The Commerce Requirement of the Robinson-Patman Act

Peter W. Marshall

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol22/iss5/6
NOTES

THE COMMERCE REQUIREMENT OF THE ROBINSON-PATMAN ACT

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful to "discriminate in price between purchasers of commodities of like grade and quality." Such discrimination generally takes two forms. When the defendant's price discrimination adversely affects competing sellers, then he has unlawfully injured his primary-line competition. On the other hand, when the seller's price discriminations adversely affect his nonfavored buyers, then he has injured secondary-line competition.

Section 2 of the original Clayton Act, as enacted in 1914, was designed primarily to prevent injury to primary line competition by making local price cutting illegal. This section of the act, however, suffered from a number of weaknesses. First, the prohibition against price discriminations was qualified to allow price differentials which were based on the "differences in the . . . quantity of the commodity sold." Thus once the seller could show a quantity difference between purchasers he was free to grant unlimited discounts to the large purchasers. Second, the original act permitted price discriminations between purchasers when "made in good faith to meet competition." However, once the seller could show that he was reducing prices only to "meet competition," the act placed no restric-

2. 15 U.S.C. §§ 13, 13a-13c, 21a (1964) (originally enacted as ch. 592, 49 Stat. 1526 (1936)).
3. For an example of an injury to primary line competition, assume an industry in which there are two manufacturers (M₁, M₂) and two wholesalers (W₁, W₂). M₁ sells to W₁ for $1.00 per unit and to W₂ for $0.50 per unit. M₂, who had been selling to W₂ for $1.00 per unit, suffers a decrease in sales. If M₁ reduced his selling price to W₂ for the purpose of taking business away from M₂, then he has unlawfully injured a primary line competitor. See F. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 142-50 (1962) [hereinafter cited as Rowe].
4. For an example of an injury to secondary line competition, assume one manufacturer (M₁) and two wholesalers (W₁, W₂). If M₁ sells to W₁ at $0.50 and to W₂ at $1.00, then M₁ is guilty of discriminating against secondary line competitors. See Rowe, supra note 3, at 180-95.
5. Ch. 323, § 2, 38 Stat. 730 (1914).
6. H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914); see also Rowe, supra note 3, at 6.
8. Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620, 624 (6th Cir. 1939).
tions on the extent to which he could discriminate. Third, price discriminations were prohibited only when made by one "engaged in commerce, in the course of such commerce." Yet it was not clear whether the act prohibited a corporation which sold its products across state lines from discriminating against a purchaser located in the state where the corporation does business.

The framers of the Robinson-Patman Act sought to close these loopholes. First, the act prohibited all price differentials other than those justified by differences in the cost of manufacture, sale or delivery. Second, the "meeting competition" defense was made available only to one who could show that his lower price "was made in good faith to meet an equally low price of a competitor." Third, Congress intended to liberalize the existing commerce requirements of the Clayton Act by providing that the act would apply "where either or any of the purchases involved in such discrimination are in commerce." This clause was added to make clear that the sale to the victim need not cross state lines if the sale to the favored buyer was in interstate commerce.

This Note is concerned with the third modification of the Clayton Act. Rather than broadening the scope of the act, as was the intent of Congress, the courts have narrowly interpreted the commerce provision. The requirement that at least one of the commodities involved in the discrimination be actually sold in interstate commerce has been so construed as to preclude application of the act in numerous instances. For instance, since it is generally held that retail sales of such goods as gasoline and groceries are not sold "in" interstate commerce but rather "come to rest" with the retail merchant, price-cutting local merchants have been able to escape the sanctions of the act, although such merchants may have their prices set by an interstate corporation.

10. Id.
12. 15 U.S.C. § 13(a) (1964). The statute provides in pertinent part: [N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." However, the act also provides that "the Federal Trade Commission may . . . fix and establish quantity limits, and revise the same as it finds necessary . . . where it finds that available purchasers in greater quantity are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly. . . ." Thus, quantity discounts, even if cost-justified will be prohibited under the act if they would ultimately have anticompetitive results. Id.
17. Id. at 209.
Such an interpretation contrasts sharply with the court’s construction of the Sherman Antitrust Act. For an action under the Sherman Act to lie, it is not necessary that the trade or the restraint of trade be in interstate commerce; all that is required is that the transaction in question adversely affect interstate commerce. But the Sherman Act did not always have such a broad interpretation. In the early part of this century, the act could be applied only when the conspiracy of the defendants directly restrained the flow of interstate trade. Only through a long process of what could best be described as judicial amendment did the Sherman Act reach its present jurisdictional limit.

In light of that expansion, the jurisdictional requirement of the Robinson-Patman Act should be similarly liberalized. A local discriminatory sale should be deemed “in commerce” just as a local conspiracy is now held to be “in restraint of interstate commerce.” This examination rests upon the following premises: (1) There is no reason, either textual or logical, why the commerce clause of the Robinson-Patman Act cannot be construed as broadly as that of the Sherman Act; (2) it was the intent of Congress that the commerce provision of the Robinson-Patman Act be liberally construed; (3) because the scope of its commerce requirement has been unduly restricted, the effectiveness of the Robinson-Patman Act has been unnecessarily lessened. Before considering these propositions, however, it will be useful to trace the development of the commerce requirement under the Sherman Act. The cases which liberalized that requirement can provide precedent by analogy for a similar liberalization of the Robinson-Patman Act’s commerce provision.

Expansion of the Sherman Act’s Jurisdiction

United States v. E.C. Knight Co., the first Sherman Act case to come before the Supreme Court, rendered that act almost completely useless. That case involved the acquisition by the American Sugar Refining Company of four sugar refineries located in Philadelphia. These acquisitions gave American Sugar “nearly complete con-

---

19. 15 U.S.C. §§ 1-7 (1964). Section 1 provides, inter alia: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal . . . .” (emphasis added).
21. E.g., Swift & Co. v. United States, 196 U.S. 375 (1905), where the Court found a violation of the Sherman Act even though the illegal acts occurred entirely within one state.
22. 156 U.S. 1 (1895).
trol of the manufacture of refined sugar within the United States."\(^{23}\) The government's attempt to cancel the acquisitions and to enjoin further violations of the Sherman Act was unsuccessful. In finding for the defendants, the Court took the extreme position that there was no "direct relation" between commerce among the states and the manufacture of a product within one state.\(^{24}\) The unrealistic distinction between production and commerce in the *Knight* case ultimately rested on the Court's refusal to recognize that the commodity was produced with the intent that it should go forth into the interstate market. The Court in *Knight* equated "direct" restraints on commerce with restraints "in commerce": Only "direct" restraints were subject to federal control, and only a restraint "in commerce" could be "direct."\(^{25}\)

The history of the Sherman Act following the *Knight* case can be conveniently divided into three general periods. During the first period of over 40 years the courts gradually held constitutional greater exercises of federal power over commerce but were careful to exclude local activities not having a "direct" relationship to interstate commerce.\(^{26}\) During President Franklin D. Roosevelt's New Deal, the Federal Government sought to regulate activities that could only be characterized as local. During this second period, the Supreme Court came to hold that a local activity whose only effect on interstate commerce was "indirect" could nevertheless be subject to federal control.\(^{27}\) In the third period, which extends to the present, the federal courts have gradually applied the New Deal courts' approach to factual situations in which the effect of the regulated activity upon interstate commerce is marginal at best.\(^{28}\) Each of these periods will be examined in detail.

### A. Development Prior to the New Deal

The Court, which had virtually made the Sherman Act a dead letter in *Knight*, breathed new life into the act 4 years later in *Addyston Pipe & Steel Co. v. United States*.\(^{29}\) Addyston was one of six defendants who were enjoined from combining to fix prices and allocate territories among competitors. The Court found that the purpose of the combination of iron pipe manufacturers was "to directly and by means of such combination" restrain interstate commerce by means of the illegal agreements.\(^{30}\) *Knight* was distinguished as a combination in which the parties had not agreed about the future disposition of the

---

23. *Id.* at 9.
24. *Id.* at 17.
25. *See id.*
26. *See text accompanying notes 29-41 infra.*
27. *See text accompanying notes 42-58 infra.*
29. 175 U.S. 211 (1899).
30. *Id.* at 240.
manufactured product. The Court, in Addyston, restricted its holding by stating in dictum that the defendants would have been free "to combine in regard to a proposal for pipe deliverable in their own state," although the pipe might be subsequently used in construction outside the state.

In Swift & Co. v. United States the Supreme Court was called upon to decide the type of case which the dictum in Addyston had hypothesized. The Court this time found that federal power could be constitutionally employed to regulate such an intrastate activity. In Swift meat dealers had entered into a conspiracy to fix prices, which conspiracy a federal court enjoined under the Sherman Act. Although these violations of the act were local, the Supreme Court held that the injunction was properly issued. Mr. Justice Holmes, speaking for the Court, declared:

[Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.]

This case is notable for at least two reasons. First, the "current of commerce" concept was first used to justify regulation of a seemingly intrastate activity. Second, the Court declined to base its holding on the proposition that a purely intrastate activity could affect interstate commerce. Instead the Court based its holding on the theory that the Federal Government could prohibit an intrastate restraint on the sale of a commodity if that commodity was involved in an interstate transaction and was only temporarily within the state.

The "effect on commerce" doctrine, although not used in Swift, was the ratio decidendi of the Shreveport Rate Case. This case, although not arising under the Sherman Act, is nevertheless essential to an understanding of the development of Congress's power to regulate commerce. In this case the Supreme Court sustained an order of the Interstate Commerce Commission prohibiting several railroads from adjusting their rates to discriminate in favor of local traffic and against interstate traffic. To the argument that Congress was without power to confer upon the ICC authority to regulate intrastate rates, the Court

31. Id.
32. Id. at 247-48.
33. 196 U.S. 375 (1905).
34. Id. at 398-99 (emphasis added).
answered that the commission did have that power when those local rates adversely affected interstate commerce. In order to maintain fair and orderly market conditions, the federal power over the intrastate activities of an interstate concern was extended to all matters having a close and substantial relationship to interstate commerce.\textsuperscript{36} The doctrine that a purely local activity having a \textit{direct} effect on interstate commerce was subject to federal control was "inevitably to add force and scope to the [Sherman Act]."\textsuperscript{37}

Although the distinction between "direct" and "indirect" effects on interstate commerce could not be determined by reference to "mathematical or rigid formulas,"\textsuperscript{38} it was possible to draw certain conclusions. The federal courts were apparently willing to label "direct" any restraint on interstate commerce which had its origins in an intrastate activity if that activity was conducted by a concern also engaged in interstate commerce.\textsuperscript{39} "Indirect" effects were those that a concern selling solely within one state might have on interstate commerce.\textsuperscript{40} It was not until the early 1940s that the Supreme Court would declare the distinction between "direct" and "indirect" to be meaningless.\textsuperscript{41}

B. The New Deal

During the Great Depression, it was necessary for the Federal Government to provide vigorous leadership by the passage of bold, innovative programs designed to promote relief, recovery and reform. The federal courts, clinging as they did to an unrealistically narrow interpretation of the Constitution's commerce clause, were at first an obstacle to the exercise of federal power. The fate of the National Industrial Recovery Act\textsuperscript{42} is a good example of the conflict between the political and judicial branches.

Perhaps the most significant measure passed during President Franklin D. Roosevelt's "First Hundred Days" was the National In-

\textsuperscript{36} \textit{Id.} at 351.
\textsuperscript{38} Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 466-67 (1938) (interpreting commerce clause in context of National Labor Relations Act).
\textsuperscript{39} \textit{See} Houston, E. \& W. Tex. Ry. v. United States, 234 U.S. 342 (1914). \textit{But cf.} UMW v. Coronado Coal Co., 259 U.S. 344 (1922), wherein a local labor union not engaged in interstate commerce was held not to have violated the Sherman Act. The Court said that a "direct" restraint is effected when the "obstruction . . . is intended to restrain commerce . . . , or has necessarily such a direct, material and substantial effect to restrain it that the intent must reasonably be inferred." \textit{Id.} at 411.
\textsuperscript{40} \textit{See} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 547 (1935).
\textsuperscript{41} Wickard v. Filburn, 317 U.S. 111, 120 (1942).
\textsuperscript{42} Ch. 90, 48 Stat. 195 (1933).
It was the purpose of this act to stabilize wages and prices by permitting industries to regulate themselves. Section 3 of the act authorized the President to promulgate “codes of fair competition for the trade or industry.” The codes were to contain provisions establishing minimum wages and free collective bargaining and prohibiting unfair trade practices. Violation of any code provision “in any transaction in or affecting interstate commerce” was made punishable as a misdemeanor. Two years after the act was passed, however, the Supreme Court, in *A.L.A. Schechter Poultry Corp. v. United States*, struck down the NIRA as unconstitutional. After holding that the act was invalid as an unconstitutional delegation of legislative power, the Court further held that the Constitution’s commerce clause did not permit a code to be applied to the petitioner, the operator of a wholesale poultry slaughterhouse in Brooklyn whose sales were exclusively local. Chief Justice Hughes, speaking for the Court, said that the transactions in question were not “in” commerce. He distinguished the “current of commerce” cases on the ground that the petitioner’s poultry was intended solely for local disposition. Nor did the transactions “directly” affect commerce so as to bring them within the purview of the commerce clause. The Court arrived at this conclusion despite the fact that 96 percent of the poultry marketed in New York came from other states.

Within 2 years after *Schechter* was decided, the Supreme Court

43. *Id.* § 1, 48 Stat. at 195.
44. *Id.* § 3(a), 48 Stat. at 196.
47. 295 U.S. 495 (1935).
48. *Id.* at 542.
49. *Id.* at 543. “The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had [permanently] ceased. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here.” *Id.*
50. *Id.* at 544-50. “[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.” *Id.* at 546.
51. *Id.* at 520.
began to give a more realistic interpretation to the commerce clause.\textsuperscript{52} It was, however, \textit{Wickard v. Filburn},\textsuperscript{53} decided in 1942, which has had the most significant effect on the Court's interpretation of the commerce provision of the Sherman Act. Filburn owned a small farm in Ohio on which he raised poultry and dairy cattle. He also harvested a small acreage of wheat for home consumption and market sale. Pursuant to the Agriculture Adjustment Act of 1938,\textsuperscript{54} the Department of Agriculture allocated Filburn 11 acres on which to plant his wheat. Filburn planted and harvested 23 acres, refused to put the excess in storage, and sued to enjoin enforcement of the penalty imposed upon him by the act. The Supreme Court, speaking through Mr. Justice Jackson, unanimously reversed the district court's injunction prohibiting enforcement of the act. The Court regarded the case as particularly significant because no previous decision had held that intrastate "activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof."\textsuperscript{55} It was urged upon the Court that the statute went beyond the reach of congressional power since the effects were, at most, "indirect." The Court rejected this argument, declaring:

\begin{quotation}
Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."
\end{quotation}

The Court rejected the argument that Filburn's farm was too small to have any significant effect on interstate commerce.

That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.\textsuperscript{57}

Mr. Justice Jackson used as authority for the above statement many of the earlier antitrust cases which had held that when a local restraint is part of a larger conspiracy, the local restraint is subject to federal control.\textsuperscript{58} But \textit{Wickard} went far beyond those previous cases to make it clear that Congress could also regulate a local activity which was not itself part of an interstate concern when the activity has a substantial economic impact on interstate commerce.

\begin{itemize}
\item \textsuperscript{52} \textit{NLRB v. Jones \& Laughlin Steel Corp.}, 301 U.S. 1 (1937).
\item \textsuperscript{53} 317 U.S. 111 (1942).
\item \textsuperscript{55} \textit{Wickard v. Filburn}, 317 U.S. 111, 120 (1942).
\item \textsuperscript{56} \textit{Id.} at 125.
\item \textsuperscript{57} \textit{Id.} at 127-28.
\item \textsuperscript{58} \textit{E.g., Swift \& Co. v. United States}, 196 U.S. 375 (1905); \textit{Northern Sec. Co. v. United States}, 193 U.S. 197 (1904).
\end{itemize}
C. From the New Deal to the Present

Using the proposition that "Congress in passing the Sherman Act wanted to go to the utmost extent of its Constitutional power ..." and the Wickard decision as its judicial tools, the Court engaged in a long and gradual expansion of the Sherman Act's jurisdiction. The first major step in that expansion occurred when the case of United States v. Frankfort Distilleries, Inc. was decided. The respondents were producers, wholesalers and retailers of alcoholic beverages. They admitted on demurrer the allegation that they agreed to make contracts fixing the retail prices of alcoholic beverages sold in Colorado and to boycott all others who did not enter into the agreements. They were adjudged guilty by the district court and fined. The court of appeals reversed on the ground that the indictment failed to show any conspiracy in interstate commerce. The Supreme Court reversed the court of appeals, affirming the judgment of the district court. The Court noted that in resolving questions relating to the Sherman Act's jurisdiction over a restraint of trade occurring within a single state that

there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.

Frankfort Distilleries is an example of a defendant engaged in interstate commerce who restrained that commerce through its local activities. In contrast, in United States v. Women's Sportswear Manufacturers Association the defendant trade association and its members contended that they were engaged purely in intrastate commerce. The association was charged with inducing jobbers in the woman's sportswear industry to employ only members of the association, all of whom


60. 324 U.S. 293 (1945).
61. Id. at 297. See also Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). In that case three California sugar refineries which sold their production in interstate commerce entered into an agreement to pay uniform prices for sugar beets purchased from the plaintiffs' farms, all of which were located in Northern California. Rather than dealing with the very product (sugar) that moved in interstate commerce, the local conspiracy concerned beets before they were turned into sugar. The Court, nevertheless, held that the agreement to purchase beets was an "inseparable element" of the later sale of sugar in interstate commerce. Id. at 237. The Court concluded: "The vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry." Id. at 238.

were unionized. The union members performed such functions as stitching and attaching buttons for the jobbers. Mr. Justice Jackson, speaking for a unanimous court, declared that it was not material that the nature of the defendants' operations when considered alone may be purely intrastate. Justice Jackson stated the commerce requirements of the Sherman Act to be as follows:

Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.64

In Burke v. Ford65 the Supreme Court placed a new judicial gloss on the Sherman Act's commerce provision. In that case a group of Oklahoma liquor retailers sued under section 1 of the Sherman Act to enjoin a state-wide market division by Oklahoma wholesalers. The district court and the court of appeals found that interstate commerce ceased at the point that the liquor "came to rest" in the wholesalers' Oklahoma warehouses. Therefore, both courts held that the interstate commerce requirement of the Sherman Act had not been satisfied. The Supreme Court reversed in a per curiam opinion. The Court found that the absence of free competition reduced the number of sales made by out of state distilleries to local retailers. This "substantial effect" on interstate commerce was enough to invoke the Sherman Act.66

From the above discussion the following conclusions may be drawn. As the federal courts have given a broader interpretation to the

63. Id. at 464.
64. Id. See also United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954), where a Chicago trade association of plastering contractors, a local union and its president were charged with conspiring to bar the entry of new competitors in violation of section 1 of the Sherman Act. Despite the allegation that all interstate movement of plastering materials had ended before the local restraints became effective, the Court held that the commerce requirements had been satisfied. The Court concluded: "That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question." Id. at 189.
66. Id. at 321. It may be cogently argued, however, that, in light of the factual situation at bar, the Court's test was too broad. Language in the opinion seems to indicate that there was a restraint of trade in interstate commerce: "Horizontal territorial divisions almost invariably reduce competition among the participants... The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers. In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller." Id. at 321-22.
Constitution's commerce clause, the commerce requirement under the Sherman Act has been concomitantly liberalized. The reason for both developments is the same: the judiciary recognized the compelling necessity for federal intervention in the nation's economy. Given that rationale, it should follow that the applicability of the Robinson-Patman Act should be similarly broadened. Indeed, it is clear from the legislative history that the act was intended to be applied as broadly as was constitutionally possible.

The Legislative History of the Robinson-Patman Act

The ineffectiveness of section 2 of the original Clayton Act has already been discussed. Those deficiencies became even more acute with the advent of large chain stores and mail-order houses in the 1920s. These large scale buyers were able to demand discounts from manufacturers and wholesalers without regard to the sellers' cost. Their large orders also enabled them, by integrating the middleman functions, to eliminate wholesale selling expenses. Retailers and wholesalers formed political alliances to limit or offset the competitive advantages of chain stores. On the state level one result of those alliances was "fair trade" legislation. On the national level, the Senate, in 1928, directed the Federal Trade Commission to investigate the marketing and distributing functions of chain stores. The final results of that investigation were presented to the Senate over 6 years later. It was the recommendation of the FTC that all exceptions to unlawful price discriminations based on the quantity sold, the cost of selling or the need to meet competition be eliminated. The Commission proposed an amendment to the Clayton Act which would have prohibited all unfair and unjust price discrimination and would have left to the FTC and the courts the task of determining whether a violation had occurred. The text of the amendment proposed by the FTC read as follows:

It shall be unlawful for any person engaged in commerce in any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or unjustly in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States.

Within a year this recommendation was incorporated verbatim in
a bill introduced by Representative Mapes of Michigan.\textsuperscript{72} By making unlawful any price discrimination "in or affecting commerce," such legislation would have significantly expanded the Clayton Act. Although the seller would have been required to be engaged in interstate commerce, it would no longer have been necessary for the actual sale to take place in interstate commerce. The United States Wholesale Grocers' Association, however, feared that their interests would not be adequately protected by the Mapes Bill, which was subsequently discarded while in hearings.\textsuperscript{73} In its place the association drafted what was to become the Patman Bill.\textsuperscript{74}

Representative Patman's Bill, as reported by the House Committee on the Judiciary, contained the following provision which was not found in the Robinson-Patman Act as finally enacted:

\begin{quote}
and that it shall also be unlawful for any person, \textit{whether in commerce or not}, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where in any section or community and in any line of commerce such discrimination may substantially lessen competition in commerce among either sellers or buyers or their competitors or may restrain trade or tend to create a monopoly in commerce or any line thereof. . . .\textsuperscript{75}
\end{quote}

The subsequent deletion of this subsection has been advanced as evidence that Congress intended that the commerce requirement of the Robinson-Patman Act be narrowly construed by the courts.\textsuperscript{76} But the \textit{Schechter} case, decided only 2 weeks before Representative Patman introduced his original bill, plainly made the language of the bill unconstitutional.\textsuperscript{77} It was congressional doubt about the constitutionality of the provision, not a desire that the Robinson-Patman Act's commerce requirement be narrowly construed, that led to the elimination of the provision.\textsuperscript{78}

\textsuperscript{72} H.R. 4995, 74th Cong., 1st Sess. (1935).
\textsuperscript{74} See \textit{Hearings on H.R. 8442 Before the House Comm. on the Judiciary}, 74th Cong., 2d Sess. 9 (1936), where Representative Patman acknowledged that Mr. H.B. Teegarden, counsel for the United States Wholesale Grocers' Association, actually wrote his bill. See Evans, \textit{supra} note 73, for a thorough discussion of the legislative history of the Robinson-Patman Act.
\textsuperscript{75} H.R. 8442, 74th Cong., 2d Sess. (1936), as reported by the House Committee on the Judiciary, March 31, 1936, \textit{quoted in Rowe}, \textit{supra} note 3, at 566.
\textsuperscript{76} See, \textit{e.g.}, C. AUSTIN, \textit{PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT} 15 (2d rev. ed. 1959); Rowe, \textit{supra} note 3, at 78.
\textsuperscript{77} See A.A.A. \textit{Schechter Poultry Corp. v. United States}, 295 U.S. 495, 542-50 (1935) (activities not "in" commerce must directly affect interstate commerce in order to be subject to federal control).
\textsuperscript{78} See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936).
Rather than restrict the jurisdiction of the federal courts under the act, Congress intended to expand that jurisdiction by adding a new clause to the commerce provision of the original section 2 of the Clayton Act. To the original commerce requirement of the act which required that the price discrimination be committed by one "engaged in commerce, in the course of such commerce," was added the provision that it shall be unlawful to discriminate "where either or any of the purchases involved in such discrimination are in commerce." It is clear from the legislative history that Congress intended this clause to extend the protection of the Robinson-Patman Act. Although it was well settled that is was unlawful for a seller in State A to discriminate against customers or competitors in other states, there was doubt whether an unlawful discrimination occurred when the victim and the discriminating seller were in State A and the favored buyer was in State B. The addition of the phrase "where either or any" was intended to make clear that the latter practice was illegal.

The federal courts have construed this clause to mean that at least one of the sales must actually cross state lines. It is true that there is testimony in the Congressional Record that would support this interpretation. However, this testimony "was based on the assumption that retail sales are intrastate in nature and thus would not meet the commerce requirements of the Act." Indeed, that the Schechter decision clearly affected the drafting of the act's commerce provision is shown by the following comment of the House Report:

[The phrase "where either or any"] is of first importance in extending the protections of this bill against the full evil of price discrimination, whether immediately in interstate or intrastate commerce whenever it is of such a character as tends directly to burden or affect interstate commerce.

It is submitted, therefore, that the courts' construction of the commerce provision of the Robinson-Patman Act is not supported by congressional intent. What is clear from the evidence is that Congress intended to exercise all of its powers over commerce when it passed the Robinson-Patman Act. Just as the power of Congress to regulate in-

80. Id.
81. See text accompanying notes 95-129 infra.
82. 80 Cong. Rec. 8103 (1936) (remarks of Representative Mapes that the Robinson-Patman Act would not apply to the sales of retail merchants).
terstate commerce has expanded, so should the federal courts's construction of the act's commerce requirement become broader. The "guiding ideal" of Congress when it enacted the Robinson-Patman Act was the "preservation of equality of opportunity so far as possible to all who are usefully employed in the service of distribution and production." The judiciary's application of the act, however, has often—and unnecessarily—undermined that ideal.

Judicial Interpretation of the Robinson-Patman Act's Commerce Requirement

In the 1954 decision of Moore v. Mead's Fine Bread Co. the Supreme Court clearly recognized that interstate corporations, if they could not be regulated under the Robinson-Patman Act, could destroy all local competition. Moore, the plaintiff, had a bakery business in Santa Rosa, New Mexico, which competed with the defendant Mead's in the sale of bread to local Santa Rosa merchants. Mead's, one of several corporations with interlocking ownership, had a plant in Clovis, New Mexico, which served not only Santa Rosa but also Farwell, Texas. Moore's sales, on the other hand, were purely intrastate. A "price war" developed in Santa Rosa between the two competitors, although Mead's maintained its higher prices in Farwell. Moore, eventually forced out of business, brought an action for treble damages, alleging violations of the Robinson-Patman Act. The Supreme Court, speaking through Mr. Justice Douglas, affirmed the district court's judgment for the plaintiff. Although discriminatory prices had been charged only in intrastate sales, the Court nevertheless held that the commerce requirement of the Robinson-Patman Act had been satisfied. The commerce provision of the act—"where either or any of the purchases involved in such discrimination are in commerce"—clearly applied to the case at bar. The Supreme Court had already made it clear that "no single sale can violate the Robinson-Patman Act. At least two transactions must take place in order to constitute a discrimination." The Court in Moore properly compared the sales made by Mead's in Santa Rosa with its sales in Texas, thus finding a discriminatory sale "in commerce."

The Court recognized that its decision was clearly consistent with the legislative history of the Robinson-Patman Act. Moreover, Justice Douglas supported his opinion with the following dictum:

86. H.R. REP. No. 2287, 74th Cong., 2d Sess. 6 (1936).
88. Id. at 119.
90. 348 U.S. at 120. The Court quoted Representative Utterback, manager of the Conference Bill: "Where . . . a manufacturer sells to customers both within the State
If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.91

Although the above is "mere" dictum, the Court clearly indicated that if an interstate corporation financially supports local price discriminations through its interstate sources, then it should be subject to the Robinson-Patman Act. The lower federal courts in subsequent Robinson-Patman Act cases have interpreted the act more narrowly. Moore has been narrowly distinguished as a case in which one of the sales involved in the discrimination crossed a state line.92 As a result, there are two economically important situations in which a sale will not be "in commerce" although the seller is wholly owned or financially supported by an interstate enterprise. First, it has been held that if a corporation engaged in interstate commerce has a local plant which produces, processes and sells a commodity solely within one state, the courts may not compare those sales to the sales of the same commodity by the corporation's other plants which do cross state lines.93 Second, the courts have continued to apply obsolete theories of interstate commerce so as to bar all remedy to local merchants injured by discriminatory local sales made by interstate corporations.94 These two limitations will be examined in detail in the following sections.

A. The Autonomy of Local Processing Plants—

A Curious Interpretation

Willard Dairy Corp. v. National Dairy Products Corp.95 marked

and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade. . . .”

91. Id. at 119-20.
93. See text accompanying notes 95-103 infra.
94. See text accompanying notes 104-29 infra.
95. 309 F.2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934 (1963).
the origin of a serious limitation of the applicability of the Robinson-Patman Act. In Willard the plaintiff, a local dairy which sold all of its products within a small area of Ohio, charged that the defendant, a national company with dairy processing plants in many states, had violated the act by making discriminatory sales from its Shelby, Ohio, plant. The defendant admitted reducing the prices of its milk in the area where it competed with the plaintiff while maintaining a higher price in other areas of Ohio, also served by the Shelby plant. The complaint alleged discrimination by the defendant's Shelby plant, but did not claim any of that plant's products were shipped in interstate commerce. The plaintiff attempted to amend its complaint by alleging that the defendant's other Ohio plants, which were engaged in interstate commerce, had maintained their prices. The trial judge refused to allow this amendment and granted the defendant's motion for summary judgment. The Court of Appeals for the Sixth Circuit affirmed, holding that the defendant's interstate shipments "from other than its Shelby, Ohio, plant to areas in which the plaintiff did not engage in business" were wholly "immaterial" to the case.96

It is clear that Willard narrowed the applicability of the Robinson-Patman Act. In determining whether there has been a price discrimination, a court may compare the allegedly discriminatory sale only with those sales made by the same plant or distributor. If that plant makes only local sales, then the commerce requirement of the Robinson-Patman Act has not been satisfied, although the plant may be owned and controlled by a corporation whose other plants make sales in interstate commerce.97

The Willard decision was closely followed by another very similar case, Borden Co. v. FTC.98 It was alleged that Borden violated the act by failing to charge its customers uniform prices for milk produced in Ohio and processed at Borden's Portsmouth, Ohio, plant. The F.T.C. trial examiner followed the Willard rule and found no violation of the Robinson-Patman Act. His decision was reversed by the Federal Trade Commission which "placed great stress on the fact that Borden

96. 309 F.2d at 946. Mr. Justice Black dissented from the Supreme Court's denial of certiorari. In language reminiscent of the Moore decision Mr. Justice Black declared: "Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent." 373 U.S. 934, 935-36 (1963).
97. 309 F.2d at 946.
98. 339 F.2d 953 (7th Cir. 1964) (The FTC also found that Borden had engaged in price discriminations adversely affecting primary-line competition in Indiana. The Seventh Circuit vacated that part of the commission's order on the basis that competitive injury had not been sufficiently established.)
is engaged in interstate commerce.”

It was the view of the commission that Borden’s “operations constitute an ‘interstate complex’ and that its practices and policies have an ‘interstate homogenity.’” The opinion concluded: “Since it is impossible to divorce The Borden Company and its products, if The Borden Company is in commerce, so must be all of its products.”

The Seventh Circuit disagreed, preferring to rely on the dissent to the commission’s decision:

Section 2(a) of the Clayton Act, as amended, states the jurisdictional requirement respecting ‘commerce’ in three separate ways, and each of these variants of the commerce requirement must be satisfied. First, respondent must be ‘engaged in commerce’; second, the unlawful discrimination must occur ‘in the course of such commerce’; third, ‘either or any of the purchases involved in such discriminations must be ‘in commerce.’

“[U]nless the third commerce requirement of Section 2(a) is to be given no effect whatever, the Commission’s burden of establishing jurisdiction cannot be discharged merely by a showing that respondent is an interstate concern or that it makes interstate sales not involved in the challenged discrimination.

Although the obvious meaning of the “third commerce requirement” is that at least one of these sales involved in the discrimination must cross state lines, it is by no means obvious that the sales of only one plant may be compared to find “the purchases involved in such discriminations.” And, even more important, it must be remembered that the “third requirement” was added to the Robinson-Patman Act to extend its reach, not to restrict it.

Moreover, it should be clear that the “two-plant” rule makes it possible for a large, interstate corporation to violate the Robinson-Patman Act with impunity. If such a corporation has two or more centers of manufacture within a state, raw materials from other states may be shipped to those plants, where they are used to manufacture the final product. One plant, solely for the purpose of destroying its competitors, may take intrastate sales at price $A$, while the other plant sells some or all of its products across the state line at price $B$—possibly to the competitors of those buying at price $A$. Despite the clear effect on interstate commerce of both sales, the corporation, under the present case law, has not violated the act. The corporation’s very size has given it immunity from the sanctions of the Robinson-Patman Act—certainly a result contrary to the intent of its framers.

99. Id. at 955.
100. Id., quoting from Commissioner Dixon’s majority opinion for the FTC.
101. Id.
102. Id.
103. See text accompanying notes 80-84 supra.
B. Retail Sales and the "Come to Rest" Doctrine—An Outmoded Concept

The first Supreme Court decision to hold that the "flow of commerce" doctrine was applicable in Robinson-Patman Act cases was Standard Oil Co. v. FTC. The issue in that case was whether temporary storage of gasoline within a state, by a company in interstate commerce, would deprive the gasoline of its interstate character. The proposition that sales from local storage plants to retailers and jobbers within the same state "are but a throat through which the current flows," and hence part of interstate commerce, had received early acceptance. However, and it was not until the Standard Oil decision that the issue was effectively resolved: Temporary storage of a commodity by a company engaged in interstate commerce does not alter the interstate nature of sales to local retailers.

Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns.

On the other hand, once the commodity has reached the retailer the courts have held that the flow of commerce has terminated, and any subsequent sale by the retailer to the public at large is no longer part of interstate commerce. The commodity is said to "come to rest" at the retailer's place of business while it awaits resale to the public at

108. 340 U.S. at 237-38. Nor does it matter if the product has undergone minor processing while it is temporarily at rest. Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965).
109. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Plotken's West, Inc. v. National Food Stores, Inc., 312 F. Supp. 136 (E.D. Mo. 1970). The court in Cliff gave three exceptions to the general rule: "Retail sales of goods shipped into a state may be considered to remain within the flow of commerce under three circumstances: (1) Where they are purchased by the retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; (2) where the goods are purchased by the retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer, although not for immediate delivery; and (3) where the goods are purchased by the retailer based on the anticipated needs of specific customers." 417 F.2d at 210.
large. The case of Walker Oil Co. v. Hudson Oil Co. has been said to demonstrate "the distinction, insofar as Robinson-Patman is concerned, between the flow of gasoline from a producer to retail dealers, as in Standard Oil Co. v. Federal Trade Commission . . . and subsequent purchases by random customers from the dealers at their place of business." Walker Oil Co. charged that Hudson Oil Co. lowered its prices at a Florida gasoline station to injure Walker while it maintained higher prices at another station located 60 miles away in Alabama. The Court of Appeals for the Fifth Circuit, in affirming defendant's motion for summary judgment, held that the retail sales to random members of the general public were not "in commerce" and hence the price differentials between the two gasoline stations did not violate the Robinson-Patman Act.

The distinction between the applicability of the Sherman Act and the Robinson-Patman Act is distinctly shown by the case of Food Basket, Inc. v. Albertson's Inc. Food Basket operated a single independent supermarket located in Taylorsville, Utah. Albertson's was an interstate supermarket chain with stores throughout the state, including one in Taylorsville. It purchased its groceries and frozen foods from two Salt Lake City Wholesalers. Food Basket alleged that it was driven out of business by the predatory tactics of Albertson's, which violated section 2(a) of the Robinson-Patman Act. Food Basket sought to prove that Albertson's sold products at its Taylorsville store at lower prices than it sold like merchandise at its other stores, both within and outside the State. The district court granted Albertson's motion for summary judgment on the Robinson-Patman Act claim, which judgment was sustained by the Court of Appeals for the Tenth Circuit.

Food Basket made two arguments in support of the applicability of the Robinson-Patman Act. First relying upon dictum in Moore, it argued the act should apply since Albertson's subsidized its losses with profits from "its interstate treasury." The court rejected the argument, distinguishing Moore as a case where the defendant made sales across state lines. The present case only involved "two purely local discriminatory sales in different states," and hence outside the scope of the act.

113. 414 F.2d at 588-89.
114. 383 F.2d 785 (10th Cir. 1967).
115. Id.
117. 383 F.2d at 787.
118. Id. at 788.
of the act. The court, nevertheless, recognized the logic of the plain-
tiff's argument and was forced to admit that Moore was "susceptible" to the construction urged by Food Basket.119 The court, however, re-
jected the argument by concluding: "It seems safe to assume that if the post-Meade [sic] Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on re-
peated applications for certiorari."120

Alternatively, Food Basket contended that a "practical continuity" theory should apply; that is, since substantially all the goods sold in Utah were processed and packaged outside the state, "the discrimina-
tory sales were in the flow of commerce and within the interdiction of 2(a)."121 The Court responded, by noting:

It is, of course, true if goods originating out of the state can be said to be shipped to the wholesalers in anticipation of orders from re-
tailers, or if a substantial part of the goods were shipped directly out of the state to the retailers as drop shipments, the discriminatory sales are within the scope of 2(a)....122

The court concluded that the case at bar did not involve such a factu-
tual situation. Even if the goods were shipped to wholesalers in antici-
pation of orders from retailers, however, the weight of authority clearly dictated judgment for the defendant.123 In the court's hypothetical, the sales of local wholesalers would be subject to the Robinson-Patman Act, but it would not remove the immunity of retailers in their sales to the public at large.124

The restrictive doctrine that retail goods reaching the shelves of a retail grocer are no longer in commerce was dispositive of Cliff Food Stores, Inc. v. Kroger, Inc.125 Cliff Foods was a small grocery chain operating three stores in the Dallas, Texas area. Kroger was the third largest retail grocery chain in the nation and had forty stores in the Dal-
las area, including four operating under the name of Bi-Lo. Bi-Lo sold the same products at lower prices than Cliff's stores, which suffered a resulting sharp drop in sales. Kroger, however, maintained its out-of-
state prices. Holding that the Robinson-Patman Act "was not intended to regulate retail sales to consumers,"126 the district court dismissed

119. Id. at 787.
120. Id.
121. Id. at 788.
122. Id.
125. 417 F.2d 203 (5th Cir. 1969).
126. Id. at 208.
Cliff's complaint. The Court of Appeals for the Fifth Circuit affirmed, although it refused to hold that all retail sales are beyond the purview of the Robinson-Patman Act. The court noted, in dictum, that not only may the goods remain within the flow of commerce if they are ordered by the retailer for the anticipated needs of specified customers, but they may also reenter the flow of commerce if the retailer makes deliveries across state lines.

The "come to rest" doctrine had its origin in the Schechter decision. Since the retailer usually does not hold the commodity for purposes of any further interstate transaction, the commodity comes to rest within the state. Schechter distinguished "stream of commerce" cases, such as Swift, as situations where the goods, after being shipped into a state, later go forward in interstate commerce. Yet Standard Oil Co. v. FTC distinctly held that a commodity could remain in interstate commerce after it crossed state lines for the last time. Furthermore, Standard Oil cannot be distinguished as a case where the commodity was stored in anticipation of orders from specified retailers. Likewise, distinctions between retail sales based on anticipated needs of specified customers and sales to the random public become completely arbitrary when the retail sale is controlled and financed by an interstate corporation. In both situations the retail sale, for purposes of the Robinson-Patman Act, should be recognized as being in commerce.

Conclusion

It is submitted that the retail sales of an interstate corporation to the public at large should be considered as "being in commerce." This Note, however, suggests that justice could best be served by making applicability of the Robinson-Patman Act's commerce requirement equal to that of the Sherman Act. Thus, any local price discrimination that adversely affected interstate commerce would be prohibited by the Robinson-Patman Act. Given the Supreme Court's current ten-

127. On appeal the plaintiff also argued that Kroger, in its capacity as an integrated wholesaler-retailer, violated the Robinson-Patman Act by selling products to stores in competition with the plaintiff at a lower price than to its other stores. The court of appeals held that the charges were not properly before the court since they had not been raised at the trial. Id. at 208 n.3. Even if they had been properly raised, however, it is difficult to see how the plaintiff could have prevailed in his claim of injury to secondary line competition. The plaintiff was not a "purchaser" within the meaning of the act, and therefore had no standing to sue. Becker v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965).

128. 417 F.2d at 210.
129. Id. at 210 n.4.
131. Id. at 543.
dency to find that even remote local restraints substantially affect inter-
state commerce, the deficiencies of the Robinson-Patman Act's com-
merce requirement would be totally eliminated.

The Sherman Act was not always covered with the judicial gloss
that has so effectively increased its scope. The act began its long his-
tory in the courts with one of the most restrictive interpretations imagin-
able. The federal judiciary, however, have come to acknowledge
that Congress wanted to exercise all of the power available to it when it
enacted the Sherman Act. Recognizing that "the federal commerce
power is as broad as the economic needs of the nation," the courts
have greatly increased the scope of the Sherman Act.

Congress also enacted the Robinson-Patman Act in the belief that
its commerce provision was as broad as was constitutionally possible. Nor
should the difference in wording between the two statutes be con-
trolling, especially in light of congressional intent. Neither the legisla-
tive history of the Robinson-Patman Act nor its wording compels the
restrictive interpretation the courts have given it. Just as the Sher-
man Act underwent a process of judicial amendment, so also should the
Robinson-Patman Act be more liberally—and realistically—construed
to remedy its inadequacies.

Its deficiencies are obvious, and have been discussed at length. First, the "two-plant" doctrine makes it possible for a corporation do-
ing business in interstate commerce to make discriminatory interstate
sales with impunity. There is absolutely nothing in the wording or
legislative history of the act to compel this result. Second, and more
important, the Robinson-Patman Act is inapplicable to most cases in-
volved discriminatory retail sales. Ironically, chain stores, those
menaces that necessitated the enactment of the Robinson-Patman Act,
have been able to employ their predatory practices at the retail level—

137. H.R. REP. No. 2287, 74th Cong., 2d Sess. 6 (1936).
138. It may be argued, of course, that a construction of the clause "where either
or any of the purchases involved . . . are in commerce" to mean "where either or
any of the purchases involved . . . affect commerce" would render that clause mean-
less. That is, because virtually every transaction has some effect on interstate com-
merce, both purchases would almost always be "in commerce" under the proposed inter-
pretation. The answer to this argument is that, in 1936, "in commerce" and "affect
commerce" were practically synonymous. See text accompanying notes 44-47 supra.
Since the meaning of the latter term has been broadened, it makes no sense to argue that
the former term should remain static.
139. See text accompanying notes 95-103 supra.
140. See text accompanying notes 104-29 supra.
because of the judicial interpretation of the legislation that was designed to regulate them.

It should be obvious that the inadequacies of the act stem from the failure of the courts to distinguish between entities which are wholly intrastate and those which do business within and without a state. Vast interstate enterprises have been able to remove themselves from the restrictions imposed by the Robinson-Patman Act by successfully claiming that their sales were not made "in commerce." In short, the act has been bound to conceptions of commerce which were repudiated 30 years ago. The primary victims are the businessmen it was designed to protect.

*Peter W. Marshall*

* Member, Second Year Class.