

PRICE DISCRIMINATION, COMPETITION, AND CONFUSION:  
ANOTHER LOOK AT ROBINSON-PATMAN

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"Sometimes I doubt whether we ever needed the Robinson-Patman law, with all its elusive uncertainty. I have thought that the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured."

—Lindley, J., in *U.S. v. N.Y. Great A & P Tea Co.*, 67 F. Supp. 626, 676 (E.D. Ill. 1946).

WHEN Robinson-Patman became law in 1936,<sup>1</sup> chain stores were the legislative target. Consistent ability to undersell independent retailers rapidly expanded mass distribution systems in the twenties.<sup>2</sup> Subsequent depression years supplied cost-cutting incentive, sharpened consumer price-consciousness, and accelerated the shift to streamlined, cheaper forms of distribution.<sup>3</sup> A seemingly uncheckable trend threatened to eliminate independent wholesalers and retailers.<sup>4</sup> The FTC Final Report on the Chain Store Investigation, filed in 1934,<sup>5</sup> concluded that discriminatory price concessions to chain buyers were

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1. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946).

2. Chains between 1920 and 1930 more than tripled their outlets. At the same time the number of chains diminished. Concentration of control accompanied rapid expansion of area. By 1930, 7,000 chains operated 160,000 outlets. In the retail food trade, chains accounted for 13% of outlets, but handled 29% of the total amount of business. Cheaper selling techniques, economies of large scale operation, and purchasing concessions consistently enabled mass distributors to undersell independents. ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS, 7-8, 20 (1937) (hereinafter cited as ZORN & FELDMAN).

3. See, e.g., ZORN & FELDMAN at 26-27, 277.

4. *Id.* at 19-23, and see note 6 *infra*.

5. In 1928, the Senate directed an investigation by the FTC to determine "how far the rapid increase in the chain-store system of distribution is based upon actual savings in costs of management and operation and how far upon quantity prices available only to chain-store distributors." Sen. Res. 224, 70th Cong., 1st Sess., 69 CONG. REC. 7857 (1928). The investigation culminated in a final report in 1934. See note 6 *infra*.

The FTC REPORT concluded that "[t]o the extent that chain stores consistently undersell independents we may expect a steady trend toward final chain-store supremacy and dominance in distribution which is apparently uncheckable." FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION 86-87 (1934).

a prime source of their competitive advantage.<sup>6</sup> Since existing law could not curb such discrimination,<sup>7</sup> Congressional action was recommended.<sup>8</sup> The Robinson-Patman Act followed.

Despite the limited objectives of its framers, the statute is drawn in universals. Discriminatory practices in any market context fall under the ban of the Robinson-Patman Act. Apparently Congressional doubts of the con-

6. FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, 57-58, 85 (1934). The various types of discriminatory concessions secured by chains were summarized *id.* at 59-63. For criticism of the REPORT's conclusions, see McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937). He contends that integrated functions rather than buying power is the principal source of chain-store economies. *Id.* at 343. See similarly, Cassady, *The Integrated Marketing Institution and Public Welfare*, 6 J. MARKETING 252, 255-59 (1942).

7. Section 2 of the old Clayton Act, 38 STAT. 730 (1914), prohibited price discrimination whose effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The Act was directed at predatory price cutting that eliminated competition among *sellers*. See, *e.g.*, Comment, 46 YALE L.J. 447 n.1 (1937); legislative history quoted in *Mennen Co. v. FTC*, 288 Fed. 774, 778-79 (2d Cir. 1923), *cert. denied*, 262 U.S. 759 (1923). Accordingly, courts at first refused to interfere with price discrimination that harmed competition among *buyers*. See *Mennen Co. v. FTC*, *supra*; *National Biscuit Co. v. FTC*, 299 Fed. 733 (2d Cir. 1924), *cert. denied*, 266 U.S. 613 (1924). But in *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 245 (1929), the Supreme Court brushed aside legislative history and read "clear" statutory language to forbid lessening of competition among buyers as well. However, a statutory proviso exempting discriminations made "on account of differences . . . in quantity in the commodity sold" rendered *Van Camp* impotent. A quantity sale permitted unlimited price discrimination. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939), *cert. denied*, 308 U.S. 557 (1939). The FTC REPORT, *supra* note 6, at 90-91, was aware of the loophole. It pointed out that "prior to the Van Camp decision, during a period when chain stores were enjoying an extensive growth based largely upon special price concessions from manufacturers, the Commission was prevented by court decisions from applying section 2 of the Clayton Act to ameliorate the resultant competitive situation between the chains, the cooperatives, and the independents. *Id.* at 90.

For general discussion of Clayton Act aims and administration, consult MILLER, UNFAIR COMPETITION 130-41 (1941) (hereinafter cited as MILLER).

8. The FTC recommended amending the Clayton Act to read "It shall be unlawful . . . to discriminate unfairly or unjustly between different purchasers. . . ." FTC REPORT, *supra* note 6, at 96-97. But to chain-store opponents this appeared too mild. Extensive Congressional hearings followed and led to the final formulation of the Robinson-Patman Act. For the checkered congressional history of the Act, see ZORN & FELDMAN at 51-56; Rose, *The Right of a Businessman to Lower the Price of His Goods*, 4 VAND. L. REV. 221, 236-37 (1951). The U.S. Wholesale Grocers' Association became a prime mover behind the legislation. In fact, counsel for the Association is said to have drafted the Patman bill. ZORN & FELDMAN at 51 n.4; Rose, *supra*, at 237 n.70.

stitutionality of special legislation<sup>9</sup> turned the anti-chain store bill into a legal umpire over all interstate business pricing.<sup>10</sup>

#### A GLOSSARY FOR PRICE DISCRIMINATION<sup>11</sup>

The American business structure facilitates discriminatory pricing. Under conditions of perfect competition, competitors bound by a "going" market price obviously cannot discriminate.<sup>12</sup> But where sellers are few or in concert, where

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9. Cf. the following colloquy between Sen. Vandenberg and Sen. Logan, in charge of the bill in the Senate:

Mr. Vandenberg: Is it not a fact that this provision was written entirely with the field of retail merchandising in mind, and that it never was contemplated that it was intended to reach into industrial production?

Mr. Logan: Really that was my idea about it. However, it had to be general. We could not pick out one particular business. . . .

Mr. Logan: But I had no idea . . . that it had anything to do with the automobile industry. . . .

Mr. Logan: But I apprehend that if we attempt to make exemptions of particular classes of business we may run into difficulties with the Supreme Court. . . . If we exempt one group, and make the law apply to another, I am afraid we may have some serious constitutional difficulty. 80 CONG. REC. 6429 (1936).

10. The Robinson-Patman Act early was recognized as an anti-chain store measure and severely criticized on that premise. McNair, *supra* note 6; McAllister, *Price Control by Law in the United States*, 4 LAW & CONTEMP. PROB. 273, 289 (1937); Burns, *The Anti-trust Laws and the Regulation of Price Competition*, *id.* at 301; McLaughlin, *The Courts and the Robinson-Patman Act*, *id.* at 410; Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137 (1937); Comment, 46 YALE L.J. 447, 479 (1937). And see Rep. Patman's statement, "Chain stores are out. There is no place for chain stores in the American economic picture." Quoted in McNair, *supra* note 6, at 334 n.1. *But cf.* Hamilton & Loevinger, *The Second Attack on Price Discrimination*, 22 WASH. U.L.Q. 153 (1937).

11. In economic terms, discrimination implies that a seller charges *different prices* for *identical products* sold at the *same time* under *identical conditions*. Conditions include quantities sold, credit and delivery terms, and the seller's marginal costs. If *all except one* variable are identical, there is discrimination. Obviously there may be discrimination even when prices are uniform. And to complicate analysis, in most sales transactions two or more of the variables differ. MILLER at 122-23, 145 n.7; EDWARDS, MAINTAINING COMPETITION 164 n.9 (1949). The complexity of the problem has caused difficulty in defining price discrimination. Economists' definitions call for economic analysis. See, *e.g.*, "exercising a different degree of monopoly power . . . between two sales." MILLER at 123. Selling a "homogeneous commodity at the same time to different purchasers at different prices." BURNS, DECLINE OF COMPETITION 273 (1936).

The Robinson-Patman Act, however, has polevaulted analytic barriers. Under it price differences, regardless of other variables, may be illegal discriminations; and uniform-price policies, although often systematic economic discriminations, are sanctioned by law. In order to accommodate the following discussion to legal concepts, legal nomenclature has been adopted.

12. Perfect competition presupposes (1) perfect knowledge by buyers and sellers of products, prices, and terms of sale; (2) uniformity of products so that buyers can shift

products are differentiated in fact or fancy, and where powerful buyers range the market, some buyers pay less than others for similar goods. In short, any market imperfection permits a degree of price discrimination<sup>13</sup> through which sellers adapt their prices to different demand elasticities of buyers. The following are typical forms that price discrimination takes.

*Trade or functional discount.* The seller's schedule fixes discounts from quoted price to buyers classified according to rank on the distribution ladder. Typical systems allow reductions to wholesalers, jobbers, and retailers in decreasing amounts, regardless of size of individual transactions or aggregate sales volume. A wholesaler may buy ten units during one year. But a retailer who buys 100 units each month must pay the higher price.

*Quantity discount.* The size of an individual sale within a quantity bracket determines specified price reductions. Any buyer regardless of trade function is eligible for the discount, and aggregate sale volumes are immaterial. Buyers taking smaller quantities may pool purchases to qualify for discount brackets. A typical discount schedule allows reductions for carload quantity sales.

*Volume discount.* The discount schedule allows progressively larger price concessions based on sales aggregates over a period of time. Size of individual sales and the buyer's trade function are disregarded. Frequently purchases ranging over a seller's entire product line, and sometimes even similar purchases from his competitors, are aggregated to qualify for greater discounts. A chain store typically gets lower prices on a hundred small orders of products

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quickly among sellers to seek the best possible deal; (3) a large number of small buyers and sellers individually unable to affect overall price; (4) active competition unrestrained by private agreement or public control. Prices would be forced to the minimum level of costs and profits and automatically adjust output capacity to demand. A seller pricing above this level would lose all sales to competitors. And no seller reduces his price because he sells all he can produce at the going market price. See, *e.g.*, EDWARDS, MAINTAINING COMPETITION 6-8 (1949); WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 2-3 (TNEC Monograph 21, 1940) (hereinafter cited as WILCOX); BAIN, PRICING, DISTRIBUTION AND EMPLOYMENT 47-50 (1948) (hereinafter cited as BAIN).

13. Perfect competition is an economic fiction not duplicated by business realities. WILCOX at 3-5. Businessmen set prices within an area of discretion. Complexities of modern manufacturing processes, increasing differentiation of manufactured goods accentuated by brand names and advertising, and sellers' concentration and concerted action are powerful factors expanding the area of price discretion. See, *e.g.*, NELSON & KEIM, PRICE BEHAVIOR AND BUSINESS POLICY 4-10 (TNEC Monograph 1, 1940) (hereinafter cited as NELSON & KEIM). For some prerequisites of price discrimination in imperfect markets, see Cassady, *Some Economic Aspects of Price Discrimination under Non-Perfect Market Conditions*, 11 J. MARKETING 7 (1946). Price discrimination does not presuppose monopoly control. Sellers' knowledge and buyers' ignorance of market conditions permits discriminatory prices. A fault line in the market that prevents those on one side of the line from taking advantage of a price established on the other keeps discrimination going. *Id.* at 15, 18-20. And see Edwards, *Types of Differential Pricing*, 6 J. MARKETING Supp. 156, 163 (1942).

A, B, and C placed by its individual sales outlets than another buyer who makes one large purchase of A.

*Discrimination between segregated markets.* Buyers not fully competing with each other pay different prices for substantially identical goods. A car manufacturer, for example, pays a lower price for accessories used for installation than does an accessories distributor making replacement sales.

*Selective discrimination.* Selected buyers get unsystematic price concessions which are not openly quoted. The seller selects these low-price customers to accomplish any of a number of purposes.

#### SOME PURPOSES AND MARKET EFFECTS OF PRICE DISCRIMINATION

Market strategy shapes a firm's pricing policy and patterns of price discrimination.<sup>14</sup> Discriminatory practices vary among industries, and among firms within one industry. Even a single firm may use a combination of discriminatory pricing methods.<sup>15</sup> Only a broad aim to maximize profits is common to all forms of price discrimination. Nor does any specific practice entail inevitable economic consequences—market structures shape market effects.<sup>16</sup> But some more obvious purposes match particular discriminatory techniques with generally predictable market results.

*Determining channels of distribution.* Functional or trade discounts segmentize the distribution process.<sup>17</sup> When a producer finds direct selling to small retail outlets inconvenient, dealing through middlemen shifts his burden of warehousing, delivery, and the credit risks of scattered small accounts.<sup>18</sup>

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14. Edwards, *supra* note 13, at 157-58. Because today's emphasis on imperfect markets and overhead costs has cut adrift the classical economic analysis of price discrimination, Dr. Edwards argues that new efforts to classify and appraise the phenomena of price difference are overdue. *Id.* at 156. Much of this article rests on Dr. Edwards' valuable outline and suggestions. For an analysis of price discrimination in terms of modern economic theory, see also Cassady: *Some Economic Aspects of Price Discrimination under Non-Perfect Market Conditions*, 11 J. MARKETING 7 (1946); *Techniques and Purposes of Price Discrimination*, *id.* at 135; *Legal Aspects of Price Discrimination*, *id.* at 258, 377 (1947).

15. See *id.* at 144-45; Edwards, *The Struggle for Control of Distribution*, 1 J. MARKETING 212 (1937) *passim*.

16. For general analysis of price discrimination's economic effects, consult MILLER at 122-30, 161-93; ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION*, cc. 15, 16 (1933).

17. See Edwards, *supra* note 15; Edwards, *Types of Differential Pricing*, 6 J. MARKETING Supp. 156, 163-64 (1942).

18. See, e.g., ZORN & FELDMAN at 3-6, 167 for description of typical middleman functions.

A trade discount system accordingly attempts to compensate for these shifted distributive functions with scaled price concessions.<sup>19</sup>

Well-ordered middleman systems kept alive by functional discounts tend to resale price fixing programs.<sup>20</sup> Producers may dislike competition among distributors that spreads upward to force cuts in their own profit margins.<sup>21</sup> Resale price control by a producer's forward integration into retailing is costly, and is not feasible if his product alone cannot support separate sales outlets. Effective resale price maintenance, however, confers the benefits of integration without its burdens.<sup>22</sup> And when the producer alone cannot supervise scattered retailers, a co-operating middleman system can police deviations from the manufacturer's "suggested" price.<sup>23</sup>

But modern marketing methods have shattered the symmetry of old-line distribution. Whereas distributor classifications once matched their functions,<sup>24</sup> new processes cut across old labels.<sup>25</sup> On the one hand, middlemen perform less than their traditional full functions—a desk jobber may never see the goods. On the other, chain stores and mail-order houses integrate wholesale and retail functions to cut costs and prices.<sup>26</sup> Moreover, for many sellers, dealing through only one distributive channel is inadequate. Lack of alternative channels is risky and may leave a part of the market untapped. Sellers, therefore, "straddle the market" and move goods at the same time through middle-

19. See Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 38 (1949); McNair, *supra* note 6, at 340, 345.

20. For critical analysis of resale price maintenance, consult MILLER at 230-66; EDWARDS, MAINTAINING COMPETITION 66-73 (1949); FTC, REPORT ON RESALE PRICE MAINTENANCE (1945) *passim*.

21. See Adelman, *supra* note 19, at 46; Comment, 58 YALE L.J. 1121, 1122 (1949).

22. *Ibid.*; Burns, in *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689, 691-92 (1949). Burns defines resale price maintenance as "indirect integration." *Id.* at 692.

23. Comment, 58 YALE L.J. 1121, 1126-29 (1949); Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). And see notes 96 and 97 *infra*.

24. For a brief outline of the traditional manufacturer-wholesaler-retailer distribution channel, see ZORN & FELDMAN at 3-6.

25. McNair, *supra* note 6, at 339, 341, 345, 348. And see Shniderman, "The Tyranny of Labels", 60 HARV. L. REV. 571, 574-75 (1947).

26. ZORN & FELDMAN at 167-68; Edwards, *The Struggle for the Control of Distribution*, 1 J. MARKETING 212 (1937). "In the field of wholesaling alone are full line and short line wholesalers, service wholesalers, cash and carry distributors, drop shippers, . . . desk jobbers, and many others." George, *Business and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 392, 395 (1937). Integration of manifold middleman functions results in superior operating efficiency and permits lower retail prices. See, e.g., Cassidy, *The Integrated Marketing Institution and Public Welfare*, 6 J. MARKETING 252, 253, 257-59 (1942); McNair, *supra* note 6, at 341.

man systems and directly to large retail outlets.<sup>27</sup> Aggressive distributors and a disorganized market structure thwart sellers' attempts to stabilize price.<sup>28</sup>

Quantity discounts, on the other hand, may reflect distribution economies rather than shifted functions<sup>29</sup> and slice through the maze of functional labels. Carload shipments are obviously cheaper than small-lot distribution. Economical quantities shrink handling and service costs.<sup>30</sup> In addition, a quantity discount schedule that permits pooling of small buyers' orders invites direct producer-market outlet dealing.<sup>31</sup> Splitting traditional middleman functions<sup>32</sup> between buyer and seller short-circuits a middleman profit. The result is streamlined and lower-cost<sup>33</sup> distribution.

*Accommodating market pressures.* Volume discounts are systematic concessions to powerful buyers;<sup>34</sup> the size of the discount registers degrees of

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27. "A manufacturer, as a practical matter, frequently is forced to straddle. Perhaps most of his merchandise still goes through wholesalers and small independent retailers, but in view of the increasing importance of chains he will cut himself off from too large a part of his consumer market if he does not sell some of his goods through them; and, looking to the future, he does not dare place sole reliance on a single channel of distribution which may conceivably dwindle and dry up." McNair, *supra* note 6, at 345-46 (1937). "The strongest practical justification for the wholesaler's discount, as a matter of policy, is the manufacturer's interest in keeping the independent wholesaler in business, partly because of the wholesaler's ability to distribute to independent retailers in rural areas . . . and partly to prevent the chain-store purchasers from dominating distribution completely." Comment, 46 YALE L.J. 447, 455 (1937).

28. Adelman, *supra* note 19, at 62-63; Burns, *supra* note 10, at 318. An aggressively competing retailer has succeeded in practically tumbling the resale price maintenance structure built up under Miller-Tydings Act sanction. Cf. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). See note 96 *infra*.

29. Adelman, *supra* note 19, at 39.

30. *Ibid.*

31. Cf. Edwards, *Types of Differential Pricing*, 6 J. MARKETING Supp. 156, 163-64 (1942).

32. See notes 24 and 26 *supra*.

33. "When integration pays, the saving is essentially in the cost of transfer." Adelman, *supra* note 19, at 29.

34. Edwards, *supra* note 31, at 161. This is most readily apparent when buyers are permitted to aggregate purchases not only from the seller granting the discount, but his competitors as well. Because volume discounts induce a large buyer to concentrate his later purchases with his earlier supplier, other sellers must offer equivalent concessions to lure him away. *Ibid.* For an example, cf. Brief of Counsel Supporting the Complaint, p. 5, General Motors Corp. and AC Spark Plug Co., FTC Dkt. 5620 (pending).

Volume discounts, besides clearly favoring chain stores, act "in part as an exclusive dealing arrangement" because they tend to concentrate the purchases of any one buyer upon one seller. Moreover, in industries where limited-line and full-line manufacturers compete, volume discounts based on full-line purchase aggregates clearly foreclose limited-line producers from sales. MILLER at 150.

market pressure. Sellers do not "favor"<sup>35</sup> market giants who beat down prices, but placate coercion with concessions. When unused operating capacity eats into sellers' profits, price concessions come easier. Sales at any price above out-of-pocket costs spread overhead and earn profits or cut losses.<sup>36</sup> That is why they are made. But a uniform price at this level would bankrupt the firm because its fixed costs would not be fully covered.<sup>37</sup>

Systematic discrimination contains its own limitations. When both low and high-price buyers market an identical sellers' product down the line, the product competes with itself at every step in distribution and in the final sale.<sup>38</sup> Discrimination great enough to permit low-price buyers an arbitrage profit by selling to high-price buyers cannot last.<sup>39</sup> Concessions to some tend to spread to all. Buyer-coerced discrimination in the end can force all the seller's prices down.<sup>40</sup>

Discriminating between segregated markets, on the other hand, guarantees sellers more permanent success. When market splitting prevents buyers from reselling to each other and high-price buyers from shifting into the low-price field, a seller can tailor price to differing market pressures.<sup>41</sup> Since there is no leakage of price benefits, the high pressure of some buyers does not benefit all others.<sup>42</sup> Car manufacturers who depress price for original installation

35. In less sophisticated Robinson-Patman Act discussions, "favored buyer" is a convenient descriptive device. Sinister connotations of the phrase spread a haze of unlawfulness that obscures the need for economic analysis of price discrimination.

36. "Out-of-pocket" or "marginal" cost is the added cost needed to produce a small additional amount of output. See, e.g., CLARK, *ALTERNATIVE TO SERFDOM* 64 (1948). Because demand fluctuates, plants are built to take care of demand increases. Under average business conditions, therefore, plants may operate short of capacity. *Id.* at 80; Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1346-47 (1948). For an excellent discussion of the interrelationship between unused capacity and price discrimination, see *id.* at 1328-30; cf. Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 39-40 (1949).

37. Cf. *id.* at 40.

38. Cf. MILLER at 233.

39. Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 38-39 (1949).

40. "A strong, alert buyer, large enough so that the loss of his patronage is not a matter of indifference, constantly on the watch for a break which he can exploit by rolling up the whole price front, able to force concessions first from one and then from all, and followed by other buyers, can collapse a structure of control or keep it from ever coming into existence." Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1300 (1948). And cf. Note, 58 YALE L.J. 969, 975 (1949).

41. *I.e.*, differing elasticities of demand. See MILLER at 126-30. For classification and discussion of market splitting techniques, see Cassady, *supra* note 14, at 135-44; Edwards, *Types of Differential Pricing*, 6 J. MARKETING Supp. 156 (1942). And see Maroni, *Discrimination under Market Interdependence*, 62 Q. J. ECON. 95 (1947) for the economic limitations on a firm's tailored price spreads.

42. Edwards, *supra* note 41, at 157.



accessories, for example, do not influence high prices to replacement dealers.<sup>43</sup> Or when a mail-order house coerces a low price for rubber tires to be sold under its own brand label, it may interfere little with higher-price sales under another label.<sup>44</sup> Such a seller-buyer relationship can make for a long-lasting and mutually profitable co-existence. The seller has an assured market and with small risk can earn large profits;<sup>45</sup> the buyer has bought favorably and profits in his later operations.

In non-competitive sectors of the economy, price discrimination among segregated markets may be preferable to price uniformity. The discriminatory low price may tap new demand areas that otherwise would not buy at all. And even high-price buyers may benefit relatively. A seller's stepped-up output and fuller plant utilization cuts unit costs and may reduce *all* prices to a point below a non-discriminatory one-price level.<sup>46</sup>

*Stifling, meeting, or creating competition.* Selective price cuts can eliminate the competition of smaller rivals and entrench monopoly control. Sellers who operate in wider markets may drastically cut prices in smaller rivals' territory to enforce price leadership or to drive out competitors altogether.<sup>47</sup> In either case, competition is dead. A price raider, however, does not "recoup" local losses by raising his prices elsewhere; he already should be charging all the market can bear.<sup>48</sup> Future monopoly profits make up the present loss.

But selective price concessions may merely maintain competition. Sellers shade established rivals' prices to gain footholds in new markets or to attract

43. Cf. the *Champion* case, discussed at pp. 951-55 *infra*.

44. Cf. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939), *cert. denied*, 308 U.S. 557 (1939). Goodyear sold tires to Sears, Roebuck at substantially cheaper prices than to independent dealers. The tires were identical except for trademark and thread pattern. These superficial differentiations, and the secrecy of the arrangement, blocked buyer shifts from high to low-price identical product. See MILLER at 128-29, 136-39 for a discussion of the case.

45. Sears purchased under a ten-year requirements contract. Goodyear made a net profit of \$7.7 million on sales of \$116 million worth of tires to Sears during the years 1926-33. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620, 622 (6th Cir. 1939).

46. See MILLER at 164-65, citing ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION* 201-5 (1933); BURNS, *DECLINE OF COMPETITION* 277 (1937); CLARK, *SOCIAL CONTROL OF BUSINESS* 356-57 (2d ed. 1939); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1330-1 (1948); Fly, *Observations on the Antitrust Laws, Economic Theory, and the Sugar Institute Decisions*, 45 YALE L.J. 1339, 1347, 1367 (1936).

47. Cf. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944). For discussion, see EDWARDS, *MAINTAINING COMPETITION* 159 (1949).

48. The economic fallacy of "recoupment" has been demolished by able writers. "It would be a strange businessman who was able to raise prices to buyer X, but waited until he lowered them to Y." Adelman, *supra* note 46, at 1331; Note, 58 YALE L.J. 969, 974 (1949). Yet the "illiterate notion that lower prices to some buyers must necessarily imply higher prices to others" does not die. See, *e.g.*, Rose, *supra* note 8, at 230-33.

others' trade.<sup>49</sup> And selective price reductions may probe competitive market response before a lowering of price across the board.<sup>50</sup>

Disparities in sellers' and buyers' power make the line between predatory price cutting and aggressive competition thin.<sup>51</sup> Business correspondence may reveal a seller's predatory intent.<sup>52</sup> Where such facts are absent, however, the depth and frequency of price cuts and, most important, the vitality of remaining competition must make the necessary distinction.<sup>53</sup>

In some industrial markets<sup>54</sup> operating short of full capacity selective price cuts remain the sole effective force of competition. A small number of sellers with heavy capital investments may supply the entire output of a standardized industrial commodity.<sup>55</sup> Price changes by producers have minor effects on total demand. Cement, for example, makes up a small part of the cost of the end product in which it is used. A cut in cement prices, therefore, is not likely to increase proportionately overall demand for cement.<sup>56</sup> But because industrial

49. EDWARDS, MAINTAINING COMPETITION 162 (1949).

50. *Ibid.*

51. *Id.* at 170. And see WILCOX at 6: "The test of predation is intent, but the price cutter's purpose is known only to himself, is only to be inferred by others . . . Every act of competition is designed to attract business to one competitor rather than another and, to that extent, to eliminate the latter from the market. The line beyond which such activity is to be denounced as predatory is not an easy one to draw."

52. *Cf.* E. B. Muller v. FTC, 142 F.2d 511 (6th Cir. 1944).

53. EDWARDS, MAINTAINING COMPETITION 170-71 (1949). *Cf.* F & A Ice Cream Co. v. Arden Farms Co., CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,848 (S.D. Cal. 1951). In determining whether a low price was quoted for a predatory purpose, relevant factors are "the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the field in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise, and other factors, financial or economic, which might or might not warrant a precipitate reduction in price." *Id.* at page 64,494.

54. For economic surveys of basically non-competitive markets, see BAIN, PRICING, DISTRIBUTION, AND EMPLOYMENT 176-221 (1948); MILLER at 172-93; FELLNER, COMPETITION AMONG THE FEW (1950). See also Comment, *Price Systems and Competition: The Basing Point Issues*, 58 YALE L.J. 426, 430-43 (1949); NELSON & KEIM at 32-37. And *cf.* Bain, *Price and Production Policies*, in A SURVEY OF CONTEMPORARY ECONOMICS 129, 152 *et seq.* (Ellis Ed. 1948) for emphasis on institutional behavior, rather than "mutually recognized interdependence," as the basis of price rigidity, and consequent criticism of economists' "flight from reality to calculus." For similar emphasis, consult ARNOLD, BOTTLENECKS OF BUSINESS (1940); NOURSE, PRICE MAKING IN A DEMOCRACY (1944).

55. Markets with few sellers, *i.e.* "oligopolies," are common in American industry. For statistics and description, see WILCOX at 113-20; FELLNER, COMPETITION AMONG THE FEW 18 (1950); MILLER at 177.

56. The cost of cement does not exceed 16% of the final cost of the products in which it is used. Comment, 58 YALE L.J. 426, 431 n.17 (1949). If, for example, the price of cement is 15% of the cost of buildings, a 20% cut in cement prices would reduce building

buyers of cement or glucose are unmoved by labels or slogans, price is the focus of each *individual* transaction.<sup>57</sup> Accordingly, one seller's price concession booms his sales at the expense of all others who must retaliate or leave the field.<sup>58</sup> But because any price reductions are quickly matched, all sellers lose out in the end. Each ends up with his initial market share, but at lower prices.<sup>59</sup> Furthermore, price reductions may "spoil the market"—it becomes difficult to raise prices again. And paradoxically, price cuts interpreted as portending still further reductions may actually result in the loss of sales.<sup>60</sup> In such markets price competition is vermin, and sellers readily co-operate to stamp it out.<sup>61</sup> Follow-the-leader pricing and industry-wide formulas establish a "sticky" price and enable sellers quickly to spot deviations from it.<sup>62</sup> Unused plant capacity, however, presses on each seller and creates mutual uncertainty.<sup>63</sup> As pressure develops, selected buyers with large orders may receive discreet concessions. Each concealed discrimination is a crack that tends to spread and crumble the entire artificial price wall.<sup>64</sup>

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costs only 3%. Neither the demand for buildings nor the "derived" demand for cement necessarily would rise noticeably.

"In general, the individual seller can expect to benefit from a price cut only if the volume of his sales is thereby increased by an amount sufficient to augment his net profits or reduce his loss. This postulates a very considerable increase in consumption as price declines—*e.g.*, a high degree of elasticity of demand. There are many industries in which consumption does not increase materially when price declines—*i.e.*, demand is notably inelastic. This is true particularly of those industries whose product is merely a minor component part of a finished article manufactured by others, of whose total cost they comprise but a small part. Thus the consumption of cement depends upon the rate of construction activity, the demand for spark plugs is dependent upon the sale or use of automobiles. . . . Consequently an isolated change in the price of such commodities cannot be expected to exercise any appreciable influence upon their demand." NELSON & KEIM at 35-36.

57. BAIN at 211; NELSON & KEIM at 35 n.40.

58. BAIN at 210.

59. BAIN at 210-11; Comment, 58 YALE L.J. 426, 432 (1949).

60. NELSON & KEIM at 36; Comment, 58 YALE L.J. 426, 432 n.19 (1949), citing NEAL, INDUSTRIAL CONCENTRATION AND PRICE FLEXIBILITY 82 (1942).

61. Comment, 58 YALE L.J. 426, 452-53 (1949); Note, 58 YALE L.J. 969, 975 (1949); MILLER at 186-88; BAIN at 213-14. For discussion of restrictive activities of trade associations, see WILCOX at 225-58. And *cf.* FTC v. Cement Institute, 333 U.S. 683 (1948); Comment, *supra*, at 448; Fly, *supra* note 46, at 1348, 1360-1, 1368.

62. MILLER at 376-77; BAIN at 184-88.

63. *Cf.* note 36 *supra*.

64. "*Sporadic, unsystematic* discrimination is one of the most powerful forces of competition in modern industrial markets. Like a high wind, it seizes on small openings and crevices in an 'orderly' price structure and tears it apart." Adelman, *supra* note 46, at 1331-2.

For the competitive importance of sporadic price "chiseling," see also CLARK, ALTERNATIVE TO SERFDOM 80 (1948); Burns, *supra* note 10, at 317-18; Fly, *supra* note 46, at 1368. And see note 183 *infra*.

PRICE DISCRIMINATION AND THE ROBINSON-PATMAN ACT.<sup>65</sup>

The Federal Trade Commission enforces Robinson-Patman's prolix and

65. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946). For recent useful overall surveys of the Act, consult Haslett, *Price Discriminations and their Justifications under the Robinson-Patman Act*, 46 MICH. L. REV. 450 (1948); Crowley, *Equal Price Treatment under The Robinson-Patman Act*, 95 U. OF PA. L. REV. 306 (1947).

Concurrent with the legislative course that resulted in the enactment of the Patman bill, an independent penal price discrimination measure was introduced by Sens. Borah and Van Nuys. In a perplexing legislative compromise, the Borah-Van Nuys bill was enacted together with the Patman bill and became § 3 of the Robinson-Patman Act. See ZORN & FELDMAN at 52-54. The section has been criticized as "a grotesque manifestation of the scissors and paste pot method of drafting a potentially drastic criminal statute." Oppenheim, *Should the Robinson-Patman Act be Amended?*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 153 (1948).

Section 3 makes it a crime for any person (1) to be a party to, or assist in, a sale or contract to sell which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above those available to competitors in respect to a sale of goods of like grade, quality, and quantity; (2) to sell, or contract to sell, goods at lower prices in one part of the United States than in another for the purpose of destroying competition, or eliminating a competitor; (3) to sell, or contract to sell, goods at unreasonably low price for the purpose of destroying competition or eliminating a competitor. 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1946). For discussion, see Rose, *supra* note 8, at 228-35.

Actions under § 3 are brought by the Department of Justice or treble damage claimants, since the FTC's jurisdiction is limited to issuing cease and desist orders. *Id.* at 228 n.29. Section 3 lay dormant for over ten years. Several cases adverted to § 3 treble damage suits but rendered no decisions. See Bruce's Juices v. American Can Co., 330 U.S. 743, 750-52, 757 (1947); Louisiana Farmers' Protective Union v. Great Atlantic & Pacific Tea Co., 131 F.2d 419, 422 (8th Cir. 1942); Atlanta Brick Co. v. O'Neal, 44 F. Supp. 39, 43 (E.D. Tex. 1942). But § 3 treble damage suits are spreading rapidly. Predatory price cutting is the typical allegation. Only two § 3 claims appear to have gone to judgment on the merits. Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950) (Recovery denied. No geographic price variations nor destroying competition as "moving cause" of price reductions. Plaintiffs themselves are illegally maintaining prices); Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949) (Recovery denied. Insufficient causal connection between unreasonably low prices and injury). *Cf.* Moore v. Mead Sv. Co., 184 F.2d 338 (10th Cir. 1950), 51 COL. L. REV. 523 (1951) (Recovery denied. Plaintiff fixing prices in "pari delicto"); Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453 (5th Cir. 1949), *cert. denied*, 339 U.S. 953 (1950) (Recovery denied. No elimination of competition *in course of* interstate commerce); Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951) (same). *And cf.* Gordon, Wolf, Cowen Co. v. Indep. Halvah & Candies, Inc., 9 F.R.D. 700 (S.D.N.Y. 1949) (motion to dismiss on grounds of § 3's unconstitutionally vague criminal standards denied); F & A Ice Cream Co. v. Arden Farms Co., CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,848 (S.D. Cal. 1951) (§ 3 price cutting clause held constitutional); Hipps v. Bowman Dairy Co., *id.* at ¶ 62,859 (N.D. Ill. 1951) (§ 3 price discrimination clause held constitutional and enforceable by treble damage suit); Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S.D. Cal. 1950) (motion to dismiss, because § 3 not a part of antitrust laws enforceable by treble damage suit, denied). Future denial of recovery on "pari delicto" grounds is doubtful. The Supreme Court has held that plaintiffs' antitrust violations do not shield defendants from Sherman Act treble damage liability. Kiefer-Stewart Co.

ambiguous<sup>66</sup> clauses. The law forbids, in short, price discrimination that may injure "competition with" sellers, buyers, or their customers.<sup>67</sup> Rebates to buyers for their own account<sup>68</sup> and discriminatory allowances or services<sup>69</sup> are illegal regardless of their effects on competition. The Act, however, permits legal justification of discriminatory prices by a seller's cost savings<sup>70</sup> or good faith meeting of competition.<sup>71</sup> The FTC, aided by private complaints, has proceeded against hundreds of offenders.<sup>72</sup> And private litigants have brought numerous other violations before the courts.<sup>73</sup>

v. Seagram & Sons, 340 U.S. 211 (1951). Only one § 3 charge by the Department of Justice is reported. In *U.S. v. Bowman Dairy Co.*, 89 F. Supp. 112 (N.D. Ill. 1949), defendant was charged with contracting for secret rebates to A & P. Defendant moved to dismiss the indictment on grounds that § 3's vague standard of criminality violated the Fifth and Sixth Amendments. The Court was "beset with doubts" of the section's constitutionality, but declined to decide constitutional questions on motion. *Cf. U.S. v. Borden Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 61,351 (companion case voluntarily dismissed by the government on May 24, 1951). Almost 15 years after its enactment, § 3 is still in flux. Broadly interpreted, it may become a plaintiffs' bonanza.

66. "[T]he cause of the trouble is the [Robinson-Patman] Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." Clark, J., in *Ruberoid Co. v. FTC*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,847 (2d Cir. 1951). See also *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951), discussed at pp. 965-72 *infra*.

67. The relevant part of Section 2(a) reads: "It shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, 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". 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

68. See pp. 957-58 *infra*.

69. See pp. 959-61 *infra*.

70. See pp. 961-65 *infra*.

71. See pp. 965-72 *infra*.

72. As of June 1950, the FTC had adjudicated: under § 2(a)—124 cases, § 2(c)—146 cases, § 2(d)—60 cases, § 2(e)—41 cases, § 2(f)—11 cases. Statement of James M. Mead, Chairman, FTC, to the Watchdog Subcommittee of the Committee on Interstate and Foreign Commerce of the U.S. Senate, August 24, 1950, Appendix F, pp. 3-4 (mimeographed copy in Yale Law Library).

One FTC Commissioner has sharply attacked the Commission's reliance on private complaints. Count I of Commissioner Mason's complaint against the FTC avers "that the FTC, unable to prosecute everyone in the business world, picks its cases by the fan mail system; that litigation depends on private complaint rather than public interest." Mason, *The FTC's Search for a New Role* 5 (Address before the Boston Conference on Distribution, October 17, 1950, mimeographed copy in Yale Law Library).

73. Violations of § 2(a): *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951) (\$225,000 treble damage award for injury by discriminatory volume prices and freight equalization); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1 (7th Cir. 1949), *cert. denied*, 338 U.S. 948 (1950) (contract option differential between manufacturers and distributors held reasonable and lawful classification); *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943) (differen-

Recent cases highlight the dangerous effects of a statute that regulates a competitive economy but perverts the economics of competition. Because the universals of the statute have swallowed up original aims, decisions strike into all sectors of industry. No coherent pattern of business regulation emerges. The cases' undercurrent of protecting some competitors, however, increasingly conflicts with public policy of competition itself.

*Functional discounts*<sup>74</sup> and *resale price maintenance: The Standard Oil (Indiana) Case*.<sup>75</sup> Standard discriminated between independent distributors and controlled retail outlets in the Detroit area.<sup>76</sup> The retailers took tank-wagon delivery and paid Standard's posted tank-wagon price per gallon. Standard, however, charged the 1½ cent cheaper tank-car price to distributors with bulk storage and delivery equipment who took tank-car lots.<sup>77</sup> These

tial between brick price and price of brick in lump sum construction contract not unlawful); *Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939) (refusals to sell do not violate §2(a); there must be *actual* sales at discriminatory prices); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd on other grounds*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951) (injury by discriminatory volume prices and freight equalization entitles to treble damages); *Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949) (contracting at discriminatory prices creates no §2(a) cause of action; there must be two actual sales); *McWhirter v. Monroe Calculating Machine Co.*, 76 F. Supp. 456 (W.D. Mo. 1948) (commission-basis store manager has good cause of action against rival store granting secret concessions to buyers; but suit dismissed for lack of proved injury to plaintiff); *Lewis v. Shell Oil*, 50 F. Supp. 547 (N.D. Ill. 1943) (Contract made in plaintiff's state and delivery from bulk plant in same state. Suit dismissed because discrimination must be *in* interstate commerce); *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N.D. Ill. 1941) (plaintiff, although not a purchaser, has treble damage cause of action for injuries caused him by seller's discriminatory prices to plaintiff's competitors). Cf. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947) (discriminatory volume prices held no §3 defense to suit for payment of purchase price of goods).

For treble damage suits under sections 2(c), (d), and (e), see notes 198 and 210 *infra*.

74. For legal discussion of functional discounts and case citations, consult Shneiderman, *supra* note 25, *passim*; Van Cise, *Functional Prices*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 89 (1947). Cf. *Ruberoid Co. v. FTC*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,847 (2d Cir. 1951).

75. *Standard Oil Co.*, 41 FTC 263 (1945), *modified*, 43 FTC 56 (1946), *modified and aff'd*, *Standard Oil v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951). For critical analysis of substantive aspects of the case, see Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 60-74 (1949); Note, *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 YALE L.J. 158 (1949). The meeting competition defense is discussed at pp. 965-72 *infra*.

76. 41 FTC 263, 272 (1945). Standard sold to about 350 retail outlets in the Detroit area. It owned and leased 200 stations and had requirements contracts with the rest.

77. *Id.* at 272-73.

resold some gasoline to other independent outlets and marketed some through their own pumps.<sup>78</sup>

The FTC found two vices in the transaction. One tank-car buyer resold to an independent outlet below Standard's posted tank-wagon price.<sup>79</sup> This outlet cut its prices and "diverted business" from others.<sup>80</sup> Another tank-car customer cut prices to the public at his own pumps.<sup>81</sup> This enabled him, too, to "divert large amounts of business" to himself, with "resultant injury" to other retailers.<sup>82</sup> Some retailers lost business. This, according to the FTC, was the statutory injury to "competition."

The FTC ordered Standard to prevent further injuries in two ways. Buyers who resold to retailers below Standard's posted price could no longer get the lower tank-car rates.<sup>83</sup> And integrated customers, who took tank-car delivery and performed storage but marketed directly to the public, had to pay the same price as "other retailers."<sup>84</sup> To avoid violation of its order, the FTC advised, Standard could easily police resale prices. If Standard threatened to cut off distributors not adhering to posted prices, they would surely stay in line.<sup>85</sup> Standard, moreover, owned dealers' filling station insignia and could remove them if further persuasion was needed.<sup>86</sup>

On review, the Seventh Circuit upheld the order with minor modifications.<sup>87</sup> Standard now would violate the order only when it *knew* or *should have known* that distributors undercut its posted tank-wagon prices.<sup>88</sup> Anyway, the Court added, Standard could avoid all trouble by selling at a uniform price to all customers.<sup>89</sup>

The Supreme Court never reached the order's merits. Standard argued that no seller "in his right mind" familiar with antitrust law would establish a resale price maintenance system.<sup>90</sup> The FTC disagreed. Standard could lawfully refuse to sell, and distributors would then naturally comply.<sup>91</sup> The Su-

78. *Id.* at 272-74.

79. *Id.* at 276.

80. *Ibid.*

81. *Id.* at 275.

82. *Id.* at 276.

83. Standard Oil Co., 43 FTC 56, 58 (1946). Modified order to cease and desist, par. 6.

84. *Ibid.*, par. 5.

85. FTC Brief, p. 95, Standard Oil v. FTC, 173 F.2d 210 (7th Cir. 1949).

86. *Id.* at p. 96.

87. Standard Oil v. FTC, 173 F.2d 210 (7th Cir. 1949).

88. *Id.* at 217.

89. *Ibid.*

90. Brief for Standard, pp. 46-47, Standard Oil v. FTC, 340 U.S. 231 (1951).

91. FTC Brief, p. 71. The FTC relied on *U.S. v. Colgate & Co.*, 250 U.S. 300 (1919), a case never overruled but considered moribund. Comment, 58 *YALE L.J.* 1121, 1129 (1949). Justice Frankfurter, on oral argument, considered the case "rather under a cloud." 18 *U.S.L. WEEK* 3211 (1950). But *Colgate* now has a new lease on life. *Adams-Mitchell Co. v. Cambridge Distributing Co.*, CCH *TRADE REG. REP.* '48-'51 Dec. ¶ 62,856 (2d Cir.

preme Court was obviously perturbed. Justice Jackson demanded to know whether the Government was "trying to enforce two conflicting legislative policies" and what the competition was that the Robinson-Patman Act protected.<sup>92</sup> To date the answers remain in limbo. By a decision that turned on one vote the Court reversed a Seventh Circuit holding that the meeting of competition defense did not apply.<sup>93</sup> Hence there was no need to adjudge the substantive merits of FTC's order. The case was remanded for further findings.

Though this particular FTC proceeding may discreetly die,<sup>94</sup> the legal risks of market "straddling" created by the FTC action may destroy actively competing distributors. Under the order, whose merits the Supreme Court opinion left unscathed, functional discounts to buyers likely to undercut sellers' posted prices are illegal.<sup>95</sup> As a result, "straddling" sellers must control their middlemen's prices to escape a Robinson-Patman Act proceeding. But section 1 of the Sherman Act condemns horizontal resale price maintenance agreements that end competition between direct seller and distributors.<sup>96</sup> In addition,

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1951). And *see* Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 214 (1951). See notes 96 and 97 *infra*.

92. 18 U.S.L. WEEK 3210 (1950). While the *Standard* case was pending on appeal, the Antitrust Division was preparing complaints against Pacific Coast oil majors charging resale price maintenance as part of a Sherman Act offense. The complaint against Standard Oil of California, Shell Oil Co., and The Texas Co. alleged dominance of the industry perpetuated "by refusing to sell their gasoline . . . to any wholesale or retail distributor who fails or refuses to follow the prices fixed by them." A similar complaint was filed against Sun Oil Co. in Pennsylvania. Rose, *supra* note 8, at 248 nn.125, 126. The Antitrust Division prosecutes what the FTC prescribes. This "swinging door" paradox and the refusal of the Attorney-General's office to appear in support of the FTC order, 18 U.S.L. WEEK 3210 (1950), points up the Court's dilemma. See also notes 237 and 265 *infra*.

93. *Standard Oil v. FTC*, 340 U.S. 231 (1951). For full discussion of the decision, see pp. 965-72 *infra*.

94. The Supreme Court reversed and remanded on January 8, 1951. As of July 10, 1951, the FTC had taken no further action in the *Standard Oil* case. Communication to YALE LAW JOURNAL from Bureau of Antimonopoly, FTC, in Yale Law Library.

95. Paragraph 6 of the modified cease and desist order prohibits discounts "where such jobber or wholesaler, to the knowledge of the respondent, or under such circumstances as are reasonably calculated to impute knowledge to the respondent, resells such gasoline or intends to resell the same to any of its said retailer-customers at less than respondent's posted tank-wagon price. . . ." 173 F.2d 210, 217 (1949).

96. *E.g.*, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). The Miller-Tydings Act, 50 STAT. 693 (1937), 15 U.S.C. § 1 (1946), does not change this result. Miller-Tydings expressly excludes resale price maintenance agreements between sellers in competition with each other from its protective umbrella. Since both *Standard* and the distributors resell to retail outlets, any price maintenance agreement between them would be "horizontal," and therefore illegal. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 n.1 (1951); Note, 59 YALE L.J. 158, 161 n.15 (1949). The *Schwegmann* case, holding non-signer provisions of a state "fair trade" law unenforceable, sounds an advance requiem for all resale price fixing contracts. For conflicting interpretations of *Schwegmann's* effects on "intrastate" resale price maintenance, compare *Bulova Watch Co., Inc. v. S. Klein On The Square, Inc.*, CCH TRADE REG. REP. '48-'51 DEC.



policing and cutting off middlemen to enforce tacit price control may violate section 5 of the Federal Trade Commission Act.<sup>97</sup> Consequently, a seller who markets directly and through distributors risks prosecution under contradictory laws. To avoid this dilemma he may discontinue one distribution channel. Most likely the independent distributor, a powerful competitive lever in seller-dominated markets,<sup>98</sup> will be eliminated.

Classification of integrated buyers as retailers<sup>99</sup> rivets dominant sellers' bargaining position. Some buyers invest in functionally integrated distribution facilities. Prohibiting lower prices to them forces economic discrimination<sup>100</sup> that withholds returns from their investment. Economies of their integration are siphoned into sellers' pockets. This punishes integrated buyers who typically trigger active retail price competition.<sup>101</sup> Placid retail markets exert no downward pressure on stable sellers' prices. The FTC's buyer classification policy, therefore, both curtails competition at the retail level and insulates sellers' prices from market forces.

*Quantity and volume discounts,<sup>102</sup> and the prima facie case: The Morton Salt Case.*<sup>103</sup> Morton Salt Company granted discriminatory discounts in mar-

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¶ 62,854 (N.Y. Sup. Ct. 1951), with *Rothbaum v. R. H. Macy & Co., Inc.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,855 (N.Y. Sup. Ct. 1951). See note 97 *infra* for revived possibilities of resale price control enforced by refusals to sell.

97. *E.g.*, *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (requesting customers to report price cutters, customer blacklists, detecting price cutters by agents and numbering packages); *Q.R.S. Music Co. v. FTC*, 12 F.2d 730 (7th Cir. 1926) (procuring agents and retailers to report price cutters). *But cf.* *U.S. v. Colgate*, 250 U.S. 300 (1919) (refusal to sell to dealers deviating from "suggested" prices and securing assurances of compliance from customers does not violate Sherman Act); *accord*, *Adams-Mitchell Co. v. Cambridge Distributing Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,856 (2d Cir. 1951). The decision "breathes new life into the decrepit doctrine of United States v. Colgate, 250 U.S. 300, thereby condoning a form of price-fixing which will simplify evasion of the anti-trust laws." *Id.* at page 64,517 (dissenting opinion). See notes 91 and 92 *supra*. And see *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951) (agreement between affiliated sellers to refuse to sell in order to maintain maximum prices violates Sherman Act, but each "acting individually perhaps might have refused" to sell). See generally, Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121 (1949).

98. See Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 62 (1949).

99. Paragraph five of the cease and desist order prohibits lower prices to "any dealer, jobber, or wholesaler on such gasoline sold . . . at retail". *Standard Oil Co.*, 43 FTC 56, 58 (1946).

100. See note 11 *supra*; Adelman, *supra* note 98, at 63-64.

101. Comment, 58 YALE L.J. 1121, 1122-3 (1949). "Defensive" discriminators may refuse to sell to integrated buyers altogether. The integrated buyer can get a supply from other distributors, but at a prohibitive price. *Id.* at 1123 n.12, 1133-4. *Cf.* *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915).

102. For legal survey and citations, see Haslett, *The Validity of Quantity Discounts*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 26 (1948). And *cf.* *FTC v. Standard Brands, Inc.*, 189 F.2d 510 (2d Cir. 1951).

103. *Morton Salt Co.*, 39 FTC 35 (1944), *modified*, 40 FTC 388 (1945), *set aside*, *Morton Salt Co. v. FTC*, 162 F.2d 949 (7th Cir. 1947), *rev'd and remanded*, 334 U.S. 37 (1948), *modified*, 3 CCH TRADE REG. REP. ¶ 14,095 (FTC 1948). For comment, see

keting table salt. Carload-quantity buyers received a 6% discount.<sup>104</sup> Small buyers pooled purchases to qualify for carload discounts, and in one year 99.9% of sales was made in carload lots.<sup>105</sup> A volume schedule based on annual aggregates granted further discounts up to 10%.<sup>106</sup> Only 4 chain stores obtained both carload and maximum volume discounts.<sup>107</sup>

The FTC never made a legal distinction between quantity and volume discounts. All were treated as quantity discounts.<sup>108</sup> That 99.9% of sales were made in carload quantities was immaterial.<sup>109</sup> Because the Robinson-Patman Act aimed to "reach price discriminations in their incipiency," it was not necessary to show actual injury to competition.<sup>110</sup> Nevertheless, a 2000 page record was built. The facts were that some grocers received discounts, others did not. A parade of grocers as expert witnesses testified that if one grocer had to pay 10 cents more for a case of salt than his competitor, doubtless his "competitive position" would be impaired.<sup>111</sup> But the FTC did not rest on expert opinion. One wholesaler, for example, paid 15 cents more for a case of salt than A & P and was forced to cut his profit margin 5 cents to enable his customers to compete.<sup>112</sup>

The FTC concluded that those who received discounts enjoyed a substantial competitive advantage.<sup>113</sup> Wholesalers not obtaining discounts had to choose between reselling at competitive prices which cut into their profits, or charging higher prices that lost their sales.<sup>114</sup> And retailers buying from non-discount wholesalers paid prices that prohibited competition between them and chain stores.<sup>115</sup> The FTC held, therefore, that Morton's discounts might substantially lessen competition and "injure, destroy, and prevent competition" between those who received discounts and those who did not.<sup>116</sup>

The cease and desist order revamps Morton's price policy. Morton's discounts were geared to quantity and volume purchases. The FTC substitutes pricing according to functional labels.<sup>117</sup> Chain stores, their integrated func-

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Zlinkoff & Barnard, *Basing Points and Quantity Discounts*, 48 COL. L. REV. 985, 1020 (1948); Note, 27 N.C.L. REV. 126 (1948).

104. A case containing 24 packages was sold at \$1.60 in less than carload lots and at \$1.50 in carload lots. 40 FTC 388, 394 (1945).

105. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 48 n.17, 60 (1948).

106. 40 FTC 388, 394-95 (1945).

107. *Id.* at 395.

108. See, *e.g.*, the statement of contested issues, FTC Brief, p. 3, *Morton Salt Co. v. FTC*, 162 F.2d 949 (7th Cir. 1947).

109. *Id.* at pp. 26-27.

110. *Id.* at p. 26.

111. *Id.* at pp. 33-35. 51 witnesses were so interrogated. *Morton Salt Brief*, p. 33, *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

112. FTC Brief, pp. 36-37, *Morton Salt Co. v. FTC*, 162 F.2d 949 (7th Cir. 1947).

113. 40 FTC 388, 396 (1945).

114. *Id.* at 397.

115. *Ibid.*

116. *Ibid.*

117. *Id.* at 398.

tions disregarded, are considered retailers.<sup>118</sup> Morton may not differentiate in price among competing wholesalers or among competing retailers.<sup>119</sup> And, an obvious block to chain "retailers'" buying power, a chain "retailer," under the order, may not get lower prices than any wholesaler with whose customers he competes.<sup>120</sup> To comply with the order and retain its chain store customers Morton for all practical purposes must institute a one-price policy. This opens several marketing alternatives. Morton may quote identical prices to wholesalers, chain stores, and small retailers. In that event there would be no discrimination within a class, or between wholesalers and chain stores. Alternatively, Morton might sell at a uniform price to chain stores and wholesalers and discontinue small retail accounts. Finally, Morton could avoid the effect of the order by dealing exclusively with chains.

The Seventh Circuit set the order aside.<sup>121</sup> It thought that the FTC had confused injury to competition with the normal effects of differences resulting from larger quantity purchases.<sup>122</sup> Judge Minton dissented. He deemed the discounts discriminatory per se unless justified by cost savings.<sup>123</sup> Besides, "[t]he fact of the discrimination itself . . . would have supported an inference that the effect may be to lessen competition."<sup>124</sup>

The Supreme Court reversed.<sup>125</sup> The avowed purpose of the Robinson-Patman Act was to "protect competition from all price differentials except those based in full on cost savings."<sup>126</sup> The FTC's 2000 page record had proved too much. It had shown only the obvious, "that the competitive opportunities of certain merchants were injured" when they had to pay substantially more for salt than their competitors.<sup>127</sup> There was no need of testimony to prove the self-evident: "there is a 'reasonable possibility' that competition may be adversely affected" when like goods are sold to some customers substantially cheaper than to their competitors.<sup>128</sup>

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118. *Cf. id.* at 397.

119. Par. (a) and (b), cease and desist order, *ibid.* A five-cent spread permissible if it did not "tend" to injure competition was eliminated upon remand from the Supreme Court. 3 CCH TRADE REG. REP. ¶ 14,095 (FTC 1948). *Cf. Ruberoid Co. v. FTC*, CCH TRADE REG. REP. ¶ 62,847 (2d Cir. 1951).

120. Par. (c), cease and desist order, 40 FTC 388, 398, prohibits "selling . . . to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailers."

121. *Morton Salt Co. v. FTC*, 162 F.2d 949 (7th Cir. 1947).

122. *Id.* at 957.

123. *Id.* at 959.

124. *Id.* at 960.

125. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

126. *Id.* at 44.

127. *Id.* at 46-47.

128. *Id.* at 50. *Cf. Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), *clarified*, 155 F.2d 1016 (2d Cir. 1946) (where injury to

Two justices dissented in part.<sup>129</sup> They considered the "possibility" criterion fatal to any discount the FTC chose to attack.<sup>130</sup> Moreover, there was a definite difference between the volume discount for which only 1% of buyers qualified and the carload discount under which 99.9% of sales were made.<sup>131</sup> "Quota" discounts gave an arbitrary advantage to large buyers and were illegal.<sup>132</sup> But carload discounts, after all, passed on the advantages of low cost distribution to the consumer and should be upheld.<sup>133</sup>

Implementation of Robinson-Patman objectives demands the dissenters' distinction between carload and volume discounts. Chain stores were the statute's target. Quantity discounts factually available to pooling buyers, however, benefit not only chain stores but *all* buyers of economical quantities. Volume discounts, on the other hand, are the heart of the chain store problem that the Act aimed to resolve. In *Morton Salt*, only 4 large chains took the annual volume of 50,000 cases of salt that qualified for the top discount bracket. These discounts were clearly out of individual small buyers' reach and conferred cumulative competitive advantages on the chains. Illegality of such volume discounts, despite possible harm to effective competition, makes sense in terms of the statutory objectives. Illegality of pooled quantity discounts does not.

The theory of the decision insulates high-cost distribution systems from competitive streamlining. Order-pooling to obtain carload discounts leads to direct dealing that splits middleman functions between seller and buyer. As a result, a wholesaler profit is short-circuited and distribution costs reduced. The FTC's functional straitjacket preserves middlemen from competitive displacement by short-channel marketing.<sup>134</sup> Needed development of lower-cost

competition among *sellers* is charged, proof of price discrimination *alone* makes out a *prima facie* case shifting the burden of justification to the discriminator). The case is cited with approval in the *Morton Salt* case, 334 U.S. 37, 45 n.13 (1947). This doctrine apparently applies equally to cases where injury to *competing buyers* is alleged. See *id.* at 45; *FTC v. Standard Brands, Inc.*, 189 F.2d 510, 515 (2d Cir. 1951); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd on other grounds*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951).

129. *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948) (partially dissenting opinion). Justice Jackson, with whom Justice Frankfurter joined, wrote this opinion.

130. *Id.* at 58.

131. *Id.* at 59-61.

132. *Id.* at 58-61.

133. *Ibid.*

134. "The unfortunately wide differentiation between wholesale and retail prices, and the sharp separation between wholesale and retail markets, may be regarded as a vestigial remainder of the mercantilist system (as a colossal system of restraint upon trade), which has only recently begun to be undermined." SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 72 (1948 ed.). See also Edwards, *The Struggle for Control of Distribution*, 1 J. MARKETING 212 (1937).

distribution<sup>135</sup> is impaired. Competitive public policy should not preserve wholesalers against the inroads of competition.<sup>136</sup>

The *Morton Salt Case* and its sequel also outlaw buyer-coerced price reductions. *Morton Salt* orders the seller to discontinue volume concessions to large buyers. The reverse side of the coin, *Automatic Canteen*,<sup>137</sup> directly prohibits the large buyer from forcing concessions.<sup>138</sup> Morton's discounts injured some buyers' "competitive position." Automatic's forced concessions<sup>139</sup> had the opposite effect. Price reductions "diverted business" from sellers who refused to lower prices and thus injured "competition" among sellers.<sup>140</sup>

135. It costs more to distribute goods than to make them. In 1939, marketing costs accounted for 50.5% of the total cost of distribution and production of goods. CONVERSE & HUEGY, *ELEMENTS OF MARKETING* 693-4 (3d rev. ed. 1947); STEWART & DEWHURST, *DOES DISTRIBUTION COST TOO MUCH?* 101, 105-6 (1939). And see SIMONS, *op. cit. supra* note 134, at 71: "[O]ur vaunted efficiency in production is dissipated extravagantly in the wastes of merchandising."

136. "The Robinson-Patman Act . . . is a part of the struggle between the older and newer organizations in distribution in which the older group sought protection from the state presumably because it was not prepared to rely on the outcome of competition." Burns, in *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689, 695 (1949). Cf. Testimony of R. N. Rowe, Vice-President of the U.S. Wholesale Grocers' Ass'n, before the House Select Committee on Small Business: "[W]e would like to see more zeal and loyalty for the Robinson-Patman Act on the part of some elements in Congress, in the Justice Department, and the Federal Trade Commission. These elements seem to have gone off the reservation to follow the will-o'-the-wisp of something termed 'hard competition' . . . and the alleged conflicting theories and content of the Sherman Act and the . . . Robinson-Patman Act. . . . All this talk leaves us cold."

[Q.] Your Association feels that the Robinson-Patman Act is more or less [its] Magna Carta . . . ?

Mr. Rowe: Oh, yes, that is correct." *Hearings before Select Committee on Small Business, Functional Operation of the FTC*, 81st Cong., 2d Sess. 65-66 (1950).

137. *Automatic Canteen Co. of America*, 3 CCH TRADE REG. REP. ¶ 14,398 (FTC 1950), review pending 7th Cir., *id.* at ¶ 14,998.

138. The charge was brought under § 2(f) of the Robinson-Patman Act, which reads: "[I]t shall be unlawful . . . knowingly to induce or receive a discrimination in price which is prohibited by" § 2. 49 STAT. 1526 (1936), 15 U.S.C. § 13(f) (1946). For general discussion, see Forkner, *The Significance of Section 2(f)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 66 (1948); Howrey, *The Buyer and the Prima Facie Case*, *id.* at 87.

The order to cease and desist forbids Automatic "from knowingly inducing or accepting a price from a seller known by it . . . to be below the net price . . . to other customers, where the seller is competing with any other seller for respondent's business, or where respondent is competing with other customers of the seller." *Automatic Canteen Co. of America*, 3 CCH TRADE REG. REP. ¶ 14,398 (FTC 1950).

139. Automatic knew of prices to other buyers and "employed various means to induce lower prices." It informed prospective seller of the prices and terms of sale which "would be acceptable to it *without consideration or inquiry as to whether such suppliers could justify such price on a cost basis* or whether it was being offered to other customers of the supplier." FTC opinion, *ibid.* (emphasis added). Cf. note 184 *infra*.

140. "Any discrimination . . . will divert business from any manufacturer or jobber who does not grant such price discrimination to [one] who does grant them." Automatic,

Both decisions sterilize powerful buyers and shield monopolistic sellers' prices from assault. Were small sellers without alternative market outlets exploited, antitrust policy should be concerned.<sup>141</sup> In the *Morton Salt Case*, however, chain stores beat down the salt industry's collusive prices.<sup>142</sup> And Automatic Canteen cracked the prices of brand-insulated sellers such as the Wrigley Company. Preventing buyers' attacks on concerted or powerful sellers' prices is misdirected effort. Only strong and aggressive buyers can loosen concentrated sellers' stranglehold on price.<sup>143</sup>

Powerful distributors are far less dangerous than powerful manufacturers to competitive public policy.<sup>144</sup> Large traders combine economies of scale with bargaining coercion of size. True, concessions to size alone confer a cumulative advantage in subsequent market operations that could jeopardize the existence of smaller rivals.<sup>145</sup> But distribution outlets typically require lower capital investment and simpler technology than finished-goods production units. Competitors' ease of entry forestalls monopoly.<sup>146</sup> Large distributors who, consequently, resell under competitive conditions pass on at least part of their concessions to the consumer. Unlike concentrated manufacturers, they cannot restrict purchases or sales to manipulate price.<sup>147</sup> When sellers are not atomized, powerful buyers are a needed offset. Small producers are not likely to

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therefore, "injured competition between manufacturers" who did grant discriminatory prices and those who did not. FTC opinion, *ibid.*

141. *Cf. Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (conspiracy among 3 sugar refiners, the only market outlet for beet growers, to pay uniform price for beets held Sherman Act treble damage cause of action).

142. *Salt Producers Ass'n v. FTC*, 134 F.2d 354 (7th Cir. 1943) (18 producers combined to monopolize and suppress competition in the sale of salt by price fixing, curtailing production, and exchanging price lists and information on terms of sales).

143. For detailed exposition of this theme, see Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. ECON. 238 (1949). See also Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 YALE L.J. 969 (1949).

144. "[T]here is less to fear from concentrated buying power than from concentrated control over sales. Though the buyer may exploit the seller, he is likely to be cautious in using the types of restrictions that are most harmful to the general public." EDWARDS, *MAINTAINING COMPETITION* 96 (1949).

145. *Id.* at 160-61. *But cf. Burns, supra* note 136, at 695. Burns contends that though there may be some truth in the argument that large buyers get advantages not only from cost-reducing opportunities but from market control opportunities as well, the argument has never been satisfactorily documented. In practice, he argues, it is impossible to draw a line between sources of possible price advantage.

146. Factors forestalling monopoly in distribution are: low capital requirements, cheap quarters, cheap equipment available at second-hand, abundant stocks of goods, numerous and widely scattered sources of supply, easy credit, unskilled labor technology. WILCOX at 57. "Even if all of the larger trading corporations were to combine, it may be doubted that they could obtain or hold a position of monopoly. There is no obstacle to entrance to the field." *Ibid.* See also, PURDY, LINDAHL & CARTER, *CORPORATE CONCENTRATION AND PUBLIC POLICY* 411 (1942); SIMONS, *op. cit. supra* note 134, at 72.

147. *Cf. EDWARDS, MAINTAINING COMPETITION* 96 (1949).

be victimized. Because few of them are dependent on a single buyer, sufficient alternative outlets for workable competition generally exist.<sup>148</sup>

*Discrimination between segregated markets and "functional" discounts: The Champion Spark Plug Case.*<sup>149</sup> Champion Spark Plug Company discriminated between motor vehicle manufacturers and spark plug sales distributors in its sales of spark plugs. The Ford Motor Company paid 6 cents per plug used for motor installation and 22 cents for replacement plugs which it resold.<sup>150</sup> Distributors, on the other hand, paid 26 cents for replacement plugs.<sup>151</sup> Champion's distinct packaging differentiated plugs for the two separate end uses.<sup>152</sup> And Ford segregated original equipment and replacement plugs for excise tax purposes.<sup>153</sup> The FTC trial examiner's recommended cease and desist order forbids Champion to discriminate in price, unless justified by cost savings, between original equipment and replacement buyers.<sup>154</sup>

Price discrimination between segregated markets, not functional discounts, is the apparent issue of the *Champion* case. Champion's distinct packaging for different end uses set up a barrier separating non-competing markets. Because low-priced plugs installed by Ford did not compete with high-priced replacement sales, the low 6 cent price did not interfere with Champion's replacement prices. And since Ford installed and never distributed original equipment plugs, the low price was not a functional discount segmenting a distribution channel.<sup>155</sup>

The contentions of both FTC trial staff and Champion becloud this issue. The trial staff ignores the segregated markets, considers the two prices paid by Ford "fictitious," and claims the "true" price to be their weighted average.<sup>156</sup>

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148. *Ibid.*

149. Champion Spark Plug Co., FTC Dkt. 3977 (pending). The case has been briefed and argued before the FTC, and is now before the Commission awaiting decision. Communication to the YALE LAW JOURNAL from Bureau of Antimonopoly, FTC, dated July 10, 1951, in Yale Law Library.

For a recent full discussion of the case, see Hansen & Smith, *The Champion Case: What is Competition?*, 29 HARV. BUS. REV. No. 3, p. 89 (May 1951).

150. Brief of Counsel Supporting the Complaint, p. 8 (hereinafter cited as FTC Brief); Trial Examiner's Recommended Decision, p. 10 (hereinafter cited as Recommended Decision).

151. *Ibid.* See also note 161 *infra*.

152. FTC Brief, p. 5; Brief for Respondent, p. 25 (hereinafter cited as Champion Brief); Recommended Decision, p. 7.

153. Champion Brief, p. 25.

154. Champion is forbidden from "selling to any purchaser at a price different from the price charged any other customer who either (a) purchases Champion spark plugs for original installation in engines or . . . vehicles manufactured for sale and sold in competition . . . or (b) who purchases Champion spark plugs for resale in competition. . . ." Recommended Decision, p. 29.

155. Compare discussion at pp. 933-35 *supra*, with pp. 936-37 *supra*.

156. FTC Brief pp. 5-6, 10. See also Recommended Decision, pp. 8, 12-13. And see note 157 *infra*.

According to it, Ford paid not 6 cents for original equipment and 22 cents for replacement plugs, but 16½ cents for all plugs.<sup>157</sup> The 4 cent replacement plug differential between Ford and other replacement buyers merged into this larger spread and was not argued as a separate issue. Champion, on the other hand, defends the 6 cent price to Ford as a "functional discount" immune from any Robinson-Patman challenge.<sup>158</sup> The *Champion* case, it argues, is a "test case" for American industry on the legality of "functional prices or trade discounts."<sup>159</sup> It is not.

The FTC has never invalidated genuine functional discounts to distributive middlemen. Lower prices on goods for resale have consistently passed FTC scrutiny; dual-function buyers may lawfully obtain lower prices on goods bought for further distribution.<sup>160</sup> But Champion's discounts to Ford worked in reverse. The price of plugs for resale was *higher* than the price of buyer-used plugs. Obviously there was no compensation of a buyer for relieving a seller from distributive functions.

The nub of the *Champion* case lies deeper. Champion's discriminatory pricing to Ford, the FTC trial staff charged, stunted competition in the spark plug industry.<sup>161</sup> Champion and two other spark plug manufacturers shared

157. FTC Brief, p. 10 n.26. The average is weighted by the respective volume of installation and replacement plugs bought by Ford.

158. *Champion* Brief, pp. 9-19.

159. *Id.* at pp. 1, 7, 9. The injection of the functional discount label into the *Champion* case has laid the foundation for spurious generalizations and general confusion. See, e.g., letters from the National Congress of Petroleum Retailers, Inc., and the Motor and Equipment Wholesalers Ass'n, reprinted in FTC Release, December 2, 1950. These letters from distributive middlemen's associations express fears that the *Spark Plug Cases* portend an FTC attack on all functional discounts. The Commission's replies, reprinted *ibid.*, do not enlighten. Their gist, that functional discounts *as such* are not challenged, does not make clear that Champion's discounts to Ford cannot be compared with functional discounts to middlemen. Moreover, in a companion case FTC counsel adopted the functional discount label to compare the incomparables. FTC Reply Brief, pp. 2-5, General Motors and AC Spark Plug Co., FTC Dkt. 5620 (pending). For resultant extrapolation from the specifics of the *Champion* case to the generality of functional discounts, see Austern, *Inconsistencies in the Law*, CCH ANTITRUST LAW SYMPOSIUM 158, 164-65 (1951); Simon: *Legal Price Fixing*, CCH ANTITRUST LAW SYMPOSIUM 83, 88 (1951); *Price Discrimination to Meet Competition*, [1950] U. OF ILL. LAW FORUM 575, 576 (1951); Hansen & Smith, *supra* note 149, at 89.

160. Shniderman, *supra* note 25, at 592-95 and sources there cited; Standard Oil Co., 43 FTC 56, 58 (1946). And see letter from Director, Bureau of Antimonopoly, FTC, to General Manager, Motor and Equipment Wholesalers Ass'n, FTC Release, Dec. 2, 1950. "Your letter expresses a fear that the Commission is moving to outlaw wholesaler functional discounts as such. You are assured that such a fear is groundless. In my opinion, the Robinson-Patman Act does not provide for such action. *The Commission has never so moved and in no present case does there appear any such intention.*" (emphasis added).

161. The trial staff secondarily alleged that Champion's discriminatorily low prices to Ford "prevented Ford from competing with it." FTC Brief, pp. 29-31. In the light of antitrust policy toward industrial integration as expressed in the recently amended section 7 of the Clayton Act, for example, the FTC solicitude over Ford's competitive



about 80% of the industry's output.<sup>162</sup> Champion's low original equipment price to Ford, combined with similar price policies by the other majors, foreclosed smaller spark plug manufacturers from markets.<sup>163</sup> Original equipment sales to the automobile industry were essential to build up replacement demand.<sup>164</sup> But small rivals could not meet Champion's six cent price because they were unable to sell at a loss until a demand for higher-priced replacements developed.<sup>165</sup> And barring them from access to original equipment markets in turn stymied their replacement sales. The argument is plausible—but defective.

Champion's pricing policy can achieve a double-barreled economic objective. Ford's bargaining pressure drives Champion's price down toward Ford's hypothetical spark plug production costs. Champion must accede to Ford's coercion or lose Ford as its major market outlet. But Champion may be unable to sell to everyone at this price and still earn profits. It can, however, charge a higher price to less powerful buyers and, at the same time, block Ford from cheap reselling that may usurp the high-price market. Champion's two-price quotations to segregated spark plug markets with one stroke serve both ends. Ford buys plugs at two prices that bracket the price it has economically bargained for.<sup>166</sup> And Champion's distinct packaging of installment and replacement plugs insulates its high-

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prowess seems soggy with crocodile tears. Moreover, the implication that Champion's lower prices bribed Ford not to compete is patently absurd. In a competitive system, lower prices are typically designed to keep a prospective buyer from buying somewhere else, or going into business for himself. And compare FTC, REPORT ON THE MOTOR VEHICLE INDUSTRY 1062 (1940): "To the extent that car manufacturers absorb parts manufacturers, . . . the car manufacturers tend to restrict free competition in the parts manufacturing industry."

Thirdly, Champion's price policies allegedly "caused injury to competition between buyers." FTC Brief, pp. 31-37. Ford's "average price of 16½ cents" paid for all plugs it bought gave it a "competitive advantage." *Id.* at 31-32. Apparently the FTC staff made no separate argument based on the 4 cent price differential between replacement plug prices to Ford and to distributors, nor did the trial examiner make findings on this point. The issue of injury to competing buyers is not only the least important in the case, but seems fully ruled by the *Morton Salt* case, discussed at pp. 945-51 *supra*.

For a survey of the allegations and issues in the *Champion Case*, consult Hansen & Smith, *supra* note 149, *passim*.

162. FTC Brief, p. 4. Recommended Decision, p. 6.

163. FTC Brief, pp. 27-29. The brief recounts unsuccessful attempts by Blue Crown Spark Plug Co., a small manufacturer, to sell to Deere Co., a tractor manufacturer, and Kaiser-Frazer Corp. In both cases Blue Crown's bids were rejected as too high and contracts were awarded to Champion on the basis of six and five cent original equipment bids. *Id.* at 27-28. *Cf.* note 166 *infra*. See also Recommended Decision, p. 13.

164. FTC Brief, p. 29; Recommended Decision, p. 13.

165. FTC Brief, p. 29.

166. Champion's sales of the low-priced original equipment plugs were conditioned on purchase of higher-priced replacement plugs. FTC Brief, p. 25; Recommended Decision, p. 8.

price replacement sales from encroachment by this low-price original equipment buyer.<sup>167</sup> But only to the second purpose is the two-price system essential. The system cannot foreclose smaller spark plug manufacturers from markets. They, too, could quote separate prices for installment and replacement plugs and compute prospective profits from the sale of both. Competitive weakness may prevent their meeting the prices, single or double, of a more powerful rival. A uniform price quotation by Champion of 16½ cents for *all* plugs may still put them out of the race. If anything does, Champion's dominant market position in the spark plug industry, not its double price tags, stifles smaller competitors.

But Robinson-Patman is a dangerously clumsy tool. Prohibiting discrimination between segregated markets can have unforeseen consequences. Preferential price treatment is common industrial practice<sup>168</sup> when manufacturer-users can threaten to enter manufacturing themselves and deprive a seller of his market. Ford, for example, suggested this possibility to Champion.<sup>169</sup> Because any price above out-of-pocket cost spreads overhead, and manufacturer-users do not compete with other sales, sellers may readily accede to a preferential price policy. Eliminating preferential pricing, however, may encourage users to integrate upward into manufacture or sellers to merge with major market outlets.

In the market context of the spark plug industry, this is not unlikely. Champion, an independent, and two rivals connected with automobile majors share about 80% of output.<sup>170</sup> Because its rivals' major markets seem more assured, a forced non-discriminatory policy primarily affects Champion. Ford, if denied preferential prices, may itself integrate into spark plug manufacture or swallow up Champion, subject to the limitations of new section 7 of the Clayton Act. In that event, about 30% of the spark plug market would be lost not only to Champion, but all independent manufacturers as well. To ensure competition in the spark plug industry, atomization of both

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167. Ford, to determine the price at which it will resell, apparently considers the high price it has paid for replacement plugs as the actual cost to it. Champion Brief, p. 37 n.107. Ford, therefore, does not average low and high purchase price and compete in the resale market on that basis.

168. See Dun & Bradstreet, Report on the Scale of the Original Equipment Market and the Prevalence of Differentials between Original Equipment and Trade Customers (undated), reprinted as Exhibit A, Champion Brief, pp. 39-41. "A recent check . . . by Dun & Bradstreet showed that 70 per cent of the responding companies who sell identical products to original equipment and to trade buyers sell at different prices to these two classes of customers." *Id.* at 39.

169. FTC Brief, pp. 30-31; Champion Brief, pp. 30-32. *Cf.* note 161 *supra*.

170. See note 162 *supra*. General Motors manufactures its own spark plugs through its wholly owned AC Spark Plug Division. FTC Brief, p. 3, General Motors Corp. and AC Spark Plug Co., FTC Dkt. 5620 (pending). Chrysler buys plugs from Electric Auto Lite Co. Harold E. Talbott is a director of both companies, and Chairman of the Finance Committee of Electric and Member of the Finance Committee of Chrysler. Champion Brief, p. 5, citing DIRECTORY OF DIRECTORS IN THE CITY OF NEW YORK 626 (1950).

producers and industrial buyers might prove essential. The Robinson-Patman uniform price formula, on the other hand, may force further integration in the already highly integrated automobile industry. While atomization might set off competition in the spark plug industry, the Robinson-Patman Act never will.

*Selective price discrimination.* Predatory price cutting is illegal under Robinson-Patman and section 5 of the FTC Act.<sup>171</sup> In *E. B. Muller v. FTC*,<sup>172</sup> two sellers controlled the major part of the chicory market and decided to eliminate their sole competitor, a smaller local seller. Business correspondence showed their deliberate intent.<sup>173</sup> Prices were cut drastically in the competitor's trade area and kept higher elsewhere. This geographical price discrimination tended to monopoly and was held illegal under the two statutes.<sup>174</sup>

Mere expansion of trade, however, also conflicts with the Robinson-Patman Act. In *Samuel H. Moss v. FTC*,<sup>175</sup> a seller of rubber stamps charged varying prices to his accounts. He did not know his competitors' prices but merely "bid low enough to get the business."<sup>176</sup> This practice, found the FTC, had "a tendency to induce purchase of [his] stamps by various users, and to divert trade to [him] from his competitors."<sup>177</sup> The Second Circuit affirmed a cease and desist order.<sup>178</sup>

Price "chiseling" to disturb a price-fixing conspiracy may also be illegal. The Staley Company allowed favorable purchase options to some buyers.<sup>179</sup>

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171. "Unfair methods of competition in commerce . . . are hereby declared unlawful." 52 STAT. 111 (1914), 15 U.S.C. § 45(a) (1946). See also note 65 *supra* for discussion of Robinson-Patman § 3.

172. 142 F.2d 511 (6th Cir. 1944).

173. *Id.* at 517.

174. *E. B. Muller & Co.*, 33 FTC 24 (1941), *aff'd*, *E. B. Muller v. FTC*, 142 F.2d 511 (6th Cir. 1944).

175. 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), *clarified*, 155 F.2d 1016 (2d Cir. 1946).

176. 148 F.2d 378, 379.

177. *Samuel H. Moss, Inc.*, 36 FTC 640, 648 (1943). Par. 7 of the findings continues: "The lower prices at which respondent offered for sale and sold its rubber stamps to users thereof to induce the purchase of respondent's rubber stamps in preference to those of his competitors had a substantially injurious effect upon competition in the sale and distribution of rubber stamps . . . and in some instances respondent's prices were such that competitors could not meet such prices without suffering a loss on such business and in one instance a competitor was forced out of business as the result of such acts and practices of the respondent." *Id.* at 648-49 (emphasis added). Compare EDWARDS, MAINTAINING COMPETITION 168 (1949): "[I]njury to competition should be defined as injury to the vitality of competition in the market, not as injury to competition between particular designated competitors nor as injury to a particular competitor, even though the power of large buyers is somewhat less drastically reduced by such an interpretation."

178. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945), *clarified*, 155 F.2d 1016 (2d Cir. 1946).

179. *Staley Mfg. Co.*, 34 FTC 1362, 1369-70 (1942).

Apparently collusion in the glucose industry had ended competition<sup>180</sup> but not uncertainty among sellers; some competition still operated underground. Staley discovered through salesmen and buyers that its "competitors" had chiseled. It did not stop to verify reports—it also chiseled.<sup>181</sup> The FTC held this price discrimination illegal, and the Supreme Court agreed.<sup>182</sup>

Blanket illegality of selective price discrimination cements rigid prices that antitrust policy aims to loosen. The *Staley* doctrine relieves colluding sellers from the burden of hounding and punishing price cutters.<sup>183</sup> The Robinson-Patman Act does it for them. In this way the law reduces the sellers' uncertainty that blocks fully effective collusion. Illegality of secret price cuts in non-competitive markets protects rigid price structures from chipping by sellers whose self-interest dictates concessions to selected buyers. When underground competition is prevented, monopolistic prices may last indefinitely.

Failure to differentiate aggressive competition from predatory price cutting further petrifies prices.<sup>184</sup> The *Muller* and *Moss* cases received equal treatment under the Robinson-Patman Act. But deliberate destruction of remaining competition and selective price reductions to "divert trade" are not the same. One ends competition, the other *is* competition. Prices reduced to gain new trade symptomize a competitive system's effective functioning. Prohibiting selective price reductions "low enough to get the business" comes close to outlawing price competition itself.<sup>185</sup> If a seller by law must lower all his prices or none, he will hesitate long to lower any.<sup>186</sup>

180. See note 247 *infra*.

181. 34 FTC 1362, 1371.

182. *Staley Mfg. Co.*, 34 FTC 1362 (1942), *aff'd*, *FTC v. Staley Mfg. Co.*, 324 U.S. 746 (1945).

183. "[I]n industries in which concerns are relatively few and large, competition often takes the form of secret price concessions, which are likely to be discriminatory in character; and the effort to stamp out competition often consists primarily in attempts to require uniform methods of pricing. Congress probably never contemplated an interpretation of the Robinson-Patman Act under which the only important method by which enterprises in an industry actually compete might be interpreted as an injury to competition; . . . Thus the law of price discrimination . . . may be so interpreted as to encourage some of the methods by which groups of large concerns give force to collusive agreements." EDWARDS, *MAINTAINING COMPETITION* 167-68 (1949). See also note 64 *supra*.

184. "Nothing would be gained by using the power of government to deprive large enterprises of a venturesome spirit or to induce them to compete halfheartedly, with a regard for the interests of their competitors similar to that which is produced by collusive agreements. This would be to require semimonopolistic concerns to behave like monopolies." EDWARDS, *MAINTAINING COMPETITION* 156 (1949).

185. *Cf. id.* at 162; notes 51 and 53 *supra*.

186. "To the extent to which sellers are required to maintain uniform prices to all buyers, they are rendered unable to seek particular sales by cutting prices. If they choose to rely upon price competition as their primary sales argument, they must cut prices simultaneously to all comers. Naturally, many sellers are far more reluctant to take such a broad step than to reduce prices on individual transactions. In this way, therefore, anti-

*Per se violations: The "brokerage" clause.*<sup>187</sup> Southgate Brokerage Co. bought direct from sellers for its own account. Functioning as its own "broker," it did not need the services of other brokers. Accordingly it obtained equivalent price concessions. A cease and desist order was affirmed.<sup>188</sup> The court acknowledged that direct buying clearly benefited the sellers.<sup>189</sup> But to pay buyers "for doing their own work" was "a mere gratuity"<sup>190</sup> illegal under the Robinson-Patman Act.

The statute's "brokerage clause" tends to create a legal monopoly for independent brokers that no efficient buying can bypass.<sup>191</sup> Statutory language is vague.<sup>192</sup> In short, receipt or payment of compensation by either party to a transaction is illegal except when services are rendered. Judicial interpretation, however, quickly read the exception out of the statute.<sup>193</sup> Obviously direct buyers relieve a seller from paying intermedi-

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discrimination laws may restrict price competition and may favor the emphasis of non-price factors." NELSON & KEIM at 62.

187. Section 2(c) of the Robinson-Patman Act reads: "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 49 STAT. 1526 (1936), 15 U.S.C. § 13(c) (1946). The baffling syntax of the section has perturbed at least one court. "The punctuation as published is confusing. . . . Commas are not to be suffered to defeat the legislative meaning." *Webb-Crawford Co. v. FTC*, 109 F.2d 268, 270 (5th Cir. 1940).

For general discussion of the brokerage clause, consult ZORN & FELDMAN at 204-19; Austern, *Section 2(c)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 37 (1946); Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511 (1940); Note, 47 YALE L.J. 1207 (1938).

188. *Southgate Brokerage Co.*, 39 FTC 166 (1944), *enforced*, *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945).

189. 150 F.2d 607, 611.

190. *Ibid.*

191. See acid criticisms by Adelman: *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1335-7 (1948); *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 54-56 (1949); *The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. ECON. 238, 248-50 (1949). See also EDWARDS, MAINTAINING COMPETITION 169 (1949) and sources cited in note 187 *supra*. Only the National Food Brokers' Ass'n stands opposed to the critical barrage. Its 1950 resolution considers the Robinson-Patman Act of "great value" and warns that weakening of the Act "would tend to throw the food industry back to the days of chaotic business conditions." N.Y. Times, Jan. 24, 1950, p. 45, col. 1.

192. See note 187 *supra*.

193. *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Great A & P Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940). See Austern, *supra* note 187, at 42; Oppenheim, *supra* note 187, at 145-46. And see statement by Rep. Utterback explaining the brokerage clause: "[W]here sales are made from

aries to find market outlets.<sup>194</sup> But these are not *legal* services—the buyer is “doing his own work.” The market effects of the brokerage clause are, therefore, simple.<sup>195</sup> Because a direct buyer is denied functional compensation, an unneeded broker picks up business or a seller pockets the value of the function. The clause thus grants a legal tollgate to the broker or a windfall to the seller.<sup>196</sup> Ironically, small wholesalers’ cooperative buying agencies are conspicuous victims<sup>197</sup> of strict FTC “brokerage clause” enforcement.<sup>198</sup>

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buyer to seller [sic], *in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by either party to the other.*” 80 CONG. REC. 9418 (1936) (emphasis added). Compare note 194 *infra*.

194. “The broker’s task is a genuine marketing function, that of establishing contact between buyers and sellers. In some lines of business, textiles, for instance, the brokerage function commonly is performed by independent concerns having no regular or permanent affiliations either with buyers or with sellers. In other fields, notably the food trades, the broker is essentially a manufacturer’s sales representative having close relationships with a number of manufacturers whom he serves by finding customers. In these same trades the opposite situation also is to be observed, where the brokerage function is integrated with the buying side, the broker’s job then being that of seeking prospective sellers. Since the brokerage function *per se* is that of arranging contacts between buyers and sellers, there is no essential reason why a broker who is part of a chain grocery store organization does not perform as typical a brokerage function when he establishes contacts with canners who have a certain grade of fancy canned corn available for delivery as some other broker regularly retained by these canners may perform in seeking out chains.” McNair, *supra* note 6, at 344. See also ZORN & FELDMAN at 204-5.

195. The clause, as interpreted, apparently means that (1) an intermediary who acts for the buyer, or who is controlled by the buyer, cannot be paid by, or receive brokerage from, the seller even for services rendered to the seller; (2) a seller who ordinarily utilizes brokers in selling a product may not reflect the non-use of brokers in his price to particular customers; (3) this restriction applies to sales made to bona fide brokers who, as part of their operations, buy for their own account. Austern, *supra* note 187, at 45.

The universal language of §2(c) could probably encompass all violations of §2(a). Because of the required “injury” criterion of §2(a) and that section’s permitted defenses, which do not apply to §2(c), the distinction may be vital. Yet apparently the label attached to a particular transaction may invoke the legal consequences of one or the other section. See *id.* at 45 n.41.

196. See Note, 58 YALE L.J. 969, 973 (1949).

197. *E.g.*, Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir. 1938), *cert. denied*, 305 U.S. 634 (1938); Modern Marketing Service, Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945).

198. Brokerage clause cases make up more than one-third of all FTC Robinson-Patman Act proceedings. See Austern, *supra* note 187, at 38-39, 48-54; statistics cited in note 72 *supra*. The Commission apparently has not yet been unsuccessful in a §2(c) proceeding.

The all-inclusive statutory language, moreover, has spawned absurdities in private litigation. See Baysoy v. Jessop Steel Co., 90 F. Supp. 303 (W.D. Pa. 1950) (steel delivery contract unenforceable because it stipulated price concession to buyer for services connected with transaction). *But cf.* Bruce’s Juices v. American Can Co., 330 U.S. 473 (1947) (seller’s violation of §3 held no defense to his suit for purchase

*Per se violations: The "proportionally equal" clauses.*<sup>199</sup> Elizabeth Arden, Inc., supplied cosmetics demonstrators to some department store and specialty shop customers. These services, however, were not granted to other accounts.<sup>200</sup> A cease and desist order was affirmed.<sup>201</sup> The court emphasized that the criteria of the price discrimination clause of the Robinson-Patman did not apply to the "proportionally equal" services clause:<sup>202</sup> a showing of competitive injury was unneeded.

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price of goods). And see *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. 1942) (supplier's breach of distributor's contract unactionable because volume rebate formed part of the agreement); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943) (seller's bribery of buyer's agent entitles buyer to treble damages against seller); *Allgair v. Glenmore Distilleries Co.*, 91 F. Supp. 93 (S.D. N.Y. 1950) (buyer who pays "under the table" to seller to evade OPA price regulations has treble damage claim against seller); *Interborough News Co. v. Curtis Publishing Co.*, 10 F.R.D. 330 (S.D. N.Y. 1950) (seller who granted rebates to insistent buyer has treble damage claim against him). Because §2(c) outlaws payment as well as receipt of "brokerage", all parties in the *Allgair* and *Interborough* cases technically violated the statute. For that reason, the Court in these companion cases required plaintiffs to show "economic coercion" before recovering their money threefold. Payment to a buyer or his agent for "doing his own work," albeit unfaithfully, and payment to a seller for doing no work link all the above cases to the Robinson-Patman Act's brokerage clause.

199. §§2(d) and 2(e) of the Robinson-Patman Act read: "[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." 49 STAT. 1526 (1936), 15 U.S.C. §13(d) (1946). "[I]t shall be unlawful for any person to discriminate in favor of one purchaser against another . . . by contracting to furnish or furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale . . . upon terms not accorded to all purchasers on proportionally equal terms." 49 STAT. 1526 (1936), 15 U.S.C. §13(e) (1946).

For general discussion, see ZORN & FELDMAN at 219-33; Carter, *Validity of the Demonstrator Practice under Section 2(d) and (e)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 91 (1946); Dunn, *Section 2(d) and (e)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 55 (1946); Layton, *Demonstrators on Proportionally Equal Terms*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 38 (1948); Montague, *Proportionally Equal Terms*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 51 (1948). For an excellent early discussion, see Comment, 46 YALE L.J. 447, 465-72 (1937).

After exploring in detail the verbal inconsistencies of §§2(d) and 2(e), one author concludes that they have no effect in the practical operation of the statute. Dunn, *supra*, at 62, 66-68.

200. Elizabeth Arden, Inc., 39 FTC 288, 300-1 (1944).

201. Elizabeth Arden, Inc., 39 FTC 288 (1944), *aff'd*, Elizabeth Arden, Inc., v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947).

202. 156 F.2d 132, 135.

The "proportionally equal" clauses of the Robinson-Patman Act are anomalies.<sup>203</sup> A seller is prohibited from compensating a customer for services rendered in connection with the sale, unless such payments are available to competing customers on "proportionally equal terms." Conversely, the seller himself may not furnish buyers with services which are not accorded to other buyers on "proportionally equal terms."<sup>204</sup> Competitive injury is not requisite to illegality.

Blanket illegality ignores the economic functions of suppliers' allowances and services in promoting sales of branded goods.<sup>205</sup> Advertising pushes sales to both distributor's and supplier's advantage. Accordingly, distributors secure allowances to cover local advertising and display. A supplier, alternatively, can stimulate sales directly by furnishing sales aids to buyers. Supplier-paid product demonstrators who operate in buyers' retail outlets are common in the drug and cosmetics trade.<sup>206</sup> Chain stores may wield their bargaining power to secure advertising allowances not available to independent buyers. But their greater coverage of the buying public stretches the supplier's advertising dollar.<sup>207</sup> For similar reasons, department stores may obtain demonstrator service that other buyers do not get. When a supplier gains economic benefits from allowances and services, forcing his sales promotion outlay into more costly channels cannot be justified.

But "bogus" allowances and services from which the supplier gains no benefit may serve as disguised price concessions to powerful buyers.<sup>208</sup> In

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203. The "proportionally equal" standard is nowhere defined. It in effect establishes a ratio without a basis of comparison. For that reason, one writer considers the clauses a "legislative monstrosity." Oppenheim, *Should the Robinson-Patman Act be Amended?*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 146 (1948). See also ZORN & FELDMAN at 225-26. Layton, *supra* note 199, at 45-50 suggests formulas to implement the "baffling measuring rod."

204. See note 199 *supra*.

205. "A successful demonstration . . . increases the volume of the manufacturer and the store and benefits other sellers of the product in the competitive area by creating a demand that might not otherwise exist." Carter, *supra* note 199, at 92. And see generally ZORN & FELDMAN at 219-33; Adelman, *The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. ECON. 238, 253-54 (1949).

206. ZORN & FELDMAN at 231-32; Carter, *supra* note 199, at 92; Comment, 46 YALE L.J. 447, 470-72 (1937).

207. McNair, *supra* note 6, at 343-44; Note, 58 YALE L.J. 969, 974 n.33 (1949); Comment, 46 YALE L.J. 447, 465 (1937).

208. The FTC investigation of chains that preceded Robinson-Patman revealed widespread use of "bogus allowances" as disguised discriminatory price concessions to chains. ZORN & FELDMAN at 222-23. "Section 2(d) is historically designed to stop pseudo-advertising and sales-promotion allowances by the manufacturer to a larger dealer in his product, which make an indirect price concession to him that is injurious to competing smaller dealers therein." Dunn, *supra* note 199, at 65. *But cf.* statement of Rep. Utterback, in charge of the Patman bill on the floor, explaining §§ 2(d) and (e): "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the



that event, the competitive injury criterion of the price discrimination clause should govern the "proportionally equal" clauses as well. Special concessions in the form of advertising allowances, demonstrator services, or outright price reductions do not call for separate standards of legality.<sup>200</sup> Even the broadest Robinson-Patman philosophy must stop short of illegality without injury.<sup>210</sup>

#### STATUTORY JUSTIFICATIONS FOR PRICE DISCRIMINATION

Price discrimination under the Act may be justified in two ways. Differential prices that cost savings can account for are permissible. And good faith meeting of competition by a discriminatory lower price may be a complete defense.

*Cost defense.* Price differentials that "make only due allowance for differences in the cost of manufacture, sale, or delivery" resulting from differing methods of sale or delivery of goods escape Robinson-Patman illegality.<sup>211</sup>

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customer so favored as compared with others who have to bear the cost of such services themselves." 80 CONG. REC. 9418 (1936) (emphasis added).

209. See proposals by Oppenheim, *supra* note 203, at 147-48.

210. In practice, the impact of the clauses has struck far afield. The cosmetics industry has borne the brunt. See *Elizabeth Arden, Inc., v. FTC*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), *cert. denied*, 326 U.S. 773 (1945) (department store not granted "proportionally equal" demonstrator services or allowances recovers treble their value against discriminating manufacturer); *accord*, *Sun Cosmetics Shoppe, Inc., v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949). See also *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 743-45 (1945) (seller's discriminatory advertising expenditures illegal under § 2(e)); *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir. 1946), *cert. denied*, 329 U.S. 721 (1946) (defendant seller violating marketing price agreement by granting "bogus" advertising allowances liable for treble damages to competing seller). See *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951) (runway delivery of cans and runway discount by Indiana manufacturer to adjacent canner entitles "competing" Arkansas canner not receiving discount to treble damages against manufacturer). The deceptive simplicity of the Robinson-Patman Act has vitiated apparently valid Sherman Act causes of action. Compare *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949) (refusal to sell by manufacturer of uniquely designed furniture bidding for public contracts, pleaded as discriminatory furnishing of price list services, held no violation of § 2(e)), with *U.S. v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945) (refusal to sell by manufacturer of unique linen rugs bidding for public contracts held violation of Sherman Act).

211. The relevant portion of section 2(a) reads: "It shall be unlawful . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition . . . : *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

A seller charged with price discrimination can defend his prices with cost accounting.<sup>212</sup> Systematic cost studies that estimate distribution costs to typical customer classes *may* be acceptable as a cost justification under the Act. Thus in the *Minneapolis-Honeywell* case, the Federal Trade Commission permitted a cost study to justify *some* brackets in the seller's volume discount schedule.<sup>213</sup> Minneapolis-Honeywell's cost defense succeeded because the Commission found the cost study "made in good faith and in accordance with sound accounting principles."<sup>214</sup>

But the elements of good faith and sound accounting principles are left undisclosed. Prior to promulgating the *Minneapolis-Honeywell* test, the FTC in the *Standard Oil* case<sup>215</sup> had summarily rejected cost studies which attempted to establish cost differences in serving tank-car and tank-wagon customers. Despite the standardized nature of gallonage delivery,<sup>216</sup> the study largely failed because conducted in a geographic area other than that in which the alleged discriminations had occurred.<sup>217</sup> The Commission, however, made no attempt to distinguish *Standard* in its *Minneapolis-Honeywell* opinion. It must be assumed, therefore, that *Standard's* cost study was made in bad faith or with unsound accounting principles, or that inconsistent precedents now rule the FTC's interpretation of the cost defense.

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For general analysis of the cost defense, consult Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 IOWA L. REV. 244 (1951); Comment, 35 ILL. L. REV. 60 (1940).

212. The burden of proving cost savings is on the seller charged with price discrimination. *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948). A buyer charged with knowingly accepting discriminatory prices must prove the seller's cost savings to escape. *Automatic Canteen Co.*, 3 CCH TRADE REG. REP. ¶ 14,398 (FTC 1950).

Procedures for allocating distribution cost are described in *Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling*, H.R. Doc. No. 287, 77th Cong., 1st Sess. (1941); Heckert, *Back to Distribution Costs*, 79 J. ACCOUNTANCY 456 (1945); Longman, *Distribution Costs*, 70 J. ACCOUNTANCY 232, 431 (1940).

Distribution cost accounting is of recent vintage. Improvement of distribution cost procedures was expected as a major by-product of the Robinson-Patman Act. In 1937 there was "a great new stirring throughout business concerning methods of checking distribution costs." George, *Business and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 329, 401-2 (1937). In 1941, an FTC investigation of distribution cost procedures revealed "a dearth of good case material." Sawyer, *supra* note 211, at 256. In 1951, distribution cost accounting was still in its "pioneering stage." *Id.* at 259-60. A respondent attempting to establish a cost defense will thus be forced to operate on the fringes of accountancy.

213. *Minneapolis-Honeywell Regulator Co.*, 44 FTC 351, 380-82, 394 (1948), *rev'd on other grounds*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,881 (7th Cir. 1951).

214. 44 FTC 351, 394.

215. *Standard Oil Co.*, 41 FTC 263, 281 (1945). For an analysis of *Standard's* cost defense and criticism of its outright rejection, see Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 64-66 (1949).

216. Adelman, *supra* note 215, at 64 nn.102, 103 and text.

217. 41 FTC 263, 278-79.

But more recent cases hold systematic cost studies of customer classes inherently inadequate. A showing of cost savings in separate transactions with individual customers seems required. In two cases<sup>218</sup> the American Can Company attempted to justify price discrimination by studies that allocated sales costs to volume discount brackets. One court found the defense's "ultimate fault" in failure to separate costs for individual competitors; a small buyer's "identity as an individual, for cost purposes, was completely lost."<sup>219</sup> The other court equally disapproved studies which disregarded individual transactions and costs of serving individual customers.<sup>220</sup> FTC counsel quickly adopted this novel doctrine in the *Champion* case.<sup>221</sup>

Under current interpretations a cost defense, as a practical matter, is impossible.<sup>222</sup> Functional and quantity discounts at best are overall long run

218. *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951).

219. *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484, 496 (W.D. Ark. 1949). The Court also distinguished the *Minneapolis-Honeywell* case. There respondent's discount schedule contained many brackets, and an independent accounting firm had made comprehensive cost studies and revised them several times. But American Can's schedule provided for only three brackets. Moreover, American set up its prices first, and then conducted cost studies to justify them. It therefore could not meet the "good faith cost study" test of *Minneapolis-Honeywell*. *Ibid.*

220. *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 988-89 (S.D. Fla. 1949).

221. Brief of Counsel Supporting the Complaint, pp. 38-39, *Champion Spark Plug Co.*, FTC Dkt. 3977 (pending). See also Brief of Counsel Supporting the Complaint, pp. 20-21, *Electric Auto-Lite Company*, FTC Dkt. 5624 (pending).

222. "Any [individual transaction] basis for testing price discrimination seems fairly absurd as a working principle." Thorp, *Price Discrimination and Cost*, 63 J. ACCOUNTANCY 183, 185 (1937).

In adversary proceedings, apparently only two respondents have made out successful cost defenses. *Bird & Son, Inc.*, 25 FTC 548 (1937); *Minneapolis-Honeywell Regulator Co.*, 44 FTC 351 (1948), *rev'd on other grounds*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,881 (7th Cir. 1951). Both these cases, however, involved group cost studies which courts rejected in the *American Can Cases*. Some of the numerous unsuccessful cost justification attempts are analyzed by Sawyer, *supra* note 211, at 250-58; Warmack, *Cost Accounting Problems under the Robinson-Patman Act*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 105 (1947); Comment, 35 ILL. L. REV. 60 (1940).

FTC Commissioner Mason faces a dilemma. People constantly ask him, "Why, if you adopt without question your own accountants' figures on cost savings in a Robinson-Patman Act suit and always reject private industry's figures—why in the name of fair play don't you give us the privilege of coming to you in the first place so you can fix the prices we shall charge our customers?" Mason, *Progress of the Federal Trade Commission*, CCH ANTITRUST LAW SYMPOSIUM 50, 54 (1951).

Even the successful cost defense may be a Pyrrhic victory. Under the "proportionally equal" clauses, pp. 959-61 *supra*, a seller might violate the Act by not according all customers the opportunity of taking advantage of sale or delivery methods that result in cost savings. The FTC seems to have argued for this interpretation in one case. See Haslett, *supra* note 65, at 473 n.86. For the ambiguous distinction between price dis-

estimates of savings through utilization of particular distribution channels or sales in economical quantities.<sup>223</sup> Separate transactions may never enter the calculation. And volume discounts cannot be rationally explained in terms of cost. A large volume purchase clearly contributes to fuller plant utilization and spreads overhead. But no one customer can claim sole credit as the marginal buyer—all buyers have contributed equally.<sup>224</sup> Finally, selective price cuts by definition are not related to any cost standards.

A more fundamental objection is the statute's prescription of cost as a standard for price. Demand conditions, not costs, determine price in a competitive system.<sup>225</sup> Price is what the buyer is willing to pay and what the seller is willing to accept. The cost concept nullifies the demand side of the price bargain.<sup>226</sup> Moreover, the cost concept is inadequate in practice. When two or more products are jointly produced or distributed, separate costs of each are factually indeterminate.<sup>227</sup> A large part of distribution cost involves joint costs that are allocable only on an arbitrary basis.<sup>228</sup> In short, cost allocations

crimination justified by cost savings, and illegal service allowances, see *American Can Co. v. Russellville Canning Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 at pp. 64,700-1 (8th Cir. 1951). And see Address by Austin Forkner, FTC Attorney, N.Y. Times, Nov. 17, 1948, p. 41, col. 3. Mr. Forkner explains the buyer's responsibilities under § 2 (f) and states that a buyer knowingly receiving discriminatory prices must prove the seller's cost savings to escape. But even if he establishes a successful cost defense, says Forkner, he may find himself "caught on another limb of the statute" because the items making up this cost saving may not have been granted by the seller to other competitors "on a proportionally equal basis."

223. McNair, *supra* note 6, at 346-47; Adelman, *supra* note 215, at 38-39.

224. *Id.* at 39.

225. See Comment, 46 YALE L.J. 447, 482 (1937), criticizing the Act's apparent acceptance of "the mistaken view that under competitive conditions price is or should be 'determined' by costs, even in the 'short period' and at all stages of a trade cycle." See also, EDWARDS, MAINTAINING COMPETITION 161-62 (1949); MILLER at 363-64; Edwards, *Types of Differential Pricing*, 6 J. MARKETING Supp. 156 (1942); Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321, 331-33 (1937); Harbeson, *The Cost Concept and Economic Control*, 17 HARV. BUS. REV. 257, 262-64 (1939). *But cf.* Hawkins, *Marketing and the Theory of Monopolistic Competition*, 4 J. MARKETING 382, 385-87 (1940).

226. Prices fluctuate as a function of demand, within limits set by costs. See, e.g., Comments: 46 YALE L.J. 447, 482 n.186 (1937) and sources there cited; 57 YALE L.J. 391, 396-97 (1948).

227. Harbeson, *supra* note 225, at 265.

228. Distribution cost includes all costs in getting goods from factory door to customer. Selling, advertising, warehousing, transportation, and credit costs are part of distribution cost. Heckert, *supra* note 212, at 456-57. Accountants recognize that much of this cost is allocable only according to preconceived plans. *Id.* at 458-59; Longman, *supra* note 212, at 432; Ostlund, *The Robinson-Patman Act and Quantity Discounts*, 14 ACCTG. REV. 402, 405 (1939). See also Sawyer, *supra* note 211, at 249, 255.

are based on business policy, not fact.<sup>229</sup> The cost defense is a slippery standard for permissible pricing.<sup>230</sup>

*Good faith meeting of competition.* In *Standard Oil v. FTC*,<sup>231</sup> the Supreme Court construed Robinson-Patman's meeting competition clause<sup>232</sup> as an absolute statutory defense to a price discrimination charge. As inter-

229. EDWARDS, MAINTAINING COMPETITION 161 (1949) ("allocation[s] . . . by policy decisions . . . masquerade as mere accounting procedures"); Edwards, *Comments and Discussion*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 57, 60 (1947) ("the allocation of joint cost . . . is a matter of business policy, not a matter of fact.") Hamilton, *supra* note 225, at 325 ("the motive of pecuniary gain sets the theme for the accountant's song.")

230. Commentators have violently attacked the Robinson-Patman Act's cost defense concept. McNair, *supra* note 6, at 337 ("bad economics and impossible accounting"); McLaughlin, *supra* note 10, at 415-16 (1937) ("utterly overwhelming and subversive of legitimate business practice"). See also Edwards, *supra* note 229, at 60 ("we are in danger of erecting the FTC into a sort of an orthodox cost accounting faculty"); Edwards, *The Struggle for the Control of Distribution*, 1 J. MARKETING 212, 216 (1937) ("The pursuit of discrimination into the labyrinths of cost accounting will produce a clash of accounting orthodoxies reminiscent of the theological disputes of the early churchmen."). Dr. Edwards at present is Director of the Bureau of Industrial Economics of the Federal Trade Commission.

231. 340 U.S. 231 (1951); Note, 36 IOWA L. REV. 351 (1951). For interpretations of the decision, see Austern, *Inconsistencies in the Law*, CCH ANTITRUST LAW SYMPOSIUM 158, 166-68 (1951); Rose, *supra* note 8, at 245-51, 257-59; Simon, *Price Discrimination to Meet Competition*, [1950] U. OF ILL. L. FORUM 575, 584-92 (1951). And see discussion of the substantive features of *Standard* at pp. 942-45 *supra*.

232. "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1946). On August 2, 1951, the Senate passed, without amendment, S. 719, to establish beyond doubt that under the Robinson-Patman Act it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet the equally low price of a competitor. 97 Cong. Rec. 9661 (Aug. 2, 1951). The proponents of the bill contend that this amendment codifies the *Standard Oil* decision. Also included in the measure is a provision permitting sellers to absorb freight charges in determining prices when the seller can thereby meet the lower price of a competitor situated more closely to the customer. For exposition of conflicting views on S. 719, see SEN. REP. No. 293, 82d Cong., 1st Sess. (1951) and *id.* Part 2 (minority views). See also, CCH TRADE REG. REP. '48-'51 DEC., Report Letter No. 221, p. 5 (Aug. 13, 1951); note 237 *infra*.

The meeting competition clause is analyzed by Austern, *Required Competitive Injury and Permitted Meeting of Competition*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 63, 66-84 (1947); Berger & Goldstein, *Meeting Competition under the Robinson-Patman Act*, 44 ILL. L. REV. 315 (1949); Haslett, *supra* note 65, at 473-80; McColester, *Section 2 (b)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 23 (1946). See also sources cited in note 231 *supra*.

preted by the Federal Trade Commission, a successful meeting competition defense under section 2(b) merely rebutted a *prima facie* violation under section 2(a)<sup>233</sup> and called for proof of actual, not merely potential, competitive injury.<sup>234</sup> Because the Commission found that Standard's discriminatory prices had in fact caused competitive injury, it dismissed Standard's defense as immaterial and made no findings on meeting competition.<sup>235</sup> The FTC's statutory interpretation was upheld by the Seventh Circuit.<sup>236</sup> The Supreme Court, however, reversed and remanded for further findings on the defense.<sup>237</sup>

The decision settles the substantive effect of the defense but wraps its contents in uncertainty. Clearly, "good faith meeting of a competitor's equally low price," the statutory defense, now excuses price discrimination regardless of competitive injury. Not so clear are the defense's legal elements. Standard discriminated only to retain some customers. For that purpose it matched, but did not undercut, competitors' price offerings of comparable grade gasoline.<sup>238</sup> The Supreme Court, in a footnote, considers these facts sufficient for a complete defense.<sup>239</sup> But the Court goes on to discuss apparently separate

233. For ingredients of the *prima facie* case, see note 128 *supra*.

234. FTC Brief, pp. 31-32, 35-37, *Standard Oil v. FTC*, 340 U.S. 231 (1951). Under the original Clayton Act, good faith meeting of competition was a complete defense. See 340 U.S. 231, 239-40, 251.

235. *Standard Oil Co.*, 41 FTC 263, 281-82 (1945); FTC Brief, pp. 23-24, *Standard Oil v. FTC*, 340 U.S. 231 (1951).

236. *Standard Oil Co. v. FTC*, 173 F.2d 210, 214-17 (7th Cir. 1949).

237. *Standard Oil v. FTC*, 340 U.S. 231 (1951). The Court heard two oral arguments in successive terms before handing down its decision. *Id.* at 234. See also note 92 *supra*. Interestingly enough, between the 1949 and 1950 terms Congress passed and the President vetoed legislation establishing good faith meeting of competition as an absolute defense. One commentator on the judicial process speculates that the Court's delay indicated initial agreement with the Seventh Circuit's interpretation and a desire to let Congress settle the matter. Rose, *supra* note 8, at 249-50. For pending legislation, see note 232 *supra*.

The decision's rationale automatically makes meeting competition an absolute defense to charges brought under the "proportionally equal" services clause. See 340 U.S. 231, 241 (1951). This clause is discussed at pp. 959-61 *supra*.

238. 340 U.S. 231, 238 n.7 (1951).

239. *Id.* at 243 n.9, which in turn refers to *id.* at 238 n.7, quoting the FTC trial examiner's conclusions of fact: "The recognition by [Standard] of Ned's Auto Supply Company as a jobber or wholesaler . . . was a forced recognition given to retain that company's business. Ned's Company at the time of recognition, and ever since, has possessed all qualifications required by [Standard] for recognition as a jobber and the recognition was given and has ever since been continued in transactions between the parties, believed by them to be bona fide in all respects. . . ." "The differentials on its branded gasolines [Standard] granted Ned's Auto Supply Company . . . were granted to meet equally low prices offered by competitors on branded gasolines of comparable grade and quality." Compare the Court's statement, *id.* at 236 n.4: "We use the term 'jobber' in this opinion merely as one of convenience and identification, because *the result here is the same whether these . . . dealers are wholesalers or retailers.*" (emphasis added). *But cf. id.* at 247 n.14, apparently requiring a showing of "lawful prices."

requirements of meeting lawful prices,<sup>240</sup> the seller's good faith,<sup>241</sup> and economic self-defense.<sup>242</sup> No summation weaves the strands into a clear-cut pattern of legality. Standing alone, *Standard* perplexes.

The Court's reliance on the *Glucose Cases*<sup>243</sup> may shed light on what *Standard* means. The companion *Glucose Cases*, decided by the Court in 1945, involved geographic pricing systems.<sup>244</sup> In *Staley*, a seller had adopted the single basing-point system of his "competitors." *Staley*, located in Decatur, Illinois, followed prevailing industry practice and quoted prices f.o.b. Chicago. As a result, buyers in and around Decatur paid "phantom freight."<sup>245</sup> The Supreme Court found the systems to result in systematic price discriminations injuring buyers and held them illegal under the Robinson-Patman Act.<sup>246</sup> Significantly, subsequent FTC proceedings found an industry-wide price-fixing conspiracy—uniform pricing formulas to which sellers adhered choked competition among themselves.<sup>247</sup>

*Staley*, nevertheless, claimed meeting competition to defend its own illegal system. Adopting its competitors' pricing system, it contended, met compe-

240. *Id.* at 242, 244, 246, 247 n.14, 250. At 244 n.10, the Court cites a lower court opinion as "indicating" that the price met must be lawful, but does not indicate approval of that indication. At 247 n.14, the Court refers to a similar "suggestion" in legislative history. The most conspicuous reference to "lawful" prices, however, appears in the heading of section III of the opinion. *Id.* at 238. But neither litigant tendered an issue of lawful prices. *Cf.* oral argument, 18 U.S.L. WEEK 3209-11 (1950).

Mr. Justice Reed: "Do you challenge that the competing offers were legal?"

Mr. Cassidy [FTC Counsel]: "I won't challenge it in my argument. The case is just as strong one way as the other." *Id.* at 3211.

241. 340 U.S. 231, 247 n.14.

242. *Id.* at 242, 249, 250.

243. *Corn Products Rfg. Co. v. FTC*, 324 U.S. 726 (1945); *FTC v. Staley Mfg. Co.*, 324 U.S. 746 (1945).

244. For an excellent discussion of the basing-point problem and the significant issues of the *Glucose Cases*, consult Comment, *Price Systems and Competition*, 58 YALE L.J. 426 (1949), especially at 446-48. And see generally, MACHLUP, *THE BASING POINT SYSTEM* (1949), reviewed by Clark, *Machlup on the Basing Point System*, 63 Q. J. ECON. 315 (1949); Symposium, *Delivered Pricing*, 15 LAW & CONTEMP. PROB. 123-313 (1950). For a recent example of a court wallowing in the basing-point morass, see *American Can Co. v. Russellville Canning Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951).

245. *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 755-56 (1945).

246. *Corn Products Rfg. Co. v. FTC*, 324 U.S. 726, 738-39 (1945); *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 750-51 (1945).

247. In 1947, an FTC complaint alleged a price-fixing conspiracy among *Corn Products*, *Staley*, and other manufacturers together accounting for 95% of the corn derivatives industry. Two years later the respondents consented to entry of an order forbidding price fixing. Findings of fact, consented to but not admitted, stated that the industry members had concertedly used delivered pricing systems and operated trade associations for central exchange of information, enabling each seller to match exactly the others' quoted prices to all customers. Because respondents had waived appeal, the trial examiner's order automatically became the FTC final order on November 20, 1950. 3 CCH TRADE REG. REP. ¶¶ 14,204; 14,396; 14,491; 14,531.

tion. The Supreme Court had no trouble rejecting this defense. Staley's system artificially raised and did not lower prices.<sup>248</sup> And Staley had not acted in good faith when it chose to adopt another's clearly discriminatory pricing system.<sup>249</sup> In short, when an unlawful system artificially raised prices, its meeting another's like unlawful system was no excuse.<sup>250</sup>

Much of the *Standard Oil* opinion, therefore, is based on factually incomparable precedent.<sup>251</sup> In the *Glucose Cases*, the Supreme Court reiterated countless times that it was dealing with sellers' pricing systems.<sup>252</sup> But Standard made individual price reductions. Standard lowered prices and competed; Staley artificially raised prices and, the FTC later found, colluded.<sup>253</sup>

Narrowly read, *Standard Oil* spells out a hollow defense. When factual contexts of the *Standard* and *Staley* cases are glossed over, the *Standard* opinion's restrictive phrases seem successive legal requirements of the meeting competition defense. A discriminating seller initially would have to prove that he matched, but did not shade, a competitor's price offering of goods of comparable grade. Next, proof of the seller's good faith and the lawfulness of the prices met would be required. And finally, a seller could prevail only if he discriminated in economic self-defense to retain his customers.

But each element, separately considered, is a misleading and inadequate competitive criterion. Meeting but not undercutting price, without more, is meaningless. Delivery and credit terms, for example, are essential parts of the price bargain.<sup>254</sup> And when a competitor offers a product with greater trade acceptance in no way related to grade or quality,<sup>255</sup> merely matching his price still loses the sale. Conversely, a seller of consumer-favored goods nominally meets but in fact beats a lesser-known product's price. Preferred brands may factually undersell competing products without nominally even

248. *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 756-57 (1945).

249. *Id.* at 757.

250. *Id.* at 753-54.

251. Staley also granted discriminatory purchase options to some individual buyers. The Court briefly disposed of this subsidiary issue. Apparently because Staley had made these concessions without diligence to find out whether it was in fact meeting actual lower prices of competitors, its meeting competition defense was not sustained. *Id.* at 758-60.

252. One page of the *Staley* opinion alone mentions "systems" nine times. *Id.* at 753.

253. See note 247 *supra*.

254. "To look at price alone is to oversimplify the problem. . . . Price is merely a focus for all the complex questions involved in industrial management and industrial markets." NELSON & KEIM at 5. See also, Till, *The Fiction of the Quoted Price*, 4 LAW & CONTEMP. PROB. 363, 368-70 (1937); Learned & Isaacs, *supra* note 10, at 143-44; Alderson & Cox, *Towards a Theory of Marketing*, 13 J. MARKETING 137, 139-40 (1948).

255. The FTC has recognized that trade preferences distort the significance of quoted prices. See, e.g., *FTC v. Standard Brands*, 189 F.2d 510, 513 n.7 (2d Cir. 1951); *Minneapolis-Honeywell Regulator Co.*, 44 FTC 351, 396-97 (1948), *rev'd*, CCH TRADE REG. REP. '48-'51 DEC. ¶62,881 (7th Cir. 1951). And see NELSON & KEIM at 6-7, 67-68 for the importance of non-price intangible factors in competition.



approaching their prices. The "naked" price is a deceptive standard of legality.

No decision to date reveals how a seller must go about proving his good faith. Sellers attempt to gain sales and earn profits. That is the good faith of a competitive system. But the intricate *Staley* opinion tests "good faith" in several disconnected contexts. Discriminatory prices were not quoted to meet a lower price, and consequently were not in good faith.<sup>256</sup> Elsewhere in the opinion, good faith appears lacking when unlawful prices are met.<sup>257</sup> And finally, good faith seems tied to legally required seller's knowledge of the prices he meets, or his diligence to find them out.<sup>258</sup> In the *Moss* case, the Second Circuit initially reserved decision on whether good faith meant more than "actual intent to sell at the price named."<sup>259</sup> After the *Staley* decision, that court clarified its earlier opinion. A discriminating seller could not "escape" unless he proved his price offers to be in fact no lower than his competitors' prices, or "that [he] did not mean them to be."<sup>260</sup> A competitor looking to the case law for guidance must surely come away perturbed.<sup>261</sup>

Meeting *lawful* prices, moreover, presupposes prophets, not competitors. Active competitors' books and price records are not open to each others' inspection. And sellers pricing in the haste and pressure of the market do not request affidavits from their customers to prove that competitors' price offers were within the law.<sup>262</sup> When only lawful prices can be met, a seller must compete at his peril. If he correctly guesses that his competitors' prices are illegal, he may stand aside, lose his sales, and gain a treble-damage lawsuit. But the competitor, though at first blush quoting illegal discriminatory prices, at the trial might turn up with a successful cost defense. Or he could vindicate himself by in turn proving his good faith meeting of a third seller's lawful price. In that event, the cautious seller loses both his sales and his lawsuit. And if the seller meets competitors' prices that he mistakenly guessed to be legal, he loses his defense to a Robinson-Patman Act

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256. 324 U. S. 746, 758 (1945).

257. *Id.* at 757.

258. *Id.* at 759. At another point, "good faith" dangles in limbo. *Id.* at 755.

259. 148 F.2d 378, 380 (2d Cir. 1945), *cert. denied*, 326 U. S. 734 (1945).

260. 155 F.2d 1016 (2d Cir. 1946).

261. In the *Standard* case, the FTC at one point argued before the Supreme Court that good faith was surplus verbiage in the statute. FTC Brief, pp. 41-42. But to secure a remand for further findings were the Seventh Circuit's affirmance of it not upheld, the FTC later reversed its field. It contended that it had not yet considered *Standard's* good faith as a factual issue. In ruling on good faith, the Commission might well adopt a "vigorous interpretation." This would take into account that *Standard* met some price offerings of competitors against whom Robinson-Patman Act charges were pending, and that offerings were made by non-majors selling unbranded gasoline. Again, the Commission might consider the "objective test" of injury to competition as the only practicable way of determining good faith. *Id.* at 44-45.

The "objective test," of course, would nullify the substantive defense by reducing it to the procedural interpretation that the Supreme Court reversed.

262. See, e.g., *Simon*, *supra* note 231, at 587; *Austern*, *supra* note 232, at 83.

charge. If sellers must hurdle legal barriers of meeting only lawful prices in a state of metaphysical good faith, competition will not be very lively.

A restrictive interpretation of *Standard* not only creates procedural handicaps, but is economically unsound. If sellers may only lower prices to retain customers in economic self-defense, rivals are granted vested rights in trade. Competing sellers do not allocate customers, but strive by lower prices to expand their sales. In active competition, high-price sellers must lose out.<sup>263</sup> Little incentive to competitive efficiency remains when competitors are shielded from their rivals' price attacks. Moreover, a new concept of "retainable" customers leads into statutory bogs.<sup>264</sup> A customer may be one who negotiates with a view to buying, one who has bought at some time in the past, or one who currently buys. Robinson-Patman's "retainable" customer entitled to sellers' special price treatment would require further judicial definition. Present statutory ambiguity does not commend new interpretive quirks.

*Standard's* competitive undercurrent calls for a broader reading of the opinion. The basic conflict between Robinson-Patman and antitrust policy was apparent to the Court.<sup>265</sup> It did not "reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts."<sup>266</sup> But the Court must have meant at least to mitigate that conflict. In assuming that Congress did not intend the Robinson-Patman Act to "abolish competition,"<sup>267</sup> the majority sidestepped much legislative history, admittedly confused, largely pointing the other way.<sup>268</sup> A strong three-judge dissent heavily bolstered by Congressional

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263. "In an economy based upon private enterprise, the threat of business loss and of possible bankruptcy is a necessary supplement to the incentive of possible profits. The desire to avoid losses is a part of the driving force behind business. Without it, there would be a premium upon the launching of improvident and ill-conceived enterprises." EDWARDS, MAINTAINING COMPETITION 13 (1949).

264. See Austern, *Inconsistencies in the Law*, CCH ANTITRUST LAW SYMPOSIUM 158, 166-67 (1951).

265. In the course of oral argument, for example, Justice Jackson inquired what the competition was that the Robinson-Patman Act protected. When FTC counsel replied that it was the competition of the retailers who lost business, the Justice protested that it was the essence of competition in a capitalist system that the low-price seller gets the customer. 18 U.S.L. WEEK 3210 (1950).

The conflict between the FTC order in the *Standard* case and antitrust policy is discussed at pp. 943-45 *supra*. See also note 92 *supra*.

266. 340 U.S. 231, 249 (1951).

267. *Ibid.*

268. Rep. Utterback, member of the Conference Committee, made the statement most directly opposed to the majority's reading of the statute. He explained to the House that meeting competition is "not . . . an absolute bar to a charge of [price] discrimination. . . . [The] provision is entirely procedural. It does not determine substantive rights, liabilities, and duties." 80 CONG. REC. 9418 (1936). And Rep. Patman, co-sponsor of the Act, was equally blunt. "[T]he provision permits the accused to throw himself on the mercy of the court. PATMAN, THE ROBINSON-PATMAN ACT 40 (1938).

Commentators who delved into legislative history reached opposite conclusions. Berger & Goldstein, *supra* note 232, at 322-25, and Haslett, *supra* note 65, at 477, read Con-

reports and debates makes clear that the majority sought to accomplish fundamental change.<sup>269</sup> Pocking the substantive meeting competition defense with pitfalls for the seller would clearly rob the decision of significance.

*Standard* should make meeting competition a flexible defense adapted to particular facts. To retain its customers, *Standard* matched but did not undercut competitors' prices. Illegalizing this, the Court must have thought, clashed with Sherman Act objectives.<sup>270</sup> Its discussion of meeting but not beating prices in economic self-defense may simply mirror *Standard's* facts coupled with a warning to powerful sellers that predatory price cutting will not be tolerated. And the *Glucose Cases'* significance could not have escaped the Court. A price-fixing conspiracy was the crux of an uncontested industry-wide offense.<sup>271</sup> When one seller attempted to justify his unlawful pricing system by meeting the "competition" of others' unlawful systems, absence of good faith and lawful prices handily disposed of a perverse defense. *Standard's* good faith and lawful price discussion may reaffirm the *Staley* holding to emphasize that collusive price matching is no excuse. In short, *Standard* should mean that competitive pricing is defensible, predatory or collusive pricing is not.

Though Robinson-Patman's restrictive web will still entangle active competitors, a broad interpretation of *Standard* gives them a chance to escape. The Supreme Court did not remand for separate findings on separate issues of good faith, lawful prices, and economic self-defense. Rather, the heading of section III of the opinion reads "There should be a finding as to whether petitioner's price reduction was made in good faith to meet a lawful equally low price of a competitor."<sup>272</sup> Other interpretations are equally plausible.<sup>273</sup>

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gressional intent as establishing a substantive defense. Rose, *supra* note 8, at 246-47 reads legislative history to find meeting competition a mere procedural rebuttal.

269. Justice Reed wrote a dissenting opinion in which the Chief Justice and Justice Black joined. Justice Minton, author of the Seventh Circuit opinion, did not participate. The dissent interpreted the majority opinion as leaving "what the seller can do almost as wide open as before" the Robinson-Patman Act. 340 U.S. 231, 253 (1951).

270. See note 265 *supra*. Even the dissenters concluded that the FTC's order might have to be amended, though they would affirm the Seventh Circuit "in principle." 340 U.S. 231, 267 (1951). They agreed that nondiscriminatory pricing tended to weaken competition, *id.* at 253-54, specifically disaffirmed approval of the Act's wisdom, *id.* at 267 n.17, and cited Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948), for discussion of its merits. *Id.* at 254 n.5. The Adelman article, at 1334-7, scourges the Robinson-Patman Act as essentially anti-competitive.

271. See note 247 *supra*.

272. 340 U.S. 231, 238 (1951) (emphasis added). *Standard's* General Counsel read the opinion as containing no "joker," but as merely reaffirming the *Staley* case. Austern, *supra* note 231, at 168 n.38.

273. One commentator concludes that the Court remanded for a finding of lawful prices, and that the decision added this new requirement as a constituent element of good faith. He argues, however, that it should be the FTC's burden to prove that the prices met were not lawful. Note, 36 IOWA L. REV. 351, 367 (1951). Other writers

Only future adjudication can tell whether *Standard's* ambiguities freed competition.<sup>274</sup>

#### EVALUATION AND CONCLUSION

Fifteen years of enforcement have failed to stake out boundaries for the Robinson-Patman Acts' vague universals. Cut loose from original legislative objectives, recent proceedings reach out into all sectors of the economy to strike down business practices previously thought competitive. Decisions superimpose ambiguities on uncertain statutory language. And private litigation, since the statute's text does not restrain forays into absurdity,<sup>275</sup> still further expands the reach of the Act.

Only a uniform price policy is fully secure from Robinson-Patman proceedings and treble-damage claims.<sup>276</sup> In imperfect markets, however, uniform prices make for more perfect monopoly.<sup>277</sup> Prices smashed into uniformity by competitive hammering are the hallmark of perfect competition. But economics do not work in reverse—uniform prices do not *create* competition. Colluding sellers end competition by matching uniform prices so that any seller's deviation can be quickly spotted.<sup>278</sup> Simple price structures lessen

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interpret the decision as calling for a finding of good faith. Rose, *supra* note 8, at 258; Simon, *supra* note 231, at 585.

But since the FTC made no findings of any kind in connection with meeting competition, the Court in all probability would not remand for partial findings on segments of the defense.

274. Two subsequent cases have dealt with meeting competition. In a treble-damage action, one seller claimed injury by a competitor's discriminatory prices. When defendant ingeniously contended that plaintiff should have met these prices, plaintiff argued that *Standard Oil* permitted only lawful prices to be met. The Court avoided a ruling on *Standard* and held that meeting prices, in any event, was not obligatory on a competing seller. *Dean Milk Co. v. American Processing & Sales Co.*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,777 (N.D. Ill. 1951). And the Second Circuit held that a seller who "met" competitors' prices for smaller quantities with similar prices for larger quantities had no valid defense. The Court interpreted an "equally low price of a competitor" to mean an equally low price for a given quantity, and said nothing about the seller's good faith. *FTC v. Standard Brands, Inc.*, 189 F.2d 510 (2d Cir. 1951).

275. See especially private litigation under the brokerage clause, note 198 *supra*. See also notes 73 and 210 *supra*. For litigation bordering the grotesque, see the *Russellville* case, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd*, CCH TRADE REG. REP. '48-'51 DEC. ¶ 62,895 (8th Cir. 1951).

276. "Not until there is a discrimination in price . . . does § 2(a) of the Act have any application." *Bird & Son, Inc.*, 25 FTC 548, 558 (1937). See also, Austern, *Inconsistencies in the Law*, CCH ANTITRUST LAW SYMPOSIUM 158, 163-64 (1951); EDWARDS, MAINTAINING COMPETITION 164 n.9 (1949). And see note 11 *supra*.

277. See, e.g., NELSON & KEIM at 8-9; Fly, *supra* note 46, at 1347.

278. The *Sugar Institute* case, 297 U.S. 553 (1936), revealed one of the most perfect restraints of trade in antitrust history. The Institute enforced among refiner members not only open sales prices and standardized terms of sale, but also a uniform unit price regardless of quantities sold. But "[t]he fact of the matter is that the

mutual uncertainty. Recent cases, moreover, consider industry-wide price uniformity strong evidence of price-fixing conspiracy.<sup>279</sup> But pricing that would dispel such suspicions probably violates the Robinson-Patman Act.<sup>280</sup>

Compulsory one-price policies, furthermore, create rigid market structures not subject to competitive pressures. Powerful buyers prevented from forcing discriminatory concessions may drift to smaller sellers and output contracts.<sup>281</sup> Small sellers, consequently, may first be estranged from alternative market outlets and then exploited.<sup>282</sup> Weaker buyers, however, cannot as readily shift their sources of supply. Compelled to deal with powerful suppliers, they cannot challenge sellers' dominance over price. The sellers' and buyers' pairing off,<sup>283</sup> therefore, removes competitive offsets to economic power and increases the exploitative potential of size.

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Robinson-Patman bill practically enacted the Sugar Institute code." Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334 (1948). "[N]ow the Federal Trade Commission can enforce the very thing the Sugar Institute was condemned for doing. It's about time we had a suit to quiet title between the position of the Department of Justice and the Federal Trade Commission." Lowell B. Mason, Acting Chairman, FTC, *Federal Trade Commission—With a New Look* 5 (address on January 25, 1950, mimeographed copy in Yale Law Library). For comprehensive analysis of the Sugar Institute's activities and litigation, consult Fly, *Observations on the Antitrust Laws, Economic Theory and the Sugar Institute Decisions*, 45 YALE L.J. 1339, 46 YALE L.J. 228 (1936).

279. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683 (1948). "Thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny." *Id.* at 713. See Comment, *Price Systems and Competition*, 58 YALE L.J. 426, 448-50 (1949). And cf. *Allied Paper Mills v. FTC*, 168 F.2d 600 (7th Cir. 1948); *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974 (4th Cir. 1949).

280. Cf. *Tag Manufacturers Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949) (price-fixing allegations disproved by evidence of widespread deviations from listed prices); Simon, *Legal Price Fixing*, CCH ANTITRUST LAW SYMPOSIUM 83, 86-87 (1951). Benjamin Fairless, president of US Steel, fears that confused antitrust laws confront business leaders with the alternative of going broke or running their businesses from jail. He argues that if businessmen quote identical prices they may violate the Sherman Act; if one of them cuts prices to beat competitors he transgresses the Robinson-Patman Act; if he raises his prices and the others refuse to follow he goes out of business; if others do follow he stays in business but again may tangle with the Sherman Act. Quoted by Rose, *supra* note 8, at 222.

281. Cf. *Learned & Isaacs*, *supra* note 10, at 151-52; *Burns*, *supra* note 10, at 318.

282. For discussion of output contracts, consult Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1 (1932). Their use as tools of exploitation is discussed in Note, 58 YALE L.J. 1161, 1165 (1949). "[A] manufacturer may accept a low price because he has become dependent upon the large buyer; he may have allowed his selling organization to shrink and have relied upon continued orders from the large firm. Turning to small orders means incurring the initial costs of entering an alternative market." *Burns*, *supra* note 10, at 318. And cf. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

283. Cf. MILLER at 170-71.

The Sherman and Federal Trade Commission Acts should prevent price discrimination clearly harmful to competitive public policy.<sup>284</sup> Power to segregate and exploit markets can only be eliminated by antitrust surgery after market analysis. A price discrimination statute deals with symptoms and cannot cure causes.<sup>285</sup> When a monopolist discriminates between non-competing buyers, and competing sellers cannot be injured when there are none, Robinson-Patman by its terms is inapplicable.<sup>286</sup> Predatory price cutting to eliminate competitors violates the Federal Trade Commission Act. The *Muller* case<sup>287</sup> was brought under both statutes. For the reviewing court section 5 of the FTC Act fully covered the offense; Robinson-Patman need not have existed. Predatory price cutting, moreover, need not even be discriminatory. A sufficiently strong seller can cut *all* his prices to stifle weaker rivals.<sup>288</sup> Robinson-Patman could not interfere.<sup>289</sup>

The Robinson-Patman Act, therefore, is both antithetical to antitrust policy<sup>290</sup> and unnecessary for antitrust enforcement. To cope with price dis-

284. Sherman Act cases solely dealing with predatory price cutting are rare. Such price discrimination generally appears as part of a broader monopolistic program. See, e.g., *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1 (1911). EDWARDS, MAINTAINING COMPETITION 166 (1949). But predatory price cutting violates §5 of the FTC Act. *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

Private litigants are specifically authorized by statute to enforce the Sherman Act through injunctions and treble damage suits against violators. E.g., *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D. N.Y. 1948). But because the FTC Act does not specifically authorize private suits, courts have dismissed private claimants under §5 of the Act for want of jurisdiction. *Samson Crane Co. v. Union National Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949), *aff'd mem.*, 180 F.2d 896 (1st Cir. 1950). A broad interpretation of §§4 and 16 of the Clayton Act which specifically authorize private redress for violations of the "antitrust laws" could include private suits under FTC §5 as an antitrust law. Moreover, other statutes that do not specifically authorize private relief have been judicially interpreted as granting private causes of action. E.g., *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (leading case upholding private cause of action for violation of §10(b) of the Securities Exchange Act), discussed in Comment, 59 YALE L.J. 1120, 1133-5 (1950). And see generally, Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949); Note, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COL. L. REV. 1090 (1948).

285. "Within the broad policy of the antitrust laws, the function of the law against price discrimination is essentially palliative. It cannot remove the difficulties that have been created by fewness and large size. That is a task requiring other instruments." EDWARDS, MAINTAINING COMPETITION 169 (1949). See also MILLER at 407-9.

286. EDWARDS, MAINTAINING COMPETITION 164 n.9 (1949); MILLER at 144-45.

287. *E. B. Muller v. FTC*, 142 F.2d 511 (6th Cir. 1944).

288. Cf. *American Tobacco Co. v. U.S.*, 328 U.S. 781, 806-7 (1946); EDWARDS, MAINTAINING COMPETITION 170 (1949).

289. The Department of Justice and private litigants, however, can bring suit under §3 of the Act. See note 65 *supra*.

290. Economists' recent writings consistently emphasize the anti-competitive keynote of Robinson-Patman. See EDWARDS, MAINTAINING COMPETITION 166-69 (1949); Adelman: *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334

crimination as part of a coherent antitrust program, law and economics must jibe. Robinson-Patman's demonstrated blindness to economic consequences blocks the market analysis essential to this result. Past performance argues strongly for its demise.

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(1948); *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 60 (1949); *Integration and the Outlook for the Future*, CCH ANTITRUST LAW SYMPOSIUM 135, 138 (1951); Burns, in *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689, 695 (1949); Mason, *The Current Status of the Monopoly Problem in the U.S.*, 62 HARV. L. REV. 1265 (1949); Rostow, *Monopoly under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 749 (1949).

See also COUNCIL OF ECONOMIC ADVISERS, THIRD ANNUAL REPORT TO THE PRESIDENT 15 (1948): "The tendency toward soft competition has . . . been exhibited in the Robinson-Patman Act, which prohibits price-making policies previously accepted as legitimate features of hard rivalries for business. . . . The philosophy of the Sherman Act appears to be yielding to a policy of 'ethical competition', which does not differentiate between the stability of the individual firm and the stability of the total economy." And see Statement of John D. Clark, Member, Council of Economic Advisers: "We have also been sympathetic with the plea of businessmen that if penalties are imposed for the violation of a law prohibiting business policies which have for years been accepted as fair, vigorous competition, the liability should be clearly expressed in the statute and should not be a trap buried under general language so ambiguous that the Supreme Court itself cannot decide what it means. . . . [T]here is a heavy burden of proof upon him who would temper the storms of competition for the lamb. . . . He must make an exceedingly strong case that his proposal will not, by depriving competition of its vigor, deny the people those benefits of larger production, lower costs and prices, and improved standard of living which the Sherman Act was designed to promote." *Hearings before the Subcommittee on a Study of Monopoly Power of the Committee on the Judiciary, House of Representatives*, 81st Cong., 1st Sess., Serial No. 14, Part I, 114 (1949).