

# Running Away from Robinson-Patman: The "Commodities" Limitation, Newspaper Advertising, and Small Distributors

*The Robinson-Patman Act is designed to protect small business from anticompetitive price discrimination in sales of "commodities." Because the Act also inhibits procompetitive price discrimination, courts restrict its application through a narrow, mechanical construction of "commodities." This approach ignores economics and policy, and exempts transactions such as sales of newspaper advertising, which inflict harm on small business without counter-benefits in overall competition and efficiency. This comment argues that such an approach should be abandoned in favor of a more flexible, policy-oriented construction of commodities. It then presents a proposal for a commodities analysis, and applies the analysis to retail newspaper advertising.*

Courts increasingly view short-run efficiency rather than the preservation of small competitors as the dominant goal of antitrust law.<sup>1</sup> Not surprisingly, courts have begun to construe

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<sup>1</sup> Preservation of a society with small competitors was once a strong antitrust policy, and continues to have support. *See, e.g., United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945). "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* *See also* Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1196-1203 (1977); *Cf.* Pitofksy, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1053-55 (1979).

Recent opinions look primarily toward efficiency goals. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (implies that monopolist can legally exercise power in one market to gain advantage in another whenever the result is shortrun efficiencies); *see also* Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68

the Robinson-Patman Act,<sup>2</sup> an anti-price discrimination law designed to protect small business,<sup>3</sup> as narrowly as possible. While narrow application limits the short-run anticompetitive and inefficient effects of the Act, it can also emasculate legislation that Congress continues to support.<sup>4</sup>

The Robinson-Patman Act only regulates price discrimination in sales of "commodities."<sup>5</sup> Courts have used this jurisdictional limitation, undefined in the Act, to exclude from price discrimination prohibitions transactions which combine components of commodities and non-commodities. The current test for a commodities transaction—the "dominant nature of the transaction" test<sup>6</sup>—is a formalistic device used to determine whether the Act applies, and does not allow for policy considerations.

This comment advocates a more flexible approach to the commodities limitation. The newspaper advertising industry illustrates that Robinson-Patman can sometimes aid small competitors without causing substantial short-run efficiency losses. Possessing monopoly power in the retail advertising market, newspapers maximize profits by extracting high advertising rates from small retailers. Nonetheless, courts maintain that newspa-

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CALIF. L. REV. 1, 2 (1980).

<sup>2</sup> Act of June 19, 1936, ch. 592 §§ 1-4, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13-13b, 21a (1976)).

<sup>3</sup> See notes 54-58 and accompanying text *infra*.

<sup>4</sup> In 1975, the Antitrust Division of the Department of Justice proposed major reform or repeal of the Robinson-Patman Act. In response, the Committee on Small Business held hearings on the Act in 1976. See *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, 94th Cong., 1st Sess. (1975-1976)*. The findings were summarized in the final report of the Committee. See HOUSE COMM. ON SMALL BUSINESS, SUMMARY OF ACTIVITIES, H.R. DOC. NO. 94-1791, 94th Cong., 2d Sess. (1977). The report stated that the Robinson-Patman Act "should not be repealed nor emasculated nor weakened in any way whatsoever . . . the Act has implemented the clearly expressed national public policy that government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise." *Id.* at 311. The report recommended that "appropriate departments and agencies fully and effectively enforce the Robinson-Patman Act . . . and thereby comply with the express mandate of Congress." *Id.* at 312. See also *Yes Virginia, There is Still a Robinson-Patman Act (But Should There Be?)*, 45 ANTITRUST L.J. 14, 16 (1976).

<sup>5</sup> See Section III *infra*.

<sup>6</sup> See Section III (A) *infra*.

per advertising is not a commodity for purposes of Robinson-Patman. Courts should abandon this view, as well as the current commodities test. Instead, courts should adopt a policy-oriented analysis that considers the harm inflicted on small retailers in deciding whether or not the Act should govern transactions such as advertising sales.

#### I. PRICE DISCRIMINATION AND NEWSPAPER ADVERTISING: A CASE STUDY

In the strict legal sense, price discrimination occurs whenever the same good is sold at different prices to different buyers, regardless of differences in the seller's costs.<sup>7</sup> However, the economist conceptualizes price discrimination as the unequal relationship between price and cost. That is, if identical goods are sold to different customers at different prices that do not reflect the cost of supplying the goods, economic price discrimination occurs, even where prices charged are identical.<sup>8</sup>

In order to discriminate profitably, a seller must have sufficient market power to affect the price of the good<sup>9</sup> and segregate buyers based upon what they will pay for the goods.<sup>10</sup> Price discrimination occurs in two situations. First, a seller may make *sporadic* price cuts to selected buyers, as a competitive or predatory strategy against other sellers.<sup>11</sup> Second, a powerful seller

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<sup>7</sup> FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). Price discrimination is a narrow legal term of art. R. POSNER, THE ROBINSON-PATMAN ACT 2 (1976). The legality of price discrimination is determined from its effects on competition. *Id.* The Robinson-Patman Act, 15 U.S.C. § 13 (1976), governs price differences, see Section II *infra*, and cannot be violated unless two or more buyers are charged different prices. See Lamet, *Price and Service Discrimination Under Federal and State Laws*, in ANTITRUST ADVISOR 304 (C. Hills ed. 1978).

<sup>8</sup> F. SCHERER, INDUSTRIAL PRICING: THEORY AND EVIDENCE 125 (1970); Cooper, *Price Discrimination Law and Economic Efficiency*, 75 MICH. L. REV. 962, 963 (1977); R. POSNER, *supra* note 7, at 3.

<sup>9</sup> F. SCHERER, *supra* note 8, at 125. This implies some degree of economic monopoly power. Theoretically, a seller in a perfectly competitive market is unable to raise or lower the price of the good and thus cannot discriminate profitably. *Id.*

<sup>10</sup> The seller breaks buyers into groups with different price elasticities of demand. *Id.* An additional requirement is that buyers receiving the lower price cannot easily resell the good to buyers willing to pay the higher price. This is known as "arbitrage." *Id.*

<sup>11</sup> R. POSNER, *supra* note 7, at 13-14; F. SCHERER, *supra* note 7, at 133. See

may have a set policy of *systematic* discrimination.<sup>12</sup> Sellers can maximize profits and sales by offering discounts to large or marginal buyers while denying similar discounts to small or less price-sensitive buyers.<sup>13</sup>

Sporadic, competitive price discrimination can lower prices through price experimentation, particularly in concentrated markets.<sup>14</sup> On the other hand, systematic, profit-maximizing discrimination increases output but strengthens monopoly positions because it creates anticompetitive buyer-seller ties.<sup>15</sup> Both types of discrimination warrant scrutiny because they tend to injure small buyers, who often lack power to meaningfully negotiate for the low prices available to large buyers.<sup>16</sup>

A paradigm example of harmful discrimination is the monopoly newspaper,<sup>17</sup> which systematically discriminates against small purchasers of retail advertising space. While this discrimination increases newspaper profits and total advertising out-

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UNITED STATES DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 50 (1977) [hereinafter cited as U.S. DEP'T OF JUSTICE REPORT]. For a description of unsystematic price discrimination in an oligopoly market, *See also* R. POSNER, *supra* note 7, at 13-14.

<sup>12</sup> Posner labels this "persistent" price discrimination. R. POSNER, *supra* note 7, at 12. *See also* F. SCHERER, *supra* note 8, at 134, which cites the pricing structure found in *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (monopolist machinery manufacturer and lessor had scheme of lower rates of return on machines which faced competition than on those it supplied exclusively) as an example of systematic price discrimination.

<sup>13</sup> F. SCHERER, *supra* note 8, at 133.

<sup>14</sup> *Id.* Unsystematic price discrimination can undermine uniform pricing policies of an oligopolistic market through secret price concessions that eventually lead to lower prices throughout the market. *Id.*

<sup>15</sup> *Id.* at 134.

<sup>16</sup> *Id.* at 117.

<sup>17</sup> Newspaper monopolies are "local monopolies." Usually, only one newspaper is published per town. *See* note 25 *infra*. Because other media are abundantly available in most towns, including large newspapers with county and statewide circulation, a newspaper is not an information monopoly. *See* note 26 *infra*. However, to the retailer, the newspaper may be a monopoly seller of suitable advertising space. *See* notes 20-29 and accompanying text *infra*.

The potential for newspaper monopoly in the national market creates serious first amendment problems. The largest 13 newspaper chains now control 42% of daily circulation. *See* note 161 *infra*. There have been predictions that by the end of the century, all daily newspapers will be owned by a small number of communications conglomerates. Kampelman, *The Power of the Press: A Problem for our Democracy*, POL. REV. Fall 1978, at 7, 11.

put,<sup>18</sup> it injures small retailers who must continually purchase newspaper advertising to compete effectively.<sup>19</sup>

Other media are not effective substitutes for retail newspaper advertising. *Retail* advertising, unlike *general* or brand advertising, tends to emphasize prices and services available on a wide variety of brands.<sup>20</sup> Radio and television offer fleeting images and sounds which cannot provide memorable in-depth price information on numerous goods.<sup>21</sup> Other printed media, such as magazines, are not published as frequently as newspapers.<sup>22</sup> Freely distributed advertising tabloids, known as "shoppers," have the appropriate format, but have little or no editorial or news items to assure readership.<sup>23</sup> Thus, it is not surprising that both the price and demand for newspaper advertising are increasing despite competition from other media.<sup>24</sup> The newspaper remains an irreplaceable medium for in-depth retail price advertising.

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<sup>18</sup> Price discrimination redistributes wealth to the discriminator and away from his customers. F. SCHERER, *supra* note 8, at 129.

<sup>19</sup> "To many local advertisers, the use of daily newspapers is almost a necessity. Department stores and supermarkets in particular, rely heavily on newspaper advertising to attract customers." S. ULANOFF, *ADVERTISING IN AMERICA* 279 (1977). Courts have also recognized that retail advertisers must rely on daily newspapers for most of their advertising. *See, e.g., United States v. Times-Mirror Co.*, 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1968), *rehearing denied*, 391 U.S. 971 (1968). *See also Roberts, Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 320-21 (1968).

<sup>20</sup> G. ROSDEN, 1 *THE LAW OF ADVERTISING* § 7.06[1], at 7-46 (1979). Comment, *Local Monopoly In the Daily Newspaper Industry*, 61 YALE L.J. 948, 987 (1952). General advertising is usually placed by national or regional advertisers, and is thus also called national advertising. Similarly, retail advertising is usually placed by local merchants, and often termed "local display advertising." *See Landon, The Relation of Market Concentration to Advertising Rates: The Newspaper Industry*, 16 ANTITRUST BULL. 53, 61 (1971); P. BURTON & J. MILLER, *ADVERTISING FUNDAMENTALS* 267 (2d ed. 1976).

<sup>21</sup> R. GIST, *BASIC RETAILING* 283 (1971); Roberts, *supra* note 19, at 321.

<sup>22</sup> R. GIST, *supra* note 21, at 283.

<sup>23</sup> Roberts, *supra* note 19, at 321. The use of newspaper advertising is preferable to extensive use of shoppers. Advertising subsidizes information and entertainment media, enabling consumers to receive non-commercial information at a much reduced price. W. COMANOR & T. WILSON, *ADVERTISING AND MARKET POWER* 16 (1974).

<sup>24</sup> For example, revenue for Times-Mirror, Inc., publishers of the *Los Angeles Times*, showed an increase in revenue of 16% in 1979 (\$496 million to \$579 million); revenue for the Gannet newspaper chain increased \$143 million to a total of more than \$1 billion in 1979. EDITOR & PUBLISHER, Feb. 16, 1980, at 22.

Since the newspaper page is a distinct product market for retail advertising, the small retailer usually buys from a monopoly seller. Intra-city newspaper competition is non-existent in most American cities.<sup>25</sup> While this trend does not indicate the existence of news information monopolies,<sup>26</sup> the lack of intra-city competition does indicate that small retailers face a monopoly market in retail advertising. Small retailers with limited advertising budgets must purchase space from a paper that circulates within their immediate trading area only.<sup>27</sup> The smaller the trading area, the less likely it is that other suitable newspapers exist.<sup>28</sup> In short, it is impractical for a small suburban retailer to advertise in a county-wide major metropolitan daily; the retailer is confined to the local suburban daily.<sup>29</sup>

Since there is little competition in the retail advertising market, and because small retailers must buy newspaper advertising space, newspapers have the requisite power to affect price.<sup>30</sup> Through the use of standardized "rate cards," a complex array of rates for different types and amounts of advertising,<sup>31</sup> publishers segregate advertisers based on their advertising demand.<sup>32</sup> Newspapers are thereby able to practice economic price

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<sup>25</sup> In 1910, 57.1% of daily newspaper towns were served by more than one locally published newspaper. B. RUCKER, *THE FIRST FREEDOM* 8 (1968). Presently, only 2.5% of American towns have directly competing newspapers. *Economic Concentration In the Media—Newspapers: Hearings Before the Select Comm. on Small Business*, 96th Cong., 1st Sess. 107 (1979) (statement of John Shenefield) [hereinafter cited as *1979 Hearings*].

<sup>26</sup> Compare B. RUCKER, *supra* note 25, at 217-25 with Loevinger, *Media Concentration: Myth and Reality*, 24 *ANTITRUST BULL.* 479, 489 (1979).

<sup>27</sup> P. BURTON & J. MILLER, *supra* note 20, at 225.

<sup>28</sup> *Cf.* B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* 51 (1975). Most areas are served by a major metropolitan newspaper and either a local suburban or mid-size city daily. This competitive scheme has been called the "umbrella structure," where newspapers of equal stature do not compete with each other, but do compete with larger or smaller papers above and below them who circulate within their "umbrella." *Id.* at 50-51.

<sup>29</sup> Local papers depend on local advertising by stores located in their immediate trading area, for whom an ad in the metro daily would be wasteful. *Id.* at 51; P. BURTON & J. MILLER, *supra* note 20, at 225.

<sup>30</sup> See text accompanying note 9 *supra*.

<sup>31</sup> Most media, including newspapers and television, issue rate cards, which contain rates chargeable for lineage and list various discounts offered. They are commonly incorporated into advertising contracts. *G. Rosden, supra* note 20, § 2.03, at 2-23.

<sup>32</sup> See note 10 and accompanying text *supra*.

discrimination.

Because there is no check on advertising price discrimination, newspapers routinely discriminate against small or disfavored buyers. Currently, antitrust law tolerates newspaper monopolies,<sup>33</sup> and exempts them from the price discrimination prohibitions of the Robinson-Patman Act.<sup>34</sup> Accordingly, virtually all newspapers increase sales and profits by encouraging large purchases of advertising space through quantity and volume discounts.<sup>35</sup> These incentives are effective marketing techniques,<sup>36</sup> but they are not necessarily based on lower production costs.<sup>37</sup> Once a newspaper has invested in large printing capacity, newspaper advertising has a relatively uniform marginal cost: merely the cost of adding more lines of print to a page, or more pages to the paper.<sup>38</sup> Distribution cost remains constant.<sup>39</sup> If the price of advertising were directly correlated to cost, rates and discounts would be fairly constant as to both large and small customers.

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<sup>33</sup> Recent economic literature suggests that monopoly newspapers are primarily due to economies of scale in printing and distributing newspapers. 1979 *Hearings*, *supra* note 25, at 19. Antitrust law is increasingly willing to tolerate monopolies who owe their existence to efficiency. See, e.g., *Berkey Photo, Inc., v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); Sullivan, *supra* note 1, at 2-3. Individual acquisitions by even large newspaper chains such as Gannet, with revenues over one billion per year, see note 24, *supra* are too incrementally small to be pursued by the Federal Trade Commission or the Department of Justice. 1979 *Hearings*, *supra* note 25, at 111. At least two cases specifically labelled a newspaper defendant a "natural monopolist." See *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960); *United States v. Harte Hanks Newspapers, Inc.*, 172 F. Supp. 227, 228 (N.D. Tex. 1959).

<sup>34</sup> See text accompanying notes 130-34 *infra*; *contra*, see notes 135-37 *infra*.

<sup>35</sup> Landon, *The Relation of Market Concentration to Advertising Rates: The Newspaper Industry*, 16 ANTITRUST BULL. 53, 60 (1971).

<sup>36</sup> See Comment, *Effective Marketing and the Robinson-Patman Act: Volume Incentives, Functional Discounts, and Promotional Allowances*, 55 TEX. L. REV. 473 (1977).

<sup>37</sup> *Id.* at 474. Cf. A. SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT 161 (1963) (volume discounts are difficult to cost-justify).

<sup>38</sup> J. SIMON, ISSUES IN THE ECONOMICS OF ADVERTISING 146 (1970); Landon, *supra* note 35, at 61-62. Landon also includes in marginal cost the opportunity cost of replacing editorial material with advertising and the expected future loss of circulation as a result. *Id.*

<sup>39</sup> Although there are scale economies in distribution, they relate to density of subscribers. B. OWEN, *supra* note 28, at 58. For a particular newspaper, the number of pages produced does not significantly affect distribution costs.

Thus, cumulative volume and steep quantity discounts do not reflect lowered marginal costs of advertising. Moreover, when unattainable by small buyers, such discounts tend to favor large buyers.<sup>40</sup>

Cumulative volume discounts award lower rates to retail advertisers who contract in advance to buy a quota of advertising over an agreed time period, often a year.<sup>41</sup> The advertising contract does not obligate the retailer to buy a fixed amount of linage.<sup>42</sup> Should purchases fall short of the quota, the advertiser

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<sup>40</sup> See C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 210 (1959); Landon *supra* note 35, at 60 (addressing media discounts); Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of "Competitive Advantage,"* 44 GEO. WASH. L. REV. 48, 53 (1975).

Volume and quantity discounts are not the only discriminatory rates that can unfairly burden small advertisers. With very few exceptions, newspapers charge "national" advertisers a higher rate than "retail" advertisers. J. SIMON, *supra* note 38, at 144. The rate difference is larger than possible differences in cost. *Id.* But see P. BURTON & J. MILLER, *supra* note 29, at 270 (suggesting that greater selling and planning costs of national advertising may justify the rate difference). The usual criteria for qualifying for the lower "local display" rate is to have business operations in the same community where the newspaper is published. Landon, *supra* note 35, at 58. Although it is easy to picture a "national advertiser" as a large operation, and a "local advertiser" as a small operation, this is not always the case. For example, large food chains manufacture nationally distributed grocery products. See generally *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972). However, these goods are marketed and advertised by local chain retail distributors, and thus are charged the local advertising rate. A relatively small producer, who lacks outlets in the local community would still have to pay the higher "national rates."

In *Motors, Inc. v. Times-Mirror Co.*, 102 Cal. App. 3d 735; 162 Cal. Rptr. 543 (2d Dist. 1980), a wholesale distributor of auto products brought a class action against the *Los Angeles Times* under state unfair practices law. The distributor engaged in a cooperative retail advertising program with its retailers, but was still charged the 30% higher national rate. The Court of Appeals reversed the trial court's grant of summary judgment to the defendant, and held that the distributor had alleged a valid cause of action. The court noted that the unfairness of the rate difference "seems obvious," *id.* at 741, 162 Cal. Rptr. at 546, because a large retailer such as Sears, which manufactures and internally distributes its own products can obtain 30% cheaper rates than a smaller, non-integrated distributor. *Id.* at 741 n.4, 162 Cal. Rptr. at 546 n.4.

<sup>41</sup> Landon, *supra* note 35, at 60; C. EDWARDS, *supra* note 40, at 212; Comment, *supra* note 36, at 474; SAWYER, *supra* note 37, at 93.

<sup>42</sup> "There is nothing very legal or binding about the usual space contract signed by a local advertiser and the newspaper. Its most important functions are to protect the advertiser against rate increases . . . and to give the newspaper some assurance of regular advertising on the part of the advertiser." P.



simply pays the standard rate for the quantity of advertising actually purchased.<sup>43</sup> In addition, newspapers offer similar discounts for advertising at a specified frequency over the contract period, even if the retailer purchases only token, minimum-sized advertisements, called "rate-holders."<sup>44</sup> These discounts are uncertain and cumulative, and it is therefore unlikely that they only reflect lowered planning costs.<sup>45</sup> Thus, the scheme is a form of economic price discrimination which induces large advertisers to concentrate purchases in one medium in order to obtain the lower rates unavailable to smaller advertisers.<sup>46</sup>

Newspapers also sporadically discriminate by awarding premium positions, such as those in the front of the newspaper.<sup>47</sup> Such locations command higher prices than do other positions because they are perceived as more effective advertisements. Allowing the advertiser to select its desired locations also generates planning costs for the publisher.<sup>48</sup> The discretionary nature of the scheme permits publishers to select premium positions for favored advertisers without a premium charge.<sup>49</sup> Other advertisers must either pay more for the same location or accept inferior locations at the same rate the favored customer is paying for the

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BURTON & J. MILLER, *supra* note 20, at 268.

<sup>43</sup> This is called the "short-rate," which is the difference between the contract rate and the rate assigned to the quantity actually purchased. *Id.* at 272.

<sup>44</sup> *Id.*

<sup>45</sup> This rationale is used to justify most rate discrimination. For example, "national advertisers" pay more for advertising than "local advertisers." While P. BURTON & J. MILLER, *supra* note 20, at 270, assert higher selling and planning costs as the reason, J. SIMON, *supra* note 38, at 145, views this as simply price discrimination. National advertisers have a higher demand for space.

<sup>46</sup> For example, if a large advertiser qualifying for a volume discount decides to place advertising with a competing media, the discount may be lost. See text accompanying note 43 *supra*.

<sup>47</sup> Advertisers can advertise for a special low rate, called the "Run of Paper" (ROP) rate, if they are willing to give up the privilege of choosing the location of the advertisement. S. ULANOFF, *supra* note 19, at 282.

<sup>48</sup> The demand factor is probably the most important. Advertisers are greatly influenced by marketing studies showing, *e.g.*, that the sports page has a high male readership and is well suited for tire advertisements. See S. DUNN, *ADVERTISING: ITS ROLE IN MODERN MARKETING* 541 (4th ed. 1978).

<sup>49</sup> In *National Tire Wholesale, Inc., v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979), a tire retailer alleged that the *Washington Post* granted another tire retailer premium positions at no extra charge, while refusing to sell to plaintiff premium positions. 441 F. Supp. at 83.

preferred location. Either practice is a form of price discrimination.<sup>50</sup>

In sum, such newspaper pricing schemes are discriminatory. If an appliance or packaged foods manufacturer attempted the same schemes, a court would likely find the schemes presumptively injurious to small retailers, and in violation of the Robinson-Patman Act.<sup>51</sup> As long as the Act remains in force,<sup>52</sup> Congress maintains a basic policy of protecting small business from injury inflicted by anticompetitive price discrimination.<sup>53</sup> Permitting unjustified price discrimination in sales of newspaper advertising circumvents this policy because it leaves small retailers unprotected when purchasing essential advertising linage from monopoly sellers.

## II. ANTICOMPETITIVE PRICE DISCRIMINATION AND THE ROBINSON-PATMAN ACT

In 1936, the Robinson-Patman Act<sup>54</sup> amended the price discrimination provisions of section 2 of the Clayton Act.<sup>55</sup> Congress strengthened price discrimination prohibitions because it was concerned about the demise of small business during the Depression.<sup>56</sup> The drafters of the Act feared that large retailing

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<sup>50</sup> The discrimination can be substantial. In a major metropolitan daily such as the *Los Angeles Times*, placement near the top of the page and next to reading matter can add 33% to the cost of an advertisement. S. DUNN, *supra* note 48, at 541.

<sup>51</sup> See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (volume discounts offered by salt packager found discriminatory; injury presumed).

Quantity discounts may be discriminatory where they are practically within the economic reach of only the largest buyers. F. ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 97-98 (1964). Where discounts, even if discriminatory, are available to many of the seller's customers, "availability" should rebut the presumed harm alleged by the buyer. See Millistein, *The Status of "Availability" Under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U. L. REV. 416, 426-30 (1967).

For a full explanation of the "presumed injury" theory, see Gifford, *supra* note 40, at 54-58 (1975).

<sup>52</sup> See note 4 and accompanying text *supra*.

<sup>53</sup> See text accompanying notes 56-58 *infra*.

<sup>54</sup> Act of June 19, 1936, ch. 592 §§ 1-4, 49 Stat. 1526 (codified at 15 U.S.C. §§ 13-13f, 21a (1976)). This article is concerned exclusively with sections 2(a) and 2(b) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 13(b) (1976).

<sup>55</sup> Ch. 323, § 2, 38 Stat. 730 (1914).

<sup>56</sup> U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 108; C. EDWARDS, *supra* note 40, at 11; Gifford, *supra* note 40, at 48-51.

chains would eliminate their smaller rivals by using their purchasing power to obtain price cuts from suppliers.<sup>57</sup> By passing Robinson-Patman, Congress expressed its judgment that the long-run benefits of preserving a society populated with small competitors outweigh possible short-run efficiency losses caused by limiting the seller's discretion to discriminate.<sup>58</sup>

Congress, realizing that some price discrimination is competitive and beneficial to consumers, allowed price differences in certain situations. First, where differences in the seller's cost of serving different buyers justifies differences in price, the Act recognizes that no economic price discrimination exists,<sup>59</sup> and permits the discrepancy.<sup>60</sup> Second, the Act allows economic price discrimination where a seller is lowering prices to meet competition from other sellers.<sup>61</sup> Moreover, all price differences are legal

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The amendment removed the "quantity" defense from the Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914), and added an additional injury clause: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (1976). This clause creates a cause of action for harm to an individual victim of price discrimination. See text accompanying notes 63-64 *infra*.

<sup>57</sup> *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 75 (1979). See U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 9. Congress feared that manufacturers with excess plant capacity would be willing to sell to large buyers at near marginal costs, while small buyers would be forced to pay higher prices to cover fixed manufacturing costs. See, e.g., 80 CONG. REC. 6621, 7324, 7887, 8104 (1936) (statement of Rep. Logan); Gifford, *supra* note 40, at 50.

<sup>58</sup> See, e.g., Elzinga, *supra* note 1, at 1205-1206. U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 141; Gifford, *supra* note 40, at 51.

<sup>59</sup> See text accompanying note 8 *supra*.

<sup>60</sup> Cost-justification is a complete defense to price differences. Section 2(a) of the Act, 15 U.S.C. § 13(a) (1976) provides "that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." This tracks the economic concept of price discrimination. See text accompanying notes 7-8 *supra*.

<sup>61</sup> Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1976), states in part: "nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor." See generally H. SHNIDERMAN, PRICE DISCRIMINATION IN PERSPECTIVE 74-93 (1977).

The scope of the defense is currently in flux. The Supreme Court recently held that exchanging price information with other sellers for the purpose of

unless they may lessen competition, tend to create a monopoly, or injure a competitor of the favored buyer or the seller.<sup>62</sup> The concern with injury to individual recipients added a new dimension to antitrust law by focusing on competitive harm between two or more competitors buying from the same supplier.<sup>63</sup> This concept, known as "secondary-line injury," covers price discrimination that harms an individual small business, even though the Sherman Act requirement that the seller be monopolizing or attempting to monopolize is absent.<sup>64</sup>

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establishing the defense could be an element of a Sherman Act violation, 15 U.S.C. §§ 1-7 (1976). *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). In *Great Atlantic & Pacific Tea Co.*, 440 U.S. 69 (1979), the court interpreted § 2(f) of the Act, 15 U.S.C. § 13(f) (1976), which concerns buyer liability. The court found that a seller offering prices lower than its competitors' was attempting to meet, rather than injure, competition.

<sup>62</sup> Section 2(a), 15 U.S.C. § 13(a) (1976).

<sup>63</sup> The Act's predecessor, the Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914), like the Sherman Act, 15 U.S.C. §§ 1-7 (1976), spoke only of a general "lessen[ing] of competition or tend[ency] to create a monopoly." The Robinson-Patman amendment specifically mentions injuries to customers of a discriminating seller. Section 2(a), 15 U.S.C. § 13(a) (1976). The Robinson-Patman Act has been strongly criticized for its focus on harm to individual competitors. To further the basic antitrust goal of competition, the overall market should be of primary concern, and not the protection of the individual business. See THE NEAL REPORT, reprinted in 1 JOURNAL OF REPRINTS FOR ANTITRUST LAW AND ECONOMICS 633, 690 (1969).

<sup>64</sup> Although the Act covers primary-line, or seller level injury, its primary aim is to prevent competitive harm at the buyer level. See, e.g., *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960). See generally Gifford, *supra* note 40, at 52.

Price discrimination may violate the Sherman Act if it constitutes a restraint in trade or an attempt to monopolize. See *U.S. v. Wichita Eagle Publishing*, 1959 Trade Cas. ¶ 69, at 400 (D. Kan. 1959). *But see, e.g., National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979), for difficulties in establishing a Sherman Act cause of action. The problem is that the newspaper and the retailer are not competitors, and that the retailer would have to show some type of exclusionary conduct on the part of the newspaper. Courts have occasionally noted secondary-line discrimination as part of a range of activity constituting Sherman Act violations. See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (contract between movie distributors and exhibitors which discriminated against small independent distributors found in violation of Sherman Act section 1); *Peelers v. Wendt*, 260 F. Supp. 193 (W.D. Wash. 1966) (lessor of patented shrimp peeling machines charged much higher rates to Pacific Northwest canners than to Gulf Coast canners because higher labor costs in Northwest made machines more valuable. The court found facts justifying a Sher-

## III. THE "COMMODITIES" LIMITATION

The numerous jurisdictional limitations of the Robinson-Patman Act weaken its ability to accomplish its objective. The Act only affects in-commerce<sup>65</sup> price discrimination where two requirements are met. First, there must be actual sales<sup>66</sup> to at least two different purchasers.<sup>67</sup> Thus, the Act does not apply to leases or other non-sale transactions,<sup>68</sup> nor does it govern refusals to sell.<sup>69</sup> Second, the sales must involve "commodities," a term only vaguely defined by legislative history<sup>70</sup> and by judicial

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man Act section 2 violation). *Id.* at 196-97. The canners had no Robinson-Patman cause of action since the Act does not govern leases. *See* text accompanying notes 66-68 *infra*. *United States v. New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

<sup>65</sup> Section 2(a), 15 U.S.C. § 13(a) (1976), covers: "any person engaged in commerce, in the course of such commerce, either directly or indirectly." At least one of the transactions being compared must involve the physical movement of the commodity across state lines. *See Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186 (1974); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973). *See generally* Note, *The Price Discrimination Provisions of the Robinson-Patman Act: A Forthcoming Clarification of the Jurisdictional Requirements?*, 5 LOY. CHI. L.J. 562 (1974).

<sup>66</sup> *See* S. OPPENHEIM & G. WESTON, PRICE AND SERVICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 816-17 (1974).

<sup>67</sup> On its face, section 2(a) applies only to direct purchasers. However, the Supreme Court has adopted an indirect customer theory to prevent unlawful discrimination from insulation by sale and resale of the commodity. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), competitive injury was found at the fourth resale level. However, the manufacturer cannot be held responsible for price discrimination by the wholesaler. Imposition of this responsibility would force the manufacturer to decide between illegal price restrictions or Robinson-Patman liability. *See* H. SHNIDERMAN, *supra* note 61, at 21.

<sup>68</sup> *See* AMERICAN BAR ASS'N, REPORT ON PRICE DISCRIMINATION IN NON-SALE AND NON-COMMODITY TRANSACTIONS 5-9 (1973) [hereinafter cited as ABA REPORT]; Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5 of the Federal Trade Commission Act in Price Discrimination Regulation*, 16 BOS. C. INDUS. & COM. L. REV. 151, 191-92 (1975).

<sup>69</sup> Section 2(a), 15 U.S.C. § 13(a) (1976) provides in part: "nothing herein contained shall prevent persons engaged in selling . . . from selecting their own customers." This also follows from the "purchaser" requirement. *See* note 67 *supra*. Where a seller refuses to deal, there is no "purchase" relationship. *See* P. AREEDA, ANTITRUST ANALYSIS 845 (2d ed. 1974).

<sup>70</sup> Section 2(a), 15 U.S.C. § 13(a) (1976) speaks of price discrimination between "different purchasers of commodities of like grade and quality." (emphasis supplied). The legislative history is unclear.

One expert recently stated "[i]t seems to me that the Robinson-Patman Act's legislative history has something in it for everybody." *Panel Discussion*

interpretation.<sup>71</sup>

The legislative history establishes only the broad proposition that the word "commodities" refers to tangible goods, and that intangibles are not covered by the Act.<sup>72</sup> Courts interpret this to mean that "services" are not commodities,<sup>73</sup> and this interpretation was confirmed in 1957 when Congress defeated a bill extending Robinson-Patman to cover services.<sup>74</sup> However, the "commodities" question is far from settled. Almost all transactions involve components of both services and tangibles.<sup>75</sup> Legislative history offers no guidance on how to properly classify

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*on Prosecuting and Defending Claims Under the Robinson-Patman Act*, 47 ANTITRUST L.J. 1395, 1396 (1979) (statement of J. Rill, Chairman, Subcommittee on Pricing Practices and Jurisdiction, Robinson-Patman Committee, ABA Section on Antitrust Law). Congress did not discuss at length the scope of "commodities" because the term is merely carried over from the original Clayton Act, ch. 323, § 2, 38 Stat. 739 (1914). A federal appeals court researched but was unable to locate any conclusive legislative history on "commodities." *Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961).

<sup>71</sup> *E.g.*, *Ambook Enterprises v. Time Inc.*, 612 F.2d 604 (2d Cir. 1979); *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 84-86 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979); *Sun Communications, Inc. v. Waters Publications, Inc.*, 466 F. Supp. 387, 390-91 (W.D. Mo. 1979); *Baum v. Investors Diversified Serv. Inc.*, 409 F.2d 872 (7th Cir. 1969); *TV Signal Co. of Aberdeen v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1259 (8th Cir. 1972); *Kennedy Theater Ticket Ser. v. Ticketron*, 342 F. Supp. 922 (E.D. Pa. 1972); *American Tel. & Tel. Co. v. Delta Communications Corp.*, 408 F. Supp. 1075, 1114 (S.D. Miss. 1976), *aff'd*, 579 F.2d 972 (5th Cir. 1978).

<sup>72</sup> *See* 79 CONG. REC. 9078-79 (1935); *Tri-State Broadcasting Co., v. United Press Int'l, Inc.*, 369 F.2d 268, 270 n.2 (5th Cir. 1966).

<sup>73</sup> *See* authorities cited in *Baum v. Investors Diversified Serv., Inc.*, 409 F.2d 872, 874-75 (7th Cir. 1969). The court in *Columbia Broadcasting v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) was unable to find conclusive legislative history supporting this, and based its opinion on plain meaning and context. *Id.* at 378. Note, however, that as late as 1947, at least one commentator predicted that the Act would cover services if they were an integral part of the commodity transferred. *See*, *Crowley, Equal Price Treatment Under the Robinson-Patman Act*, 95 U. PA. L. REV. 306, 316 (1947).

<sup>74</sup> H.R. 8277, 8th Cong., 1st Sess.; 103 CONG. REC. 9898 (1957).

<sup>75</sup> "With the expanding role of services in the economy, it seems likely that the increasing packaging of goods and services by sellers may present a formidable hurdle to Robinson-Patman claimants." Rill, *Recent Developments Affecting Private Actions Under the Robinson-Patman Act*, 47 ANTITRUST L.J. 1415, 1422 (1979); Casady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 S. CAL. L. REV. 241, 253 (1957).

mixed transactions. Consequently, courts have developed a formalistic device—the “dominant nature” test—to distinguish commodities from non-commodities transactions.<sup>76</sup> Policy considerations are conspicuously absent from judicial examinations of transactions, and courts use the test only to exclude transactions from coverage. This practice has resulted in a narrow definition of commodities, despite the Supreme Court mandate that courts are to liberally construe Robinson-Patman.<sup>77</sup>

#### A. *The Dominant Nature/Essence of the Transaction Test*

When faced with a “commodities” question involving services and tangibles, most courts will apply the “dominant nature of the transaction” test articulated in *Tri-State Broadcasting Co. v. United Press International*.<sup>78</sup> The test states that where a

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<sup>76</sup> The lone exception is an 8th Circuit case holding that a newspaper is predominantly a tangible good, although composed of both goods and services—and thus, a “commodity.” *Morning Pioneer, Inc., v. Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

<sup>77</sup> “It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that exceptions are to be construed strictly.” *Abbott Laboratories v. Portland Retail Druggists Ass’n, Inc.*, 425 U.S. 1, 11 (1976).

<sup>78</sup> 396 F.2d 268, 270 (5th Cir. 1966). As applied to Robinson-Patman, this test is not supported by precedent. The opinion cites to *General Shale Prod. Corp. v. Struck Const. Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 789 (1943) for support. 396 F.2d at 270. However, *General Shale* did not use any such test. Rather, *General Shale* held only that the buyer was not purchasing commodities from this seller. *Id.* at 427. “Appellant [sic] theory . . . is that the appellees discriminated in selling the commodity to the buyer at a lower price than to other purchasers.” *Id.* (emphasis in original) “The Appellees did not sell the commodity to the buyer.” *Id.* at 428. A purchase-sale relationship is a separate Robinson-Patman requirement. See text accompanying notes 66-69 *supra*.

*Tri-State* uses “in essence” and “dominant nature” interchangeably. 369 F.2d at 270. Other than the cite to *General Shale*, there is no mention of where the test came from. However, courts have faced a similar problem in Uniform Commercial Code Litigation. Article 2 of the Code governs sales, and is limited to “transactions in goods,” U.C.C. § 2-102 (1979 version). Periodically, a problem arises when a transaction is for both goods and services. Professor Farnsworth, writing on the warranty concept, points out that an “in essence” test was first used by an English Court in *Clay v. Yates*, 156 Eng. Rep. 1123, at 1125 (Ex. 1856). Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 663 (1957). The “essence test” has since been reconsidered as a means of dealing with hybrid sales-services transactions. See, e.g., *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532

transaction is *in essence* the sale of services, incidental transfers of commodities will not bring the transaction within the ambit of Robinson-Patman.<sup>79</sup> Courts apply the test identically to all transactions with service and tangible components. However, the problem arises in two different types of cases: the "piece of paper" cases and the "mixed transaction" cases.

In the "piece of paper" cases, an intangible service or privilege is represented, described, or transferred by a piece of paper or other tangible symbol. For example, insurance coverage is represented by a printed policy.<sup>80</sup> The right to sit in a seat to view a theatre performance is represented by a ticket.<sup>81</sup> By claiming that the tangible symbol, *i.e.*, the ticket or the policy, is the good sold, the plaintiff attempts to bootstrap the service or privilege into the scope of the Act. The dominant nature test prevents bootstrapping by identifying the paper as incidental to a transaction that is essentially one of services or privileges.

The test works well in the extreme case where the piece of paper simply represents the services purchased. Thus, written news reports,<sup>82</sup> theatre tickets,<sup>83</sup> traveller's checks,<sup>84</sup> licenses of patented processes,<sup>85</sup> and television advertising time,<sup>86</sup> have all

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F.2d 572, 580 (7th Cir. 1976); *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974).

<sup>79</sup> "Virtually no transfer of an intangible in the nature of a service, right, or privilege can be accomplished without the incidental involvement of tangibles." *Tri-State Broadcasting Co., v. United States Press Int'l, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966); *Freeman v. Chicago Title and Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (insurance not a commodity); *Aviation Specialities, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978).

<sup>80</sup> See *Freeman v. Chicago Title and Trust Co.*, 505 F.2d 527 (7th Cir. 1974).

<sup>81</sup> *Kennedy Theatre Ticket Service v. Ticketron, Inc.*, 342 F. Supp. 922 (E.D. Pa. 1972).

<sup>82</sup> *Tri-State Broadcasting Co., v. United Press Int'l, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966).

<sup>83</sup> *Kennedy Theatre Ticket Service v. Ticketron, Inc.*, 342 F. Supp. 922 (E.D. Pa. 1972).

<sup>84</sup> *American Bankers Club, Inc. v. American Express Co.*, 1977-1 Trade Cas. ¶ 70,740 (D.D.C. 1977).

<sup>85</sup> *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968), *aff'd on other grounds*, 445 F.2d 84 (7th Cir. 1971).

<sup>86</sup> *Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961), *cert. denied*, 369 U.S. 812 (1962). The court identified the dominant nature of the transactions as the "privilege of sponsorship identification with the broadcast of a television program." *Id.* at 378. Within the "piece of paper" cases, the weakest commodity case is where the only tangible compo-



been found to be in essence services transactions.

However, the test can create arbitrary distinctions. For example, compare the artificial difference the test could make between types of securities. The Seventh Circuit found that mutual fund shares were incidental representations of investment services, and thus not commodities.<sup>87</sup> A share of common stock, however, represents an ownership interest in a corporation, rather than services.<sup>88</sup> While the issue has not been litigated, it is not clear how the dominant nature test would be applied to common stock since there are no services involved.

Some courts have classed newspaper advertising as a "piece of paper" case.<sup>89</sup> However, newspaper advertising, like shares of common stock, does not fit neatly into this classification because the tangible component, the ad itself, does not merely represent

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ment is a contract. *Cf. Columbia Broadcasting with Tri-State Broadcasting Co. v. United Press Int'l, Inc.*, 369 F.2d 268 (5th Cir. 1966), where the good was printed news reports, but the Court found that the essence of the transaction was the privilege of broadcasting the reports.

<sup>87</sup> *Baum v. Investors Diversified Serv. Inc.*, 409 F.2d 872 (7th Cir. 1969). The case involved a cumulative discount scheme. A purchaser of a \$500,000 block of shares was charged the same commission as a purchaser of a \$1,000 block who had in the past purchased \$499,000 of shares. *Id.* at 873. This is similar to the cumulative discount used by the media to induce advertising. *See generally* Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 *YALE L.J.* 1339, 1347-66 (1965); *Times-Mirror Co., Inc. Complaint*, No. 9103, [1977] *TRADE REG. REP. (CCH)* ¶ 21,343.

<sup>88</sup> "A share of stock is 'intangible, and rests in abstract legal contemplation.' Nevertheless, it is well established that a share of stock is property, analogous to, and in the nature of, a chose in action, although it is not technically a chose in action." F. CHRISTY & R. APPEL, *THE TRANSFER OF STOCK* § 4 (5th ed. 1975). Note that in *General Shale Prod. v. Struck Const. Co.*, 132 F.2d 425 (6th Cir. 1942), cert. denied, 318 U.S. 780 (1943) a construction contract was held not a commodity because it "was not for a transfer of chattles." *Id.* at 428. Stock is also difficult to fit into this distinction.

<sup>89</sup> In *National Tire Wholesale, Inc., v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979), the Court was influenced by Kintner's assertion that the printed page of a newspaper advertisement is only a tangible, incidental vehicle for the conveyance of the advertiser's message. 441 F. Supp. at 85. Kintner is a former director of the FTC. The FTC now finds, however, that newspaper advertising is neither dominantly tangible or intangible. *See* notes 135-36 and accompanying text *infra*. *See also* *Times-Mirror Co. v. FTC*, 1979-2 *Trade Cas.* ¶ 62,756 at 78,360 (C.D. Cal. 1979) (finding of A.L.J. that a newspaper primarily "sells the service of taking the advertiser's message into a million homes with its own means of distribution").

the purchase of services. While the advertiser is in part purchasing distribution services,<sup>90</sup> it is essential to the retailer that the ad purchased be in tangible, non-fleeting form.<sup>91</sup> It is thus a far different and less clear case than the paradigm example of a theatre ticket, which simply represents the right to use a seat to view a performance.<sup>92</sup>

When the tangibles transferred have independent significance apart from the services, a "mixed transaction" case arises. Unlike the "piece of paper" cases, the tangible component could be sold without the services component. Repair service contracts including replacement parts,<sup>93</sup> and construction contracts including building materials<sup>94</sup> are typical "mixed transaction" cases.

Unlike the "piece of paper" cases, the dominant nature test as applied to mixed transactions does not label a particular good a commodity or a non-commodity. Instead, it evaluates the entire transaction from the standpoint of the seller, and eliminates from consideration transactions in which the defendant is in es-

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<sup>90</sup> See text accompanying notes 102-04, *supra*.

<sup>91</sup> *United States v. Times-Mirror Co.*, 274 F. Supp. 606, 617 (C.D. Cal. 1967), *aff'd mem.*, 390 U.S. 712 (1968); *Roberts, supra* note 23, at 320-21. However, the court in *National Tire Wholesale, Inc., v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 545 F.2d 888 (D.C. Cir. 1979), refused to distinguish broadcast advertising from newspaper advertising on the grounds that the former involves a "fleeting visual or auditory image." 441 F. Supp. at 85.

<sup>92</sup> *Kennedy Theatre Ticket Services v. Ticketron, Inc.*, 342 F. Supp. 922, 926 (E.D. Pa. 1972). In *Advanced Office Systems, Inc., v. Accounting Sys. Co., Inc.*, 442 F. Supp. 418 (D.S.C. 1977), the court considered tangible goods which are used to convey information. Unless the tangible has a "functional value solely derived from its tangible existence," it is not a commodity. *Id.* at 423. Thus, the bills prepared by a billing service were not commodities. The court hypothesized that a custom made T-shirt with an advertising message would be a commodity. *Id.* Presumably, then, a newspaper advertising case might hinge on this ultrafine distinction. Query whether the advertisement could become a commodity if it also contained a negotiable coupon, springing to "functional existence" when clipped from the paper.

<sup>93</sup> See, e.g., *General Glass Co., Inc., v. Globe Glass and Trim Co.*, 1978-1 Trade Cas. ¶ 61,998 (N.D. Ill. 1978) (auto glass replacement firm's bill for glass and labor found not divisible); *Aviation Specialities, Inc. v. United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978) (discount sale of jet engine parts "woven" into general repair agreement); *Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co.*, 313 F. Supp. 1184 (N.D. Tex. 1970) (glazing firm supplies doors and windows).

<sup>94</sup> See, e.g., *General Shale Prod. Corp. v. Struck Const. Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

sence selling services. Bricks<sup>95</sup> and jet engines<sup>96</sup> are clearly commodities. However, when transferred by contractors and repairmen, they do not convert what is essentially a services transaction into a commodities transaction.<sup>97</sup>

A major weakness of the dominant nature test in mixed transactions is that it provides no concrete criteria for deciding whether the service or the commodity component dominates. Comparisons of identifiable dollar amounts are not decisive. The Fifth Circuit recently found a repair contract in which parts costs exceeded labor costs to be dominantly a services transaction.<sup>98</sup> The message, affirmed in recent decisions,<sup>99</sup> is that any significant degree of services in an otherwise commodities transaction can remove the transaction from the reach of Robinson-Patman consideration.

Courts should refuse to separate mixed transactions in only two situations. First, where the cost of supplying the service varies with each customer so that detecting price discrimination in the accompanying commodities is too difficult, courts should not apply Robinson-Patman.<sup>100</sup> Second, applying the Act could be unfair where the defendant deals in services and is merely transferring the commodities to facilitate the transaction.<sup>101</sup> This will

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<sup>95</sup> *Id.*

<sup>96</sup> *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978).

<sup>97</sup> *Id.* at 1191; *General Shale Prod. Corp. v. Struck Const. Co.*, 132 F.2d 425, 428 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

<sup>98</sup> "However, the dominant nature of the transaction test is not met merely by comparing the dollar totals of items in the cost breakdown." *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978).

<sup>99</sup> *E.g.*, *General Glass Co., Inc. v. Globe Glass and Trim Co.*, 1978-1 Trade Cas. ¶ 61,998 (N.D. Ill. 1978); *Advanced Office Systems, Inc. v. Accounting Office Systems Co., Inc.*, 442 F. Supp. 418 (D.S.C. 1977).

<sup>100</sup> This worried the court in *Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co.*, 313 F. Supp. 1184 (N.D. Tex. 1970). The case concerned the commodity status of a contract for glass installation that included glass. "Although glass and metal are involved in each job, intangible items, such as installation, weather conditions, the architect or contractor in charge of the job and other intangibles make each job unique or different." *Id.* at 1185. Similar problems are not present in a standardized newspaper transaction, in which there is no hourly service rate charged. Rates are standardized on rate cards. *See note 31 supra.*

<sup>101</sup> For example, a contractor who procures building materials after winning a contracting bid is not really a materials seller. In *General Shale Prod. v. Struck Const. Co.*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780

normally be the case where the defendant is not the producer of the commodity. In these situations, the dominant nature test can reach a correct, though often fortuitous, result.

The sale of newspaper advertising could be classed as a mixed transaction involving the sale of tangible advertisements and distribution services. However, the dominant nature test is not useful in determining whether Robinson-Patman applies. Newspaper advertising is bought and sold as a unified good; distribution is not marketed separately.<sup>102</sup> Moreover, the money spent on a newspaper ad primarily pays for its production, which is much more expensive than its distribution.<sup>103</sup> Finally, the publisher does not merely transfer the advertisement to facilitate sales of services, but rather is the manufacturer of the advertisement.<sup>104</sup>

In sum, the dominant nature test creates more problems than it solves. It lacks consistent criteria, and thus fails to draw bright lines between commodities and non-commodities.<sup>105</sup>

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(1943), a construction company was awarded a municipal low-income housing contract based on a bid submission. The bid included the supplying of bricks, which the construction company had yet to purchase. The construction company opened bids to brick producers. A brick company reduced its price to meet the bids of its competitors and the bid was accepted. 132 F.2d at 428. One of the rejected brick producers sued the construction company, claiming that it was in effect selling bricks to the city at a discriminatory low price. *Id.* at 429. The gist of the case is the contractor's refusal to deal with the plaintiff brickmaker. The defendant was supplying labor, and was merely procuring the bricks to be used for the job. The court held that defendant did not sell bricks, and thus the sale requirement had not been met. *Id.* at 428. See notes 66-68 *supra*.

<sup>102</sup> However, in many cases, newspapers are circulated by independent distributors. B. OWEN, *supra* note 28, at 58. This weakens the argument that the advertiser is essentially buying distribution services from the publisher. Yet, this argument is accepted by the courts. See, e.g., National Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 85 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979).

<sup>103</sup> If relative cost was determinative a newspaper would be essentially a produced good. In a "typical" newspaper of 100,000 circulation, newsprint, ink, copy preparation, composing and engineering—production costs—account for 42% of total expenses. By comparison, distribution cost is 13% of total expenses. B. OWEN, *supra* note 28, at 35.

<sup>104</sup> See note 101 and accompanying text *supra*.

<sup>105</sup> When the FTC held that newspaper advertising was a commodity, it hinted that the present analysis was forcing courts to "become preoccupied with metaphysical considerations about what is or is not a tangible product." The Times-Mirror Co., Inc., No. 9103, [1978] FTC Complaints and Orders

Moreover, certain products not in existence when Robinson-Patman was passed, such as packaged computer programs, are composed of relatively equal amounts of services and tangibles. These products do not lend themselves to a dominant nature test.<sup>106</sup> The test forces senseless distinctions and fails to consider whether a court should prevent price discrimination because it is anticompetitive or injures small buyers.

*B. A Proposed Analysis: A Basic Purpose Approach to Robinson-Patman*

A proper analysis of the scope of "commodities" should consider the policy of protecting efficient small competitors.<sup>107</sup> Interpreting a statute to effectuate its basic purpose is a long-standing rule of jurisprudence, and would produce sounder Robinson-Patman results.<sup>108</sup>

In a basic purpose analysis of a commodities question, the

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(CCH) ¶ 21,448, at 21,452.

<sup>106</sup> Designing a unique computer program is clearly a service, even though the program is stored on a tangible memory device. For a description of memory devices, see generally *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258, 275 (N.D. Okla. 1973). However, computer companies now sell standardized computer programs which are mass produced and sold much like commodities at a grocery store. See generally Note, *Computer Programs as Goods Under the U.C.C.*, 77 MICH. L. REV. 1149 (1979).

<sup>107</sup> See text accompanying note 55 *supra*.

As Sutherland points out, there are limits on literalism. C. SANDS, 2A STATUTES AND STATUTORY CONSTRUCTION 65 (4th ed. 1973). "While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and obvious purpose of the law should not be sacrificed to a literal interpretation of such words." *Pierce v. Van Dusen*, 78 F. 693, 696 (1897). For an interesting comment on how positivist judges—who carefully avoid judicial legislating—grapple with unclear statutes, see Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 487, 491 (1979).

<sup>108</sup> The Supreme Court recently used such a test to interpret the jurisdictional limits of § 16(b) of the Securities Exchange Act of 1934, 48 Stat. 896, (codified at 15 U.S.C. § 78 p (b) (1973)), which only applies to "purchase and sales." Faced with "unorthodox" transactions—a stock option and exchange—the Court stated: "In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent." *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 (1973). The Court was willing to extend the jurisdictional scope if necessary to serve Congressional purpose. *Id.* at 595. Thus, the Court found no "sale" because there was no possibility of shareholder harm. *Id.* at 596.

threshold inquiry is *whether the good sold can fit within the structure of the statute*. Section 2(a) of the Robinson-Patman Act requires that the subject of the transaction be measurable in "like grade and quality."<sup>109</sup> Unless a court can adequately compare the unit sold with other units, it is too difficult to determine if price discrimination has taken place.<sup>110</sup> Insurmountable administrative problems might result from applying the Act to transactions which are saturated with services unique to each customer.<sup>111</sup>

The second inquiry is *whether the alleged discrimination is the type of "evil" Congress intended to prevent*. The Supreme Court has clearly stated that the basic purpose of Robinson-Patman is to prevent a large buyer from using its economic buying

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<sup>109</sup> 15 U.S.C. § 13(a) (1976). A disfavored customer must prove that the commodities sold to favored and disfavored purchasers are of "like grade and quality." Normally, courts evaluate grade and quality on physical aspects of the good, but an important criteria is the acceptability of products by its consumers. See H. SHNIDERMAN, *supra* note 61, at 21-23. Interestingly, the one court to compare newspapers found them of differing grade and quality based on intangible factors. *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 342 F. Supp. 1138, 1141 (D.N.D. 1974), *aff'd*, 493 F.2d 383 (8th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974) (newspaper delivered to two different cities was not of like grade and quality although physically identical).

<sup>110</sup> Services tend to vary with each particular job, and are thus difficult to compare. See, e.g., testimony in *Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co.*, 313 F. Supp. 1184, 1185-86 (N.D. Tex. 1970).

The method of pricing is an important factor. Where the seller has a detailed and consistent pricing scheme, the inference is that buyers conceptualize the good as quantifiable and comparable. For a discussion on comparing mixed-transactions of like grade and quality, see Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 S. CAL. L. REV. 241, 253 (1957). "The commodity is different from another precisely the same physically if any of the elements which combine to compose the commodity-service are missing from one transaction and not from others." *Id.*

<sup>111</sup> See ABA REPORT, *supra* note 68, at 59. Some commentators feel that the exclusion of services from the Act was irrational, R. POSNER, *supra* note 7, at 35, and probably just a reflection of the types of business transactions most important at that time. Reeves, *supra* note 68, at 192. The major Robinson-Patman reform studies, THE NEAL REPORT, *reprinted in* 1 JOURNAL OF REPRINTS FOR ANTITRUST LAW AND ECONOMICS 633, 756 (1969), and the Department of Justice Reform Statute, U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 281-85 advocate extending the jurisdictional scope into services, if other modifications are adopted.

power to secure a competitive advantage<sup>112</sup> over a small buyer.<sup>113</sup> If the subject of the transaction fits within the structure of the statute,<sup>114</sup> and the plaintiff alleges the type of discrimination Congress sought to prevent,<sup>115</sup> the complaint should withstand summary judgment. However, the plaintiff must also show that it is a small competitor and that the discriminating seller is not a small competitor in the seller's market.<sup>116</sup> Congress never intended to apply the decidedly populist<sup>117</sup> Robinson-Patman Act against small business.<sup>118</sup>

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<sup>112</sup> For a complete discussion of the "competitive advantage" theory and its evolutionary development in the administration of Robinson-Patman, see Gifford, *supra* note 40.

<sup>113</sup> *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 75-76 (1979); *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

<sup>114</sup> See text accompanying notes 109-11 *supra*.

<sup>115</sup> Congress intended to limit price discrimination which gives a large buyer a competitive advantage over a smaller rival for reasons other than scale efficiencies. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). Pricing policies, such as quantity and volume discounts, are suspect under the Act, but can be cost-justified. See note 60 *supra*. Under traditional Robinson-Patman analysis, competitive injury is presumed where the suspect pricing schemes exist. Gifford, *supra* note 40, at 54. Thus, while judges cannot evaluate discrimination unless evidence of its effects are presented by both parties, see note 123 and accompanying text *infra*, they can nevertheless make an initial determination based on the type of discrimination alleged.

<sup>116</sup> There are several criteria to determine whether a particular competitor is "small." The Small Business Administration defines "small business" in a variety of ways depending on the government program involved. See 13 C.F.R. §§ 121.3-121.3-16 (1979). The Small Business Act defines a small business as one which is independently owned and operated and which is not dominant in its field of operation. 15 U.S.C. § 632 (Supp. II 1978). Currently the Small Business Administration is considering a proposal to define "small business" based on number of employees as an indicator of market share. 45 Fed. Reg. 15,442 (1980). This is a workable standard, but courts should not be constricted to the fixed numbers used by the SBA out of administrative necessity.

<sup>117</sup> The term is used in antitrust parlance to encompass those who view non-economic values, along with efficiency and competition, as proper goals of antitrust. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 2, at 11 (1977). There is ongoing debate over whether populist acts such as Robinson-Patman have any place in antitrust policy. See, e.g., Pitofsky, *supra* note 1; Elzinga, *supra* note 1; Schwartz, Book Review, 128 U. PA. L. REV. 244, 246-253 (1979); R. BORK, *THE ANTITRUST PARADOX* (1978). Populist values are losing ground in current antitrust jurisprudence. See note 1 *supra*.

<sup>118</sup> A strong criticism of Robinson-Patman is that it has often been used against its intended beneficiaries, small businesses. U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 98-99. Also, the Act has placed an unfair regulation and

The final inquiry is *whether the benefit to competition, efficiency, or the consumer clearly outweighs the presumed harm to small business*. The first two inquiries determine whether application of the Act is feasible and appropriate; this inquiry determines whether application is desirable.<sup>119</sup> Some price discrimination, although prohibited by Robinson-Patman, is procompetitive and benefits consumers by lowering prices. The failure of the Act to distinguish between some forms of beneficial and detrimental price discrimination has led most economists and many lawyers to advocate its repeal or reform.<sup>120</sup> However, Congress is unlikely to take such action.<sup>121</sup> Thus, where the Congressional policy of preserving efficient small competitors in the long run collides with immediate goals of competition and efficiency, the court must weigh competing policies.<sup>122</sup> The basic inquiry is whether the price discrimination creates such a substantial present gain in efficiency, competition, reduced consumer prices, or general social welfare that it justifies some competitive injury to small business. The best way for a court to make this determination is to allow the defendant to prove a "desirability defense" by presenting market evidence.<sup>123</sup>

Discrimination is most likely desirable where the seller lacks a powerful market position, and is sporadically discriminating to

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enforcement burden on small businesses. *Id.* at 97-99.

<sup>119</sup> Such a determination, as well as determining whether price discrimination has actually taken place, can be difficult. These difficulties "often raise high barriers to the task of administering a rule against discrimination without interfering with economic efficiency and competition." *See Cooper, supra* note 8, at 966-82.

<sup>120</sup> *See, e.g., R. BORK, supra* note 117. Bork bluntly labels the Act "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory." *Id.* at 382. *See also R. POSNER, supra* note 7, at 52-53.

<sup>121</sup> *See* note 4 *supra*.

<sup>122</sup> *See Great Atlantic & Pacific Tea Co., Inc. v. FTC*, 440 U.S. 69 (1979). "More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." *Id.* at 80 n.13. In *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61 (1953), the Court warned against interpretations which "extend beyond the prohibitions of the Act and, in so doing, help give rise to price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Id.* at 63.

<sup>123</sup> R. BORK, *supra* note 117, criticizes the defenses available to rebut a prima facie section 2(a) violation. "Nothing in Robinson-Patman permits proof that real economic discrimination is beneficial." *Id.* at 391. However, in making a borderline "commodities" determination, the courts should permit the defendant to make such a showing.



better compete in that market. Conversely, where a powerful seller systematically discriminates to maximize profits<sup>124</sup> and thereby causes competitive harm to small buyers, the result is undesirable, and courts should apply Robinson-Patman.<sup>125</sup> As with other Robinson-Patman defenses, the burden should be on the seller to justify the price difference.<sup>126</sup>

In sum, the basic purpose test calls for a flexible "commodities" analysis where the transaction is mixed. Courts should not create narrow *per se* categories of commodities transactions for judicial convenience. Rather, where the mixed transaction fits within the structure of the statute<sup>127</sup> and injures small competitors,<sup>128</sup> a court should presume Robinson-Patman applies. This presumption would be rebuttable by a reasonable showing by the defendant that the alleged price discrimination furthers basic antitrust policies of competition and consumer welfare.<sup>129</sup>

#### IV. Applying Robinson-Patman to Newspaper Advertising: A Basic Purpose Analysis

Legal analysis of the "commodity" status of printed advertis-

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<sup>124</sup> See note 15 and accompanying text *supra*. Arguably, Robinson-Patman should only be enforced against systematic discrimination. U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 158. The statute makes no distinction between systematic and sporadic discrimination. *Id.* A court applying the Act to a borderline transaction should, however, consider the type of discrimination.

<sup>125</sup> Although allowing a monopolist to discriminate will create higher profits and outputs than those of a nondiscriminating monopolist, F. SCHERER, *supra* note 8, at 130, some types of systematic discrimination have less clear efficiency benefits. For example, "third degree" discrimination, where the seller can divide customers into two or more groups each with its own demand function, *id.* at 126, will increase output in certain market circumstances only. See *id.* at 131.

Posner, *supra* note 7, at 10-12, points out that "dead-weight loss" can result from systematic price discrimination. If monopolies can discriminate, monopolizing is more attractive and more apt to attract inefficient expenditures to monopolize. *Id.* at 10. Also, unless discrimination is "perfect," it may lead to smaller output than cost-justified pricing. *Id.* at 11.

<sup>126</sup> Normally, the defendant has the burden of justifying price discrimination once the plaintiff has established a *prima facie* case. See H. SHNIDERMAN, *supra* note 61, at 2. Thus, to require the defendant to show desirability keeps in line with the statutory scheme, but creates a more flexible defense for a borderline commodities case.

<sup>127</sup> See notes 109-11 and accompanying text *supra*.

<sup>128</sup> See notes 112-18 and accompanying text *supra*.

<sup>129</sup> See notes 119-26 and accompanying text *supra*.

ing has produced conflicting results. For example, the District of Columbia Circuit has analyzed the issue as a "piece of paper" case and found that newspaper advertising is not a commodity for purposes of Robinson-Patman.<sup>130</sup> The Second Circuit recently reached the same result,<sup>131</sup> but based the decision on legislative history<sup>132</sup> and post-passage statements by the Act's author.<sup>133</sup> However, the Second Circuit was the first court to consider, albeit briefly and inaccurately, whether the subject of the transaction, newspaper advertising, could fit within the structure of the statute.<sup>134</sup>

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<sup>130</sup> *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979). The court quoted with approval a commentator who maintains that "the printed paper is merely a tangible vehicle for the conveyance of . . . ideas." *Id.* at 85.

The court declined to defer to the FTC complaint alleging that newspaper advertising was a commodity because "it in no way represents the view of the Commission on the issue." *Id.* Since that time, however, it has become the official view of the FTC that newspaper advertising is a commodity. See text accompanying notes 135-36 *infra*.

The 8th Circuit applied a mixed transaction analysis to newspapers, and found them to be dominantly tangible goods, and thus commodities. *Morning Pioneer, Inc. v. Bismark Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

<sup>131</sup> *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979).

<sup>132</sup> *Id.* at 610 (citing floor debate, 80 Cong. Rec. 3115 (1936)). The debate cited was not, however, specifically concerned with section 2(a), which was the provision at issue in *Ambook*. See Note, *Antitrust Implications of Network Television Quantity Advertising Discounts*, 65 COLUM. L. REV. 1213, 1232 n.72 (1965). This also ignores a wealth of legislative history indicating that a basic purpose of the Act was to prevent harm to small business. See, e.g., Wolfe, *Reform Or Repeal of the Robinson-Patman Act—Another View*, 21 ANTITRUST BULL. 237, 238-40 (1976); R. KINTNER, AN ANTITRUST PRIMER 60 (2d ed. 1973); U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 137; MacIntyre, *The Public Policy of the Robinson-Patman Act*, 14 ANTITRUST BULL. 789, 791 (1969). All cite relevant parts of the legislative record and draw conclusions therefrom. For a comprehensive legislative history of the Act, see U.S. DEP'T OF JUSTICE REPORT, *supra* note 11.

<sup>133</sup> *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604 (2d Cir. 1979). However, post-passage statements by the author of a statute is a poor source of statutory meaning. C. SANDS, *supra* note 107, at 215.

<sup>134</sup> *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 610 (2d Cir. 1979). "To regard advertisements as commodities would involve almost insolvable problems in determining whether these were of 'like grade and quality.' The page of the newspaper, the month, the day of the week . . . would have to be weighed." *Id.* See also notes 138-41 and accompanying text *supra*.

The opinion declines to defer to the FTC view that newspaper advertising is

On the other hand, the Federal Trade Commission has ruled that newspaper advertising is a commodity.<sup>135</sup> Recognizing that neither the service nor tangible components clearly dominate, the Commission found that policy considerations tip the scales in favor of applying Robinson-Patman.<sup>136</sup> The Supreme Court has expressly reserved the newspaper advertising issue, even though both parties conceded the point in a leading newspaper antitrust case.<sup>137</sup> As this section illustrates, a basic purpose analysis would include retail newspaper advertising within the definition of commodity, and apply the Robinson-Patman Act where the seller is discriminating against small business.

First, *newspaper advertising fits within the structure of the statute*. Since the cost of distributing a newspaper advertisement is identical for every advertisement in a newspaper,<sup>138</sup> the price of an advertisement depends wholly on its tangible aspects: location, type and size.<sup>139</sup> These factors are standardized on published "rate cards,"<sup>140</sup> and a court could thus compare advertisements of similar value. The FTC, presumably trade regulation experts, found that newspaper advertising could fit within the Robinson-Patman framework.<sup>141</sup>

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a commodity, note 135 *supra*, dismissing it as a "purported discovery." 612 F.2d at 610. Reliance is also placed on a negative response by a sponsor during floor debate considering whether section 3 of the Act affected newspapers. *Id.* at 609-10 (citing 80 Cong. Rec. 3115 (1936)). The question did not, however, focus on section 2(a), which was the provision at issue in *Ambook*. See Note, *Antitrust Implications of Network Television Quantity Advertising Discounts*, 65 COLUM. L. REV. 1213, 1232 n.72 (1965).

<sup>135</sup> The Times-Mirror Co., Inc., Complaint, No. 9103, [1978] FTC Complaints and Orders (CCH) ¶ 21,448.

<sup>136</sup> *Id.* at ¶ 21,452.

<sup>137</sup> *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609 n.27 (1953).

<sup>138</sup> Distribution costs are identical because newspaper distribution capacity is a fixed cost. The fixed cost is determined by the number of subscribers rather than the number of advertisements. However, in an indirect sense, to the extent one advertisement can attract a theoretical subscriber to a newspaper—greater advertising raises readership—an incremental step towards scale economy is taken because of the small marginal cost of newspaper advertising.

<sup>139</sup> Landon, *supra* note 35, at 59-60.

<sup>140</sup> See note 29 and accompanying text *supra*.

<sup>141</sup> See The Times-Mirror Co., Inc., Complaint, No. 9103, [1978] FTC Complaints and Orders (CCH) ¶ 21,448, at 21,452. The expertise of the FTC was an influential factor in *Sun Communications, Inc. v. Waters Publications, Inc.*, 466 F. Supp. 387, 390-91 (W.D. Mo. 1979) (newspaper advertising a Robinson-

Second, *the newspaper industry is engaging in the kind of price discrimination Congress sought to prevent.* Sellers of newspaper advertising are maximizing profits through price discrimination that favors large retail buyers.<sup>142</sup> Quantity and volume discounts, prevalent in most media,<sup>143</sup> are traditionally suspect under Robinson-Patman. Moreover, discrimination in advertising space is more harmful to small retailers than most other price discrimination. Normally, if a supplier discriminates, the price difference affects only one of possibly hundreds of products a retailer distributes.<sup>144</sup> However, advertising expenses comprise part of the cost of each item. If the small retailer pays discriminately high advertising costs, the result is substantially higher costs per dollar of sales.<sup>145</sup> Thus, price discrimination in newspaper advertising is likely to cause serious competitive injury to small retailers, and should therefore create a presumption in favor of applying Robinson-Patman.<sup>146</sup>

Third, *the benefit to competition, efficiency, the consumer, or general social values does not clearly outweigh the harm to*

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Patman "commodity").

<sup>142</sup> See notes 17-53 and accompanying text *supra*. Private plaintiffs are beginning to fight discriminatory newspaper advertising rates. See *Sun Communications, Inc. v. Waters Publications, Inc.*, 466 F. Supp. 387 (W.D. Mo. 1979); *Motors, Inc. v. Times-Mirror Co.*, 102 Cal. App. 3d 735, 162 Cal. Rptr. 543 (2d Dist. 1980) (wholesale distributor of auto products alleged Los Angeles *Times*' advertising rates constitute an unfair business practice under state antitrust law).

<sup>143</sup> See Blake & Blum, *Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 *YALE L.J.* 1339, 1347 (1965).

<sup>144</sup> In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), the Supreme Court found actionable injury to small retailers from volume discounts available for salt which amounted to 7 ½¢ per case. While it is difficult to see how substantial injury could be shown in such a case, the Court felt that Robinson-Patman was not enforceable unless injury was presumed. Any one item may be a small percentage of what a retailer distributes, but if many sellers discriminate, the overall effect on the retailer would be substantial. See Gifford, *supra* note 40, at 55; U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 224-25.

<sup>145</sup> U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 196. "Other things being the same, a retailer with 5 percent or less of a local market may have net advertising costs, per dollar of sales, three or four times as great as the retailer with a 20 percent or more market share. This cost disadvantage could amount to 0.8 cent per dollar of sales or more." *Id.* (quoting a 1966 FTC Food Study).

<sup>146</sup> See notes 112-18 and accompanying text *supra*.

*small business*.<sup>147</sup> The systematic rate discrimination practiced by monopoly newspapers is anticompetitive in the newspaper industry. It maximizes monopoly profits and creates entry barriers through publisher-advertiser ties.<sup>148</sup>

Moreover, there is no efficiency argument to support the validity of advertising discrimination. It is true that large distribution systems have inherent economies of scale, even in per-unit advertising costs.<sup>149</sup> However, to the extent large retailers have lower advertising costs because a newspaper is practicing non-cost-justified price discrimination, the advantage is not gained through increased efficiency.<sup>150</sup> Thus, the small retailer is suffering competitive harm without a substantial efficiency gain to society.<sup>151</sup>

Increased advertising output might justify systematic discrimination.<sup>152</sup> As the Supreme Court recently recognized, price ad-

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<sup>147</sup> See text accompanying notes 119-29 *supra*.

<sup>148</sup> See note 15 and accompanying text *supra*. The advertiser is discouraged from advertising in competing media because the volume discount rate would be lost. These ties raise barriers to the entry of competing newspapers. See F. SCHERER, *supra* note 8, at 133.

<sup>149</sup> U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 195. A 1966 FTC study cited economies of scale in newspaper advertising as the most important efficiency advantage of large retailers. *Id.* See also W. COMANOR & T. WILSON, *supra* note 23, at 52. Large firms are able to spread the fixed cost of advertising over more units of output, placing smaller firms at a substantial disadvantage. *Id.*; U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, at 195.

<sup>150</sup> Newspaper advertising rate discrimination creates additional economy of scale for large advertisers. W. COMANOR & T. WILSON, *supra* note 23, at 53. See U.S. DEP'T OF JUSTICE REPORT, *supra* note 11, which points out scale efficiencies of large retailers and uses as an illustration the "significant volume discounts that may only be received by retailers which buy substantial advertising linage during the year." *Id.* at 195. The Report ironically implies, however, that such discounts exist because advertising is not covered by Robinson-Patman. *Id.* at 195-96.

<sup>151</sup> See text accompanying note 122 *supra*.

<sup>152</sup> Economists are concerned that a perfectly competitive market would not produce sufficient information. Posner, *Information and Antitrust*, 67 GEO. L.J. 1187, 1193 (1979). However, economists continue to disagree over whether too much advertising by a particular firm creates barriers to entry. The "Chicago" school does not view high advertising outlay as anticompetitive because consumers will pay for advertising only to the extent that it reduces the consumer's cost of searching for goods. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979). Others maintain that disproportionately high advertising expenditures can create barriers to entry. See F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 344

vertising is crucial to the competitive process.<sup>153</sup> Informative advertising from both large and small competitors tends to lower prices by encouraging consumers to search for lower prices.<sup>154</sup> However, Robinson-Patman regulation would not necessarily curtail retail advertising. Large retailers, unlike smaller retailers, usually have some choice in media because of their large trading areas.<sup>155</sup> A newspaper faced with a Robinson-Patman suit will probably not eliminate discounts necessary to keep its largest customers. Rather, it has strong incentives to make more discounts, and thus more advertising available to small retailers, in order to justify its larger discounts.<sup>156</sup>

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(1970). See also D. WORCHESTER, WELFARE GAINS FROM ADVERTISING 7-10 (1978); P. BLOOM, ADVERTISING, COMPETITION, AND PUBLIC POLICY: A SIMULATION STUDY 2-16 (1976); see generally S. ORNSTEIN, INDUSTRIAL CONCENTRATION AND ADVERTISING INTENSITY (1977).

<sup>153</sup> Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (ban on price advertising of retail prescription drugs is unconstitutional under the first amendment). The Court noted that insufficient price information impacts more heavily on the poor and the elderly, who are least able to make physical shopping comparisons. *Id.* at 763-64. For a discussion of the economic aspects of Virginia Pharmacy, see Jackson & Jefferies, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 25-40 (1979).

<sup>154</sup> Price information advertising, as opposed to brand advertising, is more closely associated with a real reduction in consumer search costs and gain in efficiency. Cady, *Advertising Restrictions and Retail Prices*, 16 J. ADVERTISING RESEARCH 25, 27 (1976). See text accompanying note 20 *supra*.

Costly consumer search means that one firm producing a product identical to those of other firms may have disproportionate and inefficient market power. Nelson, *Comments On A Paper By Posner*, 127 U. PA. L. REV. 949, 951 (1979); Posner, *supra* note 152, at 1193.

<sup>155</sup> The peripheral advertising dollar, potentially as high as 35% of total large retail ad expenditures, faces strong broadcast competition. This applies particularly to chain retailers so large that even a large metropolitan newspaper covers only a small portion of their total trading area. CHAIN STORE EXECUTIVE, April 1979, at 25. This indicates that large retailers have a more elastic demand for newspaper advertising than small retailers, who must depend almost exclusively on newspaper advertising. See notes 20-24 and accompanying text *supra*. W. COMANOR & T. WILSON, *supra* note 23, point out that if a greater choice of media is available to large retailers because of their size, they will have more elastic demand schedules. *Id.* at 53. This will be reflected by media price discrimination in the form of quantity discounts. *Id.*

<sup>156</sup> If sufficient discounts are available to many buyers, a discount structure should be justified. See note 51 *supra*. Opening up and restructuring media discounts seems to be the goal of current FTC action. See the Times-Mirror Co., Inc., Complaint No. 9103, [1978] FTC Complaints and Orders (CCH) ¶

The court must also consider first amendment interests. The flow of wealth to monopoly newspapers created by systematic price discrimination<sup>157</sup> might, in some cases, justify injury to small business. The discrimination may be necessary for the newspaper to continue operating profitably.<sup>158</sup> Wealthy newspapers may better act as a check on government power.<sup>159</sup> Furthermore, increased advertising sales enable newspapers, primarily subsidized by advertising, to print more news.<sup>160</sup> However, in many cases publishers use high profits to acquire other media, causing concentration in the information industry which is contrary to first amendment interests.<sup>161</sup> Thus, unless the newspa-

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21,448. The FTC is negotiating a settlement of a Robinson-Patman proceeding against the *Los Angeles Times*, hoping that "any settlement provide future guidance for not only newspapers but also electronic media." [1980] 953 ANTI-TRUST & TRADE REG. REP. (BNA) A-22.

<sup>157</sup> See note 13 and accompanying text *supra*.

<sup>158</sup> See, e.g., E. FRANCOIS, MASS MEDIA AND THE LAW OF REGULATION 21 (1978), discussing the view of Justice Stewart that the media functions as the fourth branch of government.

<sup>159</sup> See W. COMANOR & T. WILSON, *supra* note 23, at 16; B. OWEN, *supra* note 28, at 35. After the FTC ruling that advertising was a commodity, the Times-Mirror Co., Inc., Complaint No. 9103 [1978] FTC Complaints and Orders (CCH) ¶ 21,448, the *Times* requested judicial intervention. *Times-Mirror Co. v. Federal Trade Commission*, 1979-2 Trade Cas. ¶ 62,756 (C.D. Cal. 1979). The *Times* claimed that first amendment interests would be harmed if the FTC was allowed to proceed. "The plaintiff contends that if it is forced to cut back on volume discounts, the result will be a reduction in total advertising . . . [which] will mean less space for news and editorial matter with the resultant 'chilling effect on the flow of news to the public'." *Id.* at 78,361.

<sup>160</sup> See note 23 *supra*.

<sup>161</sup> Congress, concerned about newspaper concentration, held hearings in 1979 to discuss Senate Bill 600, which would limit chain newspaper acquisitions. See generally 1979 Hearings, *supra* note 25.

An antitrust policy which allows systematic newspaper discrimination to create barriers to entry is contrary to first amendment interests. In the landmark case of *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court called upon antitrust law to protect the basic first amendment precept that "the widest possible dissemination from diverse and antagonistic sources is essential to the welfare of the public." *Id.* at 20. However, antitrust law has not been up to the task. The largest 13 newspaper chains (two or more newspapers under common ownership) now control 42% of U.S. daily newspaper circulation. EDITOR AND PUBLISHER, Sept. 1, 1979, at 9. For an overview of antitrust problems in the newspaper industry, see Roberts, *supra* note 19; Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market:" The Supreme Court on the Structure and Conduct of Mass Media*, 32 VAN. L. REV. 1249, 1254-77 (1979); Comment, *Antitrust Malaise in the Newspaper Indus-*

per demonstrates the need to discriminate to maintain editorial and financial vigor, first amendment considerations do not justify the price discrimination or resulting harm to small retail advertisers.

In sum, the application of Robinson-Patman to newspaper advertising will enhance competition in the retail market without causing substantial short-run efficiency costs. It might also increase price advertising by small retailers, and is not contrary to first amendment interests. Thus, newspaper advertising is a good candidate for Robinson-Patman consideration.

### CONCLUSION

Congress' continuing support of the populist Robinson-Patman Act<sup>162</sup> should signal the judiciary that antitrust policy is not to ignore the needs of small business.<sup>163</sup> However, sensitive to widespread criticism of the inefficient and anticompetitive effects of the Act, courts view enforcement with diminishing favor. As courts increasingly turn to efficiency as the cornerstone of antitrust policy,<sup>164</sup> they struggle to construe Robinson-Patman consistently with efficiency objectives.<sup>165</sup> The best, and possibly only, means of meshing policies is to adopt a flexible approach that weighs competitive injury to small business with overall efficiency objectives.

Discrimination in newspaper advertising rates injures small distributors while achieving little in overall efficiency.<sup>166</sup> Possessing monopoly power in retail advertising, newspapers maximize profits by extracting high advertising rates from small retailers. Nevertheless, courts have inflexibly excluded newspaper advertising from the Robinson-Patman Act, which regulates only "commodities" transactions.<sup>167</sup> Through the "dominant nature of the transaction" test, courts have narrowed the definition of

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try: *The Chains Continue to Grow*, 8 ST. MARY'S L.J. 160 (1976); G. ROSDEN, *supra* note 20, at § 7.06; B. OWEN, *supra* note 28, at 83-85.

<sup>162</sup> See note 4 *supra*.

<sup>163</sup> See *Small Business and the FTC: Price Discrimination*, [1980] 428 TRADE REG. REP. (CCH) ¶ 2 (remarks of A. Dougherty, director of FTC Bureau of Competition).

<sup>164</sup> See note 1 and accompanying text *supra*.

<sup>165</sup> See note 122 and accompanying text *supra*.

<sup>166</sup> See notes 148-51 and accompanying text *supra*.

<sup>167</sup> See notes 70-106 and accompanying text *supra*.



commodities transactions to include only those few transactions which do not mix services and commodities. Admittedly, narrowing Robinson-Patman out of existence avoids its anticompetitive effects.<sup>168</sup> However, as the newspaper advertising example shows, instances remain where the Act can protect small competitors without substantially diminishing overall competition and efficiency.

A flexible approach to the commodities requirement of the Robinson-Patman Act would allow courts to broaden or narrow its scope depending on the need for regulating price discrimination. Increased flexibility will aid courts in addressing what should be the central inquiry: how to reconcile the special need for efficiency in inflationary times with the continuing Congressional commitment to preserving the vitality of small business.

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<sup>168</sup> See *Champaign-Urbana News Agency v. J.L. Cummins News Co.*, 479 F. Supp. 281 (C.D. Ill 1979). The opinion openly attacks the Robinson-Patman Act, stating that "the broader policies of antitrust are better served by interpreting the Act narrowly rather than broadly." *Id.* at 291. Compare note 77 *supra*.