to curb dual distribution abuses. Although the FTC declined to adopt any trade rules or regulations, it warned that major company inter-

sale, any resale price fixing and price discrimination is beyond the reach of both the Sherman and the Robinson-Patman Acts. See notes 59-66 and accompanying text infra.

Resale price maintenance, occurring when a supplier dictates the exact minimum or maximum price at which a commodity may be resold, is a per se violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Albrecht v. Herald Co., 390 U.S. 145, 152 (1968). See Note, Gasoline Marketing and the Robinson-Patman Act, 82 YALE L.J. 1706 (1973). A major supplier may reduce its wholesale price 1.4 cents and suggest that the dealer lower the retail price by two cents. Or, a supplier may lower prices for a specific time period and on an exact number of gallons by employing a system of rebates to the dealer.


57. ALLVINE & PATTERSON, supra note 22, at 46-47 (discussing major oil companies' control of dealer operations through competition with them at strategically located stations). A former Federal Trade Commission official has testified that majors "may be favoring the company-operated stations in terms of volume, pricing lower there than to their independent outlets, independent branded dealers. In fact, we have every indication that is going on." Hearings on H.R. 130, supra note 40, at 265 (statement by Owen M. Johnson).

58. [1967] 3 TRADE REG. REP. (CCH) ¶ 10,373. To determine whether a price discrimination would result in statutory injury to competition, the FTC said it would appraise relevant competitive facts. Id. The test for injury would be "a substantial lessening of competition or substantial impairment of the ability of a firm to compete with the grantor or recipient of the price discrimination." Id. at 18,241-42. Factors to be considered are: [T]he identity of the firms affected by the discrimination, the effect of the discrimination on the pricing policies and profit margins of independent refiners, the duration or probable duration of the discrimination, whether the dealers affected by the discrimination receive price assistance from their suppliers and, if so, to what extent, the purpose of the discrimination, the normal and customary differential between major and private brand prices in the marketing area in which discrimination is made . . . .

Id.
vention in competition at the dealer level to discipline branded or non-branded dealers would constitute geographic price discrimination,\textsuperscript{59} violating section 2(a) of the Robinson-Patman Act.\textsuperscript{60}

To invoke the jurisdiction of the Act, the dealer alleging disfavored treatment must show that his supplier has unjustifiably charged him a different price for his gasoline than that charged another retail purchaser.\textsuperscript{61} Two sales must have occurred, at least one of which generates discrimina-

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{59}]
\item [\textsuperscript{59}] [1967] 3 \textit{Trade Reg. Rep.} (CCH) \$ 10,373, at 18,245. The FTC also stated that such activity would be considered an unfair trade practice in violation of \$ 5 of the Federal Trade Commission Act, 15 U.S.C. \$ 45 (1976).

Under \$ 2(a) of the Robinson-Patman Act, a major supplier may be held liable in treble damages for a primary-line price discrimination against a fellow supplier competitor, for a secondary-line violation against disfavored customers competing with the seller's favored customers, or a tertiary-line violation against the customers of the disfavored purchasers. 15 U.S.C. \$ 13(a) (1976).

\item [\textsuperscript{60}] 15 U.S.C. \$ 13(a) (1976).

\item [\textsuperscript{61}] The Act recognizes a lower price, charged in good faith to meet an equally low price of a competitor, as an affirmative defense. 15 U.S.C. \$ 13(b) (1976). The courts generally agree that a supplier may assert under a \$ 2(b) defense that he lowered his price to retain a customer who was approached with an offer from a competitor/supplier (primary-line competition). \textit{See}, \textit{e.g.}, FTC v. Sun Oil Co., 371 U.S. 505 (1963) (section 2(b) defense applied only to primary-line, not secondary-line, competition faced by a customer of the seller). Such a "price raid" is not, however, a frequent occurrence in gasoline marketing. Moreover, if a dealer switches suppliers, he may lose the benefits associated with his franchise rights, such as signs, other supplies, and even his lease. \textit{See Note, supra} note 55, at 1708. A franchisor may not explicitly require the dealer to purchase gasoline from his lessor/supplier without violating the prohibition against exclusive dealing arrangements in \$ 3 of the Clayton Act, 15 U.S.C. \$ 14 (1976). Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949). Similarly, the lease cannot require the lessee/dealer to purchase gasoline from the lessor/supplier, since that would constitute an illegal tie-in under \$ 3 of the Clayton Act, 15 U.S.C. \$ 14 (1976) and \$ 1 & 2 of the Sherman Act, 15 U.S.C. \$\$ 1, 2 (1976). \textit{See} Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); Northern Pac. Ry. Co. v. United States, 336 U.S. 1 (1958); Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

Courts disagree on whether or not the \$ 2(b) "meeting competition" defense is available to a major refiner/supplier when the discriminatory price granted to its dealer is designed to meet an equally low price of a competitor dealer whose price has been subsidized by its supplier. \textit{See} Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420, 421 (D. Conn. 1955), \textit{rev'd on other grounds}, 240 F.2d 457 (2d Cir.), \textit{cert. denied}, 353 U.S. 965 (1957) (defense disallowed except in the "price raid" context); \textit{cf.} Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) (section 2(b) defense available to American Oil Company when the lower price was granted to its individual dealer to meet an equally low price given by a competitor oil company to its individual competitor/dealer). The Supreme Court declined to resolve the issue in Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). \textit{See} text and accompanying notes 113-14 \textit{infra}. Yet, the terms of a dealer's supply contract frequently are incorporated by reference into the lease. Thus if the dealer breaches the contract, the franchisor/supplier may exercise its option to terminate the lease. \textit{See Note, supra} note 55, at 1707 n.9.
\end{enumerate}
\end{footnotesize}
tion impacting across a state line. Since most major integrated oil companies transport petroleum products across state lines, their sale of gasoline to independent franchise dealers or other marketers for resale to customers falls within the purview of section 2(a). When gasoline is supplied by a major or independent refiner/marketer to its own company-operated retail outlet, however, an intra-company transfer occurs, eliminating one of the two sales required to trigger the Act's coverage. Consequently, although price discrimination may result when a supplier provides gasoline to its own station and sells gasoline at a higher price to an independent dealer, the refiner/marketer may be insulated from antitrust liability. The refiner/marketer is also free to set retail gasoline prices within federal price parameters, even if the resulting profit loss must be subsidized by earnings from another level of the company or from operations in another market.

Beyond the FTC policy guidelines for gasoline marketing practices, no federal regulations addressing dual marketing or embracing retail divestiture have been adopted. Individual state dealer organizations, however,

64. Owen M. Johnson, Jr., former Director of the Bureau of Competition of the Federal Trade Commission has testified: "The legal learning in the area is that an internal transfer from a supplier to a company operated station is not a 'sale,' so you are outside the Robinson-Patman Act." S. REP. NO. 731, supra note 26, at 23.
66. If a vertically integrated oil company uses profits derived from one function or market to subsidize a below-cost price in another market, it may be liable for a violation of § 2 of the Sherman Act. See 15 U.S.C. § 2 (1976). Such a case is difficult to prove, however, since it must be shown that the integrated company possesses monopoly power in the relevant geographic gasoline market, either used or able to be exercised while engaging in anticompetitive practices intended to eliminate competition or control prices. For a good discussion of the problem, see Comment, Dual Distribution and Attempted Monopolization under Section 2 of the Sherman Act, 11 DUQ. U.L. REV. 68, 70-71 (1972).
have successfully persuaded some state legislatures to enact gasoline retail divorcement legislation designed to equalize the advantages enjoyed by major refiner/marketers over independent branded and nonbranded dealers. The dealers have argued that while state franchise laws provide legal recourse against arbitrary franchise terminations and nonrenewals, such protection might be ineffectual if the number of major oil company-owned outlets increase to compete with established franchise dealers. Moreover, they contend that excising the majors from retail marketing would spur freer and more equitable competition among dealers.

II. VALIDATION OF RETAIL DIVORCEMENT STATUTES

To date, five jurisdictions have enacted laws restricting refiner/marketer company operation of gasoline retail outlets. They are Maryland, industry. The statute provided no protections against dual marketing abuses. See notes 176-79 and accompanying text infra.

68. State franchise practices statutes were partially preempted by the Petroleum Marketing Practices Act, discussed at notes 171-75 and accompanying text infra, providing greater protections against arbitrary terminations and failures to renew franchise agreements, and requiring advance notification by franchisors of such intentions.

69. Meriwether & Smith, supra note 22, at 1290-91.

70. Hearings on H.R. 8117, supra note 34, at 7 (statement by Lewis A. Haskell, Jr., former president of the National Congress of Petroleum Retailers). The Independent Gasoline Marketers Council has also supported retail divestiture.


The California Assembly rejected a bill which would have required strict divestiture rather than functional divorcement. Note, supra note 22, at 1292. California did enact a price discrimination statute modeled after the Robinson-Patman Act, 15 U.S.C. § 13 (1976), but broader in scope and aimed specifically at refiners, distributors, manufacturers, or transporters of petroleum products whose total production, gasoline refining capacity or sales volume at the wholesale level is 50,000 barrels a day or more. Cal. Bus. & Prof. Code § 21200 (West 1979). Section 21200 states:

It is unlawful for any refiner, distributor, manufacturer, or transporter of motor vehicle fuels or oils engaged in business in this state, either directly or indirectly, to discriminate in price between different purchasers of motor vehicle fuels or oils of like grade and quality, where the effect of such discrimination is to lessen competition, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. Upon proof being made, . . . a seller [may rebut] the prima facie case thus made by showing that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price. If such lower price should be incorporated into a term
Florida, Delaware, the District of Columbia, and most recently Virginia enacted statutes requiring that no such contract shall as to such discriminatory price be valid for more than one year. (Emphasis added.)

Id. The statute was challenged by Shell Oil Company as directly conflicting with the Robinson-Patman Act, frustrating the congressional purpose embodied in that Act’s § 2(b) defense, and thus void under the supremacy clause of the United States Constitution. On June 11, 1976, the United States District Court for the Northern District of California granted Shell’s motion for summary judgment. Shell Oil Co. v. Younger, [1976-1] TRADE CAS. (CCH) ¶ 60,960 (N.D. Cal. 1976). The State has filed an appeal in the Ninth Circuit Court of Appeals, Docket No. 76-2784 (filed December 23, 1976).

72. The Maryland statute provides, in pertinent part:

(B) After July 1, 1974, no producer or refiner of Petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operated it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(D) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied. (Emphasis added.)


The legislation was enacted after a State Comptroller’s study and subsequent hearings on the effects of the oil shortage on local gasoline markets showed that every type of independent outlet suffered greater shortages in 1973 than company owned and operated retail outlets. See Comment, supra note 19, at 323-25. In public hearings, the state presented evidence showing the existence of forward integration in Maryland as well as inequalities in supply allocations and price allowances. Id. at 326 n.19. While supporters of the legislation argued that independent marketers would be forced out of the market, the oil companies testified that the ultimate result of divorcement would be to force discount marketers out of business since they could not compete without price allowances. Id.

73. Florida enacted a less stringent law allowing a producer, refiner, or its subsidiary to operate up to three percent of all its retail service stations with company personnel, while exempting certain independent refiners. FLA. STAT. ANN. § 526.151 (1974). The statute was declared unconstitutional, however. Exxon Corp. v. Conner, Case No. 74-1449 (Fla. Cir. Ct. Jan. 23, 1975).

74. Delaware enacted a retail divorcement statute similar to the Maryland law. Unlike Maryland, however, Delaware protected existing company operations. DEL. CODE tit. 6, §§ 2905(A) and 2906 (1978 Cum. Supp.).

75. Retail Service Station Act of 1976, D.C. Law No. 1-123, [1977] D.C. Code Legis. & Admin. Serv. 120. Section 3-102 of the Act provides that no producer, refiner or manufacturer of motor fuels shall, after April 19, 1977, open and, after January 1, 1981, operate, a retail service station in the District:

irrespective of whether or not such retail service station will be operated under a trademark owned, leased, or otherwise controlled by such producer, refiner or manufacturer, unless such retail service station is to be operated by a person or entity other than either an employee, servant, commissioned agent or subsidiary of such producer, refiner, or manufacturer or a person or entity who operates or man-
The divorcement approach is bold and, not surprisingly, has generated vigorous opposition from target oil companies on both constitutional and economic grounds. Although the oil companies prevailed in the

ages such retail service station under a contract with such producer, refiner, or manufacturer which provides for a fee arrangement.

Id. Every "wholesaler" (defined in § 2-101(r) as "any person, including any distributor, who is engaged in the business of selling, supplying, or distributing motor fuels or petroleum products to retail service stations") must, under § 3-103(a):

extend all voluntary allowances, including, . . . any temporary price reduction, price allowance, price adjustment, special sale, deal, discount, inducement, incentive, rent rebate, rent abatement, rent relief or other allowance uniformly, on an equitable basis, to every retail service station served. In the event that an exceptional or undue hardship has been imposed on a specific retail service station by the occurrence or existence of special or unusual circumstances, including, but not limited to, loss by fire or a temporary road closing, a non-uniformly extended voluntary allowance may be extended to such retail service station.

The divorcement and uniform voluntary allowance provisions of the D.C. Act are more specific than their Maryland counterparts. The D.C. language was drafted in response to the initial ruling that the Maryland law was unconstitutionally vague. See Exxon Corp. v. Mandel, No. 22,069 (Anne Arundel County Cir. Ct. Jan. 27, 1975).

76. On January 22, 1979, the Virginia House of Delegates in response to the election year complaints of more than 3,000 independent service station operators, passed a retail divorcement bill by banning competition from new company-owned stations. Wash. Post, Feb. 17, 1979, at § B1, col. 1. Under the bill, H. 458, producers and refiners could not open after July 1, 1979 any new directly operated stations within one and a half miles from any retail outlet operated by a franchised dealer. Any directly operated station in existence on that date would not be affected by the divorcement provisions. The Virginia measure is weaker than the Maryland law because the delegates feared that restrictions on company operated stations would aggravate expected gasoline shortages resulting from cessation of oil exports from Iran. Id.

77. Florida's statute became the first divorcement law to be invalidated. See Exxon Corp. v. Conner, Case No. 74-1449 (Fla. Cir. Ct. Jan. 23, 1975). The law applied only to retail outlets, producer-operated or otherwise, selling only gasoline and oil or qualifying as less than full service. Fla. Stat. Ann. § 526.151(1), (3) (Supp. 1974). In so discriminating by class of station and operator, the Florida Circuit Court ruled, the state invalidly exercised its police powers since the obvious result of the restraint was to reduce competition with independent dealers. Moreover, the statute violated the equal protection clause of the fourteenth amendment by singling out the major integrated oil companies. The court felt the dealers needed no special protection since they already enjoyed good profit margins in the sale of their petroleum products, and that the public would be better served with continued provision of needed goods and services, no barriers to entry, and marketing innovations. The court found it unnecessary to address the issue of whether the statute imposed an undue burden on interstate commerce. Id.

The Delaware statute, see note 74 supra, was challenged by Exxon and ARCO in Atlantic Richfield v. Tribbett, Case Nos. 4692, 4774 (Del. Ch., New Castle City Aug. 25, 1977). Letters were exchanged among the Deputy Attorney General for Delaware, Counsel for Exxon, and the Vice Chancellor of the Delaware Court of Chancery. Paper by Harry Gill, Delaware and Maryland Divestiture Acts Decisions, Petroleum Industry Marketing Attorneys Meeting in Washington, D.C. 4-6 (April 5, 1978) (available at the American Petroleum Institute in Washington, D.C.). The letters pointed toward settlement of the issue left unresolved by the Supreme Court in FTC v. Sun Oil Co., 371 U.S. 505 (1963)—whether the Robinson-
early tests,\textsuperscript{78} the turning point came in \textit{Exxon Corp. v. Governor of Maryland}, when the United States Supreme Court endorsed retail divorcement as a reasonable means to preserve competition.\textsuperscript{79} Significantly, the Court

Patman meeting competition defense would be available to a refiner granting its dealer a discount to permit him to meet a price posted by a competitive dealer if that dealer were either an integrated supplier/retailer or receiving a discount or lower price from his supplier, a competitor of a refiner. The Delaware court might have embraced the extension of the defense as enunciated in \textit{Bargain Car Wash v. Standard Oil Co. (Ind.)}, 466 F.2d 1163 (7th Cir. 1972), see note 61 \textit{supra}. However, the Vice Chancellor of the Delaware court of Chancery denied plaintiff oil companies' motion for partial summary judgment after the Maryland Court of Appeals upheld that state's divorcement statute. \textit{Atlantic Richfield v. Tribbett}, Case Nos. 4692, 4774 (Del. Ch., New Castle City Aug. 25, 1977). See note 79 \textit{infra}.

A different approach was taken in New Hampshire. The state legislature requested an advisory opinion on the constitutionality of retail divorcement before acting upon legislation similar to the Maryland statute. The New Hampshire Supreme Court followed the lead of the Maryland Court of Appeals, holding that the proposed legislation would not violate the state or federal Constitution when applied prospectively. \textit{In re Opinion of the Justices}, [1977-2] \textit{TRADE CAS. (CCH)} \textsuperscript{79} 61,600 (N.H. June 20, 1977). If the bill were to apply retrospectively to the 13 existing company-operated stations, however, the Justices indicated that they would consider the divorcement an unconstitutional taking of property without due process: “Although [producers and refiners] may still own the stations and may lease them, they must nevertheless divest themselves of their existing retail businesses which in themselves are property rights.” \textit{Id}. The New Hampshire Legislature subsequently defeated retail divorcement legislation. \textit{A.P.I. Survey, supra} note 71.

78. The Maryland statute initially was struck down by the trial court. Granting the oil companies' motion for summary judgment, the Circuit Court of Anne Arundel County, Maryland held that the statute's requirement of uniform application of voluntary allowances would place plaintiffs in jeopardy of violating the Robinson-Patman Act, especially in areas where the allowance would necessarily impinge upon gasoline sales in neighboring states. \textit{Exxon Corp. v. Mandel}, No. 22,069 (Anne Arundel County Cir. Ct. Oct. 14, 1975) (mem.). Moreover, the voluntary allowance provision would have the effect of depriving plaintiffs of the absolute section 2(b) meeting competition defense of the Robinson-Patman Act and would foster the lack of lawful competition within the state to the detriment of the consumer. \textit{Id}.

In a separate opinion, the court found that although the state's divorcement statute did not unduly burden interstate commerce, it denied plaintiffs equal protection of the laws and deprived them of their property without due process of law. \textit{Exxon Corp. v. Mandel}, No. 22,069 (Anne Arundel County Cir. Ct. Jan. 27, 1976). The court cited unanimous expert testimony that the preclusion of independent, crude-deficient refiners from the retail market in Maryland would eliminate a powerful source of price competition with the branded dealers in the state and thus hurt consumers. The court questioned the state's motives in enacting the statute, noting that the original draft of the legislation included "wholesalers" in the prohibition against retail selling. The only reason given for the wholesalers' exemption from the law as enacted was their request to be eliminated from coverage—not because some benefit to the public might be derived. \textit{Id}.


The Maryland court, after an exhaustive review of the record, found that the statute did not deny the oil companies equal protection nor unconstitutionally discriminate against their direct-operated outlets in favor of those of mass merchandisers, such as Sears Roebuck and Pantry Pride, allowed to own and operate retail gasoline stations. \textit{Id} at 439, 370 A.2d
chose to forego economic analysis of the Maryland statute, deferring to the State's political decision to protect independent dealer competitors. Speaking for the majority, Justice Stevens acknowledged that the evidence at 1118. Since oil company favoritism toward company-operated stations over independent retailers was an evil properly remedied by barring producers and refiners from retailing, the court found the divorcement provisions rationally related to the pro-competitive purpose of the statute and thus within constitutional bounds. \textit{Id.} at 440, 370 A.2d at 1118-19.

Nor did the Maryland court find any unconstitutional taking of the oil companies' property. Full ownership benefits were not denied by the statute as long as any retail outlet owned by a producer or refiner was leased to an independent dealer, said the court. \textit{Id.} at 437-38, 370 A.2d at 1117. See Comment, \textit{supra} note 18, at 330-31 nn.52-53.

The court rejected the oil companies' commerce clause challenge to the statute, finding no burden to the free flow of commerce or goods. It interpreted the law as regulating only wholly intrastate retail marketing of gasoline. Governor of Maryland v. Exxon Corp., 279 Md. at 431, 370 A.2d at 1114. The court reasoned that since no oil was produced or refined in Maryland, the statute neither discriminated against out-of-state companies nor protected local interests, and its purpose was to preserve competition rather than to protect certain business classes. \textit{Id.} at 431-32, 370 A.2d at 1114-15. The number of stations which might be withdrawn was small, about six percent, making any resulting reduction of gasoline and services too speculative a burden on interstate commerce to outweigh Maryland's legitimate interest in preserving a competitive gasoline market. \textit{Id.} at 435-36, 370 A.2d at 1116-17. See also Comment, \textit{supra} note 18, at 33 n.72.

Similarly, the Maryland court rebuffed the companies' supremacy clause argument, finding the statute's allocation provisions fundamentally harmonious with the federal Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. § 753 (1976)). \textit{Id.} at 442, 370 A.2d at 1119. It also held that the anti-price discrimination provisions of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), were not in actual or potential conflict with the Maryland statutory uniform "voluntary allowances" requirement, narrowly construing the term to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer." \textit{Id.} at 447, 370 A.2d at 1122. Thus the uniformity requirement would not apply in a "price raid," the only instance in which, according to the doctrine of \textit{Enterprise Industries}, the § 2(b) "meeting competition" defense could be asserted. See note 61 \textit{supra}.

The court rejected several other constitutional challenges to the divorcement provisions. It found no unlawful delegation of authority to the Comptroller of the Treasury, enabling him to alter divorcement dates and to determine when a producer or refiner could operate a station temporarily. \textit{Id.} at 440-41, 370 A.2d at 1119. Specific terms used in the statute survived attack as being too vague and thus violative of the oil companies' due process rights guaranteed by the fourteenth amendment. \textit{Id.} at 453-55, 370 A.2d at 1125-26. The court also upheld the allocation provisions of the statute: "Every producer, refiner or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments." \textbf{MD. ANN. CODE} art. 56, 157E(f) (Supp. 1977). Governor of Maryland v. Exxon Corp., 279 Md. at 442, 370 A.2d at 1119.

80. The Court's deemphasis of economic considerations was criticized by John Shenefield, Assistant Attorney General, Antitrust Division, in his address to the Natural Resources Law, Administrative Law and Public Utility Law Sections of the American Bar Association in New York City on August 8, 1978:

While it is understandable that a state might, out of a sense of equity, seek to protect independent distributors from competition of larger integrated firms, it is also reasonably clear that over the long run consumers will pay higher prices as a
presented by the refiners might cast some doubt on the soundness of the retail divorcement approach, but he cautioned that due process did not empower the judiciary "to sit as a 'superlegislature' to weigh the wisdom of legislation."\textsuperscript{81} The Court concluded that even if the Maryland statute irrationally frustrated the state's intended goal of enhancing competition, as the oil companies argued, it did not possess any authority to render an economic evaluation overriding the state's power to legislate against what it found to be injurious practices in its own internal commercial and business affairs.\textsuperscript{82}

\textbf{A. Negative Implications of Exxon Corp.}

The Supreme Court's deference to the Maryland legislature reflected the application of the "negative implications" theory of the commerce clause. The theory presumes that, absent congressional action in the field, a state may regulate to protect the public health and welfare of its citizens, even though such regulation has some effect on interstate commerce, as long as the effect is not burdensome or discriminatory.\textsuperscript{83} Since no federal law re-

\begin{flushright}
American Petroleum Institute, State Relations Memorandum 20-21 (August 18, 1978).


81. 437 U.S. at 124.

82. \textit{Id.} (citing Lincoln Fed. Lab. Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949)). The legislative history of the Maryland statute indicated a purpose to preserve the competition in gasoline retail marketing, arguably threatened by the forward integration of major oil companies. Due to the wide belief among experts that private brand marketers were actually the competitive force in the marketplace, the divorcement provisions were directed solely at producers and refiners. Comment, \textit{supra} note 18, at 333 nn.72-73.

quired either divorcement or divestiture in the petroleum industry, Maryland was free to adopt this method of regulation as a means of furthering a legitimate state interest. According to a majority of the Court, the Maryland statute discriminated neither against interstate goods nor in favor of local producers and refiners. By defining interstate commerce as the in-


According to the test enunciated in Barnwell, the state must have a legitimate interest in enacting its statute. Id. at 185-86. Discrimination against interstate commerce in purpose or effect, "whether forthright or ingenious," is not a legitimate state interest. Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940). See also Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977). If the statute is not deemed discriminatory, the Court will consider whether it is reasonably adapted to accomplish a legitimate state purpose, and it may defer to the state legislature’s determination of the wisdom and reasonableness of the regulation. 303 U.S. at 190-91. The Court then balances any burdensome effect upon interstate commerce against the state’s interest in achieving its avowed purpose by the particular means chosen. See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Breard v. Alexandria, 341 U.S. 622 (1951).

The recent trend in Burger Court decisions leans toward “state presumption”; that is, in the absence of any Congressional declaration of federal concern, the Court will presume that the field is open to state regulation. Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623 (1975).

84. See note 3 supra. Since federal and state antitrust laws are complementary, the general view is that the commerce clause does not preempt state antitrust laws. See generally AMERICAN BAR ASSOCIATION ANTITRUST SECTION, STATE ANTITRUST LAWS (1974). See also Note, supra note 83, at 1476-77. State divorcement statutes having no parallel in federal law, and are, however, a departure from traditional state antitrust legislation. Note, supra note 22, at 1309.

85. See note 83 supra. Based on the State Comptroller’s study and other testimony, the Maryland legislators had concluded that divorcement would enhance and preserve inter-brand competition, increase the competitiveness of the gasoline market, and increase benefits to consumers. See Brief of Appellants, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) at 17, 23 (citing testimony by the oil companies and Dr. James M. Patterson, Professor of Marketing at Indiana University and coauthor of COMPETITION, LTD.: THE MARKETING OF GASOLINE (1972) and HIGHWAY ROBBERY: AN ANALYSIS OF THE GASOLINE CRISIS (1974)).

86. 437 U.S. at 126. The Court distinguished Exxon Corp. from other cases in which the effect of the state regulation had been to increase sales of local goods and decrease sales of out-of-state goods. Id. (citing Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977) and Dean Milk Co. v. Madison, 340 U.S. 349 (1951)). Hunt involved a North Carolina statute mandating that all apples sold or shipped into the state in closed containers bear either the applicable federal grade or a designation that the apples were not graded. Washington apple growers challenged the statute as discriminating against the interstate shipment of their apples grown, graded, and marketed under standards stricter than the federal or North Carolina standards. 432 U.S. 333, 338 (1977). The Supreme Court held that the challenged statute discriminated against Washington growers and dealers by raising their costs of doing business and stripping them of the competitive advantages they had earned for themselves by an expensive, stringent inspection and grading system. Id. at 351.
terstate flow of goods, rather than retail transactions, the Court could easily deny that any serious threat to the movement of petroleum products into Maryland existed by pointing to the fact that divorcement would affect only a small percentage of the service stations in the state. The Court did not foresee any injurious effect on the gasoline retail market, its dealers, and its customers, even though some interstate firms might be burdened by the law. No preference was given to local producers and refiners since Maryland had none, and there was no barrier to interstate independent dealers. Thus, the oil companies’ theory that the statute would create a protected enclave for independent dealers in Maryland against out-of-state competition was rejected. In the Court’s view, the fact that the burden of the state regulation fell on some interstate companies did not, by itself, establish a claim of discrimination against interstate

Not only did North Carolina apple growers suffer no commensurate costs, but the statute did remarkably little to accomplish its purpose of protecting consumers since it permitted apples to be sold in closed, ungraded containers. The Court in Exxon Corp., however, saw no higher costs for out-of-state gasoline dealers in the local market. In Exxon Corp., found no economic isolation, no barrier to the flow of out-of-state goods, and no discrimination against interstate independent gasoline dealers in favor of intrastate independent dealers. 437 U.S. 117, 125-26 (1978).

In Dean Milk, an Illinois milk distributor challenged a Madison, Wisconsin ordinance prohibiting the sale of milk bottled more than five miles from the city’s center. The Supreme Court invalidated the ordinance, as discriminating against the flow of goods of out-of-state businesses, aiming to protect the large local milk industry from competition. 340 U.S. 349, 354 (1951). The regulation, establishing an economic barrier, could not be justified as essential for the protection of local health interests. To uphold such a discriminatory burden on interstate commerce “would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.” By contrast, the Court in Exxon Corp. found no economic isolation, no barrier to the flow of out-of-state goods, and no discrimination against interstate independent gasoline dealers in favor of intrastate independent dealers. 437 U.S. 117, 125-26 (1978).

Dissenting in Exxon Corp., Justice Blackmun argued that the Maryland statute discriminated against out-of-state retailers in favor of local independent dealers. He characterized the discrimination as aimed against retailing rather than against the interstate flow of goods: “The fact that gasoline will continue to flow into the State does not permit the State to deny out-of-state firms the opportunity to retail it once it arrives.” He concluded that such a denial amounted to “protectionist discrimination not justified by any legitimate state interest that cannot be vindicated by more even-handed regulation.” Although the number of company-operated retail gasoline stations affected by the statute was small in relation to the total, more than 99% of the class of stations statutorily insulated from out-of-state competition were operated by local business interests. Of those entirely excluded, 95% were out-of-state firms.

87. Id. at 139 (Blackmun, J., dissenting).
88. Id. at 126.
89. Id. at 124-25 n.15. Hudson Oil Company acquired a refinery in Maryland after the statute’s enactment. Consequently, it may no longer market gasoline as a non-producer and non-refiner, as Sears Roebuck and Pantry Pride.
90. Id. at 125.
Similarly rejected was the oil companies' claim that the Maryland statute impermissibly burdened interstate commerce. Appellants argued that independent refiners—Ashland Oil, Kayo, Petroleum Marketing Corporation, and Hudson Oil—might withdraw entirely from Maryland because they could market effectively and profitably only through company-operated stations. Since these independents stimulated price competition in gasoline marketing, it was argued that their exit would result in higher prices and fewer special services to consumers. The Court noted, however, that since the functional divorcement provisions of the Maryland law did not require these independent refiners to withdraw from retailing, but merely to lease those stations they owned to independent dealers, there was no reason to assume that independent refiners' share of the entire gasoline supply would not be replaced promptly by other interstate refiners and the consumers' source of supply maintained.

The Court refused to accept the oil companies' argument based on *Hughes v. Alexandria Scrap Corp.* that the challenged statute interfered with "the natural functioning of the interstate market." *Hughes* and the line of cases preceding it focused on the natural functioning of the inter-

91. Id. Justice Blackmun vigorously disagreed in his dissents: when the burden is significant, when it falls on the most numerous and effective group of out-of-state competitors, when a similar burden does not fall on the class of protected in-state businessmen, and when the State cannot justify the resulting disparity by showing that its legislative interests cannot be vindicated by more evenhanded regulation, unconstitutional discrimination exists. *Hughes* at 148 (Blackmun, J., dissenting).

92. 437 U.S. at 127. As Justice Blackmun noted in his dissent, Maryland's divorcement requirement would affect the direct operation of 17 Ashland stations valued at $2 million and 21 Petroleum Marketing stations valued at over $2 million. *Id.* at 139 n.6. Thus, he argued that the divorcement statute would work far greater injury on competitors than that found unconstitutional in *Hunt*. The increased costs threatening Washington apple growers were of less magnitude than those facing all the oil producers and refiners required to divest operations valued at more than $10 million. *Id.* at 140.

93. *Id.* at 127.

94. 426 U.S. 794, 806 (1976) (Virginia scrap metal processor challenged a Maryland statute as unlawfully burdening the flow of "hulks" (old, inoperable vehicles) across state lines and denying equal access to the state bounty offered for destruction of such hulks). The *Hughes* Court said that the Maryland law did not prohibit the flow of hulks, or regulate the conditions under which the flow could occur. If there were any impact on the interstate flow, it was indirect only and occurred because the state had made the disposal of hulks in Maryland more lucrative. *Id.*

95. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Arizona's requirement that state-grown fruit be packed before shipment held to burden interstate shipment in bulk); *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (N.Y. statute denying licenses to milk distributor to open plant for out-of-state shipment of raw milk held to burden impermissibly interstate commerce); *Toomer v. Witsell*, 334 U.S. 385 (1948) (South Carolina requirement
state market of goods, the Court noted, rather than the protection of a particular market structure or method of operation. The Court conceded the possibility that the consuming public might be injured by the loss of high volume, low-priced stations operated by the independent refiners, but it would not address a problem relating only to the statutes economic wisdom, instead of its burden on commerce.

The oil companies' final commerce clause argument fared no better. The Court rejected their "novel" suggestion that because the economic market for petroleum products is nationwide, no state has the power to regulate gasoline retail marketing. The Court observed that while multifarious state divorcement laws might be enacted, rarely has the commerce clause alone been sufficient to preempt an entire field from state regulation. Only when a lack of national uniformity would impede the flow of interstate goods has the preemption doctrine been invoked. In the Court's view, the oil companies' were not concerned with the burden of complying with a variety of different regulations, but rather with the possibility that all of the states would follow Maryland in concluding that divorcement of producers and refiners from direct retailing of gasoline was warranted.

By deferring to the State's choice of regulation to preserve competition in gasoline retailing, the Court declined to render an independent analysis of the divorcement statute's purpose and effect. Justice Blackmun's dissent performed that assessment, however. He viewed the state interest in that offshore shrimp boats pack and pay state taxes on catch before transporting in interstate commerce found unconstitutionally burdensome.

96. 437 U.S. at 127 (citing Breard v. Alexandria, 341 U.S. 622 (1950)). Breard sanctioned a municipal ordinance prohibiting door-to-door peddlers from calling on private residences without invitation because:

the usual methods of seeking business are left open by the ordinance. That such methods do not produce as much business as house-to-house canvassing is, constitutionally, immaterial and a matter for adjustment at the local level in the absence of federal legislation. . . . To solicitors so engaged, ordinances such as this compel the development of a new technique of approach . . . .

Id. at 638-39.

97. 437 U.S. at 128. The Court did not inquire into alternatives less drastic than divorcement since that, also, would be substituting its judgment for that of the Maryland legislature. Id. Analysis of less drastic means to accomplish the state's avowed purpose is required only when the state's regulation is found to discriminate against or impermissibly burden interstate commerce. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951).

98. 437 U.S. at 128.


100. 437 U.S. at 128. Indeed, many states have either considered or have plans to consider divorcement laws fashioned after the Maryland statute. See note 71 supra.
and the statute's effect on competition as "nothing more than a desire to protect particular competitors—less efficient local businessmen—from the legal competition of more efficient out-of-state firms, illegitimate under the Commerce Clause." Moreover, Blackmun concluded that while the state might have a legitimate concern in limiting the economic power of vertical integration, nothing in the record indicated that the existing vertical integration in the Maryland gasoline market had inhibited competition. If the state was concerned about unfair competitive behavior such as predatory pricing or inequitable allocation of petroleum products by integrated firms, said Blackmun, existing federal and state laws provided a remedy.

B. Absence of Federal Preemption

Once the Court determined that the commerce clause of its own force would not preempt the statute's divorcement provisions, it proceeded with little difficulty to uphold the remaining provisions on uniform voluntary allowances. The companies argued that the uniformity requirement conflicted with the section 2(b) "meeting competition" defense of the Robinson-Patman Act and frustrated its basic federal policy favoring competition reflected in the Sherman Act as well. In doing so, the com-

---

101. 437 U.S. at 141 (Blackmun, J., dissenting). Justice Blackmun noted that, in the record below, the state repeatedly conceded its statute was intended to protect "the retail dealer as an independent businessman [by] reducing the control and dominance of the vertically integrated petroleum producer and refiner in the retail market." Id. at 140 (Blackmun, J., dissenting).

102. Id. at 142-43 (Blackmun, J., dissenting) (citing the trial court's finding from stipulated facts by the parties that retail gasoline marketing was highly competitive because of the number and location of available facilities, the comparatively small capital costs for entering the business, the mobility of the purchaser at the time of purchasing, the visibility of price information, and the interchangeability of products and variety of prices, brands, and services available to the consumer. Id. at n.9). The trial court found that divorcement would be harmful to competition and would primarily protect the independent dealers rather than the public at large. Id. at n.10


106. Brief for Appellants, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). The oil companies argued that Congress intended the Sherman Act preserve the competitive system as the country's economic order by maintaining the national flow of trade and freedom of competition in interstate commerce. Yet, because the Act was inadequate to accom-
panies asked the Court to allow a federal statutory defense to stand supreme over a state law imposing on a supplier an affirmative duty to grant uniform voluntary allowances to every dealer it supplied.107

A proper supremacy clause analysis, the companies argued, would examine the purpose, operation, and effect of both the federal and the state laws in order to determine whether Congress actually intended to preempt the state statute. In Exxon Corp., however, the Court declined to assess the purpose and effect of both federal antitrust statutes and the Maryland allowances provision. It looked no further than to what it perceived to be the state legislature's prerogative to promote uniform treatment of commercial competitors.108 The Court began by adopting the Maryland Court of Appeals' construction of voluntary allowances as encompassing "temporary price reductions in the wholesale price to a retail dealer to enable
the dealer to meet the lower price of a competing retail dealer." 109 It held that the section 2(b) "meeting competition" defense would be inapplicable when a competing retailer independently lowered its price, prompting the oil company to reduce prices to one of its own retailers in order to meet the competition. In this instance, the voluntary allowance would not be a response to competition from another oil company. 110 Instead it would give an unfair advantage to the branded dealer in a "price war" with a private-brand marketer who had reduced his profit margin in order to price below the branded dealer competitor. 111 Unable to compete by brand recognition, the independent marketer could capture a share of the market only by volume sales of cheaper gasoline. If the competing branded dealer received a discount price from a branded supplier in order to meet the independent's low price, however, the success of the independent's strategy would be jeopardized. 112

Exxon Corp. also questioned whether the section 2(b) "meeting competition" defense would apply when the competing retailer's lower price was subsidized by its supplier and the oil company gave its own retailer a price

109. 437 U.S. at 130. See note 79 supra.

110. 437 U.S. at 129 (citing FTC v. Sun Oil, 371 U.S. 505 (1963)). The Exxon Corp. Court noted that the uniformity requirement of the Maryland statute would not apply in the "price raid" situation, as discussed in note 61 supra. 437 U.S. at 129 n.19. In Standard Oil Co. v. FTC, 340 U.S. 231, 242-50 (1951), the Supreme Court interpreted the legislative intent of § 2(b) as neither abolishing competition nor so radically curtailing it that a seller would have no substantial right to self-defense against a price raid by a competitor. Id. at 247-49 (citing H.R. REP. NO. 2287, 74th Cong., 2d Sess. 16 (1936)). Similarly, in FTC v. Sun Oil, 371 U.S. 505 (1963), the Court interpreted congressional intent as limiting the § 2(b) defense to the acting parties, the sellers. Id. at 514-23. It would make little sense linguistically and practically, said the Court, to talk of a wholesaler's meeting of the "equally low" price of one of his purchaser's retail competitors since wholesale prices are generally lower than retail prices. Id. at 515. Furthermore, the defense would not apply to a supplier who reduced its wholesale price to allow a dealer to meet in turn lower retail price competition when there was no indication that the Act contemplated a two-step transaction. Id. The Court in Sun Oil thus interpreted the Robinson-Patman Act as favoring equality of treatment to insure that purchasers from a single supplier would not be injured by that supplier's discriminatory practices. Id. at 516, 519.

111. See Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420, 421 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). Texaco had offered its dealers discounts or "allowances" to stay competitive with other dealers in the area. The court deemed station sales to be at the competitive level justified under the Act. 136 F. Supp. at 421. It said the Act would not permit discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competition. Id. (emphasis added).

112. The discount, or temporary allowance, makes it more costly for price-conscious competitors to increase their share of the market and tends to discourage both market entry and expansion. 371 U.S. at 523. See Note, supra note 55, at 1711.
reduction to meet the competition.\textsuperscript{113} The Court found it unnecessary to
decide whether the section 2(b) defense would apply, because even if it
did, any conflict between the Maryland statute and the Robinson-Patman
Act would be insufficient to require preemption.\textsuperscript{114}

Nevertheless, the oil companies further contended that because granting
uniform allowances to all of their dealers supplied statewide would result
in primary-line price discrimination, they would violate the Robinson-Pat-
man Act.\textsuperscript{115} The Court found, however, that compliance with both federal
and state law was possible. First, injury flowing from a uniform price
reduction would not be actionable under section 2(a) of the Robinson-Pat-
man Act prohibiting only price discrimination.\textsuperscript{116} Second, the Maryland
law did not require a supplier to grant voluntary allowances. It merely
required nondiscriminatory uniform grants of allowances exclusive of any
temporary allowance given to retain a deal in a “price raid” by another
supplier.

Although circumstances could be envisioned in which price discrimina-
tions proscribed by the Robinson-Patman Act might be compelled by the
Maryland statute, the existence of such potential conflicts was entirely too
speculative, in the Court’s view, to warrant preemption.\textsuperscript{117} Moreover, the
Court found no justification for preemption in the hypothetical conflict
when, in complying with the Maryland statute, the oil companies would
grant voluntary allowances to their Maryland dealers and incur liability
for secondary-line price discrimination against their District of Columbia
dealers, even though section 2(b) would permit such localized discrimina-
tion.\textsuperscript{118}

The Court refused to accept the oil companies’ assertion that section
2(b) established a federal right to engage in discriminatory pricing, stating
that the provision defined only a specific and limited, though absolute, de-
fense for a seller’s reductions in price made in good faith to meet competi-
tion.\textsuperscript{119} The Court deemed illogical the inference that by excluding certain

\begin{itemize}
  \item \textsuperscript{113} 437 U.S. at 129 n.20. For discussion of the conflicting decisions in \textit{Enterprise Indus.}
    and \textit{Bargain Car Wash}, see note 61 \textit{supra}.
  \item \textsuperscript{114} 437 U.S. at 130.
  \item \textsuperscript{115} \textit{Id.} The companies argued that while a Baltimore dealer might desperately need an
    allowance, to give him one would require the same allowance be given to all other dealers in
    the state. Thus, an unneedy Salisbury dealer receiving an allowance could lower his price
    and injure a competitor across the street, while exposing the supplier to a price discrimina-
    tion suit to which he would have no “meeting competition” defense. \textit{Id.}
  \item \textsuperscript{116} 437 U.S. at 130 n.21.
  \item \textsuperscript{117} \textit{Id.} at 131.
  \item \textsuperscript{118} \textit{Id.} at 131 n.22.
  \item \textsuperscript{119} \textit{Id.} at 132.
\end{itemize}
competitive behavior from the general ban against discriminatory pricing, Congress intended to preempt Maryland's power to prohibit any conduct within that exclusion, particularly when the basic purposes of the state statute and the Robinson-Patman Act were similar. The oil companies argued that Maryland's uniform allowances provision undermined the section 2(b) competitive balance between the section 2(a) price discrimination prohibition and the Sherman Act. Only in the sense that the Maryland law would have an anticompetitive effect could it be in conflict with Robinson-Patman, concluded the Court.

The supremacy clause challenge in Exxon Corp. suffered for lack of a solid statutory foundation. The oil companies attempted to elevate the section 2(b) defense to a federally created right to discriminate in price. Failing that, they were saddled with the antidiscrimination command of section 2(a) which could lead to uniform pricing in an oligopolistic market. In such a situation, the Robinson-Patman Act and the Maryland law have a similar effect. The crucial difference, and the potential conflict, is that the state law will not always sanction selective price reductions under the section 2(b) defense. Price concessions may provide the main element of competition in an oligopolistic market dominated by a few major firms. Moreover they may also occasion a supplier's assertion of the "meeting competition" defense.

---

120. Id.
121. Id. at 133. The companies contended that by commanding uniform application of all voluntary allowances, the statute would force a supplier to make a "ruinous" choice between two unacceptable alternatives. Id. If a supplier decided not to reduce its price to a particular dealer who was adversely affected by a competing supplier's price reduction to its dealers, then the first supplier's dealer would lose sales of its supplier's gasoline. That dealer might switch to another supplier and receive a lower price, or go out of business. Brief for Appellants at 80-81, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). Alternatively, the first supplier could meet the competing supplier's lower price but suffer costly consequences by having to extend the same lower price to all of the supplier's dealers in Maryland and perhaps even having a price discrimination suit brought against him by a nearby dealer in the District of Columbia who did not receive the discount. Id. Further, it was noted that a statewide extension of a 3-cent competitive allowance to all 194 Shell dealers in Maryland would cost Shell $12,000 a day. Id. at 81 n.43.
122. 437 U.S. at 133.
123. Speech by Jonathan C. Rose, Antitrust Division, Dep't of Justice, to the Legal Committee of the Grocery Manufacturers of America (Oct. 29, 1975), reprinted in Hearings on H.R. 130, supra note 40, at 274-75.
Yet, when independent private brand marketers generate vigorous price competition, price concessions or "voluntary allowances" may be unnecessary and even anticompetitive. To protect themselves against major brand refiner/marketers who might otherwise subsidize their direct operated and franchise dealer stations with lower distribution prices, rent rebates and other allowances, these private brand marketers have promoted the Maryland divorcement solution. Similarly, branded franchise dealers hope the Maryland law will give them allowances similar to those received by their fellow franchisees or at least rid them of price competition from refiner directly-operated outlets. The Court in Exxon Corp. never discussed the possible effects of retail divorcement and uniform allowances on competition. Instead, it deferred to the Maryland legislature arguing that if an adverse effect on competition could itself render a state statute invalid, the states' power to engage in economic regulation would be effectively destroyed.125

Blackmun's dissent raises a critical question which the majority avoided: whether state regulation affecting interstate commerce should protect competitors or the competition among them. The Maryland statute was designed to preserve competition among retail gasoline dealers by excluding refiner/marketers from direct retailing. Yet, absent aggressive price competition from refiner-direct operations, dealers may raise their prices to the detriment of the consuming public. The state is charged with protecting the public health and welfare by its economic regulation. Should it be permitted to decide which "public" needs more protection: gasoline dealers or consumers? Answering these questions would have required evaluation of the economic implications of retail divorcement. Instead, the Court accepted the state's political policy to protect local competitors.

III. PRACTICAL IMPLICATIONS OF RETAIL DIVORCEMENT

Exxon Corp. has sparked divorcement law interest in other states wishing to preserve competition in gasoline retail marketing by curbing forward integration.126 Unfortunately, it has given little guidance on the

---

Otherwise, sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.

A prudent businessman faced with this choice often would forego the price reduction altogether. This reaction would disserve the procompetitive policy of the Sherman Act without materially advancing the antidiscrimination policy of the Robinson-Patman Act.

98 S. Ct. at 2890.
125. 437 U.S. at 133.
126. See note 71 supra.
desirability of retail divorcement.

A. Effect on Major Oil Company Forward Integration

The trend in major and independent refiner/producer marketing techniques toward direct company operation of retail outlets may be short-circuited by state retail divorcement laws. Indeed, that is the statutes' objective. The extent to which refiners will divorce themselves from retailing depends on whether divorcement enactments occur on a broad scale. Assuming that they do, the major and certainly the independent refiners' respective control of the market in gasoline retailing arguably could decrease.127 The large integrated marketers would no longer be able to command a price advantage over their independent private brand competitors by "transferring" gasoline to their company-operated stations and selling it to customers at low prices while still allowing themselves a margin of profit.128

The methods by which these marketers dispose of their company-operated stations will become very important. Independent gasoline dealers who lobbied for retail divorcement statutes have assumed that producers and refiners would naturally sell or lease their direct outlets to independent dealers whom they would continue to supply.129 Those expectations, consistent with traditional gasoline marketing techniques, may be borne out to some degree.130 Yet, major oil companies may decide not to turn their company stations over to dealers but simply to sell them off and withdraw from certain markets in order to economize their downstream operations.131 Alternatively, producer/refiners may lease their stations to only a

127. It is hard to imagine, however, that the major producer/refiners' influence would decline since they market to such a large extent through franchise dealers.

128. See note 55 and accompanying text supra.

129. Hearings on H.R. 8117, supra note 34, at 7-8 (statement of Lewis A. Haskell, Jr., President, National Congress of Petroleum Retailers). H.R. 8117 provided federal small business loans so that independent dealers could purchase stations targeted for divestiture by large producers and refiners. See note 4 supra.

130. Exxon screened dealer candidates for operation of 46 of its company-operated stations in Maryland shortly after the state divorcement requirement became effective. U.S. OIL WEEK, Nov. 27, 1978, at 8.

131. As one columnist and legal authority commented, "The court didn't say refiners have to turn their stations over to the dealers. . . . I see the dealers losing very badly although they think they have won a great victory. The oil companies will sell off their $400,000 sites to others, not to them." Statement by Sam Borenkind, quoted in Reid, Divestiture: What Will the Majors Shed, NATIONAL PETROLEUM NEWS, Aug., 1978, at 59 [hereinafter cited as Reid, Divestiture].
few jobbers rather than create a multitude of one-station jobbers. The major companies may also franchise "multi-station" dealers in metropolitan markets, with the dealers purchasing their petroleum supplies at jobber prices rather than at the higher "dealer tank wagon" price. Working through wholesalers would give the majors virtually the same price advantages they enjoyed without divorcement in states such as Maryland where the statute does not apply to wholesaler retail outlet operations.

Even if many states enact retail divorcement statutes, the major producer/refiners will continue to dominate gasoline marketing. The majors own the largest percentage of total retail gasoline outlets in the United States, of which only a small portion are company-operated. The ban on direct retailing by the majors may only slow their efforts to streamline their marketing operations to produce a profit downstream.

132. Reid, How the Major Execs See Marketing Five Years From Now, NATIONAL PETROLEUM NEWS, April, 1978, at 70.
134. John Shenefield, Assistant Attorney General, Antitrust Division, warned the Virginia House of Delegates that retail divorcement legislation could indirectly benefit the large integrated oil companies disposing of most of their products through independent dealers, and directly benefit the integrated firms by disrupting the marketing activities of their most efficient independent rivals. Testimony on Retail Marketing Divorcement and Divestiture Legislation before the General Laws Comm. of the Virginia House of Delegates 14-15 (Jan. 18, 1979).
135. See note 25 supra. In Maryland, the majors direct-operated outlets represent only 5% of the total retail stations. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 123 (1978).
136. Alfred F. Dougherty, Jr., Director of the Federal Trade Commission's Bureau of Competition, stated that the major companies nationwide chains of franchised dealers had grown unnecessarily inefficient and costly, and that the companies' decision to reduce the number of franchised dealers was a healthy development. Letter to Senator Clifford Hansen (May 4, 1978), reprinted in 124 Cong. Rec. S7001-02 (daily ed. May 5, 1978).

A possible indication of the major companies' efforts to streamline their marketing operations is their reduction in investment in that sector. In 1970 marketing costs were $1.45 billion, or 19% of the industry's total capital expenditures, but by 1976 they were down to $625 million, only 3% of total capital expenditures. Chase Manhattan Bank, Capital Investments of the World Petroleum Industry, reprinted in Petroleum Industry Research Foundation, Inc., The Impact of Gasoline Station Divestiture on Competition 15 (Dec. 1978).
could very well be higher refined product prices for consumers.137

B. Disproportionate Impact on Independent Refiners

Gasoline retail divorcement, touted as a protection measure against the overbearing market power of the major integrated companies, operates most harshly on the independent refiner/marketers. These independent operators have commanded an increasing share of the gasoline market primarily through their use of company-run stations and competitive pricing.138 A retail divorcement requirement, such as in the Maryland statute,

137. A Lundberg survey revealed that company operated stations were pricing an average of 1.9 cents a gallon below lessee dealer stations. Among majors only, the salaried-to-lessee spread was 1.3 cents a gallon. Among nonmajor producer/refiners the spread was 1.6 cents. The Maryland Question, supra note 133, at 3.

Several federal agencies have warned of the anticompetitive, anticonsumer effects of a ban on producer/refiner company stations. A Justice Department official has stated that marketing divestiture would be protectionist for the market positions of individual petroleum distributors, not for competition. Letter from Patricia Wald, Assistant Attorney General, Antitrust Division, to Senator Clifford Hansen (May 3, 1978), reprinted in 124 CONG. REC. S7000-01 (daily ed. May 5, 1978). Owen M. Johnson, Jr., former Director of the Bureau of Competition of the Federal Trade Commission, testified that the independent branded dealers had a "record of relative inefficiency" due to myriad low-volume operations with high unit costs, and that price competition has generally come from nonbranded independents. Hearings on H.R. 130, supra note 40, at 260. Replacement of low-volume dealers with high-volume directly owned outlets may benefit consumers if nonbranded independents are able to obtain gasoline at reasonable prices to sell in competition with the majors. Id. John Hill, former administrator of the now defunct Federal Energy Administration, said that a restriction on the number of refiner operated outlets would interfere seriously with market competition and encourage continuation of some inefficient retail operations. H.R. REP. No. 1615, 94th Cong., 2d Sess. 36 (1976).

138. John Shenefield, Assistant U.S. Attorney General, Antitrust Division, testified before the General Laws Committee of the Virginia House of Delegates that retail divorcement would be highly inequitable and seriously anticompetitive: "Such legislation would impose severe and unnecessary hardships on independent refiners in a manner that suggests that it might be designed to insulate the full-service independent dealer from the competition offered by high-volume, low-overhead, company-operated gas-and-go stations." Testimony before the Virginia House of Delegates, supra note 133, at 17. Similar conclusions were reached in the Lamont & Phillips study of the Virginia gasoline industry. See Lamont & Phillips, supra note 133, at 3.

Through direct operations, independent refiners can regulate the retail price at which their gasoline is sold and undersell their branded dealer competitors. The fact that these new entrants have sold twice the average monthly volume that the traditional service stations have marketed not only suggests the effectiveness of the independent refiner/marketers but also explains their unpopularity with the independent branded dealers promoting divorce legislation.

Also opposed to major and independent refiner-direct stations is the Society of Independent Gasoline Marketers of America (SIGMA). This group is concerned that the independent refiners, like the majors, will subsidize their lower priced direct-sale gasoline with higher wholesale prices charged to SIGMA's independent marketers. Hearings on H.R. 130, supra note 40, at 198.
could eliminate the competitive benefits which the independent operators have brought to the gasoline retail market. First, independent refiner/marketers may withdraw from gasoline retailing in the state altogether. It is uneconomical for the independents to market through franchise arrangements and independent dealers are not likely to be interested in independent nonbranded franchises absent the promotional support and assurances against failure offered by a major brand supplier.

Second, the independent refiner/marketers' withdrawal will deprive customers of a significant number of the low-cost gasoline outlets that often discipline the pricing habits of branded stations. Third, the independent refiners may decide that, without retail operations, the incentives to supply the wholesale market in a divorcement state are inadequate. Since the aggressive and competitive independent nonbranded marketers obtain a major portion of their gasoline from independent refiners, the independent marketers may be indirectly disadvantaged by the divorcement statutes.

Independent refiner/marketers obviously can ill afford to pick up stakes in every state enacting divorcement legislation. Consequently, they are planning extensive lobbying efforts to combat state divorcement action. They have learned from experience that without a brand name, they must compete by price. They will not relinquish easily the price advantages of company operated retailing, permitting them to enter new markets successfully, test innovations, respond quickly to consumer demands, and assure outlets for their refined products.

The assurance of product outlets is one of the justifications for forward integration in the petroleum industry. The oil companies have argued that a serious anticompetitive effect of the Maryland divorcement statute will be to preclude the forward and backward integration of the independent

139. The independent refiners suggested this possibility may occur in Maryland but have not committed themselves to withdrawal. See Brief for Appellants at 38, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).


142. See, e.g., U.S. Oil Week, Jan. 8, 1979, at 6, col. 1. Many of the major integrated companies are also working on antidivorcement campaigns. U.S. Oil Week, Aug. 7, 1978, at 8.

143. The major oil companies make the same arguments in defense of their own company outlets. Brief for Appellants at 33-39, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). Since few independent refiners own or control much crude oil, they are vulnerable to supply interruptions and fluctuations in the price of whatever supplies are available. Id. They can attempt to avoid potential losses at the refinery level, however, by maintaining a high demand for their low-priced gasoline. Id. at 37-39.
refiners and marketers. The more aggressive independent nonrefiner marketers have little concern about integration in either direction. They reap profits in retailing and would relinquish their newly acquired refineries rather than their gasoline stations. Yet, for the independent refiner/marketers, the economic choice is not so easy. Viable independent producers and refiners are needed to foster competition in petroleum marketing at every functional level.

C. Remedy for Subsidization

Proponents of Maryland's retail divorcement law have argued that it prevents the integrated oil companies from using their windfall crude oil profits to subsidize gasoline price cuts, preventing retailers from combating selective price cuts by their nonintegrated competitors. The divorcement statutes curb subsidization in two ways. First, in a dual distribution situation, refiners will not be able to sell gasoline through company-operated stations. Therefore, they will lack the opportunity to undercut prices offered by their own franchisees or private brand independent marketers. Second, the statutory requirement that any voluntary allowances be applied uniformly prevents a refiner from subsidizing some of its dealers to the disadvantage of its other dealers. Thus, retail marketers are on more even footing.

Major refiners sell gasoline to their franchisees at the dealer tank wagon price which includes charges for transportation, credit cards, brand name and other nonprice competitive advantages. That price is usually several

144. Id. See also Position Paper, supra note 141, at 10.
145. Reid, Divestiture, supra note 131, at 62.
147. Brief for Appellees at 18, Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978).
148. See notes 58 and 61 and accompanying text supra. The National Oil Jobbers Council has urged that divorcement statutes also prohibit refiners from acting as their own wholesaler and using profits from other segments to subsidize their marketing operations. Hearings on H.R. 130, supra note 40, at 175 (statement by John Gifford, Chairman of the Board, The Gifford Co.).
149. Subsidization would occur, for example, when a refiner grants a voluntary allowance to one of its dealers to meet the lower price of the dealer's competitor, imposed as a similar voluntary allowance granted by the competitor's supplier. The "good faith" requirement of the section 2(b) "meeting competition" defense is lacking if the first supplier is meeting the price which it knows to be discriminatory. See, e.g., National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 524 (7th Cir.), cert. denied, 393 U.S. 977 (1968); Note, supra note 61, at 1716 n.59. Moreover, it would be difficult to determine whose competition the first refiner was meeting when there were several different branded and nonbranded stations existed in the area.
cents above the refining gate or the "rack" price, paid by the independent marketer for gasoline purchased directly from a refiner. To sell its gasoline at a lower price, the independent reduces the margin between the rack price paid and the price charged by its branded competitors. Its aim is to improve its market position by outstripping branded dealer sales volume, compensating for lost profit margin by quantity sales. If, however, the major refiner can reduce its differential to allow its dealer to compete with the independent marketer, the independent is squeezed out—it has no more margin to sacrifice. The statutory requirement that any supplier's voluntary allowance be available uniformly offers independent refiners and marketers protection from integrated firms' subsidization.150

Yet the statute's protection may prove illusory. Others beside major refiners subsidize their retail operations. Many jobbers supply their own direct-operated outlets at lower prices than that charged dealers.151 Dealers are angered by the practice, but the divorcement legislation they have promoted has only banned producers and refiners from retail marketing, not jobbers or wholesalers.

Another loophole in the statute exempts certain potential allowances, such as rent subsidies, from the uniformity requirement.152 Finally, some pricing differentiation may not be actionable as discriminatory. If, as the oil companies contended in Exxon Corp., uniform application of allowances results in discrimination against District of Columbia dealers, suppliers could establish a system of feathering, or zone pricing, to localize price cuts in border areas. Such a system minimizes the effects of the reduction by progressively increasing prices the farther the other dealers are from the zone of the initial discount.154

150. In his testimony on Virginia's retail divorcement proposal, see notes 134 and 138 supra, Assistant Attorney General Shenefield expressed some sympathy for branded dealers whose delivered price was 6 to 8 cents more than a refiner/marketer's price. He noted, however, that the differential might be cost-justified if the direct marketer used no credit cards or brand advertising, offered limited service, and had lower overhead costs. Testimony before the Virginia House of Delegates, supra note 134, at 9-10. Shenefield felt existing antitrust laws, providing an injured dealer a treble damage action, both serve as an adequate deterrent to subsidization and afford the dealer relief and monetary compensation. Id. at 12.

151. The Oil Daily, Aug. 24, 1978, at 1, col. 3; at 5, col. 5.

152. For example, if rental charges are based on gasoline sales volume, a dealer who sells more gasoline will pay less rent. The scheme operates more as an incentive than an allowance.

153. See Exxon Corp. v. Governor of Md. 437 U.S. 117, 131 n.22 (1978), and discussion in text accompanying note 121 supra.

154. Comment, supra note 19, at 340. Feathering was suggested as a permissible alternative by the Supreme Court in FTC v. Sun Oil, 371 U.S. 505, 527-28 n.17 (1963) (dictum). During oral argument before the Supreme Court in the Exxon Corp. case, Maryland's Assis-
A major form of subsidization which the divorcement statute does not remedy is the cross-subsidization of the major companies by the independent refiners, largely dependent on the majors for crude oil supplies.\footnote{155. For discussion of cross-subsidization resulting from federal energy regulations, see note 50 \textit{supra}.} If the majors continue to market gasoline through their overextensive franchise networks, they may recoup their losses from inefficient dealers by charging independent refiners more for crude oil and by raising the cost of gasoline and other refined petroleum products sold to independent marketers. Moreover, if the majors lease their stations to branded jobbers and supply them with gasoline at the rack price for resale directly through jobber-operated stations, the resulting price could undercut the branded franchisees’ prices. Alternatively, if rack prices increase, jobbers may increase their margins by charging higher prices for gasoline supplied to the independent retailers, whether branded or unbranded.

\textbf{D. Dealers’ Paltry Independence}

The independent dealers were ecstatic when Maryland’s gasoline retail divorcement law was upheld.\footnote{156. At their annual convention, the National Congress of Petroleum Retailers unanimously adopted a resolution calling for federal retail divestiture legislation as a primary objective to remove all gasoline suppliers from ownership and/or operation of service stations. \textit{The Oil Daily}, Aug. 24, 1978, at 1, col. 2-3.} Dealers, as independent businessmen and women, undoubtedly have a legitimate concern about self-preservation in the face of the major oil companies’ market withdrawals and the conversion of their remaining outlets to direct company operation. Retail divorcement appeared to be a panacea for the dealers’ ills. Not only would divorcement rid them of major and independent refiner/marketers’ direct competition, but it might also provide more stations for lease. Nonetheless, the actual outcome is not yet clear. Producers and refiners may opt for more multiple leasing, regional marketing, or jobber direct retailing.\footnote{157. \textit{See} note 133 and accompanying text \textit{supra}.} Another likely result is that interstate gasoline marketers neither producing nor refining oil, and perhaps only engaging peripherally in petroleum products—chain stores such as Sears, Pantry Pride, and Montgomery...
Ward—will be free to buy or lease stations. These stations are often the dealers' most vigorous competitors.\(^{158}\) The chain store does not expect any profit from gasoline sales, for the station is only a lure to attract customers to the owner's department store.

Any of these alternative marketing techniques promise active competition in gasoline marketing. Whether independent dealers will ever realize any benefits from their retail divorcement campaign is still uncertain.\(^ {159}\) It may be that these dealers will encounter the same level of price competition, but without the insulation available to them before enactment of divorcement legislation. In the past their suppliers could afford some of them temporary relief from potentially lethal competition when the going got rough. With a new statute requiring voluntary allowances be applied uniformly to all, suppliers are likely to let the marginal dealers fend for themselves. Ironically, the retail divorcement laws, as presently drafted, may affect gasoline retailing and objectionable marketing techniques the same way. Dealers operating uneconomically will close, and refiners will be marketing more effectively, through courtesy of the dealers' own efforts.

Perhaps it is for these reasons that dealer organizations have seized upon "minimum markup" legislation as an alternative remedy for alleged abuses of major companies' dual distribution practices.\(^ {160}\) Maryland, for example, has enacted a law requiring major distributors to provide independent dealers with gasoline at a wholesale price of at least four cents per gallon under the lowest price posted at company-operated stations.\(^ {161}\) Other states are considering the minimum markup concept as well.\(^ {162}\) In addition to guaranteeing them a good price for their gasoline, some mar-

---

\(^ {158}\) The Maryland Question, supra note 133, at 5.

\(^ {159}\) One major executive commented that in the long run, "We will see the demise of the lessee dealer. . . . Nobody is going to build expensive retail outlets and lease them to dealers under such restrictions." Reid, Divestiture, supra note 131, at 60.

\(^ {160}\) See notes 34, 57-58 and accompanying text supra.

\(^ {161}\) MD. ANN. CODE, art. 11, § 304(1)(Supp. 1977). Although the law's implementation was enjoined initially, the injunction was lifted in November, 1978. Exxon Corp. v. Lee, No. 25,393 (Anne Arundel County Cir. Ct. November 9, 1978) (unreported decision). The preamble to the Maryland law states:

[D]istributors of gasoline have sold gasoline in the State through retail outlets operated by them at prices below or substantially the same as the wholesale price at which the same distributors have sold gasoline to their retail dealers. Because of this pricing policy, retail dealers have been unable to fairly compete. . . . and as a result, some retail dealers have ceased their business operations. . . . [Thus the] purpose of this Act is to preserve competition among retail stations in this State for the benefit of the consuming public. . . .

\(^ {162}\) Minnesota has an eight percent minimum markup law in effect. NPN Bulletin, Nov. 27, 1978, at 2, col. 2. Michigan, Ohio, Iowa and South Dakota marketers are also interested in the minimum markup approach. Id.
keters favor minimum markup legislation as a viable "fall back" if they cannot persuade their state legislature to enact a retail divorcement law.\textsuperscript{163} Major and large independent refiners would prefer minimum markup because it would allow them to continue retailing through company-operated stations and price their gasoline higher. For jobbers, the minimum markup concept is preferable to retail divorcement legislation extending the direct marketing ban to jobbers as well as refiners.\textsuperscript{164} Yet minimum markup legislation suffers from the same flaw as retail divorcement: while intended to preserve competition by protecting small independent dealers, it may have the anticompetitive effect of increasing gasoline prices to consumers.\textsuperscript{165}

IV. OUTLOOK FOR FEDERAL PREEMPTION

With a new legislative session commencing in every state as well as in the Nation's capital in 1979, campaigns are under way to enact, defeat, and/or modify retail divorcement proposals. At least thirty-two states are expected to consider some form of gasoline marketing legislation.\textsuperscript{166} Independent branded dealers are promoting the Maryland prototype, possibly with amendments to exclude jobbers and chain stores from gasoline retailing. Jobbers and the independent marketers are anxious to evade the ban while ensuring that it will apply to refiner-direct marketing. Independent refiners might support divorcement proposals if they include an independent refiner exemption.\textsuperscript{167} Major and independent producers and

\begin{itemize}
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Shortly after Maryland's minimum markup law went into effect, Exxon and Citgo announced increases in the street price of their gasoline of one to two cents per gallon in the state. U.S. OIL WEEK, Nov. 20, 1978, at 4, col. 2.
\item In 1967, the FTC rejected an industry sponsored trade regulation that proposed basing Robinson-Patman enforcement on the postulate that a customary margin of two cents existed between retail prices of major and private brand gasoline and that price discrimination sufficient to eliminate or reduce that margin would injure competition. The FTC stated: \textquoteleft\textquoteleft[Whether a price difference in a specified amount might lessen competition can in most cases be determined only after the difference occurs and then only from an examination of all the surrounding facts and circumstances. Moreover, the Commission believes that by establishing a fixed margin between prices. . . of gasoline and by creating an automatic inference of competitive injury it. . . [might eliminate the] incentive to compete in price if the price margin they [independent marketers] desire is guaranteed to them. We cannot protect competitors to the detriment of competition itself.\textquoteright\textquoteright [1967] 3 TRADE REG. REP. (CCH) ¶ 10,373 at 18,241.
\item \textsuperscript{166} See note 71, supra.
\item \textsuperscript{167} See Hearings on H.R. 130, supra note 40, at 303-304 (statement of Evan Evans for Committee of Independent Refiners/Marketers).
\end{itemize}
refiners generally oppose any gasoline marketing regulation. States with strong dealer organizations and few resident producer/refiners are likely to adopt the Maryland approach to divorcement, perhaps with an added ban on wholesalers' direct retailing. Where jobbers are well organized, they may be successful in excluding wholesalers from coverage, as they did in Maryland.

State legislatures may wish to reserve judgment on gasoline marketing divorcement, however, until the economic impact of the Maryland, Delaware, Virginia and District of Columbia statutes can be analyzed. The regulations promulgated by these jurisdictions to implement their divorcement laws may effect significant changes—such as in the definition of "voluntary allowances" or the procedures for the timing of, and possible exemptions from, the divorcement requirements—potentially prompting other states to draft substantially different bills. The most important consideration may be the effect of the Iranian oil export slowdown on the availability of gasoline supplies in the United States. Retail divorcement could cause a reduction in gasoline supplies if producers and refiners decided to close their company-operated stations rather than keep them in operation with franchise dealers.168 In that event, the constriction on the flow of gasoline into the state would effect an impermissible burden on interstate commerce, according to the reasoning of Exxon Corp. v. Governor of Maryland.

Whether or not many more states enact gasoline divorcement laws, there will be pressure on the Congress to enact federal divorcement legislation. How the Congress will respond is speculative. One congressional proposal introduced in the 95th Congress by Senators McIntyre and Durkin would have imposed a selective moratorium on the opening and operation of retail gasoline stations or homeheating oil outlets by the major oil companies.169 Despite these efforts, Congress is not likely to require integrated

168. The Virginia State Senate heard testimony warning that refiner-direct stations might be withdrawn and with them their gasoline allocations established under the federal allocation program. The threat gave the Senators little pause, apparently, since they proceeded to enact their retail divorcement bill. See note 76 supra.

169. S. 3369, 124 CONG. REC. S12377 (daily ed. Aug 2, 1978). The bill applied only to a "major market shareholder," defined as "a refiner who is not an 'independent refiner' or a 'small refiner'" as those terms are defined in section 3 of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 752 (1976). The operative provisions of the introduced bill stated:

Any major market shareholder directly or indirectly engaged in the production, refining, or transportation of petroleum products shall not acquire, operate, or control, directly or indirectly, any retail outlet for the marketing of petroleum products which was not acquired, operated, or controlled by such person as of the date of enactment of this Act.
oil companies to "divorce" themselves from their marketing functions. Energy leaders in the legislative and executive branches generally view gasoline marketing as fairly competitive; debate is more focused on whether the production, refining, and distribution of petroleum is sufficiently anticompetitive to warrant total vertical divestiture. An important effect of the state retail divorcement laws is the interest they may rekindle in previously unsuccessful petroleum antitrust efforts.

Another reason why the Congress may postpone action on retail divorcement is the enactment of the Petroleum Marketing Practices Act of 1978. Title I of the Act establishes federal standards for termination and nonrenewal of franchise relationships in gasoline marketing. This "Dealer Day in Court" legislation was enacted in response to dealer allegations during and after the 1973 oil embargo, that their gasoline supplies were being cut and their franchises arbitrarily terminated by their major suppliers. Many of the states responded quickly to the dealers' agitation by enacting state petroleum franchise protection statutes. As the different state franchise regulations began to play havoc with the interstate oil companies' contracts, it became evident that federal preemptive legislation was preferable to the conflicting state laws' disruption of the uniformity necessary for a viable national business economy. The Petroleum Marketing Practices Act was intended specifically to preempt state laws conflicting with the federal termination, nonrenewal notification and certain other requirements. Its purpose was to alter significantly the balance between the supplier-franchiser and the retailer or distributor franchisee by limiting the suppliers' use of termination threats. In fact, some feel that these franchise protections, coupled with the federal gasoline allocation and price controls, now adequately protect the independent franchise deal-

S. 3369 95th Cong., 2d Sess. § 4 (1978). Convictions for violations were punishable by a fine not to exceed $100,000, or 10 years imprisonment, or both. A $10,000 penalty would be imposed for each day a violation continued. Id. at §§ 5, 6(a). The bill was introduced too late in the 95th Congress to allow for hearings or other committee action.

170. U.S. DEP'T OF ENERGY, AN ANALYSIS, supra note 2; S. REP. No. 1005, supra note 1, at 5; S. REP. No. 731, supra note 26, at 52-58 (Letters from the Departments of Commerce and Justice, and the FTC); Presidential Task Force, supra note 22, at D37; ENERGY RESOURCES COUNCIL, ANALYSIS OF VERTICAL DIVESTITURE iv (1976).
171. See, e.g., note 18 supra.
174. See, e.g., Pub.L. No. 95-297, § 105(a), 92 Stat. 322 (1978) discussed supra note 54, at § 105(a). The need for national uniformity in franchise relationship and contractual arrangements is arguably greater than a need for a uniform system of marketing gasoline which a federal retail divorcement statute might establish.
175. S. REP. No. 731, supra note 26, at 22.
In sum, retail divorcement is not only radical surgery, it is unnecessary.

Title III of the Petroleum Marketing Practices Act carries particular significance for the future of gasoline retail divorcement. It directs the Department of Energy to study the extent of subsidization and to report to the Congress findings and legislative recommendations. The study must address the following issues: the role of oil company vertically integrated operations in facilitating subsidization of gasoline sales at the wholesale or retail level; whether this practice is predatory and threatens competition; the profitability of various segments of the industry; and the impact of prohibiting subsidization on consumer gasoline prices to consumers and to the health of the petroleum industry. Title III also enables the President

---

176. John Shenefield, Assistant U.S. Attorney General for Antitrust, made this argument in his testimony before the Virginia House of Delegates. See note 134 supra. See also Hearings on H.R. 8117, supra note 34, at 185 (statement of Exxon Corporation); S. REP. NO. 731, supra note 26, at 52 (letter of Charles Haslam, General Counsel, Dep't of Commerce).

177. As reported by the Senate Committee on Energy and Natural Resources, Title III addressed the evils perceived in dual marketing. Producer/refiners would have been required to provide gasoline to their company-operated stations at essentially the same price as that offered to their franchise stations. The title prohibited subsidization of marketing operations with funds or services derived from other petroleum-related functions, finding the subsidies inherently predatory and anticompetitive. S. REP. NO. 731, supra note 26, at 13 (citing §§ 301-02 of the Senate bill). Title III required disclosure of information on transfer prices, discounts, rebates, allowances and other services once a dealer alleged injury due to such discriminatory subsidies; the supplier would then have the burden of rebutting presumptions of subsidization using defenses such as meeting competition, cost justification for price differentials, and an initial promotional effort or new entry defense. Id. at 17, 46-47.

The subsidization provisions were very controversial, and were deleted from the House version of the petroleum marketing legislation before it was reported from committee to the full House of Representatives. See House Comm. on Interstate and Foreign Commerce, Report on the Petroleum Marketing Practice Act, H.R. REP. NO. 161, 95th Cong., 1st Sess. (1977) (Comm. Print). When the Senate Energy Committee included Title III, the action drew heavy fire from both the Justice Department and the Federal Trade Commission. Patricia M. Wald, Assistant Attorney General, stated:

If, in the name of competition, legislation is enacted which has the effect of preventing distributors from reacting to the competitive pressures of the marketplace, then the benefits of maintaining competition largely will have been dissipated.

Letter to Senator Henry Jackson (Dec. 6, 1977), reprinted in S. REP. NO. 731, supra note 26, at 52-56. Alfred F. Dougherty, Jr., Director of the FTC's Bureau of Competition, wrote that enactment of Title III would be unwise prior to development of a data-gathering system sufficient to allow enforcement of anti-subsidization provisions. Letter to Senator Clifford Hansen (Dec. 7, 1977), reprinted in S. REP. NO. 731, supra note 26, at 57-58. Consequently, a compromise was struck on the Senate floor. A substitute Title III was adopted directing the Energy Department to study subsidization and its potential effects. See 124 Cong. Rec. S7149, S7153 (daily ed. May 9, 1978) (remarks of Senator Dale Bumpers).


179. Id.
to take interim action "to maintain the competitive viability of the marketing sector" while the Congress considers the Department of Energy's study report. Although the results of the study probably will not be available until 1980, the Department of Energy has already hinted at its position on retail divorcement in its study plan. The Department stated that in cases in which it appears that vertically integrated operations are more efficient than nonintegrated marketers, "a policy of separating retail outlets from the integrated companies, or forcing them to sell gasoline at higher prices, will lead to an increase in their company-wide costs and a reduction in their company-wide profits, with adverse effects to consumers."

By initiating a comprehensive federal study of gasoline marketing practices, Congress has implied that any necessary and appropriate remedial action be national in scope. It may be that Congress will decide ultimately that petroleum marketing divorcement is desirable or, to the contrary, too disruptive to viable competition to admit of state regulation. In either case, the Congress is asserting its constitutional prerogative to regulate commerce among the several states.

V. CONCLUSION

Independent dealers have campaigned long and hard for more equal treatment in petroleum marketing. Their gains are impressive, but perhaps only partially productive. They have generated necessary analysis of oil industry operations at each functional level. When more information is available on the actual costs and profitability of various energy ventures, more appropriate industry practices and, if necessary, government regulations can be developed.

It could result that state gasoline retail divorcement laws, while denying dealers the independence and competitive advantages they anticipated, will actually accelerate the trend toward fewer more efficient retail operations. Maryland's initiative in petroleum marketing regulation has important implications for both state and federal antitrust enforcement in the energy field. The Supreme Court in Exxon Corp. has indicated that it will not discourage divestiture as a structural remedy for oil industry practices deemed by the legislature to be anticompetitive. During the next few years, the Congress will review the results of the Energy Department study and legislative recommendations on oil industry subsidization. Most

180. Id. at § 301(d)(2).
182. Id. at 3550.
likely, if any federal divestiture proposal is considered, it will focus on crude oil production and pipeline distribution rather than the marketing function.\textsuperscript{183} Even limited divestiture could be an expensive proposition,\textsuperscript{184} yet in the long run, it may save billions of dollars otherwise wasted by inefficient marketing operations.\textsuperscript{185} With needed energy investments in the United States projected to be almost $580 billion over the next ten years alone,\textsuperscript{186} thousands of conveniently located service stations may be a luxury the country can no longer afford.

\textit{Katharine R. Boyce}

\textsuperscript{183} See note 170 and accompanying text \textit{supra}.  
\textsuperscript{184} See Energy Resources Council, \textit{Analysis of Vertical Divestiture} vii-viii (1976).  
\textsuperscript{185} With a six to eight cents per gallon gain due to efficiency of gasoline retail operations, it has been estimated that $42 billion to $57 billion could have been saved by the major integrated oil companies between 1968 and 1975. Letter from Alfred F. Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission to Senator Edward M. Kennedy (May 23, 1978), \textit{reprinted in} 124 Cong. Rec. S8949 (daily ed. June 9, 1978).  
\textsuperscript{186} Findings and Conclusions, Presidential Task Force, \textit{supra} note 22, at xxxiv.