From the *Wheeling Steel Corporation* point of view, of course, there is considerable justification for barring an international which has behaved in the manner of the Operative Potters Brotherhood in *Polynesian Arts* and the Teamsters in *Jack Smith Beverages*. Psychologically, the effects of employer domination may be felt for sometime to come, even after the employer has ceased his illegal activities. The employee's present livelihood and, more particularly, his future with the company regarding advancements and other related factors depend, to some extent, upon his being viewed with favor by the employer. If the employer had favored Teamsters' Local 164 to the point of interference, support, and domination, would the employees not feel the effects of this when Teamsters' Local 165 starts organizational activities in the same plant?[72]

It has been suggested, however, that the *Wheeling Steel Corporation* rationale is, at least, not the most important basis for the disestablishment order. Further, there is little danger that any employer will ever control the Teamsters. Perhaps a modified policy can be adopted; the Board could order disestablishment of the company dominated local and, in addition, direct the employer to withhold recognition from any other local of the same international which might thereafter wish to organize in the plant until it is certified. With the employer's influence removed from the picture by a cease and desist order, the remaining problem would be one which the Board has long faced—control of pre-recognition or preelection activities.[73]

THE NEW PRIMA FACIE TEST FOR PROOF OF RECEIPT OF PRICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT

For almost seventeen years, Section 2(f) of the Robinson-Patman Act seemed to be the one provision of that Statute which posed no significant problems.[1] In some thirty words this Section apparently had effec-

72. Note that in the *Polynesian Arts* case, the hostility of the employer was directed at the CIO International and not at any particular local thereof. Polynesian Arts, Inc., 100 N.L.R.B. 542, 546 (1952).

73. See note 26 *supra*. Surely it would be better to face the problem squarely in this manner than to continue along the lines suggested by the *Jack Smith Beverages* case and refrain from giving notice and hearing to the international.

1. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1946). The Robinson-Patman Act is directed primarily against the practice of granting discriminatory prices by sellers, but Subsection (f) provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

tively fixed buyer responsibility for the receipt of unlawful price differences.[2] The confusion and controversy, which have generally characterized application of the Robinson-Patman Act since its passage in 1936, have now pervaded this Subdivision.[3]

Currently, in proceedings instituted by the Federal Trade Commission charging a violation of Section 2(f), conflicting interpretations of the words "knowingly to induce and receive" have raised doubts as to whether or not a buyer need be shown to be aware of the illegality of the discount he receives. Coincident with this uncertainty is dissension concerning the proper allocation of the burden of proof in such proceedings.

There have been various expressions of opinion as to the motives which led to passage of the Robinson-Patman Act.[4] The Statute has

2. Comparatively few cases have been brought under this buyer Section. The Federal Trade Commission has issued, in all, eleven cease and desist orders against buyers found in violation of Section 2(f). Automatic Canteen Co., 46 F.T.C. 861 (1950); National Tea Co., 46 F.T.C. 829 (1950); Curtiss Candy Co., 44 F.T.C. 237 (1947); Associated Merchandising Corp., 40 F.T.C. 578 (1945); E. J. Brach & Sons, 39 F.T.C. 535 (1944); Atlantic City Wholesale Drug Co., 38 F.T.C. 631 (1944); A. S. Aloe Co., 34 F.T.C. 363 (1941); American Oil Co., 29 F.T.C. 857 (1939); Miami Wholesale Drug Corp., 28 F.T.C. 485 (1939); Golf Ball Manufacturer's Ass'n, 26 F.T.C. 824 (1938); Pittsburg Plate Glass Co., 25 F.T.C. 1228 (1937). These cases were largely uncontested, and no judicial review of a Commission order was taken until the *Automatic Canteen Company* proceeding in 1950.

3. The Act has led a controversial existence; it has been described as ". . . clumsily drafted and full of ambiguities and vague provisions. . . ." OPPENHEIM, PRICE AND SERVICE DISCRIMINATIONS UNDER THE ROBINSON-PATMAN ACT 7 (1949). Although some of the Congressional language was poorly selected to achieve the Act's objectives, a great deal of the difficulty in interpretation seems to arise from a pronounced and growing tendency to consider the law as somehow inimical to antitrust policy and to ignore conveniently legislative pronouncements. See Standard Oil Co. v. FTC, 340 U.S. 230 (1951).

The Federal Trade Commission has been criticized for taking extreme positions on controversial points. Simon, *The Case Against the Federal Trade Commission,* 19 U. OF CHI. L. REV. 297 (1951). In rebuttal to Simon's article, see Wallace and Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission,* 19 U. OF CHI. L. REV. 684 (1952).

For a full discussion of the problems arising under the Act, see AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1952); OPPENHEIM, *loc. cit. supra.*

4. The Act has been described as a shift from efforts to preserve competition between manufacturers to a control of their prices, the purpose of such control being to obviate the necessity for retail price control. See Burns, *The Anti-trust Laws and the Regulation of Price Competition,* 4 LAW & CONTEMP. PROB. 301, 308-309 (1937). The Robinson-Patman Act has been recognized as primarily directed against mass buyers. Rose, *The Right of a Businessman to Lower the Price of His Goods,* 4 VAND. L. REV. 221, 238 (1951). Earlier writers had maintained that regardless of motives it would be largely anticompetitive in effect. See Burling and Sheldon, *Price Competition As Effected by the Robinson-Patnam Act,* 1 WASH. & LEE L. REV. 31, 51-52 (1939). Selling and buying would degenerate to the one price level it was feared. Some still strongly feel that the Act militates against price competition, but the fears of these commentators seem far from realized. See Adelman, *Effective Competition and The Antitrust Laws,*

been attacked as class legislation, a raid by selfish interests upon chain stores, enacted in the guise of a general law.[5] An opposite view maintained by the Federal Trade Commission is that the motivating force leading to Congressional approval was the plight of small business in the years following the depression.[6] Both of these views find some basis in the depression era background of the Act. Legislative history reveals concern for smaller enterprises and the common understanding that it was necessary to protect them and the entire competitive economy from concentrations of excessive economic power.[7] Reportedly, small business

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61 HARV. L. REV. 1289 (1948); Morton and Cotton, *Robinson-Patman Act—Antitrust or Anti-Consumer,* 37 MINN. L. REV. 227 (1953).

5. These selfish interests have been identified as the so-called orthodox distributors—the wholesalers, retailers and jobbers—who would protect their interests from the threat posed by the more modern distributors such as chain stores which buy directly from producers. See McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction,* 4 LAW & CONTEMP. PROB. 410, 413 (1937). This writer's hope was that strict construction by the courts would render the law innocuous. *Id.* at 419. See also Gould, *Legislative Intervention in the Conflict Between Orthodox and Direct-Selling Distribution Channels,* 8 LAW & CONTEMP. PROB. 318 (1941); Feldman, *Legislative Opposition to Chain Stores and Its Minimization,* 8 LAW & CONTEMP. PROB. 335 (1941).

6. The purpose of the act is to preserve the vigor of competition by protecting small business interests. The theory is that competition will survive if competitors survive. In this respect, the Act would espouse a new economic ethic of proportionately equal treatment for all competitors. It would do away with the unfair advantages of big business. This theory is contrary to many established business practices. See Fulda, *Food Distribution In the United States, The Struggle Between Independents and Chains,* 99 U. OF PA. L. REV. 1051 (1951), for a discussion of the pricing practices of the chains in one area of distribution.

This description is applicable to the Commission's attitude prior to recent changes in the makeup of the five man policy controlling board of Commissioners. Edward F. Howrey, who was counsel for the Automatic Canteen Company, was named to the Federal Trade Commission in March, 1953, and later replaced James Mead as chairman. Commissioners Lowell B. Mason and Albert Caretta, who for sometime had been loudly critical of the Commission policy, have now joined Howrey as members of the dominant faction. An early indication of change in policy was the announcement of FTC support of a Senate bill which would make absolutely certain that good faith meeting of competition by a seller is a complete substantive defense to a charge of discrimination. See N.Y. Times, June 20, 1953, § 1, p. 21, col. 4. The old Commission had bitterly opposed all attempts at such legislation. See testimony of Commissioner Stephen J. Springarn. *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on Price Discrimination and Basing Point System,* 82d Cong., 1st Sess. 236 (1951).

7. The accent of the times was upon the oppressive practices open to big business; and chain stores, as big business, caught the brunt of the attack. The Federal Trade Commission's investigation of chains had culminated in an extensive report illuminating the excessive bargaining power and coercive pricing practices of chains. See *Final Report on the Chain Store Investigation,* SEN. DOC. No. 4, 74th Cong., 1st Sess. (1934). There was a definite antichain feeling.

Congressman Utterback, in presenting the conference report of the bill to the House, spoke of the local independent businessman in the urban and rural communities of under 25,000 population as the "backbone of the local enterprise." He said: "It is a mistake to assume that he [the small businessman] is less efficient just because he is small. For that very reason, on the contrary, he is often the more efficient. He has less overhead, less of a top-heavy, unwieldly organization, less of his activities devoted to the crushing

needed protection from mass buyers with ability to obtain concessions from both small and large suppliers.[8]

Although there was general recognition that the mass buyer wielded a bulk of the excessive economic power from which the Act would protect the economy and small business, Section 2(f) dealing with buyer responsibility for the discriminations was added in what appears to have been a Congressional afterthought.[9] Section 2(a) prevents the seller from utilizing the force of price discriminations as a competitive device, and, consequently, the buyer is prevented from receiving the benefits such a practice might nurture.[10] The purchaser provision was intended to effectuate enforcement of the Act by imposing liability upon the buyer for receiving certain price discriminations.

The central question involved, however, is what type of buyer conduct the Section was designed to reach. Because of the unfortunate legislative choice of the word "knowingly," the United States Supreme Court in *Automatic Canteen Co. v. FTC* determined that Section 2(f) was intended to impose liability only upon the coercive and consciously violating buyer.[11] Therefore, the Court concluded, the Commission

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of competition rather than to services really productive." 80 CONG. REC. 9416 (1936). The nonresident competitor should not be allowed to crush this superior efficiency ". . . with no other weapons than those of greater size and power. . . ." *Ibid.*

8. The legislature recognized, of course, that not all concessions to large buyers were lacking in economic justification. The Act was not intended to purge the economy and rob the consumer of all the real advantages of bigness in business. H.R. REP. No. 2287, 74th Cong., 2d Sess. 17 (1936).

Section 2(a) of the Act sanctions the granting of price differentials which are cost justified. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946). The question is often posed as to whether costs are actually the full determinants of price. See Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials Under The Robinson-Patman Act,* 30 TEXAS L. REV. 1, 7 (1951); Hamilton, *Cost As A Standard For Price,* 4 LAW & CONTEMP. PROB. 321 (1937). Admittedly, several market factors play a part in the determination of price. Whether the Act is sufficiently cognizant of such market factors as variations in demand from place to place and time to time is another matter. See EDWARDS, MAINTAINING COMPETITION 161-162 (1949).

9. Section 2(f) was introduced by Senator Copeland of New York in amendment of the proposed bill and was received by Senator Robinson with the following comment: "This amendment makes the person who knowingly receives an unfair, discriminatory price also liable; and I think it is sound in principle." 80 CONG. REC. 6428 (1936). There was no further discussion and the amendment was immediately accepted. *Ibid.*

10. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946).

11. 346 U.S. 61 (1953). This case involved Commission proceedings against a company engaged in the leasing of automatic vending machines and the sale and distribution of candy for resale through such machines. The Company purchased candies from over 100 suppliers and was charged with receiving price favors from some 83 of them in the form of discounts as much as 33% below list prices.

This was the first case in which the Supreme Court was called upon to construe Section 2(f). The Court decided that, under a just interpretation of the Section, a buyer could not be adjudged in violation of the Act unless it were shown that he had received a discriminatory price, knowing, or being chargeable with knowledge, of the unlawfulness of the price favor. The Court referred to the legislative record of the

would have to offer prima facie proof that the buyer should reasonably have known the price he received was illegal before requiring him to cost justify receipt of an allegedly unlawful discount.[12]

This interpretation appears to ignore the fact that price discriminations are not necessarily motivated by the buyer's coercion. The large supplier may voluntarily use discriminations as a competitive device[13] and perhaps accept prices which do not equal actual production costs.[14]

Act to bolster its construction. "Congressman Utterback, in presenting the conference report to the House, spoke quite clearly in terms indicating that the provisions of § 2(f) contemplated only the buyer who knew that the price was not justified by costs." *Id.* at 73, n.15. This reference was to Congressman Utterback's remark that Section 2(f) ". . . makes it easier for him [the manufacturer] to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers." 80 CONG. REC. 9419 (1936).

The Court seems to have read too much into these words since surely the use of the Section was not to be limited to self-enforcement on the part of sellers. Two policy considerations weighed heavily in the decision. The Court determined that it would be inimical to antitrust policy in general to allow the Commission to hold the buyer strictly accountable for any price favors received and also to place the difficult burden of proving costs upon the buyer. Automatic Canteen Co. v. FTC, 346 U.S. 61, 73-74 (1953). There was also apprehension that the amount of cooperation which would be required between buyer and seller in order that the buyer might acquire data necessary to prove the seller's costs would lead to possible collusion between the buyer and his sellers as against other buyers and sellers. *Id.* at 69.

12. Previous to Automatic Canteen Co., 46 F.T.C. 861 (1950), the Federal Trade Commission had considered it only necessary to prove that the purchaser was knowingly inducing and receiving lower prices than his competitor for goods of like grade and quality from their common supplier and that as a result competition was impaired. Once having established these facts, the Commission would shift the burden of justifying the differences in price to the alleged violator.

The basis for the Commission's theory of proceeding is found in the language of Section 2(b) of the Act. That is, "[u]pon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the *person charged with a violation of this section. . . .*" (emphasis added) 49 STAT. 1526 (1936), 15 U.S.C. § 13(b) (1946). Since the Court's decision in FTC v. Morton Salt Co., 334 U.S. 37 (1948), the Section has imposed on the seller the burden of affirmatively proving costs in order to justify price differences to various purchasers. The Commission felt that use of the language, "person charged with a violation of this section" rather than "seller," indicated that the same burden was on the buyer. The only additional element in the buyer Section was that of knowledge, and the Commission considered this to involve only knowledge of the price differential received. Automatic Canteen Co., 46 F.T.C. 861, 881 (1950).

13. EDWARDS, *op. cit. supra* note 8, at 162. Edwards recognizes the use of price variations as a competitive device, while at the same time questioning the attempt to police such differences without taking into account varying market factors which cause sellers to make special rather than over-all reductions in prices to all purchasers.

14. One commentator, discussing the reasons for discriminations, wrote: ". . . [I]f the proposed sale will add to total revenues more than it will add to total costs, the sale is worth making. For the return over and above the added (variable) cost is a contribution toward meeting the fixed costs. It increases profits or decreases losses. If it did not, it would not be made." Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 39 (1949).

The Act, of course, condemns the granting of prices not cost justified which tend to injure competition.[15] Legislative history, however, indicates that Congress intended to impose upon the buyer equal responsibility for such discriminations.[16] The only buyers to be exempted from liability were those who unknowingly and incidentally received price favors in the routine course of business.[17]

Since the Act is intended to preserve competition by protecting small enterprises from excessive aggregations of economic power, a consideration of the content of "competition" which the Act would protect against encroachments of discriminatorily competing sellers and buyers is essential. Competition and competitive injury have long remained the relatively unknown quantity in the formula of basic antitrust policy.[18] One writer has described the evolution of competition in three stages: the original concept of the Sherman and Clayton Acts;[19] the later develop-

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Adelman feels that there is essential economic justification for the use of discriminatory pricing methods. Adelman, *Effective Competition and The Antitrust Laws*, 61 HARV. L. REV. 1289, 1330-1337 (1948). But see Dirlam and Kahn, *Integration and Dissolution of the A & P Company*, 29 IND. L.J. 1, 18-19 (1953).

15. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1946). See FTC v. Morton Salt Co., 334 U.S. 37 (1948); FTC v. Staley Mfg. Co., 324 U.S. 746 (1945); Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945).

16. 80 CONG. REC. 9419 (1936).

17. The conference report contained the following discussion of the word "knowingly" as used in Section (a) of the Act: "The word 'knowingly' appears in the Senate amendment immediately before the words 'receives the benefit of such discrimination.' The House conferees accepted this amendment. Its purpose is to exempt from the meaning of the surrounding clause those who *incidentally receive discriminatory prices in the routine course of business* without special solicitation, negotiation, or other arrangement for them on the part of buyer or seller, and who are therefore not justly chargeable with knowledge that they are receiving the benefit of such discrimination." (emphasis added) H.R. REP. No. 2951, 74th Cong., 2d Sess. 5-6 (1936).

It would seem that this language could clearly be applied to Section 2(f) since the same buyer is referred to in both Sections. Under the Commission's construction, a buyer would be exempt from liability if he was both unaware of the unlawfulness of the differential and an incidental receiver of the price favor. But an active solicitor and receiver of systematic price diseriminations would be liable whether or not it were shown that he was aware of the unlawfulness.

18. Oppenheim, *Needed Revisions In National Antitrust Policy*, ANTITRUST LAW SYMPOSIUM 70, 71 (1953 ed.). This writer emphasizes the lack of a definite concept of the "competition" which should be the basis of antitrust law. His comments are borne out by many conflicting views as to the true measure of competition which seem to be the result of various confiicting economic considerations. Fuchs, *Economic Considerations In The Enforcement of the Antitrust Law of the United States*, 34 MINN. L. REV. 210 (1950). Fuchs points out that there are a "number of major considerations of policy"—social, economic and political—affecting our antitrust policy. *Id.* at 218. He suggests that there is a general desire for a vigorous competition which is tempered by the need for the maintenance of a number of small independent businesses and for the security and orderly process obtainable through economic planning. *Id.* at 219-220.

19. Competition was originally considered to be the exact opposite of monopoly just as black is the opposite of white. Monopoly involved the control of an entire supply. The law of antitrust was directed against "malevolent manipulations" or "abuses" of power by big business. Mere bigness was considered no offense unless it involved a complete

ment of monopolistic competition;[20] and the recent introduction of workable competition.[21] Cutting across these evolutionary periods are the often applied descriptive terms, "hard" and "soft" competition.[22]

The Federal Trade Commission's activities enforcing the Robinson-Patman Act indicate adherence to the monopolistic competition concept. In 1952, the Commission expressed the belief that the best way to preserve vigorous competition was to keep the number of firms relatively large and their size relatively small.[23] In an attempt to accomplish this goal, the FTC has endeavored to eliminate the incipient threat to competition, price discrimination. Partly through use of unlawfully disparate price practices, a good sized firm can stimulate its growth to a size greatly out of proportion to its actual efficiencies.[24] The larger the firm

control of supply. Hale, *Size and Shape: The Individual Enterprise As A Monopoly,* 1950 U. ILL. L. FORUM 515, 519-520.

20. During the thirties, the theory of monopolistic competition was developed. Economists realized that competition and monopoly were less than opposites. Competition was seen to be plagued not with monopoly as such, but with groups of large firms wielding oligopolistic power. By their size these firms could control large sectors of the market to the detriment of smaller competitors. Size became, in itself, an offense; the intent of the holders of the power became secondary. The purpose of antitrust tended to become one of breaking up the excessively large firms in order to promote pure competition. The purported efficiency of the larger firms was subjected to searching criticism. *Id.* at 521-528.

21. The theory of workable competition was introduced in 1940 by Professor J. M. Clark. Clark, *Toward A Concept of Workable Competition,* 30 AM. ECON. REV. 241 (1940). The basic tenet of the theory is that, in an economy where one or more of the prerequisites of perfect competition are lacking, the existence of the other conditions of such competition may not be beneficial and may actually be detrimental to the economy. *Id.* at 242. Accepting this, Clark concludes ". . . that imperfect competition may be too strong as well as too weak; and that workable competition needs to avoid both extremes." *Id.* at 243. If proper steps are taken, there can be a ". . . fairly healthy and workable imperfect competition . . .", rather than the so-called monopolistic competition which involves competition between firms that are only slightly modified monopolies. *Id.* at 256.

22. Those who advocate a policy of less regulation speak of the need for "hard" competition and denounce the theory of cushioning individual businesses from the force of competition. This protection of competitors is claimed to be creative of a "soft" competition and inimieal to basic antitrust policy. See Simon, *Price Discrimination to Meet Competition,* 1950 U. ILL. L. FORUM 575, 580-584.

23. See the testimony of Federal Trade Commissioner Stephen J. Springarn, speaking for the Commission, in *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on the Impact of Monopoly and Cartel on Small Business,* 82d Cong., 2d Sess. 11 (1952).

24. The findings of fact in the *Automatic Canteen Company* proceedings before the Commission place emphasis on the marked growth of that Company. This growth was, in part, attributed to receipt of discriminatory prices and use by the Company of illegal tying arrangements. The firm had bound its lessees to exclusive dealing contracts which provided that lessees, upon termination of the lease, would not "'. . . directly or indirectly, or under any circumstances or conditions whatsoever, own, sell, lease, operate, or otherwise deal in any automatic vending machine of any kind or character, or sell or offer to sell any merchandise of any kind or character by means of any type of automatic vending machine, within the territory hereinbefore described.'" Automatic Canteen Co., 46 F.T.C. 861, 877-878 (1950).

These contracts were found to be in violation of Section 3 of the Clayton Act, 38

becomes, the more effective may be its use of price discriminations. The impact of these conditions on the economy is seen as the real injury to competition; however, through the processes of the Robinson-Patman Act, this threat can be curtailed, or perhaps prevented in its inception.[25]

Commentators, who criticize Commission policy as creative of soft competition and consider the Act an inefficacious preserver of competition, are generally those who accept the theory of workable competition and advocate its adoption in antitrust law.[26] There is much to indicate that workable competition is gradually gaining recognition.[27] The goal of this antitrust theory is to achieve the proper workable amount of competition for each of the various industries in the economy.[28] A serious problem, however, is the determination, with any certainty, of just what constitutes a workable amount of competition. Consequently, views of the doctrine have remained largely subjective with each advocate articu-

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STAT. 731 (1914), 15 U.S.C. § 14 (1946), which proscribes such tying arrangements in restraint of trade. The circuit court sustained the holding of the Commission as to these contracts; there was no appeal to the Supreme Court on that matter. Automatic Canteen Co. v. FTC, 194 F.2d 433, 436 (7th Cir. 1952).

25. "Price discrimination is a tool used to achieve an enlarged monopoly control which the Sherman Act condemns; and it is the function of the Clayton and Patman Acts to prevent such monopoly in its incipiency." Testimony of Dr. Vernon A. Mund, Professor of Economics at the University of Washington, in *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on Price Discrimination and the Basing Point System,* 81st Cong., 1st Sess. 63, 65 (1951). Dr. Mund indicated that he saw no conflict between the underlying policy of the Sherman and Robinson-Patman Acts. *Ibid.* But see Oppenheim, *Federal Antitrust Legislation: Guideposts To A Revised National Antitrust Policy,* 50 MICH. L. REV. 1139, 1198 (1952).

26. Oppenheim advocates adoption of the theory of "workable" competition coupled with general legislative standards and a "rule of reason" enforcement policy. Oppenheim feels that one of the patent defects of the Robinson-Patman Act is its embodiment of a dual legislative standard under which the Commission is empowered to enforce the law against practices which either tend substantially to injure competition in general, or tend to injure competition between individual competitors. This latter competitive effect, being easier to prove, is frequently the basis of a Commission case against an alleged violator. The Court has construed this standard as requiring only a showing of possible competitive injury. FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948). Oppenheim feels that, because of this standard, the Act is not actually antitrust, but that it has more of the characteristies of unfair trade practice legislation in that it allows for affirmative regulation by the FTC of methods of price competition. Oppenheim concludes that this regulation is creative of soft competition. See Oppenheim, *supra* note 25.

27. The Supreme Court has indicated a need to ". . . reconcile . . . the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts." Standard Oil Co. v. FTC, 340 U.S. 230, 249 (1950). The Court recognized a basic conflict between the Robinson-Patman Act and antitrust policy in general in Automatic Canteen Co. v. FTC, 346 U.S. 61, 72 (1953).

Another indication was Attorney General Brownell's recent appointment of Professor S. Chesterfield Oppenheim, along with Assistant Attorney General Stanley N. Barnes, to head a committee to study antitrust laws. See N.Y. Times, July 10, 1953, § 1, p. 8, col. 6.

28. See Clark, *supra* note 21, at 243.

lating different standards for ascertaining the proper measure of competition.[29]

While there may be a need for reformulation of present legislation to achieve a consistent over-all antitrust policy, the statutory provisions required do not necessarily include the premises of workable competition. There is too much of a tendency under this theory to disregard the need for the protection of small enterprises,[30] too much of a tendency to instill the desired workable competition with characteristics of hard competition.[31]

The Robinson-Patman Act may have allowed the Commission, as is claimed by some writers, to become overly protective of competitors;[32] but if such is the case, the solution lies in enacting more effective provisions[33] rather than rejection of the basis principles of the Act.[34]

29. From the attempts at creating a definable standard of workable competition, one fact does seem to emerge: The advocates of workable competition tend to foster a "hands-off" policy of antitrust. Competition is to be assumed effective and good if the economy is functioning efficiently. Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws,* 26 N.Y.U.L.Q. REV. 405, 406 (1951). The legislative standards of enforcement are to be general, and enforcement groups are to be given a wide latitude under a rule of reason enforcement policy. Oppenheim, *supra* note 25, at 1151-1165.

For a discussion of the status of "workable" competition, see Hale, *supra* note 19, at 528-530.

30. Of course, there is no complete disregard of small business problems by those holding forth "workable" competition, but their emphasis is primarily upon the positive aspects of competition. Smith, *supra* note 29, at 419.

31. It was recently suggested that effective competition should be ". . . characterized by a ceaseless striving among competitors, endeavoring to expand their markets—and the size of the total market as well—by producing relatively more and better goods at relatively lower prices." See EFFECTIVE COMPETITION 10 (Report to the Secretary of Commerce by his Business Advisory Council, 1952).

32. One commentator criticized the Commission's findings of competitive injury in Standard Oil Co., 41 F.T.C. 263 (1945). The extent of the injury was the loss of "many customers" to competitors in the area. Adelman, *Integration and The Antitrust Laws,* 63 HARV. L. REV. 27, 71 (1949). Another writer has attacked the law as tending to ". . . sterilize powerful buyers and shield monopolistic sellers' prices from assault." Rowe, *Price Discrimination, Competition, and Confusion: Another Look At Robinson-Patman,* 60 YALE L.J. 929, 950 (1951).

33. Rather than require the FTC to make the broader showing that the proscribed activity tends substantially to injure competition in general, the better approach would be to develop an adequate test as to what constitutes a serious enough injury to competitors to warrant Commission interference.

34. Oppenheim has suggested that the Robinson-Patman Act be revised to prohibit price discriminations only where the effect may be to lessen substantially competition or to create a monopoly in any line of commerce. Oppenheim, *Needed Revisions In National Antitrust Policy,* ANTITRUST LAW SYMPOSIUM 70 (1953 ed.). For the purpose of eliminating ". . . the Robinson-Patman illusion of equality among unequals . . .", *id.* at 82, he made the following suggestions: "Repeal the quantity limits proviso which is antitrust matter better handled under the Sherman Act. Retain the absolute defense of a good faith meeting of a competitor's lower price but repeal the prima facie case rule of the present Section 2(b) so that the Commission would be required to adduce evidence of substantial injury to competition. . . ." *Ibid.* These suggested revisions would in effect result in a resurrection of the original ineffective Section 2 of the Clayton

Proximately intertwined with a consideration of the competition which the antitrust laws would preserve is a determination of whether the true test of a violation should be objective or subjective. The Federal Trade Commission has advocated a strict liability concept of antitrust law which would permit a finding of violation without regard to the intent which motivates such activities.[35] This practice places emphasis on the competitive effect of business activities. Such a test can be easily reconciled with the Commission's ostensible advocacy of the monopolistic competition concept. The FTC had seen real danger to the vigor of competition in the use of discriminatory pricing as a spur to a firm's growth.[36] Discriminatory practices are not always evidence of wilful attempts to injure competition. However, the Commission felt that whenever such practices were employed, the perpetrator secured an unfair advantage over rivals.[37] The culminating effects of such tactics could result in the extinction of smaller firms and aggrandizement of the discriminators. Therefore, to protect competition the FTC has attempted to disregard the intent of the allegedly offending parties.

The resolution of the problems of Section 2(f) should lie within this framework of the legislative goals which the Robinson-Patman Act was designed to achieve and the implementation of that policy by the Federal Trade Commission.

In the *Automatic Canteen* case[38] the petitioner urged that the FTC should be required to establish the illegality of the prices received and to prove a knowing violation of Section 2(f). The basis of this argument was that to accept any other procedure in relation to cases arising under this Section would tend to ". . . destroy the normal bargaining process between buyer and seller . . ."[39] because fear of a Commission proceeding would prevent all purchasers from soliciting a lower price or from accepting such a price even if it is freely offered.[40] These arguments seem to have little merit when considered in light of the Commission policy of directing its efforts only at buyers who systematically and continually receive lower prices than those accorded their competitors by the same sellers.[41] The more valid objection to the Commission's procedure is that

Act, 38 STAT. 730 (1914), as it existed prior to its amendment by the Robinson-Patman Act.

35. See testimony of Commissioner Springarn in *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on the Impact of Monopoly and Cartel on Small Business,* 81st Cong., 2d Sess. 13 (1952).

36. *Id.* at 11.

37. Standard Oil Co., 41 F.T.C. 263, 283 (1945).

38. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

39. Brief for Petitioner, p. 2, Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

40. *Ibid.*

41. The Court rejected the Commission's contention that "systematic and continued

the purchaser who systematically receives price benefits may actually deserve the discounts but still not attempt to bargain for them because the burden of proving his seller's costs would be impossible to sustain in a Commission hearing.

In proceedings against purchasers who are consistently favored with lower prices, the FTC should be allowed to hold the buyer strictly accountable without proof of intent. This class of buyers actively seeks and often acquires a definite advantage over rivals. Failure to prove the buyer's knowledge that prices received are discriminatory should not justify continuance of the harmful practices because it is the effect on competition which the Act would cure and not the bad motives of businessmen.[42] The FTC's practice of emphasizing effect rather than motive in cases against receivers of systematically discriminatory prices gains

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receipt" of lower prices could be an adequate test of violation. Automatic Canteen Co. v. FTC, 346 U.S. 61, 72 (1953).

In the proceedings the Commission had heard under Section 2(f), generally flagrant violations were involved. In the *A. S. Aloe* case, for example, the respondent was found to have received differentials of about 10% to 40% below the prices accorded competitors in the purchase of surgical equipment. The violation in that case was patently intended since correspondence between the buyer and his sellers indicated that Aloe considered the Act unenforceable. A. S. Aloe Co., 34 F.T.C. 363, 373 (1941). In many other cases, circumstances indicated conscious intent to violate the Act through use of advertisement rebate schemes, Atlantic City Wholesale Drug Co., 38 F.T.C. 631 (1944); Miami Wholesale Drug Corp., 28 F.T.C. 485 (1939), or through combinations which forced discounts in various ways. Associated Merchandising Corp., 40 F.T.C. 578 (1945); Golf Ball Manufacturers' Ass'n, 26 F.T.C. 824 (1938); Pittsburgh Plate Glass Co., 25 F.T.C. 1228 (1937).

The Commission, however, seems to have proceeded early on the theory that only a knowledge of the differential need be shown. American Oil Co., 29 F.T.C. 857 (1939). In the *E. J. Brach* case, the Commission, after establishing evidence of a continuing receipt of price favors by the respondent, shifted the burden of justification to that respondent. E. J. Brach & Sons, 39 F.T.C. 535 (1944).

It was not until the circuit court upheld the Commission's theory of proceeding in the case of Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952), that businessmen became aware of the alarming possibilities presented in Section 2(f). H. Thomas Austern, in a speech before the 37th Annual International Convention of the National Association of Purchasing Agents, announced that every buyer who got a lower price would be buying himself into a potential prosecution. Austern, *Price Bargaining Now a Legal Hazard to Buyers,* 175 COMMERCIAL & FINANCIAL CHRONICLE 2329 (1952).

The FTC in the past has not been overly active in bringing charges against buyers. The whole question seems to be whether the "systematic discrimination" test allows the Commission too much discretion in broadening the application of the Section. The Supreme Court thought it did. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

42. It should be noticed that the Act does not require proof of a knowing violation on the part of the seller who grants the unlawful price. An attempt to justify this position is placed upon the basis that the seller sets the price and, therefore, should be assumed to know whether or not it is discriminatory. The contention is that the buyer has no similar control over the price. But, as Mr. Justice Douglas pointed out in Automatic Canteen Co. v. FTC, 346 U.S. 61, 85 (1953) (dissent), a large buyer may exert pressures on the market and sellers which may result in the granting of concessions. This is a virtual setting of prices. Such a purchaser should be held strictly accountable to a determination of the fairness of prices where they appear excessively low.

validity from the fact that Commission proceedings are not criminal[43] and no penal sanction is imposed on a buyer found to be violating the Act.[44] Therefore, the only fact to be determined is whether or not there is cost justification for the price difference.

Considerable doubt exists as to just what the Commission would be required to prove in order to show knowledge on the part of the buyer under the Supreme Court's ruling in the *Automatic Canteen* case. Mr. Justice Frankfurter apparently believed it would be an easy matter for the FTC to find some basis for proceeding against a violator even with the added burden of proof requirement.[45] He indicated that the requisite knowledge could be imputed to the buyer if the Commission showed that differences in methods of servicing the buyer and his competitors could not give rise to such cost savings as would justify price variations and that a buyer with a general knowledge of the trade should have been aware of that fact.[46] This is tantamount to requiring the FTC to prima facie negate the possibility that the price was cost justified before shifting the burden of proof to the buyer. Such a possibility brings into focus the problem of whether the Commission or the buyer should be given primary responsibility for the task of proving the seller's costs.

The petitioner's reason for urging the Court to require the FTC to negate the cost defense is premised upon the belief that it is practically impossible for the buyer to prove cost justification and that, because of this, the buyer would be effectively denied a defense and would be

43. When a proceeding against an alleged violator is successful, a cease and desist order issues directing the respondent to discontinue the objectionable activities. For a discussion of the problems the Commission confronts in framing cease and desist orders and the difficulties of compliance, see Shniderman, *Federal Trade Commission Orders Under the Robinson-Patman Act: An Argument For Limiting Their Impact On Subsequent Pricing Conduct*, 65 HARV. L. REV. 750 (1952).

44. There is provision in the Act for criminal sanctions against discriminating buyers and sellers, but this Section is applicable only if the violator grants or receives prices which discriminate ". . . to his knowledge against competitors of the purchaser. . . ." 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1946). A violation of Section 2(f) under the Commission theory, which made knowledge of the illegality no part of the offense, would not constitute a violation of the criminal Section.

There is also provision in Section 4 of the Clayton Act for suit by any person ". . . who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." This Section provides for recovery of treble damages. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1946). It seems doubtful that recovery by private persons under this section would be made easier if the FTC were allowed to proceed under the theory that knowledge of the illegality is not part of the violation of Section 2(f).

45. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). The Court did realize that it might prove difficult to establish actual knowledge since it indicated that even a direct warning by the seller to the buyer that the prices requested are not justified would not be conclusive and might prove to be little more than puffing by the seller to keep the prices high. *Id.* at 80, n.24.

46. *Id.* at 80.

forced to refrain from bargaining for lower prices. As a result, it was contended that the buyer would seek the legal shelter of a uniform price level.[47] If the situation described by the buyer is accurate, the resort to such a practice might deprive the public of savings due to the actual efficiencies of large scale distribution. It is speculative, however, whether the burden of cost justification would be impossible for the buyer to sustain.

The difficulty of proving that price differences have a true basis in cost is readily admitted. Even the seller, who sets the prices and has much of the relevant data necessary for an accounting analysis, may have a difficult time justifying his prices.[48] This results in part from the fact that distribution cost analysis is a relatively new and unsettled field of accounting.[49] Another factor tending to make proof of a price differential an extremely arduous task is that in the past the Commission has consistently required an accurate and exact analysis.[50] The greatest complications arise in those businesses which engage in the production and sale of multiple products and distribute these products to many different classes of purchasers. For these firms, cost analysis involves a proper allocation of joint costs of distribution to each product and each customer,[51] and this has proved to be an onerous task.[52]

47. Brief for Petitioner, p. 11, Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

48. There have been very few successful cost defenses by sellers. In an early case, the Commission accepted showings by a respondent that the cost of selling to mail order houses was 18.6% per unit while the cost of servicing ordinary retailers was 47.1% per unit. This was more than adequate justification for the 20% discounts accorded the mail order houses. Bird & Sons, 25 F.T.C. 548 (1937).

In a more recent case, the FTC partially accepted the proof offered by a respondent as to the price brackets the firm had set up on the basis of annual quantity discount purchases. Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

For a full discussion of factors which have resulted in a preponderence of failures over successes in cost justification attempts, see Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases,* 36 IOWA L. REV. 244, 258 (1951).

49. See *Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling,* H.R. Doc. No. 287, 77th Cong., 1st Sess. (1941).

50. One writer states that more adequate accounting methods might be used by the businessmen, and that "[a]ccounting methods, in fact, would receive an adequate test only if they were used to establish price differentials in the first instance, instead of . . . after the fact to justify discriminations that were set up for other reasons." Fuchs, *supra* note 8, at 17.

51. For a discussion of the methods of distribution costs analysis, see Sawyer, *supra* note 48; Note, *Proof of Cost Differentials Under the Robinson-Patman Act,* 65 HARV. L. REV. 1011 (1952).

52. In Standard Brands Inc., 29 F.T.C. 121 (1939), for example, the respondent made elaborate showings as to cost which were found unacceptable because of a failure of the respondent to make proper allocation of joint costs. The respondent's accountants used estimated figures as to such allocations which the FTC would not accept. The Commission gave little weight to the fact that the figures had long been in use by the firm and were verified by expert testimony.

For a discussion of this case, see Taggart, *The Standard Brands Case,* 21 NAT'L ASS'N OF COST ACCOUNTANTS' BULL. 195 (1939).

Because of a general failure by buyers to defend before the Commission on the basis of cost justification, there is no certainty as to the standard of accounting proof which the FTC would require of a buyer in such a case. Consequently, in the *Automatic Canteen* case the Supreme Court had to base its decision on the parties' opposing arguments and the evidence of past Commission practices in regard to *sellers*.[53] The Court refused to accept the Federal Trade Commission's contention that the buyer could make a reasonable showing of its seller's cost through ". . . knowledge generally available to the buyer from published data or experience in the trade. . . ."[54] Mr. Justice Frankfurter stated he could find nothing in the Commission's opinion[55] to indicate that such data would be acceptable in attempts by buyers to prove costs.[56] The Court apparently assumed that the FTC would be unreasonable in the standard of proof which it would require of buyers.[57]

The objective of the Robinson-Patman Act to eliminate unfair price advantages usually granted larger firms and denied smaller rivals can be achieved to the betterment of the over-all economy only if the Act remains an effective and justly administered law. The Act's basic features are essential to antitrust policy and must be retained in any attempted reformulation of these laws.

53. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953). The Court acknowledged the exacting nature of the cost analysis required of sellers by the FTC, *id.* at 68, and was probably swayed in its decision by the fact that cost proof seemed generally to be an ordeal survived only at the sufferance of the Commission.

The FTC had indicated earlier that "good faith" attempts at cost justification would be accepted. Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948). Whether this marked a change in the attitude of the Commission is only a matter of conjecture.

54. Automatic Canteen Co. v. FTC, 346 U.S. 61, 69 (1953).

55. Automatic Canteen Co., 46 F.T.C. 861 (1950).

56. Automatic Canteen Co. v. FTC, 346 U.S. 61, 69 (1953).

57. The validity of this assumption can be questioned although Mr. Justice Frankfurter's position may have some basis on the record of past FTC performance. Admittedly, the Commission has tended to take a seemingly unreasonable position in refusing requests of buyers charged with a violation of the Act for bills of particulars informing them of specific activities alleged to be illegal. The Commission refused such bills of particulars to the Kroger Company, FTC Doc. No. 5991 and the Safeway Stores, Inc., FTC Doc. No. 5990.

In those cases, Commissioner Caretta wrote a dissenting opinion concurred in by Commissioner Mason. Caretta pointed out that these proceedings were against buyers who did not have the data pertaining to the seller's business transactions needed for a proper defense. He added: "Failure to issue complaints containing specific allegations or failure to amend the general complaints issued in these cases, or to deny particulars as requested is 'trial by ambush' and obviously unfair to the respondents." FTC releases during week ended Feb. 14, 1953.

A further question to be considered is whether the Commission is equipped to handle the burden of negating cost justification. The FTC is certainly not one of the more richly endowed agencies. The increased expense of proceedings under the additional burden of proof might prove prohibitive to enforcement of Section 2(f). It is also arguable that the actual participants in the market transactions would be better able to carry such a burden of cost justification if the standard of proof required is a reasonable one.

The law's adequacy to cope successfully with the problems created by the use of discriminatory pricing policies depends to a great extent on full buyer responsibility for unfair prices. Full responsibility means equal liability with the seller for discriminatory prices. Therefore, Section 2(f) should be clarified to make it obvious and certain that the only buyers to be exempted from liability are those who only incidentally and unknowingly receive unfair price advantages. The regularly favored buyers, usually the large ones with an eye toward continued growth, should be placed on notice that their activities may be illegal. The liability of systematically favored buyers should not be conditioned on conscious intent.

At the same time, however, growing firms should not be prevented from obtaining lower prices to which they may be justly entitled. These lower prices may be denied if the Act's provisions are blindly administered so as to make proof of cost justification impossible. To save these justifiable advantages in price resulting from efficiencies, the requirements of a reasonable standard of proof and different methods of administering this Section should be written into the Act so that an alleged buyer-violator may have a fair chance to justify the costs of his seller.

A reasonable standard of proof would not require the buyer to develop a minutely exact accounting analysis of the various cost elements entering into the seller's determination of the price. The buyer with a full awareness of the market situation can be justly charged with the burden of making a showing of costs by data generally available to the trade. The Commission should be required to accept such a showing. It must be remembered, however, that the buyer might still have a difficult task under this standard because the FTC would only institute proceedings against a buyer in situations where costs seemed clearly unjustifiable.[58]

Perhaps a more adequate method of administering cases arising under the Section would be to join the buyer and seller in a proceeding, charging one with granting and the other with receiving discriminatory prices.[59] Under such an arrangement, the seller could be required to carry the burden of proving his own costs. One circumstance militating against this procedure is that in many of the cases numerous buyers and sellers are involved in a general violation of the Act. It would be

58. But, if the buyers should carry the burden of proving costs, the Commission should be required to file a bill of particulars containing specific allegations. See note 57 *supra*.

59. The Commission used this method in an earlier case under the Act, and the seller successfully defended on the basis of costs. Bird & Sons Co., 35 F.T.C. 548 (1937).

impractical to join all the participants in one suit,[60] but perhaps a representative group could be joined in any particular proceeding. Another difficulty arises in situations in which the seller's defense fails. All efforts should be made to assure the buyer of a valid attempt on the seller's part to prove that his cost savings would permit granting price reductions to the buyer. If the seller cannot justify his prices, the presumption must be that they are unlawful unless the buyer can himself sustain the burden of cost justification.

Much of the criticism which has been leveled at Section 2(f) of the Robinson-Patman Act could be dispelled if proper measures are enacted to insure the effectiveness of the provision and, concurrently, provide for sensible enforcement.[61] The Section could be administered to avoid needless harassment of large buyers while at the same time safeguarding the small competitor from unfair price practices.

POSSESSION AND CONTROL OF ESTATE PROPERTY DURING ADMINISTRATION: INDIANA PROBATE CODE SECTION 1301

Statutory reform of the law generally follows a pattern of piecemeal enactment in response to particularly pressing needs. The changes wrought by codification can more often be traced to shifts in basic social and economic conditions, to the consequent evolution of fresh legal concepts, and to the need for a more systematic organization of the law. In recent years, the development of probate law has proceeded increas-

60. In Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), for example, there were some 80 sellers granting the buyer allegedly illegal discounts. Various other buyers were receiving price discounts on candy products contemporaneously with Automatic Canteen, as appeared in the facts of another case. That case involved in part a charge against the Curtiss Candy Company of granting discriminatory prices to Automatic Canteen, Confection Cabinet Company, Berlo, Sanitary Automatic, and "several other buyers." Curtiss Candy Co., 44 F.T.C. 237, 263 (1947).

The matter is further complicated by the fact that violations of the Act in this situation extended back beyond the buyers and sellers of candies involved. Two companies, Corn Products and Staley, were found guilty of allowing discriminatory prices on glucose, a basic ingredient of candy, to various manufacturers of confections. A. E. Staley Co., 34 F.T.C. 1362 (1942); Corn Products Refining Co., 34 F.T.C. 850 (1942).

61. See Austern, *Tabula in Naufragio—Administrative Style; Some Observations On The Robinson-Patman Act,* ANTITRUST LAW SYMPOSIUM 105, 107-109 (1953 ed.). This writer comments on the fact that there is a great deal of business support of the Act in spite of the criticism leveled at it from many other sources.