Robin-Patman Law: A Review and Analysis

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Cover Page Footnote
The author wishes to thank his colleagues Barry E. Hawk and William T. Lifland for their helpful comments
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HUGH C. HANSEN *

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INTRODUCTION

The Robinson-Patman Price Discrimination Act (Act)\(^1\) is now almost fifty years old. Conceived in the midst of the Great Depression, it has been the subject of controversy ever since.\(^2\) Critics, in a "contest of witticisms,"\(^3\) have had much fun with the Act, calling it the "Typhoid Mary of Antitrust,"\(^4\) a "grotesque manifestation of the scissors and paste-pot method" of draftsmanship,\(^5\) and something ranking "high on the list of things with which economic nonsense is associated."\(^6\) The Act’s supporters have prevailed, however, and the Act has remained invulnerable to amendment.\(^7\)

2. W. Patman, Complete Guide to the Robinson-Patman Act 202-03 (1963) ("Robinson-Patman Act ... enforcement has not been without opposition."); Elman, The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal, 42 Wash. L. Rev. 1, 1 (1966); Rowe, The Robinson-Patman Act—Thirty Years Thereafter, 30 A.B.A. Antitrust Sec. 9, 9 (1966) ("That the Robinson-Patman Act ... is the most controversial of our antitrust laws may be the understatement of the century.") [hereinafter cited as Rowe I].
7. As Congressman Patman noted shortly before his death:

This law has stood the test of time. It has repeatedly been attacked and after each encounter with its detractors, this statute has emerged stronger than
In 1975 this invulnerability was threatened when President Ford and the Department of Justice (Department) launched a public attack upon the Act. Unlike the Federal Trade Commission (FTC or Commission), which had historically supported the Act, the Department had neither supported nor criticized the Act; it had simply ignored it. When pressed to explain its lack of enforcement, the Department cited its division of labor agreement with the FTC rather than expressing any policy dissatisfaction with the Act. The change in its public position in 1975 was therefore surprising, especially when the Department suggested not only amendment, but also outright repeal of the Act—a course that few of the Act’s critics had endorsed.

ever, and it still stands as solid as the Rock of Gibraltar—a bulwark of protection for the 9½ million small entrepreneurs of this great Nation of ours.

Recent Efforts to Amend or Repeal the Robinson-Patman Act: Hearings Before the Ad Hoc Subcomm. on Antitrust, The Robinson-Patman Act, and Related Matters of the House Comm. on Small Business [pt. 1], 94th Cong., 1st Sess. 6 (1975) (emphasis added) [hereinafter cited as Recent Efforts Hearings].

One strong critic of the Act has admitted that “[a]llmost all of the fatigued, frustrated, and fulminating critics eventually admit that this statute seems invulnerable to amendment.” Austern, Isn’t Thirty Years Enough?, 30 A.B.A. Antitrust Sec. 18, 25 (1966) [hereinafter cited as Austern I].

8. Within a period of seven months the President, the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Antitrust Division and two of his assistants all made statements attacking the Act. The President stated:

The Robinson-Patman Act is a leading example of [a law] which restrain[s] competition and den[ies] buyers substantial savings . . . . It discourages both large and small firms from cutting prices, and it also makes it harder for them to expand into new markets and to pass on to customers the cost-savings on large orders.


9. See infra notes 312-18 and accompanying text.

10. See infra notes 327-44 and accompanying text.


12. The Department suggested two alternative legislative amendments: enactment of a “Predatory Practices Act” (Appendix A) to protect seller-level or primary-line competition only; or enactment of a “Robinson-Patman Act Reform Statute” (Appendix B) to protect both primary-line and buyer-level or secondary-line competition.

The Justice Department initiative was met by an immediate counterattack. The House Small Business Committee formed an Ad Hoc Subcommittee to hold hearings on the efforts to amend or repeal the Act. The Department, recognizing that this was hardly a friendly forum, sought hearings before the Senate Antitrust and Monopoly Subcommittee. When this effort was unsuccessful, hearings were held under the auspices of the Domestic Council Review Group on Regulatory Matters. These hearings led to the Department of Justice Report on the Robinson-Patman Act (Justice Report), which recommended extensive amendment of the Act. Strong opposition in the House and the most intellectually sound and economically defensible approach.” Rose, *supra* note 8, at 15.

14. While some critics have advocated repeal, R. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 52 (1976); Liebeler, *supra* note 6, at 22; Rose, *supra* note 8, at 15, most have accepted the need for a price discrimination law, albeit a better one than the Robinson-Patman Act. See, e.g., Austin, *The Robinson-Patman—Is it in the Public Interest?,* 1 A.B.A. Antitrust Sec. 92, 105 (1952) (“the Robinson-Patman Act as it is now interpreted is [not] in the public interest [but] I would not for the moment advocate . . . repeal”); Elman, *supra* note 2, at 5 (“the Policy of the Robinson-Patman Act is rooted in a justifiable ethic”); Handler, *Twenty-Five Years of Antitrust,* 73 Colum. L. Rev. 415, 457 (1973) (“I have never been one who advocated the repeal of Robinson-Patman . . . . A price discrimination law, grounded in common sense and having proper economic objectives, could serve a very useful function.”).


16. If there was any doubt about the Small Business Committee's views, it was dispelled by the Committee Chairman's statement in the announcement of the formation of the Subcommittee that “[t]his landmark Act should be retained, continued and enforced.” *Recent Efforts Hearings [pt. I], supra* note 7, at 1.

The Department's fears that it would not receive a fair hearing proved to be justified. As noted in the Report of the *Recent Efforts Hearings:*

Based upon preconceived notions about the Robinson-Patman Act, [the] opportunity [for an objective and impartial evaluation] was not afforded the Ad Hoc Subcommittee . . . . The hearings . . . were so one sided as to make it impossible to believe anyone can honestly think otherwise. Thirty non-government witnesses appeared before the Ad Hoc Subcommittee and not one of them advocated weakening or repealing the Robinson-Patman Act . . . . How an objective study can be made of anything, let alone a controversial piece of legislation, by only hearing from one side is beyond our understanding.

H.R. Rep. No. 1738, 94th Cong., 2d Sess. 134 (1976) (additional views of Hon. M. Caldwell Butler, Hon. Thomas N. Hiness, and William F. Goodling). Also, for some unexplained reason the opponents of the Act received their invitations to testify only days before the scheduled time or even after the scheduled time, while those favoring the Act received them weeks before. *Id.* at 135-36.


18. *Id.*

a change in Administrations, however, halted whatever momentum had developed to amend or repeal the Act.

Today, the Department again ignores the Act, and again justifies its inaction on the basis of the division of labor rationale. Although it remains a vocal critic of the Act, and despite widespread recognition that the Act is flawed, the Department appears to have no plans to seek either amendment or repeal. As Justice Powell recently stated: "The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century."

Three principal reasons explain why the Act has remained unscathed for so long. First, supporters are steadfast in their belief that the Act is a "fair dealing" statute that protects the small businessman. And unlike the effects of the now defunct Fair Trade Laws, the Act's harmful effects on consumers are difficult to show, at least to a degree sufficient to outweigh this support for small business.

Second, few people understand the complex world of Robinson-Patman law, and fewer still care to. Consequently, the number of


21. Id. at 5-6.


25. See infra note 375 and accompanying text.
people available to pressure for change and to educate those who would have to change it is limited. For example, the Justice Department could not get the Nader organization or any other consumer group to support its 1975 efforts toward amendment, even though the Act undoubtedly leads to higher prices for consumers. Robinson-Patman law is difficult to understand for a number of reasons. First, the law has no internal consistency or guiding rationale that would suggest either appropriate analyses or results. Second, it bears little resemblance to other antitrust laws. Third, it is rarely taught in law school, and one has to devote many hours to mastering its intricacies. Even those with years of experience have admitted to still being "puzzled" by it. Finally, unlike other areas of the law, it produces no devotees or disciples. No one, it appears, dwells longer than necessary in the land of Robinson-Patman.

The final reason that the Act has escaped repeal or amendment is that underneath the rhetoric, the prevailing attitude toward competition has been ambivalence. Praised in the abstract, competition is often sacrificed to protect competitors, especially when the competitors are small. Therefore, even when the arguments for change in Robinson-Patman law are effectively made, critics must still overcome the irrepressible but unspoken concern for competitors.

None of this is meant to say that the Justice Department's 1975 efforts were for naught, or that change in the Act is impossible. The Department undoubtedly raised the consciousness of the bench and bar: The Supreme Court has taken a renewed interest in Robinson-Patman, two studies have recently been made, and there have been

26. See infra notes 375-419 and accompanying text.


28. See infra notes 45 & 69. See Baxter, Statement Before the Senate Judiciary Comm. on S. 418 and S.127, the "Unfair Foreign Competition Act of 1983," at 3 (Mar. 21, 1983). In a rare occurrence, the Supreme Court appeared to recognize explicitly the protectionist character of the Robinson-Patman Act. See Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 103 S. Ct. 1011, 1023 & n.39 (1983). Justice Powell noted that the purpose of the Act was to benefit small businesses, id. at 4201 n.39, and provide them with "protection from . . . competition," id. at 4201.

favorable developments in the case law.\textsuperscript{31} There is also a new interest in the methods of proving predatory pricing, an important concept in Robinson-Patman law.\textsuperscript{32}

The time therefore appears ripe to fan the low flames of the Robinson-Patman debate. Was the Justice Department correct? Should the Act reach its Golden Anniversary? If so, in what form? If changes are needed, what modifications would be best, and what is the most likely method of accomplishing them?

This Article attempts to provide both a comprehensive basis for understanding, and a critical analysis of, the Act. Part I of this Article reviews the origins of the Act, the development of the law to date, the methods of enforcement, and the practical effects of the Act. Part II explores the various possibilities for change, and suggests appropriate amendments.

\section{I. Forty-seven Years of Robinson-Patman}

The Robinson-Patman Act was proposed by a wholesaler organization seeking protection from competition.\textsuperscript{33} Rhetoric rather than factual or economic analysis prevailed in Congress, and the Act was poorly drafted. For years, enforcement by the FTC was at best ill-advised, the Justice Department consistently ignored the Act and private plaintiffs used it to stave off the ravages of competition. Moreover, courts for the most part “muddled rather than clarified”\textsuperscript{34} the Act’s operation. One British observer concluded that for one unfamiliar with the law, “there is a real danger that an account of the case-law under the Robinson-Patman Act . . . will be met with frank unbelief.”\textsuperscript{35} On the other hand, there has recently been considerable improvement in courts’ interpretations\textsuperscript{36} and the FTC has shown a greater willingness to be guided by economic principles in its enforcement efforts.\textsuperscript{37}

\begin{thebibliography}{99}
\bibitem{31} See \textit{infra} notes 205-11 and accompanying text.
\bibitem{32} See \textit{infra} notes 151-64 and accompanying text.
\bibitem{33} The organization was the United States Wholesale Grocers Association. Its counsel, H.B. Teegarden, is credited with drafting most of the Act. Justice Report, \textit{supra} note 17, at 114.
\bibitem{34} J. Landis, Report on Regulatory Agencies to the President-Elect Subcomm. on Administrative Procedure of the Senate Comm. on the Judiciary, 86th Cong., 2d Sess. 51 (Comm. Print 1960) [hereinafter cited as Landis Report].
\bibitem{36} See \textit{infra} notes 151-64, 205-11 and accompanying text.
\bibitem{37} See \textit{infra} notes 319-26 and accompanying text.
\end{thebibliography}
Why has the Act’s enforcement and interpretation been so uneven? The answer, to the extent one exists, starts with the circumstances that produced the Act.

**A. Origins of the Act**

Supporters of the Robinson-Patman Act are fond of saying, “[i]f we didn’t already have a Robinson-Patman Act, we’d have to invent one,” the clear implication being that the Act was a response to a universal need. In fact, however, it is a period piece, the product of unique and troubled times.

In 1936 the United States was in the depths of the Great Depression. Citizens and their elected representatives alike were looking for answers, and not finding many. Traditional solutions did not work, basic values were questioned, and the nation had lost its faith in competition. The antitrust laws, “the charter of economic liberty,” were suspended to the extent that they conflicted with the radical approach of the National Recovery Act (NRA). With unemployment high and independent merchants going out of business at a reported rate of ten percent per year, economic survival was the main consideration. The Blue-Eagle economics of the day branded competition and efficiency as luxuries, and throughout the country there was a strong populist bent.

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38. *Recent Efforts Hearings* [pt. II], *supra* note 7, at 138. (statement of Owen M. Johnson, Jr., Esq., Director of the FTC Bureau of Competition (quoting Paul Rand Dixon, Acting Chairman of the FTC)).

39. One indication of this is that the states have resisted the temptation to copy the Robinson-Patman Act, despite enacting price discrimination laws of their own. *But see* Va. Code §§ 59.1-9.1 to -9.9 (1974). Apparently France is the only foreign country that has a similar statute, and it is said not to enforce it. *See* Rose, *supra* note 8, at 2.


45. Justice Brandeis summarized the populist view in a 1933 Supreme Court decision upholding a Florida tax on chain stores:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which
It is not surprising therefore that change in the traditional system of distributing goods and commodities was viewed in more than economic terms. For example, although some consumers viewed the increase in the number of chain stores at the expense of small corner stores as a competitive benefit, others viewed it as a threat to religious values, the ability of working people to buy food and the quality of small-town life in general.

In trying times issues are not always framed in subtle ways. Fine distinctions give way to black and white, good and evil. Scapegoats the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business, can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.


47. As Representative Shannon stated in debates prior to passage of the Act:
I am not a Sabbatarian, but I do believe in a proper observation of that day from the standpoint of religion, rest, and pleasure.
In almost every city in this country today you will find a group of chain stores, under the guise of drug stores, selling every article under the sun and keeping open 18 hours on Sunday as well as the day before, the Sabbath of Moses.


48. Representative Moritz stated:
I do not know what our family would have done when I was a child if we had not used the book of the independent store. We used the book of the friendly neighborhood grocery store. We waited until dad got paid and then paid the bill. You cannot do that at the chain store. If that is radical, make the most of it. I believe that chain stores should not only be curbed, but they should be eliminated, because the great harm they do far outweighs the little good they do.

Id. at 8136 (statement of Rep. Moritz).

49. Representative Nichols stated:
You know there is a certain sentiment and romance about the corner or crossroads grocery store. There formerly, and there now, exists the skit and whittle club. You know, where the boys gather around the stove in the winter, sit around its red-hot fire, chew tobacco, spit on the bowl, and listen to it sizzle, and settle the problems of the Nation, and the problems of the community.

Id. at 8135 (statement of Rep. Nichols); see id. at 8133 (statement of Rep. Dirksen) ("As lawmakers, can we do something that will sort of preserve the communal life in those little centers?").
are found and conspiracies uncovered. During the Depression, the prime scapegoats were the chain stores, and in particular, the Great Atlantic and Pacific Tea Company, known to all as the A & P.\textsuperscript{50} Independent merchants and wholesalers organized a massive campaign against the "chain store menace."\textsuperscript{51} Huey Long proclaimed that he "would rather have thieves and gangsters than chain stores in Louisiana."\textsuperscript{52} The chains were accused of conspiring with the lords of Wall Street and Big Business,\textsuperscript{53} and the underlying bias was strongly anti-New York.\textsuperscript{54} The intensity and extent of the campaign led one observer to compare it to "the beginnings of the Nazi movement in Germany, where the same zeal was displayed to protect the small businessman from his large competitors."\textsuperscript{55} Although the comparison is extreme,\textsuperscript{56} the situation was certainly unique in American history.

In this climate, Congress became radicalized in its approach to solving the nation's problems. As one authority on the Act stated:

"Legislative proposals that would previously have seemed drastic were regarded as conservative. Procedures in considering legislative recommendations that would previously have seemed superficial and summary were regarded as adequate. There survived from the NRA period and from the continuing economic depression a sense of urgency and a willingness to experiment."\textsuperscript{57}

One product of this radicalization was the Robinson-Patman Act. The congressional hearings were surprisingly limited for a major statute, and consisted for the most part of testimony by members of Congress or representatives of the food industry.\textsuperscript{58} No witnesses were

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51. See Justice Report, supra note 17, at 102-08.


55. Levi, supra note 3, at 60.

56. See Elman, supra note 2, at 5 ("indefensible charge").


58. Id. at 23-24; Baker, Statement prepared for Hearings on the Robinson-Patman Act before the Domestic Council Review Group on Regulatory Reform (Dec. 9, 1975) (quoted in Justice Report, supra note 17, at 137-38): Congress held very few hearings, considering the sweeping nature of the legislation. The House Committee held a short set of hearings on the original Patman Bill in the early summer of 1935; a few more days in February, 1936. Meanwhile the Senate Committee held no hearings on the Robinson Bill and only two days of hearings on the Borah-Van Nuys Bill in March,
heard from the Department of Justice, the FTC, the American Bar Association (ABA), members of the bar, economists or consumers. Economic analysis was replaced with rhetoric. The chains were "bribing or baiting their customers with real low prices while their competitors [were] being destroyed." It was a question of "right or wrong," and the chains were "wrong." Congress made no factual investigation of its own, and ignored evidence that conflicted with accepted rhetoric.

Congress made no pretense at first that the Act was an antitrust statute. Without a blush, the original bill was called the "Wholesale Grocers Protection Act." Congressman Celler, one of the few vocal opponents in Congress, complained that "this is a bill that seeks to help a very small segment of our business population." An attempt to include in the Act the traditional Clayton Act "injury to competition" standard was opposed because it was "too restrictive, in requiring a showing of general injury to competitive conditions." A "less rigorous" standard was adopted instead. For Congress the

1936. That was pretty much the extent of the record developed by the Congress.

Id. 59. The FTC's absence was especially surprising because the FTC report on chain stores supplied the only factual basis for the hearings. See FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935) [hereinafter cited as FTC Report].

60. Of course, at that time there were no consumer groups. As Congressman Celler noted then: "Unfortunately, housewives and the consumer generally are not organized. Their voice is not articulate." H.R. Rep. No. 2287, 74th Cong., 2d Sess. (pt. 2), at 6 (1936) (dissenting statement).


62. Id. at 8111 (statement of Rep. Patman). Representative Patman noted: [T]here has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstance and for the same quantities of goods. Is that right or wrong? It is wrong.

Id. 63. See Justice Report, supra note 17, at 126-39. Congress even ignored evidence in the FTC Report that had provided the basis for the Congressional hearings. See FTC Report, supra note 59.

64. H.R. 8442, 74th Cong., 1st Sess. (1935):


67. 80 Cong. Rec. 9417 (1936) (statement of Rep. Utterback). This was accomplished by adding to the traditional Clayton Act standard one that emphasized injury to the disfavored competitor. See infra notes 120-24 and accompanying text.
"immediately important concern [was] injury to the competitor victimized by the discrimination," and not injury to competition. While this concern is understandable given the context of the times, it supports the view that the Robinson-Patman Act is an antitrust statute in name only.69

In fact, the Act was part of a multi-faceted congressional response to changes in the American marketplace that threatened the traditional market structure and the political and social values thought to go along with it.70 Other efforts resulted in the NRA,71 the Fair Trade Laws,72 and the chain-store taxation and abolition bills.73 No one would claim that these efforts had anything to do with antitrust. The only product of these efforts that remains in effect today is the Robinson-Patman Act.

B. Development of the Law to Date

This section is not intended as an exhaustive survey of Robinson-Patman law. Rather, it introduces the reader to the basic principles and some of the complexities and problems with the law that have developed over the years. Until recently, the problems inherent in the Act were compounded by FTC and court interpretation of the Act’s provisions.

1. Nomenclature

The Robinson-Patman Act is comprised of four sections. The first section is an amendment to section 2 of the Clayton Act.74 Thus, while the Act has a first section, it has no “Section 1.” Rather, the six subdivisions of this section are denominated 2(a) through 2(f) to com-

69. See Levi, supra note 3, at 61. Traditional antitrust law has had a populist, protectionist bent to it also. See supra note 45. This was particularly evident during the Warren Court years when the Court’s vertical distribution restrictions favored autonomy of the small retailer over economic efficiency or the interests of the consumer, see, e.g., Albrecht v. Herald Co., 390 U.S. 145 (1968), and its merger opinions seemed to reflect a “small is good” philosophy, see, e.g., United States v. Von’s Grocery Co., 384 U.S. 270 (1966). Justice Stewart, in dissent in Von’s Grocery, complained that “the Court’s opinion is hardly more than a requiem for the so-called ‘Mom and Pop’ grocery stores—the bakery and butcher shops, the vegetable and fish markets—that are now economically and technologically obsolete in many parts of the country.” Id. at 288. (Stewart, J., dissenting).
70. See Justice Report, supra note 17 at 113; I ABA Monograph, supra note 30, at 14.
71. See supra note 42 and accompanying text.
72. See supra note 24 and accompanying text.
73. See Justice Report, supra note 17, at 112; F. Rowe, supra note 27, at 8.
plement the nomenclature of the Clayton Act section that they amend. The Act also contains sections numbered 2, 3 and 4.\textsuperscript{75} This numbering has even confused experts, who have variously referred to section 1 (which does not exist) and to section 2 (which merely provides for prospective relief) of the Robinson-Patman Act when referring to the substantive amendments to section 2 of the Clayton Act. In discussing the substantive civil provisions of Robinson-Patman, it is accurate to refer either to sections 2(a) through 2(f) of the Robinson-Patman Act, or to section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

2. Section 2(a)

Section 2(a)\textsuperscript{76} is the heart of the Act. It prohibits price discrimination in the sale of commodities of like grade and quality when the effect may be to injure competition at either the seller or customer levels.\textsuperscript{77} Such discrimination is permitted, however, when it is justified by cost savings, the need to meet a competitor’s equally low price, or changing conditions.\textsuperscript{78}

a. Jurisdictional requirements

Before the legality of a pricing practice may be judged under the Act, certain jurisdictional or threshold requirements must be met. These requirements generally narrow the reach of the Act as compared with other antitrust statutes. The Act applies only if two or more consummated sales\textsuperscript{79} of commodities\textsuperscript{80} of like grade and qual-

One court has held that the requirement of an actual sale was excused in a case in which the plaintiff's failure to purchase "was directly attributable to defendant's own discriminatory practice." American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 924 (5th Cir.), cert. dismissed, 342 U.S. 875 (1951). Section 9 of the Justice Department's Robinson-Patman Reform Act adopts this approach and states that "[a]n offer to deal only on discriminatory terms shall . . . be treated as a completed transaction for the purpose of according relief under this Act." Appendix B, § 9. Nevertheless, whether it is good policy or not, the Fifth Circuit holding is an aberration and has not been followed. See, e.g., M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1065 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976); Uniroyal, Inc. v. Hoff & Thames, Inc., 511 F. Supp. 1060, 1068 (S.D. Miss. 1981); Republic Packaging Corp. v. Haveg Indus., 406 F. Supp. 379, 381 (N.D. Ill. 1976) ("Bruce's Juices is inconsistent with the plain statutory language requiring consummated transactions.").


82. 15 U.S.C. § 13(a) (1976). There have been conflicting views as to the exact scope and meaning of "price discrimination." The meaning appeared to be resolved by the Supreme Court in FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), in which Chief Justice Warren stated "a price discrimination within the meaning of [section 2(a)] is merely a price difference." Id. at 549. However, within two years, a leading authority on the Act stated: "Notwithstanding the broad Anheuser-Busch doctrine as to differentials in prices paid, no price discrimination arises if the same concessions are practically accessible to all customers, even though some do not avail themselves of the option." F. Rowe, supra note 27, at 97 (emphasis added) (footnote omitted). In FTC v. Borden Co., 383 U.S. 637 (1966), the Supreme Court reversed the Fifth Circuit on the issue of "like grade and quality," id. at 638-39, but also remanded the case for consideration of issues not addressed by that court, one of which was the FTC's determination that mere price differences were "discriminatory within the meaning of the Act," id. at 646. Justice Stewart, in dissent, addressed the issue directly:
As the opinion of the Court suggests . . . the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end . . . Nothing in FTC v. Anheuser-Busch, Inc., a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimination within the meaning of § 2(a) can be made out.

Id. at 659 n. 17 (Stewart, J., dissenting) (citations omitted).

In FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977), defendant-appellant Ford seized on Justice Stewart’s distinction, and argued that the rule in Anheuser-Busch was not applicable in FLM. The case involved a secondary-line situation in which all of Ford’s dealers were offered the same prices for crash parts, even though these prices differed depending upon whether the dealer was going to use the part in its retail or wholesale operation. The Second Circuit agreed that the rule did not apply, stating that “the Act, as its language indicates, requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances.” Id. at 1026. Recently, the Third Circuit concurred in this view. Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 120 (3d Cir. 1980) (uniform pricing formula applicable to all customers not price discrimination even if it results in different prices), cert. denied, 451 U.S. 911 (1981). There appears to be continued adherence to the Anheuser-Busch definition in primary-line cases, however. See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1040 (9th Cir.), cert. denied, 103 S. Ct. 57 (1982); John B. Hull, Inc. v. Waterbury Petroleum Prods., 588 F.2d 24, 28 (2d Cir. 1978), cert. denied, 440 U.S. 960 (1979).


84. See 15 U.S.C. § 13(a) (1976). An “indirect purchaser” doctrine has developed:
approximate time period. At least one of the sales must cross a state line, and both sales must be for use, consumption or resale within.

[It] treats as the supplier's own customers, in contemplation of law, the accounts of his distributors, whose autonomy he has supplanted by his own activities. In such circumstances, a cognizable discrimination in price or promotional arrangements can arise by reason of disparities between the supplier's own customers and those customers of his distributors which are viewed as the supplier's "indirect purchasers."

F. Rowe, supra note 27, at 57 (footnote omitted). The doctrine was first enunciated one year after the passage of the Act by the FTC in Kraft-Phoenix Cheese Corp., 25 F.T.C. 537 (1937). The Commission stated: "A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys." Id. at 546. The doctrine has been generally approved by the courts. See, e.g., Hiram Walker Inc. v. A & S Tropical, Inc., 407 F.2d 4, 7 (5th Cir.), cert. denied, 396 U.S. 901 (1969); cf. American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.) (§ 2(d) action), cert. denied, 371 U.S. 824 (1962). The doctrine has been limited by some courts to situations in which "the manufacturer 'deals directly with the retailer and controls the terms upon which he buys,'" FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1028 (2d Cir. 1976) (quoting American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.), cert. denied, 371 U.S. 824 (1962)), cert. denied, 429 U.S. 1097 (1977); Klein v. Lionel Corp., 237 F.2d 13, 14-15 (3d Cir. 1956); Windy City Circulating Co. v. Charles Levy Circulating Co., 550 F. Supp. 960, 966 (N.D. Ill. 1982); Thomas v. Amerada Hess Corp., 393 F. Supp. 58, 75 (M.D. Pa. 1975). The doctrine has become less important since the Supreme Court broadly defined standing to sue by private plaintiffs. See Perkins v. Standard Oil Co., 395 U.S. 642, 649-50 (1969); cf. FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) (§ 2(d) action).

For a recent case narrowing standing in Robinson-Patman actions, see Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 49 (2d Cir. 1980) (indirect purchaser-plaintiff must be in the "target area" of the seller's price discrimination). But see infra notes 165-84 and accompanying text.

The courts are split whether a parent company's transfer of goods to its wholly owned subsidiary can be a "sale" under the Act, or stated another way, whether the subsidiary can be a "purchaser." Under one view, such intra-corporate transactions can never be considered "sales" within the meaning of the Act. Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962, 967 (5th Cir.), cert. denied, 444 U.S. 942 (1979); Uniroyal, Inc. v. Hoff & Thames, 511 F. Supp. 1060, 1067 (S.D. Miss. 1981). Under the other view such transactions may be sales depending upon the amount of the parent's control or dominion, and the arm's length nature of the transaction or the competitive situation. See Brewer v. Uniroyal, Inc., 498 F.2d 973, 977 n.2 (6th Cir. 1974) (per curiam); Schaben v. Samuel Moore & Co., 462 F. Supp. 1321, 1330 (S.D. Iowa 1978), aff'd per curiam, 606 F.2d 831 (8th Cir. 1979).

85. See, e.g, England v. Chrysler Corp., 493 F.2d 269, 272 (9th Cir.), cert. denied, 419 U.S. 869 (1974); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1962); Grandstaff v. Mobil Oil Corp., 1979-1 Trade Cas. (CCH) ¶ 62,421, at 76,540-41 (E.D. Va. 1978); cf. Atalanta Trading Corp. v. FTC, 258 F.2d 365, 372 (2d Cir. 1958) (§ 2(d) action) ("the time interval is a determining factor").

86. See 15 U.S.C. § 13(a) (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200-01 (1974). The Robinson-Patman Act, like other antitrust statutes, was enacted by Congress under its constitutional authority "[t]o regulate Commerce with
the United States or any territory thereof. Refusals to deal are specifically excluded from the scope of the Act.

foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The Robinson-Patman Act's coverage, however, is narrower than the other provisions of the Clayton Act and much narrower than the Sherman Act. The cumulative commerce requirements specified in § 2(a) limit application to a person 1) "engaged in commerce," 15 U.S.C. § 13(a) (1976), who 2) "in the course of such commerce" discriminates in price between different purchasers, id., and 3) "where either or any of the purchases involved in such discrimination are in commerce." Id.; see, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1043 (9th Cir.), cert. denied, 103 S. Ct. 57 (1982); Hampton v. Graff Vending Co., 516 F.2d 100, 101-02 (5th Cir. 1975). Under this standard, price discrimination that is wholly within one state, the markets of which involve only local intrastate commerce, is not within the reach of the Act. See Standard Oil Co. v. FTC, 340 U.S. 231, 237-38 (1951) (temporary storage of gasoline does not interrupt flow of commerce); Great Atl. & Pac. Tea Co. v. FTC, 557 F.2d 971, 979 (2d Cir. 1977) (milk processing does not stop flow of commerce), rev'd on other grounds, 440 U.S. 69 (1979). But see Belliston v. Texaco, Inc., 455 F.2d 175, 180 (10th Cir.) (processing of crude oil to gasoline stops the flow of commerce), cert. denied, 408 U.S. 928 (1972); Mowery v. Standard Oil Co., 463 F. Supp. 762, 775 (N.D. Ohio 1976) (same), aff'd mem., 590 F.2d 335 (6th Cir. 1978).

Generally, goods leave the flow of commerce when they are stored in a warehouse or storage facility for general inventory purposes without consideration of particular customers' needs or orders. See Hampton v. Graff Vending Co., 516 F.2d 100, 102-03 (5th Cir. 1975). A recent Ninth Circuit case held commerce not to be interrupted when goods are stored in warehouses owned by the interstate producer. See Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 879 (9th Cir. 1982).

87. 15 U.S.C. § 13(a) (1976). Thus, the specific provisions of § 2(a) exempt export sales. Courts have held, however, that § 2(c), id.: § 13(c), does apply to these sales. Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 834 (N.D. Ohio 1964); Baysoy v. Jessop Steel Co., 90 F. Supp. 303, 305 (W.D. Pa. 1950). See also B. Hawk, United States, Common Market and International Antitrust: A Comparative Guide 55 (1979) ("sections 2(c), (d) and (e), unlike section 2(a), probably cover goods sold for export").

In 1938 the Nonprofit Institutions Act\textsuperscript{89} exempted from the application of the Robinson-Patman Act sales to nonprofit schools, colleges, universities, public libraries, churches, hospitals and charitable institutions for their own use.\textsuperscript{90} Given this exemption, a significant question remaining unresolved in the jurisdictional area is whether the Robinson-Patman Act covers sales to government-operated organizations of this kind.\textsuperscript{91} Although this issue remains unresolved, the Supreme Court in \textit{Jefferson County Pharmaceutical Association v. Abbott Laboratories}\textsuperscript{92} addressed in the 1982 Term the extent to which sales to the government are implicitly exempted from the Robinson-Patman Act.

The petitioner in \textit{Jefferson County} was a trade association representing private retail pharmacies in Jefferson County, Alabama. The association sued drug manufacturers and the government entities that ran three hospital pharmacies.\textsuperscript{93} Each pharmacy sold drugs on a retail basis. Petitioner alleged that the government pharmacies, through a system of competitive bidding, were receiving lower prices from the drug manufacturers than the local private pharmacies.\textsuperscript{94}

\textsuperscript{89}. Ch. 283, 52 Stat. 446 (1938) (current version at 15 U.S.C. § 13c (1976)).
\textsuperscript{90}. Id.
\textsuperscript{91}. Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 103 S. Ct. 1011, 1020 n.23 (1983) ("Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right . . . We need not address this issue here.") (citations omitted).
\textsuperscript{92}. 103 S. Ct. 1011 (1983).
\textsuperscript{93}. Id. at 1013. The hospital pharmacies were sued under § 2(f), which prescribes buyer inducements of price discriminations in violation of § 2(a). See infra notes 286-304 and accompanying text. The two government respondents were the Board of Trustees of the University of Alabama, which was responsible for the University of Alabama Hospital Pharmacy and the Russell Ambulatory Center Pharmacy, and Cooper Green Hospital, a county hospital and a public corporation under the laws of Alabama, which was responsible for the Cooper Green Hospital Pharmacy. See Brief for Respondents at 3, Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 103 S. Ct. 1011 (1983).
\textsuperscript{94}. Petitioner alleged that the three government pharmacies violated § 2(f) and the drug manufacturers violated § 2(a). 103 S. Ct. at 1013. The district court dismissed the action on the grounds that the sale to state governments were "beyond the intended reach of the . . . Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F.2d 92, 102 (5th Cir. 1981) (district court opinion in appendix). The Fifth Circuit by a divided panel affirmed on the basis of the district court opinion. \textit{Id.} at 93.

In the Supreme Court, Petitioner argued broadly that there was no government exemption at all, Brief of Petitioner on the Merits at 7, Jefferson County Pharmaceutical Ass'n v. Abbott Labs., 103 S. Ct. 1011 (1983), and that even assuming there was some form of exemption, it did not cover sales to the government for resale. \textit{Id.} at 11. Respondents argued that there was an implicit exemption in the Act demonstrated by the legislative history, Brief for Respondents at 8, and subsequent actions by Congress, \textit{Id.} at 18, 34. They also argued that 46 years of state purchasing practices were based upon the firm conclusion that the Act did not cover such sales. \textit{Id.} at 30.
Writing for the Court, Justice Powell stated that the terms "persons" and "purchasers" in the Act were broad enough to cover governmental bodies. In support of this conclusion he cited the Court's opinions in Sherman and Clayton Act cases construing "persons" to cover governmental bodies. Accordingly, he concluded that the "plain language of the [Robinson-Patman] Act strongly suggests that there is no exemption for state purchases to compete with private enterprise." Notwithstanding the petitioner's argument that there was no need to look at the legislative history, Justice Powell acknowledged that congressional intent to exempt certain government purchases could be found if "apparent from the purpose and history of the Act." Nevertheless, he found no such intent. Noting that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions from the antitrust laws," he concluded that the legislative history, subsequent actions by Congress, courts and commentators offered little support to justify the exemption.

Although Justice Powell defined the issue narrowly to concern only those purchases by state governments for resale in the retail market, his reasoning reaches more broadly and would seem to lead to the

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95. 103 S. Ct. at 1015.
96. Id.; see, e.g., City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 395 (1978). As to "purchasers," the Court stated:
   The word "purchasers" has a meaning as inclusive as the word "person." See
   Antitrust Act contains terms general to all purchasers. The pending bill does
   not segregate any particular class of purchasers, or exempt any special class
   of purchasers.").

103 S. Ct. at 1015 n.11.
97. Id. at 1016. It would seem that this "plain language" would also "strongly
suggest" that there is no exemption generally for state purchases, not only those that
"compete with private enterprise."
98. Brief of Petitioner on the Merits at 7, Jefferson County Pharmaceutical Ass'n
99. 103 S. Ct. at 1016.
100. Id. (quoting Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975)).
101. 103 S. Ct. at 1016.
102. Id. at 1019-21.
103. Id. at 1021-22.
104. Id.
105. Id. at 1023.
106. Id. at 1014. As Justice Powell stated:
   The issue here is narrow. We are not concerned with sales to the federal
   government, nor with state purchases for use in traditional governmental
   functions. Rather, the issue before us is limited to state purchases for the
   purpose of competing against private enterprise—with the advantage of
discriminatory prices—in the retail market.

Id. (footnotes omitted) (emphasis in original).
conclusion that all sales to state and local governments are covered by the Act.” 107 Perhaps to discourage this argument in the future, he stated the holding very narrowly: “We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act.” 108

This narrow language, together with the strong dissent by Justice O’Connor for four Justices, 109 is a good indication that there are not five votes for any wider Robinson-Patman coverage of state and local government purchases than that accorded under the facts in this case. That coverage is wide enough, however, to concern state and local government-run pharmacies and those who supply them. They might be subject to treble-damage suits for past transactions, 110 and will probably have to alter their purchasing and sales practices in the future. 111

Jefferson County notwithstanding, courts in general have narrowly construed the jurisdictional requirements of Section 2(a), 112 and the

107. Justice O’Connor made this point in dissent:
If, absent a clear expression of legislative intent to the contrary, the plain language of the statute controls, then by the majority’s own assertions one would have to conclude that even purchases for the State’s own use or for resale to indigents would fall within the Act’s proscriptions. For, as the majority remarks . . . the terms “person” and “purchasers” are broad enough to include governmental entities, and the legislative history is “ambiguous on the application of the Act to state purchases for consumption.” Id. at 1029 (O’Connor, J., dissenting) (citations omitted).

108. Id. at 1023.

109. See id. at 1025-33 (O’Connor, J., dissenting).

110. The majority noted the holding by both courts below that “the Eleventh Amendment bars petitioner’s claim for damages against [the state-run pharmacies.]” Id. at 1014 n.5. Petitioner did not challenge this ruling. Id.

111. Many state laws require competitive bidding for purchases by state and local government agencies. See Brief for Respondents at 30 n.35, Jefferson County Pharmaceutical Ass’n v. Abbott Labs., 103 S. Ct. 1011 (1983). Yet competitive bidding conflicts with the proscriptions of the Act. See Workshop Discussion, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 147, 161 (1971) (“competitive bidding has always been very hard to rationalize under the Robinson-Patman Act, whether you look at it from the standpoint of a buyer or a seller”) (statement of H. White); Note, Competitive Bidding under the Robinson-Patman Act, 49 St. John’s L. Rev. 512, 539-40 (1975) (“Bidding and price haggling are often viewed as an ideal manifestation of the competitive process . . . . Nevertheless, the uncertainties which the Robinson-Patman Act present may discourage the use of these pro-competitive devices . . . .”).

Moreover, the Supreme Court undoubtedly recognized that its holding would affect present purchasing policies because it specifically recognized that its interpretation would provide “protection from the competition of [state and local agencies],” 103 S. Ct. at 1023, for the “benefit of small, private retailers,” id. at n.39.

112. See supra notes 79-88.
law concerning these jurisdictional requirements has not been subject to much criticism. Rather, the application of a broad injury-to-competition test, and the judicially restricted availability of the defenses set forth in sections 2(a) and 2(b), have drawn the most fire. In this regard, the courts' narrow application of the jurisdictional requirements has been a favorable development for critics in that it has limited the reach and application of the Act.

b. Competitive-injury test

Robinson-Patman cases are divided into categories based upon the distribution level of the competitor who claims injury. The two most common classifications are "primary-line" and "secondary-line." Primary-line cases involve competitors of the seller; secondary-line cases involve competitors of the favored purchasers who buy from the seller. Third-line cases, which are very rare, involve customers of the seller's customers. Expansive readings of the Act have even created fourth-line cases. Although there have been no fifth-line cases, they would also be cognizable under the Act if there were actually a distribution system that utilized that many levels.

The Act does not prohibit all price discriminations; it prohibits only those that have a proscribed injurious effect on competition. Technically, three types of injury to competition are cognizable: 1) substantial lessening of competition; 2) tendency to create a monopoly; and 3) injury to, or prevention or destruction of, competition with any person who either grants or knowingly receives the benefit of [the] discrimination, or with customers of either of them. The Clayton Act provided precedent for the first two types of injury, although the third had no statutory precedent and was intended to enlarge the application of the price discrimination law. Courts do not generally focus upon the statutory language, but apply instead the general injury-to-competition test discussed below.

113. See infra notes 131-44 and accompanying text.
114. See infra notes 191-215 and accompanying text.
119. See id.
121. Id.
122. Id.
124. See supra notes 66-68, and accompanying text.
Competitive injury is determined under an "incipiency of injury test." The purpose of the test is to "catch the weed in the seed [to] keep it from coming to flower." The incipiency test derives from the word "may" in section 2(a). Although the test does not require an actual injury, neither does it allow a mere or remote possibility of injury to suffice. Rather, the test requires a reasonable possibility or a reasonable probability of such injury. These two standards are apparently fungible.

In fact, because of what the courts and the FTC have done, the whole issue of competitive injury has become something of a semantic exercise with little relationship to the results reached. Perhaps because of the difficulties involved in making real inquiry into competitive injury, courts and the FTC have avoided grappling with the facts in the cases before them. Instead they have relied upon mere inferences to find injury.

i. Secondary-line cases

In secondary-line cases, the most common actions under the Act, courts have made the "self-evident" inference of injury to competition

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129. See Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 35 (7th Cir. 1976); Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1174 (7th Cir. 1972); National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 614 (7th Cir. 1969); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir.), cert. denied, 382 U.S. 959 (1965); American Oil Co. v. FTC, 325 F.2d 101, 104 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964); Standard Motor Prods. v. FTC, 265 F.2d 674, 676 (2d Cir.), cert. denied, 361 U.S. 826 (1959); Moog Indus. v. FTC, 238 F.2d 43, 51 (8th Cir. 1956), aff'd, 355 U.S. 411 (1958); General Foods Corp., 50 F.T.C. 885, 887 (1954).
130. The distinction "has become an empty quibble without operational significance." F. Rowe, supra note 27, at 136; accord International Air Indus. v. American Excelsior Co., 517 F.2d 714, 729 (5th Cir. 1975) ("difference between the two formulations is trivial"), cert. denied, 424 U.S. 943 (1976); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 n.11 (5th Cir.) ("more apparent than real"), cert. denied, 383 U.S. 959 (1965). One district court used both terms disjunctively in its charge to the jury. International Air Indus. v. American Excelsior Co., 517 F.2d 714, 728 (5th Cir. 1975); see Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840-41 (7th Cir. 1961); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 792 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952). But see William Inglis & Sons Baking Co. v.
in cases in which the difference in price is substantial or "sufficient in amount to influence . . . resale prices." The Supreme Court has recently restated this Morton Salt rule as one in which "injury to competition is established prima facie by proof of a substantial price discrimination . . . over time."

The Morton Salt rule has been dispositive even in the face of convincing facts to the contrary. For instance, injury to competition has been found when the competitors have testified that they were not injured, when the difference in wholesale price did not affect the retail price, and even when the competitor receiving the better price performed services for the seller, the cost of which offset the price advantage.

ITT Continental Baking Co., 668 F.2d 1014, 1042 (9th Cir. 1981) (suggesting that standards may differ), cert. denied, 103 S. Ct. 58 (1982).

131. FTC v. Morton Salt Co., 334 U.S. 37, 47, 50 (1948); accord Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1174 (7th Cir. 1972) ("While the bare existence of price differentials does not compel an inference of a substantial lessening of competition, the cases go far in that direction."). The FTC has consistently taken the position that to prove competitive injury it is not necessary to show that the favored purchaser passed on the discount as a lower price to its customers. See, e.g., Great Atl. & Pac. Tea Co., 87 F.T.C. 962, 1054-55 (1971), aff'd, 557 F.2d 971 (2d Cir. 1977), rev'd on other grounds, 440 U.S. 69 (1979); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 679-80 & n.11 (5th Cir.), cert. denied, 387 U.S. 959 (1965). See infra note 315.


136. See, e.g., Purolator Prods. v. FTC, 352 F.2d 874, 882 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); United Fruit Co., 82 F.T.C. 53, 130 (1973). This is true even though cost justification is a complete defense under § 2(a). See infra note 195 and accompanying text.
The conclusiveness of this inference-of-injury rule, like other per se rules in antitrust law, obviates any close factual scrutiny of competitive consequences. Yet, unless one is willing to assume that all price discriminations cause injury to competition, it is not an enlightened rule. Some commentators have therefore advocated limiting its use to situations characterized by systematic discriminations favoring large buyers.\footnote{See I ABA Monograph, supra note 30, at 103.} \footnote{Lewin, Antitrust Ideas: Three Problems, N.Y. Times, Mar. 8, 1983, at D2, col. 1.} Others would go even further. Judge Bork recently stated:

If the new economics is right, there is never a case in which price discrimination injures competition. . . . In the Robinson-Patman Act, when Congress said it wanted to forbid price discrimination to protect competition, they said it with a wink. I don’t think it’s a judge’s job to enforce winks.\footnote{451 U.S. 557 (1981).}

The Supreme Court, however, is less hostile to the Act than the “new economics” and has strongly affirmed the use of the inference. In 1981, in \textit{J. Truett Payne Co. v. Chrysler Motor Corp.},\footnote{Id. at 561-62.} the Court cited with approval the Morton Salt inference of injury rule.\footnote{103 S. Ct. 1282 (1983).} In the 1982 Term, in \textit{Falls City Industries v. Vanco Beverage, Inc.},\footnote{Id. at 1289.} the Court specifically rejected petitioner’s argument that “the Morton Salt rule should be applied only in cases involving ‘large buyer preference or seller predation.’”\footnote{1287.} Justice Blackmun, speaking for a unanimous Court, found no economic basis for such a distinction, and stated that only Congress, not the Court, could alter the general applicability of the Act to all transactions.\footnote{Id. at 1287-88.} There have, nevertheless, been some situations in which the rule has not been applied.\footnote{Id. The facts in the case were peculiar. Falls City, a beer brewer, sold to wholesalers in Kentucky and Indiana at different prices. The wholesalers were not allowed to compete because of Indiana state law restrictions. \textit{Id.} at 1287. Therefore no secondary-line injury to competition was alleged. The wholesalers sold to retailers in their respective states. These retailers, also because of state law, theoretically did not compete. Because consumers did not observe the restriction on importing beer from Kentucky, however, the Kentucky retailers actually competed with the Indiana ones. \textit{Id.} at 1287-88.} This then was one of the rare third-line cases, in which the injury to competition was among the customers of the seller’s customers. The action was brought, however, by the secondary-line wholesaler, Vanco, who received the higher price from Falls City and passed it on to its retailer-customers. Vanco had standing because the injury-to-competition on the third level caused it injury as well. See \textit{id.} at 1288.

The Court affirmed the finding that the lower prices to Kentucky wholesalers caused injury to competition to Indiana retailers on the third line stating:
ii. Primary-line cases

Injury to competition is generally harder to prove in primary-line cases than in secondary-line ones, although for a period, the Supreme Court’s opinion in *Utah Pie Co. v. Consolidated Baking Co.* put this distinction in doubt. *Utah Pie* and other primary-line cases had focused on the “predatory” nature of the seller’s activity and inferred injury to competition from a finding of predatory intent. Yet such intent was often gleaned from a number of non-economic factors or factors not related to the price discrimination. In short,

The Court of Appeals agreed with the District Court’s findings that “the major reason for the higher Indiana retail beer prices was the higher prices charged Indiana distributors . . . thereby causing the retailers to curtail purchases from Vanco.” These findings were supported by direct evidence of diverted sales, and more than established the competitive injury required for a prima facie case under § 2(a).

*Id.* at 1290 (citation and footnote omitted).

144. See, e.g., Borden Co. v. FTC, 381 F.2d 175, 178-81 (5th Cir. 1967) (private brand and name brand competition); Tri-Valley Packing Ass’n v. FTC, 329 F.2d 694, 703-04 (9th Cir. 1964) (lower-priced product available to disfavored purchaser); American Oil Co. v. FTC, 325 F.2d 101, 104-06 (7th Cir. 1963) (insignificant duration of price discrimination), cert. denied, 377 U.S. 954 (1964). *Contra* Fowler Mfg. Co. v. H.H. Gorlick, 415 F.2d 1248, 1253 (9th Cir. 1969), cert. denied, 396 U.S. 1012 (1970); Purolator Prods. v. FTC, 352 F.2d 874, 882-83 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968).

Recently, the Ninth Circuit held that allegations in a complaint that competitors of the plaintiff received a 12% price reduction, that plaintiff had sustained increased costs of doing business, and that “competition by plaintiff in the photofinishing trade has been lessened, restrained and eliminated,” did not state a prima facie § 2(a) violation. Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 547-48 (9th Cir. 1983) (emphasis added by court).


146. 386 U.S. 685 (1967).

147. In *Utah Pie*, the Court held that injury to competition had been proved, *id.* at 702-03, because, as an ex-FTC Chairman put it:

Utah Pie’s monopolistic position of 66.5% of the market was reduced to a commanding 45.3%. This result was reached by the Supreme Court notwithstanding the fact that Utah Pie had growing sales, had proved its ability to survive as a “healthy and effective competitor” and to remain “a financially strong business concern”; and notwithstanding the fact that consumers in Salt Lake City had greatly benefited from reduced pie prices.


149. See Austern, *Presumption and Percipience About Competitive Effect—An Evaluation*, 37 Antitrust L.J. 22, (1968) [hereinafter cited as Austern II]. As Professor Austern noted:
predatory intent, and thus injury to competition, was found in cases in which no economic analysis of the transaction involved had taken place. Since 1975, however, courts, influenced by the Areeda-Turner article on predatory pricing, have begun to use modern cost analyses.

Professors Areeda and Turner maintained that pricing above a firm's short-run marginal cost should be conclusively presumed law-

\[\text{Predatory intent \ldots will always be found in unrelated, usually unauthorized, and colored characterizations of purpose. Calling a local competitor an unfavorable factor or a bad actor, or suggesting that he be taught a lesson, or pointedly claiming "We can take Jones' business," or acting like Agent 007, can override the most favorable economic analysis to yield a finding of predatory intent.}\]


150. Perhaps one reason for the development of these inferences is the strong faith the courts and FTC had in the Robinson-Patman doctrine that price discriminations are generally predatory, not cost related, and eventually lead to monopoly. It has been argued, however, that even at the time of the passage of the Act, there were facts available to dispute these assumptions. *See* Justice Report, *supra* note 17, at 124-39.

A more cynical view is that these inferences protected certain types of businesses and methods of distribution regardless of the effect on competition. In any case, these inferences were compatible with the Supreme Court's per se approach to antitrust in general. Besides the basic per se rule against horizontal price fixing, *see* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), the Court developed per se rules against 1) horizontal territorial restraints, United States v. Topco Assoc., 405 U.S. 596, 608 (1972), 2) tying arrangements, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 8 (1958), 3) concerted refusals to deal, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959), 4) most vertical-distribution restraints, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 381 (1967), and even 5) vertical resale price maintenance of *maximum prices* when the distributor has a total monopoly over the product, *see* Albrecht v. Herald, 390 U.S. 145, 152-53 (1968).


ful, and that prices below that level should be conclusively presumed unlawful. Although this test was designed to determine whether a monopolist's pricing is predatory under the Sherman Act, Professors Areeda and Turner have stated that it is applicable to Robinson-Patman Act cases as well. They would modify the per se illegality of the test to allow non-monopolists to invoke the Robinson-Patman Act defenses.

In the eight years since it was published, the Areeda-Turner test has drawn much comment, criticism, and a number of counter-proposals. Though no court has adopted the per se test completely, the

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152. Id. at 711-13. Marginal cost is defined as "the increment to total cost that results from producing an additional increment of output." Id. at 700. The conclusive presumption of illegality is subject to the limitation that under conditions of strong demand, prices may fall below marginal cost if they remain above average total costs. Id. at 712-13. In 1978, Professors Areeda and Turner modified the test to treat the presumption of illegality as rebuttable rather than conclusive. See 3 P. Areeda & D. Turner, Antitrust Law 154 (1978). Because short-run marginal cost is usually difficult or impossible to compute, Areeda and Turner suggest using reasonably anticipated average variable cost, which approximates marginal cost. Areeda & Turner, supra note 151, at 716. Variable costs are defined as "costs that vary with changes in output. They typically include such items as materials, fuel, labor directly used to produce the product, indirect labor such as foremen, clerks, custodial help, utilities, repair and maintenance, and per unit royalties and license fees." Id. at 700. They are short run costs; they are incurred during "the period in which the firm cannot replace or increase plant or equipment." Id. at 701. "The average variable cost is the sum of all variable costs divided by output." Id. at 700.

153. Areeda & Turner, supra note 151, at 727. As Areeda and Turner stated: The basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical. If the Sherman Act is properly interpreted to permit a monopolist to discriminate in price so long as his lower price equals or exceeds marginal cost, such discrimination is a fortiori permissible for firms with lesser degrees of market power.

Id.

154. See id. at 733.

155. Joskow and Klevorick advocate a cost-based rule and propose a two-tiered predatory pricing test. The first tier analysis involves an assessment of market structure, performance and other factors to determine if monopolistic conditions exist in the relevant market. If these conditions exist, the second step of the analysis involves an assessment of the alleged predatory pricing conduct. Joskow and Klevorick employ a set of rules to determine if the pricing conduct should be considered predatory. First, a price below average variable cost is conclusive evidence of predatory pricing. Second, a price below average variable cost but above average total cost leads to a presumption of predatory pricing. This presumption may be rebutted by evidence that the producer possessed excess capacity and that the pricing was not deliberately exclusionary. Third, a price reduction followed by a price increase within two years leads to a presumption of predatory pricing even if the price is above average total cost. See generally Joskow & Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 Yale L.J. 213 (1979).
test has influenced the approaches of many courts. General agreement apparently exists with the per se illegality standard for monopolists who price below short-run marginal or reasonably anticipated average variable costs. In addition, most courts agree that pricing above these costs is some indication of legality. The difference

Williamson advocates a non-cost-based rule and proposes a system of rules that prevent a dominant firm from increasing output for a limited period after there is a new entry into the industry. Williamson's pricing restriction rules only apply when the industry is at least a "loose oligopoly," price reductions are over a long period of time and demand is not declining. Under such conditions, prices are to be considered as predatory if they are less than average total cost in the intermediate run or less than full costs over the long run. If there exists excess capacity, prices are considered predatory when they fall below average variable cost. See generally Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 284 (1977).

Scherer advocates a rule of reason inquiry into all relevant variables to determine predatory pricing. Scherer calls for a thorough examination of the factual circumstances in a case, particularly of producer intent and the structural consequences of the alleged predatory behavior. The relevant variables to be examined include the relative cost positions of the firms in the industry, conditions of entry, reactions to entry and reactions to withdrawal by established firms. See generally Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976). Posner finds that "proof of sales below average balance-sheet cost [total costs as stated on its books divided by the number of units of output produced] with intent to exclude might be enough to establish a prima facie case of predatory pricing." R. Posner, Antitrust Law 190 (1976). Sullivan suggests that courts look to "human animus" in market conduct. He would focus on the "traces" a predator leaves behind, such as documents containing information about competitors. Sullivan, Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?, 125 U. Pa. L. Rev. 1214, 1229-30, 1232 (1977). See generally Note, Predatory Pricing: The Retreat From the AVC Rule and the Search for a Practical Alternative, 22 B.C.L. Rev. 467 (1981).


157. See I ABA Monograph, supra note 30, at 88. But see Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1386 (9th Cir. 1983) (rejecting per se characterization). The ABA Monograph provides an excellent discussion of the treatment given the Areeda-Turner test by the courts and others. See I ABA Monograph, supra note 30, at 81-96.

158. See I ABA Monograph, supra note 30, at 88; William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035-36 (9th Cir. 1981), cert. denied, 103 S. Ct. 58 (1982); International Air Indus. v. American Excelsior Co., 517 F.2d 714, 723 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976); see also Transamerica Computer Co. v. IBM Corp, 698 F.2d 1377, 1388 (9th Cir. 1983) (prices above average total cost not per se legal but presumptively legal).
between the courts' and the Areeda-Turner approaches is that courts display a willingness to consider other factors as well.\textsuperscript{159}

The Justice Department and the FTC each have proposed tests that appear to give a seller even more leeway before predation is found. The Department's proposed predation test is based on the Areeda-Turner test\textsuperscript{160} but would allow a defense that Areeda and Turner do not.\textsuperscript{161} The FTC, in its recent proposed modification of its order in \textit{Borden, Inc.},\textsuperscript{162} suggested that predatory pricing by a monopolist should be determined by comparing a seller's average revenues and costs, rather than by comparing revenue and cost in a particular transaction.\textsuperscript{163}

While considerable debate regarding which cost analysis method should be used continues, the significant result of the Areeda-Turner article is that courts now focus squarely upon cost-based facts relating to the price discrimination itself. This does not mean that non-price information is not considered,\textsuperscript{164} but it does mean that the days of finding predatory intent solely from a sales manager's invectives appear to be gone. This is a significant improvement in the law.

\begin{itemize}
\item \textsuperscript{160} See Appendix A, § 3; Appendix B, § 3; I ABA Monograph, \textit{supra} note 30, at 90.
\item \textsuperscript{161} The proposed statutes add a new defense to those already in the Robinson-Patman Act—"elimination of a competitor is not threatened." See Appendix A, § 4(d); Appendix B, § 4(d).
\item \textsuperscript{163} \textit{Borden, Inc.}, 48 Fed. Reg. 9023, 9023 (1983) (Proposed Order Modification with Statement to Aid Public Comment). This standard appears to give a monopolist more leeway in pricing than the Areeda-Turner test. \textit{See id.} at 9031 (Bailey, Comm'r, dissenting); \textit{id.} at 9029 (Pertschuk, Comm'r, dissenting). As Commissioner Pertschuk noted:
\begin{quote}
[It] is important to note that, though the term "variable costs" is used, the standard is far from the standard conception of the term. The revised order actually prohibits \textit{total} variable costs from exceeding total revenues in a single quarter in a single sales district. This is a very different idea from prohibiting pricing products below the \textit{average} variable cost per unit (a surrogate for marginal cost), and it leads to easy avoidance of the standard . . . . In short, the idea seems to be that a potential predator must obey the law on \textit{average}, rather than in particular situations.\textit{Id.} (emphasis in original). While \textit{Borden} was not a Robinson-Patman action, the proposed proscriptions for a monopolist's pricing would apply, \textit{a fortiori}, \textit{see supra} note 153, to a non-monopolist seller under the Robinson-Patman Act.
\item \textsuperscript{164} See \textit{supra} note 159 and accompanying text.
\end{quote}
\end{itemize}
In sum, the new approaches to finding predatory intent are an important development for reconciling findings of competitive injury in primary-line cases with competitive reality.

c. Standing and damages in private actions

Analytically distinct from, but pragmatically related to, the issue of competitive injury under section 2(a) of the Act, are the issues of injury, for purposes of private-plaintiff standing, and damages, under section 4 of the Clayton Act. Only recently have these issues received much attention in Robinson-Patman Act cases.

The Supreme Court addressed both issues in *J. Truett Payne Co. v. Chrysler Motors Corp.* On the issue of damages, the Court rejected the "automatic damages" theory, which allows a plaintiff to calculate damages on the basis of the price discrimination differential alone. As to standing, the Court held that a private plaintiff "must

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Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id.

166. Both the law of standing and of damages is influenced by the courts' view on the substantive law involved. This is particularly clear in constitutional law, yet it is true for other areas of law as well. Beginning in 1940, the Supreme Court, for three decades, expansively interpreted the antitrust laws and their prohibitory effect. The Court appeared to have no interest in restricting standing or damages. See, e.g., Perkins v. Standard Oil Co., 395 U.S. 642, 648-49 (1969); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 118 (1969). The private plaintiff was not someone pursuing his own self-interest, but rather a private attorney general who served as "a vital means for enforcing the antitrust policy of the United States." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968).


168. Id. at 561-62.

169. Earlier, the Court in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947), appeared to have endorsed this theory. Id. at 757 (a plaintiff "would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices"). Justice Rehnquist writing for the Court in *J. Truett Payne*, however, dismissed the language in *Bruce's Juices* as "merely dictum" without spending much time examining the issue. 451 U.S. at 563 n.3. Rehnquist simply rejected the automatic-damage theory as being in conflict with the requirement of
prove more than a violation of section 2(a), since such proof establishes only that injury may result"; 170 the plaintiff must show that it "has been actually 'injured.'" 171 On the other hand, the Court in Blue Shield v. McCreedy 172 recently endorsed its expansive view of standing 173 in Robinson-Patman Act cases in which indirectness of injury is an issue. 174

§ 4 that the plaintiff be injured. Id. at 561-62. At the same time, however, Justice Rehnquist appeared to accept in Robinson-Patman cases the lenient proof requirements established for Sherman and Clayton Act cases generally. See id. at 568.

An interesting aspect of the J. Truett Payne opinion is the Court's blurring of the distinction between standing and damages. The standing issue—whether the plaintiff has been injured—and the damage issue—how much he has been injured—are closely related and both require causation, but they are distinct. Standing normally requires proof by a preponderance of the evidence. Id. at 570 (Powell, J., dissenting). Damages in antitrust actions, as noted above, are subject to a more lenient standard of proof. See id. at 563-68, 570. By failing to distinguish the two, the Court, by implication, lessened the burden of proof on standing. As the Court noted, the lenient damage standard relies in part upon

the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.

Id. at 566. If this uncertainty also affects the plaintiff's ability to prove the fact of injury, as opposed to the amount, there is reason to relax the standard of proof for standing also.

Four Justices argued, however, that the standing standard should not be relaxed. Id. at 569 (Powell, J., dissenting in part) (joined by Brennan, Marshall, and Blackmun, JJ.). It is interesting that three liberal members of the Court would require more proof than the conservative Justices. The case is also interesting because of the unanimous view on issues that had divided the lower courts. All nine Justices rejected the "automatic damages" theory, id. at 561-63; id. at 569 (Powell, J., dissenting in part), and agreed that the private plaintiff in a damage action must prove more than the Government must prove in an injunctive action, id. at 561; id. at 569 (Powell, J., dissenting in part). In effect the opinion eliminates the automatic damages theory and it may institute a lenient injury standard for private plaintiffs in damage actions. Because four Justices would require the normal standard of proof of standing, however, and because Justice Rehnquist was not explicit in lessening the standard, it may be that the ultimate effect will be merely the elimination of the automatic-damage theory. Nevertheless, one court, in discussing J. Truett Payne, referred to the "'lenient' antitrust rules governing proof of injury." Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 23 (1st Cir. 1981).

170. 451 U.S. at 562 (emphasis in original).

171. Id.

172. 102 S. Ct. 2540 (1982).


174. 102 S. Ct. at 2547 n.12 ("Focusing on the substantive terms of the Robinson-Patman Act, we found no warrant in its 'language or purpose' to engraft an 'artificial' limitation on the reach of the remedy to bar what the court below had termed a 'fourth level' injury.") (quoting Perkins v. Standard Oil Co., 395 U.S. 642, 648-49 (1969)).
In the 1982 Term, in Associated General Contractors v. California State Council of Carpenters, a Sherman Act case, the Court attempted to set general guidelines for “antitrust standing.” The Court rejected the use of any one specific antitrust standing theory, such as the target area or zone of interest theory. Justice Stevens, writing for the Court, stated instead that “courts should analyze each situation in light of [four] factors:” 1. causal connection between the violation and the harm; 2) defendant’s intent to cause harm to the plaintiffs; 3) nature of the plaintiff’s injury—“whether it is of the type that the antitrust statute was intended to forestall”; and 4) directness or indirectness of injury to the plaintiff. The effect Associated General Contractors will have on the law regarding standing in Robinson-Patman actions is unclear. What is clear, however, is that the decision puts in doubt the validity of any case that decided the issue relying upon one theory only.

An issue not yet addressed by the Court is what happens to the Clayton Act standing analysis when a plaintiff also sues for an injunction. All private injunction actions under the antitrust laws are governed by section 16 of the Clayton Act. Under

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175. 103 S. Ct. 897 (1983).
176. Id. at 4144 n.31. The Court recognized that: the focus of the doctrine of “antitrust standing” is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. Id.
177. Two courts had held that the plaintiff must do business in the “target area” of the antitrust conspiracy; that area threatened by a breakdown in competitive conditions. Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18 (1st Cir.), cert. denied, 446 U.S. 983 (1979).
178. One court stated that standing depends upon whether the injury “arguably comes within the zone of interests protected by the [antitrust laws].” Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1152 (6th Cir. 1975).
179. 103 S. Ct. at 907 n.33.
180. Id. at 908. Causation is the one factor that if not present would preclude standing.
181. Id. In the Court’s analysis this appeared to be the least important factor. “We are also satisfied that an allegation of improper motive, although it may support a plaintiff’s damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss.” Id. (footnotes omitted).
182. Id. at 910.
183. Id.
184. See, e.g., Schwimmer v. Sony Corp. of Am., 637 F.2d 41, 47-49 (2d Cir. 1980) (indirect purchaser must be in the “target area” of the seller’s price discrimination).
section 16 a private plaintiff may bring suit to enjoin "threatened loss or damage."\textsuperscript{186} It appears that this standard is something less than an "actual injury" though something more than a possibility or probability of injury. Thus, a private plaintiff in a Robinson-Patman Act case may be able to survive a standing challenge under \textit{J. Truett Payne} by seeking an injunction as well as damages.\textsuperscript{187}

\textbf{d. Defenses}

The defenses to a prima facie section 2(a) case are set forth in provisos in section 2(a) itself and in section 2(b). The defenses are: 1) the price differential was cost-justified;\textsuperscript{188} 2) the price differential was made in good faith to meet the equally low price of a competitor;\textsuperscript{189} and 3) the price differential was made in response to changing conditions affecting the market for, or the marketability of, the goods concerned.\textsuperscript{190}

\textbf{i. Cost justification}

The cost-justification defense contained in section 2(a)\textsuperscript{191} reflects the economic premise that a seller should not be required to charge an artificially high price to a particular buyer if it actually costs less to sell to that buyer than to others.\textsuperscript{192} Since the Act's inception, however,
interpretations of the cost-justification defense have been characterized by a requirement of meticulously exact data. Consequently, over the years various commentators, courts and members of the FTC have recognized that the defense "is largely a legal mirage." In fact, Professor Areeda has asked "[whether] the cost justification defense ought to be repealed because it is a mere illusion that entraps the unwary and obscures from Congress and the courts the real impact of § 2(a)."

It is evident from the legislative history (of the Act) that Congress sought to curtail the concentration of economic power in the distributive area of the economy by eliminating inequalities derived from sheer economic power, while at the same time not stifling competition based on real cost savings and increased efficiency.

Id. at 676 (emphasis added).

193. An example of this is the following statement of the FTC Chairman in 1937:

Such [cost justification] information can seldom be derived from the present books of account. Packing costs have been determined by a stopwatch. Costs of handling invoices have been determined by counting the number of invoices or the number of entries for a period of time and attributing to each operation a charge based upon the personnel it took and the space it occupied during that period. Sales costs have been worked out by the timing of calls, the recording of the number of each type of call made to each type of customer, the analysis of the comparative number of productive and non-productive calls, and the use of various devices for apportioning salesmen's salaries, commissions, and expenses in accord with the facts discovered.


194. F. Rowe, *supra* note 27, at 303; *see* Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 79 (1953) ("Proof of cost justification being what it is, too often no one can ascertain whether a price is cost-justified."); Sylvania Elec. Prods., 51 F.T.C. 282, 290 (1954) (Howrey, Chairman, concurring) ("the fact remains that the cost defense has proved largely illusory"); Attorney General's Nat'l Comm. to Study the Antitrust Laws, Report 171 (1955) ("largely illusory in practice") [hereinafter cited as Att'y Gen. Rep.]; Day, *Pricing and Discrimination*, 44 Antitrust L.J. 312, 322 (1975) ("cost justification . . . [has] proved to be of little value to defendants"); Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N.Y.U. L. Rev. 1143, 1162 (1955) ("the bright promise of the cost-justification proviso of Section 2(a) has proved largely delusive") (at the time the author was the FTC General Counsel) [hereinafter cited as Kintner I].

195. P. Areeda, *Antitrust Analysis* 895 (2d ed. 1974). Several reasons explain the ineffectiveness of the cost-justification defense. First, there is the lack of guiding principles from the FTC. In 1953 an Advisory Committee to the FTC attempted to produce reliable guidelines so that "sellers who wish[ed] to facilitate a determination of compliance with the Robinson-Patman Act would be able to organize their cost records accordingly." FTC Press Release, Nov. 30, 1953, *quoted in F. Rowe, supra* note 27, at 301. FTC Chairman Howrey hoped that the effort would produce standard guidelines because, he reasoned:

[T]hen distribution cost accounting could be built into the seller's formal books of account. This would permit business firms to keep their costs in a form which would enable them to compute directly the distribution costs
applicable to specific products, to specific classes of transactions, or to specific classes of customers.


The FTC has taken no formal action regarding guidelines, prompting Rowe to complain:

[N]ot one of the final FTC dismissals of a formal proceeding to date by reason of successful cost justification reveals an adjudication in light of criteria or rules, either legal or accounting . . . .

[ Efforts at cost justification have been foiled by a reluctance on the part of FTC accountants to formalize their criticisms and objections to a company's cost project. Although written critiques by the Commission's staff may have been prepared in connection with a respondent's cost study, a practice of nondisclosure has withheld the contents of this report except for sporadic informal disclosures. Enlightenment and guidance in published form thus came neither from the tribunal nor the staff.]

F. Rowe, *supra* note 27, at 299-300 (emphasis added) (footnote omitted). Obviously, no company would institute a costly and complex cost accounting system without some assurance that the system would be acceptable to courts and the FTC.

Another reason for the ineffectiveness of the cost-justification defense is the ambiguity of the § 2(a) proviso itself. The Attorney General's Report summarized the problem:

At one point the cost proviso expressly recognizes the propriety of price differentials reflecting economies in manufacturing, as well as sales and delivery, costs; yet elsewhere the proviso evidently insists that legally cognizable costs derive exclusively from methods or quantities of sale or delivery—thus demanding that efficiencies in manufacturing be specifically related to distribution techniques before qualifying as a basis for permissible variations in price.


Perhaps the most formidable problem with the defense is the difficulty inherent in cost accounting, which is far from an exact science. As the FTC Advisory Committee's Report noted, cost data radiate "an aura of precision that is not warranted [because] cost differences at best include elements of opinion and approximation." *Advisory Comm. Rep., supra* at 10, *supra* note 27, at 302. One commentator has observed that one must "desert the bookkeeper and take on the techniques of the appraiser." A. Sawyer, *supra* note 193, at 122. Moreover, for accountants, who conventionally deal with average costs rather than cost differences, cost accounting is a "completely new field." *Massel, The Robinson-Patman Act: Cost Justification*, in Conference on the Antitrust Laws and the Attorney General's Committee Report 197, 208 (1955). Moreover, not only are there no FTC guidelines, there are no guidelines within the accounting profession comparable to those for financial accounting. *Id.*

Additionally, there is the practical problem of segregating costs. Justice Jackson recognized this problem when he referred to "the elusiveness of cost data, which
apparently cannot be obtained from ordinary business records [and which are] ordinarily obtainable . . . only after a detailed investigation of the business." Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 68-69 (1953). The ex-chief economist for the FTC concluded similarly that "[s]egregated costs for particular commodities can be ascertained easily only where the commodities sold are few, or each is produced and sold separately from the rest." C. Edwards, supra note 43, at 593. Although cost accounting advances have alleviated some of these problems there is still the problem of how to allocate costs by customers, i.e., the pro-rated cost per product of a salesperson visiting large and small purchasers.

Finally, the "exorbitant expense" of record-keeping contributes to the ineffectiveness of the defense. Id. at 612. If the FTC would accept accounting estimates, this burden might not be so great, but it does not. As the Supreme Court stated in Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953):

[W]henever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business. Id. at 68 (footnote omitted); see Freer, supra note 193, at 485; Att'y Gen. Rep., supra note 194, at 171-75.

There has been some judicial broadening of the defense in that the use of average cost data for similar and non-arbitrary customer groups has been permitted. See United States v. Borden Co., 370 U.S. 460, 468-69 (1962). Use of reasonable approximations, however, rather than actual cost data, is still not allowed. Moreover, Commission action indicates that a cost-justification analysis "must be done over when a concern decides to change the boundaries of its discount classes or the character of its discounts." Freer, supra note 193, at 486. As Freer noted:

In one case . . . the commission had no sooner examined and found not unlawful a quantity-discount system established by a large manufacturer than the manufacturer decided to inaugurate a system of volume discounts. Thereupon, when certain customers complained and the commission renewed its investigation, the manufacturer found that an entirely new analysis of his costs was necessary. Id. And unfortunately for smaller companies, "the cost and complexity of a Robinson-Patman cost study does not decrease proportionately with the size of the respondent." Taggert, Cost Justification Under the Robinson-Patman Act, 101 J. Acct. 52, 54 (June 1956).

Compounding these problems has been the hostility to the defense of the FTC and the courts. See, e.g., Beatrice Foods Co., 76 F.T.C. 719, 760-68 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971); Thompson Prods., 55 F.T.C. 1252, 1264-66 (1959). Although in pre-complaint negotiations the FTC had been less hostile to cost justifications that were made before the price discrimination and that concerned only a few products, this limited flexibility was not reflected in the case law. Moreover, some courts have indicated that even if the defendants were to prove cost justification, usually a complete defense, Standard Oil Co. v. FTC, 340 U.S. 231, 241 (1951), they might still be held liable; see Alhambra Motor Parts v. FTC, 309 F.2d 213, 216, 219 (9th Cir. 1962) (dictum) (a complete defense unless Commission establishes that such defense is "available on proportionally equal terms"); American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 923-24 (5th Cir.), appeal dismissed, 342 U.S. 875 (1951). But see American Can Co. v. Russellville Canning Co., 191 F.2d 38, 58-59 (8th Cir. 1951) ("court could not concern itself with the question whether the system was fair and
ii. Meeting competition

Under section 2(b), price differentials may be justified if they are made to meet the equally low price of a competitor. In Standard Oil Co. v. FTC, the Supreme Court held that the meeting-competition defense is a "complete defense" to a section 2(a) price discrimination charge. In theory, this defense serves to balance the Robinson-Patman Act with the Sherman Act.

It appears still true that the cost-justification defense is practically unavailable because "only the most prosperous and patient business firm could afford pursuit of an often illusory defense." Consequently, few litigants have successfully asserted the defense. In a rare example of a successful defense, a district court accepted the defendant's cost-justification defense on a motion for summary judgment. See Uniroyal, Inc. v. Hoff & Thames, Inc., 511 F. Supp. 1060, 1071-72 (S.D. Miss. 1981). Most cases go the other way. See, e.g., Barry Wright Corp. v. ITT Grinnell Corp., 1980-81 Trade Cas. ¶ 63,862, at 78,572-73 (D. Mass. 1981).

In any case, until recently the supporters' fears were more theoretical than real. A "complete" defense has little meaning if it cannot be established. The meeting-competition defense has rarely been successful, and as the General Counsel of the FTC said four years after the Supreme Court decision, "[t]he effect of Standard Oil on price-discrimination cases, despite the alarms of its critics, has been precisely nil. The good-faith meeting-competition defense has not been successful in a single case." Kintner I, supra note 194, at 1167 (footnote omitted). The author was citing this record as a positive achievement of the Commission. See id. at 1166-68.

Rowe, Pricing and the Robinson-Patman Act, 41 Antitrust L.J. 98, 98 (1971) ("Section 2(b) has been the prime axis for accommodating the inherently restric-
Although the meeting-competition defense has fared better than the cost-justification defense, this is not attributable to a lack of effort on the part of the FTC, which attempted in the past to limit the practical utility of the defense.\textsuperscript{200} Moreover, because the heart of the defense is

tive provisions of the Robinson-Patman Act to the Sherman Act’s mandates for vigorous competitive pricing by sellers.”) (footnote omitted) [hereinafter cited as Rowe IV; see E. Kintner, A Robinson-Patman Primer 178, 193 (1970). As Kintner stated:

This defense has the effect of sanctioning certain instances of discriminatory concessions and constitutes a congressional resolution to encourage “hard competition”—lower prices—in certain competitive situations even though, by definition, adverse competitive effects continue. The [defense constitutes a] safety [valve] against excessive pressure for “soft competition” capable of being read into Section 2(a).

\textit{Id.; see also} ABA Antitrust Developments 143 (1975) [hereinafter cited as Antitrust Developments].

200. \textit{See, e.g.,} Callaway Mills Co. v. FTC, 362 F.2d 435, 441 (5th Cir. 1966) (products must be of like grade and quality); Purolator Prods. v. FTC, 352 F.2d 874, 884-85 (7th Cir. 1965) (prices must be in response to an individual competitive situation), \textit{cert. denied}, 389 U.S. 1045 (1969); Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964), \textit{cert. denied}, 380 U.S. 906 (1965) (competitor’s price must be verified); Forster Mfg. Co., 68 F.T.C. 191, 196-97 (1965) (seller must have knowledge of specific competitor’s actual price); Cabin Crafts, Inc., 64 F.T.C. 799, 806 (1964) (evidence must show that meeting of price was on goods of comparable quality).

FTC majority pronouncements have 1) required a seller to show facts indicating that his competitor’s price was legal, \textit{American Oil Co.,} 60 F.T.C. 1786, 1799 (1962), \textit{vacated on other grounds}, 325 F.2d 101 (7th Cir. 1963), \textit{cert. denied}, 377 U.S. 954 (1964), 2) disallowed the meeting-competition defense for any seller who maintained a pricing “system,” \textit{Standard Motor Prods.,} 54 F.T.C. 814, 831 (1957), \textit{aff’d}, 265 F.2d 674 (2d Cir.), \textit{cert. denied}, 361 U.S. 826 (1959), 3) limited \textsection 2(b) to instances in which competitors had extended pre-existing lower price offers to the seller’s customers rather than to the competitor’s own customers, \textit{American Oil Co.,} 60 F.T.C. 1786, 1799 (1962), \textit{vacated on other grounds}, 325 F.2d 101 (7th Cir. 1963), \textit{cert. denied}, 377 U.S. 954 (1964), 4) barred the \textsection 2(b) defense for any seller whose competitive price reductions also gained rather than only retained business, \textit{Sunshine Biscuits, Inc.,} 59 F.T.C. 674, 681 (1961), \textit{vacated}, 306 F.2d 48 (7th Cir. 1962), 5) questioned whether a large seller could fully use the \textsection 2(b) defense against a small competitor, \textit{see Forster Mfg. Co.,} 62 F.T.C. 852, 915-16 (1963), \textit{vacated}, 335 F.2d 47 (1st Cir. 1964), and 6) attempted to read the \textsection 2(b) defense entirely out of \textsection 2(d) cases, \textit{Shulton, Inc.,} 59 F.T.C. 106, 112 (1961), \textit{vacated and remanded}, 305 F.2d 36 (7th Cir. 1962).

The first time that the Commission accepted the defense in a litigated proceeding was in \textit{Continental Baking Co.,} 63 F.T.C. 2071 (1963), in which the respondent had an exceptionally strong case. Continental had previously refused to grant discriminatory discounts even though its competitors had done so. It had lost substantial business as a result of its refusals. Continental subsequently offered discounts only to customers who had been offered an equal or greater discount by a competitor. Furthermore, it asked its sales representatives to verify customer’s claims and it never undersold its competitor. \textit{Id.} at 2150-52. The staff had reportedly dropped prior investigations because it anticipated successful meeting-competition defenses. \textit{To Amend Section 2(b) of the Clayton Act: Hearings on S. 11 and S. 138 before the
the amorphous standard of good faith, much discretion has been given to the trier of fact, and this discretion, coupled with the fact that the burden of proof is on the seller, has made succeeding on this defense difficult.

The practical meaning of the meeting-competition defense is that no injury to competition has occurred, and it thus appears that the defense is compatible with both antitrust's concern for competition and the Act's supporters' concern for small businessmen. The past


201. FTC Commissioner Elman has stated: "[A]t the heart of Section 2(b) is the concept of 'good faith.' " Continental Baking Co., 63 F.T.C. 2071, 2163 (1963). The Commission has recognized that the term "good faith" is subject to differing interpretations: "Such a standard, whether it be considered 'subjective' or 'objective,' is inherently ad hoc. . . . Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others." Id. Such an amorphous standard permits a court, jury or the Commission to decide a case almost any way it chooses.

202. See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 704 (9th Cir. 1964); Continental Baking Co., 63 F.T.C. 2071, 2163 (1963).

203. Although courts have been more receptive to the defense than the FTC, see e.g., Harbor Banana Distribs. v. FTC, 499 F.2d 395, 399 (5th Cir. 1974); Cadigan v. Texaco, 492 F.2d 383, 386-87 (9th Cir. 1974); Callaway Mills Co. v. FTC, 362 F.2d 435, 441 (5th Cir. 1966); Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965); McCaskill v. Texaco, 351 F. Supp. 1332, 1337-40 (S.D. Ala. 1972), aff'd mem. sub nom. Harrelson v. Texaco, 486 F.2d 1400 (5th Cir. 1973), they have also adopted requirements that make this a complicated and difficult defense. Some of these requirements include: 1) "meeting, not beating" the competitor's price, see National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 523 (7th Cir.), cert. denied, 393 U.S. 977 (1968), 2) defensive retention of old customers rather than aggressive pursuit of new ones, see Cadigan v. Texaco, 492 F.2d 383, 387 (9th Cir. 1974); Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48, 51-52 (7th Cir. 1962); Standard Motor Prods. v. FTC, 265 F.2d 674, 677 (2d Cir.), cert. denied, 361 U.S. 826 (1959). Contra Falls City Indus. v. Vanco Beverage, Inc., 103 S. Ct. 1282, 1294-95 (1983), 3) meeting the price of one's own competitor rather than that of competitor of one's customer, see Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 129 (1978); Belliston v. Texaco, 455 F.2d 175, 182 (10th Cir.), cert. denied, 409 U.S. 928 (1979); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 997-98 (10th Cir. 1965), cert. denied, 380 U.S. 964 (1966); Sun Oil Co., 55 F.T.C. 955, 965 (1959), vacated, 294 F.2d 405 (5th Cir. 1961), rev'd, 371 U.S. 505 (1963), 4) individual competitive situation rather than pricing system, see Standard Motor Prods. v. FTC, 263 F.2d 674, 677 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959); Ingram v. Phillips Petroleum Co., 259 F. Supp. 176, 184 (D.N.M. 1966). Contra Falls City Indus. v. Vanco Beverage, Inc., 103 S. Ct. 1282, 1295 (1983); Callaway Mills Co. v. FTC, 362 F.2d 435, 441 (5th Cir. 1966).

204. Consider the following example. If the price of seller A to buyer X is lower than its price to buyer Y, X's competitor, but the price to X was made to meet the
hostility to the defense is therefore difficult to understand on any principled basis. Moreover, this hostility has been a roadblock to making the Act compatible with competitive principles.

Fortunately, the law in this area has experienced a dramatic turn-around recently. The Supreme Court has considered the meeting-competition defense three times in the last five years. Although in *United States v. United States Gypsum Co.*,\(^2\) the Court, concerned with the use of the defense to aid price-fixing, appeared to indicate that the defense might be further limited,\(^2\) the Court's subsequent

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price of seller B, then X would have received a lower price in any case, either from A or from B. A's price, therefore, aided competition and caused no harm to Y. See P. Areeda, *supra* note 195, at 901; *Dairy Price Discrimination Hearings, supra* note 11, at 691. The Court of Appeals for the First Circuit reasoned similarly in a recent § 2(e) case. See *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 24-25 (1st Cir. 1981).

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206. In *Gypsum*, a criminal price-fixing action, the Court considered the defendants' argument that inter-seller price verification was permissible under the Sherman Act because it was necessary in order to meet the requirements of the meeting-competition defense under the Robinson-Patman Act. *Id.* at 447-48. The Court rejected this argument, stating that the flexibility of the "good-faith" standard would protect sellers in most situations without the need to resort to price verification. *Id.* at 454. In addressing the specific situation of a seller that desired to verify a market price quotation furnished by a possibly lying buyer, the Court stated:

The so-called problem of the untruthful buyer which concerned the Court of Appeals does not in our view call for a different approach to the § 2(b) defense. The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and we agree with the Government and the FTC that this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary—the buyer.

*Id.* (footnote omitted). The Court was particularly concerned that such verifications would lead to price stability and price-fixing. *Id.* at 457-59. The Court recognized that its efforts to make Robinson-Patman practices compatible with the Sherman Act rules against price-fixing might preclude the availability of the meeting-competition defense in some limited situations. It was willing, however, to accept this result for the sake of the broader antitrust objectives. *Id.* at 459 n.32. As the Court stated:

That the § 2(b) defense may not be available in every situation where a competing offer has in fact been made is not, in our view, a meaningful objection to our holding. . . . [I]t seems clear that inadequate information will, in a limited number of cases, deny the defense to some who, if all the facts had been known, would have been entitled to invoke it. For reasons already discussed, interseller verification does not provide a satisfactory solution to this seemingly inevitable problem of inadequate information. Moreover, § 2(b) affords only a defense to liability and not an affirmative right under the Act. While sellers are, of course, entitled to take advantage of the defense when they can satisfy its requirements, efforts to increase its availability at the expense of broader, affirmative antitrust policies must be rejected.

*Id.*
expansive approach to the defense in *Great Atlantic & Pacific Tea Co. v. FTC*,\(^2\) and *Falls City Industries v. Vanco Beverage, Inc.*,\(^3\) should allay any such fears. The Court's present approach still leaves much discretion to the trier of fact to determine good faith,\(^4\) and, admittedly, this discretion builds into the defense a degree of uncertainty. Nevertheless, the outlook for the successful assertion of the defense is the best it has ever been.\(^5\)

\(^2\) 440 U.S. 69 (1979). In this case, the Commission charged A & P, the buyer, with inducing Borden, the seller, to discriminate in setting milk prices in violation of § 2(f) of the Act. *Id.* at 74. Neither the Administrative Law Judge (ALJ) nor the Commission considered the merits of Borden's meeting-competition defense because, under their interpretation of § 2(f), it was unavailable to A & P on the facts of the case. *Id.* at 74 n.5, 82. Both the ALJ and the Commission, however, expressed doubts about the merits of the defense. *Id.* at 90-91 (Marshall, J., dissenting).

The Court rejected the Commission's § 2(f) analysis, and held that Borden's meeting-competition defense was relevant to A & P's liability. *Id.* at 81. Rather than remanding the case to the FTC for the initial consideration of this "fact specific" defense, the Court resolved the issue itself. *Id.* at 82-85. This approach is in marked contrast to the Court's remand to the court of appeals in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), of an injury-to-competition issue for consideration of the district court's factual determination. *Id.* at 568. The decision not to remand may have reflected the Court's lack of faith in the FTC's ability to resolve the issue properly, considering its past hostility to the defense. But see *Falls City Indus. v. Vanco Beverage, Inc.*, 103 S. Ct. 1282, 1297 (1983). But see infra note 417 and accompanying text. Alternatively, the decision could have reflected the Court's view of the level of factual scrutiny necessary to resolve the issue. In any case, the Court found that Borden's meeting-competition defense was valid. 440 U.S. at 83-84.

The Court noted that A & P would not divulge the amount of the bid and that Borden could not ask its competitors directly about their bids to A & P without risking Sherman Act liability. *Id.* at 84. Yet, rather than concluding that this inability to verify a competitor's bid precluded a finding of "good faith," the Court used the restrictions on Borden's ability to verify as support for its conclusion that Borden did all that it could and was therefore acting in "good faith." *Id.* The Court simply did not address the possibility that someone in Borden's position might be precluded from using the defense at all. The Court appears to have been influenced by the fact that Borden was "[f]aced with a substantial loss of business." *Id.* at 84. The seeming ease with which the Court disposed of the issue contrasts sharply with the close scrutiny courts had applied in the past. This change in approach has since been reflected in some lower court opinions. See *Hillside Dairy Co. v. Fairmont Foods Co.*, 1981-2 Trade Cas. (CCH) ¶ 64,375, at 74,725-26 (6th Cir. 1981); *Linmont Prop. v. Alan M. Newman*, 1980-81 Trade Cas. (CCH) ¶ 63,773, at 78,118 (E.D.N.Y. 1980).

\(^3\) 103 S. Ct. 1282 (1983). The Court held that the meeting-competition defense may be available even though: 1) there is a sustained price discrimination, *id.* at 1291-92, 2) the seller raises prices, *id.* at 1292, 3) the raised price increases profits, *id.*, 4) the price discrimination is intended to gain new customers, *id.* at 1293, and 5) the price discrimination is part of a territorial pricing system, *id.* at 1295-96.

\(^4\) See *supra* notes 207-08.


The FTC and the Justice Department, in an amicus curiae brief in *Falls City*, supported the expansive approach to the meeting-competition defense. See
iii. Changing conditions

The changing-conditions defense contained in section 2(a)\textsuperscript{212} contemplates two possible justifications for a price differential: 1) an alteration in market conditions;\textsuperscript{213} and 2) an alteration in the marketability of the product.\textsuperscript{214} As to the former possibility, courts have restricted the defense to the proviso's specific examples.\textsuperscript{215} This interpretation, however, unnecessarily limits the availability of the defense.

The exemption for changing conditions in the marketability of the product, on the other hand, has enjoyed more success. Courts have recognized the defense's applicability to the off-season sales of American cars\textsuperscript{216} and Christmas ornaments.\textsuperscript{217} The FTC has taken a more restrictive view, however, than the courts.\textsuperscript{218}

\textsuperscript{212} 15 U.S.C. § 13(a) (1976). The section provides in part:
That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.
\textit{Id.} As Representative Patman stated:
[This proviso] provide[s] for continuance of the normal and economically justifiable freedom of action that will permit a seller to dispose of goods on hand where he is threatened with immediate or imminent loss as the result of changing marketing conditions, deterioration, or obsolescence of the goods themselves, or any other similar circumstance that requires the sudden and immediate movement of goods on hand to avoid losses resulting from conditions beyond his control.
W. Patman, \textit{supra} note 2, at 88-89.
\textsuperscript{213} See 15 U.S.C. § 13(a) (1976); W. Patman, \textit{supra} note 2, at 88-89.
\textsuperscript{215} Moore v. Mead Serv. Co., 190 F.2d 540, 541 (10th Cir. 1951) (“the plain language of the statute limits the exceptions to those which are ‘such as’ or similar to those named”), \textit{cert. denied}, 342 U.S. 902 (1952); see Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 369 (9th Cir. 1955), \textit{cert. denied}, 350 U.S. 991 (1956); Fruitvale Canning Co., 52 F.T.C. 1504, 1515 (1956); \textit{see also} Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1173-74 (7th Cir. 1972) (retail price fluctuations do not constitute “changing condition”).
\textsuperscript{217} \textit{See} Willow Run Garden Shop, Inc. v. Mr. Christmas, Inc., 1973-2 Trade Cas. (CCH) ¶ 74,816, at 95,642 (D.N.J. 1973).
\textsuperscript{218} In Joseph A. Kaplan & Sons, 63 F.T.C. 1308 (1963), \textit{aff’d}, 347 F.2d 785, 787 n.2 (D.C. Cir. 1965), the Commission held that discounts granted prior to the introduction of a new line of merchandise because old merchandise was “slow-moving,” were not covered by the changing conditions defense. \textit{Id.} at 1344-45.
3. Section 2(c)

Section 2(c)\(^{219}\) is a self-contained enactment, unrelated to the other sections of the Robinson-Patman Act.\(^{220}\) Its provisions, as generally interpreted, prohibit a party to a sales transaction from paying a fee or its equivalent to the other party, his agent or his controlled intermediary.\(^{221}\) The section is intended to reach dummy brokerage payments that are in reality "under the table" price concessions to the buyer.\(^{222}\) Section 2(c) "was enacted by Congress because § 2(a) was not considered adequate to deal with abuses of the brokerage function."\(^{223}\)

The scope of section 2(c) is broader than that of section 2(a). Price discrimination is not normally required,\(^{224}\) and consequently, there

219. 15 U.S.C. § 13(c) (1976). The section provides:
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 therein where such intermediary is acting in fact for 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.

Id.


221. See H. Shniderman, supra note 30, at 44. Shniderman observed:
In any transaction involving the sale of goods, a violation of Section 2(c) is established when the following three elements are proved: (1) the person charged is engaged in commerce and makes or receives the prohibited payment in the course of such commerce; (2) the transaction involves a payment or a receipt by "any person" of a commission, a brokerage, or other compensation, or any allowance or discount in lieu thereof; (3) the payment is made to the other party to the transaction or to his agent representative, or controlled intermediary.

Id. (footnotes omitted).

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.

Id. (footnotes omitted); accord H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936).


need not be two consummated sales. The subsection also covers export sales, but does not specifically require that the relevant purchase be "in commerce." Significantly, it does not require that competition be injured.

Moreover, not only is the reach of section 2(c) broader than that of section 2(a), the defenses to a section 2(c) action are limited: The meeting-competition, cost-justification and changing-conditions defenses do not apply. The only clearly accepted defense derives from the "services rendered" language in the subsection. Although this language appears to recognize the valid economic function of services provided by the buyer or his agents, courts quickly limited the defense to those services performed by the seller's own broker. This limitation effectively places section 2(c) violations in a per se category. As one commentator observed, "the exception is substantively meaningless, since no one would have contended that the subsection even without the clause barred such a payment."

82-972) and (U.S. Dec. 13, 1982) (No. 82-984); Southgate Brokerage Co. v. FTC, 150 F.2d 607, 609 (4th Cir.), cert. denied, 326 U.S. 774 (1945). "In drawing an inference that an allowance is brokerage or in lieu of brokerage, however, the prices charged other customers sold through brokers may have to be compared with the price involved in the transaction being challenged." H. Shniderman, supra note 30, at 46 n.22. Recently some courts have required a showing of price discrimination. See infra notes 236-38 and accompanying text.


227. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959) (dictum); see also Ideal Plumbing Co. v. Benco Inc., 529 F.2d 972, 977 (8th Cir. 1976) (meeting competition); FTC v. Washington Fish & Oyster Co., 271 F.2d 39, 44 (9th Cir. 1959) (same).


229. See, e.g., Quality Bakers of Am. v. FTC, 114 F.2d 393, 398-99 (1st Cir. 1940); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 673-74 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); Biddle Purchasing Co. v. FTC, 96 F.2d 687, 691 (2d Cir.), cert. denied, 305 U.S. 634 (1938).

230. H. Shniderman, supra note 30, at 54. This de facto per se approach to § 2(c) is illustrated by the early Seventh Circuit case, Modern Marketing Service, Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945). The court stated:

[Section] 2(c) prohibits the payment for services rendered by a broker who is related to the opposite party in any of the ways designated in the provision. . . . Where such relationship exists, it is immaterial whether the services rendered the seller were genuine or fictitious and whether they were inci-
This much-criticized\textsuperscript{231} per se approach to section 2(c) appears to have softened since the Supreme Court considered section 2(c) for the first, and only, time in FTC v. Henry Broch & Co.\textsuperscript{232} In Broch the Court stated:

There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.\textsuperscript{233}

\textsuperscript{231} Elman, supra note 2, at 21-22. The FTC's enforcement efforts, which focused on buying groups of small purchasers, see Independent Grocers Alliance Distrib. Co. v. FTC, 203 F.2d 941 (7th Cir. 1953); Modern Marketing Serv., Inc. v. FTC, 149 F.2d 970, 973-94 (7th Cir. 1945); Biddle Purchasing Co. v. FTC, 96 F.2d 687, 691 (2d Cir.), cert. denied, 305 U.S. 634 (1938), have also been criticized because they protected the position of independent brokers at the expense of small businesses and consumers, see Rowe III, supra note 198, at 304 ("featherbedding guarantee for the organized food brokers protected from competing forms of distribution at the ultimate expense of the consumer." (footnote omitted)); \textit{id.} at 304 n.25. As then Professor Posner stated:

The greatest irony of section 2(c) is that it has so often been used to oppress small business. Many of the defendants in section 2(c) cases have been buying cooperatives composed of small food stores, which sought to obtain a discount for having adopted methods of centralized purchasing that dispensed with a need for a food broker and so made them more competitive with the chain stores. And the principal beneficiaries of section 2(c) have been food brokers, seemingly not a specially deserving group of small businessmen—or even a group of particularly small businessmen.


\textsuperscript{232} 363 U.S. 166 (1960).

\textsuperscript{233} \textit{Id.} at 173.
This language, although dictum, has sent ripples through lower courts. The tendency now is to look at the services rendered by the buyer or its agents to see if they provide cost-savings to the seller, and thereby justify the price differential.

Additionally, some courts require, at least in some circumstances, proof of price discrimination. This would make section 2(c) more consistent with section 2(a). Although the FTC has flirted with the idea that discrimination is an element of a section 2(c) violation, it recently concluded in a “dummy brokerage” case that “a general requirement that discrimination be shown cannot and should not be read into Section 2(c).”

Undoubtedly, the per se nature of section 2(c) is undergoing some change, although the scope of this change is unclear. Nevertheless,

234. In *Broch*, J.M. Smucker Co., a buyer, negotiated with Canada Foods through a broker, Phipps, for apple concentrate. Smucker asked for $1.25 per gallon, and Canada Foods offered to sell at $1.30. Canada Foods told Phipps, and Broch, a competing broker, that if the brokerage commission was reduced from 5% to 3%, it would sell for a net price of $1.25 per gallon. Broch agreed, and the sale went through Broch. *Id.* at 167-68. The Commission attacked this as a violation of § 2(c). Its theory, which the Supreme Court adopted, was that the discount to the buyer was in lieu of brokerage fees because it was made possible only by Broch’s agreement to accept a reduction in its normal brokerage commission. *Id.* at 175-77. The Court’s holding extended the reach of § 2(c) to an explicit price discount with no reference to brokerage, simply because the reduction in price was made possible by a reduction in the broker’s fee at the request of the seller. *Id.* at 174-75. This holding, which is at odds with the main purpose of § 2(c), see R. Posner, supra note 14, at 45 (“totally perverse once it is accepted that the purpose of that statute is to force price discriminations disguised as brokerage payments into the open”), causes higher prices for consumers and less competition among brokers.

235. See *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1962); *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410, 412-15 (7th Cir. 1963); *Herbert R. Gibson, Sr., 95 F.T.C. 553, 742 (1980), aff’d, 682 F.2d 554 (5th Cir. 1982), petitions for cert. filed, 51 U.S.L.W. 3484 (U.S. Dec. 10, 1982) (No. 82-972) and (U.S. Dec. 13, 1982) (No. 82-984).

236. See *Empire Rayon Yarn Co. v. American Viscose Corp.*, 364 F.2d 491, 492 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967); *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1963).


238. Herbert R. Gibson, Sr., 95 F.T.C. 553, 739 (1980), aff’d, 682 F.2d 554 (5th Cir. 1982), petitions for cert. filed, 51 U.S.L.W. 3484 (U.S. Dec. 10, 1982) (No. 82-972) and (U.S. Dec. 13, 1982) (No. 82-984). Because the Commission was focusing on the dummy brokerage situation, it is not clear how it would treat other situations. The Fifth Circuit affirmed but limited its holding to the facts. 682 F.2d at 570.

239. The trend to reconcile § 2(c) with § 2(a) reached its furthest point in *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981). Plaintiff, Allen Pen, was a wholesaler of stationery and school supplies. The defendant, Springfield, manufactured scrap books, photo albums and other similar items. Springfield required Allen Pen to buy through its sales agent. A direct competitor of Allen Pen was
certainty still exists as to one aspect of section 2(c). Section 2(c) has traditionally been used to attack corporate bribery. Today, the FTC uses section 2(c), together with section 5 of the FTC Act, to enjoin bribes of foreign government officials. The bribery cases have retained the per se approach to section 2(c).

The bribery cases, and the dummy-brokerage cases in which there is no price discrimination, show the non-antitrust character of section 2(c). This section is perhaps the best illustration of the original purpose of Robinson-Patman—to influence certain kinds of marketing practices without regard to their competitive effects.

4. Sections 2(d) and 2(e)

Sections 2(d) and 2(e) prohibit a seller from granting advertising and promotional allowances or services to customers unless such

allowed to buy directly from Springfield and received lower prices. *Id.* at 20. The First Circuit rejected Allen Pen's § 2(c) claim:

To show... no more than the existence of a price difference between two customers, one of which purchases through a broker and one of which purchases directly, is not sufficient to show that the price difference is an allowance of discount in lieu of brokerage... Rather, appellant must show that the sales agent... was interposed as a device or sham to give the favored customer a competitive advantage through a lower price... In any event, even if Allen Pen had made such a showing, it still would have had to establish injury, for § 2(c) is designed to prevent violation of the basic § 2(a) price discrimination prohibition under different guise.

*Id.* at 25 (citations omitted). *Allen Pen* illustrates a new judicial attitude toward the Robinson-Patman Act. Some courts recognize the policy problems with the Act and try to resolve them through judicial construction. The approach in *Allen Pen* to § 2(c) is not unreasonable. At this point, however, it is something of a tour de force. This is especially true to the extent that it requires proof of injury to competition in a § 2(c) case. The opinion speaks of the § 2(c) plaintiff proving injury. 653 F.2d at 25-26. Because the court bases this on § 2(c)'s relationship to § 2(a), it follows that this is injury to competition, rather than the injury in fact which all private plaintiffs must prove under § 4 of the Clayton Act. See *supra* notes 165-84 and accompanying text.


244. 15 U.S.C. § 13(d) (1976). The section provides:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale
allowances are available to all competing customers on proportionally equal terms.\(^{246}\) Congress' purpose was "to scotch evasions of the Clayton Act's ban on price discrimination by subterfuge arrangements which cloaked discriminatory favoritism to large buyers in the garb of cooperative promotional arrangements."\(^{247}\) Thus, it is not surprising, as the FTC recently noted, that "[t]he traditional use of these sections has been in the realm of cooperative promotional arrangements."\(^{248}\)

by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

\textit{Id.}

245. 15 U.S.C. § 13(e) (1976). The section provides:

\begin{quote}
It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.
\end{quote}

\textit{Id.}


The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities whether furnished "in connection with the processing, handling, sale, or offering for sale" of the products concerned.

\textit{Id.}


In the classic Section 2(d) and 2(e) case, a manufacturer has compensated a high volume retailer via a discriminatory plan, sometimes in an amount far in excess of that retailer's actual promotional costs, and in so doing has utilized a scheme not realistically available to small retailers. In addition, the manufacturer often rebates a "promotional allowance" to a retailer in an amount tied to the number of units resold by the retailer to the public, but not linked to the retailer's actual promotional expenditures. Plainly, such a transaction is in connection with a resale and within the ambit of Section 2(d) and 2(e). Similarly, making employees available or arranging with a third party to furnish personnel for purposes of performing work for a customer would also come within [these sections].

\textit{Id.} at 725-26.
Sections 2(d) and 2(e) "perhaps provide the best example to be found anywhere of the ineptitude of statutory draftsmanship." The sections were intended to be "sister" sections, yet their language is not parallel and they contain so many omissions and differences that "[n]either section completely describes an intended violation." Courts, however, have read the sections together so that they now present a somewhat "harmonious whole."

The practices proscribed by sections 2(d) and 2(e) are interrelated. If the seller pays the buyer to make and display posters advertising the seller's products, section 2(d) applies. If the seller makes the posters and furnishes them to the buyer, section 2(e) applies. The "economic evil sought to be outlawed . . . is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced."

Sections 2(d) and 2(e) have been called per se provisions. This is based in part on the opinion in FTC v. Simplicity Pattern Co., in which the Supreme Court called the sections "absolute" proscriptions that require no showing of competitive injury and permit no cost-justification defense. On the other hand, however, the meeting-competition defense has been held to be available in actions under

249. Fisher, Sections 2(d) and (e) of the Robinson-Patman Act: Babel Revisited, 11 Vand. L. Rev. 453, 467 (1958). The draftmanship has received almost universal condemnation. E.g., Stedman, Twenty-Four Years of the Robinson-Patman Act, 1960 Wis. L. Rev. 197, 218 (the relationship of sections 2(d) and 2(e) "is a hodgepodge of confusion and inconsistency that any competent, order-loving lawyer must find offensive").

250. For delineation of the specific inconsistencies, see C. Edwards, supra note 43, at 153 n.1; F. Rowe, supra note 27, at 390; Levi, supra note 3, at 61.

251. E. Kintner, supra note 199, at 227.


254. For other specific examples of this interrelationship, see P. Areeda, supra note 195, at 928-29; C. Edwards, supra note 43, at 154.


256. See Antitrust Developments, supra note 199, at 153.


258. Id. at 65; see Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1000 (5th Cir. 1974).
these sections,259 and this availability takes the sections out of a strict per se category and puts them into what may be called a "semi" per se one. This distinction may be without a practical difference, however, because the meeting-competition defense, rarely successful, at least until recently, in actions under section 2(a),260 has been even less successful in section 2(d) and 2(e) cases.261

Enforcement of sections 2(d) and 2(e) has led to a series of court and FTC decisions and the promulgation of FTC guidelines262 that define-


260. See supra notes 200-11 and accompanying text.

261. This may be due in part to the strict FTC requirement that the seller must have already established a promotional plan of its own from which to deviate in order to invoke the defense. See Rabiner & Jontow, Inc. 70 F.T.C. 638, 682-83 (1966), aff'd, 386 F.2d 667 (2d Cir. 1967), cert. denied, 390 U.S. 1004 (1968); Surprise Brassiere Co., 71 F.T.C. 868, 940-42 (1967), enforcement ordered, 406 F.2d 711 (5th Cir. 1969). Nevertheless, the recent approach of one court indicates a greater receptivity to the defense. See Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 25 (1st Cir. 1981). See supra note 239.

262. The FTC has established Guides for Advertising Allowances and Other Merchandising Payments and Services (Guides). 4 Trade Reg. Rep. (CCH) ¶ 39,035. The first Guides, were considered a “useful primer” on §§ 2(d) and 2(e). F. Rowe, supra note 27, at 364.

On May 29, 1969, following dicta from the Supreme Court opinion in FTC v. Fred Meyer, Inc., 390 U.S. 341, 355-58 (1968), the FTC revised the Guides. See 34 Fed. Reg. 8285 (1969); 1 Trade Reg. Rep. (CCH) ¶ 3980. These have been commonly known as the “Fred Meyer Guides.” As one commentator noted, the Fred Meyer Guides “expanded certain concepts, including who is a customer, the seller’s duty to inform, availability to all competing customers, meeting competition in good faith, and checking the customers’ use of payments.” C. Hills, Antitrust Advisor 278 (1971). The Guides were issued over the strong dissent of Commissioner Elman:

The Commission has disregarded the Supreme Court’s mandate to develop practical, realistic, and workable Guides implementing [Fred Meyer]. It is no service to the business community for the Commission to issue Guides which (a) do not provide reasonable guidance, (b) do not conform to the provisions of the statute, and (c) the Commission lacks the capacity to enforce.

E. Kintner, supra note 199, at 371 app. VI (dissenting statement of Commissioner Elman). Elman has not been the only critic. One commentator noted that the Guides “have been criticized as stiff, commercially unrealistic and as a manifestation of administrative overkill.” Applebaum, Promotional Allowances and the Fred Meyer Guides, 42 Antitrust L.J. 355, 355-56 (1973). And an Assistant Director of the Bureau of Competition in the FTC testified that the Guides present a special problem because they do not appear to have been developed with a real world understanding of how advertising allowances operate. I am afraid they are a little bit like prohibition laws; they are not well obeyed because nobody really wants to enforce them and they are against human nature.

Recent Efforts Hearings [pt. II], supra note 7, at 162. The Guides were amended again in 1972, although the changes were not numerous. See 37 Fed. Reg. 15,699
ate the business practices within their scope, define the jurisdictional elements of the provisions (some of which are different from (1972). It should be remembered that they have no application in private actions and even the Commission has indicated it may not always follow them. See Alterman Foods, Inc., 82 F.T.C. 298, 340-41 (1973), order enforced, 497 F.2d 993 (5th Cir. 1974).

263. Some of the cooperative promotional services or facilities held to be within the scope of the sections include: 1) special package sizes for some stores, e.g., General Foods Corp., 52 F.T.C. 798, 826 (1956); Luxor, Ltd., 31 F.T.C. 658, 664-65 (1940); FTC Guide 5, 16 C.F.R. § 240.5(b) (1982), 2) demonstrator services, e.g., Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 133 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947); FTC Guide 5, 16 C.F.R. § 240.5 (1982), 3) factory service, e.g., Dantzler v. Dictograph Prods., 272 F.2d 172, 176 (4th Cir. 1959), 4) advertising in customer-owned publications, e.g., State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 258 F.2d 831, 837 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1958), 5) accepting returns, e.g., Joseph A. Kaplan & Sons v. FTC, 347 F.2d 785, 789 (D.C. Cir. 1965); FTC Guide 5(b), 16 C.F.R. § 240.5(b) (1982), and 6) "push money" or "spiffs," e.g., United Cigar-Whelan Stores Corp. v. H. Weinreich Co., 107 F. Supp. 89, 92 (S.D.N.Y. 1952). The 1960 and 1969 editions of the FTC Guides included "push money" as an example of an applicable "service or facility" but it was omitted in the 1972 edition in response to criticism from consumer groups, which argued that this practice by sellers was misleading to consumers who might assume the salesperson had no personal reason not to give objective advice. See S. Oppenheim & G. Weston, Unfair Trade Practices and Consumer Protection 959 (3d ed. 1974).


264. There must be: 1) two or more sales, 2) reasonably close in point of time, see Atalanta Trading Corp. v. FTC, 258 F.2d 365, 371 (2d Cir. 1958), 3) of commodities, see Lang's Bowlarama, Inc. v. AMF, Inc., 377 F. Supp. 405, 409-10 (D.R.I. 1974), 4) for resale, see Clairol, Inc. v. FTC, 410 F.2d 647, 648-49 (9th Cir. 1969), 5) of like grade and quality, see Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 709 (9th Cir. 1964); General Foods Corp., 52 F.T.C. 798, 826 (1956), 6) by the same
those under section 2(a)) and set forth the basic elements of availability and proportionality.

seller, 7) to two or more different competing customers, see England v. Chrysler Corp., 493 F.2d 269, 272 (9th Cir.), cert. denied, 419 U.S. 869 (1974), 8) in interstate commerce, 9) where the seller pays for, 10) or furnishes, 11) promotional services or facilities, 12) in connection with the sale of his product, 13) without making proportionately equal treatment available to all competing customers. See H. Shniderman, supra note 30, at 61-78.

265. One difference is in the commerce requirement. Promotional arrangements have been proscribed under §§ 2(e) and 2(f) even though the sales were intrastate transactions, when the discrimination was between customers competing at least partially in interstate commerce. See, e.g., Corn Prods. Ref. Co. v. FTC, 144 F.2d 211, 220 (7th Cir. 1944), aff'd, 324 U.S. 726 (1945). The FTC Guides broadly define the commerce requirement to be satisfied “if there is any part of a business which is not wholly within one State (for example, sales or . . . deliveries of supplies or raw materials).” FTC Guide 4, 16 C.F.R. § 240.4 (1982). In addition, FTC rulings have even proscribed local discriminatory promotional payments on the ground that the recipient was an “integrated interstate operator” that utilized interstate communications media for the advertising financed by the supplier. See J.H. Filbert, Inc., 54 F.T.C. 359, 370 (1957); F. Rowe, supra note 27, at 394. The Ninth Circuit recently held, however, that it “would therefore be incongruous to hold” that these sections have a broader reach or different commerce requirement than § 2(a). Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 881 (9th Cir. 1982).

Also, unlike § 2(a), the allowance or service must be “in connection with” the resale of the product. See Skinner v. United States Steel Corp., 233 F.2d 762, 765 (5th Cir. 1956).

266. The terms “available” in § 2(d) and “accorded” in § 2(e) have been treated as synonymous. See Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 484-85 (2d Cir. 1962). “Availability” requires: 1) notification to all competing customers of the promotional program, and 2) a program that is “functionally available” to those customers. “[A] supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs.” Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1001 (5th Cir. 1974). Thus, a plan does not fulfill the notification requirement if it has been concealed. See Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 485 (2d Cir. 1962). On the other hand as Judge Friendly noted in Vanity Fair, “the legislative history . . . argues against a construction that would require the seller to make an actual ‘offer’ to all customers, including many who might not be interested.” Id. The Commission has recognized that the Act “does not specifically require that all competing customers be individually notified regarding the particulars of a promotional program.” Advisory Opinion Digest No. 195, 73 F.T.C. 1310 (1968). The same opinion ominously goes on to state, however, that “whenever a seller selects any method of notification short of actual notice to each dealer, he bears full responsibility under the law for seeing that the method selected gives each dealer the notice he is entitled.” Id. at 1311. The notice to which he is entitled is not set forth.

Despite the recognition that sellers have no duty to individually inform customers, the Commission in the past has, in effect, required individual notice. See Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1060 (1957); Henry Rosenfeld, Inc., 52 F.T.C. 1535, 1548 (1956); Kay Windsor Frocks, Inc., 51 F.T.C. 89, 95 (1954). And even though all customers may have a general knowledge of the cooperative promotional program, the Commission has required that notice as to the actual terms be given to all customers. See Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050,
If sections 2(d) and 2(e) were enacted to prevent sellers from circumventing section 2(a) by discriminating between buyers in respects other than price, why the competitive-injury requirement and the cost-justification defense should not apply to these hidden price discriminations is not clear. Nevertheless, they do not, and therefore the determination whether a seller's action is a price discrimination under section 2(a) or a promotional allowance under section 2(d) becomes crucial.

1060 (1957); FTC Guide 10, 16 C.F.R. § 240.10 (1982). The FTC has softened its rigid requirements somewhat by holding that "it is [not] necessary to make known a promotional plan where such would be a useless or futile gesture." Liggett & Myers Tobacco Co., 56 F.T.C. 221, 253 (1959). The FTC Guides allow some leeway by adopting a "good faith" standard. FTC Guide 8, 16 C.F.R. § 240.8(a) (1982) ("The seller should take reasonable action, in good faith, to inform all his competing customers . . . .")

Determining functional availability requires "a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him." State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 258 F.2d 831, 839 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1959).

Programs have been held not to be functionally available when the suppliers purchased advertisements in customer-owned publications while competing customers did not have comparable publications, id. at 837-39; when demonstrations offered were only practically available to large department stores, Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 134 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947); when the seller's offer was to pay 50% of a customer's newspaper lineage cost, and when the competing customers were "too small" or otherwise unable to engage in any kind of newspaper advertising, House of Lords, Inc., 69 F.T.C. 44, 48 (1966). If the program is functionally unavailable alternatives must be provided. See FTC Guide 9, 16 C.F.R. § 240.9 (1982). If proper alternatives are available, however, competing customers have no complaint, when, for their own convenience, they elect a more expensive alternative or do not participate at all. See United Banana Co. v. United Fruit Co., 245 F. Supp. 161, 177-78 (D. Conn. 1965), aff'd, 362 F.2d 849 (2d Cir. 1966); FTC Guide 9, ex. 1, 16 C.F.R. § 240.9 (1982).

267. Sections 2(d) and 2(e) require more than that some promotional assistance be made available to all competing customers; they require that the assistance be on "proportionally equal terms." 15 U.S.C. § 13(d)-(e) (1976). This phrase is not defined in the Act. The FTC Guides state that any "payments or services should be proportionalized on some basis that is fair to all customers who compete in the resale of the seller's products. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used." FTC Guide 7, 16 C.F.R. § 240.7 (1982) (emphasis added). Yet the Guides specifically approve only two methods of proportioning: 1) basing payments or services on dollar volume; or 2) basing them on the quantity of goods purchased during a specified period. Id. The Commission does not permit proportionality to be achieved on the basis of the value of the services rendered. See 16 C.F.R. § 240.9, ex. 1, n.2 (1982) ("Allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered to be in violation of section 2(d) or subject to the prohibitions of section 2(a) . . . .")


269. See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 708 (9th Cir. 1964).
Courts have devised two principal tests to distinguish price discriminations from promotional allowances. One test concludes that a seller has discriminated in price and that section 2(a) therefore applies if the allowance is intended to "facilitate the original sale" of the product. Sections 2(d) and 2(e) apply if the allowance or service is related to the product's resale.\(^{270}\) The other test concludes that section 2(a) applies if the seller simply pays the buyer outright, but section 2(d) applies if the seller anticipates some services for its payment from the buyer.\(^{271}\) The trouble with this test is that outright payment is, if anything, more dangerous to competition than the payment for, or provision of, services,\(^{272}\) yet it is the latter that is proscribed without regard to competitive effects and which is subject to limited defenses. The thrust of the sections is therefore not compatible with basic antitrust policy.\(^{273}\)

Sections 2(d) and 2(e) are also not compatible with commercial reality.\(^{274}\) Cooperative advertising, an important and legitimate promotional device, has been loaded down with restrictions that produce irrational results and, contrary to the purpose of the Act, hurt small businesses. For instance, using an example of ex-Commissioner Elman, if a small dress manufacturer with a restricted budget wished to engage in a cooperative promotional program, it would want to choose only those retail outlets with the greatest prestige and avoid those that could not or would not effectively promote its product or those having a public image such that the manufacturer would not want to affirmatively link its product with them. Under sections 2(d) and 2(e), however, the manufacturer would be required to make the program available on proportionally equal terms to all its customers. This obligation forces the manufacturer to "allocate [its] advertising resources irrationally and uneconomically."\(^{275}\) Moreover, the small

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\(^{270}\) See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983) (§ 2(e)); Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 708 (9th Cir. 1964) (§ 2(d)).


\(^{273}\) Id. at 629-30; see R. Posner, supra note 14, at 48 ("The short of it is that the Robinson-Patman Act subjects advertising allowances, even where wholly genuine, to a stricter scrutiny than explicit price discounts—and there is no conceivable justification for this.").

\(^{274}\) Elman, supra note 2, at 26 (Treating "all promotional allowances as disguised price rebates obviously conflicts with commercial realities.").

\(^{275}\) Id. at 27. Edwards has stated the issue very well:

The general policy of the law in a free private-enterprise system is to leave buyers free to choose their sources of supply, to buy as much as they want from these sources in such proportions as they wish, and to pay the market
manufacturer's large competitors could avoid this dilemma: Because of superior resources they could engage in direct advertising and bypass the cooperative promotional programs. 276

Another requirement that is at odds with commercial reality is that cooperative promotional programs must be "functionally available" to all competing customers. 277 This requirement forces a supplier that wishes to have a television or print program also to spend its time and resources developing a point of purchase or other type of campaign for its customers too small to engage in the television or print programs. The requirement applies regardless of the value such a campaign would have. As a result the supplier either: 1) allocates resources for wasteful or useless programs, 278 which the small businesses do not always want; 279 or 2) cuts off small buyers entirely, so that it may be free to engage in an efficient cooperative promotional program. The latter result, of course, does not help small businesses. 280

Two recent cases have attempted to narrow the scope of sections 2(d) and 2(e). In Herbert R. Gibson, Sr., 281 the FTC cautioned that "[b]ecause of the easier threshold of proof carved out for Sections 2(d) and 2(e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed." 282 In Allen Pen Co. v. Springfield

value of what they buy. The application of these principles to purchasers of advertising would suggest that it is inappropriate to require a buyer of advertising service to buy it from all his customers if he buys it from any and to buy it from them in stated proportions to which proportionate values are arbitrarily assigned. One might, with similar logic, require a steel manufacturer to buy railway transportation service from every railroad in proportion, not to his need for service from each, but to the amount of his steel products purchased by each.


276. Elman, supra note 2, at 27.

277. See supra note 266.

278. See Elman, supra note 2, at 28.

279. See Justice Report, supra note 17, at 93.

280. One administrative report concluded that the FTC no longer used § 2(d) to compel sellers to compensate small retail outlets for services that are not economically beneficial. See Report of Task Force on Productivity and Competition (1969) [hereinafter cited as Stigler Report], reprinted in Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-3 (June 10, 1969). Neither this FTC practice, however, nor the fact that many businessmen might ignore the requirements of the section, change the law or its availability to private plaintiffs. The conscientious businessmen who diligently try to comply with the Act or those fearing private suits are therefore still saddled with these requirements.


282. Id. at 726. The Commission went on to overrule its decision in Alterman Foods, Inc., 82 F.T.C. 298 (1973), aff'd, 497 F.2d 993 (5th Cir. 1974), which held
Photo Mount Co.,\textsuperscript{283} in rejecting a section 2(e) claim, the First Circuit gave broad scope to the meeting-competition defense,\textsuperscript{284} and indicated that it might also require a showing of injury to competition in the future.\textsuperscript{285} These opinions are positive steps but it is too soon to determine to what extent they represent a trend in the law.

5. Section 2(f)

Section 2(f) makes it unlawful "for any person engaged in commerce, in the course of such commerce, knowingly to induce or re-

that discriminatory payments to a private trade show were allowances subject to § 2(d) requirements. \textit{Id.} at 343. The Commission stated:

In general, marketing assistance, if discriminatorily granted, does run afoul of Sections 2(d) and 2(e). But in the present case, it is clear that the principal function of the trade show was to funnel a high volume of products from manufacturing to participating retailers at a discount price, and not to provide promotional assistance.

95 F.T.C. at 729. The Commission was concerned that "to accept the Alterman holding would mean opening up sections 2(d) and 2(e) to practices that Congress intended to be challenged solely under Section 2(a)." \textit{Id.} It was therefore necessary to "look realistically at transactions as a whole before deciding to apply [these sections]." \textit{Id.} The Commission distinguished R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964). In that case Macy's had solicited sellers to contribute $1000 apiece to defray advertising and promotional costs of its 100th anniversary celebration. The court held that the solicitation was proscribed by § 2(d). \textit{Id.} at 449-50. The Commission's complaint counsel argued in \textit{Gibson} that Macy was controlling. The Commission stated, however, that in \textit{Macy} the payments were not "general revenue," but rather "for advertising purposes." 95 F.T.C. at 729 n.10. Yet, it is difficult to see a meaningful distinction between the two cases. A "realistic" assessment of the facts in \textit{Macy} should lead to the same conclusion as reached in \textit{Gibson}—that "plainly the suppliers' principal purpose in engaging in these acts was to induce retail store buyers to make the original purchases, not to provide marketing or promotional assistance to them." \textit{Id.} at 729.

\textsuperscript{283} 653 F.2d 17 (1st Cir. 1981).

\textsuperscript{284} \textit{Id.} at 25. The court stated:

[T]he evidence suggests little more than an occasional effort by Springfield [the seller defendant] to use the [display] racks to meet the competition of its competitors . . . . If so, the offer of racks to an Allen Pen competitor is unlikely to have hurt Allen Pen, for in its absence that competitor would have accepted some equivalent advantage from a Springfield competitor.

\textit{Id.}

\textsuperscript{285} The court stated:

Allen Pen provided no evidence of any systematic effort to provide some customers, but not others, with promotional advantages. Unless evidence of any occasional advantage provided \textit{any} competitor is sufficient to make out a \textit{prima facie} case of a § 2(e) violation—and we have found no case suggesting that it is—Allen Pen did not show a substantive violation of § 2(e). We believe that § 2(e), like the rest of the Robinson-Patman Act, is aimed at significant harm to competition; and therefore the injury suffered from its violation must be something more than failure to obtain a sporadic advantage once made available to a single competitor.

\textit{Id.} (emphasis in original). See \textit{supra} note 239.
ceive a discrimination in price which is prohibited by [section 2(a)].” In addition to the elements of a section 2(a) violation, the plaintiff in a section 2(f) case must establish three elements: 1) the defendant must have been engaged in interstate commerce; 2) the purchase in question must have been made in the course of such commerce; and most importantly, 3) the defendant who induced or received the price must have had actual or constructive knowledge that the price differential given by the seller was violative of section 2(a). All the defenses available against a section 2(a) claim are available against a section 2(f) claim.

287. Id.
288. Id. The wording of the commerce requirement of § 2(f) theoretically makes it more difficult to prosecute a buyer than a seller for violating the Act. Under the "flow of commerce" doctrine, see supra note 86, the § 2(f) commerce requirement may be satisfied when the buyer purchases from a seller located in another state even if the buyer resells only locally. However, a buyer purchasing from an in-state seller, who sells at higher prices to the buyer's out-of-state competitors, in theory, would not be liable under § 2(f), even assuming the seller was liable under § 2(a). See, e.g., Central Ice Cream Co. v. Golden Rod Ice Cream Co., 184 F. Supp. 312, 319 (N.D. Ill. 1960), aff'd, 287 F.2d 265 (7th Cir.), cert. denied, 368 U.S. 829 (1961).
289. This last element was imposed by the Supreme Court in Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953). Prior to the Automatic Canteen decision, culpable knowledge by the buyer had never been required as an element of a § 2(f) offense. The Court, however, concerned with reconciling the Robinson-Patman Act with "broader antitrust policies," did not want to put "the buyer at his peril whenever he engage[d] in price bargaining." Id. at 73-74.
290. Id. at 74; see Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 82 (1979). There have been very few private actions under § 2(f). See Holleb & Co. v. Produce Terminal Cold Storage Co., 539 F.2d 29, 33-34 (7th Cir. 1976); Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 803-06 (9th Cir. 1969); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 744 (7th Cir.), cert. denied, 344 U.S. 820 (1952); American Coop. Serum Ass'n v. Anchor Serum Co., 153 F.2d 907, 917 (7th Cir.) (Major, J., dissenting), cert. denied, 329 U.S. 721 (1946); Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267, 1276-77 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975); Metropolitan Dry Cleaning Mach. Co. v. Washtex Mach. Corp., 1969 Trade Cas. (CCH) ¶ 72,686, at 86,441-42 (E.D.N.Y. 1968); Big Value Stamp Co. v. Sperry & Hutchinson Co., 1967 Trade Cas. (CCH) ¶ 71, 971, at 83,459 (S.D. Ohio 1967); Krug v. ITT Corp., 142 F. Supp. 230, 237-38 (D.N.J. 1956). One of the reasons for this dearth of private actions is the heavy burden placed by courts on private plaintiffs. For example, in Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975), the court stated: Plaintiffs' task was to take each coupler they intended to prove a 2(f) claim against and show that by reason of conversations had with a seller of hose, or by some other conduct, that coupler induced the seller to sell to him at a lower price which was discriminatory and which was, as known to the coupler, not cost justified. In a Robinson-Patman action he is required to make this showing by a meticulous attention to details.

Id. at 1276-77 (citation omitted). The Commission has rejected this heavy burden, and holds that its complaint counsel need only come forward with a prima facie showing that "a reasonable and prudent businessman should have known that the
The Supreme Court emphasized recently that without a section 2(a) seller violation there can be no section 2(f) buyer violation. The FTC had attempted to abrogate this requirement in Beatrice Foods.

differential it received could not be cost justified." Suburban Propane Gas Corp., 73 F.T.C. 1269, 1273 (1968). Complaint counsel need not submit evidence concerning the actual absence of cost justification. In this case Commissioner Elman dissented, stating that the Commission complaint counsel must not only prove "guilty" knowledge, but must also go forward with "objective evidence that the price received was not in fact cost justified." Id. at 1280 (Elman, Comm'r, dissenting).

Of the over one thousand complaints filed by the FTC only approximately 50 have contained a § 2(f) count. See Klein, Hard Bargaining Under § 2(f) of the Robinson-Patman Act, 32 Ohio St. L.J. 734, 734 n.2 (1971) ("less than 50 complaints"). Between 1971 and 1975 there was only one § 2(f) order by the Commission. Recent Efforts Hearings [pt. II], supra note 7, at 191; see Great Atl. & Pac. Tea Co., 87 F.T.C. 962 (1976), aff'd, 557 F.2d 971 (2d Cir. 1977), rev'd, 440 U.S. 69 (1979). Since 1976 there has been only one § 2(f) complaint. See Boise Cascade Corp., 97 F.T.C. 246 (1981). Moreover, since Automatic Canteen in 1953, there have been only four litigated FTC proceedings against individual buyers: Boise Cascade Corp., 97 F.T.C. 246 (1981); Great Atl. & Pac. Tea Co., 87 F.T.C. 962 (1976), aff'd, 557 F.2d 971 (2d Cir. 1977), rev'd, 440 U.S. 69 (1979); White Drug Co. of Jamestown, Inc., 77 F.T.C. 1200 (1970); Beatrice Foods Co., 76 F.T.C. 719 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). Ironically, the other proceedings have been against very small buyers who formed group purchasing organizations to compete with big buyers. See American Motor Specialties Co. v. FTC, 278 F.2d 225, 227 (2d Cir.), cert. denied, 364 U.S. 884 (1960); cf. Standard Motor Props. v. FTC, 265 F.2d 674, 675 (2d Cir.) (§ 2(a) proceeding against seller that sells to group purchasing organizations), cert. denied, 361 U.S. 826 (1959); E. Edelmann & Co. v. FTC, 239 F.2d 152, 153 (7th Cir. 1956) (same), cert. denied, 355 U.S. 941 (1957); Moog Indus. v. FTC, 238 F.2d 43, 46 (8th Cir. 1956) (same), aff'd per curiam, 355 U.S. 411 (1958). The policy of proceeding against group purchasers has been widely criticized, and is certainly at odds with the basic purpose of the Robinson-Patman Act. See Rowe III, supra note 198, at 303-04. The FTC's enforcement efforts against buying groups of small purchasers changed in the 1960's. See Meizes, supra note 231, at 751.

292. In Beatrice Foods, the Commission held that the buyer, Kroger, was liable under § 2(f) even though the seller, Beatrice, was not liable under § 2(a). 76 F.T.C. at 823. Beatrice was not liable because it had a valid meeting-competition defense. "Beatrice representatives did everything in their power to find the right price level in a cautious and prudent manner; they made specific investigations, tested rumors and tried by legitimate means to find out what their competitors were doing." Id. at 809. Interestingly enough, the three-commissioner majority which upheld the § 2(b) defense consisted of Commissioner Jones and the two commissioners who dissented from the finding of liability for Kroger. Therefore, only Commissioner Jones concurred in the entire opinion. Commissioner Jones candidly announced that Kroger could be held liable even though Beatrice had not been held liable because Kroger had "bargained too hard," id. at 818, "failed to convey any correct information about price levels being quoted by others," id. at 819 (emphasis in original), and thus had "stepped over the bounds of proper negotiation," id. at 818.

On appeal, Justice Clark sought to restrict this rather startling view of § 2(f). Commissioner Jones' statements, Justice Clark said, without explaining the distinction, were "but a warning, not a command." 438 F.2d at 1378. In any case, Justice
Clark held that "[t]he controlling point . . . is not the 'hard bargaining' nor the 'price levels' but the misrepresentation of the [competitor's] bid." Id. (emphasis in original). This established the so-called "lying buyer" exception to the principle of derivative liability in § 2(f). Justice Clark set out the rationale for the lying-buyer exception in the following passages:

Kroger [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price. . . . Automatic Canteen . . . holds only that buyers may avail themselves of discriminatory prices that a seller may lawfully grant or those that are "not known by him [the buyer] not to be within one of these defenses." . . . To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. . . . In order for the buyers to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer.

Id. at 1374-77 (citation omitted) (quoting Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953)).

In a vigorous dissent to the original FTC determination, Commissioner Elman had objected to any such exception, arguing that "[i]t puts too heavy a burden on the Robinson-Patman Act to convert it into a 'truth-in-bargaining' statute." Beatrice Foods Co., 76 F.T.C. 719, 828 (1969) (Elman, Comm'r, dissenting), aff'd sub nom. Kroger Co. v FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971).

The Commission was not content with Justice Clark's "lying buyer" gloss on its Beatrice Foods opinion and continued to pursue cases of "hard bargaining." It again went after a "silent buyer," this time A & P. Great Ad. & Pac. Tea Co., 87 F.T.C. 962 (1976), aff'd, 557 F.2d 971 (2d Cir. 1977), rev'd, 440 U.S. 69 (1979). The A & P complaint alleged neither a § 2(a) violation nor misrepresentation by the buyer. According to the FTC's complaint counsel, A & P's sin was not that it induced or coerced, honestly or dishonestly, a price discrimination from a weak seller. Rather, its sin was accepting from Borden, the mammoth of the dairy industry, a price bid "granted for the purpose of meeting competition," without notifying Borden that its bid was "substantially" below another bid. Id. at 965. The complaint alleged in Count I that this conduct was in violation of § 5 of the FTC Act, id., and in Count II that it was in violation of § 2(f) of the Robinson-Patman Act, id. at 966. Count III alleged that Borden and A & P had violated § 5 of the FTC Act by combining to stabilize and maintain the retail and wholesale prices of milk and other dairy products. Id. The Administrative Law Judge (ALJ) later dismissed this count, id. at 1037-38, and the Commission affirmed, id. at 1047.

The ALJ, after a hearing that lasted over 110 days, held that A & P violated both the FTC Act and the Robinson-Patman Act because its conduct was unfair and unethical. Id. at 1037. On review, the Commission affirmed in part and reversed in part. Id. at 1047. It rejected the ALJ's conclusion that the conduct of A & P violated § 5 of the FTC Act, stating:

The imposition of a duty of affirmative disclosure applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest. . . . We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would
then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid.

Id. at 1050-51.

In an interesting turnaround, however, the Commission also held that this conduct was in violation of § 2(f), even though there was no § 2(a) violation, and no misrepresentation. Id. at 1056-57. According to the Commission, A & P should have either refused Borden's bid, or affirmatively disclosed to Borden that its bid was too low for the meeting-competition defense. See id. The Commission never discussed why this affirmative-disclosure requirement, which it had just held "contrary to the public interest" in the FTC Act context, should apply under the Robinson-Patman Act. On appeal the Second Circuit addressed the issue but stated only that "the seeming inconsistency . . . is . . . more apparent than real." 557 F.2d at 983. The Court went on to state: "A & P's liability under § 2(f) must be independently assessed without regard to any other statute, so that a finding that A & P has not engaged in unfair trade practices does not, ipso facto absolve A & P under § 2(f)." Id. at 984. The court had no problem with the Commission's affirmative disclosure requirement because it saw no difference between the situation in which "the buyer lies [and the situation in which he] merely keeps quiet about the nature of the competing bid." Id. at 983. The Court granted enforcement of the Commission's order in all aspects. Id. at 988.

The Supreme Court dismissed the Commission's "attempt . . . to rewrite § 2(f)." 440 U.S. at 79. Borden had asserted both a cost-justification defense and a meeting-competition defense. The Commission rejected the former, but decided it did not have to reach the meeting-competition defense because A & P knew that Borden's bid was too low. The Supreme Court, perhaps reflecting its belief that the Commission would not reach the right result, did not remand for consideration of this defense. Rather, it decided the issue on the record before it, holding that a meeting-competition defense was clearly available to Borden, and therefore that the complaint against A & P had to be dismissed, regardless of what it knew. Id. at 82-85. Justice White would have remanded for consideration of the meeting-competition defense. Id. at 85 (White, J., concurring in part, dissenting in part). Justice Marshall disagreed with the Court's conclusion that § 2(f) liability was totally derivative, and would have remanded for consideration of the meeting-competition defense. Id. at 89-92 (Marshall, J., concurring in part, dissenting in part).


295. 440 U.S. at 76. The Court stated:

Liability under § 2(f) thus is limited to situations where the price discrimination is one "which is prohibited by this section." While the phrase "this section" refers to the entire § 2 of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of § 2(f), therefore, a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination "prohibited by this section."

Id. (footnote omitted); accord id. at 81.

296. Id. at 77-78 (citing Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953)).
antitrust policy. The Court held that a section 2(f) violation is derivative in nature, and therefore must be accompanied by a section 2(a) violation. The Court specifically declined to decide, however, whether a "lying buyer"—one who misrepresents competing bids to a seller—can be held liable under section 2(f) even if the seller is not liable under section 2(a).

Ironically, section 2(f) was given little legislative consideration. Although the Act was a reaction to the chain-store phenomenon, and despite the Congressional view that huge buying power compelled the seller, usually in self-defense, to grant concessions, no buyer liability provisions were included in the various bills until section 2(f) was added almost as an afterthought on the Senate floor. The section, which is very brief, does not mention discriminatory allowances or services. Though this omission is significant for potential plaintiffs who are thus without a cause of action, the Commis-

297. 440 U.S. at 80-81. The Court noted:

In the Automatic Canteen case, the Court warned against interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act, and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U.S., at 63. Imposition of § 2(f) liability on the petitioner in this case would lead to just such price uniformity and rigidity. . . . [A] duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers. . . . As in the Automatic Canteen case, we decline to adopt a construction of § 2(f) that is contrary to its plain meaning and would lead to anticompetitive results.

Id. (footnotes omitted).

298. See id. at 85 n.18.

299. Id. at 81 n.15. Although the "lying buyer" exception to derivative liability would seem to have been precluded by the Court's analysis, see supra notes 295 & 297, the Court decided it did not need to reach the issue, and reserved decision on the validity of this exception. Id. ("Because A & P was not a 'lying buyer,' we need not decide whether such a buyer could be liable under § 2(f) even if the seller has a meeting-competition defense.").

300. See supra notes 50-56 and accompanying text.


302. F. Rowe, supra note 27, at 421. When § 2(f) was added on the floor of the Senate, the only comment made was that it was "sound in principle." 80 Cong. Rec. 6428 (1936) (statement of Sen. Robinson). In the House, only Representative Utterback, in presenting the report of the conference committee, addressed this section. He stated that § 2(f) would enable a seller to "resist the demand for sacrificial price cuts [made by large buyers,] since it enables him to charge them with knowledge of the illegality of the discount." Id. at 9419 (statement of Rep. Utterback).

303. See, e.g., General Beverage Sales Co.–Oshkosh v. East Side Winery, 396 F. Supp. 590, 596 (E.D. Wis. 1975) ("Neither § 2(d) nor § 2(e) can give rise to a private cause of action against a buyer. The statutes simply fail by their own terms to provide any sanction against one who knowingly accepts discriminations in price, services, or
sion has overcome the omission by using the "inducement or receipt of discriminatory prices" language to attack such practices as "unfair methods of competition" in violation of the FTC Act. 304

C. Methods of Enforcement

The Robinson-Patman Act may be enforced by the FTC,305 the Department of Justice306 and "private attorneys general" through treble-damage307 and injunctive actions.308 Until recently the FTC has played the major enforcement role, and indeed, it has been said that "Congress has charged [the Commission] with primary responsibility for enforcing the Act."309 The principal enforcement role, however, appears to have fallen to the Commission more by default than by design.310 Today, again by default, private plaintiffs have the principal enforcement role.311

1. Federal Trade Commission

In the past, FTC enforcement of antitrust matters in general has been criticized in a succession of studies.312 An FTC General Counsel facilities."). rev'd on other grounds, 568 F.2d 1147 (7th Cir. 1978); Mark Plastic Prods. v. Exxon Corp., 1973-2 Trade Cas. (CCH) ¶ 74,784, at 95,492 (E.D. Mich. 1973).

304. See, e.g., Grand Union Co., 57 F.T.C. 382, 415 (1960), modified and aff'd, 300 F.2d 92 (2d Cir. 1962); FTC Guide 14, 16 C.F.R. § 240.14 (1982) ("[A] customer who knows, or should know, that he is receiving payments or services which are not available on proportionally equal terms to his competitors engaged in the resale of the same seller's products, may be proceeded against by the Commission under section 5 of the Federal Trade Commission Act . . . ").


306. Id. § 25.


308. Id. § 26 (1976).

309. Elman, supra note 2, at 4.

310. No preference is expressed in the Act itself. Nor is there one found in the legislative history. For instance, Representative Patman expressed no particular preference for a method of enforcement before enactment:

Question. Who will enforce this Law?

Answer. Since this will be an amendment to the Clayton Act, it is backed by all of the remedies afforded by the Clayton Act:


Second. By injunction suit, prosecuted by the Attorney General.

Third. By similar suit or injunction or damages prosecuted by anyone injured by its violation.


312. The more notable ones include: 1) the study by Gerard Henderson in 1924, G. Henderson, The Federal Trade Commission (1924); 2) the Hoover Commission's
summarized the criticism: "[F]irst, [we] don’t know what [we’re] doing or why [we’re] doing it, second, [we] haven’t enlisted the help of the staff in straightening out the mess, and, third, even if [we] had, it would have been a waste of time." 313

For years the Commission had been described as “the little old lady of Pennsylvania Avenue.” The intended characterization was of the Commission’s general lack of consumer protection and antitrust enforcement activities. In contrast, the Commission had been until recently an activist in Robinson-Patman matters; its sins were of commission, not omission. It almost unfailingly construed the Act to produce the most anticompetitive and inefficient results. It broadly construed prohibitory provisions and narrowly construed exemptory provisions.314 Its interpretations weakened the competitive injury requirement,315 restricted the statutory defenses,316 and extended the area of per se illegality.317 Even when its decisions were denied en-


315. See, e.g., FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948). In the automotive parts cases in the 1950’s and early 1960’s, injury to competition was found even when the often insignificantly lower prices received by the members of jobber buying groups were not reflected in lower resale prices, and although the buyers paying less actually performed inventory functions that increased costs, thus offsetting their nominal price advantage. E.g., Mueller Co. v. FTC, 323 F.2d 44, 46-47 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964). In American Oil Co., 60 F.T.C. 1786 (1962), vacated, 325 F.2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964), the Commission had found injury to competition from temporary selective price cuts quoted by the supplier to several dealers in economic self-defense, when faced with prior cuts by competitors in the context of a transient local gasoline price war. Fortunately, here the Seventh Circuit vacated. American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964).

316. See supra notes 195 & 260 and accompanying text.

317. The FTC, for example, extended the scope of § 2(c), a per se provision, from the prohibition of “dummy” brokerage arrangements to include the prohibition, unconditionally and irrespective of competitive considerations, of lower prices to a
forcement on appeal, the Commission persisted in subsequent cases to follow the same interpretations.\footnote{318}

Today the Commission has turned almost 180 degrees away from its activist enforcement policies. It has even very recently gone beyond the approach of benign neglect, characteristic of the recent past,\footnote{319} to

customer made possible by the reduction of a legitimate broker's fee on a large volume transaction. Henry Broch & Co., 54 F.T.C. 673, 698-99 (1957), vacated, 261 F.2d 725 (7th Cir. 1958), rev'd, 363 U.S. 166 (1960). Subsequently, the Commission enlarged the sweep of Broch by barring not only prices reflecting savings in brokers' fees, but also price reductions based on lower commissions by manufacturers' sales agents. Thomasville Chair Co., 58 F.T.C. 441, 442-43, 448-51 (1961), vacated, 306 F.2d 541 (5th Cir. 1962). The Commission also enlarged the scope of per se illegality by its expansive interpretation of § 2(d) and 2(e). For instance, it read § 2(d)'s condition that promotional payments be "available" to require that they be affirmatively offered or made available. See, e.g., Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1060 (1957).

318. For instance, the FTC's application of a "diversion of business test" for competitive injury had been denied enforcement in two cases: Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 398-99 (1948), vacated, 191 F.2d 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952); Anheuser-Busch, Inc., 54 F.T.C. 277, 299-300 (1957), vacated, 289 F.2d 835 (7th Cir. 1961). Yet, when an FTC examiner in International Milling Co., 63 F.T.C. 1123 (1963), expressly discarded the "diversion of business" formula, the Commission majority deleted those passages of the examiner's opinion. \textit{Id.} at 1137-38.

This persistence in following its own interpretations was especially questionable when the Commission chose not to seek review of courts of appeals' decisions. After being reversed in Thomasville Chair Co. v. FTC, 306 F.2d 541, 546 (5th Cir. 1962), for example, the Commission did not seek review in the Supreme Court. Nevertheless, it stated that it intended to adhere to its position disapproved by the Fifth Circuit. See Thomasville Chair Co., 63 F.T.C. 1048, 1049 (1963) (memorandum accompanying final order).

Just as the Commission's substantive interpretations of the Act were anticompetitive, so were its cease and desist orders. These orders were generally of perpetual duration and broader in scope, both in terms of products and geography, than the alleged violations. See Kauper, \textit{Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission}, 66 Mich. L. Rev. 1095, 1147-57 (1968). With the threat of criminal contempt, these orders would freeze the respondent's pricing practices without regard to changes in conditions or the competitive environment. See \textit{Justice Report}, supra note 17, at 33-34.

319. After three decades of active enforcement of the Robinson-Patman Act by the FTC, FTC enforcement diminished to the point where Frederick Rowe noted in 1966 that "a new trend appears to be emerging at the FTC: the quiet chloroforming of Robinson-Patman." Rowe I, \textit{supra} note 2, at 14. The contrast in activity was dramatic. In 1963 there were 225 orders under § 2(d) of the Act alone. \textit{Recent Efforts Hearings} [pt. II], \textit{supra} note 7, at 189. In 1966 there were only 72 orders in total. See \textit{id.} at 187-91. More importantly, however, only six new Robinson-Patman complaints had been filed. See \textit{id.} at 186-91. See \textit{infra} note 323.

The 1970's saw a continued lack of enforcement. In 1973, for example, only five new Robinson-Patman investigations had been started, \textit{id.}, and from 1971-1976 there were fewer than ten complaints, \textit{id.}, only three of which involved litigated proceedings.
one of reaching out to correct past mistakes.\textsuperscript{320} The present Chairman of the FTC, who is not a lawyer but a professional economist, requires from every complaint both a legal and an economic case.\textsuperscript{321} And his economics appear to be influenced by those of the Chicago School.\textsuperscript{322} Thus, if the FTC is a sinner now, it is only in the eyes of the Act's supporters.

What does this mean for Robinson-Patman enforcement? Probably even less of what little there was. The statistics indicate the FTC's disinclination to enforce the Act over the recent past.\textsuperscript{323} Recently, the Director of the Commission's Bureau of Competition in testimony before Congress identified three situations in which the Commission is

320. Recently the Commission has filed, with the Department of Justice, an amicus brief in Falls City Indus. v. Vanco Beverage, Inc., 103 S. Ct. 1282 (1983), urging reversal, and taking a position on the meeting-competition defense which is in contrast to its past position. Brief for the United States as Amicus Curiae in Support of Reversal at 8, 15, \textit{Falls City}. It also recently filed a proposed order in the \textit{Borden} litigation reversing its decision, and adopting a very new approach to what pricing practices by monopolists are permissible. See supra notes 162-63 and accompanying text. \textit{Borden} was not a Robinson-Patman action but, a fortiori, the Commission's views as to a monopolist's pricing should also be applicable to a non-monopolist's price discrimination.


322. \textit{Id.} at 9. Chairman Miller stated that he was "greatly influenced by Bob Bork and Dick Posner." \textit{Id.} For some of their views on Robinson-Patman, see supra notes 138, 231, 234 and accompanying text.

323. \textit{See Impact Hearings, supra} note 20, at 70-72 (statement of Thomas J. Campbell, Director, Bureau of Competition, FTC) (Statistical Appendices). The following tables are relevant excerpts from the statistics prepared by the FTC for this House subcommittee hearing:

\begin{center}
\textbf{COMPLAINTS AND INQUIRIES RECEIVED, BY SUBJECT MATTER}
\begin{tabular}{lrr}
\hline
Year & Total\textsuperscript{1} & R-P \\
1978 & 1,150 & 160 \\
1979 & 1,500 & 200 \\
1980 & 1,075 & 135 \\
1981 & 950 & 105 \\
1982\textsuperscript{2} & 2,120 & 75 \\
\hline
\end{tabular}
\end{center}

\textsuperscript{1} This includes correspondence referred to the Bureau on all subjects, including mergers, monopolization and other matters as well as R-P and vertical restraints.

\textsuperscript{2} Through August 27. The number of letters is unusually high because of correspondence concerning well-publicized mergers this year (e.g., Mobil/Marathon).
### ROBINSON-PATMAN ACT—INVESTIGATIONS

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<th>Initial Phase Investigation</th>
<th>Formal Investigation</th>
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<th>Consents Issued</th>
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</table>

1 The complaints reported under this accounting treat multiple respondents as one, and do not include complaints issued in immediate conjunction with a consent order. Accordingly, the number of complaints reported is smaller here than in some alternative tabulations.

Data reflects investigations through 6-30-82, and orders through 8-30-82.

### ROBINSON PATMAN ... CONSENT DECREES AND LITIGATED ORDERS SINCE [1975]

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Section 2(a)</th>
<th>Section 2(c)</th>
<th>Section 2(d)</th>
<th>Section 2(e)</th>
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</table>

1 Robinson-Patman orders and consents reflected in this table may total more than the number actually issued in a given year because some cases were prosecuted under several different sections of the Act.

2 Cases tabulated for Fiscal Year 1976 include consents and orders between July 1, 1975 and November 30, 1976.


<table>
<thead>
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<th>Size of Respondent</th>
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<td>Over $10 billion</td>
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<tr>
<td>1-10 billion</td>
<td>5</td>
</tr>
<tr>
<td>TOTAL</td>
<td>7</td>
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1 In terms of sales in current dollars.
most likely to bring a Robinson-Patman action, and five situations in which it would not expect to bring one. These examples indicate a limited "window of enforcement." The current economic approach of the Commission is a welcome one, though of course it is subject to change after the next presidential election.

324. Id. at 66-67. Campbell described the three situations as follows:

The first group of cases involves predation or attempted monopoly. A large, dominant firm may use selective price cuts in a campaign to drive its smaller rivals from the market. If the price cuts result in the goods being sold below cost it constitutes predation, and may be illegal. The standards for actionable predation are quite strict. Where predation is present, however, the tools by which it was carried out will often include Robinson-Patman Act violations. The price cuts will often have been focused on particular groups of customers or geographic markets, resulting in a discrimination between those sales and sales made outside the target area. In addition to challenging the predation directly, therefore, the Commission may also challenge the price discriminations used to carry it out.

In a second group of cases the price discrimination originates with a dealer rather than with the manufacturer. This is the so-called "power buyer" situation. A powerful dealer may demand a special price concession from the factory and threaten to withhold its business, or to reduce its orders, if the concession is not granted. The resulting reduced demand may well lessen the nation's total output of goods and services. This is, moreover, bad competition policy since price breaks have been given on a basis other than efficiency or "the merits." Where this situation exists we would want the Commission to be especially vigilant on behalf of the smaller competitors. At least two of our internal investigations presently involve such allegations, one focusing on a department store's purchase of housewares, and the other on a chain store's purchase of books.

A third group of cases involves attempts by a manufacturer to confer market power on one of his dealers. This practice unfairly burdens the competitors of the favored dealer. The Commission has a complaint outstanding against General Motors which raises some of these issues. The complaint charges that GM has given discriminatory advertising allowances to the largest car rental agencies. If true, it would suggest that the company has increased its chances of making large fleet sales, but that the smaller rental firms have been unfairly disadvantaged as a result.

Id. (footnote omitted) (emphasis added).

325. Id. at 67. These are:

(1) where the price difference merely reflects the actual differences in the costs of servicing dealers; (2) where a price difference is offered to meet a good-faith price of a competitor; (3) where the discrimination is not large and is unlikely to last long before being corrected by the market; (4) where alternative sources of supply at the discounted price are readily available; and (5) where our action, by demanding uniform charges, would tend to stabilize prices among members of an oligopoly.

Id. (footnote omitted).

326. It appears that two Commissioners might welcome such a change. See, e.g., Borden, Inc., 48 Fed. Reg. 9023, 9028-30 (1983) (Proposed Order Modification with Statement to Aid Public Comment) (Pertschuk, Comm'r, dissenting); id. at 9030-32 (Bailey, Comm'r, dissenting).
2. Department of Justice

The Department has concurrent authority to enforce the Robinson-Patman Act amendments to section 2 of the Clayton Act and exclusive authority to enforce section 3 of the Robinson-Patman Act—the criminal provisions. Yet its enforcement activities, both civil and criminal, have been few and episodic, and even when the Department has invoked the Act, it usually has been only as an alternative theory in a predominantly Sherman or Clayton Act suit.

A combination of factors appears to have contributed to this lack of enforcement. The underlying and basic factor is probably what one official called the "philosophic bias" against the Act—the feeling that the Act is at odds with the competitive mandate of the Sherman Act. Also important, however, are various pragmatic considerations that have reinforced the philosophic disinclination.

One such consideration is the difficulty of developing an expertise in Robinson-Patman. It is very much a discrete area of antitrust law.

327. Private plaintiffs were also allowed to sue under § 3 of the Robinson-Patman Act until January 1958 when the Supreme Court held that § 3 was not one of the "antitrust laws" under § 1 of the Clayton Act. See Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958).

328. The lack of Justice Department civil enforcement is illustrated by the testimony of one Antitrust Division official before a House Subcommittee 22 years after the passage of the Act. He stated in connection with the then upcoming trial on the remand of United States v. Borden Co., 347 U.S. 514 (1954), "to my recollection [this is] the first time that the Department of Justice will be involved in the arduous task of proving a civil Robinson-Patman Act violation." Dairy Price Discrimination Hearings [pt. III], supra note 11, at 678. And that case never did go to trial.

329. The lack of criminal enforcement is indicated by the statement of a Chairman of the ABA Antitrust Section that in "the jungle of Robinson-Patman... the potential liability is only civil." Symposium, Risk Taking Under the Antitrust Laws, 44 Antitrust L.J. 375, 422 (1975). Of course, this statement is technically incorrect, see supra notes 75 & 327 and accompanying text, but it represents the perception of the bar after years of Department inaction. See H. Shniderman, supra note 30, at 151-52 & n.2.


331. See C. Edwards, supra note 43, at 682 app. B.

332. Then Acting Deputy Assistant Attorney General Sims stated in an interview that the recent Antitrust Division arguments against the Robinson-Patman Act were based "on 'logic,' anecdotal information, and 'philosophic bias.'" Antitrust & Trade Reg. Rep. (BNA) No. 729, at A-20 (Sept. 30, 1975). He also noted that the Department "has 'never been a strong supporter of Robinson-Patman.'" Id; accord Liebeler, supra note 6, at 20 ("the Antitrust Division has never cared much for the Robinson-Patman Act"). It is interesting to note how others view this "bias." The critics of the Act naturally see it as in the public interest. See, e.g., Liebeler, supra note 6, at 43. On the other hand, the Act's supporters see this "bias" as either a sinister "conflict of interest" in the Department's enforcement duties, Recent Efforts Hearings [pt. I], supra note 7, at 607-08 (remarks of Rep. Gonzalez), or the cause of the Department's failure to understand the merits of the Act, id. at 271 (remarks of Kintner).
Years of trust-busting under the Sherman Act would not prepare one to litigate a Robinson-Patman case. “[C]onventional antitrust precepts cannot supply the beginnings of wisdom [in Robinson-Patman, in which] legal judgment is lost in a maze of provisos and quibbles.”  

Besides the basic legal incongruities, the ever-present accounting intricacies require an expertise “most of [the Department’s] attorneys do not have.”  

The natural inclination to avoid the unfamiliar is compounded by the Antitrust Division’s multi-step investigation and complaint process, which requires that a number of different lawyers be familiar with the applicable law.

Another, pragmatic reason for non-enforcement by the Department is that the FTC has had much experience with the Act and until recently was eager to enforce it. It is no wonder, then, that a “rough-and-ready allocation” of Robinson-Patman cases to the Commission has been made.

To summarize the Department’s enforcement practices, familiarity bred contempt and disuse, unfamiliarity also bred disuse and this combination, together with active FTC enforcement, created the present nonenforcement posture of the Department.

Most critics of the Act and its enforcement have spared the Department from their criticisms because the Department “has had little or nothing to do with [the Act].” Still, while lack of enforcement, especially when compared to the results of active enforcement by the FTC, may be something of a virtue, total lack of activity in this area is not. Rather than abstaining, the Department could have attempted to persuade courts and the Commission to adopt a more pro-competitive interpretation of the Act, along the lines, for instance, of the suggestions in the Attorney General’s Report. Yet the Department, until recently, did not heed those suggestions.

333. Rowe II, supra note 27, at 541.
335. For a good discussion of the Antitrust Division’s investigation and complaint process, see E. Kintner, Primer on the Law of Mergers 319-47 (1973).
336. See Liebeler, supra note 6, at 20 (“The Commission has usually been enthusiastic about its opportunities to enforce [the Robinson-Patman Act].”).
337. Dairy Price Discrimination Hearings [pt. III], supra note 11, at 678; Recent Efforts Hearings [pt. I], supra note 7, at 594.
338. Or, using merger analysis, if the Department’s enforcement activities were the relevant product market, the purists in the Division would exclude Robinson-Patman from the relevant market because it does not serve the same purpose as the Sherman Act (no cross-elasticity of demand), and those sympathetic to the Act, if any, would exclude Robinson-Patman because of the difficulties of retooling to effectively enforce it (no cross-elasticity of supply or production).
339. Liebeler, supra note 6, at 20. Liebeler did criticize the Division’s “early and badly misconceived foray against the A&P.” Id.
341. Perhaps feelings of comity prevented active public participation before the Commission, but there could have been high-level liaison between the Attorney
Today, the Antitrust Division seems to be working more closely with the FTC, and to be actively seeking to influence the direction of antitrust law, including that of Robinson-Patman, in the Supreme Court.

3. Private Plaintiffs

The Act may also be enforced through suits by private plaintiffs "injured in [their] business or property" by a violation of the Act.

General, the Commissioners and their staffs. See Stigler Report, supra note 280, at X-4. But see E. Kintner, supra note 199, at 287 ("The [liaison] system has been remarkably effective in practice, and this alone is a tribute to the practical bent of those charged with the enforcement of the act."). The Stigler Report in its study of general antitrust policy concluded that if such a system were instituted "the Commission [would] pay some heed to the Department's views, if forcefully expressed, on antitrust and trade-regulation policy." Stigler Report, supra note 280, at X-4. In the Department's favor are its few amicus briefs filed on petitions for certiorari before the Supreme Court, stating the Department's disagreement with the Commission's view of the law. For instance, in Purolator Prods. v. FTC, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968), the Department filed an amicus brief in support of the petition for certiorari, contending that the Commission's interpretation of the Act to require a split-function distributor to pay the same price as an independent jobber who performed no warehousing function would impede competition in distribution and protect existing and possibly antiquated distribution systems from normal pressures of competition and innovation. Memorandum for the United States as Amicus Curiae at 23, id.

In Monroe Auto Equipment Co. v. FTC, 347 F.2d 401 (7th Cir. 1965), cert. denied, 382 U.S. 1009 (1966), the Solicitor General also filed an amicus brief. While stating that he "agrees with the Commission that the present case does not warrant further review," he also noted that "the Commission's decision suggests an interpretation of the Robinson-Patman Act that could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical integration of concerns engaged in the wholesale and retail distribution of merchandise." Memorandum for the United States as Amicus Curiae at 4-5, id.

And in the most radical show of disagreement, the Solicitor General in Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), rev'd, 340 U.S. 231 (1951), refused to represent the Commission on appeal. While these briefs represented movement in the right direction, they were merely reactions to cases thrust before the Department by the appellate process. The Department never pursued these or subsequent cases before the Commission or lower courts.

342. The FTC and Department filed a joint brief for the United States as amici curiae in Falls City Indus. v. Vanco Beverage, Inc., 103 S. Ct. 1282 (1983); Brief for the United States as Amici Curiae in Support of Reversal, id.


344. The Department recently filed an amicus brief in Monsanto Co. v. Spray-Rite Serv. Corp., cert. granted, 103 S. Ct. 1249 (1983), to ask the Supreme Court to reconsider the per se restriction on resale price maintenance. See N.Y. Times, Mar. 1, 1983, at D5, col. 4.

Plaintiffs may seek treble damages and reasonable attorney’s fees as well as injunctions against future violations. Private plaintiffs, however, may sue neither under section 3 of the Robinson-Patman Act nor under section 5 of the FTC Act.

Although private actions have always been permitted under all antitrust laws, only fairly recently have they come of age. Today, according to a leading plaintiff’s attorney, the private action “is the only game in town.” This observation is certainly true with regard to the Robinson-Patman Act, which neither the FTC nor the Department is currently enforcing. Recent developments, however, may serve to reduce the number of private actions.

Until recently, private antitrust actions have been favored by courts. This favor has been demonstrated in such subtle ways as by

346. Id.
347. Id. § 26 (1976). Permanent injunctions have been granted in Robinson-Patman actions. See, e.g., Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661, 667 (6th Cir.), cert. denied, 382 U.S. 904 (1965). Plaintiff may also seek and be granted a preliminary injunction. In such cases, however, the plaintiff must meet the usual requirements for obtaining such relief. See Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 726 (3d Cir. 1962).
349. Despite the longstanding rule that no private right of action can be implied from the FTC Act, see, e.g., Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998 (D.C. Cir. 1973); Carlson v. Coca-Cola Co., 483 F.2d 279, 280 (9th Cir. 1973), a district court in the face of this precedent held that there was such a right when the defendant allegedly was engaged in practices “nearly identical” to those proscribed in a 1963 FTC consent decree. Guernsey v. Rich Plan of the Midwest, 1976-1 Trade Cas. (CCH) 60,740, at 68,178 (N.D. Ind. 1976).
352. See infra note 361 and accompanying text. Separate statistics for the number of private Robinson-Patman actions are not maintained by the Administrative Office of the United States Courts. Such actions remained rare until recently. R. Posner, supra note 14, at 29. Even today they are a very small percentage of the total number of private antitrust actions. See id. (“For example, in all of 1975 only nineteen decisions in private Robinson-Patman suits were reported in the federal trial or appellate courts, and eight of these involved other charges under the federal antitrust laws as well as a Robinson-Patman charge.”) (footnote omitted). Of course, the reported cases do not reflect the true number of such actions, as many are settled and some opinions are unpublished.
denominating private plaintiffs “private attorneys general,” and in such more direct ways as limiting the in pari delicto defense. In antitrust generally, and in Robinson-Patman law specifically, however, it appears that such actions present a serious “public interest gap.” First, the term “private attorney general” is a misnomer. As one lawyer accurately noted, the term itself is internally inconsistent: “An attorney general is someone who is supposedly thinking of the overall public good. ‘Private’ indicates selfish and individual interests.” Everyone agrees that private plaintiffs, in the words of one plaintiff’s attorney, are “dominated by selfish motives” and not the public good. Recognition that plaintiffs can only be expected to pursue that which will bring benefit to them points out the need to consider the results of such self-motivated litigation.

The typical plaintiff, as defined by one plaintiff’s attorney, is the businessman “backed up against the wall” who will go out of business if he does not sue. With bankruptcy as the sure alternative, he will not likely care whether he has a valid Robinson-Patman cause of action.

Significantly, some of the most successful plaintiffs’ lawyers view antitrust litigation as a morality play devoid of economics. And morality plays affect more than juries. Courts are at times equally

353. See Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968). See generally Symposium, The Private Action—The Corporate Manager’s Heavy Artillery, 43 Antitrust L.J. 5, 6-7 (1973) (remarks of Areeda); id. at 25 (remarks of Blecher) [hereinafter cited as Symposium I]. Mr. Blecher even questioned whether “in today’s more enlightened or hospitable [court] environment whether indeed in some cases a jury is desirable.” Id. at 31.


355. Id.

356. Alioto, supra note 351, at 70.

357. Symposium I, supra note 352, at 28 (remarks of Blecher).

358. One view of the “backed up against the wall” plaintiff was voiced by one commentator who noted that a recent Robinson-Patman case, Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir.), cert. denied, 414 U.S. 975 (1973), was “representative of that category of private antitrust case which is brought by unsuccessful businessmen who have already gone out of business (or in some cases by their trustees in bankruptcy) who are simply trying the antitrust alchemy to create gold out of grave dust.” Panel Discussion, supra note 354, at 92 (statement of Bohon). Old Homestead is perhaps an example of the “private attorney general” system at its worst. There the jury was allowed to infer “predatory intent” and award treble damages of more than $3 million in a primary-line case in which the defendant had constructed a new bakery doubling its former production capacity and had entered into a private label contract with a group of independent grocery retailers. 476 F.2d at 101-04.

359. One “candidly admitted that he preferred economists to stay clear of private antitrust suits because such suits involved ‘issues of morality.’” Panel Discussion,
susceptible to trying to find a way to help a small and financially troubled litigant.

Traditionally, there is little disincentive for a financially troubled businessman to sue. As Professor Areeda has noted: "[T]he order of the day seems to be—by my lights, unhappily—'Sue! You have nothing to lose but your lawyers' fees, and much to gain through windfalls or settlement.'" Yet, because of recent developments in the law, and the traditional contingency-fee arrangement for hiring attorneys, it may be harder for the private Robinson-Patman plaintiff to obtain a favorable settlement, and consequently an attorney.

supra note 354, at 97 (remarks of Elzinga commenting on Belcher's candidness). Another proclaimed "[a]ntitrust is no longer economically oriented. It is now the slingshot by which the greed, rapacity, or overzealousness of the Goliaths are curbed by the Davids." Alioto & Blecher, Antitrust in Galbraith's New Industrial State, 13 Antitrust Bull. 215, 220 (1968). In another article the same attorney stated that the essential rationale of the antitrust laws is to "protect the little fellows from the big bullies." Alioto, Against Power Abuse: Antitrust Expands, Trial, Apr.-May 1969, at 16. Another attorney stated:

I proceed on the premise that the jury's decision is not reached by applying highly technical, sophisticated, legal concepts to a relatively complex fact situation. It is, in my judgment, made on the simple basis of morality. The plaintiff wins because the jury, through the mysterious chemistry that operates inside the jury room, has determined that the plaintiff has been wronged or, in the language of the street, has been kicked around by the defendants and is thus entitled to some recompense.


360. Symposium I, supra note 352, at 11.

361. These developments include the elimination of the "automatic damages" remedy, see supra notes 167-69 and accompanying text, and expansion of the meeting-competition defense, see supra notes 205-11 and accompanying text.

362. Thus, it is likely that more Robinson-Patman actions will be in the form of alternate counts in a Sherman Act complaint. Unless it is a price-fixing class-action suit in which the plaintiff wants to demonstrate price rigidity, a plaintiff has nothing to lose by adding a Robinson-Patman count, and with the confusion of judges, both those familiar and those unfamiliar with the Act, who knows what might come of it. The confusion surrounding the Act was illustrated in FLM Collision Parts, Inc. v. Ford Motor Co., 406 F. Supp. 224 (S.D.N.Y. 1975), aff'd in part, rev'd in part, 543 F.2d 1019 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977). In this case, the district court dismissed the Sherman Act count that plaintiff had primarily relied upon, but awarded him approximately one million dollars in treble damages and attorneys' fees on the Robinson-Patman count, 543 F.2d at 1021, despite clear infirmities in the plaintiff's Robinson-Patman claim. In particular, on the issue of standing, the same district court judge had ruled against the plaintiff's position only one year before in a similar Robinson-Patman complaint. National Auto Brokers Corp. v. General Motors Corp., 376 F. Supp. 620, 632 (S.D.N.Y. 1974), aff'd, 572 F.2d 953 (2d Cir. 1978), cert. denied, 439 U.S. 1072 (1979). The busy district court, apparently unaware of its own precedent, ruled in plaintiff's favor in FLM. The defendants appealed on various issues including standing but the Second Circuit reversed the award without addressing the standing issue, holding instead that there had been no discrimination in price. 543 F.2d at 1024-28. As weak as plaintiff's Robinson-Patman case was, it went pretty far before the bubble burst. For a recent example of a creative Robinson-
Nevertheless, the conclusion remains tempting that it is very hard to justify treble damage suits as being equitable. This is not to say that there should not be private actions under the Robinson-Patman Act, but only that their "favored" position should be reevaluated.\textsuperscript{363}

\section{D. Effects of the Robinson-Patman Act}

One longtime Robinson-Patman commentator made this very pessimistic assessment of the ability to gauge the effects of the Robinson-Patman Act accurately:

No one has satisfactorily related the semantic gymnastics that pervade Commission and judicial opinions to the commercial realities and their ultimate economic effects throughout the American business world. . . . Accordingly, anyone who essays historical evaluations about this statute is wholly at large, unembarrassed by any full economic facts, entirely free, indeed required, to speculate, and inescapably treading the quicksands of controversy. Elementary caution dictates therefore that he only ask questions, rather than offer answers.\textsuperscript{364}

To the extent that judging the effects of the Robinson-Patman Act is harder than, for instance, those of the Fair Trade Laws,\textsuperscript{365} this assessment is correct. Through the use of simple analysis, logic and the available anecdotal and statistical information, however, some answers may be offered.

\subsection{1. Beneficial Effects}

The Act may have some beneficial effects. One "cynical view [of the beneficial effects] is that [the Act's] existence keeps Congress from passing a worse law in the field."\textsuperscript{366} A less cynical view is that the Act may have: 1) caused a simplification of "complex pricing structures and discount formulas which made little sense from a business stand-

\begin{itemize}
\item \textsuperscript{363} See infra text following note 458 (advocating single damage instead of treble-damage awards). The Department has announced proposals for limiting the availability of treble damages in antitrust actions to "flagrant" or per se offenses. See N.Y. Times, Mar. 30, 1983, at D1, col. 6. This supports the views discussed above, and would undoubtedly apply to Robinson-Patman actions.
\item \textsuperscript{364} Austern I, supra note 7, at 19.
\item \textsuperscript{365} See Liebeler, supra note 6, at 43 ("[T]he adverse effects of Robinson-Patman as compared with Fair Trade. The latter permitted open price fixing with consequences clear to all. The Patman Act is more subtle, more clandestine in its operation.").
\item \textsuperscript{366} Rowe III, supra note 198, at 306.
\end{itemize}
point”; 367 2) discouraged under-the-table deals in the area of advertising and promotion arrangements; 368 and 3) prevented predatory pricing practices, to the extent they really exist. 369 Finally, some think there is a psychological benefit for small businesses to know that at least one law is concerned with “fair dealing” and was passed for their specific benefit. 370

2. Harmful Effects

The harmful effects are much easier to determine. The businessman is confronted with a statute and case law that penalize active and vigorous competition. Under the Sherman Act he is told to “go out and compete,” while under the Robinson-Patman Act he is told in effect to “go out and compete, but don’t get caught.” 371 This produces harmful social and commercial costs.

a. Social costs

Often overlooked in appraising Robinson-Patman law are the social costs, which, though hard to quantify, are nevertheless important.

367. Rowe I, supra note 2, at 11.


369. Case studies by such economists as McGee, Telser, Killer and Elzinga have cast considerable doubt on the proposition that predatory pricing is customary in the real world. As one recently stated:

This is not to say that businessmen are too ethical to make use of predatory tactics, but rather that these practices tend to be ineffective. It is hard to get rich selling below cost or withholding your best product. So my . . . point is that genuine predatory behavior will be rare.

Panel Discussion, supra note 354, at 99 (remarks of Elzinga).

370. See Recent Efforts Hearings [pt. I], supra note 7, at 429.

[My] survey documents another quasi-sociological aspect, the value of Robinson-Patman enforcement in improving morale of small buyers . . . . Even in markets where handicaps do not exist, small buyers might be demoralized by the feeling of unjust handicaps in bargaining, were it not for the reassurance provided by the presence of Robinson-Patman enforcement.

Id. This conclusion, however, is contradicted by the testimony of small business representatives who said that the unfulfilled promise of enforcement by the FTC was demoralizing to small business. E.g., id. at 53, 457.

371. For instance, in one recent seminar on the Act for businessmen, a questioner was incredulous when told that a manufacturer could not give a bigger functional discount to a distributor who performs extra services, such as warehousing and servicing of retailers, than to one who did not. He simply refused to believe that the law could require that result. Who can blame him? Yet that is the teaching of the case law. See, e.g., Monroe Auto Equip. Co. v. FTC, 347 F.2d 401, 403-04 (7th Cir. 1965), cert. denied, 382 U.S. 1009 (1966); Mueller Co. v. FTC, 323 F.2d 44, 45-48 (7th Cir. 1963), cert. denied, 377 U.S. 923 (1964).
When the "law is an ass," and so at odds with economic reality, it produces disrespect. Disrespect for the law is an unfortunate situation, and with Robinson-Patman law it is a widespread one. This disrespect often produces evasion—both legal and illegal. Some lawyers even counsel that in "the jungle of Robinson-Patman . . . some risk-taking [i.e. illegal evasion] may be inevitable." Those not having the benefit of counsel probably do not realize that their normal competitive behavior is illegal. In any case, substantial evasion is widely believed to exist.

When normal competitive, but unlawful, behavior is attacked either before the FTC in the form of a competitor's complaint, or in court, the FTC and courts will sometimes wink at the requirements of the Act. This then produces frustration and disrespect for the legal process in the complainant.

In short, in the world of Robinson-Patman someone will always be led to have contempt for the law. When considering the Act's costs, this effect should not be minimized.

b. Commercial costs—higher prices

The harmful social costs would be sufficient justification to criticize the Robinson-Patman Act. Yet the commercial costs resulting from the application of and compliance with the Act have wider effect. In a nutshell they are higher prices. These result because the Act 1) increases costs of doing business, 2) fosters price rigidity, and 3) facilitates price-fixing.

i. Increased costs of doing business

Although the recurrent criticism that the Act leads to higher prices is difficult to prove statistically because of the lack of comparative statistics for non-Robinson-Patman situations, the Act undoubtedly sets in motion a sequence that logically should lead to higher prices. One such indirect cause has already been discussed—evasion. While illegal evasion may produce more social than accounting costs, legal evasion can easily lead to higher prices. For instance, a slight change

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372. For a discussion of legal forms of evasion, see Rowe III, supra note 198, at 307.
374. For example, one commentator remarked that "except for Prohibition, I know of no other instance of such wholesale evasion of rules laid down by a Government agency." Pollack, supra note 200, at 625; accord Rose, supra note 8, at 5 ("[T]he Robinson-Patman Act is so at odds with economic reality that it is apparently disregarded in many transactions in various sectors of the economy.").
375. Some attempt, however, has been made to quantify this phenomenon. See Liebeler, supra note 6, at 33, 35.
in the physical design of a product to avoid the "like grade and quality" requirement of section 2(a) causes extra production costs directly attributable to the Act.

Costly attorneys' fees also tend to drive prices upwards. Those businesses seeking to comply with the Act in part or in whole cannot do it alone; they need lawyers. There may be some truth to the claim that the Robinson-Patman Act "gives lawyers more reasons for writing opinions than any other section of the antitrust laws." The complexity of the Act requires that each significant pricing or promotional decision be "certified by counsel." While this requirement benefits the legal profession, it may cost businesses substantial sums of money—amounts that may well be reflected in higher prices.

Forcing businesses into inefficient methods of distribution is another way in which the Act causes price increases. A direct buying retailer, for instance, cannot legally receive from sellers discounts that reflect the buyer's cost of performing brokerage or wholesaler functions, thereby foreclosing the chance that any savings derived from eliminating a middleman will be passed on to the consumer. Moreover, this bar naturally discourages backward integration into marketing and wholesaling, steps that for many retailers would produce cost-saving efficiencies. Finally, to circumvent this bar the retailer might be tempted to integrate backward one more step—into production—a step that on its own terms might be inefficient, but which becomes economically attractive because of the restrictions of the Act.

Another cause of inefficient business practices is the Act's requirement in sections 2(d) and (e) and the FTC Guides that a manufacturer develop and distribute promotional programs for small retailers even though the cost of such programs far outweighs any possible return. This requirement on its face increases costs to the manufacturer, leading to higher prices for the consumer.

The Act also increases prices by discouraging producers from entering new markets. This is the result of cases such as Utah Pie Co. v.

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376. See, e.g., Universal-Rundle Corp., 65 F.T.C. 924 (1964), vacated, 382 F.2d 285 (7th Cir. 1967). Universal-Rundle sold bathtubs to Sears, Roebuck for a lower price than it charged its distributors. Id. at 926. The FTC held that this price discrimination was outside the reach of the Act because of slight design differences such as a one-inch difference in height. Id. at 945.


378. Rowe III, supra note 198, at 306.

379. For example, A & P very effectively integrated backward into marketing. See M. Adelman, supra note 65, at 160-61.

380. Ironically, an increasing response of manufacturers to these commercially uneconomical restrictions is the termination of direct selling to small buyers. See, e.g., Recent Efforts Hearings [pt. I], supra note 7, at 455-56; Liebeler, supra note 6, at 32. Such termination not only hurts those small buyers that the Act was meant to protect, but also increases prices to consumers since another layer of distribution is now needed for those small buyers to receive the products for resale.
Continental Baking Co. In that case, national manufacturers engaged in geographic price discrimination, which caused a local competitor to reduce prices drastically. Although the local competitor enjoyed an increase in its sales volume, retained the largest share of the market and continued to make a profit, the court nevertheless held that the jury could reasonably have concluded that the local pie company would in time feel the financial pinch and be a less competitive force. Utah Pie therefore, to the extent it is still good law, makes any sustained territorial price variation risky and makes expansion safe only if unsuccessful.

ii. Price rigidity

For competitors within any particular market Robinson-Patman "introduces rigidities of various kinds into the pricing structure all the way from the manufacturer to the ultimate retailer." This price rigidity is no surprise because "[t]he concept that a business should charge a single price for its goods" is "deeply embedded" within the Act. Thus, with respect to a business' amount of understanding of Robinson-Patman law, ignorance is bliss. The "deeper the company's

381. 386 U.S. 685 (1967). For a very good critique of this case, see Bowman, supra note 147.
382. 386 U.S. at 703. Justice Stewart was correct in his criticism that "the Court has fallen into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition." Id. at 705 (Stewart, J., dissenting).
383. Rather than using the analysis in Utah Pie, many lower courts in primary-line cases have adopted modifications of the Areeda-Turner predatory pricing test. See supra notes 151-64 and accompanying text. There is still a great risk involved, though, in ignoring this Supreme Court precedent.
384. Successful expansion will almost always require an initial lowering of prices in the new market. Such expansion will invite a lawsuit by a local competitor who under Utah Pie can get to a jury on the issue of injury to competition by showing the entry, lower prices than charged elsewhere and a general lowering of prices in the market.
386. 1 M. Hoffmann, supra note 377, at 39. As one leading commentator on the Act has noted:

With a price differential equated with a price discrimination, with injury to competition virtually presumed from the existence of the price difference, and with the statutory justifications devitalized, legal caution must inevitably discourage bold or aggressive maneuvers in favor of the conservative and the safe pricing routine.

Rowe III, supra note 198, at 306 (footnotes omitted).
understanding of the decisional law under the act, the more hesitant it is apt to become."\textsuperscript{387}

Compounding the stabilizing effect on pricing caused by a heightened awareness of Robinson-Patman law is the fear of the unknown.\textsuperscript{388} In much of Robinson-Patman law there are only one or two opinions covering a particular question. While these may dictate the result in cases having nearly identical circumstances, they do not establish with any certainty what the result will be in the cases having many variations of those facts, or even cases with the same facts in other jurisdictions. Faith in the sound enforcement policies of the government agencies or in the ability of the courts to reach economically realistic results could alleviate this uncertainty. While the businessman is faced with greatly improving records of courts and the FTC, he knows that a "private attorney general" may be policing the market and "will take advantage of all the broadest interpretations against any defendant, and will inevitably strive to push the bounds of the law to the utmost extreme."\textsuperscript{389}

Thus, the company that wishes to make selective price cuts has much going against it. If it can determine with reasonable certainty that the prices can be defended under the Act, it still must evaluate the costs and probability of a lawsuit, adverse publicity, trade association animosity, complaints to the FTC or Congress, FTC investigations, increased attorneys’ fees, and the need for cost accountants and market experts. It may even be that the cost of determining the Robinson-Patman consequences of the price cut alone might outweigh the possible benefits of the price reduction.

This uncertain balancing is in sharp contrast to the effortless, costless certainty that no change in price means that it will be completely beyond the Act’s proscriptions.\textsuperscript{390} The path of least resistance, even for competitive-minded companies, therefore, is price uniformity. Needless to say, the company that is disinclined to make price cuts to begin with will have many reasons not to make them, and can piously tell its customers that such cuts would be illegal.\textsuperscript{391}

\textsuperscript{387} Shniderman, \textit{supra} note 385, at 176.

\textsuperscript{388} See \textit{id.} at 173. ("Any broad-gauged evaluation of the Robinson-Patman Act’s impact on pricing flexibility must take into account the basic uncertainty of the law. This doubt as to the conduct proscribed may itself tend to discourage pricing innovations, including changes in the level of prices.") (footnote omitted).

\textsuperscript{389} Rowe IV, \textit{supra} note 199, at 107-08 (emphasis in original) (footnote omitted).

\textsuperscript{390} See, e.g., Jones, Testimony before the Domestic Council Group on Regulatory Reform, Dec. 8, 1975, Transcript at 33 [hereinafter cited as Jones]. This still leaves the alternative of an across-the-board cut, but this is an unusual and costly response to an isolated competitive situation.

\textsuperscript{391} It is unlikely that a customer would seriously challenge such a statement. Such a challenge might lead to requests from the seller for cost figures or verifications of competitors’ bids in records that the customer does not have or would not want to disclose.
The buyer liability provisions of the Act further enhance price rigidity. The ability of an individual buyer to bargain freely for a lower price is essential to effective competition. For this reason, some think buyer liability has no place in the antitrust laws at all. In any case, the watchwords to a competitive buyer are "caveat emptor." This potential liability is especially troublesome given that usually only strong or aggressive buyers can exert the pressure necessary to force price concessions from sellers in oligopolistic markets or in markets controlled by price collusion. Put another way, "the formula for competition is simple: add one part of Sears Roebuck to twenty parts of oligopoly."

392. See supra notes 286-304 and accompanying text.
393. See Elman, supra note 2, at 9 ("[P]rice differences will naturally arise from the ordinary pressures of everyday bargaining and haggling in a competitive market. A price discrimination law which results in the elimination of such pressures would impair or obstruct the competitive process. Especially in a sellers' market that is oligopolistically structured, the ability of a few buyers to obtain lower prices may be the only way in which a general reduction of prices in such a market can come about.") (footnote omitted).
394. See, e.g., Jones, supra note 390, at 23.
395. Id. As Professor Jones stated in his testimony: "One reads anti-trust cases in this area with amazement [and] increasing incredulity that this conduct could possibly be considered antithetical to competitive pricing." Id.
396. See Elman, supra note 2, at 9. As one scholar observed:
A strong, alert buyer, large enough so that the loss of his patronage is not a matter of indifference, constantly on the watch for a break which he can exploit by rolling up the whole price front, able to force concessions first from one and then from all, and followed by other buyers, can collapse a structure of control or keep it from ever coming into existence. Small wonder, as the NRA experience showed, that sellers attempt to keep big buyers out of the market or to restrict their bargaining power.

397. Wilcox, quoted in F. Scherer, Industrial Market Structure and Economic Performance 191 (1973) (footnote omitted); see Liebeler, supra note 6, at 29. It may be significant that both price-fixers and supporters of Robinson-Patman dislike "secret" price concessions to buyers.

The Commission's efforts against "power buyers" when the seller makes the advances are also troublesome. One commentator has described this situation:
When a seller hungry for business decides to make a price concession, to whom will he make a concession? Almost inevitably [the large buyer]. There is more payoff in it, and therefore it is more likely than not that the first beneficiary of a break from the prevailing prices in such an industry will be to a large buyer.

Baxter, supra note 385, at 42. This in turn may cause a process of price erosion throughout the industry. As explained further by then Professor Baxter:
Assuming that Seller No. 1 has gained a large buyer, someone has lost a good customer, and in that sense now has excess capacity, and has to go looking for some other buyer. So, the pressures are magnified for another price concession.
The Supreme Court opinion in *Great Atlantic & Pacific Tea Co. v. FTC*, by allowing the buyer to invoke the seller's meeting-competition defense, gives some solace, but it still leaves both the buyer and the seller at the mercy of the fact-finder's determination of "good faith." Thus, the buyer has to be very careful when it knows that the seller's bid depends upon the meeting-competition defense, especially if the seller can allege that he dealt with a "lying buyer." Moreover, *A & P* did nothing to remove the hazards a buyer encounters by accepting a bid based on the cost-justification defense. Thus, the Act thwarts a process that could lead to a general lowering of prices.

### iii. Price fixing

The Act fosters price fixing in basically three ways. First, by requiring uniform prices the Act provides an enforcement tool for price-fixing agreements, which are illegal under the Sherman Act. "Cheaters" may be subjected to actual or threatened lawsuits under...
the Act, complaints to enforcement officials, bad publicity, and the
anguished cries of competitors before sympathetic congressional com-
mittees. Such actions, which might evidence illegality under the Sher-
man Act, may be defended under the Robinson-Patman Act as the
public-spirited policing of a "private attorney general."

Second, the ambiguous nature of the "good faith" requirement\textsuperscript{404} imposed on the meeting-competition proviso in section 2(b)\textsuperscript{405} also fosters price fixing. One of the elements of good faith is the require-
ment that the seller attempt to verify the lower price offered by its
competitor.\textsuperscript{406} Although "good faith" in section 2(b) "does not require
the seller to justify price discriminations by showing that in fact they
met a competitive price,"\textsuperscript{407} what exactly is required, short of obtain-
ing proof positive, remains an open question. In \textit{Viviano Macaroni
Co. v. FTC},\textsuperscript{408} the Third Circuit, in rejecting a section 2(b) defense,
held that the seller should have verified the buyer's oral report and
investigated the buyer himself "in view of the 'tendency of buyers to
secure the most advantageous terms of sales possible.'"\textsuperscript{409} The court
also held that the seller should have verified its salesman's report of
"an inroad" by a competitor, even though the salesman had eighteen
years of service and the dollar amount involved was not large.\textsuperscript{410}
Although other indicia of lack of good faith were present in \textit{Viviano},
the case was a warning to businessmen of the dangers of verifying
solely through their customers, and left doubts whether they could
rely on their salesmen, however senior, to do the verifying. Even if
\textit{Viviano}, decided before \textit{Great Atlantic & Pacific Tea Co. v. FTC},\textsuperscript{411}
merely represents an extreme or isolated case, it nevertheless illus-
trates how the "good faith" standard gives tremendous discretion to
the Commission, courts and juries in judging a seller's verification
efforts.\textsuperscript{412} This discretion is especially troublesome to a businessman

\textsuperscript{404} See Continental Baking Co., 63 F.T.C. 2071, 2121-22 (1963) See \textit{supra} note
201 and accompanying text.
\textsuperscript{405} See \textit{supra} notes 196-99 and accompanying text. It is ironic that the provision
that is touted as making possible the compatibility of the Robinson-Patman Act with
the Sherman Act, see \textit{Antitrust Developments, supra} note 199, at 143; E. Kintner,
\textit{supra} note 199, at 178, facilitates price-fixing, which is per se illegal under the
Sherman Act.
\textsuperscript{406} See \textit{supra} note 206.
See \textit{supra} note 206 and accompanying text.
\textsuperscript{408} 411 F.2d 255 (3d Cir. 1969).
\textsuperscript{409} \textit{Id.} at 259 (quoting FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759 (1945)).
\textsuperscript{410} 411 F.2d at 259.
\textsuperscript{411} 440 U.S. 69 (1979).
\textsuperscript{412} As the Commission itself has noted, the "standard, whether it be considered
'subjective' or 'objective,' is inherently \textit{ad hoc} [and further that] the same method of
who knows that the trier of fact years later may be a hostile jury sitting in the home town of the plaintiff.

The recent Supreme Court opinions in United States v. United States Gypsum Co. and A & P, as salutary as they are, provide little comfort to sellers. Gypsum established that direct inter-seller price verification is not only not required under the Robinson-Patman Act, but will be subject to "close scrutiny under the Sherman Act." It left the seller on its own, however, as to what it should do to establish its "good faith," a defense the Court noted was very "fact-specific." In A & P, the Court appeared on the facts to require very little action on the part of the seller to establish the necessary good faith. It is not likely, however, to grant certiorari to rectify incorrect "good faith" determinations too frequently, given its recent statement that the question whether there is good faith is "for the trier of fact, not this Court." Thus, determinations of good faith by the fact-finder are still controlling, a fact that causes sellers who expect to rely on the meeting-competition defense to take whatever means possible, short of actual inter-seller verification, to learn the prices of its competitors.

Finally, the Act encourages price fixing by imposing liability for so-called third-line injury. In third-line injury cases the seller becomes responsible for the pricing practices of its customers. Many com-

meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others." Continental Baking Co., 63 F.T.C. 2071, 2163 (1963). Nor has the literature designed to serve the businessman and his lawyer been more specific. One guide notes that the "courts require only . . . a reasonable effort to identify the individual competitive price in a businesslike manner." C. Hills, supra note 262, at 314.

414. Id. at 458-59.
415. Id. at 455.
416. See 440 U.S. at 83-85. See supra note 206.
418. In Standard Oil Co., 41 F.T.C. 263 (1945), modified, 43 F.T.C. 56 (1946), modified, 173 F.2d 210 (7th Cir. 1949), rev'd, 340 U.S. 231 (1951), for example, the Commission held that the oil company violated § 2(a) by selling to gasoline jobbers at a lower price than to its retailers. Id. at 272-73, 283. The jobbers had resold to their retailers at a price (over which Standard had no control) lower than Standard had charged its retailers. The Commission held that this conferred upon the customers of the jobbers a competitive advantage. Id. at 275-76. The Seventh Circuit affirmed, stating that Standard "had given a club to its wholesalers which they passed on to their retailers to bludgeon their competitors." 173 F.2d at 216. In a rare act, the Solicitor General refused to represent the FTC before the Supreme Court. The Court never reached the third-line injury issue because it held that the Commission should have considered the meeting-competition defense. The majority opinion did note, however, the possible policy conflict between the Sherman and Robinson-Patman Acts. 340 U.S. at 249 & n.15.
mentators have noted that this theory of liability virtually requires the dual distribution seller to control the resale price of its customers in violation of the Sherman Act. Of course, this facilitation or encouragement of vertical price fixing would also tend to raise consumer prices.

II. PROPOSALS FOR CHANGE

The record of Robinson-Patman to date compels the conclusion that some form of change is necessary. This part of the Article first evaluates the alternatives available, and then proposes specific changes in the Act.

A. Alternative Methods of Change

Three main options are available to change the Robinson-Patman status quo: 1) more enlightened enforcement and administration of the Act; 2) complete repeal; or 3) statutory amendment. Each has its advantages and disadvantages, and its adherents.

1. Better Enforcement

Many have advocated better enforcement of the Act. The Attorney General's Report, for instance, took the position that the Act could be harmonized with the Sherman Act by proper interpretation and enforcement. Yet there are also those who think such an approach is hopeless.

Standard Oil Co. may be viewed as a secondary-line case because the disfavored purchaser was a direct-buying retailer. This labeling, of course, does not change the effect of the requirements on sellers in multi-level distribution to favored purchasers.

See, e.g., C. Hills, supra note 262, at 292 ("concept poses a problem in that it induces the supplier to engage in resale price maintenance contrary to prohibitions of the Sherman Act"); F. Rowe, supra note 27, at 200 ("in context of dual distribution [third-line injury theory of liability] inherently promotes resale price maintenance"); Campbell & Emanuel, supra note 385, at 135 n.44 ("the most efficient way for seller to police [buyer's] pricing practices might be by imposing a resale maintenance agreement... a result in contravention of § 1 of the Sherman Act").

Att'y Gen. Rep., supra note 194 at 164-65. Rowe has similarly concluded: [I]t is my personal belief that many undesirable manifestations of the Act are amenable to improvements by enlightened administration and interpretation within the framework of the present statutory text. I also feel that important progress could be achieved in reducing some existing areas of disagreement between enforcement officials and the antitrust bar by a program of joint effort and discussion in a spirit of professional competence and good faith.

Rowe III, supra note 198, at 314 n.58.

Handler noted: "There were many in the past who felt that a reconstituted Commission and the courts could bring some measure of clarity to its turgid wording.

419. See, e.g., C. Hills, supra note 262, at 292 ("concept poses a problem in that it induces the supplier to engage in resale price maintenance contrary to prohibitions of the Sherman Act"); F. Rowe, supra note 27, at 200 ("in context of dual distribution [third-line injury theory of liability] inherently promotes resale price maintenance"); Campbell & Emanuel, supra note 385, at 135 n.44 ("the most efficient way for seller to police [buyer's] pricing practices might be by imposing a resale maintenance agreement... a result in contravention of § 1 of the Sherman Act").
Robinson-Patman law is very complex and confusing, even for those with years of experience, and thus is not conducive to enlightened interpretation by judges who have only momentary exposure necessitated by the particular case before them. Considering the record of the FTC, in light of its continued exposure and its expert legal and economic staff, it is unrealistic to expect better results from courts.

Nevertheless, recent cases indicate that courts and the FTC both are doing much better in reconciling Robinson-Patman law with the Sherman Act. While this is a promising development, it is too early to tell whether this trend will continue or how successful it will be. One reason for the uncertainty is that no matter how well intentioned the courts may be, the language of the Act, its legislative history, and older precedents all point not to the protection of competition, but rather to the protection of competitors. While courts have given lip-service to an "injury-to-competition" test, the "inference-of-injury" rule for secondary-line cases, recently reaffirmed by the Supreme Court, protects competitors usually at the expense of competition. Moreover, the Court has come close to explicitly recognizing the protectionist character of the Act, and labeling it as the intended purpose of Congress.

In light of the above, courts can attempt to reconcile the Act with the competitive principles of antitrust in general in two ways. One is simply to start fresh and try with a broad brush to read competitive principles into all sections of the Act. This approach has the advantages of being quick and effective. But few courts are likely to be informed or motivated enough to be this bold, especially in light of the Court's admonition twice in the 1982 Term against courts using policy interpretations to change the express legislative intent or effect of the Act.

The other way is to give greater weight to the expressly stated defenses in the Act itself. While there does not appear to be much

But these hopes have never been realized, and I believe there is no escape from our undertaking a comprehensive legislative overhaul." Handler, supra note 14, at 457-58.

422. Indeed, judges have complained about the problems of dealing with Robinson-Patman. See F. Rowe, supra note 27, at xi, & nn.9-10. And, as noted, one judge in two cases reached opposite results on the same issue, and apparently was not even aware of it. See supra note 362.

423. See supra notes 164, 281-85, 324-26 and accompanying text.


426. See supra note 28.

427. But see supra note 69 (discussion of protectionist strain in antitrust law).

428. See supra notes 239, 283-85 and accompanying text.

movement with regard to the cost-justification defense as yet,\textsuperscript{430} the Supreme Court has breathed new and invigorating life into the meeting-competition defense.\textsuperscript{431} The Court's broad approach to the scope of the defense in \textit{Falls City Industries}\textsuperscript{432} and its application of the defense in \textit{A & P}\textsuperscript{433} indicate that it can be in some pricing situations an effective vehicle to make the Act compatible with the Sherman Act. The lower courts have been given the means; time will tell how well they use it.

Finally, another tool to reconcile the enforcement of the Act with competitive principles is already available but not in use. The Department, which frequently advocates protection of competition before both regulatory agencies and courts as an amicus on Sherman Act matters, could establish a section to advise courts on Robinson-Patman matters in private litigation. Robinson-Patman litigations are not so numerous that staffing would be a problem. Besides, it would be interesting to see how often the public attorney general and the private attorneys general agree.

2. Repeal

In the first few decades after the passage of the Act, repeal was not seriously advocated by Robinson-Patman critics.\textsuperscript{434} This may have been in part because of the view that the Act's problems would disappear with maturity. For some, however, it became apparent that the problems were not caused by growing pains, but instead were congenital. Dean Levi was one of the first to ask whether the time had come for repeal.\textsuperscript{435} Others have since answered the question in the affirmative.\textsuperscript{436} Clearly, repeal is the most effective way to eliminate the anticompetitive aspects of Robinson-Patman law.

The possibility of repeal, however, is not very great. While the abolition of the Fair Trade Laws might seem encouraging,\textsuperscript{437} it is not really instructive as to Robinson-Patman. With respect to the Fair Trade Laws, consumers and congressmen alike could see that outright price-fixing existed, which visibly raised prices in Fair Trade states. The consumer groups were united in opposition to the Fair Trade

\textsuperscript{430} See \textit{supra} notes 191-95 and accompanying text.
\textsuperscript{431} See \textit{supra} notes 207-11 and accompanying text.
\textsuperscript{432} See \textit{supra} note 208.
\textsuperscript{433} See \textit{supra} note 207.
\textsuperscript{434} See \textit{Austern III, supra} note 368, at 106 ("so far as I am aware no legal commentator over the past sixteen years (since the passage of the Act) has advocated outright repeal") (footnote omitted).
\textsuperscript{435} See \textit{Levi, supra} note 3, at 73.
\textsuperscript{436} See, e.g., \textit{Liebeler, supra} note 6, at 18; \textit{Rose, supra} note 8, at 15.
\textsuperscript{437} See \textit{supra} note 24.
Laws and it, therefore, was a fairly safe vote for members of Congress.

The Robinson-Patman Act, on the other hand, because it is so complex, allows for no clear statistical proof of adverse effects. No consumer groups have supported its repeal, and even Ralph Nader and his organization have not responded to appeals from the Antitrust Division to support its proposals. And while states anticipated the repeal of the federal Fair Trade enabling statute by repealing their own fair trade laws, the trend, if any, is just the opposite with price discrimination laws—states that do not presently have such laws are considering enacting them.

Moreover, those groups strongly opposed to repeal not only can lobby effectively but also have many strong supporters in Congress. The plight of the small businessman is a sympathetic one, likely to take precedence over abstract benefits to consumers. Moreover, many congressmen have a gut feeling, perhaps not articulated, that even if Robinson-Patman does hurt competition and the consumer, its contribution to the survival of small business is worth the costs. Finally, a congressman knows that a vote against Robinson-Patman will gain him no votes, and may instead lose him some. His next opponent is sure to publicize his "sell out of the little guy to the big corporations."

Assuming that repeal is possible, has it any drawbacks? Most truly predatory practices could presumably be attacked under section 2 of the Sherman Act. Nevertheless, some advise that caution should prevail. For instance, one critic is concerned that a sudden outright repeal of the secondary-line provision of the Act would visit severe economic changes on smaller businesses which have been created and nourished with the reasonable expectation of Robinson-Patman shelter from the onslaughts of full-blown price competition. It would be wrong to destroy those underpinnings in one fell swoop, no matter how ineluctable the logic for repeal.

Another concern might be the effect repeal would have on the Sherman Act. Although one critic who argues for repeal claims that the Act's continued "existence provides a continuing impetus for the 'Robinson-Patmanization' of [the antitrust] laws," repeal might

438. For instance, Vermont's legislature passed a resolution to initiate a study of the desirability of enacting a price discrimination law. See 5 Trade Reg. Rep. (CCH) ¶ 50,174, at 55,316 (1973).


441. Liebeler, supra note 6, at 19.
paradoxically increase this danger. Robinson-Patman law as it exists now at least is a discrete body of law confined to some extent by narrow jurisdictional limits. With repeal, there might be even more pressure to expand section 2 into "a federal tort prohibiting unfair practices." Nor by any means is it certain that either precedent or legislative history could prevent the courts from the expansion of the "attempt" provision.

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442. See supra text accompanying note 112.
443. Workshop III: Emerging Theories—Attack, Counterattack and Defense, 43 Antitrust L.J. 185, 200 (1973) (remarks of Spivack). At present § 2 of the Sherman Act requires a specific intent to monopolize, see United States v. Griffith, 334 U.S. 100, 105 (1948); American Tobacco Co. v. United States, 328 U.S. 781, 814 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905); Woods Exploration & Producing Co. v. Aluminum Co. of Am., 438 F.2d 1286, 1304 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); United States v. Aluminum Co. of Am., 148 F.2d 416, 431-32 (2d Cir. 1945), and a "dangerous probability" of success, Swift & Co. v. United States, 196 U.S. 375, 396 (1905); see Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); Agrashell, Inc. v. Hammons Prods. Co., 479 F.2d 269, 285 (8th Cir.), cert. denied, 414 U.S. 1022 (1973); Bernard Food Indus. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), cert. denied, 397 U.S. 912 (1970); but see Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.) (dangerous probability of success is not an essential element of proof), cert. denied, 377 U.S. 993 (1964), including proof of a relevant market, see Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); Acme Precision Prods. v. American Alloys Corp., 484 F.2d 1237, 1240 (8th Cir. 1973); Diamond Int'l Corp. v. Walter-Hoeffer, 289 F. Supp. 550, 576-79 (D. Md. 1968); but see Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-75 (9th Cir.) (relevant market is not in issue when the charge is an attempt to monopolize), cert. denied, 377 U.S. 993 (1964). But these requirements are under attack. An Assistant Attorney General was not speaking only for himself when he argued that "[t]o eliminate the 'dangerous probability' and 'market' requirements from Section 2 attempt to monopolize cases would make it a much more effective tool for dealing with indefensible single firm conduct." Baker, Section 2 Enforcement—The View from the Trench, 41 Antitrust L.J. 613, 620 (1972).

444. Two cases indicate the facility with which courts have disposed of unfavorable precedents and legislative history. In Guernsey v. Rich Plan of the Midwest, 1976-1 Trade Cas. (CCH) ¶ 60,740 (N.D. Ind. 1976), the district court created out of whole cloth a private right of action under § 5 of the FTC Act, despite direct precedent denying such rights to both consumers and competitors. The judge's principal justification seemed to be that the effectiveness of FTC enforcement efforts was "suspect" and because otherwise "[m]ost defrauded customers [would] have no remedy at all." Id. at 68,177. The judge noted that "complaints of this nature have become more frequent, [and yet] Congress has not seen fit to alter the basic statutory plan." Id. Yet rather than see this congressional inaction to complaints as a constraint on his action, he viewed it as the justification for it.

Another example is the Third Circuit opinion in NBO Industries Treadway Cos. v. Brunswick Corp., 523 F.2d 262 (3d Cir. 1975), vacated sub nom. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, cert. denied, 429 U.S. 1090 (1977). The Court discussed the question of whether a private plaintiff had a right to seek divestiture under § 7 of the Clayton Act. While the Third Circuit panel decided it did not have to directly reach the issue, Judge Gibbons questioned "whether legislative
3. Amendment

Amendment has been the most widely recommended remedy for the ill-effects of the Robinson-Patman Act. From a political standpoint, amendment seems more likely than repeal because a congressman can more easily justify a vote to "improve" the Act than a vote to repeal it. In 1975, momentum for change had developed. Today, however, given the resemblance of some economic conditions to the Depression which spawned the Act, whether anything can be accomplished is not clear.

Assuming that some form of amendment is possible, some factors may nevertheless make such an effort unwise. First, once the amendment process is begun, no change is guaranteed to be an improvement. Any restrictive proposals will surely meet with counter-amendments put forth by the Act's supporters. Who will win the day is anyone's guess. Past efforts to amend the Act may provide clues as to what its supporters will introduce in the future. The Kefauver-

history from 1914, strong as it appears, should control the contemporary application of a statute laying down a fundamental national economic policy. . . . There is a danger in permitting the pronouncements of statesmen long deceased to control the contemporary meaning of statutes which are almost an economic constitution for our complex national economy." Id. at 278-79 (emphasis added). This rather frank statement that the court would not feel bound by congressional intent was rightly criticized in another opinion which noted "the Court's function is not to legislate." Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 402 F. Supp. 636, 639 (S.D.N.Y. 1975). Unfortunately, what is unusual about these two opinions is not the disregard of clear precedent and legislative history, but the candid acknowledgement that they disregarded them.


446. See supra notes 8-19 and accompanying text.

447. As one commentator noted:

"We should all recognize that lawmaking is an uncertain business. Group interests almost always come into conflict in committee hearing rooms. Modifications and compromises are almost always made to win legislative and executive approval. In distribution and marketing, trade associations, in the wholesale and retail fields, have long been conspicuous in [their] efforts to make the Robinson-Patman Act more rigid and inflexible. They may try again to create a political struggle between big and little business for which there is no real basis.

Howrey, supra note 147, at 624.
Patman bills, for example, sought to curtail the meeting-competition defense. Some bills sought to declare "discriminatory" a seller's failure to grant "functional" or "trade discounts" to wholesalers, and others, to infer private remedies in connection with a broadened ban on unduly "low" prices.

Second, assuming that a satisfactory amendment could be passed, some think it would be difficult to make that amendment safe from possible result-oriented or misconceived approaches by courts and the Commission. In today's climate of the "new economics," however, this does not appear to be a legitimate cause for concern. Actually, the supporters of Robinson-Patman have more to fear from some courts and the Commission than do the critics. Of course, in the future the situation might be different. In any case, careful draftsmanship could minimize much of what risk there is.

The final concern to be considered before the amendment process is begun is the consequence that a failure to pass an amendment will have on future attempts at improved enforcement. As Dean Neal noted: "If an attempt were made . . . to stiffen the requirement of adverse effect on competition and that were defeated, it isn't very hard to imagine the use that might be made of that so-called legislative history [to counter] subsequent efforts to achieve the same result by judicial construction."
In evaluating the desirability of amendment, therefore, one must consider whether the present Act and its case law are better than that which may result from efforts to amend the Act. This evaluation will depend on one's perception of the Act's present shortcomings and future developments. For those critics of Robinson-Patman who advocate amendment, presumably the gains are worth the risks.

How then should the three alternatives for change be evaluated? Clearly, attempts at improved enforcement, while the least risky, also provide for the least amount of change. Recent developments in the enforcement area indicate, however, that even more effort might provide effective change. Repeal, on the other hand, although it has some risks, would provide the most effective change. But there is next to no hope that it could be achieved. Finally, while amendment is the most risky, it is more feasible than repeal, and if properly drafted, would also be very effective. Still, it too is not very likely. In sum, while the realistic hopes of Robinson-Patman critics appear to ride on better enforcement, better enforcement cannot provide the effective means to make the Act fully consistent with competitive principles. Only through statutory amendment can this goal be achieved.

B. Amendment of the Robinson-Patman Act

This section does not attempt to draft specific provisions for a proposed amendment of the Act. Instead, it generally sets forth proposed changes and discusses why certain areas should remain unchanged.

1. Methods of Enforcement

While many discussions have taken place on how to amend the Act, few have specifically focused on the methods of enforcement. The foregoing discussions have demonstrated, however, the desirability of making statutory changes in enforcement methods. First, the FTC should be relieved of its enforcement role. While its present "non-enforcement" role is economically sound, and certainly better than its previously misconceived enforcement policies, even this FTC enforcement posture presents problems. Currently, for example, the Commission all but ignores the complaints made by small businessmen of alleged Robinson-Patman violations. This must be bit-

454. See, e.g., Stigler Report, supra note 280, at x-8; Neal Report, supra note 80; C. Edwards, supra note 43, at 9-10; Campbell & Emanuel, supra note 385; Symposium II, supra note 445; Appendices A & B.


terly frustrating to the businessman who believes that he has been wronged. Yet, on the other hand, to divert manpower to investigate all such allegations would be a great waste of public funds. Moreover, such investigations have a chilling effect on competition in those markets. Finally, even if they are valid, to prosecute these minor actions would serve no enforcement role beyond the interests of the immediate participants. Thus, the dilemma is to choose between wasting public resources to investigate all complaints and holding out to the citizenry the misleading hope that a federal agency will look into the smallest alleged infraction of the Act. Elimination of the FTC from an enforcement role may solve this problem.

Moreover, some of the past efforts of the Commission have been imbued not with basic antitrust principles but with regulatory and truth-in-labeling principles. The Department is not charged with the same broad responsibilities in the statutes it must enforce that the FTC has, and therefore this cross-pollination is less likely to occur as a result of the Division's enforcement activities.

Dual enforcement of the Act by the FTC and the Antitrust Division has served no good purpose in the past. Therefore, given the affirmative reasons against it and the lack of good reasons for it, the FTC enforcement role should be entirely eliminated.

Second, a section within the Department should be established to deal exclusively with prosecution of Robinson-Patman actions. The principal, if not only, function of this section should be to monitor private actions, and participate in them as amicus curiae whenever it is deemed appropriate by either the Division or the court.

Third, treble damages should be eliminated from private Robinson-Patman actions. For the reasons discussed above, the "private attorney general" is a myth. Treble damages do not serve the stated public policy goals, and in the context of the Robinson-Patman Act, are basically unfair. The award of attorneys' fees and single damages should be incentive enough to enable those with valid causes of action to sue without also enticing others to sue for windfall damages or possible settlements.

2. Jurisdictional Requirements

The Act's jurisdictional requirements make its application more restrictive than the other antitrust statutes. And so it should be. Price discrimination laws have not been demonstrated to be as valuable as other antitrust statutes, and clearly "most of [the reasons for
price discrimination) are related to the improved functioning of the competitive system"; those that are not are "exceptional." More- over, the restrictive scope is a check against those interpretations of the Commission and courts that are at odds with competitive goals.

In an effort at "logical tidiness and completeness," the Neal Report proposed both that the Act's interstate commerce requirement be coextensive with that of the Clayton Act and that its coverage be extended to include "the sale, lease, transfer or provision of any commodity or service." The Justice Department's "Robinson-Patman Reform Act" likewise would change the interstate commerce requirement, and would also eliminate the requirement of two complete sales, proposing the alternative triggering events of one sale and one offer to sell at a different price. Both proposals considerably extend the jurisdictional scope of the Act, and while they may be logical, the life of the law is not logic, but experience. And experience indicates the requirements should remain as they are now.

The most drastic proposed change in the jurisdictional requirements is contained in the Justice Department's "Predatory Practices Act." This proposal eliminates the need for price discrimination altogether. The proposal, which deals only with primary-line injury, attacks the basis for finding injury in primary-line situations—the supposed subsidization of a low price in one market or with one customer by a higher price in another market or to another customer. In contrast to this theory, which has never been shown to reflect commercial reality, the Predatory Practices Act assumes first that the source of the financial strength that supports predatory behavior is immaterial to the injury; and second, that the injury results from the level of the price rather than from a price differential. The consequence of eliminating the price differential as an element of the offense is that the definition of what constitutes a "predatory" practice or price becomes the all-important inquiry.

460. Neal Report, supra note 80, at 18.
461. See Neal, supra note 80, at 58.
462. See Neal Report, supra note 80, at 18.
464. Id. § 9.
465. Even Dean Neal has noted that the addition of services to the Act's coverage was a "dubious improvement." Neal, supra note 80, at 58.
466. See Appendix A.
467. The Predatory Practices Act is an innovative proposal that presents many interesting questions. For the purposes of this discussion, however, a number of general objections to its approach will suffice. First, it seeks to wipe the slate clean. This, by itself, is not necessarily objectionable, but it means that good case law of the past is thrown out with the bad. It creates uncertainty as to what the new statute means until a significant body of case law has developed. Second, the Act relies upon determinations of what is "predatory." As elaborate as the definition is, the term inherently leaves some room for subjective interpretation.
3. Competitive-Injury Test

The main difficulty in any effort to amend the Robinson-Patman Act is refocusing its concern on the protection of competition rather than on the protection of competitors. One solution is to eliminate the "injure, destroy, or prevent" clause of the injury-to-competition provision. Although this language does not specifically mention individual competitors, courts have construed it as if it does. Thus, such a deletion, made with unmistakably clear justifications set forth in the congressional reports, would refocus the Act on competition generally. On the other hand, at this point in the development of Robinson-Patman law, this might be a case of too little, too late.468

Perhaps for this reason many of the proposals to revise the injury-to-competition test have specifically limited the discretion of courts and the Commission. An example is the Neal Report, which, with respect to primary-line injury, recognized as actionable only geographic discrimination, and would even limit that test to situations in which there was below-cost pricing469 and a showing that the discrimination imminently threatened to eliminate a competitor whose survival is significant to competition. Along the same lines, the Robinson-Patman Reform Act requires that the sales be on a sustained basis as well as at a price below cost.470

by the courts. The Neal Report correctly noted: "Interpretations of [predatory] intent are particularly perilous in [Robinson-Patman] and, as illustrated by the Utah Pie case, the concept may be manipulated to support improper results." Neal Report, supra note 80, at 19.

Third, it is not clear why the Sherman Act could not deal with the specific violations contained in the proposal. Finally, the Justice Department has added to the pricing provision a general prohibition against threatening a competitor with any form of physical or economic harm. This is an invitation for lawsuits that have little to do with antitrust and that depend on allegations that, however unfounded, will always get the plaintiff to the jury. It provides a perfect strike suit vehicle while not answering any clear need.

468. Neal, supra note 80, at 54. Dean Neal noted:

It seems doubtful . . . that the mere elimination of the alternative test would produce a sharp change in the application of the Act. I think we can reasonably surmise that the Act will continue to have a life and momentum of its own. There would be a considerable temptation to mold the lessening-competition test in the shape of the Act's prior language and the decisions that have put a gloss on that language. Those decisions, incidentally, do not in any event seem to have depended too heavily on the protection-of-competitors language of the present Act.

Id.

469. Below-cost pricing here is defined as that "less than the reasonably anticipated long-run average cost of serving those areas (including capital costs)." Neal Report, supra note 80, at 18.

470. Below-cost pricing is defined here as "below the reasonably anticipated average direct operating expense incurred in supplying the commodity." Appendix B,
As to secondary-line injury, both the Neal Report and the Robinson-Patman Reform Act would require that the discrimination be substantial and either be part of a pattern that systematically favors large firms over smaller ones or imminently threatens to eliminate one or more competitors whose survival is significant to the maintenance of competition.

While disagreement may exist over the proper definition of below-cost pricing, all the proposed provisions are better than the present language and they all correctly seek to focus the act on competition rather than on injury to competitors.

Some have questioned the need for a secondary-line provision at all. In order for any revision to realistically stand a chance for passage, however, the Act must have one. Moreover, with proper drafting the secondary-line provision can be limited to protect small businesses only from truly predatory practices of sellers or large buyers, to the extent that they really exist. Such protection is a proper goal, and if the proposed provision only serves to make clear this policy perhaps that alone is enough to justify it.

4. Meeting-Competition Defense

Of course, if the injury-to-competition provisions are suitably revised, the defenses will be less important. The meeting-competition defense is just another way of stating that competition has not been injured.

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§ 3. Howrey would require a finding, based on "an inquiry into the discrimination's business context and market effects, [that the purpose and probable effect of the discrimination] may be substantially to lessen competition or tend to create a monopoly in any line of commerce." Howrey, supra note 147, at 621.

471. Compare note 469, supra (Neal Report's definition of below-cost pricing) with note 470, supra (Robinson-Patman Reform Act's definition of below-cost pricing). The Department's test, which is based on the Areeda-Turner approach, seems to be preferable. It is the most restrictive of the various tests suggested, see supra notes 160-61, and in the Robinson-Patman, non-monopolist seller situation this is justifiable. The objection to the test usually focuses on application to a monopolist seller, see, e.g., Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869, 875-83 (1976), or to the failure to allow non-price or intent information to be considered. See supra note 159 and accompanying text. As to the latter, in the Robinson-Patman context such information merely diverts attention from the economic merits of the transactions in question without adding much useful information on the issue of injury-to-competition. For instance, using the invectives of a sales manager to prove, inferentially, injury-to-competition is like using a halftime locker-room talk to prove intent to murder the opposing team.

472. For example, the Predatory Practices Act, which is proposed to replace the Robinson-Patman Act, has no secondary-line provision. See Appendix A.

473. The Department's Robinson-Patman Reform Act is such a proposal. See supra note 471.

474. See supra note 204 and accompanying text.
The Supreme Court in *Falls City Industries* and *A & P* has led the way to making the meeting-competition defense a valuable tool for reconciling the Act with the competitive principles of antitrust.\(^{475}\) Still, some issues need to be addressed in an amendment.

One is the still murky question of how a seller is to verify the lower price of a competitor. The Supreme Court leaves this largely to the "good faith" determination and the judgment of the trier of fact.\(^{476}\) Any revision should provide that absent a showing of the seller's bad faith, a seller may rely upon whatever verification system will normally lead to a correct judgment about the buyer's representation of a competitor's price offer. Also it should be made clear that there is no requirement that a competitor's product meet the technical requirements of being of like grade and quality if such product competes with the seller's product.

A troublesome issue is whether the competitor's price must be a lawful one. If sellers are permitted to meet unlawful prices, without limitation, it may be impossible to remedy an industry-wide pattern of discrimination. The enforcement agencies or private plaintiff would be compelled to identify the initiator of the pattern, a potentially impossible task. Yet, if a seller is not permitted to meet unlawful prices he is precluded from competing effectively at a time when he is exposed to the worst kind of competitive assault. Both the *Neal Report* and the Robinson-Patman Reform Act have proposed a solution: An industry-wide pattern of discrimination, initiated by an unlawful price, would be terminated through proceedings providing for prospective relief only and in which substantially all of the firms practicing the pattern of discrimination are joined.\(^{477}\) Although this solution may not be entirely practicable, it seems preferable to prohibiting altogether a seller from meeting an unlawful price.

### 5. Cost-Justification Defense

Revision of the cost-justification defense would require permitting greater tolerance of approximations, reasonable estimates, and reasonable classifications of customers.\(^{478}\) This would allow price differences to reflect legitimate efficiencies.\(^{479}\) Also important to the revision of this defense would be an explicit overruling of the Commission's ruling that only those costs saved by the seller, as opposed to costs

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475. See *supra* notes 207-09 and accompanying text.
476. See *supra* text accompanying note 417.
477. See *Neal Report*, *supra* note 80, at 19-20; Appendix B, § 6.
479. A good example of such a redrafting is contained in the Department's Robinson-Patman Act Reform Statute. Appendix B, § 7.
incurred by buyers in operations such as servicing of retailers, are legitimate.\(^4^{80}\)

The most innovative proposal, and one that would make the defense much less technical, is that of the New York State Bar Association.\(^4^{81}\) It proposes the equivalent of the objective good faith exception to the exclusionary rule proposed for the fourth amendment. A price discrimination would be considered cost-justified if at the time of the concession the seller maintained a "good faith belief based upon reasonable evidence" that the concession was cost-justified.\(^4^{82}\)

While this seems likely to change the present law considerably, the trier of fact would still determine good faith. Considering the track record in this regard with respect to the meeting-competition defense, and the past inclination of some courts to find "predatory intent" at the drop of a hat, some uncertainty would undoubtedly remain. Of all the suggestions, however, this one would seem to be the most likely to achieve the desired result of making the defense realistically available.

6. Changing-Conditions Defense

The changing-conditions defense should be maintained in its present form. Congress should make clear, however, that contrary to present restrictive interpretations,\(^4^{83}\) the defense is not limited to those examples given in the language of the Act. Moreover, Congress should also renounce the FTC's restriction that a "pronounced and serious deterioration or alteration in the market conditions" must exist,\(^4^{84}\) and declare that discounts on products prior to the introduction of a new line of merchandise or on very slow moving merchandise are permissible.

7. Availability

Any revision should clearly indicate that if the goods or comparable goods are available to the disfavored buyer at the favored price, no

\(^{480}\) See \textit{supra} note 136 and accompanying text.

Howrey would put the burden on the plaintiff to show that the discrimination exceeded cost differences. His reason is interesting: "[I]f the government is required to show a failure of cost justification as part of its prima facie case, the Commission and the courts might quickly become less technical." Howrey, \textit{supra} note 147, at 683. Though one way to combat the hostility shown to the defense in the past, it nevertheless is better to place the burden on defendants who are in the best position to know the costs of their own operations.


\(^{482}\) \textit{Id.}

\(^{483}\) See \textit{supra} note 215 and accompanying text.

cause of action exists. If secondary-line provisions are to be justified, they must apply only when the damage to the customer is a result of the seller's discrimination. Moreover, the customer should not be allowed to sue the seller if he could have obtained the goods from the seller or someone else at the same price. Although this notion may be implicit in the present Act, making it explicit may be necessary.

8. Sections 2(c), 2(d) and 2(e)

There is wide agreement that sections 2(c), 2(d) and 2(e) should be eliminated in their present form. For the reasons discussed in the applicable sections above, this conclusion is reasonable. The only unanswered question appears to be whether they should remain in some form at all. Patchwork amendments to a statute build in years of uncertainty as courts construe, and in some cases reconstruct, them case by case. The best solution therefore is complete repeal.

It could be argued that the judiciary has so softened the section 2(c) per se proscriptions that it is worthwhile to retain it for its use against dummy brokerage and corporate bribery. This argument is not persuasive. First, the judiciary is not a harmonious whole, and there is no guarantee how a particular court will treat actions under section 2(c). The law of Robinson-Patman varies from court to court, and, in extreme examples, even before the same judge. One cannot, therefore, counsel clients with any confidence on the basis of a few favorable precedents. Second, even assuming the law was favorable

485. See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 703-04 (9th Cir. 1964).
   [A]vailability can have no place as a defense under the Robinson-Patman Act . . . . To hold otherwise would be to make a farce of the Act and to put a seller into the ludicrous position of being able to say, "If I have engaged in illegal discrimination, what of it? You didn't have to buy your goods from me."
   Id.

487. See, e.g., Neal Report, supra note 80, at 18; Justice Report, supra note 17, at 267-69; Greenberg, supra note 271, at 628; Robinson-Patman Act Reform Statute, Appendix B.
488. See supra notes 219-85 and accompanying text.
490. See supra notes 231-39 and accompanying text.
491. See supra note 362 and accompanying text.
and clear, over time it could swing back to the per se approach. Third, however deleterious the effects of dummy brokerage and corporate bribery, they are problems that can be dealt with in a separate statute, thereby preventing the per se approach from infecting the rest of Robinson-Patman law. Finally, to the extent dummy brokerage is a way for a seller to price cut without detection by competitors, it may contribute to destabilizing prices, and should not be proscribed. Therefore, section 2(a) should be adequate to deal with the alleged abuses associated with the dummy brokerage.

A better case can be made for retaining something of sections 2(d) and 2(e). Even though section 2(a) would prohibit payment for services never performed by a customer, overpayment for such services, and the shifting of promotional costs from the buyer to the seller, all as direct or indirect price discriminations, it might be difficult to apply those transactions against the cost of the goods to determine if discrimination in price did exist, and if it did, to what degree. This problem is not insurmountable, however. Unless the particular sellers are irrational, they would utilize some method to determine how much to provide the buyer in relation to his purchases. This should provide a framework for the courts.

Supporters of Robinson-Patman argue that these sections are important to effectuate the purpose of protecting the small business and to give it a fair deal—an equal opportunity without regard to competitive injury. Although this idea is appealing on its face, the record does not bear it out. In fact, it indicates the opposite. Yet, even assuming that they do help small business, the sections could not provide assistance great enough to consider retaining them in light of the gross inefficiencies and harm they cause to normal marketing practices.

9. Section 2(f)

Section 2(f) is likely to polarize the critics and supporters of Robinson-Patman. Those who favor promoting competition and economic efficiency question the need for a buyer liability provision at all. Those who favor protecting small business from the ravages of competition, and thereby ensuring its survival as an institution for its own sake, realize the importance of the provision: It is the large buyer who is most able to shake up a market and destabilize prices by inducing price discriminations.

494. See supra notes 273-80 and accompanying text.
495. Id.
The Justice Department's Robinson-Patman Reform Act does not have a buyer liability provision. This is probably the best solution. It is difficult to justify a provision that, even today, makes hard bargaining suspect.

Nevertheless, if it is to be retained, some changes should be made. The derivative nature of section 2(f) should be made explicit. This would codify the holding in A&P that the "silent buyer" is not liable if no section 2(a) violation occurred. The "lying buyer" should also be immune, given that the effect of his lie on competition is the same as another's silence and that silence itself can be a lie. In any case, to depend on a factual distinction between silence and lying in a trial years after the incident is risky. Consequently, as a practical matter a cautious buyer could never afford to be silent. Finally, the lying buyer exception to derivative liability turns the proceeding into a morality play, and diverts attention from the proper issue—harm to competition.

10. Section 3

Section 3 establishes criminal liability for charging unreasonably low prices for products in different geographic locations "for the purpose of destroying competition or eliminating a competitor." It is misguided, overly vague, and has almost never been used. It should be eliminated.

11. Section 5 of the FTC Act

Section 5 has been used to fill the gaps in the Robinson-Patman Act. Any revision of the Act must be carefully drafted to, among other things, restrict courts and the Commission from making undesirable interpretations. Yet even careful drafting would be for naught if the Commission were able through this open-ended section to challenge any price discrimination that it deemed to be an unfair method of competition. This section, a vehicle for bypassing the Act's commands, should be eliminated through a specific provision such as the ones contained in the Neal Report's draft or in the Department of Justice's draft statutes.

496. See supra note 292.
498. See F. Rowe, supra note 27, at 474.
499. Shniderman, supra note 385, at 154.
500. Id. at 151, 152 n.2.
501. See supra notes 303-04 and accompanying text.
502. See Neal Report, supra note 80, at 21.
503. See Appendix B, § 10; Appendix A, § 8.
CONCLUSION

The Robinson-Patman Act has been the subject of periodic debate. Critics have found little, if anything, to praise, while supporters have demonstrated unending loyalty to an Act they call the Magna Carta of small business. Unfortunately, supporters have had more faith than facts to support their position.

The Act was a bad seed introduced during the Great Depression—a time of great despair in this country. When the country recovered, the Act remained. Unlike other anticompetitive Depression-era legislation which was weeded out, the Robinson-Patman Act was supported in Congress and nourished by the FTC and the courts. Although it has an antitrust facade, the Act to a large degree protects competitors from competition.

Today its survival appears assured in a Congress in which the influence of small business is strong, and in which consumer groups have not pushed for change. The climate is different, however, in the enforcement agencies and the courts. Justice Department efforts to amend or repeal the Act and the new economics approach to the law have helped to produce a “new skepticism.” Few courts find that defendants acted with predatory intent—a former Robinson-Patman mainstay. The FTC and the Department decline to enforce the Act with the zeal of nonbelievers. The Supreme Court, although declining to reinterpret the Act to comport with the new economics, has expansively construed the meeting-competition defense which may accomplish the same purpose.

The fundamental flaws in the Robinson-Patman Act require repeal or amendment to remedy fully the Act’s anticompetitive effects. The Justice Department in 1975 was therefore correct. Yet it is clear that the Act in its present form will be with us for some time. For the first time in the Act’s history, however, its critics may find more hope for the future than its supporters. By the Act’s golden anniversary the new skepticism may have become the foundation for effective Robinson-Patman reform.
APPENDIX A

Predatory Practices Act

Be it enacted, etc., that this Act shall be known as “The Predatory Practices Act of 1975.”

Sec. 2. It shall be unlawful for the seller of a commodity engaged in commerce overtly to threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller; or (b) to cease or refrain from selling any commodity to any particular customer; regardless of whether any overt action is taken to fulfill such threat.

Sec. 3. It shall be unlawful for a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

Sec. 4. It shall be a defense to a violation of Section 3 that an otherwise unlawful price:

(a) was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales of the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

Sec. 5. As used herein:

(a) “Commerce” shall have the same meaning as in Section 1 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act;

(b) “Price” shall mean the exaction of all consideration diminished by the granting of any brokerage, advertising, promotional, or other allowance, or the furnishing of services or facilities;

(c) “Economic harm” shall include a reduction of revenues by sales at a price below the direct operational expense incurred in supplying the commodity, destruction of goodwill, and the withdrawal of credit without cause from a person;

(d) “Physical harm” shall include (i) physical damage to or destruction of real property, plants, buildings, equipment or other
physical assets of a business enterprise or of those individuals managing, operating, owning or controlling a business enterprise, and (ii) physical injury to or physical intimidation of individuals engaged in managing, operating, owning or controlling a business enterprise;

(e) "Direct operating expense" shall include only direct costs of production and distribution associated with the particular sales of the commodities in question and only the portion of costs of depreciation, capital, leases of land and productive facilities, and general overhead and advertising, the incurring of which vary directly with the quantity of commodity which is produced; and

(f) "to sell on a sustained basis" shall mean to sell the commodity in question for more than 60 days within a period of one year.

Sec. 6. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than one year, or both.

Sec. 7. This Act shall be considered one of the "antitrust laws" for the purposes of Section 1 of the Act of October 15, 1914 (38 Stat. 730). Provided, however, that this Act shall not be construed to limit the applicability of such antitrust laws.

Sec. 8. Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities, or the receipt of any such discrimination.

Sec. 9. Section 2 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act, as amended, and Sections 1 and 3 of the Act of June 19, 1936 (49 Stat. 1528) commonly known as the Robinson-Patman Act, are hereby repealed. Any orders or decrees entered pursuant to the sections enumerated in the preceding sentence shall expire two years after the enactment of this Act, or sooner if they so provide.

Sec. 10. The Federal Trade Commission is hereby empowered to enforce the provisions of this Act as if they were provisions of the Act of October 15, 1914 (38 Stat. 730).

APPENDIX B

Robinson-Patman Act Reform Statute

(* denotes sections contained in Predatory Practices Act)

Be it enacted, etc., that this Act shall be known as "Price Discrimination Act of 1975."

*Sec. 2. It shall be unlawful for the seller of a commodity engaged in commerce to overtly threaten a competing or potential competing seller of the commodity with economic or physical harm, so as to cause or induce the competing seller (a) to conform to pricing policies favored by the seller or (b) to cease or refrain from selling any commodity within a geographic area or to cease or refrain from selling any commodity to any particular customer; regardless of whether any overt action is taken to fulfill such threat.
Sec. 3. It shall be unlawful for a seller of a commodity, engaged in commerce, knowingly to sell on a sustained basis such commodity at a price below the reasonably anticipated average direct operating expense incurred in supplying the commodity, where such commodity is sold for use, consumption, or resale within the United States, the District of Columbia, or any other territory under the jurisdiction of the United States.

Sec. 4. It shall be a defense to a violation of Section 3 that an otherwise unlawful price:

(a) was charged by a person in order to meet in good faith an equally low price of a competitor;

(b) was charged by a new entrant, a person having at the time of sale a less than 10 percent share of the sales of the commodity in the section of the country in which the commodity was sold at such price being deemed a new entrant;

(c) was charged in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned; or

(d) did not clearly threaten the elimination from a line of commerce of a competitor of the person charging the otherwise unlawful price.

Sec. 5. It shall be unlawful to discriminate either directly or indirectly in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where:

(a) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination is part of a pattern which systematically favors larger recipients in the relevant line of commerce over their smaller competitors; or

(b) the recipient of the discrimination is in competition with others not granted the discrimination, the discrimination is significant in amount, and the discrimination clearly threatens to eliminate from a line of commerce one or more competitors of the recipient where the effect of such elimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

Sec. 6. It shall be a defense to a violation of Section 5 that the lesser price was charged in good faith to meet an equally low price of a competitor. Except in a suit seeking only prospective relief against all or substantially all of the competitors practicing the discrimination, the defense shall be allowed even if the equally low exaction of a competitor is subsequently determined to be unlawful.
Sec. 7. It shall be a defense to a violation of Section 5 that the lesser price makes an appropriate allowance for differences in the cost of manufacture, distribution, sale, or delivery resulting from the differing methods or quantities involved in supplying the customers in question. An allowance is appropriate where the difference in price does no more than approximate the difference in cost; where the difference in price does not exceed a reasonable estimate of the difference in cost; or where the estimated difference in cost is the result of a reasonable system of classifying transactions which is based on characteristics affecting cost of manufacture, distribution, sale or delivery, under which differences in price among classes approximate differences in cost.

Sec. 8. It shall be a defense to a violation of Section 5 that: (i) the lesser price was in response to changing conditions affecting the market for or the marketability of the commodities involved, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; or (ii) the lesser price was available, on reasonably practicable conditions, to the person allegedly discriminated against.

Sec. 9. Nothing herein contained shall prevent any person from refusing to deal with any person. An offer to deal only on discriminatory terms shall, however, be treated as a completed transaction for the purpose of according relief under this Act.

*Sec. 10. Section 5 of the Federal Trade Commission Act shall not be held to prohibit any discrimination in price for the sale of commodities, or the receipt of any such discrimination.

Sec. 11. An order or injunction issued to restrain or prohibit a violation of Sections 5 through 9 shall remain in effect for a limited time, stipulated at the time of entry, and reasonably related to the nature of the violation. In no case shall an order issued to enforce such sections remain in effect more than five years after the date of entry.

*Sec. 12. Section 2 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act, as amended, and Sections 1 and 3 of the Act of June 19, 1936 (49 Stat. 1528) commonly known as the Robinson-Patman Act, are hereby repealed. Any orders or decrees entered pursuant to the sections enumerated in the preceding sentence shall expire two years after the enactment of this Act, or sooner if they so provide.

*Sec. 13. As used herein:
(a) "Commerce" shall have the same meaning as in Section 1 of the Act of October 15, 1914 (38 Stat. 730) commonly known as the Clayton Act;
(b) "Price" shall mean the exaction of all consideration diminished by the granting of any brokerage, advertising, promotional, or other allowance, or the furnishing of services or facilities;
(c) "Economic harm" shall include a reduction of revenue by sales at a price below the direct operating expense incurred in
supplying the commodity, destruction of goodwill, or the withdrawal of credit without cause from a person;

(d) "Physical harm" shall include (i) physical damage to or destruction of real property, plants, buildings, equipment or other physical assets of a business enterprise or of those individuals managing, operating, owning or controlling a business enterprise, and (ii) physical injury to or physical intimidation of individuals engaged in managing, operating, owning or controlling a business enterprise;

(e) "Direct operating expense" shall include only direct costs of production and distribution associated with the particular sales of the commodities in question and only the portion of costs of depreciation, capital, leases of land and productive facilities, and general overhead and advertising, the incurring of which vary directly with the quantity of the commodity which is produced; and

(f) "to sell on a sustained basis" shall mean to sell the commodity in question for more than 60 days within a period of one year.

*Sec. 14. This Act shall be considered one of the "antitrust laws" for the purposes of Section 1 of the Act of October 15, 1914 (38 Stat. 730). Provided however, that this Act shall not be construed to limit the applicability of such antitrust laws.

*Sec. 15. Any person violating Sections 2 or 3 of this Act shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than one year, or both.

*Sec. 16. The Federal Trade Commission is hereby empowered to enforce the provisions of this Act as if they were provisions of the Act of October 15, 1914 (38 Stat. 730).