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“Antitrust’s Least Glorious Hour”: The Robinson-Patman Act

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Abstract

In *The Antitrust Paradox*, Robert Bork explored many of antitrust’s misadventures. Specifically, Bork severely criticized the Robinson-Patman Act, which he characterized as “antitrust’s least glorious hour.” In this paper, we explore Bork’s criticism of the Robinson-Patman Act along with those of other legal scholars and economists. We analyze the central prohibitions of the act and explore their competitive implications. We also show that the act’s unfortunate prohibitions have been muted by the antitrust agencies’ benign neglect and three recent Supreme Court decisions.

1. Introduction

In *The Antitrust Paradox*, Robert Bork explored many of antitrust’s misadventures. At the time, not everyone agreed with his assessment of merger policy and the whole array of vertical restraints. When it came to the Robinson-Patman Act, however, Bork was neither first nor alone in his condemnation. He severely criticized the Robinson-Patman Act, which he characterized as “antitrust’s least glorious hour” (Bork 1978, p. 382). He referred to the act as “the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory” (Bork 1978, p. 382).[1] Bork found this ill-advised statute to be beyond repair and called for its repeal.

In this paper, we explore Bork’s criticism of the Robinson-Patman Act along with those of other legal scholars and economists. We analyze the central prohibitions of the act and explore their competitive implications. We also show that

Without blaming them for what follows, we thank Dennis Carlton, Kenneth Elzinga, Herbert Hovenkamp, Keith Hylton, and Daniel Sokol for helpful advice. We also thank the participants in the symposium The Influence of Robert H. Bork on Antitrust Law: A Retrospective, which was held at the Yale Law School (September 27–28, 2013), for their comments. Finally, we thank an anonymous referee for constructive suggestions. We are grateful for financial support from our respective institutions.

[1] Although other critics may have been less colorful, Bork acknowledges that there were plenty of them. He contends that “no other antitrust statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act” (Bork 1978, p. 385).

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the act's unfortunate prohibitions have been muted by the antitrust agencies' benign neglect and three recent Supreme Court decisions.

In Section 2, we examine the Robinson-Patman Act's concern with protecting competitors rather than competition, which puts it at variance with the central focus of antitrust policy. In Section 3, we explore Bork's views on the Robinson-Patman Act along with those of other commentators. In Section 4, we turn our attention to primary-line cases. Here we explain how the Supreme Court has now muted the effects of earlier decisions. In Section 5, we examine the secondary-line cases and explain the still-present mischief of earlier decisions. In Section 6, we explore future prospects for the Robinson-Patman Act. Finally, we close with some concluding remarks in Section 7.

2. The Robinson-Patman Act

In 1914, the Clayton Antitrust Act (15 U.S.C. sec. 12) was enacted in an effort to provide some specificity that the Sherman Act's broad language lacked. In the wake of *Standard Oil Company v. United States* (221 U.S. 1 [1911])[2] and *United States v. American Tobacco Company* (221 U.S. 106 [1911]),[3] section 2 of the Clayton Act took dead aim at predatory pricing. Rightly or wrongly, Congress envisioned large multimarket firms that could use predatory prices in isolated markets to bankrupt single-market rivals as a means of extending monopoly power into those markets. By the 1930s, however, the aim was protectionism. Chain stores began to make life difficult for small, inefficient, locally owned stores. The source of this "problem" of low prices allegedly was the purchasing power of the chains. In 1936, the Robinson-Patman Act (15 U.S.C. sec. 13) amended section 2 of the Clayton Act in an effort to protect mom-and-pop stores from the large retail chains. Such protectionism was ill-advised since consumers obviously preferred the lower prices of the more efficient chains to the higher prices offered by smaller, owner-operated stores. (The premise of the act is that free markets were rife with unfair and anticompetitive practices[4] that threatened competition, small business, and consumers [Bork 1978].)[5]

As amended by the Robinson-Patman Act, section 2a of the Clayton Act provides that

[2] On the basis of a searching review and analysis of the trial record, McGee (1958) argues that predatory pricing did not occur.

[3] Burns (1986) argues that sustained bouts of very aggressive, perhaps predatory, pricing were used by American Tobacco to soften up small rivals and reduce their acquisition cost.

[4] Bork observes that superior efficiency is not popular with those who must compete against it, and it never seems well understood by lawmakers. On the origins of Robinson-Patman, see Sokol (2009).

[5] Ironically, the act largely failed to protect small businesses. Scherer and Ross (1990) report that, of the 564 companies named in Federal Trade Commission complaints about the Robinson-Patman Act violations between 1961 and 1974, only 36, or 6.4 percent, had annual sales of $100 million or more at the time of complaint. More than 60 percent had sales below $5 million. Thus, the brunt of the commission's effort fell upon the same businesses that Congress sought to protect. See Hovenkamp (2011).

[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States and where the effect of such discrimination 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 benefits of such discrimination, or with customers of either of them. (15 U.S.C. sec. 13a)[6]

Thus, the Robinson-Patman Act protects competitors of the discriminating seller from what is known as primary-line injury. In addition, the act extends protection to disfavored customers from what is known as secondary-line injury. There are two affirmative defenses to charges of unlawful price differences. First, in section 2a, there is a cost justification defense. If the seller can show that any price difference is equal to the difference in the cost of making the sales, then the price difference is lawful. Second, there is a meeting competition defense in section 2b. If the lower price is offered to meet (but not beat) an equally low price of a competitor, the resulting price difference is lawful.

3. Bork's Central Concern

The theme of *The Antitrust Paradox* is that antitrust policy should promote competition in order to promote consumer welfare, but its implementation has often been at odds with that goal. The Robinson-Patman Act, however, is different. It was intended to protect competitors instead of competition. Rather than enhance consumer welfare, therefore, the act harms consumers. This deliberate inconsistency with the broader goals of antitrust policy cannot be rationalized.

Although the Robinson-Patman Act speaks of price discrimination, it actually challenges price differences. Actual price discrimination occurs when there are differing price-to-marginal-cost ratios across customers (Stigler 1987, p. 210), but this is not what constitutes price discrimination under the Robinson-Patman Act. The act requires only different prices. Bork argues that price discrimination will seldom if ever be anticompetitive. Consequently, antitrust challenges to price discrimination are misguided. He also points out that price differences are not necessarily discriminatory but that the cost justification defense is not up to the task of identifying the instances of price discrimination. Persistent price differentials are apt to reflect cost differences across customers. These differences may be due to service costs, selling costs, purchase volumes, wholesale functions performed by the buyer, and the like (Bork 1978).[7] To the extent that the Robinson-Patman Act inhibits such price differentials, more efficient firms will be denied a lower price, which in turn harms consumers. Contemporary antitrust scholars are in

[6] Bork (1978, p. 383), observes that although the statute speaks of price discrimination, it is settled that the act merely means price difference.

[7] Bork notes that if the cost justification defense actually worked, these price differentials would be lawful.

general agreement with Bork's assessment (Sokol 2014).[8] For example, Hovenkamp (2011) observes that a necessary result of the act's protection of less efficient firms is higher consumer prices. Similarly, Carlton and Perloff (2005) explain that the Robinson-Patman Act has denied the benefits of scale economies to buyers and thereby leads to higher consumer prices.

Volume discounts provide an excellent example of this unfortunate outcome. Bork explained that volume discounts tend to be procompetitive: "Some discount schedules can be offered with reasonable confidence that certain identifiable large buyers will take advantage of [them] and this enables the seller to plan the volume of his output giving him the possibility of most efficient production for that volume" (Bork 1978, p. 393).

This, of course, allows the seller to offer lower prices that ultimately benefit consumers. As the Antitrust Modernization Commission (2007) pointed out, however, a principal objective of the Robinson-Patman Act was to impede volume discounts.

Volume discounts are not the only victims of the act. In many business environments, bargaining over price is routine. List prices are not transaction prices. Instead, list prices provide a starting point for negotiations. The bargaining involves discounts, rebates, credit terms, incentives, and other inducements. As Dewey (1959) observes, the Robinson-Patman Act outlaws bargaining, since the resulting transaction prices will inevitably vary across customers.

The act also fails to recognize that price discrimination can serve as a market-adjustment mechanism and as a way of competing in oligopolistic markets. Bork, of course, did recognize this and pointed out that price discriminations that are "characteristic of active markets are favorable to consumer welfare because they are part of the mechanism by which markets are enabled more rapidly to respond to and balance the forces of supply and demand" (Bork 1978, p. 394). In oligopolistic markets, price discrimination may be a way of pursuing marginal sales. To the extent that either overt or tacit collusion is present in the market, price discrimination can undermine the collusive price structure (Kaysen and Turner 1959; Hovenkamp 2011). The results are lower prices and enhanced consumer welfare.[9]

Because of these concerns, Bork recommended outright repeal, rather than revision, of the Robinson-Patman Act. So far, Congress has not seen fit to repeal the act, but recent decisions of the Supreme Court have done much to undermine its original intent. It is doubtful that Bork would have applauded this quasi-legislative action by the judiciary.

[8] Sokol (2014) provides an analysis of Bork and vertical restraints, including Robinson-Patman.

[9] In truth, the welfare effects of price discrimination are ambiguous. See, for example, Schmalensee (1981), Varian (1985), Katz (1987), and Schwartz (1990). To the extent that scarce resources are consumed in efforts to engage in price discrimination, social welfare is reduced because such investments are not socially productive. The Robinson-Patman Act, however, was never concerned with consumer welfare. Instead, its aim in the first instance was to protect competitors from predatory pricing. Subsequently, it also aimed at the cost advantages enjoyed by large chain retailers.

4. Primary-Line Cases

The legal theory of primary-line injury cases depends on the assumption that a multimarket firm can reduce its price in one geographic market to inflict harm on a localized rival (Hovenkamp 2011). The idea is to price predatorily in one market and finance this venture with profits earned in other, less competitive markets. The localized rival cannot use similar tactics because it does not operate in any other market and, therefore, has no source of economic profits with which to counter the competitive attack. As a result, the localized firm will eventually fail. After the local firm exits, the predator will then raise its price and recover its initial investment in acquiring the monopoly.[10]

One problem with this theory is that predatory pricing is not apt to be a profitable strategy (McGee 1958; Elzinga and Mills 2014). Another problem with the legal theory is that price discrimination is often procompetitive rather than anticompetitive. Under oligopolistic conditions, selective price cuts by one firm to expand its business at the expense of its rivals are procompetitive. Where one producer lowers price in a given geographic market, its rivals must generally follow (Bork 1978; Antitrust Modernization Commission 2007). If that period is not followed by a subsequent increase in price to above the prediscrimination levels, these consumer benefits will not be offset by any subsequent losses. That is, price discrimination may serve to move an oligopolistic industry to a new, more competitive equilibrium (Bork 1978; Kaysen and Turner 1957; Antitrust Modernization Commission 2007).

In primary-line cases, early enforcement of the Robinson-Patman Act was concerned with the impact of local price cuts on the localized rivals. That focus is squarely at odds with the broader goal of protecting competition rather than competitors. This early conflict is apparent in the *Utah Pie* case.

Primary-line injury refers to injury suffered by direct competitors of the firm practicing the price discrimination. At the time that Bork wrote *The Antitrust Paradox*, the controlling precedent in primary-line cases was *Utah Pie v. Continental Baking Co.* (386 U.S. 685 [1967]). The facts of this case and the Court's opinion go a long way toward explaining Bork's frustration with the Robinson-Patman Act.

Prior to Utah Pie's entry into the frozen dessert pie market in Salt Lake City, three multimarket firms supplied Salt Lake City. These suppliers were Carnation, Continental Baking, and Pet Milk. They supplied Salt Lake City from their plants in California. For decades, Utah Pie had supplied fresh dessert pies but did not participate in the frozen pie market.

In 1957, Utah Pie entered the frozen pie market and competed vigorously with the incumbent firms. Utah Pie's entry strategy involved undercutting the prices of the incumbents. Utah Pie was an immediate success. It its second year (1958), Utah Pie enjoyed a dominant share of the market: 67 percent.

[10] Since predatory pricing violates section 2 of the Sherman Act, the Robinson-Patman Act would seem to be unnecessary. It appears that the only contributions are that the act eliminates the need for allegations of below-cost pricing and there is no need for proof of actual harm.

Table 1
Salt Lake City Frozen Pie Market Prices ($)

	1958	1961	% Change
Utah Pie	4.15	2.75	−34
Pet Milk	4.92	3.46	−30
Carnation	4.82	3.30	−32
Continental Baking	5.00	2.85	−43

The economic consequences of Utah Pie's entry are fairly predictable: lower prices and increased volume. This is precisely what transpired. According to the Supreme Court, prices fell as the four rivals competed in the market. Table 1 shows the per-dozen prices for the four firms over the 1958–61 period. As one can see, prices declined by 30–43 percent. One would expect some of the resulting cost reductions to be passed on to consumers in the form of lower retail prices. At the same time, consumers increased consumption from 57,000 dozen in 1958 to some 267,000 dozen in 1961 (Bork 1978).

As the incumbent firms responded to Utah Pie's presence and lowered prices, Utah Pie's share of the market fell from 67 percent in 1958 to 34 percent in 1959. It then rose to 46 percent in 1960 and appeared to stabilize. As one can see in Table 2, Utah Pie had become the dominant seller in the Salt Lake City market. In 1960 and 1961, Utah Pie was at least 50 percent larger than the next biggest firm in the market.

Although Carnation, Continental Baking, and Pet Milk charged prices above those of Utah Pie, their prices in Salt Lake City were below those that they charged in other geographic markets. This too is predictable. When a multimarket firm faces new competition in one of its markets, its price will fall in response to this new competition. There is no economic reason to reduce prices in those markets where competition has not increased. Under the Robinson-Patman Act, selling frozen dessert pies in Salt Lake City at prices below those charged in other markets constitutes primary-line price discrimination. To avoid such price discrimination, the incumbent firms would have to adopt one of two pricing strategies. The first strategy would be to reduce prices in all other markets to match the price reductions in Salt Lake City. Given the relative size of the Salt Lake City market, this strategy is bound to be unprofitable, and therefore the incumbents would abandon the Salt Lake City market rather than cut prices everywhere. The second strategy would be for the incumbents to maintain their pre-entry prices in Salt Lake City and watch their market shares dwindle away. In either event, Utah Pie would emerge as the monopoly supplier of frozen dessert pies in the Salt Lake City market. Consequently, the operation of the Robinson-Patman Act would have perverse competitive results. Presumably, the purpose of antitrust laws is to promote competition, not foster local monopoly.

Apparently tired of vigorous price competition, Utah Pie sued the incumbents for unlawful price discrimination. Ultimately, the case was reviewed by the Su-

Table 2
Salt Lake City Frozen Pie Market Shares

	1958	1959	1960	1961
Utah Pie	67	34	46	45
Pet Milk	16	36	28	29
Carnation	10	9	12	9
Continental Baking	1	3	2	8
All others	6	19	13	8

preme Court, which was well aware of the procompetitive consequences of the price competition.[11] Nonetheless, the Court condemned the incumbents: "Sellers may not sell goods to different purchasers at different prices if the result may be to injure competition in either the sellers' or the buyers' market" (386 U.S. 686). But the Court did not appear to mean what it said. Inasmuch as no competitors had been forced from the market, it appears that price discrimination did not have to have an obviously exclusionary impact to be ruled illegal. The evidence displayed in Table 1 shows a pattern of falling prices. On the basis of this evidence, the Court apparently feared that aggressive price competition could have anticompetitive results at some point in the future. As one can see in Table 2, it was more likely that one of the incumbents would have fallen by the wayside, rather than the alleged victim of the price discrimination.[12] It is little wonder that Bork found nothing to commend in the Supreme Court's treatment of primary-line cases: "There is no economic theory worthy of the name that could find an injury to competition on the facts of the case. Defendants were convicted not of injuring competition but, quite simply, of competing. The Supreme Court's opinion finds a violation of Section 2(a) of Robinson-Patman solely because the market price for frozen pies went down in Salt Lake City. There could be no clearer demonstration than the Utah Pie decision that the statute is essentially anti-competitive and anti-consumer" (Bork 1978, p. 387).

The unmistakable message of *Utah Pie* is that the Robinson-Patman Act is intended to protect competitors even at the expense of competition (for a compelling argument, see Bowman 1967).[13] With Bork's able assistance, at least in primary-line cases, this unfortunate precedent was nullified by the decision in *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.* (509 U.S. 209 [1993]).[14] Brooke Group filed a Robinson-Patman Act suit alleging that Brown & Williamson, a rival cigarette producer, had implemented a price discrimination and

[11] The Court had to be aware of this, since we drew the price and market share information from the opinion.

[12] In Justice Potter Stewart's dissent, he accused the majority of falling "into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition" (386 U.S. 705).

[13] Elzinga and Hogarty (1978) explore the futility of protecting competitors at the expense of competition.

[14] In the opinion, Brooke Group is referred to as Liggett, which was its former corporate name. We substitute "Brooke Group" for "Liggett" to avoid confusion. At the Supreme Court, Bork represented Brown & Williamson; see Elzinga and Mills (2014) for a more complete description of the argument at the Supreme Court.

predatory pricing scheme that was likely to have the proscribed effect of reducing competition.

For decades, cigarette manufacturing had been one of the most concentrated and profitable industries in the U.S. economy. For many years, production of this product was controlled by six major firms, and there appeared to be no price competition among them. By 1980, domestic demand for cigarettes began to fall and producers began to accumulate substantial excess capacity. Among the producers, Brooke Group fared particularly poorly, with its market share falling from over 20 percent to around 2 percent. Brooke Group responded to its decline by introducing generic cigarettes that it priced 30 percent below the list prices of standard brands. Other manufacturers responded to this competition by introducing generic cigarettes of their own. When Brown & Williamson entered the generic segment of the cigarette market in 1983, it adopted a strategy of even lower prices than that of Brooke Group. This action precipitated a price war between Brown & Williamson and Brooke Group. Tired of competing on price, Brooke Group sued Brown & Williamson for primary-line price discrimination. In its complaint, Brooke Group alleged that Brown & Williamson had implemented volume discounts to wholesalers that were both discriminatory and below cost. The apparent theory of the complaint was that predatory pricing would punish Brooke Group for its aggressive pricing of generic cigarettes and lead it to restore higher prices for its generics. This would change the relative prices of generics and standard brands, which would result in a shift of the industry demand back to the more profitable standard brands.

The case reached the Supreme Court in 1992. By this time, the Court took seriously the Robinson-Patman Act's requirement that in order for price discrimination to be unlawful, it must be likely to have the effect of substantially lessening competition. Consequently, a difference in prices coupled with injury to a competitor would not be sufficient for plaintiffs to prevail in primary-line cases. The Court took this opportunity to set out the standards for proving predatory pricing. For the plaintiff to be successful, he or she must prove two things. First, the defendant's price must be below some relevant measure of its costs. Second, industry conditions must be such that the defendant has a reasonable prospect of recouping its losses caused by the below-cost prices. In other words, the plaintiff must demonstrate that price discrimination by the defendant is likely to substantially reduce competition in the postpredation period. This is a much more demanding standard of proof than that applied in *Utah Pie*, which required only proof of a price difference without any evidence of recoupment. In effect, the standard for unlawful price discrimination in primary-line cases became the same as the standards for unlawful monopolization under section 2 of the Sherman Act.[15]

[15] *Brooke Group* clearly harmonized the treatment of primary-line price discrimination with the broad goals of antitrust policy. No longer can a plaintiff complain about nonpredatory price discrimination and offer vague assertions that price discrimination "may substantially lessen competition or tend to create a monopoly" (15 U.S.C. sec. 14).

5. Secondary-Line Cases

The legal theory of secondary-line cases has nothing to do with competition in real-world markets. In fact, the Court has focused on violations in the presence of robust competition.[16]

The intent of the secondary-line provision is the protection of competitors.[17] Suppose that a producer sells its output to some of its customers at one price and to other customers at a lower price. If these customers then compete among themselves in the resale market, those that paid the lower price will have a competitive advantage over those that paid the higher price. To the extent that a favored firm makes sales at the expense of the disfavored firms, there is secondary-line injury. The concern in these cases is with protecting the firm's disfavored customers rather than protecting competition in the market. Instances of secondary-line price discrimination raise the obvious question of why the seller would want to disadvantage any of its customers.[18] The judiciary, however, has not been concerned with the logic of this question. The following two cases illustrate this point.

The *Federal Trade Commission v. Morton Salt Co.* case set an early and enduring precedent regarding secondary-line price discrimination (334 U.S. 37 [1948]). Morton Salt sold Blue Label table salt to both wholesalers and large retailers. The wholesalers resold the salt to retail grocery stores that were in direct competition with the large retailers that bought directly from Morton Salt. Volume discounts were available to all of its customers, large and small. The price schedule is shown in Table 3.

In principle, these discounts were available to all purchasers, but only five firms ever purchased enough salt to qualify for the price of $1.35 per case. Not surprisingly, these buyers were large grocery chains. These large chains could set retail prices of Blue Label salt below the wholesalers' prices to their customers.

The Supreme Court condemned Morton Salt's price discrimination on the presumption that price differences that persist are bound to have adverse competitive effects. No showing of actual harm was required. Accordingly, the Court decided that such discounts were illegal unless they could be cost justified.

Morton Salt argued that table salt was not a big revenue factor for any grocery store and that its discounts were not shown to have caused injury to competition. The Court dismissed this argument: "We have said that the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may have such an effect'" (334 U.S. 46). *Morton Salt,* therefore, stands for the proposition that proof of a persistent

[16] Hovenkamp (2011, p. 630) also observes that many circuit courts hold that the injury required by the statute is not an injury to economic competition at all, merely an injury to a competitor.

[17] Interestingly, a prohibition of price discrimination could help resolve the problem associated with durable-good pricing that Coase explains (Coase 1972). The consequences may be higher prices, which could actually be procompetitive because it encourages dynamic efficiency by providing incentives for developing and selling new products.

[18] Bork often raised this question but could come up with no compelling answers.

Table 3
Morton Salt Price Schedule

Quantity	Price per Case ($)
Less than carload purchases	1.60
Carload purchases	1.50

price difference between purchasers that compete in the resale market is sufficient to establish a prima facie case of illegal price discrimination.

A more recent case, *Texaco, Inc. v. Hasbrouck* (496 U.S. 543 [1990]), reaffirms the Court's unwillingness to apply the injury-to-competition standard rigorously in secondary-line cases. Here the defendant, Texaco, sold gasoline in the Spokane, Washington, geographic market at different prices to two groups of customers. One group consisted of two distributors, Gull and Dompier, who received discounts ranging from 3.65 cents to 6 cents per gallon below the dealer tank wagon (DTW) price during the 1970s. The other group consisted of the Texaco-branded independent retailers in the area, who paid the full DTW price. The favored distributors, however, operated primarily as retailers, performing virtually no standard distribution functions. Rather, they purchased their gasoline directly from Texaco and sold the bulk of it at retail through their own stations. Consequently, these two companies competed directly with Texaco's retailers in marketing that brand to final consumers.

The impact of the discounts received by Gull and Dompier on the volumes sold by these firms appeared to be pronounced. For example, from 1970 to 1975, Dompier's monthly sales rose from 155,152 gallons to 462,956 gallons, an almost threefold increase. In spite of the fact that seven out of the 12 independent Texaco retailers went out of business during this period, this does not prove that any Texaco sales were diverted from the plaintiffs. Nonetheless, the discounts received from Texaco permitted Gull and Dompier to price their gasoline below the competing retailers who were paying the full DTW prices. Hasbrouck and other independent retailers filed suit against Texaco, alleging illegal price discrimination under the Robinson-Patman Act.

In its decision, the Supreme Court ruled that the mere existence of a substantial price difference among customers who are in direct competition with one another provides sufficient evidence to infer an injury to competition. The Court's opinion proclaimed that "[i]n *FTC v. Morton Salt Co.,* . . . we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay'" (496 U.S. 559).[19] As a result, Texaco was found guilty of a violation of the Robinson-Patman Act.

The fundamental problem with this ruling is that the impact of the discriminatory prices on competition in a relevant market was never explored. While the Court examined shifts in the shares of Texaco gasoline sold by Gull and Dompier

[19] The Court did not require a showing of actual harm, sales diversion, or lost profits to any competitor of the favored customers.

versus the independent retailers, it failed to consider the likely effect of the discounts on the overall market for gasoline in Spokane.[20] It is obvious that Texaco gasoline does not constitute a relevant product market. Other brands are sufficiently close substitutes to warrant their inclusion in the appropriate market definition. Moreover, a share of something that is not a market is not a market share. As a result, shifts in the shares of Texaco gasoline among the firm's customers are completely irrelevant to a meaningful analysis of injury to competition.

The most recent Supreme Court opinion is *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* (546 U.S. 164 [2006]). In its opinion, the Court reaffirmed the *Morton Salt* inference of injury in the presence of price differences, but it did clarify that this inference is relevant only when the favored and disfavored customers are competing for the same book of business.

Reeder alleged that Volvo provided deeper discounts to other Volvo dealers than it extended to Reeder. Reeder's theory of injury was novel. It contended that its profits would have been higher if it had received the discounts afforded to other dealers. It did not argue that it lost sales to favored dealers. In fact, the sole question before the court was this: may a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer?

There is no reason to suppose that prices will be the same in all local markets. Any multimarket firm is apt to set different prices in different markets to exploit different demand conditions. If the costs of production and distribution are the same in all markets, any price difference will be discriminatory by definition. But there can be no adverse competitive impact even as envisioned by the Robinson-Patman Act. Consequently, Volvo should never have survived a summary judgment motion.

In addressing the question before the Court, the majority noted that a hallmark of the requisite competitive injury, as its decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. Since there was no evidence that Reeder competed with favored retailers for the same customers, sales diversion would be logically impossible. Consequently, Volvo was not guilty of a violation of the Robinson-Patman Act.

The bottom line is that *Morton Salt* and *Texaco* still shelter competitors at the expense of competition. Consumers will tend to pay higher prices as a result. The problem appears to be the language contained in the relevant legislation. While the Robinson-Patman Act provides that price discrimination is illegal only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce," it goes on to add "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

[20] Ironically, while the Court never considered such an impact, it noted early in its opinion (496 U.S. 548) that "[t]he retail gasoline market in Spokane was highly competitive throughout the damages period, which ran from 1972 to 1981. Stations marketing the nationally advertised Texaco gasoline competed with other major brands as well as with stations featuring independent brands."

of them" (15 U.S.C. sec. 13[a]). This latter provision appears to limit the Court's attention to the set of downstream firms that are customers of the upstream firm accused of price discrimination rather than the relevant market that is affected. Thus, the language of the act tends to mislead the Court into an invalid economic exercise—analyzing the impact on competition among a set of firms that constitute only a portion of a relevant market. Such an analysis is economically meaningless and is, therefore, doomed to err. Consequently, until the act's language is corrected, the injury-to-competition requirement for price discrimination to be held illegal will likely remain ineffective for secondary-line cases.

6. Future Prospects for the Robinson-Patman Act

The future prospects for the Robinson-Patman Act are bleak, which is good for advocates of vigorous competition. It appears that the act will be marginalized for several reasons. First, the Supreme Court rulings have undermined the continuing vitality of the Robinson-Patman Act. While the Court cannot overturn the Robinson-Patman Act, it can minimize its inconsistency with the broader goals of antitrust policy. Following *Brooke Group,* it is clear that primary-line cases must satisfy Sherman Act standards. As the Antitrust Modernization Commission (2007) report observed, *Brooke Group* has largely eliminated demands for reforms regarding primary-line cases. The Court's ruling in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.* (451 U.S. sec. 557 [1981]), which we discuss below, requires plaintiffs to show that they have suffered antitrust injury. In essence, the presumption of harm has been diminished. While *Volvo* did nothing to eliminate secondary-line complaints, the Court did urge the lower courts to interpret the Robinson-Patman Act in ways that are consistent with the procompetitive goals of antitrust policy.

Second, public enforcement of the act is nearly nonexistent. As a practical matter, the Department of Justice has turned over public enforcement of the Robinson-Patman Act to the Federal Trade Commission (FTC), which has recently abandoned it. Between 1936 and 1957, the FTC closed 429 cases and issued 311 cease-and-desist orders. The FTC was even more successful between 1960 and 1972, when it issued 758 cease-and-desist orders (Scherer and Ross 1990). The FTC's interest in the Robinson-Patman Act fell dramatically, as it filed only 12 cases during 1975–78 (Antitrust Modernization Commission 2007). In the last 2 decades, the FTC has filed only one case.[21]

Third, private actions appear to be less promising than they once were for plaintiffs. Following *Brooke Group,* plaintiffs in primary-line cases must meet section 2 Sherman Act standards, which are more demanding than Robinson-Patman Act standards have been in the past. No single case has had the same impact on secondary-line cases as *Brooke Group* has had on primary-line cases. But the combination of the Supreme Court's ruling in *J. Truett Payne* and its admonition in *Volvo* may have a similar effect.

[21] Hovenkamp (2011, p. 629) reports that the Department of Justice has not filed a case since 1972.

In *J. Truett Payne,* the plaintiff allegedly paid more for its Chrysler automobiles than its local rivals paid. It estimated its damages as the difference between the price that it paid and the price that its rivals paid times the quantity that it purchased. The Supreme Court characterized this measure as automatic damages. It then explained that this measure is improper. The correct damage measure should capture the lost profits on lost sales due to sales diversion from the plaintiff to the favored dealers. Thus, if the favored dealer merely pocketed the price differential as added profit, there would be no sales diversion and, therefore, no damages. This ruling raises the bar for private plaintiffs. Using normal business records, automatic damages are relatively easy to prove. Lost profits on lost sales due to the price differentials are obviously far more difficult to prove. Such a measure of damages, however, is more consistent with compensating victims of price discrimination for losses that flow from a substantial lessening of competition. After all, if there is no sales diversion, there is no evidence that competition has been impaired.

In addition, the Supreme Court provided some recent guidance in *Volvo* indicating that the Robinson-Patman Act should be construed in ways that are consistent with the main focus of the antitrust laws—the protection of competition. If the lower courts adhere to this admonition, private plaintiffs in secondary-line cases will have to prove an actual diminution in competition.[22]

It is too early to believe that the act's ill effects are now history. Widespread and repeated calls for repeal of the Robinson-Patman Act have fallen on deaf congressional ears. To the extent that efforts at repeal would encounter political obstacles, this suggests that there are beneficiaries of the Robinson-Patman Act. Its continuing presence, however, imposes costs on the business community and consumers. The act provides an opportunity for a plaintiff to argue that it should be interpreted just as it was in Bork's time. Even though the prospects for success today may be dim, antitrust suits impose financial costs on defendants and may lead to nuisance settlements. In addition, the Robinson-Patman Act may still impose harm to consumers even though there is no public enforcement.[23] This harm arises because the business community may be less inclined to offer discounts that appear discriminatory. As Bork points out, many business decisions have been influenced by the threat of treble-damage actions.[24] This is unsettling because the act has no redeeming virtues.

[22] Bruckmann (2013) doubts that *Volvo* is having the desired effect on private suits. Luchs et al. (2010) provide some empirical evidence that private plaintiffs have experienced precious little success in recent years.

[23] We thank Dennis Carlton for this observation.

[24] Bork argues that tens of thousands, probably hundreds of thousands, of pricing decisions every year are altered because of fear of the Robinson-Patman Act. Quantity discounts, promotional discounts, discounts to recognize the purchaser's assumptions of tasks that would otherwise fall on the seller, discounts because of the purchaser's stage in the distribution chain, promotional allowances, advertising allowances—all these and many more—are forgone or changed by the law. Moreover, suppliers often create special sizes and shapes to avoid like grade and quality, but this adds to the cost without creating additional value. Finally, resources that are expended to redistribute surplus through price discrimination are socially wasteful.

7. Concluding Remarks

Although there have been, and continue to be, missteps along the way, the purpose of the antitrust laws has been the protection and promotion of competition as a means of enhancing consumer welfare. In *The Antitrust Paradox*, Bork argued persuasively that the Robinson-Patman Act is fundamentally incompatible with that purpose. Bork's views on this issue were in the mainstream then and continue to be so today. The Robinson-Patman Act is inconsistent with antitrust laws generally. After less than 20 years of the act, its inconsistency with other antitrust laws was apparent. The report of the U.S. Attorney General's National Committee to Study the Antitrust Laws (1955) notes that there was a need for the judiciary to interpret the Robinson-Patman Act in a way that was consistent with the broader goals of antitrust. Fourteen years later, the Neal report (Neal 1969) observed that the act needed substantial revision or repeal. At the time of *The Antitrust Paradox*, the Department of Justice similarly concluded that the Robinson-Patman Act was not consistent with antitrust policy. As Bork pointed out, revision is not the answer. The problem is that the purpose of the act is fundamentally inconsistent with the antitrust goal of promoting competition. The purpose of the act has always been to soften competition rather than encourage it.

In its final report, the Antitrust Modernization Commission (2007) recommended outright repeal of the act in its entirety. Since there is no way to rehabilitate the act, we agree.

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