

Judicial Reconstruction of the Robinson-Patman Act: Predatory Differential Pricing

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INTRODUCTION

The Robinson-Patman Act¹ is now forty-five years old and has never lacked critics. Lawyers and economists have condemned it as an “anti-trust” law that would restrain rather than promote competition and would protect small business at the expense of consumers.² As a result, more than any other antitrust statute, the Robinson-Patman Act has forced ideologists to choose sides.

The academic attack on the Robinson-Patman Act has grown especially sharp in the 1970's and the 1980's with voices from the political right, center, and left condemning it as anticompetitive.³ Congress has not responded. Although it has had ample opportunities to repeal or

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¹ Clayton Act § 2, 15 U.S.C. § 13 (1976). Although the original Clayton Act § 2, enacted in 1914, forbade price discrimination, it was amended substantially in 1936.

² See R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 382-401 (1978); R. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* (1976); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948); Cherington, *The Economic Aspects of Some Recent Trade Legislation* in BUSINESS AND THE ROBINSON-PATMAN LAW: A SYMPOSIUM 26-38 (B. Werne ed. 1938); Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1114-17 (1983); Lazo, *Commercial Cooperatives Under the Patman Law*, in BUSINESS AND THE ROBINSON-PATMAN LAW: A SYMPOSIUM 142-151 (B. Werne ed. 1938).

³ See, e.g., U.S. DEP'T OF JUSTICE, *REPORT ON THE ROBINSON-PATMAN ACT* (1977) [hereafter JUSTICE DEP'T REPORT]; R. BORK, *supra* note 2, at 382-401; R. POSNER, *supra* note 2; Baxter, *A Parable*, 23 STAN. L. REV. 973 (1971); Handler, *What is Wrong with the Antitrust Laws?*, 8 ANTITRUST BULL. 557 (1963); Liebler, *Let's Repeal It*, 45 ANTITRUST L.J. 18 (1976); Morton & Cotton, *Robinson-Patman Act — Anti-Trust or Anti-Consumer?*, 37 MINN. L. REV. 227 (1953); Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law — A Paradox of Antitrust Policy*, 64 COLUM. L. REV. 415 (1964).

amend the statute,⁴ Congress has declined action — largely, it has been suggested, because of the successful lobbying of various small business associations, who believe themselves to be beneficiaries of the statute.⁵

The academic attack on the Robinson-Patman Act culminated in 1977 with a Report on the Act by the Department of Justice: a long, scholarly critique which documented the statute's anticompetitive thrust and its potential conflict with other federal antitrust statutes or general federal antitrust policy. Since publication of the Report, the Justice Department has brought no actions under the Robinson-Patman Act.⁶

Recently, the proconsumer attitude of general antitrust policy has influenced judicial analysis of the Robinson-Patman Act. Some courts have sought to transform the Robinson-Patman Act into a consumer's statute. These new judicial interpretations are contrary to the Act's legislative intent and its plain language. However, they have unquestionably made the Act more consistent with current antitrust policy than prior interpretations. This Article analyzes current judicial efforts to discern the consumer welfare principle in so-called "primary-line" applications of the Robinson-Patman Act. It also suggests ways that judicial analysis of Robinson-Patman problems could be improved to further the consumer welfare goal.

I. ROBINSON-PATMAN: PRICE DISCRIMINATION AND PRICE DIFFERENCES

Critics have often observed that the Robinson-Patman Act and its subsequent case law do not attack price discrimination *per se*.⁷ Rather,

⁴ See *Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975); *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business*, 91st Cong., 2d Sess. (1970); *Bills to Amend §§ 2 and 3 of the Clayton Act: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. (1956); AD HOC SUBCOMM. ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS OF THE HOUSE COMM. ON SMALL BUSINESS, RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT — A REPORT OF THE AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS OF THE COMMITTEE ON SMALL BUSINESS, H.R. REP. NO. 1738, 94th Cong., 2d Sess. (1976).

⁵ See JUSTICE DEP'T REPORT, *supra* note 3, at 141-48.

⁶ See Hansen, *supra* note 2, at 1115-18.

⁷ R. BORK, *supra* note 2, at 383; R. POSNER, *supra* note 2, at 3-16; F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 83 (1962); Donovan, *A Fresh Approach to Robinson-Patman: Price Differential as Price Discrimination*, 2 B.C. INDUS. & COM. L. REV. 319 (1961); Note, *Price Differences as Price Discrimina-*

the Act is aimed directly at differential pricing.⁸ Discriminatory pricing occurs when a seller has different rates of return on different sales of the same item. More precisely, price discrimination exists when sales are made at prices that yield different ratios of price to marginal cost.⁹ If a seller has the same marginal cost with respect to two different customers but charges them two different prices, the prices are discriminatory. Likewise, if the seller has different marginal costs with respect to two customers but charges them exactly the same price, the prices are discriminatory.¹⁰

Two sales at the same price never violate the Robinson-Patman Act, however, regardless of how great the difference in the seller's marginal cost of supplying the two customers.¹¹ Likewise, two sales at different prices are presumed discriminatory even if marginal costs are lower for the lower priced sale.¹² The courts, by narrowly applying the statute's "cost justification" defense,¹³ have prevented effective inquiry into whether a price difference is truly discriminatory.¹⁴ As a result, except in a small number of cases in which the cost justification defense was successfully raised,¹⁵ the Robinson-Patman Act ignores whether the defendant is actually engaged in economic price discrimination. The substantive offense that the Robinson-Patman Act measures most accurately is the offense of selling the same product to different purchasers at different prices. Ironically, the Robinson-Patman Act sometimes forces sellers to engage in actual price discrimination to avoid differential pricing. In fact, since two sales at the same price are not a viola-

tion Under the Robinson-Patman Act, 49 ILL. B.J. 200 (1960).

⁸ See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) ("[P]rice discrimination within the meaning of [§ 2(a) of the Robinson-Patman Act] is merely a price difference.").

⁹ See R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 62 (1976).

¹⁰ *Id.*; see also R. POSNER, *supra* note 2, at 3-16.

¹¹ See F. ROWE, *supra* note 7, at 30-31, 303-06.

¹² See JUSTICE DEP'T REPORT, *supra* note 3, at 10-18.

¹³ See 15 U.S.C. § 13(a) (1982): "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered"

¹⁴ See, e.g., *United States v. Borden Co.*, 370 U.S. 460 (1962); Murray, *Cost Justification Under the Robinson-Patman Act: Impossibility Revisited*, 1960 WIS. L. REV. 227; Standridge, *An Analysis of the Cost Justification Defense Under Section 2(a) of the Robinson-Patman Act*, 9 RUT.-CAM. L. REV. 219 (1978).

¹⁵ E.g., *Morton v. National Dairy Prods. Corp.*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); *American Motors Corp. v. FTC*, 384 F.2d 247 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968).

tion, the statute undoubtedly *mandates* price discrimination much more frequently than it forbids it.¹⁶

The Robinson-Patman Act is not well designed to measure and condemn price discrimination. If Congress's goal had been to forbid true price discrimination it could have drafted a better statute. However, it is unfair to criticize the Act merely because it measures price discrimination inaccurately. Economic price discrimination was not the evil that the framers of the Robinson-Patman Act intended to condemn.¹⁷ A low-price sale injures a competitor whether or not the price can be justified by the seller's lower marginal cost. Whether a low-price sale injures *competition* is a function of the relationship between price and cost with respect to that particular sale. That the seller is making other sales at a higher rate of return is irrelevant.¹⁸

A law designed to flag differential pricing has one inherent advantage over a law condemning price discrimination as such. Price discrimination is a function of the relationship between a seller's price and its marginal cost. However, marginal cost is an economist's construction of a figure that is frequently difficult to discover and even more difficult to prove in litigation.¹⁹ On the other hand, discovery of differential pricing is easy, unless the price between a seller and a buyer is secret.²⁰

The Act could not be defended merely because it makes differential pricing a surrogate for price discrimination, and condemns the former in place of the latter, for it does much more. It identifies differential pricing as the evil to be condemned and makes it very difficult for a defendant to show that differential pricing is nondiscriminatory.²¹ As a result, the Act prohibits many instances of nondiscriminatory, differential pricing.

Good arguments exist for condemning true economic price discrimi-

¹⁶ That is, different buyers impose different marginal costs on customers, depending on the buyer's size, distance from the seller, individual needs, efficiency of management, promptness of payment, and consistency of purchases. Most of these differences cannot be inexpensively documented, and thus the seller charges different groups of buyers different prices at its peril.

¹⁷ The legislative history of the Robinson-Patman Act clearly indicates that the "evil" at which Robinson-Patman was aimed was low prices, not economic price discrimination. For example, the chain stores — the Act's clear targets — were bad not because they could force sellers to supply them at a lower rate of return, but because they could obtain goods at a lower cost and thereby resell at a lower price.

¹⁸ See *infra* text accompanying notes 39-40.

¹⁹ See 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 715c-d (1978) [hereafter P. AREEDA & D. TURNER].

²⁰ See *infra* text accompanying notes 103-05.

²¹ See *supra* note 14.

nation, at least under certain circumstances.²² However, allocative effi-

²² Some antitrust commentators argue that price discrimination is basically good because it permits increased output, and consumers as a general rule are benefited by increased output. See R. BORK, *supra* note 2, at 394-98. However, price discrimination does not always result in increased output, and there are good reasons for condemning it even when it does. First, one must divide the analysis of price discrimination in order to account for the two situations in which price discrimination is used: (1) to make predatory pricing cheaper; and (2) to enable a monopolist to earn a larger return than it would earn if it were charging its nondiscriminatory profit maximizing price.

As the main text indicates, *infra* at notes 49-55, so-called "geographic" price determination can in fact lower the cost of predatory pricing, for it enables the predator to sell only part of its output at a predatory level. Such discriminatory predatory pricing does result in increased output. However, it is inefficient and contrary to optimal consumer welfare for the same reasons that predatory pricing generally is inefficient. The analysis of predatory "geographic" discriminatory pricing is identical with the analysis of predatory pricing generally, and the fact that the alleged predator is charging a higher price elsewhere is functionally irrelevant to the determination of whether she is engaged in predatory pricing. Nevertheless, to the extent that the use of geographic price cutting can make predatory pricing cheaper, a rule against price discrimination which could identify predatory instances of price discrimination would promote allocative efficiency.

Second, price discrimination enables a seller with market power to enlarge its profits, provided that the seller can identify and segregate groups of customers who place differential values on its product, and that it can prevent arbitrage. See Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 GEO. L.J. 1157 (1983). Suppose that the cost of producing a widget is \$1.00, but the seller has substantial market power and has determined that if it must charge the same price to all buyers it would maximize its profits by charging \$1.50. There are potential customers willing to pay more than \$1.50, and there are others willing to pay more than the cost price of \$1.00, but unwilling to pay \$1.50. All these sales would be profitable. If the seller were able to engage in perfect price discrimination it would make every sale at \$1.00 or higher, at the maximum price that the particular purchaser was willing to pay for the widget. In that instance output would be the same as it would be under perfect competition: every purchaser willing to pay the cost of producing a widget could buy one. For this reason — that output under perfect price discrimination is the same as output under perfect competition — commentators such as Judge Bork, R. BORK, *supra* note 2, conclude that although price discrimination *distributes* a great deal of wealth from consumers to sellers, it does not misallocate resources. Further, while perfect price discrimination might not be as consistent with optimal consumer welfare as perfect competition, it is more consistent with optimal consumer welfare than nondiscriminatory monopoly pricing would be, for the latter involves a reduction in output.

No one can engage in perfect price discrimination, however. Once we give up the illusion of perfect price discrimination we are also unable to determine whether price discrimination in fact results in larger outputs than nondiscriminatory monopoly pricing does. Suppose, for example, that the seller in the above example has a cost of \$1.00 per widget, a nondiscriminatory profit-maximizing price of \$1.50, and is able to isolate three broad groups of customers: low-preference buyers who are willing to pay \$1.00 but no more, medium-preference buyers who are willing to pay the profit maximizing

ciency or consumer welfare would not necessarily be improved if non-discriminatory differential pricing were condemned. Most economists argue that optimal efficiency occurs when each purchaser pays a price equal to the marginal cost of serving that particular purchaser.²³ To the extent the differential pricing standard of the Robinson-Patman Act departs from this goal, it frustrates the general antitrust policy of improving allocation of resources and maximizing consumer welfare.

The courts have historically interpreted the Robinson-Patman Act in a manner inconsistent with the current ideology of antitrust, but that does not mean that the Act is irrational. Congress and the judiciary could reasonably use the Robinson-Patman Act to protect a different set of interests than the other antitrust laws protect. For example, Con-

price of \$1.50, and high-preference buyers who are willing to pay \$2.00. The seller also discovers that the costs of preventing arbitrage between the \$1.00 group and the \$1.50 group are very high, while the costs of preventing arbitrage between the \$1.50 group and the \$2.00 group are quite low. Alternatively, the seller might discover that the people in the \$1.50 group are quite cost-conscious, and that many of them will in fact purchase the product at \$1.00 if it is offered in "good," "better," and "best" packages, even though they would be willing to pay \$1.50 if the \$1.00 version were not available. In general, it is plausible to assume that low-preference buyers are more cost-conscious than high-preference buyers. Under these circumstances it is reasonable for the seller to offer its product in the \$2.00 package and the \$1.50 package, but not in the \$1.00 package. That is to say, the availability of price discrimination to a seller may encourage the seller to discriminate *within* the class of persons willing to pay more than the nondiscriminatory profit maximizing price, but not to offer the product at all to customers unwilling to pay the profit maximizing price. In such circumstances output under price discrimination is no greater than output under nondiscriminatory monopoly pricing. Further, to the extent that even this super profit maximizing price discrimination is imperfect, output will in fact be less than it would be if the defendant were selling its entire output at the profit maximizing price. See J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 188 (1933).

Even assuming that a particular instance of price discrimination results in increased output, there may be good policy reasons for condemning it. As Judge Posner has noted, the notion that price discrimination, or other kinds of monopoly pricing, simply transfers wealth away from consumers and toward sellers is unrealistic, for it fails to recognize that a profit maximizing seller will spend substantial resources to acquire and maintain the requisite market power. If a certain amount of market power will enable a seller to make 10¢ per widget in monopoly profits, it will be willing to expend any amount of money up to 10¢ to acquire this power. Perhaps it will expend these monies in socially valuable activities such as cost-justified research and development; on the other hand, it may expend them in socially detrimental ways, such as false advertising or industrial espionage. To the extent it does the latter, the consumer cost of monopoly pricing is not a wealth transfer to sellers at all, but deadweight loss. See R. POSNER, *supra* note 9, at 10-11.

²³ See, e.g., E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATION* 254 (1982).

gress has labor laws that "conflict" with the antitrust laws to the extent that labor laws impose costs on employers which are eventually passed on to consumers. More explicitly, the Small Business Administration's subsidized loan programs favor small businesses at the expense of larger, more efficient businesses. To the extent that taxpayers pay for such loans, small business is aided at the consumers' expense.

The chief objection to the Robinson-Patman Act is not that it protects small business and makes consumers pay the price, but that it does so disguised as an antitrust law. The Clayton Act includes the Robinson-Patman Act along with other antitrust laws.²⁴ Private plaintiffs pleading under the Robinson-Patman Act have standing²⁵ under the Clayton Act's provision for private damages actions.²⁶ Robinson-Patman plaintiffs generally establish venue and personal jurisdiction under the same special provisions applicable to the antitrust laws.²⁷ As a result, everyone considers the Robinson-Patman Act part of the corpus of antitrust legislation but many regard it as a misfit.

The relationship between the Robinson-Patman Act and the rest of the antitrust laws has not always been disharmonious. Today courts increasingly hold that the antitrust laws ought to maximize consumer welfare, allocative efficiency, or both.²⁸ In 1914 and 1936, when the Clayton Act and the Robinson-Patman Act were passed, neither consumer welfare nor allocative efficiency were prominent antitrust goals. Antitrust law had entered a long period, lasting roughly until the end of the Warren Court era, during which it developed a policy of protect-

²⁴ 15 U.S.C. § 14 (1976).

²⁵ 15 U.S.C. § 15 (1976 & Supp. V 1981).

²⁶ 15 U.S.C. § 1314 (1976).

²⁷ 15 U.S.C. §§ 15, 22 (1976 & Supp. V 1981).

²⁸ See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (consumer standing); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (combinations in restraint of trade); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (private enforcement); *United States Steel Corp. v. Fortner Enter., Inc.*, 429 U.S. 610 (1977) ("*Fortner II*") (tying arrangements); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("antitrust injury"); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (mergers); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981) (predatory pricing), *cert. denied*, 103 S. Ct. 57 (1982); *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981) (predatory pricing), *cert. denied*, 455 U.S. 943 (1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979) (monopolization), *cert. denied*, 444 U.S. 1093 (1980); Posner, *The Antitrust Decisions of the Burger Court*, 47 ANTITRUST L.J. 819 (1978); Sullivan, *The Economic Jurisprudence of the Burger Court's Antitrust Policy: The First Thirteen Years*, 58 NOTRE DAME L. REV. 1 (1982); Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1 (1980).

ing small business at the expense of consumers.²⁹ The case law of Robinson-Patman evolved largely during this period.³⁰

With a great deal of painful reconstruction, the federal courts have been overhauling Sherman and Clayton Act policy, generally to protect consumers more, small competitors less, and to encourage efficiency in the production and distribution of goods and services.³¹ A similar overhaul of the Robinson-Patman Act poses difficult problems. First, the other antitrust laws grant extensive judicial discretion. The first two sections of the Sherman Act in particular are brilliant for their malleability. They can as easily justify the antitrust policies of the Reagan administration and the Burger Court as those of the Johnson administration and the Warren Court. Neither administration's policy committed atrocities on the statute's language. Even the original Clayton Act's provisions condemning specific practices, such as tie-ins and mergers, expressly required an injury to "competition" as part of the test for illegality. Tie-ins, exclusive dealing, and mergers are illegal only when they substantially lessen competition or tend to create monopoly.³² On the other hand, the Robinson-Patman Act condemns differential pricing when "the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"³³

Within the modern consumer welfare model of antitrust analysis,

²⁹ *E.g.*, "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). For a general critique of Warren Era antitrust policy, see R. BORK, *supra* note 2. A recent history of antitrust policy during that period, generally laudatory, is T. KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT* (1980). See also Hovenkamp, Book Review, 33 *HASTINGS L.J.* 755 (1982).

³⁰ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Borden Co.*, 383 U.S. 637 (1966); *United States v. Borden Co.*, 370 U.S. 460 (1962); *FTC v. Henry Broch & Co.*, 363 U.S. 166, *reh'g denied*, 364 U.S. 854 (1960); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

³¹ See *supra* note 28. For a critique, see Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65 (1982).

³² Clayton Act § 3, 15 U.S.C. § 14 (1976); Clayton Act § 7, 15 U.S.C. § 18 (1976 & Supp. V 1981).

³³ 15 U.S.C. § 13(a) (1976).

"competition" refers to that state of affairs in which prices are driven to cost, output is maximized, and consumer welfare is optimal.³⁴ However, Congress meant different things at different times when it used the word "competition" in the antitrust laws, and did not always have the economist's definition in mind. Judge Robert Bork has argued that when passing the Sherman Act in 1890, Congress used the economist's definition of "competition" and chose consumer welfare as its preeminent goal.³⁵ However, when Congress used the word "competition" in 1936 in the Robinson-Patman Act,³⁶ and again in 1950 in the Celler-Kefauver amendments to section 7 of the Clayton Act,³⁷ it was not referring to a situation in which prices are driven to cost and output is maximized. Rather, Congress defined "competition" as a situation in which a large number of sellers struggle against each other in the same market. Within that paradigm, a market with 100 small producers struggling against one another is more "competitive" than a market with three very large producers, even though economies of scale might make consumer prices lower in the latter market than in the former. For example, automobile prices would almost certainly be higher in the United States today if the automobile market contained 100 manufacturers each with a one percent market share.³⁸

The "competition" language of the Robinson-Patman Act will not easily satisfy the economist's definition of competition. The first half of

³⁴ See R. BORK, *supra* note 2, at 58-61. An extensive treatment of the definition of "competition" in antitrust law and in economic theory, and the differences between them before the rise of the consumer welfare model for antitrust, can be found in D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* (1959); see also Mason, *Monopoly in Law and Economics*, 47 *YALE L.J.* 34 (1937).

³⁵ See Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J.L. & ECON.* 7 (1966).

³⁶ See R. POSNER, *supra* note 2, at 25-28; F. ROWE, *supra* note 7, at 11-23; Levi, *The Robinson-Patman Act — Is It in the Public Interest?*, 1 *A.B.A. SEC. ANTITRUST L. PROC.* 60, 64 (1982).

³⁷ See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *HARV. L. REV.* 226, 234 (1960); Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 *GEO. WASH. L. REV.* 1 (1982).

³⁸ See Scherer, *Economics of Scale and Industrial Concentration*, in *INDUSTRIAL CONCENTRATION: THE NEW LEARNING* 16 (1974). The example illustrates why the traditional definition of competition as a situation in which prices are driven to marginal cost is incomplete for the purposes of antitrust analysis. If the United States contained 100 auto manufacturers, each with a 1% market share, prices would probably be driven to marginal cost, but those costs would be higher. "Competition" is the state of affairs that emerges when prices are driven to marginal cost and firms are at their optimal size and distribution. In the 1950's and 1960's, antitrust scholars tended to appreciate the first part of the definition but to overlook the second part.

the "effect on competition" clause is consistent with this economist's definition because it assesses the same requirements as do sections 3 and 7 of the Clayton Act. The second part of the clause, however, protects competition "with any person who either grants or knowingly receives" a discriminatorily low price.³⁹ Here, Congress intended to address the injury to "competition" that exists between commercial enterprises *A* and *B*, and the injury that occurs when *B* takes advantage of a price discount unavailable to *A*. In short, the statute *defines* injury to "competition" as injury to *competitors*. Courts have attempted to read the consumer welfare model into such language with little success.⁴⁰ The result is an interpretation of the Robinson-Patman Act consistent with the consumer welfare policy of antitrust, but contrary to the plain language of the Act.

II. PRIMARY-LINE VIOLATIONS AND CONSUMER WELFARE

The Robinson-Patman Act condemns differential pricing at primary and secondary levels.⁴¹ In primary-line cases, the violation of the statute injures the violator's competitors. In secondary-line cases the violation injures the seller's customers. The same statutory language condemns both of these practices, and the courts have developed almost identical tests for illegality of both.⁴² The two offenses are in fact as different as lying and stealing, and the development of a unitary judicial rule has increased the confusion engendered by the Robinson-Patman Act.

The foremost evil which primary-line Robinson-Patman enforcement

³⁹ 15 U.S.C. § 13(a) (1976).

⁴⁰ See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *D.E. Rogers Assoc., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

⁴¹ There is also a so-called "tertiary-line" injury, which accrues to the customers of the disfavored purchaser. There are relatively few cases. See, e.g., *Standard Oil Co. v. FTC*, 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946), *aff'd*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

Finally, there has been judicial recognition of "fourth-line" injury, which accrues to competitors of favored indirect purchasers. See, e.g., *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). For criticism of the concepts of third- and fourth-line injury, see F. ROWE, *supra* note 7, at 196.

⁴² See *General Foods Corp.*, 50 F.T.C. 885, 887 (1954): "The standard for determining . . . unlawfulness . . . is the same whether the competitive injury occurs at the seller level or at the customer level," see also *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552-53 (1960).

seeks to deter is a form of predatory pricing.⁴³ In contrast, secondary-line enforcement is properly directed at a form of monopoly pricing in which a seller with market power uses price discrimination to extract higher profits from its output than it could obtain by charging a unitary price.⁴⁴

Primary-line price discrimination requires no market power, although firms may engage in it to acquire market power. Secondary-line price discrimination logically requires a seller with market power, although courts have failed to recognize this.⁴⁵ Primary-line injuries depend on predatory, below cost sales to favored purchasers, while the sales to disfavored purchasers are presumably profitable.⁴⁶ On the other hand, secondary-line injuries accrue from sales to the disfavored purchaser at a monopolistic price, above marginal cost.⁴⁷ It is irrelevant whether the sales to favored customers are at the competitive price. Remarkably, Congress was able to use the same words to describe both activities. Moreover, courts purport to apply the same substantive test

⁴³ See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

⁴⁴ See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Theoretically, discriminatory predatory pricing could also yield secondary-line liability. For example, if *D* were pricing predatorily in market *A*, but selling at a higher, competitive price in market *B*, *D* could face liability both from *D*'s competitors in market *A* and from its customers in market *B*. Although the courts have not yet so held, it seems clear that *D*'s customers in market *B* have not been "injured in their business or property" for the purposes of § 4 of the Clayton Act, 15 U.S.C. § 15 (1976 & Supp. V 1981), unless they can show that *D* actually raised prices in market *B* in order to subsidize predatory pricing in market *A*. As the analysis in the text reveals, see *infra* text accompanying notes 49-60, it is unlikely that the customers in market *B* can make that showing. If they cannot, then the inference is that they are still paying the same price they have always paid; they have simply not been permitted to be beneficiaries of *D*'s predatory activity in market *A*. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), discussed *infra* at notes 123-25.

⁴⁵ Cost-justified *differential* pricing, which is nondiscriminatory, does not require that the seller have market power. However, true secondary-line price discrimination, in which the seller as a general policy charges a price which may be competitive to favored purchasers, but a supracompetitive price to disfavored purchasers, requires the seller to have a certain amount of market power. Otherwise the disfavored purchasers would purchase the product from a competitor at the competitive price. See Hovenkamp, *supra* note 22.

⁴⁶ Whether the sales to disfavored purchasers actually are profitable is irrelevant. See *infra* text accompanying note 59.

⁴⁷ See R. POSNER, *supra* note 2, at 3-10.

for legality to them. The balance of this Article addresses chiefly the first practice: predatory, or primary-line, violations.

III. PREDATORY DIFFERENTIAL PRICING IN TWO GEOGRAPHIC MARKETS

The framers of the original price discrimination provision of the Clayton Act believed that a large and powerful seller could finance predatory pricing by engaging in price discrimination.⁴⁸ Their theory: suppose *A* and *B* are competitors in a certain market. *B* operates only in this market, but *A* is large and operates in other geographic markets as well. In some of these markets, *A* has monopoly power. *A* attempts to drive *B* out of business so that *A* can also acquire a monopoly in the market shared with *B*. *A* does this by pricing its output below cost in *B*'s market. Meanwhile, *A* raises its price in other markets, where it has monopoly power. *A* then uses these increased revenues to pay for the predatory pricing in the market shared with *B*.⁴⁹

Today we know that *A*'s scheme is implausible. If *A* is a rational businessperson and there are no legal or physical restraints on price discrimination, *A* is already selling its output in each market at the profit maximizing price. *A* cannot raise its price in some markets to subsidize predatory pricing in a different market. If *A* raised its price in its monopoly markets to more than the profit maximizing level, it would produce less, not more, net revenue.

One answer to the above objection is that there is a law against selling the same product in two different markets at two different prices. As a result, *A* may not be selling its output in each area at the profit maximizing price for that market. Possibly, *A* is selling at its profit maximizing price for all markets taken together in compliance with the Robinson-Patman Act. If *A* could segregate the markets and avoid the law, *A* could obtain larger profits by selling at higher prices in selected

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Every concern that engages in this evil practice [of predatory price cutting] must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities.

S. REP. NO. 698, 63d Cong., 2d Sess. 3 (1914). The theory antedates the Clayton Act by at least 25 years. See Stimson, *Trusts*, 1 HARV. L. REV. 132, 134 (1887). Also, the theory was still popular in 1936, when the Clayton Act was amended by the Robinson-Patman Act. See JUSTICE DEP'T REPORT, *supra* note 3, at 124-25.

⁴⁹ See 80 CONG. REC. 3113, 8116 (1936); see also *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954).

areas. For example, suppose *A* sells in three different markets: #1, #2, and #3. It possesses monopoly power in #1 and #2 but faces competition in #3. The profit-maximizing monopoly price in markets #1 and #2 is \$1.00. Because of competition, however, *A*'s profit maximizing price in #3 is 90¢. If *A* prices at more than 90¢, most of *A*'s customers will turn to *A*'s rivals in #3.

If *A* is legally prohibited from selling its output at different prices in different markets, *A* must choose either to sell in all three markets at 90¢, in all three markets at \$1.00, or in all three markets at some price between 90¢ and \$1.00. Under some circumstances, a decision to sell in all three markets at 90¢ might be profit maximizing, particularly if market #3, the competitive market, is much larger than the two monopoly markets.

Suppose *A* decided that its profit maximizing price in the three markets taken together is 90¢, and has been selling at that price. Now *A* decides to drive its market #3 competitor out of business by lowering its price there to 80¢. Once *B* has been dispatched, *A* can raise its price in all three markets. Absent any legal sanction, *A* might be able to price its output in markets #1 and #2 at \$1.00 rather than 90¢ and obtain even more revenue, since the profit maximizing price in each of those markets considered alone is \$1.00. The Robinson-Patman Act, however, will require *A* to reduce its price to 80¢ in all three markets to reduce it in any market.

In short, the statute *can* make predatory pricing more expensive for a seller who operates in many markets but is engaged in predatory pricing only in one. The seller will have to lower its price in all markets simultaneously. Furthermore, predatory pricing is relatively easy to conceal. It is identifiable only from complex cost figures that may be in the exclusive control of the predator.⁵⁰ Price differences, however, are not so easy to conceal in most cases.⁵¹ If the predator decides to cut prices only in the predatory market, in violation of the Robinson-Patman Act, the predatory activity will readily be discovered and

⁵⁰ For example, under the Areeda-Turner test, predatory pricing is a function of the defendant's marginal cost, although average variable cost is generally used as a surrogate. See P. AREEDA & D. TURNER, *supra* note 19.

⁵¹ Price differences are easier to conceal if they are based on secret rebates or price concessions, rather than on publicly announced prices. The secrecy, however, makes predatory pricing much more difficult because the customers of the victim will not switch to the predator unless they know about the predator's lower prices. See *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

condemned.⁵²

The effect of a law against differential pricing in various geographic markets is not as simple as the above illustration suggests. Certainly, primary-line application of the Robinson-Patman Act may make predatory pricing more expensive. The sad irony, however, is that the statute makes *competitive* pricing in market #3 of the above illustration more expensive too.

Suppose, for example, A has had a monopoly in markets #1, #2, and #3 for some time and has enjoyed supracompetitive profits from making sales in all three markets at \$1.00 each. Now B enters market #3 and begins price-cutting to a competitive price of 90¢. The Robinson-Patman Act may give A the difficult choice of either dropping its price to 90¢ in all three markets in order to preserve its position in market #3, or closing its outlets in that area, effectively conceding a monopoly to B.⁵³ The latter option may be preferable, particularly if

⁵² This assumes that the predatory price discrimination is also *differential* pricing. One of the irrationalities of the Robinson-Patman Act's identification of price "discrimination" with price difference is that many instances of predatory pricing can fall outside the scope of the statute because, although there is true geographic price discrimination, there are no price differences.

For example, assume that company X manufactures widgets in Chicago and sells them in Chicago and Cleveland. Company Y manufactures widgets in St. Louis and sells them in St. Louis and Cleveland. Company X can engage in predatory pricing against company Y in Cleveland by selling widgets at the same delivered price in both Chicago and Cleveland. Its marginal and average variable costs of serving the Cleveland customers might be substantially higher than in Chicago, depending on the costs of shipping widgets to Cleveland. Using the Areeda-Turner test that a price below average variable cost is predatory, company X's price in Cleveland might well be predatory while its price in Chicago is nonpredatory, even though the delivered price in both cities is the same. However, as a general rule, where the delivered price is the same to all customers there is no price "discrimination" within the meaning of the Robinson-Patman Act, although the marginal cost to the seller of servicing remote customers might be substantially higher than the marginal cost of servicing nearby customers, and true economic price discrimination does in fact exist. See *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 948 (D. Conn. 1966); *Chain Inst., Inc.*, 49 F.T.C. 1041, 1105 (1953), *aff'd*, 246 F.2d 231 (8th Cir.), *cert. denied*, 355 U.S. 895 (1957).

⁵³ One recent piece of judicial reconstruction by the United States Supreme Court may eventually give the nonpredator a defense in a primary-line case, although it is of little use in enabling a court to determine whether differential pricing with a primary-line victim is predatory or competitive. In *Falls City Indus. v. Vanco Beverage, Inc.*, 103 S. Ct. 1282, 1286 (1983), the Supreme Court held that the "meeting competition" defense of § 2(b) of the Robinson-Patman Act entitles a seller to charge a lower price in order to meet competition on an areawide basis, rather than on a customer-by-customer basis, as the Supreme Court had appeared to hold in *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945). The defense is of limited utility in primary-line cases,

market #3 is relatively small. Thus, a statute prohibiting differential pricing at the primary line is as likely to prohibit competitive pricing as predatory pricing. At the time the Robinson-Patman Act was passed, predatory pricing was viewed as relatively common, inexpensive, and easy to accomplish provided one had the resources.⁵⁴ Today, predatory pricing is perceived as extraordinarily difficult to accomplish and quite rare.⁵⁵ The Robinson-Patman Act probably condemns more instances of competitive pricing than of predatory pricing.

One solution to this dilemma is to interpret the Act as condemning differential pricing at the primary line when it is predatory, but tolerating it when it is competitive. Some circuits, notably the Ninth, have recently attempted this.⁵⁶ To do so, the court must determine if the alleged predatory sales are made below cost, and with the reasonable expectation that they will dispatch competitors from the market or discipline them to permit the predator to reap the benefits of monopoly pricing later.⁵⁷

This determination is identical with the one courts make today in cases alleging predatory pricing under section 2 of the Sherman Act.⁵⁸ The reason for the identical analysis is clear: the presence or absence of differential pricing or price discrimination in different geographic mar-

largely because the defense permits the seller to meet a lower price that a rival seller is already offering, but not to initiate an otherwise illegal price cut. *Falls City Indus.*, 103 S. Ct. at 1282.

⁵⁴ See Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J.L. & ECON. 129 (1972).

⁵⁵ See, e.g., R. BORK, *supra* note 2, at 144-48; R. POSNER, *supra* note 9, at 184-96; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Some commentators think that predatory pricing is so difficult that it is irrational. See, e.g., Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

⁵⁶ See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793 (9th Cir. 1969); see also *D.E. Rogers Assoc., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1438-39 (6th Cir. 1983); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

⁵⁷ *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041-42 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

⁵⁸ See *supra* note 47.

kets is irrelevant to whether a seller is engaging in predatory pricing in a particular market. Although a law against differential pricing makes both predatory practices and intense competition in a single market more expensive for a firm that sells the same product in other markets, the presence of differential pricing is no help to a court in distinguishing whether the pricing in the low-priced market is predatory or competitive. To determine if pricing in the low-priced market is predatory, the court must analyze the relationship between the defendant's prices and its costs in that particular market. Pricing in that market is predatory if the sole explanation for the pricing is that the defendant is selling below cost today to drive rivals from the market so it can price monopolistically tomorrow.

The test for predatory pricing under the Robinson-Patman Act is actually more stringent than the test for predatory pricing imposed by section 2 of the Sherman Act. First, the Robinson-Patman Act requires the plaintiff to show that the defendant is selling the same product in a different geographic market at a different price. Second, the Robinson-Patman Act has a host of subject-matter limitations that do not apply to the Sherman Act.⁵⁹ The result is a Robinson-Patman Act that is worse than no act at all. Recent circuit court decisions have illustrated this problem.

*William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*⁶⁰ provides the best example of such analysis. The court used a virtually identical analysis for the predatory pricing claim under section 2 of the Sherman Act and the primary-line claim under the Robinson-Patman Act. Inglis, a small, family-owned bakery, was engaged in intense competition with the defendant, ITT Continental, one of the giants in the

⁵⁹ For a survey of the subject-matter limitations of the Robinson-Patman Act, see F. ROWE, *supra* note 7. For example, the Act applies only to sales and not to leases. *Export Liquor Sales v. Ammex Warehouse Co.*, 426 F.2d 251 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). As a result of this limitation, there is extensive case law as to whether agency agreements, licensing arrangements, or sales on consignment are covered by the statute. See, e.g., *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, 360 F.2d 913 (7th Cir.), *cert. denied*, 385 U.S. 957 (1966). The sales at differential prices must be "contemporaneous." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947). The sales must be sales of "commodities," and not of services. *TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256 (8th Cir. 1972). The irony of this requirement is that as a general rule it is easier to price discriminate in the delivery of services than in the delivery of commodities, for in the provision of services, arbitrage is not a problem. For example, a dentist who charges wealthy patients high fees and poorer patients low fees does not generally need to worry that poorer patients will resell the service to the wealthy patients.

⁶⁰ 668 F.2d 1014 (9th Cir.), *cert. denied*, 103 S. Ct. 57 (1982).

industry, and two other sizable bakeries. The market had excess capacity, prices were so low that Inglis could not sustain itself, and it went out of business. Inglis initially sued all three competitors, alleging a conspiracy to drive it out of business. That course having failed, Inglis alleged that ITT had engaged in predatory pricing and primary-line price discrimination.⁶¹

The Ninth Circuit's analysis of Inglis's predatory pricing claim is important because it provides a basis for analyzing the primary-line Robinson-Patman claim. The Ninth Circuit had toyed for many years with the Areeda-Turner test for predatory pricing.⁶² In *Inglis*, the court rejected important elements of that test while still accepting the test's basic price framework.⁶³

In devising their predatory pricing test, Professors Areeda and Turner began with the premise that the law of predatory pricing ought to identify pricing conduct that can be explained most reasonably as an attempt by the alleged predator to drive competitors from the market today in order to reap the benefits of monopoly pricing tomorrow.⁶⁴ Further, the anticipated monopoly profits must be sufficient when discounted to their present value to pay the full cost of today's predatory activity. Otherwise, no reasonable business would undertake predatory pricing as a means of acquiring a monopoly.⁶⁵

The Areeda-Turner rule, in broad outline, states that pricing below average total cost often makes sense. It enables a seller to clear inventory, to meet ever-changing markets, and to raise revenue in the short-run to meet immediate needs. Pricing below average total cost but above marginal cost can be either profit maximizing or loss minimizing, at least in the shortrun.⁶⁶ However, pricing below marginal cost makes no sense unless it can be explained as a mechanism for disciplining

⁶¹ *Id.* at 1024-26.

⁶² The Areeda-Turner test for predatory pricing was first developed in Areeda & Turner, *supra* note 55. A lengthy scholarly debate ensued. The test, with some modifications, now appears in P. AREEDA & D. TURNER, *supra* note 19, at ¶ 711d. For analysis of the test and a summary of the scholarly proposals and counterproposals, see Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981); Easterbrook, *supra* note 55; Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982).

⁶³ See also *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983), in which the Ninth Circuit rejected the Areeda-Turner rule of per se legality for prices above average total cost.

⁶⁴ P. AREEDA & D. TURNER, *supra* note 19, at ¶ 711b.

⁶⁵ *Id.*

⁶⁶ *Id.* at ¶ 713.

competitors or driving them from the market so that the seller can later price monopolistically. Unfortunately, marginal cost is an economist's concept virtually impossible to measure in the courtroom. Therefore, Areeda and Turner suggested average variable cost as a surrogate for marginal cost.⁶⁷ The final version of their test holds that pricing at or above reasonably anticipated average variable cost ought to be presumed lawful. Pricing below reasonably anticipated average variable cost should be conclusively presumed illegal.⁶⁸

In *Inglis*, as it had previously,⁶⁹ the Ninth Circuit essentially accepted the basic cost paradigm of the Areeda-Turner test for predatory pricing.⁷⁰ However, the court modified the specific elements of the proposed Areeda-Turner test, placing less emphasis on purely economic performance and somewhat more emphasis on subjective factors such as intent.⁷¹ The resulting analysis may be an economist's nightmare, but it takes a great many economic factors into account. *Inglis* held that to prove predatory pricing the plaintiff must show "the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power."⁷² To this point the Ninth Circuit test falls within the Areeda-Turner paradigm. The ambiguity in the *Inglis* test is the word "anticipated" — for it does not indicate whether it should be measured objectively or subjectively. Areeda and

⁶⁷ *Id.* at ¶ 715d.

⁶⁸ *Id.* at ¶ 711d. The Areeda-Turner test and similar tests for predatory pricing are predicated on assumptions about market structure that have never been relevant in Robinson-Patman litigation. For example, Areeda and Turner would apply their test only to a "monopolist." P. AREEDA & D. TURNER, *supra* note 19, at ¶ 711d. In general, only concentrated markets with high entry barriers are conducive to predatory pricing, and only the dominant firm or firms in such a market will be able to undertake predation with any prospect of success. See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 245 (1979); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 292 (1977).

⁶⁹ *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

⁷⁰ However, the court generally overlooked issues of market structure. See Hovenkamp & Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 ARIZ. ST. L.J. 442.

⁷¹ *Inglis*, 668 F.2d at 1033-36. For comparison of the Areeda-Turner test with the test formulated in *Inglis*, see P. AREEDA & D. TURNER, *supra* note 19, at ¶¶ 711.1, 714.2, 714.5, 715.2e, 720, 729.5.

⁷² 668 F.2d at 1035.

Turner used “reasonably anticipated,”⁷³ preferring an objective rather than subjective measure of predatory conduct. This conduct is to be gleaned from pricing practices alone, not from the defendant’s state of mind. The Ninth Circuit eliminated the word “reasonably,” using a mixed objective and subjective theory. The Ninth Circuit’s test begins with pricing practice to establish a basic framework, then continues by looking at the defendant’s motivation. The court held that if the defendant’s prices are below average total cost but above average variable cost, the plaintiff must show that there was predatory intent.⁷⁴ However, if the prices are lower than the defendant’s average variable costs, then the “plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.”⁷⁵ Thus, the Ninth Circuit’s test may create somewhat broader liability than the Areeda-Turner test when the defendant’s pricing was above average variable cost.⁷⁶ On the other hand, the test appears easier on defendants when the defendant’s prices are determined to be lower than average variable cost, because the presumption of illegality is not conclusive but rebuttable.⁷⁷ In *Inglis* the evidence from pricing activity failed to distinguish clearly between fixed and variable costs.⁷⁸ Further, the evidence of defendant’s subjective intent was inconclusive. The court therefore held that the trial judge properly ordered a new trial.⁷⁹

The Ninth Circuit’s analysis of the same allegations under the Robinson-Patman Act was remarkably similar to its interpretation of the Sherman Act.⁸⁰ No one disputed that Continental had sold bread in California and Nevada at different prices: “price discrimination”

⁷³ P. AREEDA & D. TURNER, *supra* note 19, at ¶ 711.

⁷⁴ *Inglis*, 668 F.2d at 1035-36.

⁷⁵ *Id.* at 1036.

⁷⁶ The Ninth Circuit test is also different from the Areeda-Turner test when the defendant’s prices have been determined to be above average total cost. The Areeda-Turner test would hold that a price above average total cost is legal; however, the Ninth Circuit is willing to entertain the possibility that a price above average total cost could be predatory. See *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983).

⁷⁷ *Inglis*, 668 F.2d at 1036.

⁷⁸ *Id.* at 1038.

⁷⁹ *Id.* at 1038-39.

⁸⁰ Areeda and Turner also advocate using the same cost tests for primary-line Robinson-Patman cases as for predatory pricing under § 2 of the Sherman Act. P. AREEDA & D. TURNER, *supra* note 19, at ¶ 720c.

within the meaning of the Robinson-Patman Act.⁸¹ The question was what test to apply. The Ninth Circuit concluded that "there exists no reason to establish principles for primary-line price discrimination cases different from those we recognized in attempt to monopolize cases."⁸² The court then developed a standard for pricing activity in the lower priced market virtually identical to the predatory pricing standard:

A plaintiff may establish the required effects on competition in a primary-line case even though the defendant's prices were shown to be above marginal cost. However, unless the plaintiff proves that the prices were below the defendant's average variable cost, the plaintiff bears the burden of establishing that the anticipated benefits of the prices depended on their anticipated destructive effect on competition. If the plaintiff does prove pricing below average variable cost, the burden shifts to the defendant to establish a legitimate business justification for its conduct.⁸³

The Ninth Circuit held once again that a new trial was in order. Although the plaintiff established that some of Continental's prices in the California market were below average total cost, it "failed to establish by sufficient evidence either that Continental's prices were below average variable cost or that the benefits of Continental's prices depended on their anticipated tendency to eliminate competition."⁸⁴

The Ninth Circuit refrained from holding the economic tests for primary-line differential pricing under the Robinson-Patman Act and predatory pricing under the Sherman Act totally equivalent. The court observed that an offense under the Robinson-Patman Act might "perhaps be established without proof of predatory intent or predatory pricing."⁸⁵ However, *Inglis* provided no clue as to what the circumstances of such a case might be. It specifically held that in the case before it the plaintiff must meet both intent and conduct requirements identical to the requirements assessed for predatory pricing under the Sherman Act.

The stated test for attempts to monopolize under section 2 of the Sherman Act, including predatory pricing, requires the plaintiff to show a "dangerous probability of success." The Robinson-Patman Act

⁸¹ *Inglis*, 668 F.2d at 1040.

⁸² *Id.* at 1041.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1042. Previously, the Ninth Circuit had suggested that the substantive test for predatory pricing under § 2 of the Sherman Act and primary-line discrimination under the Robinson-Patman Act were the same. See *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

requires only that the price discrimination "may" substantially lessen competition.⁸⁶ The *Inglis* court held that "in this case . . . the distinction is of little significance."⁸⁷ Indeed, the Ninth Circuit found it impossible to formulate precisely how one might measure this difference.

The Ninth Circuit also considered the idea that the Robinson-Patman Act might impose an additional conduct requirement that the Sherman Act does not impose: that the defendant's higher prices in one market "subsidized" the lower prices in the plaintiff's market.⁸⁸ The defendant had argued that a plaintiff pleading under the Robinson-Patman Act must show its injury was caused by the Robinson-Patman violation. As the Robinson-Patman Act prohibits price *discrimination*, not merely predatory pricing, the plaintiff would have to show that the differential pricing between the two markets, not merely the sales below cost in the plaintiff's market, caused the plaintiff's injury. The Ninth Circuit found it unnecessary to decide whether the Robinson-Patman Act assessed this subsidization requirement.⁸⁹

As previous discussion suggests, the subsidy or "recoupment" theory of predatory pricing makes little economic sense.⁹⁰ To require a plaintiff to show subsidization, as the Ninth Circuit apparently realized, would make the Robinson-Patman Act test far more stringent than the test for predatory pricing under the Sherman Act.⁹¹

However, the logic of the defendant's argument is compelling: not requiring that the plaintiff show "subsidization," or some other relationship between the higher priced and lower priced markets in which the defendant is selling, makes the Robinson-Patman price discrimination requirement superfluous. By refusing to assess the subsidization requirement, the Ninth Circuit effectively formulated a Robinson-Patman test that totally ignores that the defendant in *Inglis* was selling its product at different prices in different geographic markets. The Ninth

⁸⁶ 668 F.2d at 1042.

⁸⁷ *Id.* Professor Areeda agrees. P. AREEDA & D. TURNER, *supra* note 19, at ¶ 714c2.

⁸⁸ *Inglis*, 668 F.2d at 1042-43.

⁸⁹ *Id.*

⁹⁰ See *supra* text accompanying notes 48-54.

⁹¹ One is hard put to determine what a "subsidization" showing would be like. Would a mere showing that the defendant is making monopoly profits in the same product in a different geographic market be enough? How about monopoly profits in a different product? Must the plaintiff show that the defendant is actually using these monopoly profits in order to finance loss pricing in the target market? Or would the plaintiff need to show that the defendant actually raised its prices of the same product in a different geographic market, at the same time that it lowered its prices in the target market?

Circuit's test questions only the pricing activities of the defendant in the plaintiff's market. That the defendant in *Inglis* was selling at a higher price in a different market was an irrelevant detail used only to create jurisdiction under the statute.⁹²

IV. PREDATORY DIFFERENTIAL PRICING IN A SINGLE GEOGRAPHIC MARKET

*Inglis*⁹³ and the historical theory of predatory differential pricing involved the predator selling its output at a low price in one geographic market and at a higher price in others, allegedly to "subsidize" the lower prices. Under the traditional theory, the existence of separate geographic markets was important. It helped to explain why there was no arbitrage and why customers in the higher priced markets would not simply buy from the predator in the lower priced markets.⁹⁴ The separation of the markets appeared to make the "subsidization" theory plausible. For example, in *Utah Pie Co. v. Continental Baking Co.*,⁹⁵ the defendants' low-priced market was in Salt Lake City. Their high-priced markets included Virginia, Iowa, Michigan and Pennsylvania: clearly different geographic markets for frozen pies at the grocery store level.⁹⁶ A grocer in Salt Lake City would probably not find it profitable to buy frozen pies a dime cheaper in Chicago and pay the costs of transporting them to Salt Lake. In *Inglis*, the defendant's low-priced

⁹² The antitrust injury doctrine developed by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), supports the defendant's argument. The antitrust injury doctrine, as formulated by Justice Marshall, requires that the plaintiff's injury occurred "by reasons of" that which made the [conduct] unlawful." *Id.* at 488. If the antitrust injury doctrine applies to the Robinson-Patman Act — and the Supreme Court's holding in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981), says that it does — then the plaintiff in a primary-line Robinson-Patman Act case must show that it has been injured "by reason of" the differential pricing, not simply that the differential pricing is illegal and that the plaintiff has been injured.

⁹³ *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

⁹⁴ That city A and city B are distinct geographic markets implies that a seller's ability to price its output at above cost in city A will, up to a certain point, not be frustrated by resales made by purchasers who bought in a more competitive market in city B. For example, if widgets are sold in competition in city B at a price of \$1.00, and if total transportation and transaction costs of moving widgets from city B to city A and reselling them there are 25¢, then even a monopolist in city A would not be able to price its output higher than \$1.25 for long. However, if the monopolist in city A prices its output at less than \$1.25, it will not face arbitrage from city B.

⁹⁵ 386 U.S. 685 (1967).

⁹⁶ *Id.* at 689.

market for fresh bakery bread was in California, and the high-priced market was in Nevada.⁹⁷

Predatory differential pricing is a different phenomenon when it occurs within a single geographic market. However, one kind of price discrimination involving sales within a single geographic market, differential pricing of two different products, is similar to differential pricing between different geographic markets.

Suppose *A* is a diversified manufacturer that makes computers and chocolate cakes. *A* has a monopoly in its computers and is able to price its output substantially above marginal cost. The market for chocolate cakes, however, is more competitive, because *A* has an aggressive rival, *B*.

Assuming there is little cross-elasticity of demand between computers and chocolate cakes, the analysis of *A*'s ability to engage in predatory differential pricing in the chocolate cake market is identical to the analysis of a company selling the same product in two different geographic markets. *A* can use its monopoly profits from computer sales to finance its predatory pricing of chocolate cakes. However, having the money to finance predatory pricing does not ensure that it will be successful. *A* cannot simply raise the price of computers in order to subsidize the below-cost pricing of cakes. If *A* is rational, it is already selling computers at their profit maximizing price. But suppose that *A*'s rate of return on computer sales at a monopoly price is twenty-five percent, while its rate of return on cakes at a competitive price is five percent. If *A* decides to drop its asking price for cakes from a competitive price of \$1.00 to a predatory price of 75¢, no statute requires *A* also to drop the price of its computers. No law requires *A* to sell computers and cakes at the same price. No law prevents *A* from engaging in economic price discrimination between computers and cakes.

No plaintiff has ever claimed a primary-line Robinson-Patman injury because the defendant sold computers and chocolate cakes at different prices. The Robinson-Patman Act condemns the differential pricing of goods "of like grade and quality."⁹⁸ Nevertheless, analogous cases

⁹⁷ 668 F.2d at 1039. However, *Inglis* also involved a claim of differential pricing in the same geographic market, as between private label bread and brand name, advertised bread. *Id.*; see also *infra* text accompanying notes 98-122.

⁹⁸ 15 U.S.C. § 13(a) (1976). As a general rule, the "like grade and quality" requirement means that the goods must be physically identical. Mere differences in labeling will not suffice to make two products different. *FTC v. Borden Co.*, 383 U.S. 637 (1966). However, even relatively minor physical differences between two products can suffice to take the defendant out of the statute, because the products are not of "like grade and quality." See *Universal-Rundle Corp.*, 65 F.T.C. 924 (1964), *rev'd on other*

exist. Plaintiffs have argued that two different products are in fact of "like grade and quality" for the purposes of the Robinson-Patman Act, although customers distinguish the two products and willingly pay more for one than they do for the other.⁹⁹ *Inglis* is one such case. The plaintiff alleged not only that the defendant sold its output at two different prices in two different states, but also that it sold advertised, name-brand bread ("Wonder Bread") at one price, and unadvertised, private-label bread at a lower price.¹⁰⁰ The two breads were physically identical, although packaged differently.

The larger profits returned by selling Wonder Bread at a higher price than house bread indicate that consumers distinguish the two and are willing to pay more for Wonder Bread.¹⁰¹ This distinction by consumers is essential to the plaintiff's claim under the Robinson-Patman Act when the two products are being sold in the same geographic market. The plaintiff's allegation is that the defendant's sales of the lower-priced product are predatory, but that the defendant avoids the cost of lowering all its output to the predatory level by segregating a higher-priced product and selling that product at a profitable price.

Primary-line use of the Robinson-Patman Act in this way effectively allows the plaintiff to have it both ways at the same time. First, the plaintiff can show that the high-priced product and the low-priced product are sufficiently separate in consumer's eyes that some consumers are willing to pay high prices for the former. At the same time, the plaintiff can show that the high-priced product and the low-priced

grounds, 352 F.2d 831 (7th Cir. 1965), *rev'd on other grounds*, 387 U.S. 244 (1967); see also Medow, *Differences in Cost and Brand Valuation as Justification for Private Label Prices*, 39 ANTITRUST L.J. 857 (1970); Note, *Role of Consumer Preference in the 'Like Grade and Quality' Concept of the Robinson-Patman Amendment*, 23 BUFFALO L. REV. 709 (1974) [hereafter Note, *Consumer Preference*]; Comment, *The Borden Litigation — Its Impact Upon the Issues of Like Grade and Quality and Competitive Injury Under the Robinson-Patman Act*, 19 SYRACUSE L. REV. 898 (1968); Note, *Private Label Distribution: Lessening Competition Under the Robinson-Patman Act*, 35 U. CHI. L. REV. 529 (1968).

⁹⁹ See Note, *Consumer Preference*, *supra* note 98.

¹⁰⁰ *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1024 (9th Cir.), *cert. denied*, 103 S. Ct. 57 (1982). For an analogous case, see *FTC v. Borden Co.*, 383 U.S. 637 (1966).

¹⁰¹ The advertisement of Wonder Bread, but not house brand bread, also suggests that the cost of producing a loaf of Wonder Bread is higher than the cost of producing a loaf of house bread. If the higher price of Wonder Bread reflected the difference in marginal cost of producing and distributing it, there may have been no economic price discrimination. Under the structure of the Robinson-Patman Act this cost differential must be considered as part of the "cost justification" defense. *FTC v. Borden Co.*, 383 U.S. 637, 645-46 (1966); see also Medow, *supra* note 98.

product are “of like grade and quality” — that is, the same product — for the purposes of the Robinson-Patman Act.

It is illogical to make a case for discriminatory predatory pricing in the same geographic market based on the notion that the defendant is selling two different products of “like grade and quality” and subsidizing low-priced, predatory sales of one with high-priced sales of the other. Inglis’s claim was analogous to a claim that a defendant was using monopoly profits from computer sales to finance predatory prices in the market for chocolate cakes.¹⁰²

Predatory differential pricing has also been alleged when low-priced and high-priced sales were made in the same geographic market and the seller made no effort to distinguish two products in the eyes of consumers. No seller could engage in predatory pricing by publicly offering to sell to the victim’s customers at a predatory price of 80¢, while attempting to service its own customers in the same market at \$1.00. Arbitrage would be easy and the predator’s older, disfavored customers would insist on having the product at the lower price. However, if pricing is secret, a seller might steal a customer from a competitor by offering to sell to that customer at a discount. Suppose *A* and *B* are competing sellers and they sell their output at the competitive price of \$1.00. *A* now goes secretly to *B*’s customers and offers to sell to them at 90¢.¹⁰³

The plausibility of such a scheme depends on several factors. First, its success depends on continued secrecy, for disfavored customers will complain as soon as they find out. Both they and the predator’s competitor can file Robinson-Patman Act claims. It is also probable that one of *B*’s customers buying from *B* at \$1.00 will inform *B* of *A*’s attempts to steal the customer by underpricing. For such predatory pricing to work, *A* must secretly steal enough of *B*’s customers to drive *B* out of business. Each offer made to one of *B*’s customers, however, increases

¹⁰² The irrationality of the statute is borne out by the fact that some courts use one standard for determining whether the defendant’s two sales were of products of “like grade and quality,” but a different test in primary-line cases to determine whether the plaintiff is a competitor of the defendant — i.e., whether there is sufficient cross-elasticity of demand between the plaintiff’s product and the defendant’s product that the defendant’s low-price sales injured the plaintiff. See, e.g., *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518 (6th Cir. 1944); see also *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N.D. Ill. 1941).

¹⁰³ See *D.E. Rogers Assoc., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431 (6th Cir. 1983); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); see also *Shore Gas & Oil Co. v. Humble Oil & Refining Co.*, 224 F. Supp. 922 (D.N.J. 1963); *Electric Auto-Lite Co.*, 50 F.T.C. 73 (1953); *General Motors Corp.*, 50 F.T.C. 54 (1953); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953).

the chance that *B* will discover the price differential. If the price differential is made public and is not cost justified, all customers will insist on having the advantage. The only plausible way *A* can drive *B* out of business is for *A* to price its entire output in *B*'s market at a predatory level. In that case *B* might have a cause of action under section 2 of the Sherman Act, but not under the Robinson-Patman Act, unless *A* is also selling the same product at a different price in a different geographic market.

On the other hand, price differences do exist within single markets, and there are good policy reasons to encourage them. First, information is always less than perfect, and when particular buyers or sellers are not fully informed about market conditions at the time they negotiate a transaction, that transaction may be executed at a price different from the prevailing market price.¹⁰⁴

More importantly, such sporadic or spot price differences can facilitate the break-up of cartels or the destruction of conditions of oligopolistic pricing. For example, cartel members unhappy with the cartel agreement sometimes attempt to cheat on the cartel and enlarge their profits by giving secret rebates. The rebates either attract customers willing to pay the competitive price of a product but unwilling to pay the cartel price, or steal customers away from another cartel member. If the latter, the cartel is more likely to break up. Likewise, in an oligopoly situation sellers will use secret rebates or other secret price cuts in order to make extra, profitable sales without upsetting the apparent oligopolistic market structure.¹⁰⁵

In *O. Hommel Co. v. Ferro Corp.*,¹⁰⁶ the Third Circuit recently considered a claim that the defendant had injured a competitor by selling the same product at two different prices in a single geographic market. The product was frit, an ingredient used in the production of enamel surfaces on plumbing fixtures and kitchenware. The defendant's low-priced sales and its high-priced sales were products indisputably "of like grade and quality," and the plaintiff and the defendant were competitors with respect to the product.

Like the Ninth Circuit, the Third Circuit noted that predatory pricing should be analyzed identically under the Robinson-Patman Act and

¹⁰⁴ See generally Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187 (1979).

¹⁰⁵ JUSTICE DEP'T REPORT, *supra* note 3, at 47-58; R. POSNER, *supra* note 9, at 179-80; R. POSNER, *supra* note 2, at 11-14; G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 39, 43-44 (1968).

¹⁰⁶ 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

section 2 of the Sherman Act.¹⁰⁷ The court acknowledged that the Robinson-Patman Act might permit an inference of harm to competition if the plaintiff could show predatory intent by the defendant.¹⁰⁸ The Third Circuit defined predatory intent as the "intention of sacrificing present revenues with the hope of obtaining monopoly profits" in the future.¹⁰⁹ However, the court held that the mere fact that the defendant made secret cost concessions to certain purchasers was not sufficient evidence of such intent. If anything, secret price concessions by the defendant to a few favored customers had the effect of permitting the plaintiff to keep its customers. More probably, the court suggested, the defendant was using the secret rebates to undercut an oligopolistic price.¹¹⁰

The Third Circuit acknowledged that the Sixty-Third Congress, which passed the Clayton Act in 1914, believed that price discrimination within a single market was less threatening to competition than price discrimination between two or more different geographic markets.¹¹¹ Thus, the court distinguished *Hommel* from *Utah Pie*,¹¹² in which the Supreme Court appeared to apply an average total cost test for geographic price discrimination.¹¹³ The Third Circuit held that competitive harm in a Robinson-Patman case cannot be predicated "merely upon evidence of selective below-average [total] cost pric-

¹⁰⁷ *Id.* at 348. Actually, the Third Circuit noted first that the concept of predation under the Robinson-Patman Act "does not differ from the Sherman Act concept of predation." *Id.* Then in a footnote the court cited and approved *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), for the proposition that in primary-line issues § 2(a) of the Robinson-Patman Act and § 2 of the Sherman Act have the "same substantive content." However, the Third Circuit went on to say that it was not necessary in this case to decide whether the standards assessed by the two statutes are always identical. *O. Hommel Co.*, 659 F.2d at 348 n.9.

¹⁰⁸ *O. Hommel Co.*, 659 F.2d at 347.

¹⁰⁹ *Id.* at 348.

¹¹⁰ *Id.* at 348-49; *see also supra* note 105.

¹¹¹ *O. Hommel Co.*, 659 F.2d at 350. As the Court noted, the amendments to § 2 of the Clayton Act enacted in 1936, the Robinson-Patman Act, were concerned almost exclusively with secondary-line effects. Thus, the court found the legislative history from the original § 2, as enacted in 1914, relevant to primary-line injury. *Id.* at 347 n.8, 350 n.13.

¹¹² *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), discussed *supra* in text accompanying notes 95-96.

¹¹³ For explication and criticism of the Supreme Court's test, see Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967); Elzinga & Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978).

ing.”¹¹⁴ Thus, evidence of price-cutting within a single geographic market, with prices shown to be cut to below average total cost but not to below marginal cost, was not even sufficient to get the plaintiff to the jury.¹¹⁵

V. PRIMARY-LINE ACTIONS AND “ANTITRUST INJURY”

Recent case law has substantially eroded the distinction between the concept of “injury to competition” in the Robinson-Patman Act and in other antitrust laws.¹¹⁶ The “antitrust injury” doctrine developed by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*¹¹⁷ ought to erode that distinction even further.

In *Brunswick* the Supreme Court considered an illegal merger claim under section 7 of the Clayton Act.¹¹⁸ The plaintiff alleged that the defendant acquired one of the plaintiff’s competitors and operated it successfully. Without the acquisition, the acquired company would have gone out of business, increasing the plaintiff’s market share. The plaintiff claimed it was injured because the illegal merger increased competition in the plaintiff’s market.¹¹⁹

Without reaching the merits of the merger action, the Supreme Court held that the plaintiff had failed to state a cause of action because its theory was not predicated on the kind of injury which the antitrust laws were designed to prevent. To prevail, the plaintiff “must prove more than injury causally linked to an illegal presence in the market.” Rather, it must prove “antitrust injury,” which the Court defined as “injury of the type the antitrust laws were intended to prevent

¹¹⁴ *O. Hommel Co.*, 659 F.2d at 351.

¹¹⁵ *Id.* at 353. A very strong dissent argued that the majority rule was stricter than either the Areeda-Turner test or the Ninth Circuit’s modifications of that test in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982). Assuming that the defendant’s prices were below its average total costs but above its average variable costs, those tests would create a presumption for the defendant. However, they would permit the plaintiff to rebut the presumption, perhaps by showing predatory intent that could be inferred from long-term pricing practices. Here, the majority held that the jury was not entitled to make such an inference from the pricing practices themselves. *O. Hommel Co.*, 659 F.2d at 357.

¹¹⁶ *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982).

¹¹⁷ 429 U.S. 477 (1977).

¹¹⁸ 15 U.S.C. § 18 (1976).

¹¹⁹ 429 U.S. at 484.

and that flows from that which makes defendants' acts unlawful."¹²⁰ In short, in a private action the plaintiff must show not only that the defendant violated the antitrust laws and that the plaintiff was injured by the violation, but also that the injury was of a type from which Congress intended to protect the plaintiff, under the circumstances of the particular case.

For a time there was some question whether "antitrust injury" was a requirement of section 7 of the Clayton Act or of all of the antitrust laws.¹²¹ It now seems clear that the latter is true, at least with respect to rule of reason violations, although some authority asserts that antitrust injury will be inferred from per se violations.¹²² The antitrust injury requirement is assessed not by the individual antitrust laws but by section 4 of the Clayton Act. This section creates private causes of action for persons "injured in their business or property" by any violation of the antitrust laws. A private plaintiff pursuing a primary-line cause of action under the Robinson-Patman Act must satisfy not only the "injury" requirements of the Robinson-Patman Act but also the "antitrust injury" doctrine of *Brunswick*.

The Supreme Court has already applied the "antitrust injury" doctrine in a secondary-line Robinson-Patman case. In *J. Truett Payne v. Chrysler Motors Corp.*,¹²³ the Court held that a disfavored purchaser who could prove illegal "price discrimination" within the Robinson-Patman Act could not obtain automatic damages equal to the amount of the illegal price discrimination, multiplied by three.¹²⁴ Although the Court did not fully explain the "antitrust injury" requirements in a secondary-line Robinson-Patman case, it did indicate that the plaintiff must show more than the mere fact that it made less money or even went out of business as a result of the price discrimination. The Court

¹²⁰ *Id.* at 489.

¹²¹ See *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1232 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302-04 (4th Cir. 1979); *Mid-West Paper Prod. Co. v. Continental Group, Inc.*, 596 F.2d 573, 582 (3d Cir. 1979); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 498-500 (9th Cir. 1977); see also Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 COLUM. L. REV. 979, 994-97 (1977); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467 (1980).

¹²² *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1303 (4th Cir. 1979). If such an inference is warranted, it is because per se violations are often thought to have no efficient consequences, but only injurious ones.

¹²³ 451 U.S. 557 (1981).

¹²⁴ *Id.* at 561-63; see Note, *Tracing an Antitrust Injury in Secondary Line Price Discrimination Cases*, 50 FORDHAM L. REV. 909 (1982).

suggested that it required a showing that retail consumers paid more for cars as a result of the manufacturer's differential pricing.¹²⁵

Application of the antitrust injury concept to primary-line Robinson-Patman situations should require the plaintiff to prove that consumers are worse off because of the defendant's antitrust violations. Although courts and commentators are not yet in total agreement about the test that should be used for predatory pricing under section 2 of the Sherman Act, they do agree that the basic objective of that test is the maintenance of economic competition: a market in which prices are kept as close as possible to cost and consumer welfare is maximized. Such an interpretation of antitrust injury mandates that primary-line Robinson-Patman claims and predatory pricing claims brought under section 2 of the Sherman Act be analyzed by the same test.

CONCLUSION

When Congress enacted section 2 of the Clayton Act in 1914 and the Robinson-Patman Act in 1936, its members believed that predatory pricing was common, easily done, frequently reasonable, and facilitated by differential pricing. These beliefs are enshrined in the Robinson-Patman Act, even though we know today that they are, generally

¹²⁵ *J. Truett Payne*, 451 U.S. at 564. On remand, the Fifth Circuit found that the plaintiff had not established antitrust injury. See *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir.), *cert. denied*, 103 S. Ct. 212 (1982).

From a purely economic perspective the facts of *J. Truett Payne Co. v. Chrysler Motors Corp.*, do not make out a plausible case for secondary-line price discrimination. Such price discrimination generally requires the seller to have market power and use it to force certain buyers to pay a supracompetitive price while permitting other buyers to pay a lower, but nevertheless profitable price. The evidence in *J. Truett Payne* indicated that Chrysler did not have market power but was fighting a hard and often losing battle against competing automobile manufacturers. Its price discrimination was in fact the result of an incentive program that gave its retail dealers rebates as rewards for making retail sales quotas. To the extent the program had the effect it was intended to have, it forced Chrysler's dealers to compete more vigorously for sales, both with each other and with dealers of competing automobile manufacturers. It is not likely that such a program would represent an injury to "competition" within the "antitrust injury" doctrine of *Brunswick*, discussed *supra* at notes 117-20. See Hovenkamp, *supra* note 22, at 1171-72. For details of the Chrysler incentive program see *J. Truett Payne*, 451 U.S. at 559-60. Traditionally, the only "competitive injury" a primary-line plaintiff needed to show was that it had to lower its own prices to match the discriminatorily low prices of the defendant-competitor. See *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). For a good, historical analysis of injury tests in primary-line cases, see Gifford, *Primary-Line Injury Under the Robinson-Patman Act: The Development of Standards and Erosion of Enforcement*, 64 MINN. L. REV. 1 (1979).

speaking, unfounded. Judicial enforcement of the Robinson-Patman Act has historically entailed enormous social costs, many of which we have only recently begun to realize.¹²⁶

Recently, however, the consumer welfare paradigm of antitrust analysis has begun to influence judicial consideration of primary-line Robinson-Patman Act claims of predatory differential pricing. The effect of this new analysis has been to merge the legal standards that courts apply to primary-line Robinson-Patman claims with tests for predatory pricing claims under section 2 of the Sherman Act. Although this new interpretation of the Robinson-Patman Act runs counter to its language and its legislative history, it is absolutely essential if the anti-trust laws are to work as a functional unit and seek the single goal of maximizing consumer welfare.

¹²⁶ See R. BORK, *supra* note 2, at 384-85.

