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ROBINSON-PATMAN ACT — ANTI-TRUST OR ANTI-CONSUMER?

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“By practices which are unethical when viewed from the angle of his competitors, a businessman is frequently able to undersell them; the resultant lowered prices ease the strain on his customers’ pocketbooks fully as much if he had acted ‘fairly.’”
Frank, J., in *Standard Brands, Inc. v. Smidler*.¹

JUDGE FRANK was writing in a trade-mark case. The truth which he pointed out, however, applies equally to price discrimination laws such as Robinson-Patman,^{1a} retail price maintenance laws such as Miller-Tydings,² and state “fair trade” and sale-below cost laws.³

THE LEGISLATION

Anti-trust legislation was originally based on the theory that the public has an interest in preserving competition because hard competition will automatically lower prices. Competition would make direct price fixing by Government unnecessary except in the public utility field, the habitat of natural monopoly. Both the Sherman Act⁴ and the Clayton Act⁵ carry out this philosophy. Only where prices were driven down temporarily to close out a competitor was there any ban on price cutting in the original legislation.

With the passage of the Robinson-Patman Act in 1936 a new notion entered anti-trust law—protection of the competing businessman.⁶ Hard competition gives way to soft. Seventeen years of ex-

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1. 151 F. 2d 34, 40 (2d Cir. 1945) (concurring opinion).

1a. 15 U. S. C. § 13 (1946) as amended, 49 Stat. 1526 (1936).

2. 15 U. S. C. § 1 (1946) as amended, 50 Stat. 693 (1937).

3. Collected in CCH Trade Reg. Rep., ¶¶ 8000 to 8960.

4. 15 U. S. C. § 1 *et seq.*

5. 15 U. S. C. § 12 *et seq.*

6. Early criticisms appeared in *Symposium*, 4 Law & Contemp. Prob. 271-422 (1937).

perience, however, has not led to the complete acceptance of the view that the rival competitor, rather than the consumer, should be protected.⁷

The Act, a product of the depression, was a move in the wholesale grocers' battle against chain stores which has already produced anti-chain store taxes.⁸ The wholesalers were in a bad way. Distribution costs under the old methods were about 50 per cent of the retail price.⁹ The chains were eliminating wholesalers, and passing some of their savings on to customers. Since depression buyers were price conscious, the corner grocer was going down with his wholesaler. Articulate merchants, through lobbies, successfully petitioned Congress for relief. Consumer concern for price was forgotten.

Our primary concern here is with how Robinson-Patman hits the consumer's pocketbook.¹⁰ Interests other than consumers also

7. Recent discussions include: Adelman, *Effective Competition and the Anti-Trust Laws*, 61 Harv. L. Rev. 1289 (1948); Adelman, *Integration and Anti-Trust Policy*, 63 Harv. L. Rev. 27 (1949) (highly critical of the Act); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 Yale L. J. 929 (1951) (advocating repeal); Rose, *The Right of a Businessman to Lower the Price of His Goods*, 4 Vand. L. Rev. 221 (1951); Rose, *Your Right to Lower Your Prices*, 29 Harv. Bus. Rev. 90 (Sep., 1951) (suggesting that the present majority of the Supreme Court follows the Sherman Act philosophy of hard competition); Simon, *The Case Against the Federal Trade Commission*, 19 U. of Chi. L. Rev. 297 (1952); Simon, *Price Discrimination to Meet Competition*, 1950 U. of Ill. L. Forum 576 (advocating abolition of the Commission); Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N. Y. U. L. Q. Rev. 405 (1951) ("Freedom of competition in the public interest would be enhanced by use of the public interest test, as per the Sherman Act, in all decisions, as opposed to the individual interest of competitors as under the Patman Act."); Zlinkoff and Barnard, *Basing Points and Quantity Discounts: The Supreme Court and a Competitive Economy, 1947 Term*, 48 Col. L. Rev. 985 (1948); Haslett, *Price Discriminations and Their Justification under the Robinson-Patman Act of 1936*, 46 Mich. L. Rev. 450 (1950); Wright, *Some Pitfalls of Economic Theory as a Guide to the Law of Competition*, 37 Va. L. Rev. 1083 (1951) (Supporters of Robinson-Patman "are not so much in favor of competition as of little business and the two are not the same thing."); Handler, *Anti-Trust—New Frontiers and New Complexities*, 6 Record of the Assn. of the Bar of the City of New York 59 (1951) (denying fundamental conflict in philosophy between Robinson-Patman and Sherman Act).

8. For accounts of the passage of the act see Fulda, *Food Distribution in the United States: The Struggle Between Independents and Chains*, 99 U. of Pa. L. Rev. 1051 (1951); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L. J. 929, 931 (1951) (quoting Rep. Patman: "Chain stores are out. There is no place for chain stores in the American economic picture").

9. McNair, *Marketing Functions and the Robinson-Patman Act*, 4 Law & Contemp. Probs. 334 (1937).

10. Comprehensive discussions of the act include: Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, American Law Institute (1950); Oppenheim, *Price and Service Discriminations under the Robinson-Patman Act*, American Law Institute (1949), and CCH Symposia on Robinson-Patman Act for 1946, 1947 and 1948.

have reason to complain of it. Business is on notice that Robinson-Patman compliance may mean Sherman Act violation.¹¹ The Supreme Court has had difficulty with this conflict.¹² The Office of Price Stabilization unhappily found that ceilings were sometimes lower than the prices Robinson-Patman required.¹³ Even if justified in the depression, Robinson-Patman does not appear to fit either normal or inflationary times.

The Act has been criticized as poorly drafted.¹⁴ However technically true, this is probably the only criticism which is unfair. Since its sponsors were faced with the practical problem of getting it through Congress without arousing the public, it should be praised as one of the most skillful examples of double talk on the statute books.

11 See the following, all in CCH Business Practices, 1951 Symposium: Simon, *Legal Price Fixing*, p. 83; Van Cise, *Practical Planning*, p. 103; Adelman, *Integration and the Outlook for the Future*, p. 135; Austern, *Inconsistencies in the Law*, p. 158. Madison, *Proposed Amendments of the Federal Anti-Trust Law and Its Relations to "Big Business,"* CCH Antitrust Law Symposium 1952, p. 106 ("Paragraph 6 of the Commission's order in Standard Oil Co. v. Trade Comm'n, 340 U. S. 231 (1951), in effect required the oil company to maintain the resale prices of its wholesalers, a practice which, if it had been upheld on appeal, would clearly have violated the Sherman Act. Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211 (1951). . . . In Automatic Canteen Co. v. Federal Trade Commission, 194 F. 2d 433 (9th Cir. 1952) the Commission took the position that a buyer violates the Robinson-Patman Act if the seller is unable to satisfy the Commission that its price is legal under the Act. Such an interpretation, if followed, would tend to create price uniformity, since a buyer could deal only with sellers who have a single price or buy at his peril. The resulting price uniformity, however, would subject the seller to the danger of being charged with conspiracy under the doctrine of conscious parallel action.") Note, *The Swinging Door—Or How to Obey One Antitrust Law by Violating Another*, 59 Yale L. J. 158 (1949).

12. Justice Jackson said, during the oral argument in the Standard Oil case, supra note 11: "The whole philosophy—what troubles me—the whole philosophy of the Sherman Antitrust Act is go out and compete, get business, fight for it. Now, the whole philosophy we are asked to enforce here (under the Robinson-Patman Act) is that you really must not, you should let this business go and not meet the competition. I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me but once a term, and it must trouble them every day." Madison, supra note 11, at 110-111.

13. "Price Control v. Price Discrimination: What happens if a seller finds that his prices to certain favored buyers tend substantially to lessen competition, in violation of the Robinson-Patman Act? If he increases those prices he violates a ceiling price regulation. If he decreases his prices to all other customers enough to remove the unlawful discrimination, he puts himself out of business. A seller in this predicament can apply to OPS for permission to increase prices so as to cure his Robinson-Patman violation . . . ((OPS, GOR 18, 8/30/51).)" P H Lawyer's Weekly Report, Sept. 10, 1951.

14. ". . . the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." *Ruberoid Co. v. FTC*, 189 F. 2d 893, 894 (2d Cir. 1951).

The technique adopted was to follow each section with a proviso which did lip service to traditional anti-trust ideas. For example, Section 2(a) prohibits price discrimination, but adds "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." So much for the "rule of reason" of the anti-trust cases. The statute proceeds to muddle the notion of what is competition by referring to "competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them." In other words, we will keep all the competitors in business, but we won't let them compete with each other by cutting prices. What good to the consumer is a competitor who doesn't cut prices?

Section 2(a) also contains a proviso exempting price discriminations based on cost, and mumbles about the right of customer selection "in bona fide transactions and not in restraint of trade."

Section 2(b), after providing that the showing of discrimination shall establish a prima facie case, contains this gem: "Provided, however, that nothing [herein contained] shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ." The net effect on the consumer here is that his vendor is permitted to meet competition in a stratified price structure but prohibited from bettering it.

Section 2(c) is just as bad. It prohibits the payment of brokerage "except for services rendered." But may a buyer's agent receive brokerage where he is the one who actually renders the services?¹⁵ Since no cost defense is permitted under this section, and the integrated mass distributor must perform the broker's functions without receiving from its suppliers the traditional reduction in price by way of brokerage fee, the complying distributor has nothing but an increased cost to pass along to the consumer.

Sections 2(d) and (e) are aimed at such practices as furnishing demonstrators and making advertising allowances to dealers, with the proviso that this can be done if "on proportionally equal terms to all other customers competing in the distribution of such products or commodities." These sections do not appear to directly affect consumers.¹⁶

15. Austin, *Price Discrimination*, American Law Institute, (1950) at 102: "Section 2(c) is undoubtedly the most ambiguous and faultily drafted section of the act. Yet, surprisingly enough, it is the only section as to which no important questions of interpretation remain unsettled. . . . The 'except for services rendered' clause . . . has a very limited application. For all practical purposes it may be treated as having been read out of the statute."

16. *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988 (8th

Section 2(f) prohibits a buyer from knowingly inducing or receiving any price discrimination. It has been construed as placing on the buyer the burden of proving the seller's costs, if such defense is to be used.¹⁷ The section's undertones respecting pressures from the buying side of the market to obtain lower prices are made ineffective by the cold fact that there is no accompanying guarantee that a buyer will have available the necessary cost data to prepare a defense.¹⁸

Obviously the sponsors were trusting to the courts to give the Act its intended effect. General terms were used deliberately to avoid any danger that the act would be declared unconstitutional.¹⁹ An attempt was made to build a legislative history that would indicate the real intent of Congress.²⁰

The fact that it was in form an amendment to the Clayton Act might lead some courts to try to harmonize the two acts, rather than to realize that Robinson-Patman was designed to shift the focus from the anti-trust concept of price discrimination initiated by sellers to price discrimination produced by pressure from the buying side of the market. Nevertheless it was necessary to take the risk. Congress was not willing to openly abandon the country's traditional anti-trust policy. The debates teem with claims that the legislation was designed to strengthen the anti-trust laws.²¹

Cir. 1945), *cert. denied*, 326 U. S. 773 (1945); *Elizabeth Arden Inc. v. FTC*, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U. S. 860 (1947); *Sun Cosmetics Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (2d Cir. 1949); *United Cigar-Whelan Stores v. H. Weinrich Co.*, 107 F. Supp. 89 (S.D. N.Y. 1952).

17. *Automatic Canteen Co. v. FTC*, 194 F. 2d 433 (7th Cir.), *cert. granted*, 344 U. S. 809 (1952).

18. See the complaint in *Matter of Crown Zellerbach Co.*, FTC Docket 5421 (pending), where it is alleged respondents induced and received discriminations and refused to purchase unless granted lower prices than competitors. Review refused because Commission order not yet issued, *Crown Zellerbach v. FTC*, 156 F. 2d 927 (9th Cir. 1946).

19. 80 Cong. Record 6429 (1936): "Mr. Logan . . . if we attempt to make exceptions of particular classes of business we may run into difficulties with the Supreme Court. . . ."

20. H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936); H. R. Rep. No. 2951, 74th Cong., 2d Sess. (1936); Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936); CCH Trade Reg. Rep., vol. 3. Austin, *supra* note 10, at 5: "The act is ineptly drafted and contains many ambiguities and vague provisions, so that recourse to its legislative history is constantly important in construing it. In the thirteen years since this law has been on the books some of the uncertainties have been resolved by administrative interpretations and court decision; but many important questions of construction remain for which an authoritative answer is still lacking."

21. Section 2 of the Clayton Act already prohibited price discrimination. A price difference was justified if made on any of these grounds: differences in grade, quantity, quality or cost; to meet competition, or if it did not in fact lessen competition. The Commission lost important cases under this law, most notably *Goodyear Tire and Rubber Co. v. FTC*, 101 F. 2d 620 (6th

Faced with an act of this type there were several things the Supreme Court could do:

1. Throw the entire act out as unconstitutional. By the time that litigation under the act reached the courts, however, the era of unconstitutionality was over. After all, the Constitution does say that Congress has the power to "regulate commerce." This is what the Act attempts to do. Actually, constitutional issues raised under the act have been trivial.²² The Florida and Michigan highest courts, in decisions showing an awareness of consumer interests, recently have held state resale price maintenance laws unconstitutional,²³ but there is no reason to believe that the Supreme Court will go this far in the foreseeable future.

2. Limit the application of the act by a restricted definition of interstate commerce. This the Court has refused to do.²⁴

3. Go all the way with what the proponents of the act really had in mind, and read the qualifying provisos out of the act.²⁵

Cir. 1939), *cert. denied*, 308 U. S. 557 (1939), involving the sale by Goodyear of tires to Sears Roebuck at a quantity discount not related to cost, which were re-sold by Sears at prices below those charged by Goodyear's dealers. The section was not totally ineffective. See *Van Camp & Sons v. American Can Co.*, 278 U. S. 245 (1929). Perhaps the original Clayton act provision went as far as it is desirable to go if consumer interests are to be considered.

22. Section (2a) was unsuccessfully attacked as an improper delegation of legislative power in the *Elizabeth Arden* cases, *supra* note 16; section 2(c) was attacked, also unsuccessfully, as a violation of due process in the *brokerage* cases, *infra* notes 83 to 88; section 3, the criminal section, was held to be sufficiently definite to support a civil action for triple damages in *F & A Ice Cream Co. v. Arden Farms*, 98 F. Supp. 180 (S.D. Cal. 1951); *Balian Ice Cream Co. v. Arden Farms*, 99 F. Supp. 796 (S.D. Cal. 1951); and *Hipps v. Bowman Dairy*. 1950-51 Trade Cases ¶ 62,859 (N.D. Ill. 1951). Section 3 may not be sufficiently definite to be enforced as a criminal statute. In *United States v. Bowman Dairy*, 89 F. Supp. 112 (N.D. Ill. 1949) the court declines to pass on the question on motion, and the government later dismissed a companion case, *United States v. Borden Co.*, CCH Trade Reg. Rep., 1948-51 Dec. ¶ 61,351.

23. *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So. 2d 371 (Fla. 1949); *Shakespeare Co. v. Lippman's Tool Shop Co.*, 334 Mich. 109, 54 N. W. 2d 268 (1952); Comment, 28 N.C. L. Rev. 336 (1950). The prevailing view is to the contrary, and at least two states have recently refused to follow the Florida case: *W. A. Schaeffer Pen Co. v. Barrett*, 209 Miss. 1, 45 So. 2d 838 (1951) and *Frankfort Distillers v. Liberto*, 190 Tenn. 477, 230 S. W. 2d 971 (1951).

24. *Standard Oil Co. v. FTC*, 340 U. S. 231 (1951). Lower courts, however, are reluctant to apply the act in situations they regard as local price wars. *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 178 F. 2d 453 (5th Cir. 1949), *cert. denied*, 339 U. S. 953 (1950); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1951); *Myers v. Shell Oil Co.*, 1950-51 Trade Cases ¶ 62,816 (D.C. Cal. 1951).

25. This appears to be the approach of the dissenters in the *Standard Oil* case, *supra* note 24, and was the fate of the proviso in section 2(c), *supra* note 15.

4. Use judicial double talk.²⁶

5. Take seriously the references to competition and the provisions for defenses, and, in reliance upon the fact that Robinson-Patman is formally incorporated in the general body of American anti-trust laws, attempt to preserve the spirit of those laws.²⁷

WHAT THE SUPREME COURT THINKS NOW

The decision in *Standard Oil Co. v. Federal Trade Commission*²⁸ indicates that the Court may be coming around to the last mentioned method of handling the Act.

Standard Oil was charged, under section 2(a), with unfairly competing with independent retailers and its own retail stations by selling at a discount to wholesalers who resold at cut prices.

Standard refined gasoline in Indiana, shipped it to Michigan and distributed from storage tanks there. Sale to retailers was made at a "posted tank wagon price." Standard also supplied four "wholesale customers" in the Detroit area. They had their own storage tanks and delivery trucks. One engaged entirely in the direct sale of gas to the public at cut rates. The others re-sold to cut-rate retailers, who retailed at prices less than the "posted tank wagon price" at which their competitors purchased. The "wholesale customers" paid 1½¢ per gallon less than the "posted tank wagon price."

Standard clearly made its low price in good faith to meet the lower prices of other refineries. The charge of price discrimination was based upon the theory that the sales to the favored customers made it possible for them to re-sell at less than the prevailing retail price, thus injuring "retailer-competitors," including Standard itself in its capacity as operator of 200 service stations.

Standard defended on the grounds that its sales were intra-state; that lower costs justified the lower price; that the price was made in good faith to meet a competitor's price; and that the order of the Commission made Standard responsible for the price at which its customers resold.

The Seventh Circuit upheld the cease and desist order with a modification here immaterial.²⁹ The Court conceded that Standard's

26. The inconsistencies in *Standard Oil Co. v. FTC*, 173 F. 2d 210 (7th Cir. 1949) are pointed up in Adelman, *Integration and Antitrust Policy*, 63 Harv. L. Rev. 27, 73, n. 142 (1949) by printing in italics the sentences which give lip-service to a free enterprise economy.

27. McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 Law & Contemp. Probs. 410 (1937).

28. 340 U. S. 231 (1951).

29. *Standard Oil Co. v. FTC*, 172 F. 2d 210 (7th Cir. 1949).

sales were within the "meeting competition" proviso of Section 2(b) but said this was merely a procedural rebuttal of the prima-facie case—not a defense. Since the discount to the favored wholesalers made continuous price cutting by them possible, it could be restrained as an injury to retailer's competition even though Standard showed that it was merely meeting refiner's competition.

The decision brought joy to the service station operators. No more gasoline price wars. Nobody asked what the Detroit motorists thought!

In a five to three decision the Supreme Court refused to go along. Two things are clear from the decision. First, sales of this type are in interstate commerce—there will be no retreat from the "stream of commerce" doctrine³⁰ to dodge the problems of Robinson-Patman.³¹ Second, meeting a competitor's lower price is an absolute defense. The court did not pass upon Standard's attempted cost justification.³²

The decision represents a victory for the philosophy of the Sherman Act over that of Robinson-Putman.³³ Price wars can continue, subject to as yet undefined limitations. The difference in point of view is all the clearer after reading the dissent. The dissenters caught the spirit of the sponsors of the measure—to end price wars. But perhaps the majority of the court is nearer to the true intent of the Congressional majority that accepted the bill.

Under the court's opinion the businessman may only meet the lawful lower price of a competitor. He cannot underbid him. Such a view falls short of establishing a principle which can be regarded as practical since it implies that a businessman cannot independently

30. *Stafford v. Wallace*, 259 U. S. 495 (1922).

31. 340 U. S. 231, 238 (1951).

32. The difficulty with the cost proviso is that it finally comes down to how to distribute overhead costs. Hamilton, *Cost as a Standard for Price*, 4 Law & Contemp. Probs. 321 (1937); Austin, *Price Discrimination*, Chapter 3, American Law Institute (1950), Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials under the Robinson-Patman Act*, 30 Texas L. Rev. 1 (1951); Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 Iowa L. Rev. 244 (1951); Note, *Proof of Cost Differentials under Robinson-Patman Act*, 65 Harv. L. Rev. 1011 (1952).

33. Commissioner Mason, who dissented when the case was before the Federal Trade Commission, hailed the decision as "a reversal of the 'cry baby' philosophy on meeting competitors' prices." Mason, *Progress of the Federal Trade Commission*, CCH Business Practices, 1951 Symposium, 50. The Court said, at 340 U. S. 248-249: "The heart of our national economic policy has long been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect.' . . . We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts."

bid low for business without accurate knowledge of what his competitor may be bidding.³⁴ Such a concept represents a departure from the statutory concept of "an equally low price of a competitor." The lawful notion comes from the *Staley* case³⁵ where the Staley Company was not permitted to imitate an illegal basing point system instituted by its principal competitor.³⁶ A similar burden on knowing all prices and costs is thrown upon buyers by the Commission under Section 2(f).³⁷ However, under the Sherman Act, as applied in the *Sugar Institute* case³⁸ businessmen were enjoined from giving such price information to competitors.

Since the *Standard Oil* decision there has been one limitation and one extension in the lower courts. The Second circuit upheld a cease and desist order where the respondent met a competitor's price for a large quantity by offering the same price for a smaller quantity, under a discount schedule based on the total amount purchased from all suppliers.³⁹ The Southern California District Court, in triple damage actions brought by competitors of Arden Farms, a large ice cream manufacturer, has extended the scope of the *Standard Oil* decision.⁴⁰ In the Los Angeles area, Arden was losing customers to competitors who made sporadic price concessions to individual customers. It struck back with an area-wide price reduction, available to all customers in Los Angeles, but maintained its prices in other areas. (Arden itself might have invoked Robinson-Patman rather than responding to its competitor's price cut.) In dismissing the action, Judge Yankwich took the view that such price cutting was authorized by Section 2(b) as interpreted in the *Standard Oil* case.

At the 1951 Term the *Ruberoid* case⁴¹ furnished an opportunity to clarify the problem of functional discounts, but the Court merely affirmed a Commission order against price discrimination couched in a partial paraphrase of the statutory language. The dissent

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

35. *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

36. *Corn Products Refining Co. v. FTC*, 324 U. S. 726 (1945).

37. *Automatic Canteen Co. v. Federal Trade Comm.*, 194 F. 2d 433 (7th Cir. 1952), *cert. granted*, 344 U. S. 809 (1952).

38. *Sugar Institute, Inc. v. United States*, 297 U. S. 533 (1936). The Code of Ethics of the Institute, condemned by the Court, provided: "All discriminations between customers should be abolished. To that end sugar should be sold only upon open prices and terms publicly announced."

39. *FTC v. Standard Brands*, 189 F. 2d 510 (2d Cir. 1951).

40. *Balian Ice Cream Co. v. Arden Farms*, CCH Trade Reg. Rep., ¶ 67,266 (S.D. Cal. 1952).

41. *FTC v. Ruberoid Co.*, 343 U. S. 470 (1952), *affirming* 189 F. 2d 893, 191 F. 2d 294 (2d Cir. 1951).

criticized the Court and the Commission for not facing up to the problem.⁴²

In *Moore v. Mead Service Co.*⁴³ the court denied certiorari after the Tenth Circuit had held an illegal boycott to which the plaintiff was a party did not provide a defense under the last proviso of section 2(b).⁴⁴ Here the merchants of a town, in order to keep a local baker from shutting down, agreed not to patronize his out-of-town competitor. The out-of-towner later cut prices and the merchants broke their agreement and bought from him. The local baker then brought his successful triple-damage suit.

The *Minneapolis-Honeywell*⁴⁵ case was disposed of at the present term by dismissal because the petition for certiorari was not timely filed. The Seventh Circuit reversed a Commission order against a quantity discount schedule by finding that there was no injury either to competitor competition or to customer competition.⁴⁶ Justice Black, in dissent, thought the result below in square conflict with the *Morton Salt* case,⁴⁷ a question the rest of the court did not discuss.

Some clue as to what the Court may ultimately do may be found in the *Schwegmann* case.⁴⁸ Although the Miller-Tydings⁴⁹ issue

42. Justice Jackson, dissenting, at 343 U. S. 481: "Admitting that the statute is 'vague and general in its wording,' it does not follow that a cease and desist order should be. I think such an outcome of administrative proceedings is unacceptable. . . . The courts have derived no more detailed 'guiding yardsticks' from the Commission than from Congress. On the contrary, the ultimate enforcement is further confused by the administrative proceeding, because it winds up with an order which literally forbids what the Act expressly allows and thus adds to the difficulty of eventual sanctions should they become necessary."

43. 190 F. 2d 540 (10th Cir. 1951), cert. denied, 342 U. S. 902 (1952).

44. Section 2(b) provides in part: ". . . nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned. . . ."

45. *Minneapolis-Honeywell Regulator Co. v. FTC*, 21 U. S. L. Week 4084 (1952).

46. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F. 2d 786 (7th Cir. 1951). In this case before the Commission, Commissioner Mason had dissented, saying: "The Commission majority contends that in some cases Minneapolis-Honeywell did not lower its price to meet competitors but lowered its price to get assemblers of heating units who used Minneapolis-Honeywell controls to sell the finished product cheaper to the consumer. What an unhappy bit of evidence to justify a cease and desist order against any businessman! The respondent got caught trying to reduce prices to consumers. . . ." F.T.C. Dkt. 4920 (1948).

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

48. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951).

49. 15 U. S. C. § 1 as amended, 50 Stat. 693 (1937). Miller-Tydings was passed as a rider to the District of Columbia appropriation act to avoid a veto, and was even less a part of the New Deal than Robinson-Patman. Its repeal has been consistently advocated by both the Department of Justice and

there raised is distinguishable from the problems raised under Robinson-Patman, both acts present the question of what the courts should do to protect consumers when Congress fails to provide for their interests.

The majority of the Court cut the heart out of Miller-Tydings. It looked to the statute itself, rather than to legislative history. It found no mention of non-signer provisions and freed non-signers from "fair trade" restraints. The minority, looking at legislative history, found a clear intent by the sponsors to validate non-signer provisions *sub silentio*. It is perhaps important that Justices Jackson and Minton based their concurrence squarely upon a repudiation of the technique of statutory construction that looks for hidden intentions in legislative history.⁵⁰ The decision, destined to be overruled by Congress, set off metropolitan price wars which possibly asserted more downward leverage on the prices of formerly "fair traded" articles than all the efforts of the Office of Price Stabilization.⁵¹

EARLY COMMISSION VICTORIES

Prior to the *Standard Oil* case, the Court had followed the Commission's lead in economic matters with respect to basing points, quantity discounts and brokerage.

The impact of the basing point decisions,⁵² however, is on industrial location rather than on the cost of living. The *Corn Prod-*

the Federal Trade Commission. No department has publicly opposed Robinson-Patman, although the Department of Justice refused to participate in the presentation of the Trade Commission's argument in the *Standard Oil* case. 18 U. S. L. Week 3210 (1950).

50. 341 U. S. 395-397 (1951).

51. See Rahl, *Resale Price Maintenance, State Action and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers Corp.*, 46 Ill. L. Rev. 349 (1951); Comment, 61 Yale L. J., 381 (1952). Congress undid the effect of the decision by specifically validating the non-signer provisions of the state acts in the McGuire bill. 66 Stat. 632, 15 U. S. C. A. § 45 (Supp. 1952). In reluctantly signing the bill President Truman suggested that the whole subject both of Miller-Tydings and Robinson-Patman should be re-examined.

52. The cases provoked a flood of comment including: Symposium, 37 Geo. L. J. 135 (1949); Edwards, *Delivered Prices: Doing Business under the Present Law*, 47 Mich. L. Rev. 743 (1949); Smithies, *Economic Consequences of the Basing Point Decisions*, 63 Harv. L. Rev. 308 (1949); Dubose, *The Delivered Price Controversy and the O'Mahoney Bill*, 38 Geo. L. J. 200 (1950); Symposium on Delivered Pricing, 15 Law & Contemp. Probs. 123 (1950); Edwards, *Doing Business under the Present Law About Delivered Prices*, 11 La. L. Rev. 347 (1951); Comment, *Price Systems and Competition: The Basing Point Issues*, 58 Yale L. J. 426 (1949); Fetter, *Exit Basing Point Pricing*, 38 Am. Econ. Rev. 815 (1948); Edwards, *Basing Point Decisions and Business Practices*, 38 Am. Econ. Rev. 828 (1948). Congress passed legislation to overrule the decisions, but the President vetoed the bill CCH Trade Reg. Rep., ¶ 61,274.

ucts Refining case⁵³ presented a single basing point system. Sales were at delivered prices computed by adding to the base price at Chicago the published freight tariff from Chicago to the point of delivery. Shipments were made from either Chicago or Kansas City. The delivered price on shipments from Kansas City included an amount of "freight" that did not correspond to the freight actually paid.

In upholding the Commission's charge of price discrimination under Section 2(a), the Supreme Court said in part:

" . . . Since the cost of glucose, a principal ingredient of low priced candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers . . . distant from the basing point . . . are in a less favorable position."⁵⁴

The *Staley* case⁵⁵ involved a competitor of Corn Products located at Decatur, Ill., who also used Chicago as the basing point. Staley sought to defend proceedings under Section 2(a) on the ground that it was meeting Corn Products' lower price. Rejecting this contention, the Court employed the "lawful price" interpretation with respect to Section 2(b). Robinson-Patman objections, in these cases, were based on the low prices to the Chicago purchasers. Sounder objections could be made to the high prices charged purchasers where "phantom freight" was included—indeed basing points might have been outlawed without reference to Robinson-Patman at all.⁵⁶

The "new" *Cement Institute* case⁵⁷ involved an industry-wide multiple basing point system. In addition to violations of Section 2(a) the Commission spelled out numerous unfair trade practices under Section 5 of the Federal Trade Commission Act⁵⁸ which could have been treated as specific acts in restraint of trade under Section 1 of the Sherman Act. The court pointed out this obvious overlap and ruled that Section 2(a) was violated. The identical prices charged by the members of the Cement Institute, whether justified or not under Section 2(b), would still be sufficient to

53. *Corn Products Refining Co. v. FTC*, 324 U. S. 726 (1945).

54. 324 U. S. 726, 738. The court also said: "The statute is designed to reach such discriminations 'in their incipency' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Ibid.*

55. *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

56. *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (7th Cir. 1948), *aff'd, sub nom Mark & Co. v. FTC*, 336 U. S. 956 (1949) was brought under Section 5 of the Federal Trade Commission Act alone.

57. *FTC v. Cement Institute*, 333 U. S. 683 (1948).

58. 15 U. S. C. § 41 *et seq.* (1946).

warrant the necessary inference of concerted agreement to establish a conspiracy under the Sherman Act.⁵⁹

Although Robinson-Patman did not here prove controlling, it is in cases such as this that it most resembles an anti-trust device. In almost every other price discrimination situation the Act is violated by lowering prices or granting unduly large discounts which produce a downward pressure on the market. Robinson-Patman discourages price cutting and competition by restraining, if not prohibiting, such practices. The basic effect of the Act is at war with the anti-trust concept proper of breaking up monopoly and promoting the opportunity for freedom of competition.⁶⁰

It remains to be seen how effective the Act has been with respect to the price policies at which it was aimed. The Morton Salt Company sold its table salt to wholesalers, jobbers, and retailers, including the five largest retail chains, on a quantity discount basis available to all customers. The prices ranged from an L.C.L. quotation of \$1.60 down to a low of \$1.35 for purchasers of 50,000 cases per year.

Only the five largest chains were in a position to purchase at the \$1.35 price. As a result they could retail at a price lower than wholesalers could offer independents. Upholding the Commission's cease and desist order, Justice Black said:

"Theoretically these discounts are equally available to all, but functionally they are not . . . no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as \$50,000 worth of table salt in one year. . . . The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. . . ."⁶¹

The court further held it was sufficient for the Commission to show a "reasonable possibility" of injury to competition; also that

59. Comment, 58 Yale L. J. 426, 453 (1949): "As the statute now stands it threatens sporadic semi-concealed price cutting. This activity is price discrimination, for some buyers benefit from the secret price and others do not. But it is such a powerful competitive force that industries adopt rigid delivered price systems to stop it. . . . Use of Robinson-Patman against sporadic hidden price cutting would tend to calcify the prices that the anti-trust laws in general are supposed to make flexible."

60. See Rostow, *Monopoly under the Sherman Act: Power or Purpose*, 43 Ill. L. Rev. 745, 749 (1949): ". . . Conditions of business depression make anti-trust enforcement psychologically difficult for judges to accept. The Congress passed the Miller-Tydings Act and the Robinson-Patman Act, both of which operate fundamentally to restrict rather than to encourage competition. . . ."

61. *FTC v. Morton Salt Co.*, 334 U. S. 37, 42-43 (1948).

detailed proof of cost savings must be introduced to justify carload discounts.

Significant here is the majority's lumping all of respondent's quantity discounts for similar treatment. To be underscored also, is the Court's use of the word "functionally" in its non-technical sense. Such context, albeit innocent of implied meaning, serves to drive home the fact that the Court was dealing with quantity discounts as "quantity discounts," regardless of the fact that respondent sold under this system to all comers—jobbers, wholesalers and retail chains. One of the most important Robinson-Patman issues left open is the status of economically justified functional discounts.⁶² Yet it is in the telescoping of market functions that savings which can be passed on to consumers are frequently made possible.

By lumping all of the respondent's discounts together, absent cost justification for quantity differentials, the majority focuses attention on the deficiencies in economic reality of an act which applies alike to functional and arbitrary practices in marketing. Under the cost proviso of section 2(a) and the burden of proof established in section 2(b) there is no reason why the court should not put the respondent to its proof with regard to all its discounts. Yet, as a matter of trade practice, there is no question but that the carload discount, where reasonable in amount, is as established in the business world as the charging of interest on a promissory note.

The *Champion Spark Plug* case,⁶³ has not yet reached the courts. Champion is charged with an illegal price discrimination because it sells spark plugs to Ford at a considerably lower price than the price charged dealers who sell replacements to car owners. Ford's price is calculated on the basis of what it would probably cost Ford to make its own plugs, as General Motors does. This is regarded by the Commission as bribing Ford not to compete.

The discount situation today is this: (1) Under *Morton Salt*⁶⁴ quantity discounts cannot be given without a detailed cost justification—the generality that it is usually cheaper to sell in large

62. "If we are to believe some of our staff . . . we have authority to wipe out wholesalers, jobbers and brokers by declaring that the functional discounts they collect are unlawful." Commissioner Mason in CCH Business Practices: 1951 Symposium 51. See generally, Schneiderman, *The Tyranny of Labels—A Study of Functional Discounts under the Robinson-Patman Act*, 60 Harv. L. Rev. 571 (1947).

63. Matter of Champion Spark Plug Co., F.T.C. Dkt. 3977 (pending); Hansen, *The Champion Case: What Is Competition?* 29 Harv. Bus. Rev. 89 (May 1951).

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

quantities no longer suffices;⁶⁵ (2) under *Ruberoid*,⁶⁶ if customers sometimes compete for retail sales they must be charged the same price, even though they generally operate on different echelons in the scheme of distribution; (3) under *Minneapolis-Honeywell*,⁶⁷ there is no legislative inhibition if competitors keep right on competing, since the act requires an "injury to competition"; (4) under the circuit court decision in *Automatic Canteen*,⁶⁸ buyers accept discounts and price cuts at their peril, since they must prove that the seller acted legally in granting them; and (5) under the theory of the complaint in *Champion Spark Plug*,⁶⁹ the use of the product by the buyer is immaterial—thus carrying the disregard of the functions of the retailer, wholesaler and integrated chain to its harsh conclusion.

Legally, the safe thing to do appears to be to have one high price for everybody. Even after *Standard Oil*⁷⁰ the competitive practice of going below a rival's price to get the order (or even meeting an unlawful price, under *Staley*⁷¹) is a violation of Robinson-Patman. The *Moss*⁷² case is still good law. *Arden Farms*,⁷³ upholding an area-wide price cut to meet competitive conditions does not touch the discount problem, and represents the limit to which any court has gone in upholding traditional competitive methods since Robinson-Patman.

THE TRIPLE DAMAGE THREAT

In addition to fearing action by the Federal Trade Commission, the businessman considering a price cut must allow for possible legal action by his competitors. Since Robinson-Patman is technically a part of the Sherman Act, anyone who is injured by a violation may bring an action for triple damages.⁷⁴ The possibilities for a plaintiff's bonanza were largely overlooked for ten years after

65. *Goodyear Tire & Rubber Co. v. FTC*, 101 F. 2d 620 (6th Cir. 1939), *cert. denied*, 308 U. S. 557 (1939).

66. *FTC v. Ruberoid Co.*, 343 U. S. 470 (1952).

67. *Minneapolis-Honeywell Regulator Co. v. FTC*, 21 U. S. L. Week 4084 (1952).

68. *Automatic Canteen Co. v. FTC*, 194 F. 2d 433 (7th Cir. 1952), *cert. granted*, 344 U. S. 809 (1952).

69. *Matter of Champion Spark Plug Co.*, FTC Dkt. 3977 (pending).

70. *Standard Oil Co. v. FTC*, 340 U. S. 231 (1951).

71. *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

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

73. *Balian Ice Co. v. Arden Farms*, CCH Trade Reg. Rep., ¶ 67,266 (S.D. Cal. 1952).

74. 15 U. S. C. § 7 (1946).

the passage of the Act. The Supreme Court called attention to them in a dictum in *Bruce's Juices v. American Can Co.*⁷⁵

Counsel for Bruce's Juices took the hint and recovered a verdict which was modified and upheld in the Fifth Circuit.⁷⁶ A similar case was remanded for a new trial in the Eighth Circuit.⁷⁷ The actual damages in the two cases were fixed at \$185,000, which tripled to over \$500,000—and there are 2,938 customers who suffered from the same "discriminations."⁷⁸ American Can's quantity discount system was found discriminatory in that at least \$500,000 worth of cans had to be purchased to get any discount at all. Two customers received the maximum discount of 5% for purchases of over \$7,000,000. From 19 to 36 customers received smaller discounts. Service discrimination was also charged because a customer who had his packing plant next to American Can's Austin, Ind., plant was served by a conveyor belt. Of this, the District court said:

" . . . the fact that it is impractical, or even impossible, to furnish proportionally equal facilities to all customers cannot serve as a justification for furnishing the facilities to those where it is practical, if the furnishing of such facilities discriminates in favor of those receiving them."⁷⁹

The number of such suits is increasing.⁸⁰ Reported cases cannot give the complete picture. How many suits have been compromised? How many price cuts have been considered but never made? In business language freedom to make a price cut is a synonym for freedom of competition. Price policy used to be decided by the executive in conference with his sales manager. Under Robinson-Patman it must be decided on advice of counsel.

WHAT HAPPENED TO THE CHAINS?

The principal giant that Robinson-Patman was supposed to slay was A & P.⁸¹ It was imperative for the Commission to try to do something about this leading chain.

75. 330 U. S. 743 (1947). In that case the court held that promissory notes representing the purchase price of goods were collectible even though the vendor had violated Robinson-Patman.

76. *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (D.C. Fla. 1949), *aff'd*, 187 F. 2d 919, *modified*, 190 F. 2d 73 (5th Cir. 1951).

77. *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (D.C. Ark. 1949), *reversed*, 191 F. 2d 28 (8th Cir. 1951).

78. Rose, *Your Right to Lower Your Prices*, 29 Harv. Bus. Rev. 90, 93 (Sept. 1951).

79. *Russellville Canning Co. v. American Can Co.*, *supra* note 77 at 498.

80. CCH Trade Reg. Rep., 1948-1951 reports 18 such cases. It has recently been held that they may be also maintained as class actions. *Kainz v. Anheuser-Busch Inc.*, 194 F. 2d 737 (7th Cir. 1952).

81. Mason, *The Current Status of the Monopoly Problem in the United*

The first attack was pitched on the brokerage clause.⁸² Prior to 1936 A & P maintained a number of central buying offices. Salaried employees of A & P performed various services for manufacturers and sellers, identical with those performed by independent brokers, who were not employed in purchases by A & P. These sellers paid brokerage to the chain.

After the passage of Robinson-Patman, A & P instructed its field men to accept no further brokerage, but to buy on one of these bases: (1) to purchase at a net price which would reflect a reduction in an amount equal to the brokerage previously paid; (2) to execute "quantity discount agreements" providing for payment to A & P of an amount equal to the brokerage formerly paid, or (3) to have the seller pay brokerage into escrow until the legality of the payments could be determined.

A & P contended: (1) that the net prices, allowances and discounts were received for services rendered to sellers, and (2) that such net prices were possible because of savings in brokerage, travel expenses, etc., which justified the price differentials.

The Third Circuit⁸³ ruled against A & P and sustained the Commission's contention that the "services" of the field buying agents were "rendered" to A & P and not to the sellers. A & P's second contention that savings justified the net prices was an attempt to apply the cost proviso of section 2(a) to a case brought under section 2(c). The court held, however, that the two clauses were separate, and the cost defense does not apply in an action brought under the brokerage clause. On this theory cost savings, no matter how clearly shown, are not a justification for paying brokerage to anyone who is the buyer's agent. A & P's supplier, who receives free brokerage service, gets a windfall—A & P incurs the expense of performing the brokerage function and ends up with a higher cost instead of a saving to pass on to the consumer.

Significantly, other victims of the brokerage clause have been

States, 62 Harv. L. Rev. 1265 (1949) contrasts the views of what constitutes competition in terms of "market condition" versus "acceptable business practice." Before the advent of the chains, there existed a competitive market condition—an unlimited number of concerns in the field—but little realistic competitive action. "Acceptable business performance" arrived only when the chains started after business, but their activity produced a reduction in the number of competitors in the market. With regard to Robinson-Patman, Dean Mason concluded: "We don't want much disturbance of the channels of distribution from competitive sources and are apparently acquiescing in a re-interpretation of the Robinson-Patman Act 'injury to competition' as 'injury to a competitor.'"

82. 15 U. S. C. § 13(c) (1946).

83. *Great Atlantic & Pacific Tea Co. v. FTC*, 106 F. 2d 667 (3rd Cir. 1939), *cert. denied*, 308 U. S. 625 (1940).

small businessmen. In the *Oliver*⁸⁴ and *Biddle*⁸⁵ cases it was invoked to strike down collective purchasing agencies operated for local wholesalers. The *Quality Bakers*⁸⁶ case applied Section 2(c) to a co-operative association of small bakers, despite the presence in the act of a section designed to protect co-ops.⁸⁷ The *Modern Marketing* case⁸⁸ applied the section to strike down a central purchasing agency operated for wholesale grocers. Here the manufacturers paying brokerage were Diamond Match, Morton Salt, Quaker Oats, Ralston Purina, Wesson Oil and Proctor and Gamble. Enough said!

A & P survived the difficulties of doing business under Robinson-Patman by going into super markets.⁸⁹ In 1946 it was indicted on the charge that its buying practices violated Sections 1 and 2 of the Sherman Act. A conviction was secured⁹⁰ and the Seventh Circuit affirmed.⁹¹ The court said in part:

“. . . While A & P tried to rig up various contracts with its suppliers that would give the suppliers a semblance of compliance with the Robinson-Patman Act, by colorably relating the discriminatory preferences allowed to cost savings, the primary consideration with A & P seemed to be to get the discounts, lawfully if possible, but to get them at all events. . . .”^{91a}

A & P did not appeal and paid a \$175,000 fine. The Government then filed its current civil suit for dissolution.⁹² A & P's telling defense was not filed in court but addressed to America's housewives in its grocery ads.

84. *Oliver Bros., Inc. v. FTC*, 102 F. 2d 763 (4th Cir. 1939).

85. *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687 (2d Cir. 1938), *cert. denied*, 305 U. S. 634 (1938).

86. *Quality Bakers v. FTC*, 114 F. 2d 393 (1st Cir. 1940).

87. *Robinson-Patman*, § 4, 15 U. S. C. § 13(b) (1946). It could be argued Congress intended the section to apply only to farmers' co-ops.

88. *Modern Marketing Service, Inc. v. FTC*, 149 F. 2d 970 (7th Cir. 1945).

89. *Adelman Effective Competition and the Anti-Trust Laws*, 61 Harv. L. Rev. 1289, 1337 (1948).

90. *United States v. New York Great A & P Tea Co.*, 67 F. Supp. 626 (D.C. Ill. 1946). Judge Lindley said, at page 676: "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."

91. *United States v. New York Great A & P Tea Co.*, 173 F. 2d 79 (7th Cir. 1949); *Adelman, The A & P Case: A Study in Applied Economic Theory*, 63 Q. J. Econ. 238 (1949); Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 Yale L. J. 969 (1949); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 Ill. L. Rev. 743 (1950); Stanford, *An Old Problem in a Modern Guise; Chain Stores and Efficient Integration under the Sherman Act*, 1 Mercer L. Rev. 219 (1950); Fleming, *Business and the Antitrust Laws*, 28 Harv. Bus. Rev. (May 1950).

91a. *United States v. New York Great A & P Tea Co.*, 173 F. 2d 79, 88 (7th Cir. 1949).

92. CCH Trade Reg. Rep., ¶ 61,226.

In condemning A & P for battling its suppliers for low prices, the courts, under the compulsion of the Robinson-Patman Act, have neglected the fact that A & P is not exclusively fighting for its own profits—a large portion of these savings have always been passed on to consumers.

Housewives alone cannot control the price of groceries. Theoretically, consumer co-ops could supply the needed protection. The ingenuity of American business, however, provides a unique institution—the integrated chain store, buying at the lowest possible price, eliminating middlemen, operating efficiency, passing on substantial savings to the consumer and relying on volume for profits. Regardless of whether the marginal retailer competitor's need for legislative support ever served as valid justification for the passage of such an act, Robinson-Patman has proved to be clearly against the interest of consumers. Any sustained price reduction based on legitimately achieved lower costs is of benefit to consumers. This is a basic principle that every housewife knows.

THE OPEN MARKET

The American capitalistic enterprise system has emerged from an economic background characterized by freedom of competition. Essential to this development has been the open market which has produced the greatest flow of economic benefits to a single nation over a longer period that has occurred elsewhere in history.

On occasion monopolies have developed in certain areas of our economy which have threatened the maintenance of the open market. For such situations, the anti-trust laws were enacted.

The open market is all that the words imply. It is the flexible and fluid channel of distribution through which commodities and manufactured goods must flow from raw material to consumer. It is coordinated manufacturing, wholesaling, jobbing, commission selling, brokerage and retailing. On the selling side it demands efficiency. On the buying side this efficiency is tested by price. A law looking only to the selling side and not geared to cyclical fluctuations, and which penalizes efficiency, does not deserve any place on the statute books.