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PRICE COMPETITION AS AFFECTED BY THE ROBINSON-PATMAN ACT

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Price competition is an historic, orthodox, and, to judge by recent legislation, obsolescent desideratum. Replacing an earlier stressing of the beneficial fruits of free and open price competition, new concepts appear in the legal-economic vocabulary of the antitrust lawyer: price maintenance, price control, price stabilization, price fixing, price discrimination. These terms, in some instances, are merely the mirror image of price competition; but it is suggested that an important shift of emphasis has taken place in antitrust theory as the ill effects of price *discrimination* have become a focal point of thought and discussion in contrast with the previous dwelling on the desirable results of *price competition.* Indeed, it has been observed that the Robinson-Patman Price Discrimination Act of 1936 is "an anti-competition statute slipped into the anti-trust laws."[1]

A summary of the history of federal antitrust legislation will reveal the novel departure of the Robinson-Patman Act from previous enactments. The 1880's witnessed the impetuous post-war rise of "the Standard Oil Magnates, Coal Barons, Railroad Kings, Sugar Trust Operators, Steel and Iron Combiners."[2] The farmers and laborers of the country demanded relief from the "oppression" of the gigantic manufacturing corporations which were a new feature of industrial civilization.[3] At that time the sole interest of the supporters of antitrust legislation was the curbing of monopolies to avoid unnaturally enhanced or depressed prices. To meet this end the Sherman Anti-Trust Act of 1890 was passed; and, it might be added, in many respects this Act was merely a hasty sop to discontented rural and working classes with Congress giving very slight attention to the probable effect of this important statute.[4]

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[1]Learned and Isaacs, The Robinson-Patman Law: Some Assumptions and Expectations (1937), 15 Harv. Bus. Rev. 137, 139.

[2]Thomas E. Watson, The People's Party Campaign Book (1892), 42.

[3]Thus a group of farmers in Mecklenburg County, Virginia, resolved: "We respectfully demand of our senators and representatives in Congress to use their best efforts to enact some laws to protect the farmers in the Bright Tobacco Belt from the oppression of the American Tobacco Company." National Economist, Washington, D. C., January 23, 1892.

[4]II Beard & Beard, Rise of American Civilization (1930), 327. There seems even to have been some doubt concerning the desire of the Senate committee to draft a

There followed a period of relative inactivity in the enforcement of the Sherman Act. Only nineteen antitrust suits were instituted by the federal government during the first decade after 1890.[5] Setbacks at the hands of the court[6] together with the long depression of the Nineties temporarily nullified the statute. Not until the early 1900's was there a sustained effort by the Department of Justice to segment monopolistic enterprises and to enforce price competition. In these years the

practicable statute. Bumphrey, Authorship of the Sherman Anti-Trust Law (Cincinnati 1912). Senator Sherman, nominal author of the Act, on March 21, 1890, revealed his interest in preventing the stifling of competition by combinations sufficiently powerful to control the price: "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce price in a particular locality and break down competition and advance prices at will where competition does not exist." 21 Cong. Rec. 2457.

[5]The following table was submitted to the Temporary National Economic Committee by Wendell Berge, Special Assistant to the Attorney General. Hearing before a sub-committee of the Senate Committee on the Judiciary on S. 2719, 76th Congress, 1st Session, July 28, 1939, page 5.

ANTITRUST SUITS AND THE DEPARTMENT OF JUSTICE

Calendar Year	*Instituted*	*Terminated*	*Calendar Year*	*Instituted*	*Terminated*
1890	1	..	1915	8	10
1891	..	1	1916	2	10
1892	3	2	1917	23	19
1893	2	1	1918	11	18
1894	7	3	1919	3	8
1895	1	2	1920	10	12
1896	3	1	1921	26	15
1897	2	1	1922	22	9
1898	..	4	1923	12	25
1899	1	4	1924	15	11
1900	..	1	1925	15	22
1901	..	..	1926	12	24
1902	3	1	1927	14	18
1903	2	1	1928	21	11
1904	1	1	1929	13	6
1905	5	1	1930	11	12
1906	13	3	1931	3	19
1907	12	8	1932*	3	4
1908	8	3	1933	7	6
1909	3	4	1934	11	11
1910	16	9	1935	10	4
1911	25	10	1936	4	10
1912	22	66	1937	10	3
1913	26	26	1938	11	7
1914	11	16	1939	13	9
			1940	11	..

*1932-1939 figures are on fiscal year basis.

[6]E. g., United States v. E. C. Knight Co., 156 U. S. 1. (1895).

"trust-busting" efforts of President Theodore Roosevelt were directed against the tobacco trust, the Standard Oil Company and other massive producers.

By 1914 demand had arisen for an amendment or for further legislation clarifying the generalities of the Sherman Act. Woodrow Wilson recognized this sentiment in a message to Congress on January 20, 1914:

> "Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is."[7]

The Clayton Act was the outgrowth of this demand. In this Act the term "price discrimination" first appeared in the federal statutes. It is abundantly clear that the prohibition of certain discriminations in price was inserted to prevent the price cutting tactics used by many manufacturers to destroy competition in a particular area in order to obtain a monopoly in that area.[8] A price discrimination was not illegal under the Clayton Act unless the effect of such discrimination was to establish a monopoly or substantially lessen competition.[9] The emphasis still remained on the paramount importance of preventing monopolies or combinations in restraint of trade, first among producers and secondly

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[7]51 Cong. Rec. 1963 (January 20, 1914). President Taft had also expressed this sentiment: "I am inclined to the opinion that the time is near at hand for an amendment of the Anti-Trust Law, defining in greater detail defaults against it, and its aim, and making clearer the distinction between lawful agreements, reasonably restraining trade, and those which are pernicious in effect." Quoted in (1930) 147 Annals of American Academy of Political and Social Science 33. Contrast the statement of Gilbert H. Montague in Handler, The Federal Anti-Trust Laws: A Symposium (1932) 29: "What embarrasses business is more frequently not the uncertainty of the law but the certainty that, as interpreted by the Supreme Court, the law stands squarely across the path of many greatly desired trade arrangements."

[8]Senator Reed, referring to the bill which became the Clayton Act and speaking on September 29, 1914: "What is section 2? It is brought forward here as a remedy for the existing evil of local price-cutting. The common practice indulged in by very great and wealthy concerns is to go into a trade territory where there is competition and drop the price of an article below the cost of production. In a little while its competitors have been absolutely driven into bankruptcy or forced to quit the field. Thereupon the great concern proceeds to advance the price on that same community and recoup itself for all losses. In the meantime, without the ultimate loss of a penny, it has established a monopoly in that country, State, or neighborhood by driving out all competitors." 51 Cong. Rec. 15857. The different meaning attached to "price discrimination" in the Clayton Act and in the Robinson-Patman Act makes somewhat misleading such a title as Hamilton and Loevinger, The Second Attack on Price Discrimination (1937), 22 Wash. Univ. L. Rev. 153. It is interesting to note that in 1914, Congressman Stevens of New Hampshire introduced a bill "To prevent discrimination in prices and to provide for publicity of prices to dealers and to the public." H. R. 13305, 63rd Congress, 2d Session.

[9]Lipson v. Socony-Vacuum Corp., 76 F. (2d) 213, 218 (C. C. A. 1st, 1935).

among distributors. And the approved means of preventing monopoly appeared to be, broadly speaking, the requirement by law of price competition.

Also in 1914 the Federal Trade Commission Act[10] was passed. There was no further federal antitrust legislation until 1936. Yet, during this period important interpretations of the Sherman and Clayton Acts were had from the courts.[11] These interpretations were necessarily limited in scope, however, and in many instances conflicting, so that throughout the entire field of antitrust application there still remained wide areas of doubt.[12] Only one situation could be said to be clearly illegal beyond any possibility of doubt: combination or agreement by competitors to fix or maintain prices.[13] Price competition throughout the Twenties remained at least the verbal focal point of all antitrust activity, whatever deviations there may have been from this ideal in actual pricing policies.

As the depression of 1929 and subsequent years settled down, new attention was directed to the effect of antitrust laws on business policies. President Hoover suggested the need for further study, and implicit in his suggestion was a belief that possibly competition, through price and otherwise, was not an unqualified good.[14] Under the National

[10]Act of September 26, 1914, 38 Stat. 717, 15 U. S. C. Sec. 41. The Federal Trade Commission Act was passed shortly before the Clayton Act. Henderson, The Federal Trade Commission (1924) 16-48, describes the interrelation of the two statutes.

[11]E. g., the important series of cases dealing with the activities of trade associations. American Column & Lumber Co. v. United States, 257 U. S. 377 (1921); Maple Flooring Mfrs. Assn. v. United States, 268 U. S. 563 (1925); Cement Mfrs. Protective Assn. v. United States, 268 U. S. 588 (1925); Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936). Nelson, Open Price Associations (1923); Federal Trade Commission, Open-Price Trade Associations, Sen. Doc. No. 226, 70th Cong., 2d Sess. (1929).

[12]". . . the rule of reason, long considered essential in administering the Sherman Act, . . . makes sharpiy defined standards impossible." United States v. Standard Oil Co., 23 F. Supp. 937, 938-939 (W. D. Wis. 1938). "It is evident that while the distinctions between lawful and unlawful activities may be quite clear in theory, it is not always easy in practice to determine whether the trader has kept within the bounds of his privilege." United States v. Ethyl Gasoline Corp., 27 F. Supp. 959, 964 (S. D. N. Y. 1939).

[13]United States v. Trenton Potteries Co., 273 U. S. 392 (1927). See also Federal Trade Commission v. Pacific States Paper Trade Assn., 273 U. S. 52 (1926); Lynch v. Magnavox Co., 94 F. (2d) 883, 891 (C. C. A. 9th, 1938). Compare United States v. Socony-Vacuum Oil Co., 105 F. (2d) 809 (C. C. A. 7th, 1939), infra n. 72. Jaffe and Tobriner, The Legality of Price-Fixing Agreements (1932), 45 Harv. L. Rev. 1164.

[14]Speech by President Hoover in December, 1930, quoted in Note (1932) 45 Harv. L. Rev. 566: "The people have a vital interest in the conservation of our natural resources; in the prevention of wasteful practices; in conditions of destructive competition which may impoverish the producer and the wage earner, and they have an equal interest in maintaining adequate competition. I therefore suggest that an in-

Industrial Recovery Act[15] the first clear legislative departure from the theory of the Sherman Act took place, for

> "The N. R. A. expressed the change which had come over men's thinking when it permitted corporations to combine in order to eliminate 'unreasonable' competition. The profit motive, which at one time was a respectable justification for any sort of price cutting, had become a somewhat immoral thing because of the competing symbol of cooperation."[16]

Within the space of a very few weeks important industries adapted themselves to the new order of cooperation. Chiseling and price-cutting smacked of the illegal; and filed prices, with penalties for deviation from such prices, were encouraged.[17] The economic desirability of industrial self-regulation of prices is a matter over which there will be argument for many years; but even before the *Schechter* decision there had come a widespread dissatisfaction with both the freedom and the restraints of the new order.[18]

Following the N. R. A., the return to the older system of enforced competition was perhaps somewhat gradual; but after May 25, 1935, in legal contemplation the Sherman and Clayton Acts again governed business policies.[19] Again price competition was the legislative command.

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quiry be directed especially to the effect of the anti-trust laws to determine if these evils can be remedied without sacrifice of the fundamental purpose of these laws."

[15]Act of June 16, 1933, 49 Stat. 195.

[16]Arnold, The Folklore of Capitalism (1938) 227.

[17]Terborgh, Price Control Devices in NRA Codes (Brookings Institution 1934). In a suit involving the Code of Fair Competition for the Cleaning and Dyeing Trade Judge Knox wrote: "And who can rightly say, with assurance, that governmental price fixing, when confined to transactions in interstate commerce, is not a means reasonably adapted to the legitimate ends which Congress seeks to serve?" United States v. Spotless Dollar Cleaners, 6 F. Supp. 725, 732 (S. D. N. Y. 1934).

[18]For example, Charles A. Beard has recently attacked the revival of antitrust sentiment in The Anti-Trust Racket (Sept. 21, 1938), 96 New Republic 184: "We have the knowledge, the skills and the resources required for at least doubling the present annual output of wealth. To accomplish this speeding up there must be, at this stage of the development, close cooperation among those elements in the spheres of capital, labor, agriculture and government that recognizes the basic facts in the situation and the fundamental nature of the problem—the problem of raising our production of wealth to the highest possible level. If we can cast off the entanglements of the old anti-trust claptrap and get competent minds concentrated upon the solution of the problem, I am convinced we can find a way, not to Utopia but to a far higher standard of life and civilization than we now have."

[19]Section 5 of the National Industrial Recovery Act, 48 Stat. 195, provided: "While this title is in effect (or in the case of a license, while section 4(a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof

In June, 1936, the Robinson-Patman Act[20] was placed on the statute books. The principal portion of this Act was in the form of an amendment to Section 2 of the Clayton Act, which prohibited certain forms of price discrimination. Its genesis lay in the hostility of independent wholesale and retail grocers and druggists to the chain store method of distribution. Yet the Act, on the naive assumption that universality is a prerequisite to constitutionality, was drafted to cover all business and industry affecting interstate commerce.[21]

Shortly thereafter the Miller-Tydings Fair Trade Law[22] was enacted as a rider to other important legislation. A volte-face on the legality of resale price maintenance took place.[23] Under the protection afforded by

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taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States." This section seems to have been considered in only one judicial opinion where it was said that under the circumstances "It is idle also for the defendants to argue that the anti-trust laws are tolled by the N. I. R. A. . . ." National Foundry Co. v. Alabama Pipe Co., 7 F. Supp. 823, 824 (E. D. N. Y. 1934). However, the Circuit Court of Appeals for the Seventh Circuit in United States v. Socony Vacuum Oil Co., 105 F. (2d) 809 (C. C. A. 7th, 1939), placed considerable reliance on the effect of the Code of Fair Competition which governed the oil industry. It is interesting to note that the Secretary of the Interior, speaking in September, 1933, said, "Our task is to stabilize the oil industry upon a profitable basis."

[20]Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13 (Supp. 1937). Mr. H. B. Teegarden, counsel for the United States Wholesale Grocers Association, drafted the bill introduced by Congressman Patman. Ellison, Robinson-Patman Act: Its Political and Commercial Background, Conference Proceedings on Robinson-Patman Anti-Discrimination Act, 4 (Trade Association Executives in New York City, 1936).

[21]Senator Logan, 80 Cong. Rec. 6429 (1936).

[22]Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. Sec. 1, as amended. Missouri, Texas and the District of Columbia do not have legislation legalizing resale price agreements.

[23]The Miller-Tydings Act reverses the judicial policy as expressed in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 407 (1911); Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20 (1912); Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917). Cf. United States v. Colgate, 250 U. S. 300 (1919). See Legislative Note, Resale Price Maintenance: The Miller-Tydings Enabling Act (1937), 51 Harv. L. Rev. 336; Note, The Amendment to the Federal Antitrust Laws (1938), 26 Geo. L. J. 403. Welch Grape Juice Co. v. Frankford Grocery Co., decided by Pennsylvania Court of Common Pleas, September 7, 1939, construed the Robinson-Patman Act not to invalidate differentials between wholesalers and retailers in resale price contracts protected by the Miller-Tydings Act: "It is evident that Congress did not contemplate a construction of the Robinson-Patman Act which would create an irreconcilable conflict between it and its contemporary enactment and defeat the primary objective of the Fair Trade laws." The argument in favor of resale price maintenance is well summarized in Eli Lilly & Co. v. Saunders, North Carolina Supreme Court, September 27, 1939: "The common law emphasis on forestalling, regrating, engrossing and conspiracy to raise prices must not lead us to infer that the sole objective of public policy was to obtain the lowest possible price to the consumer on every commodity. This is both an economic fallacy and a misconception of law. The public is more interested in fair and reasonable prices which preserve the economic balance in advantages to all those engaged in the trade, with due regard to the con-

this Act, all but two states have enacted statutes permitting resale price maintenance, and the manufacturer of a standard trade-marked article is now enabled to determine the price of that article throughout its subsequent history. With this vertical control in the hands of the producer, price competition among producers would appear of even greater public concern than formerly.

Price discrimination is the theme of the Robinson-Patman Act. But it is with a new purpose that the phrase is used. For the first time, interest is centered on the effect of price discrimination on "competition between rival methods of distribution,"[24] i. e., on the buyers. The effect of the Act upon competition among sellers was not considered by Congress and has not been fully considered at any subsequent time.[25] It is the purpose of this paper to suggest that the Robinson-Patman Act runs counter to traditional antitrust theories, and that the stressing of the harmful effects of price discrimination has resulted, and may further result, in an unintended but very real diminution of price competition. Economic data, pro and con, is lacking; so the lawyer's methods—logical analysis, precedent and authority—seem appropriate to the building and fortification of this suggestion.

It is believed that this subject is one which should properly be considered at the present time, not only because the judicial interpretation of the Robinson-Patman Act is still in the formative stage where a clear presentation of the effects of the Act may influence the clarity (and gloss) given by the judges to the vagueness of its language,[26] but also be-

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suming public, than it is in securing the lowest obtainable prices, when the inevitable tendency is to degrade or drive from the market 'articles which it is assumed to be desirable that the public should be able to get.' "

[24]The Robinson-Patman Act in Action (1937), 46 Yale L. J. 447, 449, a very helpful note. See also the following notes: The Robinson-Patman Act: Some Prospective Problems of Construction and Constitutionality (1936), 50 Harv. L. Rev. 106; The Legality of Discrimination under the Robinson-Patman Act (1936), 36 Col. L. Rev. 1285; Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act (1936), 23 Va. L. Rev. 201, 316; The Robinson-Patman Act (1937), 85 U. Pa. L. Rev. 306; Marketing under the Robinson-Patman Act (1937), 31 Ill. L. Rev. 907. Numerous books and articles have also been written on the Robinson-Patman Act, and will be cited from time to time. See especially The Robinson-Patman Act (The Washington Post, 1936); Zorn and Feldman, Business Under the New Price Laws (1937); Werne, Business and the Robinson-Patman Law: A Symposium (1938).

[25]Probably the most extended and helpful treatment of this phase of the Act is found in the June, 1937, issue of Law and Contemporary Problems, which is devoted to Price Discrimination and Price Cutting.

[26]The conflict which this article suggests exists between the Sherman Act and the Robinson-Patman Act, if properly presented to the courts, should raise interesting problems of construction and extent of application. Willenbucher, The Robinson-Patman Anti-Price Discrimination Act, (Washington 1937), 61. Landis, A Note on "Statutory Interpretation" (1930), 43 Harv. L. Rev. 886.

cause of the present study of the national economy being conducted by the Temporary National Economic Committee. The Committee was charged with the duty of making "A full and complete study and investigation with respect to . . . monopoly and the concentration of economic power in and financial control over production and distribution of goods and services . . ." The Committee was further directed to determine

> "(1) the causes of such concentration and control and their effect upon competition; (2) the effect of the existing price system and the price policies of industry upon the general level of trade, upon employment, upon long-term profits, and upon consumption; and (3) the effect of existing tax, patent, and other Government policies upon competition, price levels, unemployment, profits, and consumption; . . ."[27]

There is also, at the present time, an almost feverish activity on the part of the Antitrust Division of the Department of Justice, with more antitrust suits instituted in the last six months than in any comparable period since the passage of the Sherman Act. To date the Department of Justice has rather cavalierly snubbed the Robinson-Patman Act;[28] but the Federal Trade Commission issues complaints almost daily charging violations of the Robinson-Patman Act and of the Federal Trade Commission Act (and not infrequently alleged infractions of the two Acts are joined in one complaint).[29]

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[27]The Temporary National Economic Committee, established by a resolution of June 16, 1938, 52 Stat. 705, has heard very little discussion of the Robinson-Patman Act at its hearings, and the only specific mention of the Act on the agenda is under item 20—"Small Business." Statement by Senator O'Mahoney, August 10, 1939. One witness has told the Committee that the price of glass bottles increased about the time of the passage of the Robinson-Patman Act. I Verbatim Report of Temporary National Economic Committee (TNEC) 274. Dr. Ruth W. Ayres, an economist representing consumer interests, criticized the recent price legislation and regretted that there is "no adequate data to show how these laws are working." III TNEC 291. Mr. Robert L. Davison, an authority on housing, charged that the Robinson-Patman Act stood in the way of low-cost housing. IV TNEC 567. There have also been some references to the Act in the recent steel hearings. Judge Davis of the Federal Trade Commission explained to the Committee the method adopted by the Commission to answer inquiries regarding the application of teh Act, II TNEC 278, and at another point said that the Commission had insufficient funds to enforce the Act. II TNEC 239.

[28]No criminal prosecution has been instituted under Section 3 of the Robinson-Patman Act (the criminal section which was formerly the Borah-Van Nuys Bill), although the Antitrust Division of the Department of Justice makes extensive use of the criminal sections of the Sherman Act in its efforts to secure consent decrees. For a discussion of the effect of a consent decree in an antitrust case see Donovan and McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws (1933), 46 Harv. L. Rev. 885.

[29]See Appendix to this article for a list of complaints issued under the Robinson-

The current "anti-monopoly" drive is marked not so much by the purely legalistic search for agreements in restraint of trade or efforts to break down bigness per se (as during the earlier periods referred to), but rather by an economic approach which seeks to penetrate to the root of the evil. There is a genuine desire in Washington today to find out what the restraints are which prevent prices of manufactured goods from fluctuating more widely in accordance with the law of supply and demand.[30] It is felt that in times of slack business, manufacturers, instead of reducing their prices to a point where they can maintain a satisfactory volume of sales, tend to hold up their prices and cut down drastically on production. This policy, according to the theory widely held in Washington, is highly deflationary and tends to accentuate and prolong periods of depression.[31] If prices are held up and volume cur-

Patman Act. Complaints alleging a violation of Section 5 of the Federal Trade Commission Act, which declares unlawful "unfair methods of competion," have been issued under circumstances which seem also to involve a violation of the Sherman Act. Henderson in The Federal Trade Commission (1924) 322 questions the jurisdiction of the Commission to issue orders against a price-fixing combination: ". . . upon what theory a concerted movement to refrain from competing in certain respects is a method of competition at all, is not stated. None of these cases have found their way into the courts, and it does not seem that they are to be taken very seriously." Yet Chairman Robert E. Freer, addressing the annual convention of the National Wholesale Druggists' Association, on September 27, 1939, remarked: "The past year has also been important to the Commission because of the number and scope of proceedings involving combination to fix prices and restrain competition, in addition to the Robinson-Patman and Wheeler-Lea Act activities during the fiscal year, sixteen complaints were issued charging combinations and conspiracies to fix prices or eliminate competition." Perhaps greater clarification of the jurisdiction of the Commission and the Antitrust Division should be recommended by the TNEC.

[30]Former Attorney General Homer Cummings in a letter to the President dated April 26, 1937 urged that "the time has come for the Federal government to undertake a restatement of the law designed to prevent monopoly and unfair competition. This proceeds from the conviction that the present laws have not operated to give adequate protection to the public against monopolistic practices." Solicitor General (then Assistant Attorney General) Jackson also discussed the problem in his annual report for 1937: "The antitrust laws have become theological tracts on corporate morality. . . . The attitude of seeking for a sinister intent rather than appraising the effect of combinations on prices has led to a procedure which makes antitrust prosecutions so cumbersome that only a few prosecutions are possible. . . . Correspondence, secret dealings, completely irrelevant from the point of view of the effect of the business activity under consideration, become the whole issue of the case."

[31]See e. g., the remarks of Chairman Freer of the Federal Trade Commission before the National Petroleum Association, April 13, 1939: "There has been much written recently about 'imperfect' competition. The classic concept of competition contemplates more or less sensitive prices, affected by the so-called laws of supply and demand. This concept contemplates no artificial controls either by government or by private individuals or groups of individuals. . . . In many industries, prices have become 'sticky' and tend to remain uniform and rigid in the face of changing demand and of improvements in the processes of manufacture and distribution." Industrial

tailed as demand dries up, men are thrown out of work, purchasing power destroyed, and a vicious deflationary cycle inaugurated. If, on the other hand, prices of manufactured goods are reduced as demand slackens, in most industries sales volume can be held up, not to boom-time levels, of course, but to normal proportions, and employment can be maintained.

The purpose of this article is to discuss the various factors which enter into the determination of prices of standardized manufactured goods, and to point out in what respects the Robinson-Patman Act, as one of such factors, tends to hold up such prices in times of slack business and also to produce price uniformity throughout an industry.

Factors Determining Prices

By way of introduction to a discussion of the factors entering into the determination of the prices of standardized manufactured articles, it would be well to consider the factors which determine commodity prices on an exchange, such as the Chicago Board of Trade. In the wheat pit of the Chicago Board of Trade there are a large number of buyers bidding for wheat and a large number of sellers seeking to sell wheat.[32] Complete publicity attends all of their transactions. Their bid and asked prices are a matter of common knowledge, and when a buyer and a seller succeed in agreeing on a price, say of $1.00, such price is immediately posted for all other buyers and sellers to see. As a result of such price publicity, at the moment of sale $1.00 is *the* price of wheat in that market. At such a time no buyer is going to bid $1.05, and no seller is going to ask 95c when they have just seen wheat sold at $1.00. Of course, the price may ultimately reach $1.05 if the buyers become convinced that no more wheat is going to be offered for less than that, or it may ultimately reach 95c if the sellers become convinced that no buyer is going to bid more than that. But at or about the time of sale *the* market price of wheat is $1.00. This is known as the principle of the single price. Reduced to simple terms it means that in the case of an interchangeable article or commodity of the same quality, given complete publicity as to actual prices paid, as well as bid and asked prices, at any given time and in a single market there will be only one price for such

Prices and Their Relative Inflexibility, Sen. Doc. 13, 74th Cong., 1st Sess.; Humphrey, The Nature and Meaning of Rigid Prices (1937), 45 J. Pol. Econ. 651; Means, Notes on Inflexible Prices (1936) 26 Am. Econ. Rev. (Supp.) 23, 35; Galbraith. Monopoly Power and Price Rigidities (1936), 50 Q. J. Econ. 456.

[32]Even on a commodity exchange the Sherman Act may be violated, an example being the cornering of the grain market of the Chicago Board of Trade, Peto v. Howell, 101 F. (2d) 353 (C. C. A. 7th, 1938).

article or commodity.[33] The principle operates perfectly, however, only under conditions of widespread knowledge. If, in the wheat pit, for example, little groups of men gather at different points, each bargaining privately for the purchase and sale of wheat, and keeping quiet afterwards about the prices reached, it is perfectly obvious that the price in one such group might be $1.03, in another 98c, in another 95c, and so on, depending on how many groups there were.

The only type of market in which are found all of the factors necessary for the perfect operation of the single price principle is an exchange, such as the Chicago Board of Trade. In no other type of market is complete price information transmitted instantaneously to all buyers and sellers.[34]

The same principle applies, although to a much more limited extent, in the sale of many types of standardized, interchangeable, manufactured articles. Most manufacturers of such articles put out a so-called list price for their products. This generally consists of a formal catalogue or a pamphlet, or sometimes simply a single sheet of paper, which is widely distributed throughout the industry to wholesale and retail customers, to trade periodicals, and often to competitors.[35] When manufacturers publish a list price it is usually their hope to sell their products at such price. A considerable portion of the time they are not successful in this regard, however, and normal competitive pressures tend to drive actual prices down from list prices. Because the list prices of various manufacturers of a standardized, interchangeable article are published, and hence widely known, the single price principle comes into operation (although not perfectly), and such list prices tend to be uniform.

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[33]This principle is sometimes known as Say's law.

[34]In the Sugar Institute case the court was much interested in the "waiting period" during which information concerning price changes was circulated throughout the industry. Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936) modifying 15 F. Supp. 817 (S. D. N. Y. 1934).

[35]Under the N. R. A., price lists were not only published but also filed with the Code Authority. Many people viewed the Robinson-Patman Act as an invitation to return to such a system. Mr. Jacob K. Javits describes the effect of the Recovery Act: "The open publication of prices eliminated a great many inside buying advantages which had theretofore been enjoyed by some favored buyers, and served to stabilize the price for all sellers and all buyers at the economic level then necessitated by the market. The Robinson-Patman Act was considered when passed as likely again to encourage price publication; and it has had that effect. Manifestly a price list definitely indicates the price charged and may be submitted as evidence of what the price actually was. It saves the seller from the importunities of buyers as the seller may then state that he has broadcast his prices to the world and therefore cannot deviate in a particular sale. Price publication is really a hostage to compliance with the Robinson-

Take a hypothetical example of how the single price principle might operate in a freely competitive market to make uniform the list prices of different manufacturers of a standardized, interchangeable article. Let us say that the current market price of screwdrivers is $1.00. Business is in a period of brisk demand and orders for screwdrivers are pouring in faster than they can be filled. Company A, one of the important members of the industry,[36] decides the opportunity is ripe to try to get a better return on its screwdrivers and raises its list and actual price to $1.10. Thereupon, one of two things is bound to happen in the industry. Either A's competitors, eager to increase their profits, follow the lead of A, in which event a new price level is produced, or they refuse to follow such lead and A is forced to abandon its new price and fall back to its old one of $1.00. In the latter event, A would either cancel its new list and return to its old, or would simply disregard it and sell at $1.00. Sooner or later, however, if A's competitors did not raise their prices to $1.10, A would revise its price list to $1.00, the actual market price, and thus restore the uniformity.

In the converse situation, i. e., where Company A publishes a new price of 90c, there is no alternative open as to what happens in the screwdriver industry. All of the other manufacturers are compelled to meet A's price, or retire from the market. For A's competitors, as a matter purely of business survival, cannot and will not sit idly by and watch A take away their customers. Obviously no purchaser of screwdrivers is

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Patman Act." Werne, Business and the Robinson-Patman Law: A Symposium (1938) 209.

[36]The leadership principle in industrial pricing is a recognized economic fact. One economist terms it the "follow-the-leader" method of pricing. Holtzclaw, The Principles of Marketing (1935) 601. Assistant Attorney General (then Professor) Thurman Arnold has described the ordinary occurrence: "Thus the phenomenon known as 'price leadership' became the dominant factor in establishing control on the part of great organizations. If men refused to follow the practices of the recognized and respected members of their industry, they were regarded as 'chislers' ". Arnold, The Folklore of Capitalism (1937) 227. This practice is not illegal aside from any agreement to follow the leader, and Assistant Attorney General (now Solicitor General) Jackson in his 1937 report cites United States v. International Harvester, 274 U. S. 693, 709 (1927) for the proposition that, under the decisions, price leadership "does not establish any suppression of competition or any sinister domination. . . . Indeed, the maintenance of high prices by a combination which completely dominates the market may be held to be a sign of virtue. It was held to be a sign of merit that the International Harvester Company had not indulged in price cutting." Also in Cement Manufacturers Protective Association v. United States, 268 U. S. 588, 605 (1925) the Supreme Court recognized that "Variations of price by one manufacturer are usually promptly followed by variation throughout the trade." Yet price leadership may have the same effect as an agreement to fix and maintain prices, and this economic fact should be weighed in evaluating the Robinson-Patman Act and the impetus given by that Act to adherence to published prices set by an industry leader or leaders.

going to pay $1.00 when he knows, and *ex hypothesi* he does know because A's price has been published and distributed throughout the trade, that he can buy screwdrivers for 90c.

Thus, we see that the tendency in the case of standardized, interchangeable manufactured articles is for published list prices to be uniform.[37] It is only a tendency, and not an inviolable rule, however, because knowledge of list prices is not distributed instantaneously to all buyers in the market, and because several factors in addition to price enter into the purchase and sale of manufactured articles.

The next question to be considered is whether, if the tendency is for *list* prices of standardized, interchangeable, manufactured articles to be uniform, a similar tendency exists in the case of *actual* prices. Not necessarily so. List prices do, of course, affect actual prices, particularly in times of good business, but so many other factors normally enter in to tend to make actual prices divergent that the tendency to conform is far weaker than in the case of list prices.[38] In this connection it should be noted that there is a marked difference in the strength of the tendency in times of brisk demand and in times of slack demand. In times of brisk demand, bidding is active and actual prices tend to rise. No manufacturer can hope to sell above his list price, however, so the result is that the list price, so long as it remains unchanged, acts as a ceiling on rising prices. Thus, if the period of brisk demand is sufficiently active, or lasts long enough, actual prices will coincide with list prices and, because list prices tend to be uniform, will be substantially identical in any particular market.

In periods of slack demand, on the other hand, bidding is inactive and manufacturers are under compulsion to sell, even at a loss, in order to cover their overhead.[39] Buyers, aware of this compulsion, make tempting offers at prices below the list. Sooner or later a manufacturer yields to this pressure and starts shading his price. This shading does not, however, consist of a uniform cut of say 5% to all customers, because such a cut would be promptly known by the entire industry and

[37]In view of this natural uniformity of list prices it may be questioned whether the mere juxtaposition of identical price lists is any evidence of a conspiracy or agreement to fix prices in an industry. Compare A Statement of the Substantive Law of Restraint of Trade, Monopoly, and Unfair Competition, prepared by the United States Treasury Department for the use of the Temporary National Economic Committee, page 22 (1939).

[38]Till, The Fiction of the Quoted Price (1937) 4 Law and Contemp. Prob. 363.

[39]The compulsion to grant a special price in order to augment the volume of business is especially acute in industries requiring a heavy capital investment. Marketing under the Robinson-Patman Act (1937), 31 Ill. L. Rev. 907, 920.

would defeat its own purpose by immediately bringing down the prices of all competing manufacturers by a like amount, thus preventing the particular manufacturer from gaining any advantage over his competitors.[40] What each manufacturer hopes to accomplish is to increase his own sales at the expense of his competitors by offering a more favorable price. In order to obtain and maintain this hoped for advantage, the manufacturer usually cuts his price only in individual situations, takes considerable pains to keep his lower price a secret and asks his customer not to divulge the deal they have made.

The result of this price cutting,[41] in which, in the absence of legislative restrictions such as those imposed by the Robinson-Patman Act, substantially all manufacturers in most industries indulge in periods of bad business, is complete divergence of prices, both as between competing manufacturers and between different customers of the same manufacturer. Sooner or later, if the period of slack business continues and ripens into a depression, some manufacturer will decide that the deterioration of prices has proceeded so far, and the departure from list prices become so generally recognized and followed, that a new lower list price is in order and will publish one. This new price, if the cut is deep enough, will, according to the process outlined above, be met by the rest of the industry. Then, if the depression continues and deepens, the chiseling process will start all over again and sooner or later a still lower list price will be established.

It is this chiseling process, this whittling away at published prices, which provides flexibility in the price structure of standardized, interchangeable, manufactured articles. If this process is eliminated, either through agreement in violation of the Sherman Act or in any other manner, prices in times of slack business, are going to be much slower to come down along with falling demand.

Price Lists and the Robinson-Patman Act

Yet that is just the effect of the Robinson-Patman Act. This Act provides:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indi-

[40] In Prairie Farmer Pub. Co. v. Indiana Farmers' Guide Pub. Co., 88 F. (2d) 979 (C. C. A. 7th, 1937) the court refers to "the conflict for advantage called competition."

[41] Campaigned price cutting in order to destroy a rival and to establish a monopoly in a restricted area has been condemned by Congress in the original section 2 of the Clayton Act and by the courts in United States v. American Tobacco Co., 221 U. S. 106 (1911) and United States v. Corn Products Refining Co., 234 Fed. 964 (S. D. N. Y. 1916). This type of price cutting is not the same as the off-list selling or the categorizing of customers against which the Robinson-Patman Act seems directed.

> rectly, 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 . . ."[42]

As administered by the Federal Trade Commission, in accordance with the expressions of Congressional intent contained in the legislative history of the Act, it is clear that any difference in price between two competing customers which is not affirmatively justifiable on one of the grounds stated in the Act, such as savings in the cost of doing business as between such customers, is illegal. In other words, stated in broad terms and without reference to any of the exemptions provided in the law, a manufacturer has to sell all of his customers who are in competition with one another at the same price. If a manufacturer obeys the law and sells to all of his competing customers at the same price, such price will be known by everybody throughout the trade, because no manufacturer could conceivably keep secret the price at which he sells all of his customers.[43] And as soon as the situation exists where competing sellers have a single price for all of their customers, with widespread knowledge as to such prices, the principle of the single price begins to operate, and prices throughout the industry tend to become uniform. Thus, in times of slack business, prices of standardized, interchangeable, manufactured articles, due to the operation of the Robinson-Patman Act, tend to remain at, or close to, the list price, rather than dropping away and pulling the list price down after them, as happens under normal, competitive conditions.[44]

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[42]An important extension of the terms of the Clayton Act is the addition of the clause "where the effect of such discrimination may be substantially . . . 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." Cf. Lipson v. Socony-Vacuum Corp., 76 F. (2d) 213, 218 (C. C. A. 1st, 1935); S. S. Kresge Co. v. Champion Spark Plug Co., 3 F. (2d) 415 (C. C. A. 6th, 1925); Van Camp Co. v. American Can Co., 278 U. S. 245 (1929).

[43]In Cement Manufacturers Protective Assn. v. United States, 268 U. S. 588, 604 (1925) the court recognized the uniformity which results from a known price: "Nor, for the reasons stated, can we regard the gathering and reporting of information, through the cooperation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price."

[44]Professor Arthur R. Burns, author of The Decline of Competition (1936), writes: "The obstruction of the development of large distributors and the elimination of secret price cutting is likely, however, to have the general effect of strengthening manufacturers in their efforts to maintain prices, thus reducing output and possibly intensifying depression." Burns, The Anti-Trust Laws and the Regulation of Price Competition (1937), 4 Law and Contemp. Prob. 301, 319.

To point up this fact, let us return to our old illustration of Company A and the screwdriver industry. Let us say that business has been good and the going price of screwdrivers throughout the industry is $1.10, which happens also to be the published list price of most of the manufacturers. Then business slows up and demand falls off. Customers start dickering with the Company for price concessions. Company A points out to them, however, that any such concessions are illegal under the Robinson-Patman Act.[45] The only course open to the Company is to reduce its price level uniformly to all customers. This the Company is loathe to do, however, because such a reduction would be promptly met by its competitors and any possible price advantage would be lost. After such a cut Company A would find itself enjoying approximately the same volume of business as before, but at a lower profit margin, and there is no incentive in that. Thus, in situations where the Robinson-Patman Act is followed to the letter, no company cuts its price until sheer desperation drives it to do so. This comes only after business had dried up to such an extent that a company is willing to break the market in the effort to develop some new orders.

Let us examine some of the specific pressures resulting from the Robinson-Patman Act which tend to force adherence to published price lists:

1. *The requirement that competing purchasers of goods of like grade and quality be treated equally.* This requirement, which is the broad and therefore not altogether accurate essence of the Act, was intended by the original draftsman of the Act to result in a one-price system.

> "The Act itself merely applied to wholesale distribution a principle that long has been effective and profitable throughout retail trade. Consumers immediately recognized the fairness and convenience of the one-price principle when it was introduced in the retail trade 50 years ago."[46]

The difficulty of determining when purchasers are or are not competitors,[47] and of being certain that the various functional classifica-

[45]See n. 35, supra.

[46]H. B. Teegarden, Don't Fear the Robinson-Patman Law (April 1937), 25 Nation's Business 19. Mr. Teegarden prepared the original draft of the bill. See n. 20, supra.

[47]Several Federal Trade Commission complaints have been directed toward a solution of the problem of what persons are in competition, but as yet there have been no helpful opinions by either the Commission or the courts. Certain earlier decisions will serve as guides. Baran v. Goodyear Tire & Rubber Co., 256 Fed. 571, 574 (S. D. N. Y. 1919): "There is apparently no competition between the manufacturers of tires

tions of purchasers are not legally assailable,[48] together with the uncertainty as to the breadth of interpretation which will be given to the phrase "goods of like grade and quality"[49] all contribute to the establishment and maintenance of a single-price system.

2. *The vagueness and uncertainty of interpretation of the exculpating provisions.* The Act contains a number of provisos which permit departure from a single-price system under particular circumstances. Thus, to mention one such proviso, price differentials are permissible if they "make only due allowance for differences in the cost of manufacture, sale, or delivery . . ." To determine what constitutes "only due allowance" in most situations is a problem which cannot be approached without the aid of accountants, and even then the experts are often in disagreement as to how certain cost factors should be allocated as between different methods of manufacture or distribution.[50] In fact, the Act has been termed "An Act to restore prosperity to . . . accountants";[51]

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and the dealers, nor as it alleged that any exists. The differentiation in price would not therefore substantially lessen competition." Professor Fetter, in Planning for Totalitarian Monopoly (1937), 45 J. Pol. Econ. 95, 102, approves the definition given by Professor Burns in The Decline of Competition (1936), 273, but criticizes the application of the definition: "Price discrimination occurs wherever a seller sells a homogeneous commodity at the same time to different purchasers at different prices."

[48]". . . the philosophy of the Robinson-Patman Act is fundamentally incompatible with a realistic functional view of the marketing process." McNair, Marketing Functions and Costs and the Robinson-Patman Act (1937), 4 Law and Contemp. Prob. 334, 351. Wholesaler's discounts and other functional differentials were upheld under the Clayton Act. Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (C. C. A. 2d, 1923) cert. denied 262 U. S. 759; Great Atlantic Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46 (C. C. A. 2d, 1915); National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (C. C. A. 2d, 1924) cert. denied 266 U. S. 613. It also seems clear that traditional functional differentials will be upheld under the Robinson-Patman Act in large measure. Smith, The Patman Act in Practice (1937), 35 Mich. L. Rev. 705, 724. Zorn and Feldman, Business under the New Price Laws (1937) 174. Mr. Allen C. Phelps, attorney for the Federal Trade Commission, speaking before the National Association of Retail Grocers, June 19, 1939: "It is generally considered that it recognizes the validity and propriety of functional discounts."

[49]It has been suggested that the "like grade and quality" proviso may accomplish a nullification of the Act. The Legality of Discrimination under the Robinson-Patman Act (1936), 36 Col. L. Rev. 1285, 1292.

[50]"*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." Harbeson, Costs and Economic Control (1939), 17 Harv. Bus. Rev. 257, 265 suggests, "There is great danger that, because of the difficulty of justifying price differentials on the basis of cost, the effect of this provision will be further to encourage one-price policies, price rigidity, and chronic excess capacity."

[51]Chairman Robert E. Freer of the Federal Trade Commission speaking on "Accounting Problems under the Robinson-Patman Act," March 24, 1938.

but even the most elaborate cost accounting analysis may fail to satisfy the Commission.[52] The simplicity of the one-price system is made more inviting by the accounting difficulties which plague the adoption of an alternative.

Another exculpating proviso permits price changes from time to time "in response to changing conditions affecting the market for or the marketability of the goods concerned."[53] It will take numerous decisions by the Commission and by the courts to explain the meaning of this clause.[54] Perhaps there can be changes in the market, even of manufactured articles, from hour to hour; but it is clear that the framers of the Act did not foresee such volatile market conditions and did not intend to permit so easy a defense. Already this clause has been involved in one case in which the court required the defendant to state in his answer the facts which the defendant claimed constituted changing conditions in the market.[55]

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[52]In the Matter of Standard Brands, FTC Docket No. 2986.

[53]It is said that this clause was included as "an added precaution." H. Rept. No. 2287, 74th Cong., 1st Sess., 11 (1936).

[54]Congressman Celler: "The courts will have the devil's own job to unravel the tangle." 80 Cong. Rec. 9561 (June 15, 1936). In this connection there might be considered again the suggestion "that there should be established a Federal Agency with power to inquire into, consider, and determine in advance the legality of industrial consolidations, or trade agreements affecting competition." Donovan, Some Practical Aspects of the Sherman Law (1929), 3 Temp. L. Q. 343. The same proposal is made in Tobriner and Jaffe, Revision of the Anti-Trust Laws (1932), 20 Calif. L. Rev. 585, and by Mr. Thurlow M. Gordon in Werne, Business and the Robinson-Patman Law: A Symposium (1938) 65. Another writer has criticized this advance approval on the ground that it would "permit the cartels of Germany without the public control of industrial cartels which exists in Germany." Clark, The Federal Trust Problem (1931) 291. The history of the Sugar Institute illustrates the difficulties which may arise. See opinion of Judge Mack, United States v. Sugar Institute, Inc., 15 F. Supp. 817 (S. D. N. Y. 1934). Judge Davis of the Federal Trade Commission described to the Temporary National Economic Committee the practice followed by the Commission in the wave of questions and inquiries after the passage of the Robinson-Patman Act. II TNEC 278 (March 3, 1939): ". . . as it was a new law, the Commission took the liberty and the responsibility of establishing a committee of some of its best lawyers and economists and accountants who had permission to informally discuss the problems with the innumerable members of industry who were pouring in there to try to get their bearings, and right in that connection, for several weeks, I think, the Secretary reported to us we received an average of four hundred letters a day, making inquiry about the Robinson-Patman Act, and so forth. So we authorized this committee to be as helpful as they could, not to get out on a limb or in deep water, because it was new to everybody and in the final analysis the courts had their say as to interpretation, and, in addition there, the Department of Justice had concurrent jurisdiction, and we had to proceed carefully and cautiously."

[55]In Huber Inc. v. Pillsbury Flour Mills Co., a suit for damages under the Robinson-Patman Act, Judge Goddard of the Southern District of New York, handed down a memorandum opinion on October 5, 1939: "Demand No. 1 is denied insofar

3. *The burden of proving justification which is imposed on the respondent.* There has been some doubt as to whether the proviso which allows a respondent to show that the lower price was "made in good faith to meet an equally low price of a competitor,"[56] is merely the right to put in rebuttal evidence or is a complete defense of any charge of illegality. In any event, the respondent must establish this defense, and the burden is not placed on the Commission or the complainant to show that the lower price was not given in order to meet bona fide competition.

4. *Industry control of prices through the Robinson-Patman provision in Trade Practice Rules.* It was early suggested that the courts would not permit (under the Sherman Act) an industry to require its members to live up to the Robinson-Patman Act, in other words, to act as an enforcement agency under the new Act.[57] Yet the Trade Practice Rules approved by the Commission in the case of more than a score of industries have contained a rule prohibiting price discrimination.[58]

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as it requires a statement of the sales made by defendant at prices lower than those paid by plaintiff. However, defendant should be required to state in general the market conditions prevailing at the time or times of the sales made to plaintiff, and the changing conditions which affected the marketability of the flour sold to the plaintiff and to the defendant's other customers at or between the times of such sales. If the defense is supplemented in this manner it will not be open to charge that it contains merely conclusions of law. But to require a statement of the actual sales made at lower prices than those paid by plaintiff would be to require the defendant to furnish the plaintiff with a *prima facie* case which otherwise defendant might never have had to rebut." Congressman Utterback expressed the views of the sponsors: "Whether price changes are of a character justified by the causes here described is a question of fact, and where that question comes to issue, the burden of proof is upon the offending party claiming its protection." 80 Cong. Rec. 9560 (June 15, 1936).

[56]80 Cong. Rec. 9560 (June 15, 1936). The view of the Federal Trade Commission has been expressed In the Matter of the Goodyear Tire and Rubber Company, FTC Docket No. 2116: "A manufacturer may justify a discriminatory low price to a large purchaser on the ground of meeting competition only if his competitor has previously made an equally low and discriminating price to that purchaser." It has been suggested that the defense of meeting competition should be broadly construed in order to avoid the effect of Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927) and Williams v. Standard Oil Co., 278 U. S. 235 (1929) which held state statutes prohibiting discrimination unconstitutional because this defense was not given the seller. Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act (1936), 23 Va. L. Rev. 316, 323. See The Robinson-Patman Act (The Washington Post 1936) 33.

[57]". . . it is extremely doubtful that the courts will hold that a trade association has powers of self-regulation coextensive with the broad and unexplored implications of the Robinson-Patman Act." Fly, The Sugar Institute Decisions and the Anti-Trust Laws (1936), 46 Yale L. J. 228, 247. Austern, Book Review (1938), 51 Harv. L. Rev. 1313.

[58]See, for example, Baby Chick Rule 35, Concrete Burial Vault Rule 13, Tomato Paste Manufacturing Rule 13, Wet Ground Mica Rule 4.

5. *The sanction of the ever-menacing triple damage suit.* A realistic appraisal of the freezing effect of the Robinson-Patman Act on prices must include the threat of triple damage suits.[59] If no consequence worse than a Federal Trade Commission cease and desist order were involved, the determination of industrial price policy might not be seriously affected by the Act. A successful triple damage suit, however, is a very different matter, for just one such suit might easily bankrupt many a successful corporation. It is now suggested by Senator O'Mahoney, Chairman of the Temporary National Economic Committee, that the penalties for violation of the antitrust laws should be substantially increased. Heavy penalties against officers and directors are suggested, and S. 2719 proposes that any company violating the antitrust laws shall forfeit to the United States a sum equal to twice the total net income received by such company during each month within which any violation of the antitrust laws has occurred.[60] The chilling calm of a recent Trade Commission announcement concerning a Robinson-Patman complaint illustrates the efficacy of the present damage provisions:

> "The facts were not developed because preliminary inquiries disclosed private litigation in which the party charged was being

[59]The first triple damage suit under the Robinson-Patman Act was English v. Nicholas Copper Co., filed on January 9, 1937, in the United States District Court for the Western District of Missouri on January 9, 1937. One writer has called the Act "an outrageous basis for a suit for triple damages." McLaughlin, The Courts and the Robinson-Patman Act: Possibilities of Strict Construction (1937), 4 Law and Contemp. Prob. 410, 413. The vagueness of the statute together with the fact that specific damages need not always be proved in antitrust cases seems to justify this comment. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 (1931); Hansen Packing Co. v. Swift & Co., 27 F. Supp. 364, 369 (S. D. N. Y. 1939). Cf. Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824 (D. Md. 1938). It is recognized that a Federal Trade Commission order may have "serious practical results in the encouragement of litigation, though necessarily conceding the order not to control such litigation under the doctrine of res judicata." Goodyear Tire & Rubber Co. v. Federal Trade Commission, 92 F. (2d) 677, 681 (C. C. A. 6th, 1937). The Department of Justice is setting an example in suing for three-fold damages in cases involving identical bids to the government. United States v. The Cooper Corporation, filed in the United States District Court for the Southern District of New York on February 20, 1939. A Department of Justice press release on the same day contended that "A proceeding under Section 7 is the only form of antitrust proceeding whereby the government may recover the damages it believes it has sustained by reason of the defendants' alleged combination to fix the price of tires." It is interesting to note that the United States is a "person," according to the contentions of the Department of Justice, when it comes to suing for three-fold damages, but not a "person" under the Robinson-Patman Act. 38 Opp. Atty. Gen. 539 (1936). Probably the answer is that the government does not want to pay too much for the things it buys.

[60]S. 2719, 76th Cong., 1st Sess. Hearings on this bill, introduced by Senator O'Mahoney, were held on July 28, 1939, before a subcommittee of the Senate Committee on the Judiciary.

sued for $15,000,000 triple damages under the Robinson-Patman Act which suit involved the same issues. Hence the file was closed."[61]

6. *The possibility that an important contract may be held void for illegality because of violation of the Robinson-Patman Act.*[62]

7. *The criminal penalties in Section 3 of the Act.*[63]

The perfect defense of a seller to all charges of discrimination is unfailing adherence to a published price list. Of course, in actual litigation the seller may be able to establish justification for any departures from such list. But the establishment of such justification is burdensome, and it is often easier for the seller simply to adhere to his list price. Thus, the Robinson-Patman Act does tend to enforce compliance with published price lists. As one commentator remarked, a price list is the best possible evidence that prices have not been discriminatory, provided that the seller can show that he charged list prices to his customers.[64]

Even the sponsors of the Robinson-Patman Act recognized the argument that the Act might be considered a price fixing bill. When asked whether such was the correct interpretation, Congressman Patman replied:

> "No; it is opposed to price-fixing. Because a manufacturer will be compelled to sell to all his customers at the same price under the same conditions does not mean that his competitor across the street manufacturing the same quality of merchandise will be compelled to sell to his customers at the same price. It will merely mean that whatever price the competing manufacturer across the street sells for, he must treat his own customers fairly and sell to them at the same price basis."[65]

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[61]Federal Trade Commission, "A Brief Summary of 64 Robinson-Patman Cases," 2 (undated).

[62]There has been one holding that a contract of sale which violates the Robinson-Patman Act is not void as the discrimination is only "collateral" to the contract. Progress Corporation v. Green, 163 Misc. 828, 298 N. Y. S. 154 (1937) noted in (1938) 38 Col. L. Rev. 192. Compare Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (1902); A. B. Small v. Lamborn & Co., 267 U. S. 248 (1925).

[63]The Borah-Van Nuys bill, which became Section 3 of the Robinson-Patman Act, has not yet been invoked by the Department of Justice. But these various points may not be dismissed as a parade of imaginary horribles for they must be considered by a careful lawyer and a cautious business man.

[64]"The whole tendency of the Act is toward an open but not necessarily uniform price. The seller will best conform to the policy of the Act by publishing his price list, customer classification, and what services he stands ready to give or pay for." Marketing under the Robinson-Patman Act (1937), 31 Ill. L. Rev. 907, 941.

[65]80 Cong. Rec. 7970 (May 21, 1936). In H. Rep. No. 2287, 74th Cong., 2d Sess., the same argument was made: "In conclusion, your committee wishes to correct some im-

Nearly every commentator on the Act has suggested that the Act in practice might result in substantial elimination of price competition among competitors on the same planes of production or distribution. Thus Mr. James Lawrence Fly, counsel for the government in the Sugar Institute case, pointed out that the Robinson-Patman Act may change the law, "perhaps even to the extent of requiring the kind of price uniformities which have previously been attacked as restraints of trade."[66] Another writer believed that the Act might compel by law the same rigidities of price which were objected to by critics of the NRA.[67] Mr. Blackwell Smith, who was General Counsel of the NRA, predicted that ". . . henceforth, price may be used as a weapon in competition only with the greatest circumspection."[68] He also suggests that the Act may result in

> "rigid price structures in the case of large sellers who try to conform to the Act (Such price set-ups, because of the necessity of rigid interrelation of allowances, must be altered throughout, if at all, and would result in fixity. Such a price structure results also in uniformity between sellers, in that all must recognize and adjust to such a structure of any competing seller who is a big factor in the industry.)"[69]

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portant misapprehensions, and even misrepresentations, that have been broadly urged with regard to the probable effect of this bill. There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions." In Congress the bill was viewed almost entirely as a measure affecting methods of retail and wholesale distribution and not as affecting a manufacturer's prices. A dramatic illustration of the narrowness of the approach is the answer of the late Senator Logan, one of the chief sponsors of the bill in the Senate, to an inquiry by Senator Vandenberg as to whether the "provision was written entirely with the field of retail merchandising in mind." Senator Logan replied in the affirmative, and added, "but I had no idea, until the Senator from Michigan mentioned it, that it had anything to do with the automobile industry." 80 Cong. Rec. 6429 (1936). An all-inclusive, generalized act was passed without considering in any respect the variety of the problems which would result, except in regard to the distribution of food and drugs. Congress completely disregarded the advice that "The technologies of our various trades—meat packing, building, mining, retailing, and what not—have their own compulsions with which schemes of public control must come to grips. The simple uniformity of the older acts may have to give way to an accommodation of public oversight to the varying necessity of the different trades." Hamilton, The Problem of Anti-Trust Reform (1932), 32 Col. L. Rev. 173, 177.

[66]Fly, The Sugar Institute Decisions and the Anti-Trust Laws (1936), 46 Yale L. J. 228.

[67]Gordon, Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3 (1936), 22 Am. Bar Assn. J. 593, 594.

[68]Smith, The Patman Act in Practice (1937), 35 Mich. L. Rev. 705, 731.

[69]Ibid., 730. A similar view was expressed in The Robinson-Patman Act in Action (1937), 46 Yale L. J. 447, 481: "Although the issue was never clearly presented in these

Other writers have noted that "its general requirement that prices be nondiscriminatory is characteristic of measures designed to control the charges of public utilities";[70] and in the Congressional debates and reports on the Robinson-Patman bill, great reliance was placed on the views of the Supreme Court on discrimination as stated in *Interstate Commerce Commission v. Baltimore & Ohio Railroad.*[71] A significant distinction, perhaps, is that rates and charges of public utilities are completely regulated; while the theory of previous antitrust legislation has been that the natural result of competition is a proper price level and that government regulation is a harmful and disrupting influence.

Soon after this article is printed, it is expected that the United States Supreme Court will render its decision in the *Socony-Vacuum* case,[72]

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terms, the Robinson-Patman Act amounts to a decision by Congress in favor of uniform prices against any alternative economic end. In many markets where the uniform prices to be enforced will be monopolistic prices, the decision amounts to a preference for one-price monopoly against discriminatory monopoly, an election to which there are serious objections, both economic and social." In Changes in Federal Price Discrimination Law Effected by the Robinson-Patman Act (1936), 23 Va. L. Rev. 316, 323, the author of the note says: "The right to discriminate in price and facilities to meet competition is, therefore, very limited. . . . This restriction gives the Robinson-Patman Act a much greater tendency to fix prices than Section 2 of the Clayton Act." See also McNair, Marketing Functions and Costs and the Robinson-Patman Act (1937), 4 Law & Contemp. Prob. 321, 337. The same view was expressed in Shaw's, Inc. v. Wilson-Jones Co., 26 F. Supp. 713, 714 (E. D. Pa. 1939): "The 'one price' policy, although now generally accepted as sound, wise and just, is of comparatively recent adoption. It has, however, been written into the amendments to what we know as the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1 et seq., and is now the statutory law." And in Eli Lilly & Co. v. Saunders, decided by the Supreme Court of North Carolina on September 27, 1939, reference is made to "the Second Section of the Robinson-Patman Amendment, standardizing prices by prohibiting discriminations."

[70]McAllister, Price Control by Law in the United States: A Survey (1937), 4 Law & Contemp. Prob. 273, 290.

[71]145 U. S. 263, 276 (1892): "The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; . . . It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable."

[72]United States v. Socony-Vacuum Oil Co., 105 F. (2d) 809 (C. C. A. 7th, 1939), certiorari granted by the United States Supreme Court on October 16, 1939. Justices Black, Douglas, Frankfurter and Reed will be taking part in the first major antitrust case since they were appointed to the Court. Judge Major in the opinion handed down on July 27, 1939, seemed to steer nearer the Appalachian Coals case (upon

a decision which should go far towards illuminating the present status of price competition under the Sherman Act. Some commentators have observed in the *Appalachian Coals* case[73] a disposition by the Court to depart from its previous inflexible denouncement, as expressed in the *Trenton Potteries*[74] decision, of any agreement by competitors to establish and maintain reasonable prices, and it will be enlightening to observe what stand the present Court takes with regard to these two precedents.

In the light of any new judicial expression and, more importantly, in the light of the adequate statistical data and expert testimony which should be presented to and considered by the Temporary National Economic Committee, the place of the Robinson-Patman Act in the legal chart which guides the national economy must be settled. Its relationship to the tradition and present value of the Sherman Act must be determined, for that was not done when it was passed. Perhaps price competition should be replaced by competition in Service and with a Smile,[75] as, exaggeratedly, appears to be the trend of the Robinson-Patman Act; but no such change was contemplated in its passage. The

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which the defendants relied) than the Trenton Potteries case (upon which the government relied): "A study of the decisions of the Supreme Court convinces one that the criterion employed in determining whether concerted action is such as to come within the condemnation of the statute is the effect which the action has upon fair competition. If concerted action destroys competition, it is immediately branded as unlawful. In the Trenton Potteries case, as heretofore pointed out, competition was destroyed under facts there existing by reason of the price fixing agreement. Conceivably, however, a price fixing agreement is not unlawful under all circumstances . . ." See Jaffe and Tobriner, The Legality of Price-Fixing Agreements (1932), 45 Harv. L. Rev. 1164.

[73]Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). Judge Chase cites the Appalachian case for the following broad proposition: "And to determine whether there is, or is threatened, an unreasonable restraint the particular conditions of each case must be considered with care in the light of the circumstances shown and effect be given to realities." Eastern States Petroleum Co. v. Asiatic Petroleum Co., 103 F. (2d) 315, 321 (C. C. A. 2d, 1939).

[74]United States v. Trenton Potteries Co., 273 U. S. 392 (1927). With the attitude of the Supreme Court in the Trenton Potteries case should be compared the English view in Northwestern Salt Co., Ltd., v. Electrolytic Alkali Co., Ltd., [1914] A. C. 461, 469: "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public."

[75]Chairman Freer of the Federal Trade Commission addressing the National Petroleum Association, April 13, 1939: "In those industries which for one reason or another are characterized by this so-called 'imperfect competition,' differences in price and quality often become so minimized as factors in selling, that advertising ability and sales personality are practically the only factors which remain to influence a customer in placing his orders." See also "Preservation of Competition" Through Federal Antitrust Laws (1938), 51 Harv. L. Rev. 694.

pros and cons of price competition as affected by the Robinson-Patman Act should now be considered with the broad outlook, unprejudiced viewpoint and informed judgment not previously accorded. Government regulation of business, whether by the prohibitions of the Sherman Act or the permissions of the NRA, has been at best vague—but it should not also be aimless.

APPENDIX*

ROBINSON-PATMAN CASES

Respondent	*FTC Docket No.*	*Charges*	*Disposition*
1. Kraft-Phenix Cheese	2935	Quantity discounts; price discrimination.	Comp. dis. 7-17-37
2. Shefford Cheese Co.	2936	Quantity discounts; price discrimination.	Case Closed 10-30-37
3. Bird & Son, Inc.	2937	Discount discrimination.	Comp. dis. 7-17-37
4. U. S. Quarry Tile	2951	Discount discrimination; functional classification.	
5. Bourjois, Inc.	2972	Discounts; bonuses; advertising allowances; discrimination in paying demonstrators.	Test. reop. 9-12-39
6. Richard Hudnut	2973	Discounts; bonuses; advertising allowances; demonstrators discrimination; demonstrators hidden.	Test. reop. 9-5-39
7. Elmo, Inc.	2974	Demonstrators-hidden; demonstrators-discrimination.	Test. reop. 9-2-39
8. Coty, Inc.	2975	Quantity discounts; demonstrators discrimination; demonstrators hidden.	Test. reop. 9-5-39
9. Standard Brands	2986	Quantity discounts.	C&D 6-15-39 Reoponed
10. Anheuser-Busch, Inc.	2987	Quantity discounts.	
11. Charles of the Ritz	3017	Demonstrators-hidden; demonstrators-discrimination; quantity discounts; bonuses; advertising allowances.	Test. reop. 9-2-39
12. Hollywood Hat Co.	3020	Price discrimination; misrepresentation of quality; spurious samples.	C & D Order 7-17-37
13. A. & P.	3031	Discounts discrimination; fictitious brokerage.	C&D 1-25-38 Appeal
14. Biddle	3032	Discounts discrimination; fictitious brokerage.	C & D Order 7-17-37

*Gordon W. Rule and James T. Ellison assisted in the preparation of this appendix.

Respondent	FTC Docket No.	Charges	Disposition
15. Primrose House, Inc.	3039	Price discrimination; discount discrimination; demonstrators discrimination; bonuses; advertising allowances discrimination; free goods discrimination; promotional sales discrimination; transportation allowances discrimination; hidden demonstrators.	Reopened 9-2-39
16. Christmas Club	3050	False claims as to trade marks, registration, and manufacturer; misrepresentation; advertising service discrimination; exclusive dealing contracts; price discrimination.	C & D Order 9-30-37
17. Procon	3076	Discounts discrimination; fictitious brokerage.	Case cld.
18. Oliver Bros., Inc.	3088	Discounts discrimination; fictitious brokerage.	C&D 12-31-37 Appeal
19. Cast Iron Soil Pipe	3091	Combination in restraint of trade; price discrimination; basing point; delivered price system; uniform trade discounts.	
20. Reeves, Parvin & Co.	3129	Discounts discrimination; fictitious brokerage.	C & D Order 4-15-39
21. Elizabeth Arden, Inc.	3133	Price discrimination; advertising allowances discrimination; demonstrators discrimination; demonstrators hidden; transportation allowance discrimination.	Reopened 9-5-39
22. Pittsburgh Plate Glass	3154	Combination in restraint of trade; combination to effect monopoly; price fixing; price discrimination; resale price maintenance; "white list"; uniform discounts; uniform terms of sale; refusal to sell; coercion; arbitrary buyers classification.	C & D Order 10-30-37
23. Golf Ball Mfgrs.	3161	Price discrimination; royalties discrimination; price fixing; combination in restraint of trade; coercion; resale price maintenance.	C & D Order 2-25-38
24. Cement Institute	3167	Combination in restraint of trade; price discrimination; basing point; price fixing; collusive bids; uniform discounts; uniform terms of sale; arbitrary classification of buy-	

	Respondent	*FTC Docket No.*	*Charges*	*Disposition*
			ers; espionage; refusal to permit diversion of shipments; boycott; intimidation by threats of boycott; false and misleading advertising.	
25.	Webb Crawford Co.	3214	Discounts discrimination; fictitious brokerage.	C&D 10-20-38 Appeal
26.	Quality Bakers of Am.	3218	Discounts discrimination; fictitious brokerage.	C&D 4-27-39 Appeal
27.	United Buyers Corp.	3221	Discounts discrimination; fictitious brokerage.	
28.	E. B. Muller & Co.	3224	Sales below cost; price discrimination; rebates discrimination; disparagement; misrepresentation as to quality and contents of freight shipments.	
29.	American Optical Co.	3232	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 1-21-39
30.	Bausch & Lomb Optical Co.	3233	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 1-21-39
31.	Agricultural Laboratories	3263	Price discrimination; discount discrimination.	C & D Order 1-12-38
32.	Hansen Inoculator Co.	3264	Price discrimination; discount discrimination.	C & D Order 1-12-38
33.	Albert L. Whiting	3265	Price discrimination; discount discrimination.	C & D Order 1-12-38
34.	Nitragin Company	3266	Price discrimination; discount discrimination.	C & D Order 1-12-38
35.	H. G. Brill Co.	3299	Price discrimination; rebates discrimination; discounts discrimination.	C & D Order 2-10-38
36.	United Fence Mfg. Association	3305	Restraint of trade; price discrimination; delivered price system; uniform discounts; uniform terms of sale; resale price maintenance; coercion; refusal to sell; secret apportionment of orders.	C & D Order 7-13-38
37.	U. S. Hoffman Machinery Co.	3330	Price discrimination.	
38.	Atlantic Commission Co.	3344	Discounts discrimination; fictitious brokerage.	

	Respondent	FTC Docket No.	Charges	Disposition
39.	Merck and Company	3373	Price discrimination.	
40.	Miami Wholesale Drug Corporation	3377	Price discrimination.	C & D Order 2-9-39
41.	Curtice Bros. Co.	3381	Price discrimination; advertising allowance discrimination.	
42.	Master Lock Co.	3386	Price discrimination; discount discrimination; freight allowance discrimination.	C & D Order 9-14-38
43.	American Flange and Mfg. Co.	3391	Exclusive dealing contracts; false claims of patents and exclusive rights; price discrimination; discounts discrimination; quantity rebates; reciprocity; rebates conditional on testimonials.	C & D Order 12-12-38
44.	Mississippi Sales Co.	3511	Discounts discrimination; fictitious brokerage.	
45.	Superior Ceramic Corp.	3546	Price discrimination; discount discrimination.	
46.	Trent Tile Co.	3547	Price discrimination; discount discrimination.	
47.	Mosaic Tile Co.	3548	Price discrimination; discount discrimination.	
48.	Pardee Matawan Tile Co.	3549	Price discrimination; discount discrimination.	
49.	Wenezel Tile Co.	3550	Price discrimination; discount discrimination.	
50.	Wheeling Tile Co.	3551	Price discrimination; discount discrimination.	
51.	Architectural Tiling Co.	3552	Price discrimination; discount discrimination.	
52.	National Tile Co.	3553	Price discrimination; discount discrimination.	
53.	Corn Products Refining Co.	3633	Delivered Price System; price discrimination; advertising allowance discrimination; services discrimination; exclusive dealing contracts.	
54.	C. F. Sauer Co.	3646	Price discrimination; advertising allowance discrimination; transportation allowance discrimination.	

	Respondent	*FTC Docket No.*	*Charges*	*Disposition*
55.	General Baking Co.	3669	Price discrimination.	
56.	United States Rubber Co.	3685	Price discrimination; rebates discrimination; discount discrimination; commissions discrimination.	C & D Order 4-25-39
57.	Luxor, Ltd.	3736	Services discrimination.	
58.	San Pedro Fish Exch. et al.	3739	Combination in restraint of trade; price fixing; cutting off of competitors' supply; combination to effect monopoly; coercion; boycott; intimidation; discount discrimination; fictitious brokerage.	
59.	Metz Bros. Baking Co.	3740	Price discrimination.	
60.	Lambert Pharmacal Co.	3749	Rebates discrimination.	
61.	Nutrine Candy Co.	3756	Price discrimination; lottery-push-boards.	
62.	Chilean Nitrate Sales Corp.	3764	Price discrimination; rebate discrimination; combination in restraint of trade; combination to effect monopoly; price fixing; resale price maintenance; basing point; uniform rebates; uniform freight charges; apportionment of territory; coercion; intimidation and threats; inducing uniform hauling charges; distributors' profits fixing; combination for selection of customers; credit discrimination.	
63.	Fruit & Produce Exchange	3765	Discounts discrimination; fictitious brokerage.	
64.	Modern Marketing Service, Inc., et al.	3783	Discounts discrimination; fictitious brokerage.	
65.	Anheuser-Busch Inc.	3798	Price discrimination.	
66.	Piel Bros. Starch Co.	3799	Price discrimination.	
67.	Clinton Co.	3800	Price discrimination.	
68.	The Hubinger Co.	3801	Price discrimination.	

	Respondent	*FTC Docket No.*	*Charges*	*Disposition*
69.	Penick & Ford Ltd., Inc.	3802	Price discrimination.	
70.	A. E. Staley Mfg. Co.	3803	Price discrimination.	
71.	Union Starch Co.	3804	Price discrimination.	
72.	American Maize Products Co.	3805	Price discrimination.	
73.	A. S. Aloe Co.	3820	Price discrimination; refusal to buy; coercion.	
74.	C. R. Anthony et al.	3834	Discounts discrimination; fictitious brokerage.	C & D Order 9-12-39
75.	Simmons Co.	3840	Price discrimination; discounts discrimination.	C & D Order 8-25-39
76.	American Oil Co.	3843	Price discrimination.	
77.	Williams & Wilkins Co.	3844	Price discrimination; discounts discrimination.	C & D Order 8-23-39
78.	General Motors	3886	Exclusive dealing contracts; price discrimination; discounts discrimination; price fixing; resale price maintenance; uniform terms of sale; intimidation-threats; coercion; coercion-purchase requirements.	
79.	National Numbering Machine Co.	3889	Price discrimination.	
80.	National Grain Yeast Corp.	3903	Price discrimination; free goods discrimination; discounts discrimination; bribery of employees and customers.	
81.	P. Lorillard Co.	3912	Price discrimination; free goods discrimination; discounts discrimination; bribery of employees and customers.	
82.	Brown & Williamson Corp.	3913	Price discrimination; free goods discrimination; discounts discrimination; bribery of employees and customers.	
83.	R. J. Reynolds Tobacco Co.	3914	Price discrimination; free goods discrimination; discounts discrimination; bribery of employees and customers.	

Respondent	*FTC Docket No.*	*Charges*	*Disposition*
84. Larus & Bro. Inc.	3915	Price discrimination; free goods discrimination; advertising allowances discriminaiton; time allowances discrimination.	
85. Charles V. Herron	3916	Discounts discrimination; fictitious brokerage.	
86. Phillip Morris & Co. Ltd., Inc.	3919	Price discrimination; advertising allowances discrimination; time allowances discrimination.	
87. Liggett & Myers Tobacco Co., Inc.	3921	Price discrimination; advertising allowances discrimination; time allowances discrimination; free goods discrimination.	
88. Stephano Bros.	3922	Advertising allowances discrimination.	
89. Federal Yeast Corp.	3926	Price discrimination; discounts discrimination; free goods discrimination.	
90. American Tobacco Co.	3927	Price discrimination; free goods discrimination; advertising allowances discrimination; time allowances discrimination.	

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The Editors wish to express their appreciation to the following members of the Class of 1939 whose work qualified them for membership on the REVIEW and whose endeavors contributed to its establishment: J. D. Head, E. T. Cannon, P. M. Grabill, R. F. Hutcheson, Jr., W. W. Perkins, W. F. Woodward.

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THE LAW REVIEW

With this number the WASHINGTON AND LEE LAW REVIEW makes its appearance and takes its place, though a modest one, with the honorable company of law school publications. We express our thanks and appreciation to all of those whose cooperation has made its publication possible. It represents a great deal of hard work on the part of the students and faculty advisers. All those so participating feel that they are richly repaid for their work not only in the experience gained from the investigations made but in having this publication of their law school take its place before the public.

We are also grateful to our friends who contributed the leading articles in this number. It is our hope and our promise that each number of this review will represent the same sincere effort which made this publication possible.

W. H. MORELAND, *Dean*

THE LAW SCHOOL

The law school enrollment for 1939-1940 numbers 105 men. The past several years have witnessed little change in the size of the student body. To the teaching staff has been added Mr. T. A. Smedley, a graduate of the Northwestern University Law School, who serves as librarian and assistant professor of law. Mr. R. H. Gray of the Faculty of the School of Commerce and Administration continues to devote part of his time to teaching in the law school. This additional help, coupled with some rearrangement of courses, has made it possible to strengthen the work of the school to a very appreciable degree. The curriculum has been enlarged to include the following new courses: Security I, Debtors' Estates, Insurance, Security II, Administrative Law, Federal Procedure, Business Associations II, Taxation.

Work in the library has been greatly facilitated by the assistance rendered by the librarian. The most pressing need of the library at this time is additional codes. The cost of many of these is beyond the present budget. The appearance of the library has been much improved by the hanging of the portraits of John White Brockenbrough, John Randolph Tucker, Charles A. Graves, Henry St. George Tucker, and Martin P. Burks. These portraits were presented by friends of the law school and were received with appropriate ceremonies. It is hoped that the portraits of William Reynolds Vance and Joseph Ragland Long, former deans of the school, will be made available in the near future.