Uniformity of Taxation

It has been said that "logic and taxation are not always the best of friends". In no field of taxation is the truth of this oft-cited quotation more apparent than in the attempts of the states to secure "uniformity" of taxation. Let us first consider the provisions themselves, without the benefit of judicial interpretation, before losing ourselves in the intricate webs of "logic" spun by the courts.

Since the middle of the nineteenth century, the people of most of the states have imposed limitations upon the power of their legislatures to tax. As most of these provisions contain some derivative of the word “uniform”, they are usually denominated as uniformity clauses. As the states have had a common history in most legal developments, it is not extraordinary that these provisions grew out of common conditions. During its period of agricultural development, the wealth of the United States consisted chiefly of land and a small amount of tangible personal property. The most facile way in which the various state governments could secure the necessary funds for their support was to levy a general property tax, requiring each property owner to pay a certain proportion of the value of his property in taxes. When the country passed into its industrial stage this type of taxation was no longer feasible. More and more of the wealth of the country consisted of intangibles and the revenue of the states showed a marked decline. Efforts of the legislatures to reach this property by a general ad valorem tax did not produce the requisite amount of revenue. As a result, the states began taxing intangibles, incomes, inheritances, brokers’ loans, bonds, and stocks at a flat rate and exempting them from all other taxes. In short, the classified property tax developed. Not only was tangible and intangible property taxed in a different manner but also different kinds of tangible property was classified for purposes of taxation. This met with opposition both from those not in a favored position and by those who felt that the practice of classifying might become so widespread that taxes would be levied in such a way as to favor particular persons or classes. As a result, the state constitutions were amended, during the latter half of the nineteenth century, to include the principle that “all taxes shall be uniform” or that “all taxes shall be assessed according to value”.

Restrictions Imposed by the Uniformity Provisions

As all these provisions attempt to equalize the tax burden, they are usually lumped together, although they differ somewhat in their wording. With respect to their limitations on inequality of taxation, the state constitutions may be conveniently placed into four categories. First, those state constitutions which do not contain a provision regulating the manner in which the legislature may apportion the tax burden. Second, those constitutions that deny to the legislature the power to classify subjects for purposes of taxation. Some of these last-named provisions refer to “all taxes” while others limit the operation of the clause to property taxes. Some require the taxes to be “uniform” while others require them to be


3. See note 2 supra.


levied according to a "uniform rule" or method or at a uniform rate. In addition to or in lieu of such provisions, some constitutions have the requirement that all taxes on property shall be levied according to value.

A third group of constitutions permit the legislature to classify taxable subjects by providing that the taxes, to which the limitations applies, shall be "uniform on the same class of subjects" or "property". The fourth group of constitutions have provisions, frequently adopted for the purpose of relaxing a previous limitation found unworkable specifically permitting certain types of property to be taxed differently than other property.

However, such a classification would be meaningless without reference to the specific ways in which the tax problems arise. As will presently be seen, clauses similar in language have been given varying interpretations. Hence, any intelligent discussion must concern itself with a study of the cases so that it will be possible to determine just what limitations they place upon the legislatures' exercise of the taxing power. In so doing, there will be no attempt made to determine what kinds of taxes are subject to the operation of the clause.

Assuming that a certain type of tax must not contravene the uniformity provision, the state is faced with the problem of keeping its fiscal policy within the bounds of its constitutional limitations on taxation, and thus, various fundamental questions must be answered before a specific tax can be levied. May the legislature exempt certain kinds of property from taxation or must it tax all property? May it exempt property from taxation according to the quantity of the thing taxed? May it tax different kinds of property at different rates? May it vary the rate of taxation according to the quantity of the thing taxed? May property be classified for purposes of taxation, specific subjects by providing that the taxes, to which the limitations applies, shall be "uniform on the same class of subjects" or "property". The fourth group of constitutions have provisions, frequently adopted for the purpose of relaxing a previous limitation found unworkable specifically permitting certain types of property to be taxed differently than other property.

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valuation? Some state courts have answered all these questions in the negative; some have answered all of them in the affirmative; while others have answered some in the affirmative and some in the negative.

The first question to be answered is whether the legislature must, in levying a tax, tax all taxable property in the taxing district. This problem is, in many states, determined by the exemption provisions of the various state constitutions.\(^\text{15}\) However, we shall only consider here the extent to which the uniformity provisions forbid the exemption of property from the onus of taxation. The answer to this question in a particular state will depend, in a large degree, upon the language of its uniformity provision, which we have seen varies considerably in the different states.\(^\text{16}\) For example, constitutional provisions requiring taxes to be uniform "upon the same class of subjects"\(^\text{17}\) would permit the exemption of property not similarly situated with the property that is taxed.\(^\text{18}\) Even in some of the states having a provision assessing all property taxes in exact proportion to the value of such property, the constitutional requirement is interpreted to mean that the legislature will have satisfied this requirement if it taxes all property of the same class.\(^\text{19}\) In such a case, the only question to be determined is whether the classification is a reasonable one.\(^\text{20}\) In other states, having a like broad provision, the courts have construed this provision as prohibiting all exemptions beyond those expressly permitted by the constitution.\(^\text{21}\) Under such a construction all the wealth in the state must be taxed, and a state could not, for example, tax realty and not personalty.\(^\text{22}\) However, this could be done in a state where classification of property to determine its taxability is permissible.\(^\text{23}\) In this last-mentioned type of state, property devoted to one use may be taxed, while property devoted to another use may be exempted from the operation of the tax;\(^\text{24}\) businesses may be classified for purposes of taxation according to the amount of their gross receipts;\(^\text{25}\) and numerous other classifications to determine taxability are permissible. The only requirement is that there be a reasonable basis for the exemption of a certain class.\(^\text{26}\)

A further problem arises, assuming that some kinds of property may be taxed while others may be exempted from taxation, as to whether the uniformity provisions forbid the classification of the same kinds of property

\(^\text{15}\) State constitutions may be placed in three categories in respect to their exemption provisions. First, there are those state constitutions which have no specific exemptions. Second, those constitutions permitting the legislature to grant general exemptions. Third, those constitutions permitting specific exemptions enumerated in the constitution. See 2 Cooley, op. cit. supra note 14, at c. 14, for a discussion of this problem.

\(^\text{16}\) See p. 729 supra.

\(^\text{17}\) See note ii supra.


\(^\text{19}\) McPherson v. Fisher, 143 Ore. 615, 23 P. (2d) 913 (1933).


\(^\text{22}\) Cobb v. Elizabeth City, 75 N. C. 2 (1876).


\(^\text{26}\) Lee v. State Tax Comm'r's of Alabama, 219 Ala. 513, 123 So. 6 (1929).
for the purpose of determining its taxability according to its quantity. This problem most frequently arises in the imposition of an income tax, where the legislature attempts to exempt businesses or individuals, earning below a fixed income, from the burden of the tax. Most states have held that such a classification is valid, but a minority have held to the contrary.

Attempt has also been made to tax property, according to its amount or kind, at different rates. Such an attempt is held to contravene the uniformity provisions of those states, interpreted as requiring that all property be taxed, the theory being that all property in the state must be taxed and at the same rate. In such a case an attempt to tax realty and personality, for example, at different rates would be held invalid. So, also, would an attempt to tax a business having a greater amount of stores at a higher rate than a business having a lesser amount. Other states, while permitting classification to determine whether the subject is taxable, will not permit classification to determine the rate of taxation. Still other states, while permitting different kinds of property to be taxed at different rates will not permit the rate of taxation to vary with the quantity of the thing taxed. Thus, a graduated income tax would be held to contravene the uniformity provisions of these states. A third group of states, whose constitutional provisions require that all taxes shall be uniform "upon the same class of subjects", permit classification, both as to kind and quantity of the thing taxed, to determine the rate of taxation, so long as the classification has some basis in fact.

A further limitation imposed by the uniformity provisions is that upon valuation and assessment of property taxed. The method of valuation of property for taxation need not be uniform, so long as no discrimination results. However, in those states requiring that different classes of property or all property be taxed at the same rate, the method of valuation must not result in one class of property being taxed at a higher rate than another. In other words, a result must not be reached by the method of valuation which would tend to bring about discriminations otherwise forbidden.

While the results reached in individual cases are of extreme importance, an analysis would be impossible without classifying these results in some manner. For purposes of convenience, the results reached, under the various uniformity provisions, may be placed in the following categories. First, there are those provisions which place no greater restriction upon the taxing power of the states than does the "equal protection" clause. These provisions give the legislature a relatively free hand in classifying property for purposes of taxation. The legislature may, without violating this provision, classify property according to kind and quantity, both to determine

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27. See, for example, In re Opinion of Justices, 270 Mass. 593, 170 N. E. 800 (1930).
32. Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934); Knox v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925).
35. Waring v. Mayor & Alderman of the City of Savannah, 60 Ga. 93 (1878); Reed v. Bjornson, 191 Minn. 254, 253 N. W. 102 (1934); Knox v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925).
its taxability and to determine the rate of taxation of subjects declared to be taxable. A second group of provisions are interpreted as forbidding classification for any purpose. Under these decisions the legislature may not classify property either to determine taxability or the rate of taxation of taxable subjects. All property in the state must be taxed and at the same rate. A third group permits classification into taxable and non-taxable, but does not permit classification for the purpose of determining the rate of taxation. Still another group permits classification not only for the purpose of determining taxability, but also permits a varying rate of taxation to be applied to different kinds of property. This group, however, will not permit the rate to vary where the classification depends upon quantity. Still another group permits classification as to kind, both to determine taxability and rates of taxation, but will not permit a classification based upon quantity to determine either taxability or the rate of taxation of subjects declared to be taxable.

Though the results reached by the courts, in interpreting the various clauses, are inharmonious, at least two conclusions may be reached by viewing them as a whole. First, the uniformity clauses of the majority of the states, whether or not they do insure uniformity of taxation, do impose a limitation upon the taxing power of the states in addition to that imposed by the "equal protection" clause, in that they will not permit, in varying degrees, as much classification of taxable subjects as does this clause. If "uniformity" means a lack of classification of the taxable, then, these state constitutions, as interpreted by their courts, do insure this to a greater or less degree, depending upon how great is the restriction imposed upon the legislature to classify for purposes of taxation.

It is also apparent, by examining the conclusions reached, that the results are inconsistent with each other. If all the clauses were adopted for the same purpose, then, all the clauses should be permissive only of the same interpretation. Instead we have clauses expressly permitting varying degrees of classification. If these conclusions were to be consistent with each other, then, they should either permit all "reasonable" classification or forbid classification altogether. Their failure to do this has created utter confusion.

It is also well to note that those courts interpreting their constitutions to permit classification of tax subjects to determine their taxability but not for the purpose of determining the rate of taxation are inconsistent with themselves. It is understandable that the constitutional mandate may or may not permit classification, according as the framers of the constitution thought that this was consonant with a preconceived theory of apportioning


37. ALABAMA, In re Opinion of the Justices, 234 Ala. 358, 175 So. 690 (1937); ARIZONA, Berryman v. Bowers, 31 Ariz. 56, 259 Pac. 361 (1926); ARKANSAS, Sims v. Ahrens, 167 Ark. 557, 271 S. W. 720 (1925); KENTUCKY, Raydure v. Board of Supervisors, Estill Cy., 183 Ky. 84, 209 S. W. 19 (1919); LOUISIANA, St. Anna's Asylum v. Parker, 109 La. 592, 33 So. 613 (1903); MASSACHUSETTS, Opinion of the Justices to the Senate, 195 Mass. 607, 84 N. E. 499 (1908); NEW HAMPSHIRE, Williams v. State, 81 N. H. 341, 125 Atl. 661 (1924).

38. MONTANA, Hauser v. Millet, 37 Mont. 22, 94 Pac. 197 (1908). This footnote is not exhaustive.

the tax burden. However, how may a constitution permit classification into taxable and non-taxable and yet not permit the same classification for purposes of determining the rate of taxation? If the legislature may exempt certain kinds of property altogether, why may it not tax that same kind of property at a lower rate than it does all other property? If the injury to the majority of the taxpayers, by permitting certain subjects to be taxed at a lower rate, is that they are required to contribute more proportionately to the support of the government than do those paying a lower rate, how much greater the increased burden if these subjects do not bear any part of the tax burden. This result cannot be consistent with any theory of taxation. Of course, if the intent of the framers of the constitutions was so clear that this result were unavoidable, there would be little room for criticism, since it is not the province of the courts to create a new constitution but to interpret the document before them so as to give effect to the intent of its framers. However, in view of the fact that the constitutions either forbid classification altogether or permit classification in very broad language such a result is deplorable no matter what one's predilections are as to how the tax burden is to be apportioned.

Uniformity Defined

Uniformity has been given a number of varying definitions by the courts. It has been defined as the imposition of like taxes upon all who are subject to them, uniformity of tax burden, taxation according to value, equality of burden and others of like import. All of which seems to mean that all the individuals in the state must contribute to the support of the government in proportion to their wealth. In other words, if the individual, whose wealth has a money value of one thousand dollars, must contribute ten dollars to the support of the state government; an individual, whose wealth has a money value of five hundred dollars, must contribute five dollars to the support of that government. Each is to contribute to the support of the government and in exact proportion to his total wealth. Since "uniformity", then, is interpreted to mean an equal apportionment of the tax burden, the only way to realize this result is to prohibit all classification of taxable subjects. If wealth is classified so that certain kinds are taxable and others are not taxable, the owner of the wealth which is taxed, is contributing more than his share to the support of the government in proportion to his wealth, while, by the same standard, the owner of the non-taxable wealth is contributing less than his share. If the wealth of the state is classified so that the different categories, thus established, pay varying rates of taxation, the owner of the wealth paying the lower rate, contributes less than his share, while the owner of the wealth paying the higher rate, contributes more than his share.

"Uniformity", then, must mean the total absence of classification for purposes of taxation. If all the clauses were adopted to achieve this goal, they would only be permissive of this interpretation. It has already been sufficiently indicated that this has not been the result, the different states permitting varying degrees of classification, depending upon the phraseology of the constitutions and the varying interpretations thereof by the courts. Even those states applying the most stringent rule permit classifica-

40. See note II supra.
41. State v. Street, 117 Ala. 203, 23 So. 807 (1898).
42. Evans v. McCabe, 164 Tenn. 672, 52 S. W. (2d) 617 (1931); Chicago & N. W. Ry. v. State, 128 Wis. 553, 108 N. W. 557 (1906).
44. Pingree v. Auditor General, 120 Mich. 95, 78 N. W. 1025 (1899).
tion in the case of taxes not denominated “property taxes”. If the principle of “uniformity” is to be taken as lack of classification, then, the courts should, at least, restrict the power of the legislature to classify as far as possible without doing violence to the language of the constitutions. Instead, the courts, as a whole, have construed their constitutions so as to impose the least possible restriction of that kind.

From this it seems that “uniformity” does not mean absence of classification, as may have been naively presumed from the definitions given by the courts. Does it mean, then, that classification is to be restricted but is not to be totally taboo? If so, where shall the line be drawn? What type of classification will achieve the desired end, presuming that there is a unanimity of goal? Will one type of classification prevent the achievement of uniformity, while another does not? If so what type of classification is desirable and which not? Shall the standard be the displeasure, or lack of it, which a particular classification occasions the courts? If some type of classification is permitted, what other practical standard can be used to determine its permissibility, other than its reasonableness? And if this is to be the standard, the uniformity clauses will have lost their efficacy, in view of the interpretation given the “equal protection” clause of the Federal Constitution by the Supreme Court.

If the principle of uniformity is not one requiring an equal apportionment of the tax burden, what then does uniformity mean? Is it merely a check on the legislature’s discriminatorily exercising its power to apportion the tax burden, since every exercise of the power of taxation necessarily entails the selection of the objects of taxation? If so, these clauses are superfluous, since the Fourteenth Amendment of the Federal Constitution effectively prevents class legislation. What then is their purpose? They seem to have none, except to harass the legislators in their efforts to arrive at a sensible solution to the problem of how to apportion the tax burden.

The only way that the decisions may be reconciled with the principle of uniformity as originally drafted in the state constitutions, is that the courts, realizing its impracticability, have attempted to temper its force. Changing economic conditions have had their effect upon the courts without having any effect upon the hard language of the constitutions—hence the resultant confusion. Even in this confusion, however, there is no unanimity. Some courts apply stricter tests than others whose constitutions contain the same language. Nor could this be explained by the fact that clauses adopted at the same time permit varying degrees of classification. The only possible conclusion is that there is no all-pervading principle of uniformity; or, if there is, the courts do not heed its mandate.

CONCLUSION

“The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abil-

45. For example, see Wheeler v. Weightman, 96 Kan. 50, 149 Pac. 977 (1915), which only restricts classification in the case of property taxes. See also Pingree v. Auditor General, 120 Mich. 95, 78 N. W. 1025 (1915). This is apparent in the pains to which these courts have gone to find an income tax is a property tax in order to find that is graduated feature violates the uniformity clause. Culliton v. Chase, 174 Wash. 363, 25 P. (2d) 81 (1933).
46. See p. 733 supra.
47. See p. 733 supra.
48. Compare language of clauses, p. 729 supra, with results reached by the court, pp. 732, 733 supra.
49. See p. 734 supra.
ities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation, is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in respect to their respective interests in the estate.”

This theory of taxation is the foundation of the principle of uniformity as drafted into the state constitutions. It was thought that a system of taxation, requiring each to pay in proportion to the amount of his wealth, was a theory embodying the true principles of ability to pay. However, equality of sacrifice rather than equality of contribution is the modern idea. The equity and fairness of this theory in its broadest sense is apparent and obvious, when we reflect upon the vast fortunes accumulated as the result of especially advantageous opportunities and facilities, not possessed by the people in general. It works no injustice or harm to those thus fortunately situated, does not injuriously affect production or industrial agencies, and relieves in a measure those with lesser opportunities, and those to whom taxation has always been an extreme burden. Anyone is privileged to claim that this principle is not, strictly speaking, a legal theory of taxation, but this must not be equated with a denial of their judicial recognition as significant in deciding questions of tax classification. The courts early in this century began to realize the efficacy of this principle and the number of them is constantly growing.

Since, therefore, the underlying principle of uniformity of taxation is equality of contribution, and not equality of sacrifice, it would seem that this principle has become archaic. Hence, the constitutional provisions based on this principle have also become archaic. One of two solutions is possible, either these provisions of the state constitutions must be repealed through the generally accepted means of so doing or they must be repealed through judicial interpretation. In other words, because changing conditions have rendered them pernicious, the uniformity principle should no longer be part of the organic law of the states. If there is a fear that such action would open the door to discriminatory taxation, the “equal protection” clause of the Federal Constitution forms an effective bar to this eventuality. The principle of uniformity is no longer practical because the industrial situation upon which it was predicated has ceased to be. Rules of taxation founded upon outmoded economic principles become valueless and are sometimes pernicious.

E. L.

Brokerage Provisions of the Robinson-Patman Act

The Robinson-Patman Act was enacted by Congress in an effort to abate certain destructive trade practices hitherto permitted by loopholes in

50. 3 SMITH, WEALTH OF NATIONS (1828) 368.
52. See, for example: Citizens' Tel. Co. v. Fuller, 220 U. S. 322 (1913); State v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925); Hilger v. Moore, 56 Mont. 146, 182 Pac. 477 (1915).

the Clayton Act.\(^2\) Chief among these practices was price discrimination, and an exhaustive investigation by the Federal Trade Commission disclosed that one mode of price discrimination was the granting of purchase discounts in the form of brokerage fees.\(^4\) Payments of brokerage were made either directly to the buyer or to someone controlled by him.\(^8\) Particularly vicious was the fact that these rebates did not appear as reductions in the list price but were concealed as brokerage fees.\(^5\) Moreover, this preferential treatment was accorded only those purchasers who, because of their tremendous purchasing power, were able to command it;\(^6\) and the inevitable consequence was that small buyers were placed at a competitive disadvantage.\(^7\) It was to prevent secret rebates and to remedy the inequality resulting from this practice that section 2(c) was incorporated into the Robinson-Patman Act.\(^3\)

Section 2(c)\(^9\) provides in substance that no seller shall pay any sum as brokerage, except for services rendered, either to the buyer or to the

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5. Hearings before Committee on the Judiciary on H. R. 8442, H. R. 4995, H. R. 5062, 74th Cong., 1st Sess. (1935) ser. 10, p. 62 et seq. "If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller." Biddle Purchasing Co. v. Federal Trade Commission, 96 F. (2d) 687, 692 (C. C. A. 2d, 1938).


7. "By reason of the unfair practices implied by the sellers granting a . . . brokerage fee . . . large organizations have been able to sell at prices so low that the independent dealer could not continue in business." Statement of Senator Robinson, 80 CONG. Rec. 6277 (1936).

8. In its report to the House, the House Committee on the Judiciary said, commenting on section 2(c), "Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." H. R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) IV. "One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers." Biddle Purchasing Co. v. Federal Trade Commission, 96 F. (2d) 687, 692 (C. C. A. 2d, 1938). See also NORWOOD, op. cit. supra note 1, at 128.

9. 49 Stat. 1527 (1936), 15 U. S. C. A. § 13 (c) (Supp. 1938). "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary wherein such intermediary is acting in fact or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." Although section 2(c) governs brokerage paid by the buyer to the seller or the seller's agent, and by the seller to the buyer or the buyer's agent, this Note will deal only with cases in the latter category. For articles dealing specifically with this section see Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act (1940) 8 Geo. Wash. L. Rev. 511; Notes (1938) 6 Geo. Wash. L. Rev. 203; (1939) 34 Ill. L. Rev. 339. Recent case reports may be found in (1939) 27 Geo. L. J. 384; 7 Geo. Wash. L. Rev. 910; (1938) 51 Harv. L. Rev. 1303, 24 Iowa L. Rev. 179; (1939) 24 Wash. U. L. Q. 607; (1938) 47 Yale L. J. 1207.
buyer's agent. As originally presented to the House Committee on the Judiciary the brokerage provision did not contain the exception for services rendered, but was simply a flat prohibition. The exception was added by the Committee who feared that an absolute prohibition would be unconstitutional, and also at the urging of various co-operative buying associations. The result is that section 2 (c) now has the doubtful distinction of being the most ambiguous section of the Act.

I. SECTION 2 (c) BEFORE THE COURTS

As presently worded, section 2 (c) does not prohibit the granting or receiving of brokerage fees where services have actually been rendered by the one receiving the brokerage to the one granting it. The legitimacy of any brokerage transaction therefore must be fundamentally predicated on the actual rendering of services, and it consequently becomes necessary to determine just what services are contemplated by the section. As was stated by Congressman Utterback, one of the House managers of the bill, the exception "refers to true brokerage services rendered in fact for the party who pays for them . . . ." Such services would apparently include finding a purchaser for the seller (or a seller for the purchaser), furnishing marketing advice, and so on. However, "while in certain phases of commerce the interests of a buyer and seller may be identical", and a broker who serves one necessarily confers a benefit on the other, nevertheless, the incidental service rendered to the latter is not sufficient to justify the payment or receipt of brokerage. In other words, the services rendered must be in the nature of those services customarily rendered by a broker to his client. Thus the mere fact that the buyer's broker contracts to purchase from the seller does not entitle the broker (or, a fortiori, the buyer) to a brokerage fee from the seller. This was the basis of the decision in Oliver Bros. v. Federal Trade Commission where the court sustained the finding of the Commission that the purchasing agent who rendered services to the buyer, with whom he was under contract, did not actually serve the seller from whom he made purchases, and therefore

10. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction, or to an agent, representative, or other intermediary . . . , subject to the direct or indirect control, of any party . . . other than the person by whom such compensation is so granted or paid." Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936).
14. This Note will not include a discussion of the constitutionality of section 2 (c), although that question has been raised in the cases to be considered. For such a discussion see Note (1939) 34 Ill. L. Rev. 319, 330-331; (1939) 27 Geo. L. Rev. 384.
15. 80 Cong. Rec. 9418 (1936).
16. PATMAN, op. cit. supra note 1, at 103.
17. "While such services resulting in sales by the sellers, . . . , are of undoubted benefit to them, this benefit is incidental and is an entirely different thing from the rendering of services by an agent responsible to the seller as principal." Oliver Bros. v. Federal Trade Commission, 102 F. (2d) 763, 770 (C. C. A. 4th, 1939).
18. PATMAN, op. cit. supra note 1, at 106.
20. "And we think that the commission was correct . . . . The services . . . are services rendered the buyers under their contracts and are services rendered in the purchase and not in the sale of the goods." Oliver Bros. v. Federal Trade Commission, 102 F. (2d) 763, 770 (C. C. A. 4th, 1939).
held that the brokerage paid by the latter was illegal. If the Commission and the court are right in their interpretation of the facts, then the ultimate decision is undoubtedly correct, since section 2 (c) clearly states that no brokerage transaction is legitimate unless services have been rendered. It appears, therefore, that this is the first necessary element of a legitimate brokerage transaction: that actual services must be rendered by the broker to the one paying the commission.

But assuming that the necessary services have been rendered, does it necessarily follow that brokerage fees may be granted or accepted? It should be noted that by its structure section 2 (c) imposes a prohibition against such fees, but excepts from that prohibition fees given for services actually rendered. There is at least a strong implication here that brokerage may be paid in the latter case, and this is the construction put upon the words of the section by Congressman Celler of the House Committee on the Judiciary. Needless to say it is also the view urged by the opponents of the Act. But however much the phrasing of the section might justify such an inference, an examination of the Congressional utterances on the subject indicates that the words are not intended to convey the meaning they imply. And where there is uncertainty as to the precise meaning of a statute, the legislative intent takes precedence over the literal import of the words. In its report to the House, the Conference Committee stated categorically that this subsection "prohibits its (i. e. brokerage) allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other." There is in this statement no mention of the exception for services rendered; the prohibition is absolute. This interpretation of the section is entirely in harmony with the Congressional desire to eliminate rebates and discounts in the guise of brokerage fees. The intention of Congress as evidenced by the foregoing and similar expressions has recently been given effect in the case of Great Atlantic & Pacific Tea Co. v. Federal Trade Commission.

In that case the buyer, a large grocery chain, made its purchases through a wholly owned subsidiary which received from the sellers what amounted to

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21. But even if, as a matter of fact, services were actually rendered, the decision would still be correct since the commission was passed on to the buyers. See note 48 infra.
22. "Giving to the words their grammatical and literal meaning, it may be contended that the prohibition of this brokerage provision falls to the ground whenever the requirements of these words are fulfilled" (italics added). MONTAGUE, THE ROBINSON-PATMAN ACT AND ITS ADMINISTRATION (La Salle Extension Univ., 1937) 26.
23. 80 CONG. REC. 9820 (1936).
28. The purpose of section 2 (c) has been thus succinctly stated: "The provision is designed to prevent secret rebates by means of payments of purported commissions which actually constitute differentials in price. . . ." ALLEN, A DISCUSSION OF THE ROBINSON-PATMAN ACT (Nat. Wholesale Druggists Ass'n, 1937) 8. "An examination of the legislative history unmistakably discloses that Congress was bent upon stopping at its source the evil of granting a rebate in the guise of a brokerage commission." Oppenheim, supra note 9, at 518.
a brokerage fee;\footnote{The Atlantic and Pacific Tea Co. wholly owned a subsidiary purchasing agency, the Atlantic Commission Co., through which the chain made most of its purchases. Prior to the passage of the Robinson-Patman Act the Commission Co. was granted brokerage fees by the sellers; thereafter, and pending a judicial determination of the legality of such brokerage, purchases were made on a net basis with the amount of the commissions deposited in escrow. See Zorn and Feldman, \textit{op. cit. supra} note 1, at 206.} and the fee was passed on to the parent-buyer. The buyer claimed that the fee was legitimate because the subsidiary furnished valuable services to the sellers. The court, however, refused to entertain the proposition that the "services rendered" exception should be construed to permit a brokerage fee to be paid by the seller to the buyer or his agent.\footnote{If valuable and compensable services are actually rendered by the buyer he might be entitled to a proportionate reduction in the \textit{net selling price} under section 2 (a)\footnote{“We are of the . . . opinion . . . that paragraph (c) expresses an absolute prohibition of the payment of brokerage . . . to the buyer upon the buyer’s own purchases.” Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 106 F. (2d) 667, 673 (C. C. A. 3d, 1939). Norwood, \textit{op. cit. supra} note 1, at 129. And see note 27 \textit{ supra}.} which permits price differentials making only due allowance for differences in the cost of manufacture, \textit{sale}, or delivery. In this connection the prediction has been made that “. . . a seller will probably be justified in basing a difference in price upon the fact that in making a particular sale, he is not required to utilize all departments of his business.” Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 98 F. (2d) 361, 364 (C. C. A. 5th, 1940).}{\footnote{The suggestion has been made that although the cases thus far litigated have been correctly decided as a matter of statutory interpretation, nevertheless, the statute itself may contravene well-settled principles of marketing. Oppenheim, \textit{supra} note 9, at 529.}}

In the somewhat similar case of \textit{Webb-Crawford Co. v. Federal Trade Commission}\footnote{Although there was no remission to the buyer corporation of the fees received by the brokerage firm, the court based its decision on the intimate relationship existing between the members of the firm and the buyer.}{\footnote{To grant that buyers . . . do in fact render a service to the seller which entitles them to that brokerage allowance, is to permit the complete nullification of the entire brokerage section of the Act . . . For it is that widespread practice which it is the intent and purpose of the brokerage clause to prohibit. The whole legislative history of this clause unconditionally supports this position.” Patman, \textit{op. cit. supra} note 1, at 106. To the same effect, see Oppenheim, \textit{supra} note 9, at 516 \textit{et seq.} The fact that an opposite view was expressed by one minority member of the Judiciary Committee (see note 23 \textit{ supra}) would seem to cast no material doubt as to the intent of Congress on this matter. But see (1938) 51 Harv. L. Rev. 1303.}} the court went even further, admitting that services were performed by the broker but denying the legitimacy of the brokerage transaction. The reason for so holding was that the buyer was the ultimate and actual beneficiary of the commission.\footnote{Since such a payment would amount to a concealed purchase discount and would therefore defeat the purpose of section 2 (c), these cases seem properly decided.}{\footnote{Oppenheim, \textit{supra} note 9, at 529.}}

The effect of the prohibition, however, need not necessarily be to deny to the buyer all compensation for services which he may render to the seller. If valuable and compensable services are actually rendered by the buyer he might be entitled to a proportionate reduction in the \textit{net selling price} under section 2 (a)\footnote{To the same effect, see Oppenheim, \textit{supra} note 9, at 529.} which permits price differentials making only due allowance for differences in the cost of manufacture, \textit{sale}, or delivery. In this connection the prediction has been made that “. . . a seller will probably be justified in basing a difference in price upon the fact that in making a particular sale, he is not required to utilize all departments of his business.” Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 98 F. (2d) 361, 364 (C. C. A. 5th, 1940).}{\footnote{“To grant that buyers . . . do in fact render a service to the seller which entitles them to that brokerage allowance, is to permit the complete nullification of the entire brokerage section of the Act . . . For it is that widespread practice which it is the intent and purpose of the brokerage clause to prohibit. The whole legislative history of this clause unconditionally supports this position.” Patman, \textit{op. cit. supra} note 1, at 106. To the same effect, see Oppenheim, \textit{supra} note 9, at 516 \textit{et seq.} The fact that an opposite view was expressed by one minority member of the Judiciary Committee (see note 23 \textit{ supra}) would seem to cast no material doubt as to the intent of Congress on this matter. But see (1938) 51 Harv. L. Rev. 1303.}}
business and, in good faith and as a matter of sound accounting practice, does not include the cost of the unrequired department in calculating selling costs on such sale." Thus where a seller, having no regular selling department, is not required to utilize brokerage services, the resulting saving may be legally reflected in the selling price, provided an opportunity to deal on a similar basis is afforded all buyers. This result could readily be justified as coming within the desire of the framers of the bill to guarantee to chain stores and other large buyers those normal and legitimate savings which result from their integrated production and distribution methods. But it should be stressed that if such an allowance be permitted it would appear as a reduction of the list price of the goods sold, based on the actual value to the seller of the services rendered. Moreover, in determining the validity of any such allowance, the courts will undoubtedly closely scrutinize the services for which the allowance is claimed to be sure that they are actually compensable within the meaning of the Act. Allowing the buyer thus to benefit from the services is a thing entirely different from permitting the parties to pretend to maintain a uniform price whereas in fact the buyer is being granted a discount in the form of a commission.

Section 2 (c) has been before the courts in one other case, Biddle Purchasing Co. v. Federal Trade Commission. In this case the Federal Trade Commission had issued a cease and desist order to a purchasing company which had been receiving commissions from sellers and passing them on to buyers for whom it was agent. In appealing from the order of the Federal Trade Commission the purchasing company contended that it had rendered valuable services to the sellers as well as to the buyers and that it was therefore entitled to a brokerage fee. The court dismissed this argument on the ground that even if services were actually rendered to the sellers, the fact that the commission was passed on to the buyers removed the transaction from the exception and placed it squarely within the prohibition of section 2 (c).

II. THE DECISIONS ANALYZED AND DEFENDED

In all of the cases just considered, decided on the basis of section 2 (c), the court held that the brokerage transactions were illegal, although in only one case did the court find conclusively that no services were rendered, and in another even admitted that services had been rendered. Moreover, even in the former case the finding of facts may well be criticized, and there is some evidence that the broker did perform valuable services for the sellers. It follows, therefore, that the mere rendering of services is not

38. Ibid., n. 60. But if the seller has a regularly employed sales force, the expense of which is static and is computed in the net selling price, there can be no allowance even though the buyer deals directly with the seller without the intervention of a broker. The reason is that the seller has effected no saving by dispensing with brokerage services.
40. 96 F. (2d) 687 (C. C. A. 2d, 1938), cert. denied, 305 U. S. 634 (1938).
41. Id. at 691-692.
44. "Briefly stated, this evidence is to the effect that these sellers furnish Oliver lists and prices of what they have to sell; that in sending out circulars to its subscribers, Oliver brings about a sale of the goods more satisfactorily than a broker would do..." Oliver Bros. v. Federal Trade Commission, 102 F. (2d) 783, 785 (C. C. A. 4th, 1939). See (1938) 24 IOWA L. REV. 179, 180.
sufficient in itself to legalize the brokerage transaction. The true significance of the cases seems to lie in the fact that in all four of them the brokerage fee was passed on to the buyer. The conclusion is obvious and irresistible that this was the controlling factor that induced the courts to condemn the brokerage transactions. All of the cases contain language which strongly suggests that it is the ultimate remission of the brokerage to the buyer that renders the transaction illegal. For example, Judge Parker, in the Oliver case, said, “And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer, . . .” Similar expressions can be found in the other cases. Even in dissenting from the majority of the court in the Biddle case, Judge Swan said, “In other words, if Biddle Company kept the commissions paid by the sellers, the statute would not forbid it.” It is also highly significant that the Federal Trade Commission, which found in every case that the purchasing agency rendered no service to the sellers, ordered the agencies to cease and desist receiving from the sellers commissions intended ultimately for the buyers, and ordered the sellers to stop paying only those commissions. The Commission did not impose an absolute prohibition against the brokerage transactions despite the fact that it had found that no services had been rendered, but only barred those commissions destined for the buyers. Under this interpretation of the section there appear two requisites for the legality of brokerage fees: (1) the broker must render actual services to the person paying the fee, and (2) the broker must not pass the fee on to the buyer. Perhaps this is a strained construction of the words of section 2 (c), but it is certainly a construction that is in accord with the underlying purpose of that section: namely to prohibit the unfair practice whereby a buyer receives a concealed purchase discount in the form of a brokerage fee. Moreover, although such a construction prevents the buyer from receiving a brokerage commission for services which he may actually render, it need not, as previously suggested, deprive him of all compensation therefor in the form of a reduction in list price. And if there is this means open to the buyer whereby he may profit from any substantial benefit

46. Biddle Purchasing Co. v. Federal Trade Commission, 66 F. (2d) 687, 693 (C. C. A. 2d, 1938). Judge Swan contended that services had actually been rendered to the sellers, but that the brokerage transactions were illegal in which the commissions were actually remitted to the buyers. His position was however, that in those cases where the commissions were simply credited to the buyers, the brokerage transaction was legal since the buyer would then be receiving no cash discount. This distinction hardly seems sound. Note (1939) 34 ILL. L. REV. 319, 328.
47. “It is further ordered that respondent Biddle Purchasing Company . . . do forthwith cease and desist from: i. Receiving any fee or commissions, as brokerage . . . from any seller of commodities, which fee or commission is intended to be paid over to the purchaser of such commodities, or which is to be applied for the use and benefit of such purchaser; . . .” In the Matter of Biddle Purchasing Co., et al., Fed. Trade Comm. Docket No. 3032, July 17, 1937; 2 C. C. H. 1937 Trade Reg. Serv. ¶9058.
48. Wheeler, supra note 1, at 188. “According to the second possible interpretation, subsection (c) contains not one but two distinct prohibitions: first, that the buyer or his agent may under no circumstances receive or accept any brokerage allowance; and second, that an independent broker cannot receive brokerage from anybody, even his own principal, except for actual services rendered. This view appears to be consistent with various statements of the House Committee which drafted the amendment and of the Conference Committee which accepted it” (italics added). THE ROBINSON-PATMAN ACT—ITS HISTORY AND PROBABLE MEANING (The Washington Post, 1936) 36.
49. Ibid. See note 28 supra.
which he confers on the seller, he should be content to avail himself of it and should not resort to such subterfuges as brokerage commissions.

Stated another way, section 2 (c) permits the payment of brokerage fees only to those brokers who render actual services and who do not pass the fee on to the buyer. This is the so-called "true" or "independent broker". It is argued, however, that even before the addition of the exception for services rendered, section 2 (c) permitted payments to independent brokers, and that the exception therefore must have been intended to exempt from the general prohibition still another class of brokers. And, the argument continues, since effect must be given to every part of a statute, it is improper to restrict the application of the exception to a group already excepted. This argument is persuasive and logically sound and has been advanced by respectable commentators. But no logic, however flawless, can justify an interpretation of words that is patently at odds with the interpretation placed upon them by their author. The logical interpretation of the exception for services rendered would permit remission of brokerage fees to buyers. However, since this is a result which Congress clearly wished to avoid, the force of the logic is vitiated. A more plausible conclusion seems to be that this controversial clause, expressive of a desire to protect non-discriminatory brokerage transactions, was inserted in an "over-abundance of caution", or simply that Congress was unaware of the import of its words.

Attempts have also been made to ascertain the scope of section 2 (c) by applying the law of Agency. The argument has been advanced that a broker who, with the knowledge and consent of both parties, acts on behalf of both buyer and seller is a "middleman"; that he is no less a middleman by reason of the fact that he passes on to the buyer the commission which he receives from the seller; and that as a middleman he is entitled to the brokerage fee and there is nothing illegal about the transaction. Granted that a broker may be a middleman and that he does not lose his status as such by paying to the buyer the commission which he receives from the seller, it does not follow that such remission to the buyer is not illegal under section 2 (c). So to hold would ignore the very purpose for which the section was enacted. Simply calling the recipient of a brokerage fee a "true broker", a "middleman", or a "pseudo-broker" is not determinative of his right to dispose of the fee. In determining the legality of any brokerage transaction, recourse must be had to the objective of section 2 (c), and if the transaction does not conform to that objective it is immaterial what name be given to the broker. For example, if a regularly employed salesman were to receive from his employer a commission for the sale of goods, and with or without the knowledge of the employer, split the com-

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50. See note to supra.
52. Oppenheim, supra note 9, at 519.
53. (1938) 51 Harv. L. Rev. 1303, 1304.
55. "If the Biddle Company kept the payments received from sellers . . . there would be no challenging its classification as 'middleman'. . . . It is the contention of counsel for the Trade Commission, however, that because the Biddle Company does not keep the payment which is made but instead passes it on to the buyers . . . the Company . . . is to be classed as one with the 'pseudo-broker'". Note (1938) 6 Geo. Wash. L. Rev. 203, 216. But the effect of the ruling of the Commission was not to deny to the Company its status of "middleman"; it was simply to deny the legality of the remission of the brokerage to the buyer.
mission with the buyer, the whole transaction would be illegal. Thus it appears that the conceptual reasoning above indicated is of little value. It is earnestly submitted that any problems arising under the Robinson-Patman Act should be considered *sui generis*, and that the solution of such problems must be consistent with the purpose of the Act.

The courts, too, in some of the cases discussed, have used the Agency argument, but in so doing have reached a different result. The contention of the courts seems to be that a broker employed to make purchases for a buyer cannot legally collect brokerage from the seller since, as an agent, he is subject to the control of the former. And since no services were rendered, say the courts, the transaction is illegal. This reasoning is unfortunate, since as a matter of law a broker may, under certain circumstances, serve both buyer and seller. That he may serve both as a matter of fact is obvious. It may well be, however, that in using this language the courts are simply trying to reconcile their decisions, which they feel to be correct, with a literal interpretation of section 2 (c).

III. The Future of Section 2 (c)

a. As to commissions paid by the seller to the buyer's broker

As previously pointed out, the condemnation of the brokerage transactions thus far considered seems to have been based not so much on the failure of the broker to render services, but rather on the remission by him of the fee to the buyer. In other words the effect of the decisions has been to proscribe not the receipt of the commission by the broker, but only the ultimate receipt thereof by the buyer. If, however, the buyer's broker does not remit his commission, it is quite likely that the brokerage transaction will be held legal, provided, of course, the court finds that he has rendered a compensable service to the seller. And in such cases it is not at all unlikely that the court will be much more liberal in its definition of compensable services than in the cases which have so far arisen. Thus if Biddle and Oliver had not passed their commissions to the buyers, it is not too much to assume that the courts would not have resorted to the law of Agency, or at least would have used it to attain a different result. But since these results are in harmony with the spirit of the Act, the fact that they are, or in the future may be, attained by inexact language should not arouse any serious criticism.

b. As to co-operative buying associations

A much more difficult problem is presented by an attempt to analyze the right of a co-operative buying association to receive from sellers a commission which it passes on to its member-retailers.

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56. *Patman, op. cit. supra* note 1, at 108.


59. See note 47 supra.

60. There is in the *Oliver* case at least a hint that such may be the course which the courts will pursue. "We may assume that under the section it is permissible for a broker to render services to both buyer and seller and to receive from both compensation for the services rendered; but this is a very different thing from the buyer himself receiving the compensation." Oliver Bros. v. Federal Trade Commission, 102 F. (2d) 763, 770 (C. C. A. 4th, 1939).
Section 4 of the Robinson-Patman Act provides that “nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations . . . .” (italics added). Although this section does not specifically mention co-operative wholesale associations, nevertheless it does refer to “members”, the name generally given to constituent members of a wholesale co-operative. Therefore it may fairly be inferred that the provisions of the section will be construed as applying to this group. But assuming that wholesale co-operatives come within the provisions of section 4, it is still necessary to determine whether these provisions permit the co-operative to remit to its members commissions received from sellers. The prediction has been made that “a much more liberal interpretation of the words ‘for services rendered’ may be expected in connection with brokerage paid to wholesaler-owned cooperatives.” Since the Act is directed primarily at the unfair trade practices of private chains and not at the activities of co-operative associations, this prediction may well be borne out. In cases involving co-operatives the courts may be more inclined to find services actually rendered, and then may avoid condemnation of the remission of the fees to the constituent members by recourse to section 4. Moreover, it should be remembered that the exception for services rendered was inserted in section 2 (c) at the urging of representatives of co-operative buying associations who sought to secure to their organizations the benefits of brokerage payments. On this precise point Mr. Patman, co-author of the Act, expresses only a vague opinion, but he does indicate that under certain circumstances a co-operative which renders services to the seller may receive brokerage fees, and he then concludes with the equivocal statement that “this method of operating must continue to bear close scrutiny.” The fear has been expressed, however, by the Executive Vice President of the Cooperative Food Distributors of America that as presently constituted the Robinson-Patman Act will deprive co-operative buying associations of their right to collect and distribute brokerage fees. It seems that the only conclusion to be drawn from the various expressions on this matter is that the point is much mooted. Cases involving this point may be decided either way, depending on the attitude of the court. But even if it should be decided that brokerage transactions involving co-operatives are illegal, the co-operative would still be entitled to a price differential determined on

62. ZORN AND FELDMAN, op. cit. supra note 1, at 259.
64. ZORN AND FELDMAN, op. cit. supra note 1, at 213.
65. PATMAN, op. cit. supra note 1, c. 1.
67. See note 12 supra.
68. PATMAN, op. cit. supra note 1, at 200.
69. N. Y. Jour. of Comm., Sept. 15, 1936, p. 1. It is significant that an amendment expressly permitting co-operatives to receive brokerage commissions was proposed and rejected in the House, 80 CONG. REC. 8241 (1936).
a cost-of-selling basis, and would thereby realize the benefits usually accruing to large scale and co-operative buying.

IV. CONCLUSION

The particular mode of price discrimination at which the provisions of section 2 (c) are directed is the practice whereby certain large buyers are granted, by the sellers, purchase discounts in the guise of brokerage paid either directly to the purchaser or to some third party who in turn remits it to the purchaser. It is the purpose of the section to close all channels through which these rebates might find their way into the hands of the buyer; and it is immaterial whether they flow to him directly or through an intermediary. Unfortunately, however, in a desire to protect those brokers whose activities are in no way related to the practice above described, the framers of the Act used language whose literal interpretation is destructive of the entire purpose sought to be realized. Such a construction would permit the buyer to receive a disguised rebate if he or his agent rendered services to the seller, exactly what section 2 (c) is designed to prevent. If the buyer does render valuable services to the seller he may be entitled to a reduction in the purchase price based on the consequent saving to the seller. But the reduction may not be disguised as a brokerage fee. Although a literal interpretation of the section might justify this practice, such an interpretation is clearly inconsistent with the legislative intent and should not be tolerated. The evil sought to be remedied by a statute should not be permitted to exist simply because the prohibition of that evil is imperfectly expressed.

B. J. S.

71. "When the vendor can show that a differential to the co-operative does not exceed his savings in cost in comparison with sales direct to the cooperating stores, his price schedule would be within the law." WINGATE, RETAIL BUYING UNDER THE ROBINSON-PATMAN ACT (Journal of Retailing, 1937) 29. Compare this statement with note 35 supra.

72. "It will guarantee to it (co-operative activity) the achievement of the full economies and price advantages to which the size and scale of its operations actually entitle it as compared with its larger corporate competitors." Statement of Congressman Utterback, 80 Cong. Rec. 9415 (1936).