

## NOTES

### MANUFACTURER RESPONSIBILITY FOR PRICES UNDER SECTION 2(a) OF ROBINSON-PATMAN: ARE SOME RETAILERS MORE EQUAL THAN OTHERS?

SECTION 2(a) of the Robinson-Patman Act prohibits sellers from discriminating among purchasers when "such discrimination may [tend] . . . substantially to lessen competition . . ."<sup>1</sup> Difficulty in determining legitimate prices within this imprecise language is aggravated by the conflicting nature of underlying legislative policies.<sup>2</sup> The act's proponents sought primarily to protect independent distributors from the competitive advantages enjoyed by chain stores securing special purchase discounts.<sup>3</sup> As a concession to distributive efficiency, however, Congress allowed sellers to grant discounts justified by lower servic-

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1. Section 2(a) of the act provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952).

2. Critics have frequently described the act as ambiguous. See, e.g., 80 CONG. REC. 9419 (1936) (the bill "contains many inconsistencies, and the courts will have the devil's own job to unravel the tangle"). See also *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953) ("precision of expression is not an outstanding characteristic of the Robinson-Patman Act"); *Ruberoid Co. v. FTC*, 189 F.2d 893, 894-95 (2d Cir. 1951); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 5 (rev. ed. 1953) (hereinafter cited as AUSTIN); McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 LAW & CONTEMP. PROB. 410, 413 (1937); 57 COLUM. L. REV. 429, 430 (1957).

3. When he introduced the act in the House of Representatives, Rep. Patman said: "This bill is designed to . . . protect the independent merchant . . . from exploitation by his chain competitor." 79 CONG. REC. 9078 (1935). See also S. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936). For congressional history of the act, and purposes of its sponsors, see ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 51-56 (1937) (hereinafter cited as ZORN & FELDMAN); cf. *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) (act's objective to deprive large buyer of purchasing advantage); Morton & Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer?*, 37 MINN. L. REV. 227, 228 (1953) (act helps wholesale grocer against chain store); Rahl, *Antitrust Policy in Distribution*, 104 U. PA. L. REV. 185, 188 (1955) (act's purpose to penalize integrated buyer); Rose, *The Right of a Businessman To Lower the Price of His Goods*, 4 VAND. L. REV. 221, 238, 253 (1951) (act is anti-chain).

ing costs.<sup>4</sup> Faced with the need of reconciling these objectives in order to enable businessmen to price without undue fear of penalty, courts have devised standards fostering administrative predictability.<sup>5</sup> Thus, the "competitors price rule" stipulates that different prices to buyers competing in the sale of goods constitute, *prima facie*, unlawful discrimination.<sup>6</sup> By requiring the same price to all competitors irrespective of the value of the economic function which

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4. "[N]othing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . ." 49 STAT. 1526, 15 U.S.C. § 13(a) (1952). See 80 CONG. REC. 9417 (1936) (cost justification defense assures mass distributor "full protection in the use and rewards of efficient methods in . . . distribution in return for depriving him of the right to crush his efficient smaller competitors with the power and resources of mere size"); Rahl, *supra* note 3, at 211 ("concession to efficiency"). See also REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 170, 171 (1955) (hereinafter cited as ATT'Y GEN. REP.); Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials Under the Robinson-Patman Act*, 30 TEXAS L. REV. 1, 4 (1951). Many authorities feel that the act should go beyond permitting distributive efficiency to the general promotion of competition under the Sherman Act. See, e.g., *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953); ATT'Y GEN. REP. 131. Some commentators feel that the present interpretation of the act fails to promote Sherman Act competition. See, e.g., Correa, *Discrimination in Prices*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS 152, 172* (Van Cise & Dunn ed. 1954); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 970, 974-75 (1951). Possibly, however, the act, by keeping individual competitors in business, prevents monopoly and maintains competition. See Comment, 49 N.W. U.L. REV. 197, 198 (1954). On the aims of the act generally, see Note, 66 YALE L.J. 243, 244 n.6 (1956) (collecting authorities).

5. The need for predictability under the act is generally acknowledged. See *Ruberoid Co. v. FTC*, 189 F.2d 893, 894-95 (2d Cir. 1951); Smith, *The Patman Act in Practice*, 35 MICH. L. REV. 705, 729 (1937); Legis. Note, 50 HARV. L. REV. 106, 113 (1936).

6. The "competitors price rule" has never been judicially formulated as such, but constituted the *ratio decidendi* of the following cases. *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953) (allegation that lower price to gas station owned, operated and maintained by seller who also sold to plaintiff station ground for § 2(a) suit); *Ruberoid Co.*, CCH TRADE REG. REP. (9th ed., orders) ¶ 14313, at 12,488 (1950) (FTC cease and desist order stating: "The fundamental and controlling factor . . . is that the record establishes price discriminations by respondent among purchasers who are in fact competing with one another in the resale of the products"); *American Art Clay Co.*, 38 F.T.C. 463, 467 (1944) (10% extra discount to certain distributors labeled "wholesalers" and "jobbers" illegal where buyers are in active competition with other customers not receiving such discount); *Sherwin Williams Co.*, 36 F.T.C. 25, 61, 65-66 (1943) (violation of § 2(a) for respondent to give combined wholesaler-retailer functional discount on goods sold directly to consumers in competition with retailers who purchased from respondent); *C. F. Sauer Co.*, 33 F.T.C. 812, 825 (1941) (where two purchasers were chain retailer and independent retail grocer, seller was liable for selling to chain at 30¢ less than the independent); *United States Rubber Co.*, 28 F.T.C. 1489, 1501 (1939) (held illegal for respondent to sell through wholly owned retail stores to consumers at less than the price to retailers competing for sales to the same consumers); see also *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937) (concerned with the effect of price differentials on competition between favored and unfavored retailers reselling Kraft products); cf. *Krug v.*

each performs for the seller, this rule can promote inefficient marketing.<sup>7</sup> Courts could eliminate the rule's adverse economic effects by construing the act's secondary policy—approving cost-motivated discounts—as allowing differentials in seller expenses to justify price discrimination. In practice, however, courts narrowly restrict the cost justification defense and hence favor the small buyer through rigorous application of the competitors price rule.<sup>8</sup>

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International Tel. & Tel. Corp., 142 F. Supp. 230, 235 (D.N.J. 1956) (wholesaler given cause of action because of injury to retail competitors).

The competitors price rule is a major component of the judicial interpretation of the act since most cases under § 2(a) involve price discrimination between two persons on the same level of distribution, such as two wholesalers or two retailers. See 70 HARV. L. REV. 387 (1956). The rule implements the aim of the act as stated by congressmen and commentators. See, e.g., statement by Rep. Patman, 80 CONG. REC. 3447 (1935) (the bill would "put all retail distributors upon the same floor with the same competitive rights"); statement by Rep. Utterback, 80 CONG. REC. 9416 (1936) (stressing that discrimination is a price difference between competing buyers); ZORN & FELDMAN 107 ("debates . . . show that the Act was primarily designed to prohibit differences in price among purchasers who competed in the resale of the product"); Van Cise, *Functional Prices*, in NEW YORK STATE BAR ASS'N, 1947 ROBINSON-PATMAN ACT SYMPOSIUM 89, 94 (mail order houses, chain stores and single retail stores are all retailers selling to consumers, and unless cost differences or other special factors permit they must receive the same price); Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 CALIF. L. REV. 526, 546-57 (1952).

The strength of the presumption raised by unequal prices to competitors is uncertain. Some cases insist that the complainant must also show an injury to competition resulting from price differentials. Others hold that a difference in price creates a rebuttable presumption of an adverse effect on competition. See *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945) (taking the latter view); see also Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1076-85 (1957) (citing cases and discussing both views).

7. See Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 4 (1953) (act enforces discrimination against lower cost method of distribution); Kelley, *supra* note 6, at 526-28 (efficiency gained through integration is discouraged by allowing only the retail discount—the difficulty of cost justification "discourages distributional innovations"); Comment, 46 YALE L.J. 447, 455 (1937) (failure to recognize chain's greater functions by granting discount to wholesaler performing less functions prevents elimination of the inefficient wholesaler).

8. ATT'Y GEN. REP. 170-76 (cost justification illusory); Rahl, *supra* note 3, at 211 (cost justification has proved a very slight concession to efficiency); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 963 (1951) (as a practical matter, cost defense is impossible). One of the principal arguments supporting the practical unavailability of the defense is that the cost justification defense requires an expensive distribution cost accounting system which most firms do not use. Warmack, *Cost Accounting Problems Under the Robinson-Patman Act*, in NEW YORK STATE BAR ASS'N, 1947 ROBINSON-PATMAN ACT SYMPOSIUM 105, 106-07; Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 235 (1955); Comment, 49 NW. U.L. REV. 237, 248 (1954). *But see* AUSTIN 60-61 (necessary accounting not too expensive). Moreover, the defense must be based on actual, not marginal, cost savings. Note, 65 HARV. L. REV. 1011, 1012 (1952). Joint costs such as institutional advertising and charitable contributions are allowable only on a per unit basis, thus precluding the possibility of justifying a differential. *Standard Oil Co.*, 41 F.T.C. 263 (1945); AUSTIN 63; ZORN & FELDMAN 143; see Note, 65 HARV. L. REV. 1011,

Equal prices to buyers reselling in the same market are most easily achieved when competitors purchase directly from the same seller.<sup>9</sup> Sales by a supplier to different distributive levels create problems, however, since the price paid by the indirect purchaser may differ from that charged the direct purchaser. For example, when a manufacturer sells directly both to vertically integrated chain stores and to wholesalers supplying independent retailers, the cost to the indirect-buying retailers is often different from the cost to the direct-buying chain. Although frustrating the intended effect of the competitors price rule, disparity of this sort has been permitted.<sup>10</sup> Suit will not lie against the wholesaler whatever the price structure provided he does not discriminate among retailing customers.<sup>11</sup> Consequently, the competitors price rule is avoided unless it is extended to render the manufacturer responsible for prices charged

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1014-20 (1952). The burden of proof is on the party claiming the defense. *FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948). No account is taken of factors which determine price but do not relate to sale or delivery. ZORN & FELDMAN 119-23 (enumerating various factors such as securing order at right psychological moment); Fuchs, *supra* note 4, at 7. Indirect costs are difficult to allocate where the producer manufactures two or more products. See Note, 65 HARV. L. REV. 1011, 1014-15 (1952).

A few commentators have argued that cost justification is practicable for the careful manufacturer. Note, 65 HARV. L. REV. 1011 (1952); Comment, 49 NW. U.L. REV. 237, 250 (1954).

For collection of cases involving cost justification, see Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 23 n.101 (1956).

9. The act makes it "unlawful for any person . . . to discriminate in price between different purchasers . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). Thus, responsibility for equal prices rests on the seller. Crowley, *Equal Price Treatment Under the Robinson-Patman Act*, 95 U. PA. L. REV. 306, 312 (1947) (interpreting syntax of § 2(a)). Basic to case law under the act is the rule that a seller discriminating between competing direct purchasers violates § 2(a). See cases cited note 6 *supra*.

10. See, e.g., *Sherwin Williams*, 36 F.T.C. 25, 40-41, 74-75 (1943); Albert L. Whiting, 26 F.T.C. 312, 317 (1938). In *Sherwin Williams*, respondent sold directly to consumers, retailers, integrated wholesaler-retailers and wholesalers. The seller granted discounts to the wholesalers and the wholesaler-retailers. The FTC found no violation when the wholesaler sold to retailers at less than the price respondent charged his direct-buying retailers. With respect to the sales to the wholesaler-retailer, however, the FTC held that he could receive a discount on those goods which he wholesaled to retailers, but not on those sold directly to consumers. In the latter transactions, because the wholesaler-retailer was acting strictly as a retailer competing with other retailers purchasing from respondent, the price differential violated the competitors price rule.

In *Whiting*, discounts were permitted "where, in fact, jobbing services are rendered" by the wholesaling farm bureaus. 26 F.T.C. at 317. The recipient of the discount could therefore sell at more or less than the price the direct-buying retailer received from the seller, thereby defeating the objective of equal prices to competitors. See Shniderman, "The Tyranny of Labels"—*A Study of Functional Discounts Under the Robinson-Patman Act*, 60 HARV. L. REV. 571, 599 n.104 (1947); see also notes, 12, 13 *infra* and accompanying text.

11. Discrimination by a seller is essential to a § 2(a) violation. See note 9 *supra*.

indirect-buying retailers.<sup>12</sup> On the apparent theory that sales to wholesalers and chains, distributing on different levels, are sales to noncompetitors, courts initially refused to hold a manufacturer accountable for any difference between prices to the chain and those the wholesaler charged his own customers.<sup>13</sup>

In the 1949 decision of *Standard Oil Co. v. FTC*, however, the Seventh Circuit imposed responsibility on a primary seller for price disparity on subsequent distribution levels resulting from unequal prices to immediate purchasers.<sup>14</sup> The court held that Standard discriminated illegally by granting wholesalers special discounts which enabled them to resell to indirect-buying retailers at a price lower than that charged by Standard in its sales to direct-

12. For a discussion of such manufacturer responsibility, see notes 38, 44-47 *infra* and accompanying text.

Seller responsibility for prices charged by intermediaries has been strongly criticized: "[S]uppliers granting functional discounts . . . should not be held responsible for any consequences of their customers' pricing tactics." ATT'Y GEN. REP. 208.

13. Dictum in the leading case of *Mennen Co. v. FTC*, 288 Fed. 774 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923), was generally interpreted to allow status discounts. Kelley, *supra* note 6, at 531-32. Status discounts are those given solely because of the recipient's position in the distributive hierarchy rather than because of the services he performs. See Note, 66 YALE L.J. 243, 244-45 n.9 (1956) (collecting citations). The acceptance of status discounts was based on the fact that the old Clayton Act, in force at the time of *Mennen*, forbade discrimination only where competition was injured on the same market level—"to lessen competition . . . in any line of commerce . . ." 38 STAT. 730 (1914), as amended, 15 U.S.C. § 13 (1952). *Mennen* indicated that different prices are legal between a wholesaler and a retailer even if each buys the same quantity of goods. Assuming this to have been the law under the old Clayton Act, the validity of status discounts after Robinson-Patman enactment in 1936 is questionable in view of the act's language providing that discrimination in price is a violation when individual competitors are injured. The FTC permitted status discounts under § 2(a) on unclear reasoning. See note 10 *supra*; Note, 66 YALE L.J. 243, 245 n.10 (1956). On the incompatibility of functional discounts and § 2(a), see Kelley, *supra* note 6; Legis. Note, 50 HARV. L. REV. 106 (1936).

Different theories have been advanced to support the legality of status discounts under Robinson-Patman. One theory, based on Rep. Utterback's statement that no "discrimination" exists under the terms of § 2(a) unless the price differential is between those in competition, 80 CONG. REC. 9416 (1936), contends that the wholesaler and retailer are not in competition as defined by *Mennen* because resale is at different levels. A second theory focuses on § 2(a) language stating that a violation requires injury to competition, and concludes that competition has not been injured because the wholesaler and retailer do not compete. Actually, both theories rely on the basic premise that parties selling at different levels are not competitors. The major practical difference between the two theories is that under the former complainant need show only that the parties were competing, while under the latter he must also show injury to competition. For discussion of these theories, see ZORN & FELDMAN 170, 171, 173, 176; Shniderman, *supra* note 10, at 578 & n.56; Van Cise, *supra* note 6, at 89, 92-93; Legis. Note, 50 HARV. L. REV. 106, 113 (1936). For the elements of complainant's case, see note 6 *supra*.

14. 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951), *reissued with new findings*, 49 F.T.C. 923 (1953), *set aside*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958). For a detailed analysis of the litigation, see McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398 (1956); Note, 67 HARV. L. REV. 294 (1953).

buying retailers.<sup>15</sup> As a result, the primary seller was required to price in a manner which would eliminate cost differences to competing retailers even though buyers purchasing directly from him were not on the same distributive level.<sup>16</sup> The court suggested two ways for the seller to avoid future liability. He could use refusals-to-deal as a means of forcing wholesalers to charge indirect-buying retailers a price equaling that granted direct-buying retailers.<sup>17</sup> Recognizing, perhaps, that such control might violate the Sherman Act,<sup>18</sup> the

15. 173 F.2d at 212. Four large buyers were favored by Standard, one of whom sold exclusively at retail through his own outlets. The other three sold primarily at wholesale and occasionally at retail. *Id.* at 212-13. Other direct buyers from Standard were retail service stations, more than half of which were owned and leased by Standard. *Id.* at 212.

16. *Id.* at 217. See ATT'Y GEN. REP. 206; Note, 59 YALE L.J. 158, 160 (1949). Of the four favored buyers from Standard, two priced in a manner not undercutting the small direct-buying retailers. The action of the other two led to Standard's liability. One of them was in fact a large retailer selling through his own outlets, and Standard's discount to him in effect represented a violation of the competitors price rule. See note 6 *supra*. The other price cutter was primarily a wholesaler. 173 F.2d at 212-13.

The court impliedly followed the theory expressed in *Sherwin-Williams Co.*, 36 F.T.C. 25 (1943), that the seller does not discriminate when he grants different prices to different distributive levels, *i.e.*, to direct-buying wholesalers and retailers. See notes 10, 13 *supra*. See also *Albert L. Whiting*, 26 F.T.C. 312 (1938). The *Standard Oil* court seemed primarily interested, however, in consequences on the retail level. The primary seller's liability was based not only on the fact that different prices were charged direct-buying competitors, but also on the fact that different prices to noncompetitors—wholesalers and direct-buying retailers—resulted in inequality to the direct and indirect-buying retailers.

17. 173 F.2d at 217.

18. 26 STAT. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1952). The Robinson-Patman Act expressly guarantees to sellers the right of "selecting their own customers in bona fide transactions and *not in restraint of trade . . .*" 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). (Emphasis added.) Absent any conspiracy, combination or monopolistic purpose, refusal to deal by an individual does not violate the antitrust laws. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (seller may refuse to sell to a person who will not maintain resale prices). But a concerted refusal will not escape prohibition, and the course of dealing may inferentially show the agreement which was not present in *Colgate*. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (refusal to deal must be viewed in business perspective); *United States v. Schrader's Son, Inc.*, 252 U.S. 85 (1920). Thus, even individual refusals to deal may be an integral part of a § 1 violation of the Sherman Act. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 723 (1944); *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F.2d 651 (2d Cir.), *cert. denied*, 317 U.S. 664 (1942). As suggested in the *Standard* context, refusal to deal was to be used for the purpose of maintaining resale prices. But Standard and its wholesalers were in competition with each other, both selling to retailers. Resale price maintenance is not exempt from § 1 of the Sherman Act if the price setter competes with the parties whose price he controls. See note 31 *infra*; Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 944-45 (1951); Note, 59 YALE L.J. 158, 161 n.15 (1949). "In the absence of an operative Fair Trade exemption, every plan to control resale prices by withholding goods from price cutters may founder . . . if involving an understanding beyond a naked refusal to deal." ATT'Y GEN. REP. 136.

Individual refusals to deal may also violate § 2 of the Sherman Act when part of a scheme to monopolize. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594

court indicated that, alternatively, Standard could comply with Robinson-Patman by treating wholesalers and direct-buying retailers identically.<sup>19</sup> *Standard Oil* thus endorsed a rule, previously lacking major case law support, that sales may be lawfully made at a single price to all direct purchasers regardless of their function or position in the distributive hierarchy.<sup>20</sup>

While easy to administer,<sup>21</sup> this "one-price rule" defeats the principal policy of the act by failing to achieve equal prices to competitors. Assuming the primary supplier charges a single price, unless the wholesaler foregoes a markup, his retailer customers face higher prices than their direct-buying competitors.<sup>22</sup> The one-price rule may also impede distributive efficiency. For example, whenever wholesalers and integrated retailers paying the same price relieve the primary seller of different marketing costs, economic discrimination results.<sup>23</sup> Furthermore, even if the combined distributive system of wholesaler to indirect-buying retailer and the integrated direct-buying retailer discharge equivalent functions for the seller, the one-price rule fails to ensure that the

(1953); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *New Home Appliance Center v. Thompson*, 250 F.2d 881 (10th Cir. 1957). See, generally, Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Mund, *Refusal To Sell*, 11 VAND. L. REV. 339 (1958); Comment, 58 YALE L.J. 1121 (1949).

19. 173 F.2d at 217.

20. Prior to *Standard Oil*, the only case supporting the one-price doctrine was a Federal Trade Commission decision, *Bird & Son, Inc.*, 25 F.T.C. 548 (1937). Dictum in *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945), involving basing points, may also be taken as supporting the doctrine. Other language in the *Staley* case and in companion cases, however, cast doubt on the meaning of the *Staley* dictum. See 324 U.S. at 756; *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945); cf. *FTC v. Cement Institute*, 333 U.S. 683 (1948); AUSTIN 26-36. Some support for the one-price doctrine may be found in the legislative history of the Robinson-Patman Act. See S. REP. NO. 1502, 74th Cong., 2d Sess. (1936).

21. See Van Cise, *supra* note 6, at 92, 94 (because of its administrative certainty, sellers will prefer charging one price to taking the risk of granting functional discounts). See also George, *Business and the Robinson-Patman Act: The First Year*, 4 LAW & CONTEMP. PROB. 392, 400 (1937) (charging one price is one of the "easiest and surest" methods of avoiding Robinson-Patman liability).

22. The wholesaler might sell to the retailer at or less than cost if the indirect retailer had strong bargaining power. But this would be the exceptional case and could occur for only a limited time since wholesalers would be forced out of business. See Note, 67 HARV. L. REV. 294, 314, 317 (1953); 70 HARV. L. REV. 387, 388 (1956). Usually, the wholesaler would add a markup to his cost. Shnideman, *supra* note 10, at 588-89. The markup might force wholesalers out of business if the retailers buying from them could not survive. But by taking a lower profit or successfully charging a higher price than their direct-buying competitors, indirect-buying retailers can remain in business.

23. For the definition of economic discrimination, see note 48 *infra*.

The wholesaler and direct-buying retailer often do not relieve the seller of economic functions of equal value. Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 931 n.11 (1951) (uniform price often economic discrimination); see Rahl, *supra* note 3, at 218; 57 COLUM. L. REV. 429, 430 (1957); 70 HARV. L. REV. 387, 390 (1956).

price to the indirect retailer will reflect the value of his marketing functions. The wholesaler may fail to pass on to the retailer a discount received from the primary seller for distributor services actually undertaken by the retailer. Since a direct-buying chain could obtain the full discount, the excess of the price paid by the indirect-buying retailer over that paid by the chain may represent more than the difference in economic worth of the functions which each performs.<sup>24</sup> Thus, the fact that the one-price rule effects neither distributive efficiency nor equal prices to competitors suggests its limitation to the specific fact situation of *Standard Oil*.<sup>25</sup>

The one-price rule has nevertheless been extended to cover markets in which the manufacturer controls prices to both direct and indirect retailers. In *Klein v. Lionel Corp.*,<sup>26</sup> the Third Circuit held seller regulation of prices to an indirect purchaser irrelevant to the issue of unlawful discrimination.<sup>27</sup> In that case, the manufacturer's policy of granting wholesalers and direct-buying retailers the same price resulted in a higher price to indirect-buying retailers.<sup>28</sup> Relying

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24. Of course, if the excess price to the indirect retailer exactly reflects a function performed by the wholesaler which the chain performs for itself, economic discrimination does not occur. On the other hand, economic discrimination against the chain or a wholesaler need not necessarily harm efficiency, for the party against whom discrimination has occurred may become even more efficient to regain lost profits.

25. For criticism of the one-price rule, see PATMAN, *THE ROBINSON-PATMAN ACT* 165-66 (1938) (one price involves injury to customers of the wholesaler); Notes, 59 *YALE L. J.* 158, 162 (1949), 67 *HARV. L. REV.* 294, 315 n.94 (1953). One price has been criticized on the broader level of its general effect on the economy but this criticism does not accept the basic aim of Robinson-Patman as desirable and applies equally well to any plan designed to protect independent distributors. See Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 *YALE L.J.* 929, 972, 973 (1951); Adelman, *Integration and Antitrust Policy*, 63 *HARV. L. REV.* 27 (1949).

26. 237 F.2d 13 (3d Cir. 1956), 57 *COLUM. L. REV.* 429 (1957), 25 *U. CIN. L. REV.* 537 (1956).

27. 237 F.2d at 15 n.2, 16. The court distinguished two prior FTC cases, *Luxor, Ltd.*, 31 F.T.C. 658 (1940); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937), holding control determinative on the superficial ground that they involved cease and desist orders. 237 F.2d at 15. See also *Dentists Supply Co.*, 37 F.T.C. 345, 348 (1943); AUSTIN 37. Since control by the seller over lower distributive levels is the effective lever in granting discriminatory prices, services and allowances, the *Luxor* and *Kraft-Phenix* approach seem applicable to treble damage suits such as *Klein*. For a contrary view, see Shniderman, *supra* note 10, at 589-90.

For a discussion of FTC policy on control, repudiated by the Third Circuit in *Klein*, see Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 *YALE L.J.* 1155, 1160 & n.22 (1958).

28. Lionel charged the same price to Klein's wholesaler and to the chains and mail-order houses with whom Klein competed. Thus, for the purposes of this suit, a single price policy existed. 237 F.2d at 14. But Lionel did not in fact sell to all direct purchasers at the same price. Department stores and some miscellaneous accounts received a somewhat higher price than the chains and wholesalers, but a lower price than plaintiff. *Klein v. Lionel Corp.*, 138 F. Supp. 560, 562 (D. Del. 1956). These prices were apparently considered justifiable, see *Lionel Corp. v. Klein*, 114 A.2d 652, 656 (Del. Ch. 1955), and were not at issue in this suit.



on the rule that a single price to all direct purchasers does not violate Robinson-Patman, the court affirmed dismissal of an indirect retailer's complaint without ruling on an alleged resale price maintenance agreement between manufacturer and wholesaler.<sup>29</sup> The decision therefore implicitly sanctioned disparate retailer costs flowing from distributor control of subsequent prices. Vertical price fixing, however, is exempt from antitrust strictures only when embodied in fair-trade agreements conforming with state law.<sup>30</sup> And the Supreme Court held in *United States v. McKesson & Robbins, Inc.*, that a state authorized fair-trade agreement between a wholesaler and a manufacturer competing with him in selling to retailers constitutes horizontal price fixing proscribed by the Sherman Act.<sup>31</sup> Hence, the manufacturer control of wholesale prices alleged

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29. 237 F.2d at 15 n.2. The court said that Klein had no cause of action since he was not a "purchaser." Generally, only direct buyers are recognized as purchasers. See, e.g., *Naifeh v. Ronson Art Metal Works, Inc.*, 218 F.2d 202 (10th Cir. 1954).

The court's language implies that § 2(a) not only describes what constitutes a violation of the Robinson-Patman Act but also determines who has standing to sue in case of a violation; that, by proscribing discrimination against a purchaser, the section allows suit by purchasers only. See *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541, 543 (E.D.N.Y. 1957). But standing to sue is explicitly governed by § 4 of the Clayton Act, which permits anyone injured to sue. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952). See *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N.D. Ill. 1941); see also *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956); *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456 (W.D. Mo. 1948); AUSTIN 11; *Crowley*, *supra* note 9, at 311. Furthermore, no policy reasons appear for limiting suits to purchasers. See 70 HARV. L. REV. 387, 390 (1956). The aim of the act, prevention of injury on all distributive levels, AUSTIN 44, is best accomplished through allowing suit by any injured party who can show injury to competition.

Thus, the *Klein* court's language probably went to the issue of whether plaintiff's status as a nonpurchaser affected the existence of actionable discrimination, not the issue of standing to sue. Unless some purchaser is discriminated against, the act is not violated, and hence no cause of action accrues to either purchaser or nonpurchaser. See *Bird & Son, Inc.*, 25 F.T.C. 548, 553 (1937). Since Klein was not a purchaser, no discrimination existed against him. He could have alleged injury to himself through discrimination against his wholesaler. See *Shniderman*, *supra* note 10, at 597; 70 HARV. L. REV. 387, 390 (1956). But with the court recognizing the one-price rule, no discrimination existed against the wholesaler either. *Klein v. Lionel Corp.*, 138 F. Supp. 560, 564 (D. Del. 1956). The result was that actionable discrimination would exist only if Klein, an indirect buyer, were deemed a purchaser since the price to him was higher than that charged his direct-buying competitor. See note 28 *supra*.

30. The McGuire Act exempts from the Sherman Act those fair-trade agreements made pursuant to state law which concern commodities sold in interstate commerce. 66 STAT. 631, 15 U.S.C. § 45(a) (1952). The vast majority of states have fair-trade laws with widely differing provisions. 1 CCH TRADE REG. REP. (10th ed.) ¶¶ 3003, 3005, 3006, 3008 (1957) (listing and describing state laws).

On fair trade generally, see ATTRY GEN. REP. 149-55; Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175 (1954); Rahl, *Fair Trade Since the McGuire Amendment*, in MICH. SUMMER INST. ON INT'L & COMPAR. LAW, FEDERAL ANTITRUST LAWS 188 (1953); Notes, 66 YALE L.J. 436 (1957), 69 HARV. L. REV. 316 (1955).

31. 351 U.S. 305 (1956). The McGuire Act explicitly denies fair-trade protection to horizontal agreements between businesses competing with each other. "Nothing con-

in *Klein* is illegal,<sup>32</sup> for manufacturer and wholesaler both sold to retailers.<sup>33</sup> The decision's endorsement of the one-price rule in a controlled price context nonetheless retains significance for other pricing arrangements valid under antitrust criteria.

*McKesson & Robbins* doctrine restricts, but does not eliminate, the manufacturer's ability to use fair-trade agreements to control prices charged indirect retailers. A primary seller is not covered by that doctrine when supplying multilevel distribution systems, so long as he does not compete at the same marketing level with a purchaser whose prices he controls.<sup>34</sup> For example, if the manufacturer markets through both wholesaler-large retailer and wholesaler-jobber-small retailer, his regulation of wholesaler and jobber resale prices and thus of prices to competing retailers may be valid under fair-trade law.<sup>35</sup>

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tained in . . . this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices . . . between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." 66 STAT. 632, 15 U.S.C. § 45(a) (5) (1952). The *McKesson* Court may have overreached congressional intent by holding that the McGuire Act does not allow price maintenance of the seller's own products on the same level on which he himself sells. See 351 U.S. at 316-20 (dissenting opinion of Harlan, J.); Herman, *Fair Trade and McKesson & Robbins*, 44 CALIF. L. REV. 853, 860-65 (1956); Note, 25 *FORDHAM. L. REV.* 513 (1956); Comment, 24 *U. CHI. L. REV.* 533, 535-36 n.16 (1957). Legislative reversal of *McKesson & Robbins* is not unlikely, for Congress has in the past evidenced a desire to overcome judicial weakening of fair-trade laws. See H.R. REP. No. 1437, 82nd Cong., 2d Sess. (1952). See also H.R. 10527, 85th Cong., 2d Sess. (1958) (bill would, *inter alia*, limit application of *McKesson & Robbins*); N.Y. Times, May 26, 1958, p. 20, col. 5; Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 *HARV. L. REV.* 1324, 1334 (1958).

32. In the district court, plaintiff did not allege any specific control by the manufacturer over resale prices. *Klein v. Lionel Corp.*, 138 F. Supp. 560, 564 (D. Del. 1956). The issue was raised on appeal when Klein deposed that Lionel controlled wholesale prices through fair-trade agreements. Lionel denied having made such agreements. The court found it unnecessary to resolve the issue because Klein was not a "purchaser." 237 F.2d at 15 n.2. See also note 29 *supra*.

33. 237 F.2d at 14.

34. The crucial issue in cases following *McKesson & Robbins* is whether parties to a fair-trade agreement are in competition. *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17 (1st Cir. 1957); *General Elec. Co. v. Hess Bros., Inc.*, 155 F. Supp. 57 (E.D. Pa. 1957); *G. D. Searle & Co. v. Institutional Drug Distributors, Inc.*, 151 F. Supp. 715 (S.D. Cal. 1957). See note 31 *supra*. One commentator suggests that *McKesson & Robbins* ought not to apply when the price setter competes with distributors "only by performing similar functions solely with respect to its own manufactured products," but should be limited to manufacturers who wholesale other producers' products competing with their own. Comment, 24 *U. CHI. L. REV.* 533, 542-43 (1957); see H.R. 10527, 85th Cong., 2d Sess. (1958).

35. This marketing pattern is not uncommon. See, e.g., *Moog Industries, Inc. v. FTC*, 238 F.2d 43, 46-47 (8th Cir. 1956) (producer-distributor-jobber-user); *United States Rubber Co.*, 28 F.T.C. 1489, 1502 (1939) (marketing tires through independent wholesalers to retailers as well as through certain oil companies to jobbers to retail dealers); Fleming, *Group Buying Under the Robinson-Patman Act: The Automotive Parts Cases*, 7 *BUFFALO*

Resale price maintenance can also be achieved by methods other than fair-trade arrangements. Using a subsidiary sales corporation to serve certain retailing customers may enable an original seller corporation legally to set different prices for the subsidiary's retailers than for its own.<sup>36</sup> In addition, *Klein* may shelter from Robinson-Patman suit certain indirect methods of price fixing which, because insufficiently affected with a public interest, are not actionable under other antitrust laws.<sup>37</sup> Taken together, these permissible

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L. REV. 231, 234 (1958) (automotive parts distribution involves producer, warehouse distributor, jobber and sometimes an additional sub-jobber before the ultimate consumer); Kelley, *supra* note 6, at 536 (author's distribution system examples four and eight); cf. CONVERSE & HUEGY, *THE ELEMENTS OF MARKETING* 269 n.a (3d rev. ed. 1946); ZORN & FELDMAN 183. The systems of distribution pertinent to this footnote all involve the "jobber," who apparently can only be distinguished as a "special type of wholesaler." McNAIR & HANSEN, *READINGS IN MARKETING* 62 (2d ed. 1956).

36. See, e.g., *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957). Philco, the parent company, sold directly to Davega, Baim's competitor, while Baim purchased at a higher price from Philco Distributors, a wholly owned subsidiary. Despite the fact that all but one of the subsidiary's directors were also directors of Philco, the court refused to find that the subsidiary was merely the "alter ego of the parent" and that parent and subsidiary "constitute a 'common seller' discriminating between their customers." *Id.* at 544. See also *National Lead Co. v. FTC*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); Crowley, *supra* note 9, at 313-15; Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321, 322 (1937). For discussion of the *Baim*-type discrimination arrangement, see Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1161-62 & n.26 (1958); see also Fleming, *supra* note 35, at 239; Note, 67 HARV. L. REV. 294, 305 (1953).

Generally, courts may ignore corporate entities when justice so requires. *Owl Fumigating Corp. v. California Cyanide Co.*, 30 F.2d 812 (3d Cir. 1929). Corporate entities should not be permitted to frustrate the purpose of regulatory statutes. If the court finds control in fact exercised by the parent, the subsidiary's corporate entity will be disregarded. See *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Standard Motor Products, Inc.*, CCH TRADE REG. REP. (10th ed.) ¶ 26960 (FTC Jan. 20, 1958); BALLANTINE, *CORPORATIONS* 305-06 (rev. ed. 1946); cf. *Eastern Industries, Inc. v. Traffic Controls, Inc.*, 142 F. Supp. 381, 384 (D. Del. 1956). Thus, even where the subsidiary is the seller, the independent retailer might be considered a direct buyer of the parent. If so, the retailer would have a § 2(a) action as a discriminated against purchaser when his prices were higher than those charged his competitors buying directly from the parent. On corporate entities generally, see BALLANTINE, *op. cit. supra* at 287-332; STEVENS, *CORPORATIONS* 85-99 (2d ed. 1949).

37. Injury to competition under Robinson-Patman usually may be demonstrated by showing injury to an individual competitor. The Sherman Act, however, requires proof of injury to competition in general. See notes 4 and 6 *supra*; *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500-01 (1940); *Myers v. Shell Oil Co.*, 96 F. Supp. 670, 674-75 (S.D. Cal. 1951). See also ATT'Y GEN. REP. 164-67.

Various indirect forms of price control may be legal under the Sherman Act. *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (refusal to sell permitted even though it resulted in then un sanctioned resale price maintenance); Comment, 58 YALE L.J. 1121, 1122 (1949) ("the producer may 'suggest' the proper resale price, cutting off any distributors who disregard his suggestion"). *But see* *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (limiting *Colgate*); Comment, 58 YALE L.J. 1121, 1125-29 (1949). On refusals

ways of controlling intermediary prices to retailers indicate the reach of the *Klein* extension of the one-price rule.

Whenever distributors exercise effective control over prices to competitors, application of the one-price rule is both unnecessary and harmful. *Standard Oil*, although approving the single-price doctrine, apparently adopted the view that Robinson-Patman, by favoring equal prices to competing resellers, imposed responsibility for securing that equality on the original seller.<sup>38</sup> It was in the absence of control that the court further suggested a single price for all direct purchasers as a means of discharging the seller's statutory duty.<sup>39</sup> On the other hand, when the seller enforces resale price maintenance, as alleged in *Klein*, the one-price rule constitutes a gratuitous escape from his duty.<sup>40</sup> And application of the rule in this context is trebly pernicious. First, a manufacturer can engage in economic discrimination by granting middlemen the same price as direct-buying retailers. Second, since the manufacturer fixes the prices charged by middlemen, he can determine the exact quantum of the discriminatory differential against indirect buyers. Third, when he also sets the resale prices of indirect retailers, he can manipulate their profit margins.<sup>41</sup> In sum,

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to sell in general, see note 18 *supra*. The possibility of exercising indirect control is illustrated by Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). Kraft sold directly to retailers and, using suggested price lists, set the price at which wholesalers resold to retailers. Since no fair-trade agreement existed, *McKesson & Robbins* would not have applied. See note 31 *supra*. Although Kraft's wholesale price control might have violated the Sherman Act, determining the existence of an agreement under antitrust laws is difficult. See *Pevely Dairy Co. v. United States*, 178 F.2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (reasonable jury could not have found agreement on basis of circumstantial evidence presented); *cf. Arkansas Fuel Oil Co. v. Texas*, 154 Tex. 573, 280 S.W.2d 723 (1955) (circumstantial evidence insufficient to prove agreement under state law). Thus, the difficulties involved in proving an agreement restricts the application of the Sherman Act, even where price control, as in *Kraft*, is no less real than that achieved by fair-trade agreements and prohibited under *McKesson & Robbins*.

38. 173 F.2d at 217. See note 16 *supra*.

39. 173 F.2d at 217. See text at note 19 *supra*. See also Bayly, *Four Years Under the Robinson-Patman Act*, 25 MINN. L. REV. 131, 149 (1941).

40. See notes 21-25 *supra* and accompanying text.

41. When the manufacturer exercises control over wholesale or subsidiary resale prices, he effectively determines the amount of the excess price charged the indirect-buying retailer over that paid by the direct buyer. This control in effect eliminates wholesaler competition and its advantages to the indirect retailer. When wholesale price control exists alone, the indirect retailer is still free to attempt to nullify the differential through a higher volume of sales. He might do this by selling at a lower price and accepting lower profit margins than his direct-buying competitor. However, when the manufacturer controls both the price the indirect retailer must pay and also the price at which he sells, the effect upon the indirect retailer is more severe since the manufacturer can then effectively regulate and hence reduce the indirect retailer's profit margin. *Cf. United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 315-16 n.20 (1956); Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 CALIF. L. REV. 526, 548, 556 (1952). *But cf. Herman, supra* note 31, at 861.

Although economic discrimination may result from the one-price policy, see notes 23-24 *supra* and accompanying text, its effects may not be severe in a noncontrol situation.

overruling *Klein* is indicated to accord the indirect retailer a section 2(a) cause of action for injury from seller price control on different distributive levels.<sup>42</sup>

Even in noncontrol situations, ease of administering the one-price rule may not justify its failure to achieve the act's policy of equal prices to competitors.<sup>43</sup> Availability of another standard which accomplishes effective yet equitable seller responsibility for this policy suggests discarding the one-price rule altogether. Courts could hold sellers generally responsible for ensuring price equality to competitors,<sup>44</sup> but allow appropriate seller discounts to buyers on intermediate levels of distribution.<sup>45</sup> Accordingly, if a court found that the

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The indirect-buying retailer obviously pays a higher price than his direct-buying competitor. But, absent control, competition among wholesalers tends to reduce the differential paid by the indirect retailer. Moreover, wholesalers not dealing exclusively in the primary seller's product might find it advantageous to bear the whole burden of the differential themselves in order to retain retailer goodwill, thus destroying the price advantage on that product given the direct-buying retailer. Furthermore, the direct-buying retailer may be performing certain functions for the seller which the combined wholesaler to indirect retailer system does not perform. These would tend to mitigate the advantage of his lower price. See Note, 67 HARV. L. REV. 294, 303 (1953).

42. When subsidiary control exists, the retailer buying from the subsidiary should be permitted to sue for discrimination against him on the theory that parent and subsidiary are in effect a common seller. See note 36 *supra*. Thus, the common seller would be held liable for any price differences among retailers purchasing from either the parent or the subsidiary.

When control is otherwise evidenced, the indirect retailer should be considered a "purchaser." See *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937); *AUSTIN* 37; *Bayly*, *supra* note 39, at 149-51; see also note 29 *supra*. Thus, any differential between the price he pays and that charged his direct-buying competitors would constitute prima facie discrimination, permitting anyone injured to sue under § 4 of the Clayton Act. The seller would then be unable to insulate himself from liability by charging the same price to wholesalers and direct-buying retailers.

For a discussion of proposed legislation designed to overrule *Klein*, see Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155-1160 n.21 (1958).

43. See notes 21-22, 25 *supra* and accompanying text. For a legislative attempt to override the one-price rule, see H.R. 10304, 10305, S. 3654, 85th Cong., 2d Sess. (1958), discussed in Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1160 n.21; see also note 45 *infra*.

44. Lower courts are not bound by *Standard Oil's* one-price rationale since the Supreme Court in twice reviewing that case did not affirm the doctrine. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958). Both of these decisions concerned a "good-faith" defense. Eventually, *Standard's* discounts to wholesalers were justified as good-faith lowering of prices to meet competition. The circuit court's statements on seller responsibility and the one-price rule were therefore never affirmed. Lower courts have, however, implemented the one-price rule. See, e.g., *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956); *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957).

45. Even the court in *Standard* refused to subject the seller to absolute liability for price disparities on subsequent levels. The seller was to be held liable only if he sold to a wholesaler he "knows or ought to have known" would undercut the price to the direct retailer. *Standard Oil Co. v. FTC*, 173 F.2d 210, 217 (7th Cir. 1949) (modifying the FTC

price charged middlemen was reasonably calculated to enable them to resell at a price commensurate with that charged direct-buying retailers, the primary seller would not be accountable for the competitive consequences of the resale prices of his middlemen.<sup>46</sup> The primary seller would be liable only if he granted discounts which he knew or should have known would ordinarily result in disparate prices to competing distributors.<sup>47</sup> Illegal discrimination would therefore no longer be inferred merely from different prices to direct purchasers.

The proposed competitors price rule substitutes flexible analysis for the rigidity of the one-price formula in order to effectuate the primary Robinson-Patman policy of equal prices to competing resellers. Nevertheless, economic discrimination would occur whenever the same price was charged competitors performing different marketing functions.<sup>48</sup> This shortcoming, common to all rules manifesting price equalization policy alone, could be remedied through broadened recognition of the act's secondary goal—efficient marketing. By more ready acceptance of cost justification as a defense, courts could enable sellers to operate outside the proposed rule if necessary to avoid economic

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cease and desist order, *Standard Oil Co.*, 41 F.T.C. 263, 284-85 (1945), which made the seller absolutely responsible).

Recently introduced legislation, H.R. 10304, 10305, S. 3654, 85th Cong., 2d Sess. (1958), would overrule the one-price doctrine without imposing seller responsibility. The new bills, amending Robinson-Patman § 2(a), proscribe as discriminatory a seller's "failure to impose differentials in price as between purchasers in different functional classes." Thus, while the legislation promotes special wholesaler discounts, it does not make the seller responsible for granting discounts which induce wholesalers to resell at a price lower than that charged the direct-buying retailer.

46. Cf. Bayly, *supra* note 39, at 150; Kelley, *supra* note 41, at 555; Note, 67 HARV. L. REV. 294, 317 (1953).

Seller responsibility for differentials on subsequent distribution levels may have been the basis for the decision in *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956). There, the court held that Krug, a wholesaler, had a cause of action against IT&T for granting a direct-buying retailer a lower price than that charged Krug. The injury to Krug was derivative since based on the effect that IT&T's pricing policies had on Krug's retailers. See 70 HARV. L. REV. 387 (1956).

"It has been suggested that an eventual result of this recent trend may be that the Commission will be forced by the logic of its reasoning to pass on the size of functional differentials, *i.e.*, how much off to wholesalers over retailers—in order to ensure that such differentials do not injure retailers." Van Cise, *Functional Prices*, in NEW YORK STATE BAR ASS'N, 1947 ROBINSON-PATMAN ACT SYMPOSIUM 89, 97 (but the author disapproved such "an eventual result").

47. This solution resembles that first suggested in *Standard Oil* but later never followed because of resort to the one-price rule. See note 45 *supra*. Under the proposed solution, a seller would not be liable if the discount were normal and therefore did not induce the price cut. See Van Cise, *supra* note 46, at 92, 96 (1947); cf. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1083 (1957).

48. Economic discrimination occurs whenever two purchasers performing marketing functions of unequal value for their common seller pay him an identical price. ATT'Y GEN.

discrimination.<sup>49</sup> The amount of protection afforded independent retailers against lower prices to their integrated competitors would then depend on judicial standards for determining economically permissible discounts. Resultant interaction of cost defenses with the recommended competitors price rule should adequately protect independent retailers while simultaneously favoring distributive efficiency. The conflicting aims of the act would thus be balanced to permit a more rational price structure for multistage marketing.

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REP. 333; Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 223 (1955).

49. At present, the cost justification defense is practically unavailable because courts narrowly define relevant costs. See note 8 *supra*. For a recent decision which may portend a relaxation of the judicial attitude toward cost justification, see *Simplicity Pattern Co. v. FTC*, Civil No. 13884, D.C. Cir., May 29, 1958.