PRICE DIFFERENTIALS AND PRODUCT
DIFFERENTIATION: THE ISSUES UNDER THE
ROBINSON-PATMAN ACT

FREDERICK M. ROWE†

"THE CONSUMER IS MADE THE GOAT"

—*Minority Report by Rep. Emmanuel
Celler on the Patman Bill, H.R. 8442,
H.R. Rep. No. 2287, 74th Cong., 2d
Sess. pt. 2, at 6 (1936).*

THE modern firm's differentiation of its products is part of the strategy of diversification that has guided business growth for exploiting the post-war mass market.¹ With the prodigious output of a booming technology pouring into an economy of abundance,² business cannot rest content to satisfy the public's basic wants. Creative "merchandising" must move and diffuse the stream among consumers, while advertising renews cravings for goods to provide the substance, or the illusion, of the better life.³ In competing for greater shares of this market, alert enterprisers cultivate more than customer

†Member of District of Columbia and New York Bars. This article will be integrated into a text on the Robinson-Patman Act to be published by Little, Brown & Co.

1. Such growth has occurred by expansion from within, e.g., Burck, *The Rush to Diversify*, *Fortune*, Sept. 1955, p. 91; Staudt, *Program For Product Diversification*, *Harv. Bus. Rev.*, Nov.-Dec. 1954, p. 121, as well as through the acquisition of existing enterprises. Indeed, the "conglomerate merger" or corporate "mixed marriage" is the most dramatic feature of the current merger movement. See FTC, *REPORT ON CORPORATE MERGERS AND ACQUISITIONS* c. V (1955); FOULKE, *DIVERSIFICATION IN BUSINESS ACTIVITY* 28-34 (1956); Harris, *The Urge to Merge*, *Fortune*, Nov. 1954, p. 102; Kaplan, *The Current Merger Movement Analyzed*, *Harv. Bus. Rev.*, May-June 1955, pp. 91, 95-99; Smith, *The Olin-Mathieson Deal*, *Fortune*, Nov. 1954, p. 107; Chaffetz, *The "Flood Tide of Mergers" and the Public Interest* 5-6 (Mimeo. Dec. 28, 1954).

2. The economy in 1956 was barreling along at a record gross national product rate topping \$400 billion. Consumer expenditures alone had reached a rate of \$274 billion annually in 1955. *ECONOMIC REPORT OF THE PRESIDENT* 1-4 (1956); *Fortune*, Sept. 1956, p. 37. See also ALLEN, *THE BIG CHANGE* (1952); EDITORS OF *FORTUNE*, *THE CHANGING AMERICAN MARKET* (1955); Burck & Parker, *What A Country!*, *Fortune*, Oct. 1956, p. 127.

3. See Seligman, *The Amazing Advertising Business*, *Fortune*, Sept. 1956, p. 107; Barnet, *Showdown in the Market Place*, *Harv. Bus. Rev.*, July-Aug. 1956, p. 85; Silberman, *Retailing: It's a New Ball Game*, *Fortune*, Aug. 1955, p. 78; cf. SPECTORSKY, *THE EXURBANITES* (1955); WAKEMAN, *THE HUCKSTERS* (1946); Brown, *Advertising and the*

affection for a single standard item. Brands, models, and styles abound. For differentiation can maximize profits by diversifying the firm's range of analogous products—similar yet distinct enough to capture every nuance of the consumer's need, mood, or wealth.⁴

The result is a multitude of variations on a basic product theme promoted by each firm and clamoring for customer recognition—at a variety of prices.

But a business policy of distributing differentiated goods at differential prices must contend with the Robinson-Patman Act's legal pull toward price uniformity by sellers.⁵ As passed in 1936 to amend the original Clayton Act, Robinson-Patman was a political weapon fashioned by "small business" groups to stem the inroads of modern mass marketing methods that threatened to revolutionize distribution and short-circuit traditional brokers, wholesalers, and retailers.⁶ Drafted, masterminded, and piloted through Congress by the organized grocers in the wake of NRA, the Patman bill mobilized the Poujadist

Public Interest: Legal Protection of Trade Symbols, 57 YALE L.J. 1165 (1948). In 1955 total advertising expenditures zoomed to an all-time high of nearly \$10 billion. Printer's Ink, Feb. 10, 1956, p. 23; Seligman, *supra* at 107.

4. Klaw, *Winner and Still Champion: P. & G.*, Fortune, March 1956, pp. 104, 105; Whyte, *The Cadillac Phenomenon*, Fortune, Aug. 1955, p. 106; Lippincott & Margulies, *Packaging in Top-Level Planning*, Harv. Bus. Rev., Sept.-Oct. 1956, p. 46; *The \$300,000,000 Question: How Many Grades of Gasoline?*, National Petroleum News, June 1956, p. 92.

5. For a general survey of the origin and legal impact of the Robinson-Patman Act, 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952), see Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929 (1951). See also REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 155-221 (1955) (hereinafter cited as ATT'Y GEN. REP.); Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1155-73 (1955); VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 23-29, 83-86 (1955); *Symposium on the Robinson-Patman Act*, 49 NW. U.L. REV. 196-294 (1954); DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 119-34, 202-56 (1954); Austern, *Tabula in Naufragio—Administrative Style, Some Observations on the Robinson-Patman Act*, 1953 CCH ANTITRUST LAW SYMPOSIUM 105 (1953); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (rev. ed. 1953); Sunderland, *The Robinson-Patman Act: Go Out and Compete But Don't Get Caught At It*, 34 CHI. BAR REC. 447 (1953); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1198-1213 (1952).

6. This political origin of the Robinson-Patman Act has passed beyond controversy into the annals of history. See, e.g., Burns, *The Effectiveness of the Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689, 695 (1949) ("The Robinson-Patman Act . . . is a part of the struggle between the older and newer organizations in distribution in which the older group sought protection from the state presumably because it was not prepared to rely on the outcome of competition."). To like effect, consult PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION c. VII (1955); Fulda, *Food Distribution in the United States, The Struggle Between Independents and Chains*, 99 U. PA. L. REV. 1051, 1082-1109 (1951); Note, 58 YALE L.J. 969, 970 (1949); Edwards, *The Struggle for Control of Distribution*, 1 J. MARKETING 212 (1937); McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); McAllister, *Price Control by Law*

prejudices festering in an era of crisis.⁷ To overcome problems of constitutionality posed by "special legislation" addressed to the food industry alone, the framers jerrybuilt a prolix enactment that went beyond the "anti-chain store" objectives of its backers to impose pervasive legal restrictions on pricing and promotion in all sectors of the economy.⁸ The act's principal enforcement

in the United States, *id.* at 273, 289-96; Burns, *The Antitrust Laws and the Regulation of Price Competition*, *id.* at 301; Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137 (1937).

In the contemporary opinion of Rep. Celler, a vigorous opponent of the Patman legislation:

"The advocates of this bill include many independents unable to meet competition which is easily met by their efficient fellow dealers, and as well wholesale grocers catering to such small dealers handling the basic necessity, food, and asking for unnatural restraints upon their most efficient competition. They searched high and low when they had the N.R.A. for ways and means to the same selfish end. They want no restraints on themselves; they want them only applied to the other fellow.

. . . Unfortunately, housewives and the consumer generally are not organized. Their voice is not articulate. But retail grocers and the retail druggists, and the wholesalers catering to them, have banded together and have raised a lot of commotion and issued forth reams and reams of propaganda in support of this bill, but no thought have they given to the consumer."

H.R. REP. NO. 2287, 74th Cong., 2d Sess., pt. 2, at 6 (1936). Two decades later history repeated itself. See note 142 *infra*.

7. For details, see PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* c. VII (1955) and note 28 *infra*. The legislation was passed amid congressional demagoguery verging on hysteria. See, e.g., "Mr. SHANNON. Yes; let us strike. Remember you are striking for your child and your grandchild, that he may have the opportunity that you and I had before the damnable chains came into existence in this country. [Applause.]" 80 CONG. REC. 8129 (1936). Mr. Patman asserted that "there is a conspiracy existing between a few Wall Street bankers and some of the heads of the biggest business institutions in this Nation to absolutely get control of retail distribution. They expect to do that through the chain-store system." 79 CONG. REC. 11575 (1935). And he insisted that his bill had "the opposition of all cheaters, chisellers, bribe takers, bribe givers, and the greedy who seek monopolistic powers." 80 CONG. REC. 3447 (1936). The few hardy opponents led by Rep. Celler became the target of abuse carrying ugly overtones of bigotry. See, e.g., Remarks of Reps. Patman and Cox, *id.* at 8111-12, 8118. Mr. Patman agreed that 90% of the people affected by his bill lived in two congressional districts in "the heart of New York where holders of privilege reside," "profiting to the extent of millions of dollars a year through their chiseling, cheating, racketeering tactics." *Id.* at 7887, 8112. See also debates, *id.* at 8232, 9415-16. Mr. Celler vainly protested that the Gentleman from Texas was "enthusiastically misguided," and that "the consumer will pay the piper." *Id.* at 8116, 8118.

Compare this congressional oratory and the statement of Rep. Patman in 1937, "Chain stores are out. There is no place for chain stores in the American economic picture," with the declaration of Huey Long: "I would rather have thieves and gangsters than chain stores in Louisiana." Quotations from McNair, *supra* note 6, at 334 n.1; Fulda, *supra* note 6, at 1051. As recently reminded by Rep. Patman, "one certain big concern had really caused the passage of this Act, the A&P Tea Company." *Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend Sections 2 and 3 of the Clayton Act*, 84th Cong., 2d Sess. 57 (1956).

8. See 80 CONG. REC. 6429 (1936).

mechanisms are administrative proceedings before the Federal Trade Commission and treble damage suits by "injured" persons.⁹

This article spotlights those Robinson-Patman doctrines governing the distribution of differentiated products, appraises their impact on marketing, and proposes reforms.

EVOLUTION OF LEGAL DOCTRINE

Since "precision of expression is not an outstanding characteristic of the Robinson-Patman Act,"¹⁰ a program of product differentiation must cope with several interlacing provisions.¹¹ The legality of a pricing or promotion strategy depends initially on whether the products are "of like grade and quality" within the meaning of the act. Price differentials quoted for such goods are illegal whenever they constitute "discriminations" whose 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. . . ." However, a prima facie unlawful differential may be excused if demonstrably reflecting only "due allowance for differences in the cost of manufacture, sale, or delivery," or "made in good faith to meet an equally low price of a competitor." On the other hand, promotional payments or "services" are conclusively illegal if not extended to all competing buyers on "proportionally equal terms."

Current doctrines applicable to differentiated goods trace from the original Clayton Act, the objectives of the 1936 Robinson-Patman amendments, and rulings by the Federal Trade Commission and the courts.

Pre-1936 Clayton Act Provisions

The law of today originated in the Clayton Act passed in 1914.¹² Aimed at a predatory tactic of national "trusts" to slash prices in certain localities for

9. Although the Department of Justice and the Federal Trade Commission theoretically share jurisdiction, 38 STAT. 734, 736 (1914), 15 U.S.C. §§ 21, 25 (1952), the Justice Department in practice has left civil Robinson-Patman enforcement to the FTC almost entirely. A separate criminal provision vaguely duplicating and overlapping the main civil provisions has been invoked only sporadically by the Justice Department, but has received a recent upsurge of attention from private damage claimants. 49 STAT. 1526 (1936), 15 U.S.C. § 13a (1952). *E.g.*, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). See ATT'Y GEN. REP. 198-201. On private enforcement, see Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952); Doyle, *Treble Damages and Counsel Fees*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 142 (Aug. 1954); Clark, *The Treble Damage Bonanza*, 52 MICH. L. REV. 363 (1954).

10. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953). Robinson-Patman has also been dubbed a law that is "vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." *Ruberoid Co. v. FTC*, 189 F.2d 893, 894-95 (2d Cir. 1951).

11. For the text of the pertinent provisions, see notes 24 and 103 *infra* and accompanying analysis.

12. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1952).

the purpose of eliminating a smaller rival, section 2 of the act prohibited price "discriminations" threatening "to substantially lessen competition or tend toward monopoly in any line of commerce"—unless they were made "on account of differences in the grade, quality, or quantity of the commodity sold"; corresponded with "differences in the cost of selling or transportation"; or were quoted "in good faith to meet competition."¹³

Two decisions in the 1930's delineated the areas of future conflict: price differentials among similar products of varying *physical* attributes, and among *branded and unbranded* versions of one basic commodity.

The physical factors in "grade" and "quality" were stressed in *Boss Manufacturing Co. v. Payne Glove Co.*¹⁴ A charge of predatory price cutting was dismissed because the "special" gloves sold at destructively low prices were manufactured from inferior materials by less experienced labor than the higher-priced regular product. Hence the alleged discrimination was refuted by "physical facts as to the difference in material and construction" between the products marketed at differential prices.¹⁵

The FTC's landmark *Goodyear Tire & Rubber* decision in 1936 condemned price differentials among first-line tires sold under differing brands.¹⁶ A cost-plus manufacturing arrangement created price differentials between Goodyear's tires sold to Sears, Roebuck for resale under the Sears "All State"

13. Section 2 was intended to strike at a

"common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made."

H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914). See *Mennen Co. v. FTC*, 288 Fed. 774, 778-79 (2d Cir. 1923). The enforcement of old § 2 is surveyed in MILLER, UNFAIR COMPETITION 130-41 (1941); HENDERSON, THE FEDERAL TRADE COMMISSION c. V (1925); McAllister, *Sales Policies and Price Discrimination under the Clayton Act*, 41 YALE L.J. 518 (1932).

Conceivably the exemption of "grade" or "quality" differentials was planted to weaken § 2's effectiveness at a critical point, for a lethal variant of the destructive price warfare practiced by "trusts" was the establishment of "bogus independents" and other false fronts that sold an inferior or "fighting brand" at cut-throat prices in the territory of a local competitor marked for extinction. *E.g.*, *United States v. Eastman Kodak Co.*, 226 Fed. 62, 74 (W.D.N.Y. 1915); *United States v. Corn Products Refining Co.*, 234 Fed. 964, 992 (S.D.N.Y. 1916). See STEVENS, UNFAIR COMPETITION 10 (1917). As Sen. Cummins remarked of these qualifications hedging the prohibited conduct, "there are not enough teeth in section 2 of the Clayton bill to masticate successfully milk toast." 51 CONG. REC. 14250 (1914). See also *id.* at 14228.

14. 71 F.2d 768 (8th Cir. 1934).

15. *Id.* at 770.

16. 22 F.T.C. 232 (1936). The case is analyzed in MILLER, UNFAIR COMPETITION 128-29, 136-39 (1914).

brand and the Goodyear "All Weather" brand tire marketed through the Goodyear distributor organization. Goodyear unsuccessfully sought to justify its differential as "made on account of quantity."¹⁷ In addition, the legally provable cost economies accruing to Goodyear from dealing with Sears, a mass buyer, accounted for only part of the differential and left a sizeable "net" discrimination in Sears' favor.¹⁸ And Goodyear's concession that all the tires, irrespective of brand and trademarks, were "comparable in quality" permitted the Commission to find that the price differential "was not made on account of differences in the grade or quality of the tires sold to Sears, Roebuck & Company."¹⁹

The core of illegality exposed by the Commission's inquiry into the competitive effects of the arrangement was the inflation of the private-brand mass buyer's gross operating margin in comparison with the regular Goodyear branded tire distributor's. Admittedly, the tire distributed by Sears, Roebuck under its own "All State" brand was at a distinct disadvantage in rivalry with the heavily advertised and promoted Goodyear brand for sales to the consumer.²⁰ However, the FTC concluded that Goodyear's price differential in favor of Sears not only neutralized that handicap, but conferred a substantial advantage besides.²¹ Accordingly, the Commission found the forbidden detriment to competition because "Sears, Roebuck & Co. has a much larger gross margin for profit upon which to operate in the sale of tires than the ordinary Goodyear service station dealers and sub-dealers enjoy, and this price discrimination has been and is a direct and substantial causative factor in the competitive situation in the retail tire industry" which saw a rapid growth of Sears and a decline of competing tire dealers.²²

17. The Commission considered this requirement met only so long as the size of the quantity discount was related to cost savings by the seller in dealing with the quantity buyer. 22 F.T.C. at 329. The court of appeals' ultimate reversal of the Commission repudiated this view of the law, and held that § 2's exemptions for price differentials based on grade, quality or quantity *and also* for differentials reflecting cost differences were independent and self-sufficient. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620, 623-24 (6th Cir. 1939). See note 23 *infra*.

18. 22 F.T.C. at 283, 326. This conclusion is dubious because it declined to recognize a host of "intangible" economies enjoyed by Goodyear as a result of the arrangement whereby Sears assumed the risks of raw material price fluctuations and credit losses, besides foregoing the returns from alternative investment of its capital. See *id.* at 287; 101 F.2d at 622.

19. 22 F.T.C. at 290.

20. Some of this consumer preference stemmed from Goodyear's sales of its branded tire to manufacturers as original equipment for automobiles, thereby predisposing the car owner to purchase the same brand for his replacement needs. In addition, Goodyear had spent about \$4½ million annually to promote its branded product with the public. *Id.* at 311. This margin of consumer preference for the Goodyear branded tire—and corresponding handicap for the Sears product—was approximately 20 to 25% of the retail price during the relevant years. *Id.* at 308.

21. The price differential gave Sears a gross quotation 30 to 40% more favorable than the price paid by rival tire distributors. *Id.* at 279.

22. *Id.* at 313. Compare note 18 *supra*.

The *Boss* and *Goodyear* decisions thus pinpointed these critical factors pertinent to product differentiation: the scope of the "grade" and "quality" concept; the incidence of detriment to competition; and the potentialities of cost justification.

Robinson-Patman Legislative History

The overmastering desire of the Robinson-Patman draftsmen in 1936 to abolish any blanket immunity for quantity discounts²³ led to a wholesale statutory reorganization. Several revisions affected the pricing and promotion of differentiated products: The tests of detriment to competition were tightened so as to nip discriminations creating "injury" short of competitive debilitation in an entire "line of commerce."²⁴ Specific restrictions on promotional

23. Although the court of appeals' *Goodyear* reversal authorizing *unlimited* quantity discounts did not come until 1939, that statutory interpretation was anticipated in the 1935 hearings on the Robinson-Patman proposals. *E.g.*, *Hearings Before the House Judiciary Committee on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 214, 248, 257-58 (1935).

The amendments achieved the FTC's goal in the *Goodyear* case to ensure that the amount of a seller's cost savings in dealing with large customers set the ceiling on permissible discounts in their favor. This was accomplished by deletion of the former express exemption of differentials made "on account of quantity," so as to leave quantity discounts as all other price differentials to be legally justified by recourse to the defense of cost justification which could take account of economies arising from quantity sales. In essence, quantity discounts were made subject to the statutory provisions in the same way as any other form of price differentiation. For the applicable text, see note 24 *infra*.

As a special limitation on quantity discounts, however, the Robinson-Patman amendments added a proviso authorizing the Federal Trade Commission to impose a ceiling on even cost-justified quantity differentials whenever it found "that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce. . . ." 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). To date this power has been invoked but once—by the Commission's issuance in 1951 of a quantity limit of 20,000 pounds for automotive tires and tubes. A district court has recently granted summary judgment nullifying this quantity limit in a suit brought by numerous affected tire manufacturers and buyers who assailed the Commission's rule on procedural and substantive grounds. *B.F. Goodrich Co. v. FTC*, 134 F. Supp. 39 (D.D.C. 1955). Both the statutory proviso and its implementation by the Commission have been flayed as incompatible with overall antitrust policy as curbing price reductions directly related to operating efficiencies. ATT'Y GEN. REP. 176-77; DIRLAM & KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 243-45 (1954); McGee, *The Decline and Fall of Quantity Discounts: The Quantity Limit Rule in Rubber Tires and Tubes*, 27 J. BUS. U. CHI. 225 (1954); Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 7 (1953).

24. As amended, sections 2(a) and (b) made it unlawful for any person "in the course of" commerce

"to discriminate in price between different purchasers of commodities of like grade and quality, . . . 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 benefit of such discrimination, or with customers of either of them:

payments or services were added.²⁵ The provision for price differentials reflecting differences in "grade" or "quality" moved up from its former spot in a defensive proviso into the definitional text of the act, whose controls now became operative only after the "like grade and quality" of the products in question was established.²⁶ Whereas under old Clayton 2 a seller might *defend* by relating his differential pricing to variations in the "grade" or "quality" of his differentiated products, the Robinson-Patman Act did not apply until the *plaintiff proved* the products' "like grade and quality."²⁷

During the legislative hearings and debates preceding enactment, only the "like grade and quality" provision received attention focused on the marketing of differentiated goods. Addition of the word "brand" to the requirement of "like grade and quality" was fruitlessly urged to protect the distribution of privately branded products. Mr. Teegarden, counsel for the United States Wholesale Grocers' Association and draftsman of the Patman bill, denounced the proposal as "a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers" who would negotiate for a special brand on top of a price concession from the seller.²⁸ Also, an amendment confining the

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . .

" . . . *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

49 STAT. 1526 (1936), 15 U.S.C. §§ 13(a), (b) (1952).

25. For text and discussion of these provisions, see note 103 *infra* and accompanying text.

26. See text of § 2(a) quoted in note 24 *supra*.

27. The "meeting competition" defense has had no impact on the validity of price differentials for differentiated products, and has in any event been crippled by restrictive FTC interpretations. The rise and fall of the defense is portrayed in the annals of the classic *Standard Oil* litigation, now in its seventeenth year of strife and pending before the Supreme Court for the second time. In its original *Standard Oil* ruling in 1945, the Commission held the "meeting competition" defense unavailable whenever it entered a finding of competitive "injury." 41 F.T.C. 263 (1945). This statutory interpretation was overturned in 1951 by the Supreme Court which construed § 2(b) as authorizing an "absolute" defense irrespective of FTC findings as to "injury." *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951). Upon remand, however, the Commission in 1953 again rejected Standard's defense—for lack of "good faith" owing partly to such "injury." 49 F.T.C. 923, 953-55 (1953). The court of appeals now has reversed this latest FTC action as incompatible with the facts and the Supreme Court's decision, 233 F.2d 649 (7th Cir. 1956), and the Commission has petitioned for certiorari. 25 U.S.L. WEEK 3107 (U.S. Sept. 28, 1956) (No. 465).

For the legislative tribulations of the meeting competition defense, see note 142 *infra*.

28. *Hearings Before a Subcommittee of the House Judiciary Committee on Bills to Amend the Clayton Act*, 74th Cong., 2d Sess. 421, 469 (1936).

Rep. Patman testified that "Mr. Teegarden wrote this bill." *Hearings Before the House Judiciary Committee on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 9 (1935);

act to commodities of like "design," as well as "like grade and quality," was formally rejected after being scored for facilitating evasion by subterfuge in labeling and packaging.²⁹

From the legislative evolution of the Robinson-Patman amendments, this much was clear: rejection of proposals to establish "likeness" in brand or design as an additional statutory prerequisite signified that no blanket exemption was contemplated for "like" products differentiated only in brand or design. Beyond this the act's application to differentiated goods was left for refinement by adjudication.³⁰

Informal FTC Rulings

The first price discrimination proceedings informally terminated by the Federal Trade Commission between 1936 and 1937 included several dismissals due to product variations that negated the requisite "like grade and quality."³¹ All proceedings charged discriminatory pricing by handbag and millinery manufacturers said to favor their large chain and department store accounts. One dismissal ruled that a lot of lower-priced handbags was not "of the same grade and quality" as the more expensive merchandise since it contained "bags of various grades and qualities, particularly with respect to market values";³² another determined that the lower-priced bags were "not like" other bags because they bore the "chain store's private brand or trademark" and were "specially designed to match the shoes which it sells";³³ and a third deemed the lower-priced millinery of different "grade" comprising "slow-moving styles, small sizes, less-expensive trimmings, and dyes which are less expensive to apply."³⁴

cf. id. at 27-28, 195. Actually, the United States Wholesale Grocers' Association, whose members felt the grocery chains' competitive pinch, was the dynamo behind the Robinson-Patman Act, in alliance with associations of retail druggists, retail grocers, and food brokers who have provided the organized political bulwarks of the act ever since. See notes 6 *supra*, 142 *infra*. Mr. Teegarden, the wholesalers' astute and ubiquitous counsel, functioned as Mr. Patman's factotum, drafting, analyzing, explaining, and steering throughout the forensic preliminaries until enactment. See *Hearings, supra* at 14-29, 30-39, 200-36, 244-69, 446-70.

29. 80 CONG. REC. 8234-35 (1936). During floor debate, Rep. Patman also remarked that sellers could not lawfully sell a privately branded commodity cheaper than their regular product if they were of the same "quality." *Id.* at 8115.

30. The complexities latent in the "grade and quality" concept were early discerned by Rep. Celler's Minority Statement. H.R. REP. NO. 2287, 74th Cong., 2d Sess., pt. 2, at 11 (1936). He observed that there were over 100 "grades" of cotton alone, and the Sears-Roebuck catalogue of 48,000 items might be multiplied a hundredfold to comprise all conceivably cognizable "grade" variations.

31. At the request of Rep. Patman, the Chairman of the Federal Trade Commission compiled a summary of issues and disposition in early Robinson-Patman cases. 81 CONG. REC. APP. 2336-41 (1937).

32. *Id.* at 2337.

33. *Id.* at 2339.

34. *Ibid.*

These bellwether rulings not only stressed "like grade and quality" as a statutory safeguard for differentiated products, but implied that variations of size, style, design, and even brand *might* give rise to cognizable distinctions in "grade" or "quality."

Formal Robinson-Patman Adjudications

Subsequent formal decisions brought other pertinent provisions into play against a seller's policies in marketing *promotionally* or *physically* differentiated products.

Promotional Differentiation. The Federal Trade Commission in the *Hansen Inoculator* case in 1938 ruled that inconsequential labeling variations could not controvert "like grade and quality."³⁵ Condemning price differentials in the sale of physically identical plant pharmaceuticals varying only in the inscription of the labels on the container, the Commission entered perfunctory uncontested findings reciting the existence of discriminatory prices which had the requisite "injurious" effects on competition among customers.³⁶

Again without challenge, the Commission in the two *United States Rubber* proceedings in 1939 and 1950 decided that nationally advertised and unbranded product versions were goods of "like grade and quality." After rejecting an attempted cost justification, the FTC in 1939 banned United States Rubber's price differential between nationally promoted U. S. Royal tires marketed through the United States Rubber distributor organization and the tires sold to oil companies for distribution under their own private brands—which were deemed of "like grade and quality."³⁷ A decade later the FTC condemned comparable price differentials for footwear "of like grade and quality." In this instance United States Rubber had priced its nationally advertised shoes (*e.g.*, "U. S.," "Keds," "Kedettes") higher than its unadvertised brands (*e.g.*, "American," "Titan") as well as its shoes carrying a customer's private brand designation.³⁸

35. 26 F.T.C. 303, 309 (1938).

36. Actually the labels were found to "resemble each other having green borders and background of leguminous plants and similar language," and differed only in bearing either the manufacturer's or the private brand customer's name. *Id.* at 308-09.

37. 28 F.T.C. 1489, 1500 (1939). The FTC staff in the course of the proceedings permitted United States Rubber to allocate solely to its U.S. brand customers all expenditures for U.S. Royal tire advertising and promotion. See AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER ROBINSON-PATMAN ACT 39 n.69 (rev. ed. 1953). Although the Commission's findings concluded that respondent's price differentials were not "cost-justified," 28 F.T.C. at 1502, United States Rubber had evidently succeeded in "cost-justifying" 95% of the price spread. See testimony of William T. Kelley, FTC General Counsel, in *Hearings Before the Senate Committee on Banking and Currency on S. 1122*, 78th Cong., 2d Sess. 172 (1944). Inability to justify even 5% of a price differential was deemed total failure of "cost justification."

38. 46 F.T.C. 998, 1006-09 (1950). For corroboration the FTC findings quoted United States Rubber's own discount schedule which indiscriminately characterized its several brands as "First" (or "Second") "grade and quality" footwear.

While in the second *United States Rubber* case the Commission dismissed a partial cost "justification" as legally inadequate,³⁹ such justification did subsequently vindicate private brand differentials. In *B.F. Goodrich* the FTC's complaint challenged the lower prices to private brand buyers and the purchasers of Goodrich's unadvertised "Shawmut" shoes in comparison with the higher price for nationally advertised "Hood" and "B.F. Goodrich" footwear. But the respondent persuaded FTC accountants to undertake "a more thorough examination" of its records, resulting in a concession that virtually all of the questioned price differentials were "cost-justified." And since the minor "unjustified" differentials applied only to a minute fraction of total Goodrich footwear sales, the Commission dismissed the complaint in 1954 for lack of "public interest" in further prosecution.⁴⁰ In the wake of *B.F. Goodrich*, the Commission's staff also agreed to an ultimate dismissal of the charges attacking Sylvania's quotation of higher prices for Sylvania brand tubes to its distributors than it quoted to Philco for comparable tubes resold under the Philco brand.⁴¹

The unopposed validation of the *Sylvania* cost justification in the Commission's final ruling obviated review of the "like grade and quality" and competitive "injury" aspects of the Initial Decision. Though manufactured to Philco specifications and checked and tested by Philco engineers, evidently no physical difference existed between the Sylvania and Philco brand tubes. Accordingly, the Initial Decision held them physically "interchangeable" and hence "of like grade and quality."⁴² Also, Philco's price advantage over Sylvania distributors was blamed for competitive "injury" due to Philco's "ability" to undersell Sylvania distributors who competed with Philco's sales subsidiary and Philco distributors for ultimate sales to retail radio parts and service establishments.⁴³

In the 1954 *Edelmann* Initial Decision, however, lack of competitive "injury" accounted for the exoneration of a private brand differential among products of "like grade and quality."⁴⁴ Here automotive testing instruments

39. According to the findings, the cost study had "justified" a substantial fraction of the various challenged price spreads, and in some instances had "justified" all but infinitesimal amounts. While the Commission observed that such "unjustified" remainders as \$.0064, .0047, and .0092 per dollar of gross sales might be deemed *de minimis* if standing alone, a finding of violation was warranted in view of the other instances of price differentials only fractionally "cost-justified." *Id.* at 1012.

40. *B.F. Goodrich Co.*, FTC Dkt. 5677 (Dec. 10, 1953), Initial Decision adopted by FTC (Jan. 22, 1954).

41. *Sylvania Elec. Products, Inc.*, FTC Dkt. 5728 (Sept. 23, 1954). Staff counsel acknowledged that Sylvania had "cost-justified" the bulk of the numerous challenged price differentials, and that the "unjustified" prices related to a limited number of tube types not sold in any substantial volume. Paradoxically, the respondent's accounting studies had succeeded in "over-justifying" the price spreads in the sale of many tube types but had "under-justified" others.

42. *Sylvania Elec. Products, Inc.*, FTC Dkt. 5728, at 3 (Dec. 8, 1953).

43. *Id.* at 7.

44. *E. Edelmann & Co.*, FTC Dkt. 5770 (March 5, 1954).

were sold to oil and tire company "special brand accounts" at up to one-third below the price regular equipment distributors paid. But, according to the Initial Decision, the equipment differed only as to "the brand name or mark, stamped or lithographed, on the product, and the printed insert in the hydrometer, showing how much of a particular antifreeze, as opposed to a number of antifreezes, was in the radiator solution and how much was needed to prevent solidification." The products were held of "like grade and quality" because "interchangeable" and displaying "no basic functional difference."⁴⁵ However, the private brand accounts resold only to their own franchised dealers and never bid for the customers of the distributors who paid the higher price; conversely, these franchised dealers apparently would not buy equipment from independent distributors regardless of price. With competition between the "favored" private brand and the "disfavored" regular purchasers thus non-existent, no competitive "injury" was traceable to the price differentials at bar.⁴⁶

Physical Differentiation. The sole judicial ruling on price differentials among differentiated products remains the *Bruce's Juices v. American Can Co.* decision in 1949.⁴⁷ The district court invalidated American Can Company's pricing of ISCANS, a line of juice containers, upon Bruce's complaint that it had to pay a discriminatory high price for the 3¹⁴/₁₆ inch ISCAN after being refused the 3¹²/₁₆ inch can at the lower net price its competitors were paying. These several ISCANS were adjudged of "like grade and quality," for the court felt "satisfied" they "were all of commercial grade and quality and gave substantially identical performance. Certainly all of the cans were adapted for the function for which they were sold and purchased, to wit, as containers of juice, and they were 'the same kind of goods.'"⁴⁸ Detriment to competition was inferred from a "retardation" of Bruce's growth in marketing canned fruit juices in competition with other canners.⁴⁹

45. *Id.* at 6. See note 89 *infra*.

46. E. Edelman & Co., FTC Dkt. 5770, at 7 (March 5, 1954). However, other price discrimination charges in this and several companion proceedings were sustained, culminating in cease and desist orders. E. Edelman & Co., FTC Dkt. 5770 (May 10, 1955), and cases cited in note 88 *infra*.

47. 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919, 924 (5th Cir.), *modified on rehearing*, 190 F.2d 73, 74 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951). *Boss Mfg. Co. v. Payne Glove Co.*, 71 F.2d 768 (8th Cir. 1934) was decided under the pre-Robinson-Patman provisions of the Clayton Act. See note 64 *infra* for tangentially pertinent decisions.

48. 87 F. Supp. at 987; *cf.* 187 F.2d at 924.

49. 87 F. Supp. at 992; 187 F.2d at 923. Judgment for \$215,000, including statutory attorney's fees and trebled damages, was entered in Bruce's favor as a result of this litigation which involved several types of alleged price discriminations on American's part. Contrast the court's theory of "automatic damages" with *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55-56 (8th Cir. 1951), and *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949). *But cf.* *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); *Enterprise Industries, Inc. v. The Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955).

However, the Federal Trade Commission's 1953 *Champion Spark Plug* dismissal rested on minute physical distinctions among differently priced products.⁵⁰ Champion was charged with selling "special brand spark plugs to Montgomery Ward & Company at approximately 18 cents per plug while it sells its regular Champion brand spark plugs to its distributors at approximately 26 cents per plug."⁵¹ But the special brand plugs varied slightly from Champion's regular product, containing different insulators and "ribs."⁵² The FTC trial staff conceded that the differentiated plugs were not of "like grade and quality," and the Commission ultimately dismissed these charges for lack of proof.

On the other hand, the Commission's 1956 *General Foods* decision not only adopted a looser construction of "like grade and quality" and a harsh test of competitive "injury," but imposed far-reaching promotional restrictions on suppliers of differentiated products.⁵³ The company marketed its household groceries through conventional wholesalers, but simultaneously adapted a line of specially packaged commercial groceries for distribution through Institution Contract Wagon Distributors who specialized in aggressive promotional selling to the "institution trade" comprising restaurants and hotels. In recognition of his manifold marketing functions, the ICWD received a 2.4 per cent to 4 per cent discount from wholesale list price for coffee, the chief institutional staple, and a 10 per cent reduction on other groceries.⁵⁴ General Foods was convicted of "injurious" price discrimination and illegal failure to supply all competing distributors, *i.e.*, conventional wholesalers, with institution-pack groceries on "proportionally equal terms."

50. *Champion Spark Plug Co.*, FTC Dkt. 3977, para. 10 (July 10, 1953). This phase was part of a broader attack on Champion's pricing and distribution practices which resulted in partial findings of violation and an order to cease and desist. On the *Champion* case generally, see DIRLAM & KAEN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 216-25 (1954); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 *YALE L.J.* 929, 951-55 (1951).

51. Amended Complaint, para. 7 (June 27, 1947). The complaint arose from a claim in the Montgomery Ward mail-order catalogue that its "Riverside" and "Ward Standard" brand plugs were manufactured by "one of America's leading spark plug manufacturers, using the same materials as in its own well known plugs."

52. Official Transcript of Hearings at 682-745. The functional significance, if any, of this physical variation was not revealed.

53. *General Foods Corp.*, FTC Dkt. 6018 (Feb. 15, 1956), adopting Initial Decision (March 2, 1955). The case is analyzed in Rowe, *Borderland Issues in Court and Commission Cases under Sections 2 and 3 of the Clayton Act*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 60, 67-69 (April 1956).

54. According to the FTC, the Institution Contract Wagon Distributor, "usually a relatively small operator," sold directly from his truck to the customer's kitchen in frequent deliveries to assure constantly fresh supplies, and performed a multitude of promotional activities, such as: stocking replacement parts; servicing coffee-making equipment; performance of repairs, adjustments, and 24-hour emergency service; loaning equipment to customers; recipe service; arrangement of the customers' inventory and the removal of stale and damaged merchandise; product displays; and supplying free demonstrations and promotional materials. FTC Decision at 2.

As a first step, the price differentials were held "injurious" to competition whenever conventional wholesalers paid more. The FTC brushed aside the claim that the differential merely compensated the Institution Distributor for the performance of extra distributive functions shunned by conventional wholesalers. Competitive detriment was inferred from the Institution Distributor's resales "at very small markups, forcing conventional wholesale grocers to reduce their customary markups, and consequently their profits, to meet ICWD competition."⁵⁵

The Commission next adjudged the groceries to be of "like grade and quality" irrespective of packaging or adaptation,⁵⁶ and decreed General Foods' duty to offer the institution-packed goods to one and all. General Foods cereals and dessert preparations were differentiated largely by size and wrapping, but the institution-pack coffee boasted an "additional kind of bean" for longer freshness and a distinct coloration and aroma. The Commission viewed this product differentiation inadequate to overcome the "presumption that the two packs are of like grade and quality" arising from the marketing of both under the single Maxwell House brand.⁵⁷ Moreover, the Commission then characterized the entire General Foods packaging program as providing "services" and "facilities" subject to mandatory availability to all competing customers on "proportionally equal terms."⁵⁸ In net effect, the FTC forced General Foods to distribute its institution-type products through ICWD's and conventional wholesalers alike, under compulsory price uniformity irrespective of their divergent marketing functions.⁵⁹

The most recent FTC proceeding, *Atalanta Trading Corp.*,⁶⁰ erected another promotional limitation on the foundation of *General Foods*. The Initial

55. The examiner had excluded such proof on the traditional ground that "a seller cannot justify allowances to purchasers which, in fact, constitute payment to them for doing their own work in the resale of goods purchased and owned by them." Initial Decision at 11.

56. Although "like grade and quality" is not an *express* requirement in § 2(e), the Commission implied that condition in accord with the § 2(d) precedent of *Golf Ball Manufacturers Ass'n*, 26 F.T.C. 824, 851 (1938). See FTC Decision at 8-9; Initial Decision at 17. For text and analysis of these provisions, see note 103 *infra* and accompanying text.

57. Initial Decision at 17. The Initial Decision also discarded as "without relationship to" and of "no effect upon the grade and quality of the coffee" the "variations in the kinds of grind of both types of Maxwell House coffee—fine, regular, drip, glassmaker, pulverized—and [the] variety of packs suitable for convenient use in various sizes and types of coffee-making equipment." *Ibid*.

58. FTC Decision at 8; Initial Decision at 17. See note 103 *infra* and accompanying text.

59. The FTC's cease and desist order not only banned price discriminations in the sale of goods of "like grade and quality," but also prohibited "furnishing to any purchaser any such products packaged in containers of a certain size and style, unless all purchasers of such products competing in the resale thereof are accorded the opportunity to purchase such products, packaged in containers of like size and style, on proportionally equal terms." Initial Decision at 18-19.

60. FTC Dkt. 6464, at 4 (May 21, 1956). The Initial Decision is presently pending before the Commission on review.

Decision held that "ham is ham"—and of "like grade and quality" whether cooked, smoked, or raw, and regardless of size or packaging, so long as the variations uniformly carried the producer's brand.⁶¹ Accordingly, the case outlawed a producer's payments to dealers for plugging his newly launched variation of Unox hams unless corresponding benefits were offered to all competing distributors of any "like grade and quality" Unox hams—whether they handled the featured product innovation or not.

ANALYSIS OF CONTROLLING DOCTRINES

In the perspective of two decades of Robinson-Patman, the legality of a seller's program of product differentiation centers on these current interpretations: (1) the wavering criterion of "like grade and quality" that brings the act's bans into play; (2) the condition of detriment to competition, now virtually presumed from a price differential; (3) the cost justification, which provides uncertain and expensive sanctuary for some differentials; (4) the "payments" and "services" provisions that may dissipate promotional programs or even bar the separate distribution of differentiated goods.

"Like Grade and Quality"

Despite the crucial status of "like grade and quality" as a threshold control over the application of the act, twenty years of Robinson-Patman have left the law in flux.⁶² Precedent declares only the obvious with certainty: products made from inferior components are not of "like grade and quality" with better goods; and inconsequential variations in labeling will not dispel otherwise "like grade and quality."⁶³ Beyond this the contours of the law recede into confusion.⁶⁴

61. *Id.* at 4, 5. Seen by the Initial Decision, such differentiations created "a distinction without a difference, more fanciful than real," and amounted to "no more than the distinction between sizes of the same shoe or the same dress."

62. Legal commentary on this provision is sparse. See ATT'Y GEN. REP. 156-59; AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 38-40, 118-20 (rev. ed. 1953); OPPENHEIM, UNFAIR TRADE PRACTICES 1031-38 (1950); Comment, 49 NW. U.L. REV. 225, 231-32 (1954); Mason, *Discriminate in Price Between Different Purchasers of Commodities of Like Grade, Quality and Popularity*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 82 (Aug. 1953).

63. *Boss Mfg. Co. v. Payne Glove Co.*, 71 F.2d 768 (8th Cir. 1934); 81 CONG. REC. APP. 2337, 2339 (1937); *Hansen Inoculator Co.*, 26 F.T.C. 303, 309 (1938).

64. In addition to the expository rulings discussed in the preceding text, other tangential decisions involved the "grade and quality" provision.

Several companion FTC rulings of minor significance rejected contentions that volume price differentials for a *line* of automobile supplies sold as a *unit*—each item within the line thus differing from the others and not "interchangeable"—could not give rise to price discriminations as between goods of "like grade and quality." These Initial Decisions reasoned that respondents having on their own initiative combined various items into a "line" were estopped from asserting that each single item within this "line" was not of "like grade and quality" with every other. *Moog Industries, Inc.*, FTC Dkt. 5723, at 11 (March 8, 1954);

As for product differentiation by means of brand, current doctrine is beset with inconsistency. Since legislative history implied only that brand or design distinctions *as such* should not oust the act's application, the FTC in 1937 felt free to accord liberal scope to "grade and quality" by basing dismissals on product distinctions arising from "private brand or trademark" and matching designs.⁶⁵ But a progressive legal depreciation of brand distinctions followed. In the absence of any pertinent judicial interpretation, the Commission since 1938 has consistently disregarded even nationally promoted brands as contra-

P. & D. Mfg. Co., FTC Dkt. 5913, at 6 (Dec. 20, 1954). The Commission sustained these rulings. FTC Dkt. 5723, at 8 (May 10, 1955); FTC Dkt. 5913, at 4 (April 26, 1956); and see Whitaker Cable Corp., FTC Dkt. 5722, at 3 (May 10, 1955). See also cases cited in note 66 *infra*.

In addition, some judicial decisions touched on the "like grade and quality" provision:

(1) In order to disprove charges that its sales of identical business machines to some consumers at discriminatory prices unlawfully cut into the private plaintiff's competing business in comparable machines, the defendant in *McWhirter v. Monroe Calculating Mach. Co.* maintained that "the calculating machines of the two manufacturers are not competitive in that they are not of like grade and quality." 76 F. Supp. 456, 460 (W.D. Mo. 1948). The court rightly deemed irrelevant whether the machines of the two rival sellers were of "like grade and quality" *with each other*, for the real issue concerned defendant's discriminations in the sale of *its own* machines of admitted "like grade and quality." *E.g.*, *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 518 (6th Cir. 1944). The opinion did observe that the parties' machines despite differences in appearance and design were "generally designed to perform the same general functions in their respective classifications" and so were "competitive." 76 F. Supp. at 461. But rather than defining the "like grade and quality" concept, the court thus epitomized, albeit ambiguously, the facts showing that the machines were sufficiently "competitive" so that one firm's discriminatory price cutting might impair its rival's sales.

(2) Another decision held that price differentials as between a seller's combination sale and his sales of a single item could not constitute a discrimination among goods of "like grade and quality." *Package Closure Corp. v. Sealright Co.*, 1941-43 CCH TRADE REG. REP. (Trade Cas.) ¶ 52969 (S.D.N.Y. 1943), *aff'd*, 141 F.2d 972, 979-80 (2d Cir. 1944). A treble damage plaintiff who sold milk bottle hoods had charged that competing manufacturers drove him out of business by quoting unconscionably lower prices for a cap and hood combination than for hoods sold alone. The court dismissed the complaint as alleging only "a discrimination by defendants between purchasers of caps and purchasers of hoods sold in combination with caps. Obviously, such discrimination was not between purchasers of commodities of like grade and quality."

A foggy decision dismissed a brick seller's treble damage charge that a building contractor caused it unlawful damage by bidding low on a construction project. Defendant was held outside § 2(a) because its bid of brick plus building labor added up to a "construction contract" rather than a "commodity sale" within the purview of the Robinson-Patman Act. *General Shale Products Corp. v. Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942). Just what constitutes a "commodity" within the meaning of the Clayton Act remains a hazy proposition. *Cf. Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 609 n.27 (1953) and cases cited; *Syracuse Broadcasting Corp. v. Newhouse*, CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68468, at 11965 (2d Cir. Aug. 31, 1956); *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co.*, 184 F.2d 552, 559 (4th Cir. 1950); *Christmas Club*, 25 F.T.C. 1116 (1937).

65. See text at p. 9 *supra*.

dicting "like grade and quality" in comparison with unadvertised variations sold at lower prices.⁶⁶ Yet paradoxically, the Commission has not only accorded controlling weight to nationally advertised brands in other Robinson-Patman contexts;⁶⁷ it has indeed construed brand *identities* as evidencing "like grade and quality." *General Foods*, emulated by *Atalanta Trading*, maintained that a uniform producer's brand created a "presumption" of "like grade and quality" which even substantial physical disparities in the differentiated products failed to "overcome."⁶⁸ Thus, while the Commission on the one hand ignored brand *distinctions* as *disproving* "like grade and quality" of physically "same" goods, it viewed brand *identity* as *proving* the "like grade and quality" of physically different products.

As applied to physical distinctions, administration of the "like grade and quality" provision is also wracked by contradictions. The Federal Trade Commission's 1937 dismissals once again adopted a liberal approach, and considered differences in style, size, trimmings and physical components decisive elements in comparing a product's "grade."⁶⁹ But without reference to these rulings, the *Bruce's Juices* decision in 1951 proclaimed a broader doctrine equating "like grade and quality" with functional interchangeability and extending the act to price differentials for "the same kind of goods."⁷⁰ The later *Sylvania* and *Edelmann* Initial Decisions also invoked a concept of functional interchangeability.⁷¹

66. See text at pp. 10-11 *supra*, and also *Fruitvale Canning Co.*, FTC Dkt. 5989 (June 15, 1956); *Page Dairy Co.*, FTC Dkt. 5974 (Oct. 30, 1953) adopting Initial Decision (Sept. 11, 1953) where brand and labeling distinctions were disregarded as legally insignificant.

67. According to the Commission, "public acceptance rather than chemical analysis of the product is the important competitive factor," so that "off-brand or local-brand gasoline sells at lower prices than major brands, and distributors of off-brand gasoline find it necessary to undersell major brands in order to secure some share of the market." *Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), *rev'd on other grounds*, 233 F.2d 649 (7th Cir. 1956). Conversely, a premium brand product when nominally matching the price of a lesser known product lacking comparable consumer acceptance would in truth be undercutting it in the market—so that the Commission may refuse to honor a seller's statutory defense that such a discriminatory price reduction was made in good faith merely to *meet* the competitor's equally low price. In its *Minneapolis-Honeywell* decision the Commission rejected a "meeting competition" defense partly because respondent's temperature controls sold "at a premium price" attributable to "a large customer demand for, and public acceptance of" Minneapolis-Honeywell products which enabled their sale "at prices higher than those charged by its competitors." 44 F.T.C. 351, 396-97 (1948), *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951). The Commission in a similar context also took account of the distinct price margins related to consumers' preferences cultivated through promotion of bakers' yeast. *Standard Brands, Inc.*, 46 F.T.C. 1485, 1495 (1950), *aff'd*, 189 F.2d 510 (2d Cir. 1951); *cf.* the complaints issued against *Anheuser-Busch, Inc.*, FTC Dkt. 6331 (April 19, 1955), and *Pure Oil Co.*, FTC Dkt. 6640 (Sept. 26, 1956), charging local price reductions in nationally advertised products to the alleged detriment of the lesser promoted products of rivals.

68. See text at pp. 13-15 *supra*.

69. See text at p. 9 *supra*.

70. See text at p. 12 *supra*.

71. See text at pp. 11-12 *supra*.

Yet the FTC's *Champion Spark Plug* dismissal in 1953 ignored *Bruce's Juices* and relied on minuscule distinctions in the construction of manifestly interchangeable products.⁷²

Some tentative generalizations can superficially reconcile the inconsistencies pervading the subtler interpretations of "like grade and quality": Distinctions in brand alone may not dispel the "like grade and quality" of otherwise identical products.⁷³ By a preponderance of precedent, physically differentiated products may satisfy the standard of "like grade and quality" if "functionally interchangeable."⁷⁴ However, when minor physical differentiations go hand in hand with a brand variation—the factual portrait of the *Champion Spark Plug* case—"like grade and quality" may be disproved notwithstanding evident "functional interchangeability."⁷⁵ Also, in areas where a test of "functional interchangeability" spawns absurdity—for instance, by holding all foods "interchangeable" for eating and hence legally alike—that concept may not be invoked at all. Instead, an existing brand identity may cancel even significant physical distinctions and facilitate a conclusion of "like grade and quality."⁷⁶

But more significant than nice logical reconciliations is that no appellate review to date has evaluated and resolved the existing anomalies and contradictions in the interpretation of "like grade and quality."⁷⁷

Competitive "Injury"

Contrary to the uncertainties surrounding "like grade and quality," the tests of competitive "injury" have hardened into rigidity. The "injury" requirement has evolved into an almost automatic inference from the differential itself, in

72. See text at p. 13 *supra*.

73. United States Rubber Co., 46 F.T.C. 998, 1006-09 (1950); United States Rubber Co., 28 F.T.C. 1489, 1500 (1939); Hansen Inoculator Co., 26 F.T.C. 303, 309 (1938); Fruitvale Canning Co., FTC Dkt. 5989 (June 15, 1956); Sylvania Elec. Co., FTC Dkt. 5728 (Dec. 8, 1953); Page Dairy Co., FTC Dkt. 5974 (Oct. 30, 1953), adopting Initial Decision (Sept. 11, 1953).

74. *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919, 924 (5th Cir. 1951); Sylvania Elec. Co., FTC Dkt. 5728, at 3 (Dec. 8, 1953); E. Edelman & Co., FTC Dkt. 5770, at 6 (March 5, 1954); see *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456, 461 (W.D. Mo. 1948). But cf. Informal FTC Opinions, 81 CONG. REC. APP. 2337 (1937). The statement of prevailing law by the Attorney General's Committee is on the cheery side: "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act." ATT'Y GEN. REP. 158.

75. *Champion Spark Plug Co.*, FTC Dkt. 3977, para. 10 (July 10, 1953).

76. *General Foods Corp.*, FTC Dkt. 6018 (Feb. 15, 1956), adopting Initial Decision at 17 (March 2, 1955); *Atalanta Trading Corp.*, FTC Dkt. 6464, at 5 (May 21, 1956).

77. Actually, the Commission's denial of recognition to brand differentials as determinants of "like grade and quality" prevailed by consent in the *United States Rubber* proceedings, and rested on stipulation in the *Sylvania* case. The *Edelmann* respondent had no occasion to challenge the finding of "like grade and quality" since that phase of the case was dismissed on other grounds.

the special context of differential pricing for differentiated products as elsewhere.⁷⁸

To be sure, the FTC's 1936 *Goodyear* tire proceeding, decided under the original Clayton Act, accorded a penetrating analysis to the private brand price differentials at bar.⁷⁹ Impairment of competition was adjudged only after a searching comparative evaluation of the operating margins of the recipients of the challenged prices. The FTC duly considered the premium price that the nationally advertised Goodyear brand tire commanded in the consumer market in comparison with the Sears private brand, and undertook a thorough appraisal of Sears' resale pricing policies and their competitive impact in relation to the attrition of rivals in tire distribution.

FTC rulings under the 1936 amendments, however, shirked such market analysis and inferred "injury" to competition as a matter of course. The findings of "injury" in the *United States Rubber* cases were perfunctory and uncontested paraphrases of the statutory text.⁸⁰ In the view of the litigated and more explicit *Sylvania* Initial Decision, "injury" stemmed from Philco's "ability" "at times" to underbid Sylvania's price to its distributors, while Philco's distributors and its own sales subsidiary were "encouraged" to undersell Sylvania distributors in resales to the retail trade.⁸¹ The conclusion of "injury" did not even attempt to relate the price differentials in Philco's favor to the actual re-

78. The recent trends are discussed and analyzed in Rowe, *Borderland Issues in Court and Commission Cases under Sections 2 and 3 of the Clayton Act*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 60-72 (April 1956). Compare Comment, *The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws*, 65 YALE L.J. 34, 67-81 (1955).

Among earlier legal surveys, see ATT'Y GEN. REP. 160-70, 202-09; Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1155 (1955); Sunderland, *Antitrust Developments: A New Era for Competitive Pricing*, 41 A.B.A.J. 113 (1955); Comments, *The "Injury" Requirement of the Robinson-Patman Act*, 49 NW. U.L. REV. 197 (1954), and *The Standard of Injury Applicable to First-Line Competition*, *id.* at 209; AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 40-54 (rev. ed. 1953); Levy, *Functional Pricing*, U. MICH. INSTITUTE ON FEDERAL ANTITRUST LAWS 116 (1953); Note, *Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation*, 67 HARV. L. REV. 294 (1953); Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 CALIF. L. REV. 526 (1952); Oppenheim, *Federal Antitrust Legislation: Guideposts To A Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1198-1213 (1952); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 942-45 (1951); Simon, *The Fantasy of the Phrase "Injury To Competition"*, 15 LAW & CONTEMP. PROB. 258 (1950); Austern, *Required Competitive Injury and Permitted Meeting of Competition*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 63, 73 (1947); Shniderman, *The Tyranny of Labels—A Study of Functional Discounts Under The Robinson-Patman Act*, 60 HARV. L. REV. 571 (1947); Van Cise, *Functional Prices*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 89 (1947).

79. See text at pp. 5-6 *supra*.

80. See *United States Rubber Co.*, 46 F.T.C. 998, 1011 (1950); *United States Rubber Co.*, 28 F.T.C. 1489, 1501 (1939). See also *Hansen Inoculator Co.*, 26 F.T.C. 303 (1938).

81. *Sylvania Elec. Products Co.*, FTC Dkt. 5728, at 7 (Dec. 8, 1953), set aside on other grounds by FTC (Sept. 23, 1954).

sale price tactics of Philco distributors and their bearing on competition with the distributors of Sylvania tubes, and omitted any inquiry into Philco's off-setting expenditures for advertising and promotion to gain for Philco tubes a customer appeal comparable to Sylvania's brand. The Commission's *General Foods* ruling held that competitive "injury" was wrought by a minor price differential in favor of the Independent Contract Wagon Distributors who sold "at very small mark-ups, forcing conventional wholesale grocers to reduce their customary mark-ups, and consequently their profits."⁸² Apart from this dubious detriment to "competition," the FTC ruling ignored the substantial off-setting expenses incurred by ICWD's in performing a host of valuable promotional functions shunned by the conventional wholesalers who paid the higher price.⁸³

Far from being extraordinary or vindictive rulings peculiar to differentiated goods, these cases symptomize the prevailing tendency to equate a price differential with competitive "injury."⁸⁴ In 1948 the Supreme Court's *Morton Salt* decision invalidated a seller's quantity discounts by discerning the statutory detriment to competition from "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay."⁸⁵ But the *Minneapolis-Honeywell* decision of the court of appeals⁸⁶ in 1951 and the FTC's *Doubleday* ruling⁸⁷ in 1955 stressed the limitations of that doctrine in market settings where pertinent countervailing factors operated to neutralize the effects of a nominal price differential. The most recent Commission decisions, however, have abandoned such market analysis and instead projected *Morton Salt* so as to condemn almost any price differential among rival customers as "injurious" per se.⁸⁸

The *Edelmann* dismissal of discriminatory pricing charges thus remains a lone odd legal twist. The challenged differentials were held incapable of caus-

82. *General Foods Corp.*, FTC Dkt. 6018, at 4 (Feb. 15, 1956).

83. See note 54 *supra*.

84. For a critique of this doctrine of "microscopic substantiality" in measuring competitive detriment, see Rowe, *Borderland Issues in Court and Commission Cases under Sections 2 and 3 of the Clayton Act*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 60-72, 81-82 (April 1956). However, these automatic inferences of "injury" on the customer level have recently been disavowed in cases involving competitive impairment among the seller's own rivals. See *id.* at 70-71; note 155 *infra*.

85. *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948). Cf. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945).

86. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

87. *Doubleday & Co.*, FTC Dkt. 5897, at 5 (Aug. 31, 1955). Owing to an ambiguous concurrence by one Commissioner in Chairman Howrey's opinion, some doubt attends the status of this 3-2 decision as an expression of majority policy.

88. In addition to the *General Foods* decision, see *P. Sorensen Mfg. Co.*, FTC Dkt. 6052 (June 29, 1956); *Fruitvale Canning Co.*, FTC Dkt. 5989 (June 15, 1956); *C. E. Niehoff & Co.*, FTC Dkt. 5768 (May 17, 1955); *P. & D. Mfg. Co.*, FTC Dkt. 5913 (April 26, 1956); *Whitaker Cable Corp.*, FTC Dkt. 5722 (May 10, 1955); *Moog Industries, Inc.*, FTC Dkt. 5723 (May 10, 1955); *E. Edelmann & Co.*, FTC Dkt. 5770 (May 10, 1955). Cf. *National Lead Co. v. FTC*, 227 F.2d 825, 835 (7th Cir. 1955).

ing competitive "injury" by reason of alleged exclusionary arrangements whereby the independent distributor who paid the higher price was foreclosed by the private brand customers from bidding for resales to their "controlled" franchised outlets while they refrained from competing for resales to *his* accounts.⁸⁹ The *Edelmann* rationale can of course hold only so long as the recipients of the seller's prices do not themselves compete directly in resale to the general public. More important, however, is that the foreclosure of rivals from access to substantial markets by means of exclusionary tactics offends the Sherman and Clayton Acts.⁹⁰ Few future proceedings are likely to exonerate a price differential for lack of competitive "injury" owing to circumstances that invite prosecution under another branch of antitrust.

In light of prevailing Robinson-Patman doctrine, therefore, a seller seeking to vindicate differential pricing in a program of product differentiation cannot bank on the competitive "injury" requirement of the act.

Cost Justification

As one of the defenses for exculpating "injurious" and hence *prima facie* illegal price discriminations, the statutory cost justification has provided uncertain shelter for price differentials among differentiated goods.⁹¹

Cost justifications have sporadically vindicated private brand differentials. At first, United States Rubber in 1939 failed to cost-justify its price differential in the sale of nationally advertised and private brand tires when the Commission rejected accounting studies which demonstrated "only" 95 per cent of the challenged price spread as corresponding to cost economies in dealing with private brand accounts.⁹² In the subsequent footwear proceeding, United States Rubber came closer to the mark by cost-justifying several of the differentials at issue.⁹³ In 1953 B.F. Goodrich and Sylvania finally succeeded in justifying

89. E. Edelmann & Co., FTC Dkt. 5770, at 6-7 (March 5, 1954). Notably, no officials of the oil and tire companies in question had the opportunity to refute these charges, made in a proceeding to which they were not party. The issue of dealer domination is presently before the FTC in three cases attacking "overriding commissions" paid by tire to oil companies in connection with the sale of TBA products through franchised outlets. Complaints in FTC Dkts. 6485-6487 (Jan. 11, 1956).

90. See, e.g., ATT'Y GEN. REP. 144-45; *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 314 (1949); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

91. The statutory cost justification is analyzed in ATT'Y GEN. REP. 170-75; Sawyer, *Cost Justification of Quantity Differentials*, 1 ANTITRUST BULL. 573 (1956); Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1162-64 (1955); Comment, 49 NW. U.L. REV. 237 (1954); AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 56-66 (rev. ed. 1953); Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 9-13 (1953); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 961-65 (1951); Note, 65 HARV. L. REV. 1011 (1952); Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials under the Robinson-Patman Act*, 30 TEXAS L. REV. 1 (1951); Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 IOWA L. REV. 244 (1951).

92. *United States Rubber Co.*, 28 F.T.C. 1489, 1502 (1939); see note 37 *supra*.

93. *United States Rubber Co.*, 46 F.T.C. 998, 1011-12 (1950); see note 39 *supra*.

private brand differentials in their entirety, Goodrich by grace of a *de minimis* principle which winked at some minor price spreads not fully accounted for.⁹⁴

But these successes entailed herculean exertions which may never advance the Robinson-Patman jurisprudence of the future. As exemplified by Sylvania's cost study, the most recent of the few validated by the FTC, cost justification is a huge task demanding vast investments in time and professional talent. Over a period of seven months more than 3,000 man hours under the supervision of corporate officers as well as independent CPA's were devoted to the preparation of Sylvania's cost study—which additionally secured the imprimatur of sound accounting practice bestowed by a knowledgeable professional authority on matters of Robinson-Patman accountancy.⁹⁵ The B.F. Goodrich cost justification consumed a comparable quantum of talent and time. Yet *B.F. Goodrich* and the second *United States Rubber* case culminated in stipulations among FTC staff and respondent's counsel for mutually agreeable disposition of the accounting issues. The Commission was thereby spared all articulation of a *ratio decidendi*, and instead announced simply its ultimate verdict—without reasoned analysis and bare of legal guidance or precedent value. The *Sylvania* dismissal was scarcely more revealing.⁹⁶ Although the Commission complimented the "sound accounting principles" permeating Sylvania's cost presentation, it never divulged these principles for the benefit of future respondents.

Whatever the obstacles thus confronting a cost justification for differentiated products, the general annals of Robinson-Patman accountancy imply even bleaker legal prospects. Epitomized by the FTC's disapproval of a 95 per cent justification presented by United States Rubber in 1939, the mathematical exactitude required of accounting studies has engendered warfare over trifles. Respondents have been foiled by a reluctance on the part of FTC accountants to articulate their criticisms and objections in writing,⁹⁷ and an inclination of

94. *Sylvania Elec. Products, Inc.*, FTC Dkt. 5728 (Sept. 23, 1954); *B.F. Goodrich Co.*, FTC Dkt. 5677 (Jan. 22, 1954), adopting Initial Decision (Dec. 10, 1953). The Initial Decision recited that all of respondent's challenged differentials were cost-justified except for one discount bracket covering less than $\frac{1}{2}$ of 1% of its footwear sales in 1949. *Id.* at 2.

95. See Appeal Brief for Respondent Sylvania before FTC, at 22-24.

96. A lucid and expository concurring opinion was filed separately by Chairman Howrey. The majority *Sylvania* opinion approved Sylvania's "weighted average" method of cost justification for its line of tubes whose price differentials were at issue. The "weighted average" method first ascertained the average price per tube paid by its distributors. That total was compared with the hypothetical total they would have paid for the same tubes if accorded the lower prices quoted to Philco. (In this way, proper weight was accorded to the volume in which each tube type was sold, since some types moved in larger quantities than others.) The cost study then sought to demonstrate how additional distribution costs justified charging this additional *aggregate* amount to Sylvania distributors. The narrow FTC opinion sanctioned this technique because in the case at bar the volume of consumer appeal of any particular tube type sold by Sylvania was entirely unrelated to the amount of the price differentials at issue, and because the size of the price spread for an *individual* tube had no independent significance for the competitive situation on the resale level.

97. FTC accountants have often confined their adversary appearances to oral testimony. Taggart, *Cost Justification under the Robinson-Patman Act*, J. Accountancy, June 1956, pp. 52, 56.

the tribunal to accord virtually insuperable respect to the opinions of staff accountants appearing in aid of the prosecution's case.⁹⁸ Most discouraging has been the absence of guiding policy or precedent for predicting the reception likely to face a cost project on staff or decisional levels at the FTC.⁹⁹

There being "no rules of the game," the consensus concedes that "the cost defense has proved largely illusory."¹⁰⁰ In statistical confirmation, only four cost justifications in recorded cases have succeeded in fully vindicating challenged price differentials in twenty years of Robinson-Patman enforcement.¹⁰¹ The Supreme Court has aptly observed that "proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."¹⁰²

As a legal defense for price spreads among differentiated products, a cost justification under prevailing doctrine thus remains an expensive gamble at best.

"Payments" and "Services"

Brought into play upon a finding that differentiated goods are of "like grade and quality," the "payments" and "services" provisions impose an indeterminate range of legal restrictions on a seller's promotional and distribution plans.¹⁰³

98. See ATT'Y GEN. REP. 173.

99. "Confusion arises because the FTC accountants seem to insist that each case be decided individually without much reference to what prior cases have held." Comment, 49 NW. U.L. REV. 237, 239 n.10 (1954).

100. See concurring opinion of Chairman Howrey in *Sylvania Elec. Products, Inc.*, FTC Dkt. 5728, at 5-6 (Oct. 27, 1954), echoing the conclusion of the ATT'Y GEN. REP. 171.

101. In addition to the successful cost justifications in *B. F. Goodrich* and *Sylvania*, the FTC has validated cost justifications in their entirety in *Horlicks Corp.*, 47 F.T.C. 169 (1950) and *Bird & Son, Inc.*, 25 F.T.C. 548 (1937). Cost justification partly succeeded in *United States Rubber Co.*, 46 F.T.C. 998 (1950) and *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948). Moreover, cost justifications conceivably contributed to dismissal of other cases where it was one among several tendered defenses. *Reid v. Harper & Bros.*, 235 F.2d 420 (2d Cir. 1956); *Bissell Carpet Sweeper Co.*, 40 F.T.C. 738 (1945); *Kraft-Phenix Co.*, 25 F.T.C. 537 (1937). On the other hand, cost justifications have been wholly disapproved in at least eleven cases of record. *Fruitvale Canning Co.*, FTC Dkt. 5989 (June 15, 1956); *C. E. Niehoff & Co.*, FTC Dkt. 5768 (May 17, 1955); *Champion Spark Plug Co.*, FTC Dkt. 3977 (July 10, 1953); *International Salt Co.*, 49 F.T.C. 138 (1952); *Curtiss Candy Co.*, 44 F.T.C. 237 (1947); *Standard Oil Co.*, 41 F.T.C. 263 (1945); *Morton Salt Co.*, 39 F.T.C. 35 (1944); *E. B. Muller & Co.*, 33 F.T.C. 24 (1941); *Standard Brands, Inc.*, 29 F.T.C. 121 (1939). See also *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd*, 191 F.2d 38 (8th Cir. 1951).

102. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79 (1953).

103. Section 2(d) of the act, 49 STAT. 1526 (1936), 15 U.S.C. § 13(d) (1952), declares it unlawful

"to pay or contract for the payment of anything of value to or for the benefit of a customer of such person . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is

Under current interpretations, the "like grade and quality" issue controls not only the pricing aspects of a program of product differentiation but its marketing strategy as well. Sections 2(d) and (e) of the act forbid all payments for a customer's benefit in recognition of "services or facilities" on his part as well as the furnishing of such "services or facilities" by the seller himself—unless offered on "proportionally equal" terms to all competing distributors.¹⁰⁴ For example, though the *Atalanta Trading* respondent wished to introduce a newly developed ready-to-eat "Canadian Bacon" in tins among consumers by defraying the in-store promotional outlays of those dealers willing to plug this product, he was compelled to offer comparable advertising arrangements to all competing distributors handling Unox hams of whatsoever type.¹⁰⁵ The legality of an advertising project conceived to finance the cooperative promotion of a single featured item in a seller's differentiated line was thus conditioned by section 2(d) on the plan's extension to every other variant of "like grade and quality." The *General Foods* finding of "like grade and quality" struck at a spectacularly successful campaign of distributing specially adapted institution-pack products to the commercial feeding trade through an aggressive corps of Institution Contract Wagon Distributors dedicated to hard promotional selling.¹⁰⁶ For by construing the "services or facilities" of section 2(e) as encompassing the differentiation of products in special packs and sizes, the Com-

available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

The counterpart provisions in § 2(e), 49 STAT. 1526 (1936), 15 U.S.C. § 13(e) (1952), render it unlawful

"to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

For legal analysis, see ATT'Y GEN. REP. 189-93; Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1168-71 (1955); Comments, 52 MICH. L. REV. 1198 (1954), 49 NW. U.L. REV. 225 (1954); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 110-41 (rev. ed. 1953); Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 959-61 (1951); FELDMAN & ZORN, ADVERTISING AND PROMOTIONAL ALLOWANCES (1948); Dunn, *Section 2(d) and (e)*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 55 (1946).

104. See note 103 *supra*.

105. *Atalanta Trading Corp.*, FTC Dkt. 6464 (May 21, 1956), discussed in text at pp. 14-15 *supra*.

106. *General Foods Corp.*, FTC Dkt. 6018 (Feb. 15, 1956). In the years of its Contract Wagon Distributor plan, General Foods' total sales of institution products jumped from \$9 million to over \$23 million between 1947 and 1951. And while in the corresponding years sales through conventional wholesalers dropped off only 14%, sales through ICWD's leaped practically 600%—attesting to the spectacular competitive success of the plan. See Initial Decision at 4. By 1953, sales through ICWD's had passed \$22 million, after a \$2 million volume in 1947, the first year of the plan. *Ibid*.

mission forced the respondent to offer its institution-pack products simultaneously to all rival distributors on "proportionally equal terms."¹⁰⁷

The rationale of these rulings casts complex obligations on manufacturers of differentiated goods.¹⁰⁸ A legal duty to offer comparable cooperative advertising arrangements to *all* competing distributors of any of a seller's differentiated products¹⁰⁹ entails an onerous and costly undertaking at best, and may jeopardize any campaign pitched to the promotion of one or a few featured items in a product line through a selected channel of distribution. Similarly, a cooperative advertising program implemented through the seller's direct provision of sales aids or marketing assistance to the distributors of only the featured product may founder on an obligation to supply comparable material to all other distributors of his differentiated goods. Perhaps most critically, the concept of "services or facilities" as construed by *General Foods* to reach the seller's very act of furnishing a variation of a basic commodity can abort a strategy for product differentiation—by compelling the firm selling its differentiated goods through one distribution channel to market these products simultaneously through another unwelcome and unwanted channel.

An affirmative finding of "like grade and quality" as to a seller's differentiated products thus commands conformity with the most lethal yet vaguest provisions of the act. As presently construed, sections 2(d) and (e) neither presuppose a showing of competitive "injury," nor permit a cost justification to excuse prima facie violations.¹¹⁰ Rather, failure to comply with these sections is illegal per se. But even apart from the residual mysteries enveloping the computation of the "proportionally equal terms" prescribed by these provisions,¹¹¹ the ambit of 2(d) and (e) is far from defined. Notwithstanding

107. In this respect, *General Foods* accords with an earlier Commission ruling that a seller's refusal to supply some customers with a particular packaged version of his product constituted a failure to "furnish" "services or facilities connected with the processing, handling, sale, or offering for sale of such commodity." *Luxor, Ltd.*, 31 F.T.C. 658 (1940). *But cf.* *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949), holding that a manufacturer's refusal to sell or furnish price lists for certain specially designed goods to an existing customer was not actionable under § 2(e). See also *Naifeh v. Ronson Art Metal Works*, 218 F.2d 202, 205-07 (10th Cir. 1954), and *Skinner v. United States Steel Corp.*, 233 F.2d 762, 765 (5th Cir. 1956) ("the services or facilities that must be made available on proportionally equal terms to all purchasers in competition are *merchandising services or facilities*." (Emphasis added.)).

108. For actual examples, see text at p. 34 *infra*.

109. A recent leading decision held that a seller who accorded promotional benefits to retailers must also extend them to wholesalers whose customers competed with the recipients. *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 236-37 (D.N.J. 1956).

110. *Corn Products Refining Co. v. FTC*, 144 F.2d 211, 219 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945); *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946); *United Cigar-Whelan Stores Corp. v. Weinreich Co.*, 107 F. Supp. 89 (S.D.N.Y. 1952). The Federal Trade Commission recently ruled that the "meeting competition" defense was available against charges preferred under the "services" provisions of § 2(e) but not the "payments" restrictions in § 2(d). *Henry Rosenfeld, Inc.*, FTC Dkt. 6212 (June 21, 1956).

111. See *Lever Bros. Co., Procter & Gamble Co., Colgate-Palmolive-Peet Co.*, FTC

the limited legislative objective to control discriminatory promotional deals between buyers and sellers,¹¹² the "services or facilities" challenged in the past have ranged from sales returns to warehousing arrangements to salaries of pretty girls.¹¹³ Nor is this all. The FTC has recently vowed sharper 2(d) and (e) vigilance and launched an enforcement drive with a flurry of complaints featuring novel doctrinal extensions.¹¹⁴

In sum, the "like grade and quality" issue trails in its wake a host of promotional restrictions of indefinite scope but automatic illegality—operative independent of the statutory qualifications or defenses for discriminatory pricing.

MARKET IMPACT OF PREVAILING DOCTRINE

These formidable legal barriers confronting price differentials inevitably generate pressure for uniform pricing on the seller's part. But in the context of product differentiation that tendency toward price uniformity entails two consequences—both at odds with accepted goals of antitrust: (1) The *economic* discrimination paradoxically fostered by nominal price equality; (2) The impediments to dynamic product innovation created by frozen pricing relationships.

Dkts. 5585, 5586, 5587 (Dec. 16, 1953); and FTC Trade Practice Conference Rules for the Cosmetics Industry with "explanatory analysis." 3 CCH TRADE REG. REP. ¶ 20221 (1951).

112. The legislative purpose was solely to nip discriminatory concessions disguised as advertising or promotional deals to favored customers. See, *e.g.*, Henry Rosenfeld, Inc., FTC Dkt. 6212, at 5 (June 21, 1956). That limited legislative intention is revealed in the Committee Reports. S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936); H.R. REP. No. 2287, 74th Cong., 2d Sess. 15-16 (1936). The floor debates confirm this view. See explanations of the legislation by Senator Logan and Representative Patman, 80 CONG. REC. 6282, 7759 (1936), and colloquy, *id.* at 8123.

113. Appleton-Century-Crofts, Inc., 47 F.T.C. 1371 (1951); Lambert Pharmacal Co., 31 F.T.C. 734 (1940); Elizabeth Arden v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945).

114. See FTC Press Release, July 22, 1956, "FTC to Launch Drive Against Discrimination in Food Field," recounting staff instructions by the Commission's Chairman "to take a hard look at promotional allowances and cooperative advertising payments made by food suppliers to the major retail outlets." The announcement was followed by the release of nine § 2(d) complaints on July 25. FTC Dkts. 6592-6600. Concededly experimenting with an unprecedented theory, these complaints charged the nine respondents—including Pepsi-Cola, Coca Cola, General Foods, Sunshine Biscuits, as well as makers of beer and cigarettes—with granting "indirect" promotional payments in favor of grocery chains through purchasing broadcast time from networks which ran spot advertising plugs for the chain groceries that had in turn given in-store promotion to the products of the respective respondents. See Wall Street Journal, July 25, 1956, p. 5, col. 1. In addition, the Commission has recently charged *recipients* of promotional allowances with violating the Federal Trade Commission Act's general bans on "unfair methods of competition," although the provisions of the Robinson-Patman Act do not reach the acceptance of promotional "payments" or "services." See United Cigar-Whelan Stores Corp., FTC Dkt. 6525 (July 31, 1956); Food Fair Stores, Inc., FTC Dkt. 6458 (Nov. 21, 1955); Giant Food Shopping Center, Inc., FTC Dkt. 6459 (Nov. 21, 1955).

Actually, FTC complaints issued under §§ 2(d) and 2(e) within the past year have dwarfed the number of proceedings instituted under any other Robinson-Patman provision.

Fostering of Economic Discrimination

Particularly as applied to products promotionally differentiated by brand, compulsory price uniformity enforces *economic* discrimination.

The prosperous American consumer in this age of abundance has progressed far beyond the purchase of a basic commodity for satisfying elementary needs. With growing disposable income in the hands of the buying public and more producers vying for its favor, a premium attaches to ingenuity in distribution.¹¹⁵ Salesman and huckster have joined to transform traditional marketing into "merchandising" powered by gimmicks, slogans, and brands. So allured, cultivated, conditioned—or seduced¹¹⁶—by the sloganeers and pitchmen, consumers stand ready to pay a bonus for a brand and the real or bogus benefits it symbolizes. Whatever the ultimate moralities of the matter, the cold fact is that the public will pay more money for a nationally advertised and branded version than it would pay for the physically same but promotionally unknown product *sans* brand.¹¹⁷ A manufacturer who sells a branded and an unbranded variation of the same basic item at a price differential is simply responsive to realities of the marketplace.

115. The number of consumer "spending units" with annual after-tax income of over \$4,000 has about doubled since 1950 to a present total of 26 million. \$4,000 is approximately the income line at which consumers exert "discretionary" spending power after having satisfied their basic needs. At recent rates of growth, this group which is in a position to "shop around" will comprise 36 million spending units by 1960. Seligman, *The Amazing Advertising Business*, Fortune, Sept. 1956, pp. 107, 109. See also Burck & Parker, *What a Country!*, Fortune, Oct. 1956, p. 127; Barnet, *Showdown in the Market Place*, Harv. Bus. Rev., July-Aug. 1956, p. 85; Silberman, *Retailing: It's a New Ball Game*, Fortune, Aug. 1955, p. 78.

116. Madison Avenue has now hired the wizards of psychoanalysis to probe the subconscious wellsprings of purchasing behavior. The Freudian pitch forebodes a weird assortment of wares pandering to human frailty, narcissism, and neurosis. See Stryker, "Motivation Research," Fortune, June 1956, p. 144; cf. Martineau, *It's Time to Research the Consumer*, Harv. Bus. Rev., July-Aug. 1955, p. 54.

117. E.g., CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 56-62 (6th ed. 1948); BORDEN, *ADVERTISING IN OUR ECONOMY* 30-31, 221-24 (1945). In the caustic prose of an articulate skeptic:

"The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction will follow its use? The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it."

Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1181 (1948).

A seller's marketing of such differentiated products through intermediate distributors at a price differential thus cannot be deemed "discriminatory" in any economic sense. The purchaser of the unbranded version of the seller's product naturally *pays less because he gets less*. Such a distributor—for example, a mail-order house,¹¹⁸ a multi-pump or "trackside" gasoline operator,¹¹⁹ a grocery chain¹²⁰—may resell under its own unknown and unadvertised brand at a corresponding price spread below the manufacturer's nationally promoted product which enjoys greater consumer appeal. In that event the distributor buys cheaper what he must resell cheaper. Alternatively, the unbranded distributor who paid less at the outset may invest in widespread advertising and promotion of his own brand in order to match the public acceptance and selling price of the manufacturer's branded product among customers—*viz.*, Philco which paid less for Sylvania's unbranded tubes and then promoted them under the Philco brand;¹²¹ or oil companies buying unbranded tires cheaper for resale under their own publicized brand.¹²² Here, too, the unbranded distributor re-

118. The Goodyear branded tire sold 20-25% higher in consumer markets than the comparable Sears "All State" tire. Goodyear Tire & Rubber Co., 22 F.T.C. 232, 308 (1936).

119. See, *e.g.*, REPORT OF THE SENATE SMALL BUSINESS COMMITTEE ON PETROLEUM MARKETING PRACTICES IN NEW JERSEY, S. REP. NO. 2810, 84th Cong., 2d Sess. 8, 18 (1956); Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L.J. 818, 833 (1952). The authors aptly remark that "when the national brand is removed, the discount from the tank wagon price is not discriminatory, strictly speaking, . . . since a different and inferior product in the economic sense is being sold." *Id.* at 833 n.48.

120. For an illustrative account, see *Battle of Brands, Supermarkets Step Up Use of Private Labels*, Wall Street Journal, July 11, 1956, p. 1, col. 1:

"Take the scene that presented itself to shoppers on a recent weekend at a Detroit A&P store. There in its red label splendor was a six-ounce jar of General Foods Corp.'s Maxwell House instant coffee for \$1.49. But right next to it, also in a red label, was a six-ounce jar of A&P instant for \$1.29. A half-pound of Salada tea was offered for 81 cents, competing with a half-pound of Nectar tea for 59 cents.

"Among the other products that glistened on the shelves were: Ann Page chile sauce, noodles and spaghetti; Sunnyfield butter, wheat puffs, and flour; Jane Parker bread, rolls, and cakes; Bright Sail insect powder and floor wax. All of these products carried lower prices than similar items bearing the well-known labels you see advertised nationally in magazines and newspapers and on TV screens, and which are available in most food stores. . . .

"Although the price disparity between private and national brands is sometimes as great as those presented to customers in the Detroit A&P, most sponsored label commodities are priced about one to three cents lower than comparable national brand products. The chains claim they can sell their private brand items for less than the national brands because they don't have to lay out big sums for advertising as the big food producers do."

121. See text at pp. 19-20 *supra*.

122. The so-called Quantity Limit Rule on rubber tires promulgated by the Federal Trade Commission to impose a ceiling on permissible discounts in tire sales by the manufacturer, note 23 *supra*, is under attack partly by reason of its evident effect in compelling "private brand" purchasers of tires to pay the same price as substantial purchasers of the manufacturer's brand. AMOCO is assailing the Commission's rule as arbitrarily inflicting

ceives no truly discriminatory favors; for the initial advantageous price quotation from the manufacturer is offset by the distributor's expenditures in promoting his private brand. But the price differential in either event—unless disproportionately exceeding the consumer preference margin for the manufacturer's brand¹²³—bestows no *net* advantage on the unbranded distributor. For the branded distributor who nominally pays more acquires not only the product but in addition the benefits of a manufacturer's brand that is worth money as a pre-selling symbol.¹²⁴

On the contrary, it is a uniform price between a manufacturer's unbranded and branded product that would be discriminatory—against the distributor of the unbranded version who in terms of market realities purchases a much less valuable item. Nominal price equality here would affirmatively perpetrate economic discrimination and thereby defeat the objectives of antitrust.¹²⁵ Yet this is the import of a "like grade and quality" test oblivious to distinctions in

economic discrimination on private brand buyers, and the pending decision of the court of appeals may resolve this issue in passing on the lower court's summary judgment invalidating the rule. *B. F. Goodrich Co. v. FTC*, 134 F. Supp. 39 (D.D.C. 1955).

123. This was the Federal Trade Commission's view in the *Goodyear* case. See text at pp. 5-6, 19 *supra*. Cf. Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 9-10 (1953).

124. A recent district court decision invalidating "Fair Trade" legislation thus analyzed the value added by the brand to the dealer's product:

"The price he paid was established because the article bore a certain label or trademark. Had it not been for the label he would not have been required to pay such a price. The label caused him to buy and the label assists him in selling. The value of the item is thus enhanced by reason of the label indicating that it is an established and nationally advertised commodity. If the label were removed the price to him would be reduced proportionately. . . . To use an illustration, we may say a man buys a Buick automobile. He pays more for it because it bears the label Buick, an established nationally and internationally known piece of machinery. He sells the car for a greater price because it bears the label Buick. . . . If it were made by Buick but did not carry with it a labeled evidence of that fact, it would not have cost him so much nor could he have sold it for so much."

Sunbeam Corp. v. Richardson, 1956 CCH TRADE REG. REP. (1956 Trade Cas.) ¶ 68407, at 71744-45 (W.D. Ky. July 16, 1956).

125. According to the economic analysis of the Attorney General's Committee Report, "Price discrimination, in the economic sense, occurs whenever and to the extent that there are price differences for the same product or service sold by a single seller, and not accounted for by cost differences or by changes in the level of demand; or *when two or more buyers of the same goods and services are charged the same price despite differences in the cost of serving them.*" (Emphasis added.) ATT'Y GEN. REP. 333. Cf. Adelman, *Price Discrimination As Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 223 (1955); Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 4-5 (1953).

The Supreme Court in upholding milk price control legislation providing for a differential between nationally advertised brands and lesser known products has similarly stressed that competition on equal terms could prevail only if the less advertised though physically identical product were sold at a lower price so as to offset the consumer appeal of the highly advertised brand. *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 261-63 (1936).

brand, and the prevailing strict doctrines of competitive "injury" coupled with the futilities of cost justification.

Impediments to Product Innovation

Comparably, current legal doctrines can frustrate the dynamics of product innovation and thereby deprive the economy of the fruits of a creative form of competition.

In markets attuned to the consuming public, product differentiation is a rich ingredient of economic progress.¹²⁶ Whereas in the production and sale of standardized staples, such as cement, salt, or sugar, price and delivery terms are the focal attraction to the industrial buyer, the "merchandising" of consumer-oriented goods must display additional and multifold appeals. In catering to the needs of specialized segments of the potential market, products performing basically identical functions will thus become differentiated in properties and components. For example, in purchasing the "flexible packaging materials" in the classic market delineated by the Supreme Court's *DuPont* decision, the commercial buyer may choose cellophane or any one of a dozen other differentiated products with varied attributes including printability, clarity, tear strength, and wrapping machine running qualities.¹²⁷ The motorist can increasingly select from major refiners' gasolines that feature diverse octane increases and special additives.¹²⁸ Manufacturers recognize that the purchase of goods can spring from social as well as economic motivations: automobiles serve as vehicles not only for transportation but for the advancement of prestige and status—and GM profits from designing and differentiating its product line to suit.¹²⁹ In pursuit of the housewife's fancy, manufacturers must remain alert to capture each fleeting yen: Tide makes clothes cleaner, Cheer gets them whiter.

126. For highly perceptive analysis, see Heflebower, *Some Observations on Industrial Prices*, 27 J. BUS. U. CHI. 187, 190-91, 193 (1954); Heflebower, *Industrial Pricing—Institutional Practices Versus Abstract Models*, 44 AM. ECON. REV. 121 (Supp. 1954). See also ATT'Y GEN. REP. 330-31 (1955); Alderson, *The Effects of Price Controls on Non-Price Competition*, 4 LAW & CONTEMP. PROB. 356 (1937); Till, *The Fiction of the Quoted Price*, *id.* at 363; and sources cited note 132 *infra*.

127. See *United States v. E. I. duPont de Nemours Co.*, 351 U.S. 377, 411 (1956). The story in aluminum and rubber tires is comparable. KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM* 95-103 (1954).

128. Standard of New Jersey, Continental, and Sun Oil may have launched a trend by supplanting the traditional two-grade marketing of gasoline with multi-grade distribution featuring new "super premium" high-octane blends. *E.g.*, *The \$300,000,000 Question: How Many Grades of Gasoline?*, National Petroleum News, June 1956, p. 92; Wall Street Journal, July 11, 1956, p. 14, col. 5.

129. GM's strategy has now been adapted to the resourceful marketing of men's hats. As disclosed in an interview, the new chief executive of the Hat Corporation of America contemplates the scene thus:

"We have three divisions—Cavanagh, Knox, and Dobbs. Since I became president and principal owner of the Hat Corporation last year, I've tried to pattern our

and Oxydol leaves them "detergent-clean and bleach-white"—so wherever she turns, Procter & Gamble is there.¹³⁰

The resulting multiplication of differentiated products in response to some facet of demand is not only profitable from the resourceful manufacturer's standpoint.¹³¹ It furthers this fundamental goal of economic policy: an era of abundance endowing the consumer with an ever-widening range of choice.

Moreover, the process of product differentiation may be a dynamic stimulus to the vigor of competition.¹³² In some sectors of the economy, price moves

operation after General Motors. Cavanagh is our Cadillac division, Knox our Oldsmobile division, and Dobbs our Buick division.'

"What about Champ?' we asked.

"Champ will become our Chevrolet division,' Mr. Salesky replied. . . .

"Champ hats are mass hats. Hat Corporation hats are class hats.'

The Talk of the Town, The New Yorker, Sept. 15, 1956, p. 33.

130. P. & G.'s theory is that "no one brand of detergent or shampoo will satisfy every housewife, and that the best way to increase the company's share of a particular market may be to launch a second or a third brand. The new brand may differ only slightly in performance from the old one, but it must have some distinctive characteristic that can be dramatized by the copy writers. . . . Thus, whichever way the housewife turns in her search for the perfect detergent, P. & G. has something to offer her." Klaw, *Winner and Still Champion: P. & G.*, Fortune, March 1956, pp. 104, 105.

131. Significantly, both GM and Procter & Gamble are far ahead of the pack in their respective industries.

132. Progressive economic theory has tempered the previous puritanical attitude toward product differentiation as an insidious instrument of extending a producer's preserve for "monopolistic" exploitation. Compare CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (5th ed. 1946) as expounded in Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1170 (1948), with Heflebower, *Some Observations on Industrial Prices*, 27 J. BUS. U. CHI. 187, 190-91, 193 (1954), Heflebower, *Industrial Pricing—Institutional Practices Versus Abstract Models*, 44 AM. ECON. REV. 121 (Supp. 1954), and KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM* c. V (1954).

In the Attorney General's Committee Report, such economic sages as Morris A. Adelman, J. M. Clark, Clare E. Griffin, Eugene V. Rostow, Sumner H. Slichter, and George J. Stigler subscribed to this more supple formulation:

"The effect of product differentiation depends on the market setting in which it is placed. Extreme product differentiation, by tending to insulate the demand for one product against that for rival products, may allow real positions of monopoly to develop. Relatively mild differentiation of products within a market otherwise effectively competitive, however, may be a factor favorable to the intensiveness of competition, including price competition and competition in quality. This will tend to be most forcibly the case if the product differentiation reflects product rivalry, that is, product improvement, rather than mere heterogeneity of closely similar products. For product differentiation, especially if it constitutes or embodies a genuine innovation, may be a means whereby the seller can take advantage of the time interval the market allows within which he can expect to gain from a competitive move. Particularly if the situation is such as to justify uncertainty as to the speed and completeness with which rivals will counter the initial move, such a move, in the form of product differentiation, may contribute to the competitiveness of market behavior."

ATT'Y GEN. REP. 330-31. See note 133 *infra*.

alone are futile gambits in commercial rivalry.¹³³ For example, consumers may believe that there really is little difference between the cleansing powers of one make of soap over another. Consequently, one manufacturer's price reduction for his soap may tempt a wary consumer and swing sales away from rival makers of toiletries. But for the firm this may not be the prudent course, after all. Word of the lower price for A's soap quickly spreads when posted on every drugstore shelf, and before very long B and C must meet the reduction or take heavy losses. Yet the new lower price level established after everyone's reduction benefits none of them—and they know it. A drop of, say, 20 per cent from existing overall price levels for soap cannot help hurting all toiletry makers, since it will hardly set off epidemics of public hygiene sufficient to lift total soap sales by anywhere near 20 per cent.¹³⁴ Price being a boomerang, the moral is obvious: no maker of soap is eager to initiate a reduction from which he cannot possibly hope to profit for long.

To crash such a pricing impasse, product differentiation can mobilize the forces of competitive innovation. Price factors aside, a dynamic manufacturer can out-manuever rivals to fatten his share of the market by actually improving his product in quality. By adding deodorants to soap, fluorides or even chlorophyll to toothpaste, an imaginative and aggressive manufacturer can fox the competition—backed by the assurance that his innovation will confer a profitable edge which, though doubtless temporary, lasts much longer than the interval between a price cut and his rivals' inevitable matching response.¹³⁵ This scent for a competitive sneakthrough stimulates endless proliferation from

133. The "oligopoly" model of economics is constructed and manipulated in FELLNER, *COMPETITION AMONG THE FEW* (1949). Indeed, more generous recognition of product differentiation, as other forms of sublimated price competition, may be essential to rescue oligopoly theory from a sterile dogmatism that must be refuted daily by the actual behavior of industrial markets. In the words of Judge Jerome Frank, "monopoly-phobia, like most phobias, is both a symptom and a cause of a neurotic tendency which, in refusing bravely to face facts, cannot yield intelligent guidance." *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 42 (2d Cir. 1945) (concurring opinion). See also *id.* at 41; *Eastern Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 958-59 (2d Cir. 1943); *National Fruit Product Co. v. Dwinell-Wright Co.*, 47 F. Supp. 499, 506-07 (D. Mass. 1942).

134. In economists' jargon, demand is "inelastic," *i.e.*, the customer is relatively apathetic to movements in price. *E.g.*, NELSON & KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 35-36 (TNEC Monograph 1, 1940).

135. "Wherever, and to the degree that, 'demand orientation' is feasible, the product is a potential variable and possibly more changeable than is the price for the item already being made.

"In such cases—and they are very numerous—the adaptation of product may undermine noncompetitive performance. Such a maneuver is almost impossible to control, even with the power of government, as was learned under both NRA and OPA. It makes the machinery industry inherently competitive and prolonged price-quota agreement untenable for shoes or, indeed, for most consumer goods, exclusive of such items as salt, sugar, or flour."

Heflebower, *Some Observations on Industrial Prices*, 27 J. Bus. U. CHI. 187, 190 (1954). Cf. Klaw, *How Armour Cleaned Up With Dial*, *Fortune*, Nov. 1955, p. 129.

the basic product: the extra "staying" bean in Maxwell House quantity-pack coffee for the restaurant trade; the pre-cooking and packaging of Unox ham as "Canadian Bacon"; or the spiking of gasoline with TCP. In some cases, moreover, the product so enhanced may command a higher price than its lagging rivals, thus shaking rigidified pricing relationships, fomenting uncertainty all around as to the next price or product move, and opening fresh incentives and opportunity for competitive maneuvering.

To the extent such innovation represents genuine product improvement rather than gimmicks—and there *is* virtue in combatting body odor, tooth decay, or engine knock—the economy benefits from a catalyzed rivalry through differentiations channeled into constructive forms.¹³⁶

Yet whether conceived as a response to existing consumer demands or as a competitive gambit, such product differentiation encounters current Robinson-Patman doctrine. If the volume of traffic warrants, a manufacturer of differentiated products may permanently maintain separate distributive organizations dedicated to the marketing of one featured product, thereby reaping the rewards of single-minded sales devotion as well as wholesome intra-family rivalry.¹³⁷ On a less formal basis, the manufacturer may wish to exploit his innovation by recruiting a new and specialized corps of distributors with a marketing mission, while retaining his older established middlemen for sales of the conventional product line.¹³⁸ Most flexibly, he might first want to probe the market's reaction to his product variation, through the sensitive feelers of distributors selected as most suitable for such promotional reconnaissance.¹³⁹

In all cases, Robinson-Patman comes into play. The several variations will doubtless be distributed at differential prices, for any price identity would neutralize or blunt their consumer appeal by compromising their promotional distinctions. Such product variations, moreover, will rarely revolutionize the basic function of the prototype product. The consequent "functional interchange-

136. To be sure, not all product differentiation is an economic boon. Spurious brand variations, propagated by sponsors' subsidization of the tawdry japes of TV jokesters or their financing of jackpots for moronic charades, contribute no product improvement yet debase public tastes. For a thoughtful exposé of the shabby aspects of product differentiation once prevalent, see Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165, 1167-84 (1948). That scathing indictment, however, exempts fashions, improvements in quality or service, and other manifestations of non-price competition which "at least offer ponderable utilities." *Id.* at 1179 n.61.

Corroborating Brown's dour thesis is the fabulous halitosis saga of the twenties, as retold in a millionaire's sparkling and uninhibited confession. Lambert, *How I Sold Listerine*, *Fortune*, Sept. 1956, p. 111.

137. *E.g.*, the General Motors distribution system which enfranchises separate distributors for the products of the several GM divisions. In the hat business, note 129 *supra*, this strategy means "We would no more think of having the same dealers for Champ and Cavanagh than G.M. would think of having the same dealers for Cadillacs and Chevrolets. We'll sell Champs to Gimbel's, but we wouldn't dare sell them to Saks Fifth Avenue." *The Talk of the Town*, *The New Yorker*, Sept. 15, 1956, p. 34.

138. *Cf.* the *General Foods* situation, text at pp. 13-14, 24-25 *supra*.

139. *Cf.* the *Atalanta Trading* situation, text at pp. 14-15, 24-25 *supra*.

ability" among the several product variants would hence satisfy the predominant current conceptions of the "like grade and quality" test; and the differentials in their pricing among rival distributors would encounter the virtually automatic inference of competitive "injury" subject only to the dubious possibilities of cost justification.

In addition to the resulting prohibition on differential pricing in their distribution, the evolving duties under the "payments" and "services" provisions might thwart the seller's promotional or marketing strategy. Beamed at typical market settings, the logical radiations from the Commission's rulings are jolting. Any supplier marketing both branded and unbranded tires or gasoline, for example, might become obligated to offer equivalent advertising and promotional benefits of whatever sort to his branded and unbranded distributors alike.¹⁴⁰ And if a diversified manufacturer's cars are of "like grade and quality" irrespective of brand or design because "functionally interchangeable," all distributors of one make would rate promotional assistance comparable to that enjoyed by competing distributors of every other type. Indeed, the rationale of *General Foods* can collapse a strategy of multi-channel distribution by guaranteeing access to any product variation by every rival distributor rather than only those the producer wishes to enfranchise.

As a result, the Robinson-Patman Act as presently construed can stultify that product differentiation which widens consumer choice and supplies a dynamic competitive factor enriching the economy.

PROPOSALS FOR REFORM

To remove existing legal barriers to competitive product differentiation, several reforms are feasible—short of repeal or revision of the act itself. Owing to the improbability of legislative modification of Robinson-Patman—bête noire of economics,¹⁴¹ yet sacred cow of politics¹⁴²—interpretive reappraisals of

140. *E.g.*, AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 119-20 (rev. ed. 1953); FELDMAN & ZORN, ADVERTISING AND PROMOTIONAL ALLOWANCES 139-41 (1948); see *United States Rubber Co.*, 28 F.T.C. 1489, 1502-03 (1939).

141. The Robinson-Patman Act has been characterized as anticompetitive and antithetical to overall antitrust policy, either in basic conception or specific application, by virtually every economist or market analyst of academic repute—establishing a common scholarly consensus that transcends political or philosophic persuasion.

The analysis of Antitrust Policy in Distribution in the Attorney General's Report, stressed the conspicuous "collisions between the Robinson-Patman Act and the philosophy underlying the Sherman and Clayton Acts," and proposed a series of interpretive reforms designed to accommodate the Robinson-Patman Act to these broader antitrust objectives. ATT'Y GEN. REP. 131, & c. IV *passim*. Subscribing to the fundamentals of this approach were the following academic Committee members: Morris A. Adelman, J. M. Clark, Ewald T. Grether, Clare E. Griffin, Milton Handler, Alfred E. Kahn, James A. Rahl, Eugene V. Rostow, Sumner H. Slichter and George J. Stigler.

For additional critique by scholarly observers, see COUNCIL OF ECONOMIC ADVISERS, THIRD ANNUAL REPORT TO THE PRESIDENT 15 (1948); Adelman, *The Consistency of the*

existing statutory provisions offer the sole potential for relief. Such reassessment is encouraged by the recent mandate of the Supreme Court in the *Automatic Canteen* case. In order to restrain Robinson-Patman enforcement from

Robinson-Patman Act, 6 STAN. L. REV. 3 (1953); Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1334 (1948); Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 60 (1949); Adelman, *Integration and the Outlook for the Future*, CCH ANTITRUST LAW SYMPOSIUM 135, 138 (1951); R. W. Austin, *The Robinson-Patman Act—Is It In The Public Interest?*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 92 (Sept. 1952); A. R. Burns, *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 AM. ECON. REV. 689, 695 (1949); A. R. Burns, *The Antitrust Laws and the Regulation of Price Competition*, 4 LAW & CONTEMP. PROB. 301 (1937); J. D. Clark, Statement in *Hearings Before the Subcommittee on a Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 14, pt. 1, at 107, 114 (1949); DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 218-20, 243-45, 248-49, 254 (1954); C. D. EDWARDS: MAINTAINING COMPETITION 166-69 (1949); C. D. Edwards, *The Struggle for Control of Distribution*, 1 J. MARKETING 212 (1937); C. E. Griffin, Statement in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on a Study of the Antitrust Laws*, 84th Cong., 1st Sess. 375 (1955); Hale & Hale, *Monopoly in Motion: Dynamic Economics in Antitrust Enforcement*, 41 VA. L. REV. 431, 472-73 (1955); Heflebower, *Monopoly and Competition in Various Countries*, in MONOPOLY AND COMPETITION AND THEIR REGULATION 134-35 (Chamberlin ed. 1954); Heflebower, Statement in *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on a Study of the Antitrust Laws*, 84th Cong., 1st Sess. 984 (1955); Learned & Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations*, 15 HARV. BUS. REV. 137 (1937); E. H. Levi, *Analysis of Chapter IV of Attorney General's Committee Report*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 85 (Aug. 1955); Levi, *The Robinson-Patman Act—Is It In The Public Interest?*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 60, 67 (Sept. 1952); E. S. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949); McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 334 (1937); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1198 (1952); Rahl, *Antitrust Policy in Distribution*, 104 U. PA. L. REV. 185 (1955); Rostow, *Monopoly under the Sherman Act, Power or Purpose?*, 43 ILL. L. REV. 745, 749 (1949); Rostow, *Market Organization and Stabilization Policy*, in INCOME STABILIZATION FOR A DEVELOPING DEMOCRACY 498 (Millikan ed. 1953); Rostow, Statement in *Hearings of the Antitrust Subcommittee of the House Judiciary Committee on Current Antitrust Problems*, 84th Cong., 1st Sess. 1935 (1955).

The academic voices to the contrary are thin and almost apologetic. See dissenting opinion of Louis B. Schwartz to the Report of the Attorney General's Committee, reprinted in *Hearings Before the Senate Select Committee on Small Business to Consider the Report of the Attorney General's National Committee to Study the Antitrust Laws*, 84th Cong., 1st Sess. 258, 269 (1955) ("The Robinson-Patman Act is an unhappy necessity. It tends to encourage price rigidity inconsistent with Sherman Act objectives. . ."); Walter Adams, Statement in *Hearings Before the House Small Business Committee on Price Discrimination*, 84th Cong., 1st Sess. 615, 619 (1955) ("Before the Robinson-Patman Act is sacrificed on the altar of hard competition, let us make certain that there are no better or more worthy sacrificial lambs to be found elsewhere."). See also Statement of Vernon A. Mund, *id.* at 639.

142. An eloquent testimonial to the act's political viability is the history of proposals in the Eighty-fourth Congress to sharply curtail the "meeting competition" defense. S. 11 and H.R. 11, companion bills to secure "equality of opportunity," proposed to overturn the

imposing "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation," the Court there enunciated a duty to "reconcile such interpretation" wherever feasible "with the broader antitrust policies that have been laid down by Congress."¹⁴³ Doctrinal reform to liberate product differentiation can fasten on several provisions: (1) the content of the term "discrimination"; (2) the tests of competitive "injury"; (3) the scope of permissible cost justification; and most effectively, (4) the jugular concept of "like grade and quality."

The Content of "Discrimination"

The concept of "discrimination" is an unlikely vehicle for resolution of product differentiation problems.

Since the act only applies when a person "*discriminates in price*" to cause the proscribed competitive effects, the term "discriminate" might be construed so as to exclude price differentials for genuinely differentiated prod-

Supreme Court's decision in the *Standard Oil* case, 340 U.S. 231 (1951), by making the "meeting competition" defense unavailable whenever the challenged price differential potentially lessened competition. These bills were vigorously opposed by the Justice Department not only for nullifying § 2(b) of the statute, but also as incompatible with overall antitrust policy. According to the Chief of the Antitrust Division, the *Standard Oil* ruling "goes far to harmonize the Robinson-Patman Act with the basic tenor of antitrust policy," and passage of the bills "would move the price discrimination statute into irreconcilable conflict with the Sherman Act." *Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend Sections 2 and 3 of the Clayton Act*, 84th Cong., 2d Sess. 177 (1956). But a rare parliamentary maneuver—a "discharge petition" signed by a majority of House members—prried the legislation out of Representative Celler's reluctant Judiciary Committee, and it was passed by a vote of 393-3. See H.R. REP. NO. 2202, 84th Cong., 2d Sess. (1956); 102 CONG. REC. 9023 (daily ed. June 11, 1956). While the Federal Trade Commission by 3-2 vote abandoned its previous opposition, the Justice Department stood fast in the ensuing Senate hearings. *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Bills to Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 225, 688-91 (1956). Nevertheless, the bill was favorably reported, S. REP. NO. 2817, 84th Cong., 2d Sess. (1956), but could not be brought to a Senate vote on the last day of the legislative session. 102 CONG. REC. 13876-77 (daily ed. July 28, 1956).

Although the "meeting competition" defense had succeeded but once in twenty years of Robinson-Patman enforcement, Rep. Patman in pressing for passage proclaimed that due to *Standard Oil* "the Captain Kidd's in business are having a field day" while "these independent merchants are screaming, and they have a right to scream." *House Judiciary Committee Hearings, supra* at 243, 254. Chairman Celler of the House Judiciary Committee, conquered by Mr. Patman for the second time in twenty years, bitterly remarked: "Who am I to pit my views against the very rich talent of the proponents represented by the score of retail organizations who are directly affected by this bill?" 102 CONG. REC. 9025 (daily ed. June 11, 1956).

143. 346 U.S. 61, 63, 74 (1953). Cf. the whittling of the "Fair Trade" exemptions to the Sherman Act because the Court deemed itself "bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy." *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956).

ucts.¹⁴⁴ Such a contention could draw on the oft-quoted explanation of the Robinson-Patman bill by Representative Utterback to the House of Representatives just prior to its passage: "a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other."¹⁴⁵ By this reasoning, the term "discriminate" could denote not any price differential but only an economically inequitable spread in price. Price differentials among significantly differentiated products would not be considered inequitable or prejudicial, for the respective customers had not acquired a product of equal value in the market.

Such an analysis, however, must buck twenty years of precedent. Several Supreme Court decisions, while not adjudicating this precise issue, have recited price "discrimination" interchangeably with price differences in sales among competing customers,¹⁴⁶ and the *Cement Institute* opinion actually went beyond this situation to flatly define "discrimination in price" as "selling the same kind of goods cheaper to one purchaser than to another."¹⁴⁷ A recent exhaustive FTC analysis specifically addressed to the content of the term "discrimination" is in accord.¹⁴⁸ Yet the Supreme Court's 1953 *Automatic Canteen* decision quoted the Utterback statement, and acknowledged that "discrimination" might mean either a price differential in sales between competitors or only such a differential that "puts the unfavored competitor at a disadvantage."¹⁴⁹ Furthermore, a fuzzy court of appeals opinion in 1955, without analysis of the basis or import of its assertion nor reference to the contrary legal consensus, disclaimed that a price differential among geographically disparate customers was tantamount to a "discrimination."¹⁵⁰

But besides the preponderance of precedent,¹⁵¹ the prevailing legal equation of price differences with discriminations merits retention as an indispensable

144. For text of § 2(a), see note 24 *supra*.

145. 80 CONG. REC. 9416 (1936).

146. *FTC v. Ruberoid Co.*, 340 U.S. 470, 473-74 (1952); *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 & n.13 (1948); *cf. FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945).

147. *FTC v. Cement Institute*, 333 U.S. 683, 721 (1948); *cf. Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 116-19 (1954); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945).

148. *Purex Corp., Ltd.*, FTC Dkt. 6008, at 4-7 (April 16, 1954), Initial Decision adopted by FTC (Sept. 15, 1954).

149. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 70 n.10, 71 (1953).

150. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 367-68 (9th Cir. 1955). For other ambiguous implications that price differentials as such are not "discriminations" unless quoted among competing customers, see *General Shale Products Corp. v. Struck Constr. Co.*, 37 F. Supp. 598, 603 (W.D. Ky. 1941). *Cf. PATMAN, THE ROBINSON-PATMAN ACT* 59 (1938).

151. See also AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 18-20 (rev. ed. 1953); *cf. PATMAN, THE ROBINSON-PATMAN ACT* 24 (1938): "The statement that it shall be unlawful to discriminate in price is of the same effect as to say that it shall be unlawful to make a different price."

rule of thumb. In the first place, any refinement of "discrimination" into a legal term of art can hardly be restricted to the single problem of product differentiation. If only "inequitable" price differentials were equivalent to statutory "discrimination," not only differential pricing among differentiated products but all other economically rational price spreads might claim exemption—*viz.*, functional or quantity discounts. Inevitably every legal controversy over any price difference would shift from the detailed governing provisions—"injury," cost justification, "meeting competition," etc.—over into the "discrimination" concept for *ad hoc* resolution divorced from specifically pertinent statutory text. In addition, a view of the statutory "discrimination" as something more subtle than a simple differential might logically require an obverse application: perceiving statutory discriminations from "inequitable" nominal price uniformity where no differentials exist. Whatever the inherent virtues in such an economically sophisticated conception, it would project the act into hitherto exempt areas of pricing.¹⁵² What is more, anything more complex than a disparity in quoted price could confound all future identification of the pricing subject to Robinson-Patman controls by scrapping a simple and workable legal starting point.¹⁵³

Since a more artful interpretation of the "discrimination" phrase in the act might open the floodgates to new tides of confusion, the prevailing doctrine is not likely to be revised favorably to product differentiation programs.

The Tests of Competitive "Injury"

Realistic reinterpretation of the criteria of competitive "injury" provides a more fruitful though incomplete resolution of the product differentiation dilemma.

A perceptive inquiry into the link between a challenged price differential and the requisite competitive "injury" could go far in protecting product differen-

152. The Robinson-Patman Act has from the outset been interpreted to exempt all uniform pricing on the part of the seller, whether discriminatory in any economic sense or not. See, *e.g.*, *Bird & Son, Inc.*, 25 F.T.C. 548 (1937); *cf.* *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945).

153. Some years ago, dicta in the Supreme Court's *Cement Institute* opinion appeared to sanction a Robinson-Patman interpretation measuring prices not by comparing quotations among customers, but by discerning discriminations from any difference in the seller's net return after the deduction of all freight charges incorporated in the quoted price. 333 U.S. 683, 722-25 (1948). This "mill-net" theory jeopardized all delivered pricing—whether computed by "basing points," zones, or any other mechanism—as inherently discriminatory because it necessarily resulted in differing net returns for the seller depending on the transportation costs in serving his several customers. The "mill-net" theory was finally buried by the Federal Trade Commission in *National Lead Co.*, 49 F.T.C. 791, 881-82 (1953), which held that the Robinson-Patman Act was brought into play only by "differences in actual prices at which the respondents' products are sold." (Emphasis added.) Any novel reinterpretations of the statutory concept of "price" would inevitably revive the "delivered pricing" controversy which sowed legal confusion and animated Congressional action over several years. See *ATT'Y GEN. REP.* 209-19 (1955); *SIMON, GEOGRAPHIC PRICING PRACTICES* (1950).

tiation. True, the 1936 Robinson-Patman revisions of the Clayton Act sharpened the tests of detriment to competition so as to nip discriminations carrying a potential of lesser magnitude than the previously requisite debilitation of an entire "line of commerce." However, the amendments did not purport to supersede the analytic techniques for tracing competitive detriment exemplified in the FTC's *Goodyear* ruling. Inimical competitive effects stemming from Goodyear's private brand differential in favor of Sears were adjudged only after comparative analysis of the profit margins of the affected customers, and after taking account of consumer preferences for the nationally advertised Goodyear brand tire. In this way, the price differentials were related to competitive impairment in tire distribution only in light of corollary factors illuminating their market impact. As appropriate today as at the time of *Goodyear*, a comparably discerning analysis of differentials among differentiated products could relieve current threats of per se illegality.

To this end, the statutory standard of "competitive" injury should be construed to accord due recognition to the consumer preferences operative in the pricing of differentiated goods. Cognizant of the pricing hazards among unbranded and nationally advertised versions of a seller's product, the *Report of the Attorney General's National Committee to Study the Antitrust Laws* recently recommended that "whenever a seller's price differentials to intermediate distributors as between branded and unbranded forms of a physically identical product reflect no more than the spread between the prices the public will pay for one as against the other, no 'injury' to competition should reasonably be found. For such a price differential creates no competitive advantage for the recipient of the cheaper unbranded product; rather, it represents merely a rough equivalent of the benefit by way of the seller's national advertising and promotion which the purchaser of the more expensive branded product enjoys."¹⁵⁴ Under a logical extension of this perceptive analysis—suitable for all forms of product differentiation—only the *excess* of the producer's price differential over the margin of consumer preferences between the products in question should as a matter of law be held capable of impairing competition. In terms of the statute, only that excess could have the *causal* "effect of" competitive "injury"—by whatever tests "injury" is gauged.¹⁵⁵ Administered in

154. ATT'Y GEN. REP. 159 (1955).

155. No need would exist for resolving the perennial controversy over the act's application to injury to *competition* or to *competitors*. See *id.* at 163-65. The Committee recommended that "analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to individual businessmen." *Id.* at 164. That view accords with *Purex Corp., Ltd.*, FTC Dkt. 6008, at 11, 13-14 (April 16, 1954), Initial Decision adopted by FTC (Sept. 15, 1954). The Commission, notwithstanding its virtually automatic inferences of competitive "injury" from price differentials on the *customer* level (see text at pp. 18-20 *supra*), has taken a more tolerant attitude toward differentials charged with "injuring" competition among the *seller's* own competitors. In addition to the *Purex* decision, see also *The Yale & Towne Mfg. Co.*, FTC Dkt. 6232 (June 28, 1956); *General Foods Corp.*, FTC Dkt. 5675 (April 27, 1954). Indeed, the Commission on the authority of *Yale & Towne* recently dismissed five companion proceedings challenging discounts by

this fashion, the "injury" provision would interdict only those disproportionate and excessive differentials lacking correspondence with the pricing relationships among differentiated goods in ultimate consumer markets.¹⁵⁶

Such an analytic approach to statutory "injury," however sound, faces formidable obstacles in FTC policy. The proposed analysis would subtract from the price differential the amount representing the value of the "extra," and then test whether the remainder, if any, can wreak competitive harm. Its underlying premise is the truth that a distributor acquiring a product *plus* promotion—or other valuable differentiating factor—receives more and hence must pay more than another distributor who pays less but gets less. But the Commission has decried that economic axiom in the analogous Robinson-Patman context of "functional" pricing. In the classic *Standard Oil* case, the FTC condemned a refiner's lower price to a distributor purchasing bulk gasoline—and performing his own storage and redelivery to his service station pumps—in comparison with dealers paying more for gasoline *plus* the bulk storage and delivery provided by the refiner.¹⁵⁷ After some contrary indications in the *Doubleday* case,¹⁵⁸ that theory was reaffirmed in this year's *General Foods* decision.¹⁵⁹ In

sellers of industrial trucks that allegedly impaired competition in the sellers' own line of business. *Clark Equipment Co.*, FTC Dkt. 6347 (July 31, 1956); *Elwell Parker Elec. Co.*, FTC Dkt. 6329 (July 31, 1956); *Hyster Co.*, FTC Dkt. 6330 (July 31, 1956); *Lewis Shepard Co.*, FTC Dkt. 6340 (July 31, 1956); *Otis Elevator Co.*, FTC Dkt. 6350 (July 31, 1956). See also *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955). For a jaundiced view of some of the Commission's rulings in this area, see Comment, *The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws*, 65 YALE L.J. 34, 71-85 (1955).

156. Cf. *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), as analyzed by the Commission. See text at pp. 5-6 *supra*.

157. 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946), *aff'd*, 173 F.2d 210 (7th Cir. 1949), *rev'd*, 340 U.S. 231 (1951), *reissued with new findings*, 49 F.T.C. 923 (1953), *set aside*, 233 F.2d 649 (7th Cir. 1956), *cert. filed*, 25 U.S.L. WEEK 3107 (U.S. Sept. 28, 1956) (No. 465). For an excellent analysis of this phase of *Standard Oil*, see Note, *Functional Discounts under the Robinson-Patman Act: The Standard Oil Litigation*, 67 HARV. L. REV. 294, 303 (1953). See also ATT'Y GEN. REP. 205-08 (1955); McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398 (1956).

158. *Doubleday & Co.*, FTC Dkt. 5897, at 5 (Aug. 31, 1955) indicated that inasmuch as "integrated" or multi-function distributors relieved the supplier of many marketing tasks which he otherwise might have to perform himself, such functions should "be recognized and reimbursed." Where a distributor actually assumed such extra marketing functions, "the law should not forbid his supplier from compensating him for such services," though "the amount of the discount should be reasonably related to the expenses assumed by the buyer." This and the other pertinent rulings are analyzed in Rowe, *Borderland Issues in Court and Commission Cases under Sections 2 and 3 of the Clayton Act*, ABA SECTION OF ANTITRUST LAW PROCEEDINGS 60, 64-69 (April 1956).

159. As adopted by the Commission, the *General Foods* Initial Decision held that "a seller cannot justify allowances to purchasers which, in fact, constitute payments to them for doing their own work in the resale of goods purchased and owned by them." FTC Dkt. 6018, at 11 (March 2, 1955), adopted by FTC (Feb. 15, 1956). The Commission's *General Foods* attitude was heralded in one phase of its *Edehmann* decision where it disapproved any price reductions reflecting the recipients' performance of marketing functions which

view of the FTC's adamant nonrecognition of "extra" marketing functions—provided by the seller to higher-price buyers; or, conversely, performed by lower-price customers themselves—only a basic reorientation in the Commission's conception of functional "integration" could tolerate the proposed analysis of "injury."¹⁶⁰

On the other hand, courts have never adopted the Commission's nihilistic attitudes toward multi-function marketing. The key judicial interpretations of competitive "injury" did not concern price differentials between products differentiated or embodying differing quanta of marketing functions, or did not appraise such issues though latent in the facts. The famous *Morton Salt* case, for example, involved quantity and volume discounts for identical Morton "Blue Label" salt sold at the same delivered price basis to all customers.¹⁶¹ And while *Standard Oil's* adjudication on the administrative level condemned lower prices to extra-function distributors as competitively "injurious," the two judicial review phases of this legal marathon centered on other statutory issues—although the Supreme Court indicated that no "injury" should ever be blamed on a competitive reduction to customers who could get the same low price from other sources anyway.¹⁶² Consequently, a more realistic analysis of competitive "injury" in relation to differentiated products—while perhaps foredoomed on the FTC level—may yet have its day before the courts.¹⁶³

But even judicial rationalization of the "injury" provision cannot wholly absolve a program of product differentiation. Inasmuch as the promotional "allowances" or "services" provisions as presently construed enact absolute prohibitions regardless of "injury," the duty to comply with their indeterminate proscriptions would persist. Reforms of the "injury" provision thus could ease only the pricing risks, while accompanying promotional strategy would remain subject to severe restraints in the "payments" and "services" provisions.

Cost Justification

The statutory cost justification offers scant potential for interpretive reform benefiting programs of product differentiation. Although doctrinal uncertainty

"inured to the benefit" of themselves. *E. Edlmann & Co.*, FTC Dkt. 5770, at 7-8 (May 10, 1955).

160. The Commission's policy toward permissible pricing among multi-function distributors has been characterized as inflicting "a legal penalty on integration." Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 13 (1953). See also Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 945 (1951).

161. 334 U.S. 37 (1948).

162. See 340 U.S. 231, 250 (1951). Both times the issue focused on the legal sufficiency of Standard's "meeting competition" defense which both the court of appeals and the Supreme Court assumed to be factually established. 173 F.2d 210, 213 (7th Cir. 1949), *rev'd*, 340 U.S. 231, 243 n.9 (1951); 233 F.2d 649 (7th Cir. 1956).

163. Such a reorientation could draw for support on the *Minneapolis-Honeywell* decision, which stressed the need for a "causal connection" between the challenged differential and the claimed "injury" and set aside an FTC "injury" finding owing to the absence

and insistence on mathematical exactitude have been the twin enigmas foiling past cost justifications, the range of feasible reform is narrow.

The nub of the problem is the tenuous and shifty nexus between prices and costs in competitive markets. Whatever may be the custom among corner grocers who quote prices by adding a set mark-up to their invoice costs, pricing decisions of substantial firms under competitive conditions do not evolve this way. Rather, industrial prices are coalesced from manifold considerations, with cost only part of the panorama of the market where competitive and strategic factors loom uppermost.¹⁶⁴ To be sure, a secure monopolist may retain plenary power to fix his prices on the basis of cost. But sellers exposed to normal competitive forces must quote prices responsive to the pressures of demand and competition. Such prices are not *determined* by cost; indeed, prices—which influence sales, hence production volume, which in turn governs the efficiency of the firm's plant utilization—may *determine* the unit cost of the output more directly than vice-versa. A cost justification tendered in a Robinson-Patman proceeding thus is ordinarily an *ex post facto* rationalization of price differentials that result from the interplay of other factors. As an artful portrayal of a missing link between cost and price, it is an enterprise at once contrived and suspect.¹⁶⁵

of the requisite causal relationship. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790-92 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

164. For a scholarly, incisive analysis of price-cost relationships in modern industrial markets, see Heflebower, *Full Costs, Cost Changes, and Prices*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 361-92 (1955), and Comments by Coase, *id.* at 392, and Papan-dreou, *id.* at 394. Consult also KNAUTH, *BUSINESS PRACTICES, TRADE POSITION AND COMPETITION* (1956); DEAN, *MANAGERIAL ECONOMICS* 450-51 (1951); EDWARDS, *MAINTAINING COMPETITION* 161-62 (1949).

165. For this reason, the underlying premise of the Robinson-Patman cost justification has been scored as fallacious in conception. Rowe, *Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman*, 60 *YALE L.J.* 929, 964-65 (1951); Austin, *Let's Get Cost Pricing Out of Our Laws*, *Harv. Bus. Rev.*, May-June 1954, p. 67 (1954).

Actually, comparable criticism was directed at the statute as early as 1937. See McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 *LAW & CONTEMP. PROB.* 334, 337 (1937) ("bad economics and impossible accounting"); McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 *id.* at 410, 415-16 ("utterly overwhelming and subversive of legitimate business practice"); Hamilton, *Cost as a Standard for Price*, 4 *id.* at 321, 333 ("to enthrone cost as the governor of the bargaining process is to change the character of business enterprise. . . . The cost-price provisions of the Robinson-Patman Act invite a hazardous attempt at police. In its administration it seems destined to raise more questions than it settles.").

One of the most articulate critics of the basic concept of cost justification has been Corwin D. Edwards, formerly Chief Economist of the FTC. See EDWARDS, *MAINTAINING COMPETITION* 161 (1949) ("in selling to different customers, few costs are clearly segregable, and the allocation of the rest is determined by policy decisions which masquerade as mere accounting procedures"); *Comments and Discussion*, CCH ROBINSON-PATMAN ACT SYMPOSIUM 57, 60 (1947) ("the allocation of joint cost . . . is a matter of business policy, not a matter of fact. . . . [W]e are in danger of erecting the FTC into a sort of an orthodox cost accounting faculty."); *The Struggle for Control of Distribution*, 1 *J. MARKETING*

In addition, the allocation of costs among jointly produced products is inherently indeterminate and uncertain.¹⁶⁶ Any program of product differentiation necessarily spreads the costs of manufacture and distribution over the several items in the product line. Cost allocations requiring "breakdowns" of these joint manufacturing and distribution costs to justify the price of individual product components *must* entail subjective and arbitrary judgments that transcend legal formulation. The certitude of charts and columns of numbers obscures the truth that cost accounting *can* develop no universally valid principle of allocations for explaining price differentials among two or more jointly manufactured and marketed products. For this reason, there is no legal safety in a prefabricated cost justification through a firm's "in-built" system of honestly maintained daily business records.¹⁶⁷

The Report submitted this February by the Federal Trade Commission's Advisory Committee on Cost Justification appointed in 1953 corroborates this inescapable futility.¹⁶⁸ The Committee observed that elaborate cost data radiate "an aura of precision that is not warranted" because "cost differences at best include elements of opinion and approximation," and acknowledged that many factors "preclude the possibility of developing uniform methods and procedures

212, 216 (1937) ("the pursuit of discrimination into the labyrinths of cost accounting will produce a clash of accounting orthodoxies reminiscent of the theological disputes of the early churchmen.").

That 1937 prophecy came to pass in a treble damage case in 1951. To "justify" its quantity discount system, American Can Co. presented comprehensive cost studies approved as "a well conceived, carefully operated and very well organized system" by a distinguished authority on Robinson-Patman accounting matters, Assistant Dean of the University of Michigan's School of Business Administration and later Chairman of the FTC Advisory Committee on Cost Justification. In refutation, a prominent Robinson-Patman CPA who for seventeen years had functioned in this capacity for the FTC berated the cost study on behalf of the plaintiff, avowing he had seen "none as crazy as this." *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 51-52 (8th Cir. 1951).

166. See sources cited note 165 *supra*.

167. The Supreme Court has pointedly remarked that a Robinson-Patman cost defense must develop data which "apparently cannot be obtained from ordinary business records. . . . It is not a question of obtaining information in the seller's hands. It is a matter of studying the seller's business afresh." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68-69 (1953). Cf. Taggart, *Cost Justification Under the Robinson-Patman Act*, J. Accountancy, June 1956, pp. 52, 54: "Few laymen (in the accounting sense) are so unsophisticated as to believe that an economically feasible record-keeping system can be devised which would give an immediate answer to every Robinson-Patman problem. The experience of American Can Company, which actually carried out an ambitious project of this sort for nearly five years, does little to encourage emulation."

168. ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (1956) (hereinafter cited as COST JUSTIFICATION REP.). The Committee, comprising distinguished accountants versed in Robinson-Patman matters, was conceived in hopes of ascertaining standards of "costing" suitable for adoption by the FTC as guides to business firms wishing to comply with the act and willing "to organize their cost records accordingly." FTC, Press Release, Nov. 30, 1953. No official action has been taken on the Committee's recommendations to date.

of cost accounting for Robinson-Patman Act purposes."¹⁶⁹ Accordingly, the Committee proposed that the FTC "refrain as far as possible from adopting specific rules of accounting analysis exclusive of others," and that it instead "encourage the application of ingenuity and imagination in this complex area."¹⁷⁰ The salient feature of the Report is in its focus on FTC forbearance rather than substantive clarification as the key to reform. However constructive the procedural improvements and liberalization of administrative attitudes also recommended,¹⁷¹ they highlight the lack of logic and rationality in cost justification. "Ingenuity and imagination," while a wholesome departure from accounting dogmatism, cannot foster predictability or facilitate compliance. With criteria of acceptability defying formulation, cost justification mocks ordinary legal processes and can in reality aim only at informal accommodations between opposing accountants. To lawyers a cost justification will partake of an actuarial minuet if not a mutual confidence game.¹⁷²

169. COST JUSTIFICATION REP. 6, 10. Actually, the Report has moved back once more the boundaries of an ever-receding mirage. Rationalization of distribution cost allocation was expected as a major by-product of the Robinson-Patman Act. In 1937 there was "a great new stirring throughout business concerning methods of checking distribution costs." George, *Business and the Robinson-Patman Act*, 4 LAW & CONTEMP. PROB. 392, 401-02 (1937). In 1941, an FTC investigation of distribution cost procedures revealed "a dearth of good case material" because "methods that are in use are undergoing change." *Case Studies in Distribution Cost Accounting for Manufacturing and Wholesaling*, H.R. Doc. No. 287, 77th Cong., 1st Sess. 12 (1941). Ten years later distribution cost accounting was found to be still in its "pioneering stage." Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 IOWA L. REV. 244, 259-60 (1951). In 1956, twenty years after Robinson-Patman, the Chairman of the FTC's Advisory Committee on Cost Justification observed that its Report "does not purport to be the last word in this complex field. Indeed, it is only a beginning." Taggart, *Cost Justification Under the Robinson-Patman Act*, J. ACCOUNTANCY, June 1956, pp. 52, 56.

170. COST JUSTIFICATION REP. 10.

171. Among the Report's recommendations are a more generous application of the *de minimis* concept by the Commission when faced with only partially justified price differentials; improved facilities for consultation by respondents with the FTC accounting staff; freer exchange of information at the pre-trial stage of formal proceedings; and centering of the inquiry on the underlying basis of challenged allocations rather than numbers and petty detail. *Id.* at 5, 15, 17, 18.

In some contradiction of the Committee's conclusion that rules of universal applicability are precluded by the large area of subjective discretion in cost allocations is its recommendation for the appointment of an FTC Accounting Adviser to prepare "a continuous series of accounting opinions interpreting the cost proviso" as "an authoritative guide to industry and the accounting profession in this field." *Id.* at 16, 18. It might abort the very "ingenuity and imagination in this complex area" espoused by the Report. See *id.* at 16. What is more, it would inevitably complicate the already complex processes of the Commission by introducing a sub-tribunal for accounting—a principle equally suitable to economics, marketing, or any of a number of relevant factors in a price discrimination proceeding. Also, such an institution would create the legal incongruity of the statutory cost justification being resolved in divergent ways before the FTC and courts who must adjudicate the issue without benefit of Accounting Advisors.

172. See notes 165 *supra*, 173 *infra*.

For a seller of differentiated products this legal outlook emerges: The cost defense offers an expensive yet synthetic and chancy technique for vindicating price differentials. Its contribution to counseling and logical forecasting of the legality of prices is minimal. Rather, its practical utility will vary with extra-legal considerations more than doctrinal developments. Greater administrative flexibility, rooted in frank recognition of the inadequacies of cost as a standard for price, can help once litigation is in the offing. But patience, perseverance, prolific expenditures, and rapport with FTC officials—rather than legal principle—will count for the most.¹⁷³ And as in the case of the “injury” provision, even successful cost justification can exonerate only the pricing aspects of a program for product differentiation but cannot mitigate the promotional risks deriving from the “payments” and “services” provisions.

The Concept of “Like Grade and Quality”

Due to the obstacles and limitations confronting all other avenues of doctrinal reform, reappraisal of the unsettled “like grade and quality” provision promises the most effective safeguard for the pricing as well as promotional aspects of product differentiation.

To this end, a test of “fungibility”¹⁷⁴ is proposed to supplant evolving “like grade and quality” interpretations that expose programs of product differentiation to legal jeopardy. Never definitively construed, “like grade and quality” has drifted toward a theme of “functional interchangeability” that subjects virtually all differentiated products to the act’s restrictions. All automobiles, gasolines, or soaps—howsoever differentiated in brand, design, or components—fulfill a single “function” and are “functionally interchangeable.” The hallmark of “fungibility,” on the other hand, is the merchant’s commercial indifference as between comparable yet not identical commodities of equal worth; it presupposes that the business community would as lief take one product as an-

173. In the view of two sophisticated Robinson-Patman hands: “As things now stand, the justification of different prices by cost differences is available only to the wealthy, the resourceful, and the tireless. It requires a detailed, if not a surgical, functional analysis of the seller’s entire business. Even then the conflict of theory, methods, allocations, and accounting conventions makes more for an intellectual chess game than for any reasonable evaluation of whether the seller in good faith went beyond making ‘due allowance.’” Austern, *Tabula in Naufragio—Administrative Style, Some Observations on the Robinson-Patman Act*, 1953 CCH ANTITRUST LAW SYMPOSIUM 105, 115 (1953). Cost justification “has proven to be extremely difficult, expensive, and unreliable.” Taggart, *Cost Justification Under the Robinson-Patman Act*, J. Accountancy, June 1956, p. 52.

174. The “fungibility” concept traces to Mr. Justice Clark’s majority opinion in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 613 (1953), which viewed New Orleans morning and evening newspaper readers as “fungible customer potential” for advertisers, and hence includible *within* a single antitrust “market.” The government in the recent *DuPont Cellophane* case illogically and unsuccessfully pressed that concept upon the Supreme Court as also marking the *outer* boundaries of the relevant market in monopolization cases. Brief for the United States, pp. 67-77, *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956).

other for the same money. Analogous goods would be deemed "fungible" and hence of "like grade and quality" only if they normally sold in the market at the same "going price."¹⁷⁵ Since "fungibility" would thus restrict Robinson-Patman coverage to discriminatory practices in the marketing of commercially "interchangeable" products, the act would continue to interdict genuine discriminations against customers *who must pay more for goods that others normally buy for less*—while ceasing to menace normal price variations and promotional programs in a seller's differentiated product line.

In practical application, the "fungibility" test would facilitate adjudication of the "like grade and quality" issue as to promotionally as well as physically differentiated goods. To illustrate: Historically a refiner's straight-run gasoline would have been "fungible" with cracked gasoline, for, as the Supreme Court observed in 1930, "the two are either mixed or sold interchangeably."¹⁷⁶ On the other hand, gasolines registering "super-premium" octane ratings or featuring special chemical additives are not "fungible" with the ordinary blend because they normally command higher prices in the market. Nor are nationally advertised and promoted gasolines "fungible" with unbranded gas, for their divergent consumer acceptance is reflected in an established price spread.¹⁷⁷ However, nominal brand distinctions uncharged with the seller's promotional appeal do not touch "fungibility," since an unknown brand would not govern commercial choice.¹⁷⁸ As for distinctions in size or design, the custom of the trade might provide the clue. If the dimension of cans is of the commercial essence to can-

175. For example, section 76 of the Uniform Sales Act defines fungible goods as "goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit."

A focus on the business *community* rather than the *individual* businessman would adapt the strict concepts of commercial law to the requirements of a trade regulation statute. The law merchant is necessarily concerned with the satisfaction of the individual who purchases and must pay for goods needed in his business, and must rely on the delivery of *precisely* what he ordered. To the buyer who is under contract to resell pursuant to specifications or who must otherwise fill an exact need, minor differences will matter which are inconsequential to the trade at large. Such conceptual strictness, while doubtless appropriate to the sphere of private commercial intercourse in protecting legitimate contractual expectations, would prove much too refined for purposes of a trade regulation statute that must deal with commercial generalities in declaring a broad public policy ranging over dynamic markets. The looser test here proposed would discount minor divergences at which the law merchant might balk.

176. *Standard Oil Co. v. United States*, 283 U.S. 163, 176 (1931); cf. *Blue Bell Co. v. Frontier Refining Co.*, 213 F.2d 354, 356-57 (10th Cir. 1954).

177. The typical price differential between a major refiner's "regular" and "premium" grade gasoline was found to average 2½-3 cents per gallon. CASSADY, *PRICE MAKING AND PRICE BEHAVIOR IN THE PETROLEUM INDUSTRY* 304 (1954). Also, 2 cents per gallon had been the established price differential between nationally branded gas and local brands marketed in New Jersey. REPORT OF THE SENATE SMALL BUSINESS COMMITTEE ON PETROLEUM MARKETING PRACTICES IN NEW JERSEY, S. REP. No. 2810, 84th Cong., 2d Sess. 18 (1956). As to the spread in grocery products, see note 120 *supra*.

178. Cf., e.g., the branded products marketed by the respondents in the *Hansen Inoculator*, *Edelmann*, and *Fruitvale Canning* decisions.

ners, even a minor disparity in measurement would disprove "fungibility."¹⁷⁹ Contrariwise, identical shirts differing only in collar size are "fungible" since normally collar size is unlikely to influence haberdashers' decisions. In any event, "fungibility" can furnish no panacea, only a guide to intelligent approximation. No test can supplant discerning judgment from case to case.

The proposed "fungibility" test comports with the text of the Robinson-Patman Act. The law is prefaced by the dual condition that the goods in question be of "like grade *and* quality." That two distinct conceptions were contemplated is confirmed by the original Clayton Act's exemption of prices reflecting differences in "grade" *or* "quality."¹⁸⁰ The Federal Trade Commission in 1937 accorded the concept of "grade" separate meaningful content.¹⁸¹ Considerations of "quality" aside, the requirement of "like grade" whose import was never clarified appears sufficiently plastic to take account of any other commercially significant distinctions—whether physical or promotional differentiations affecting market value. "Like grade" is thus readily equated with commercial "fungibility." So construed, the condition of "like grade" would exempt those non-"fungible" goods differentiated significantly in physical components or promotional appeal. Such an interpretation, moreover, would heed the Supreme Court's admonition to avert "a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" by construing Robinson-Patman's "infelicitous language" in consonance with "the broader antitrust policies laid down by Congress."¹⁸²

A "fungibility" test of "like grade and quality" would neither flout recorded indicia of legislative intent nor emasculate the statute. During the hearings and debates preceding Robinson-Patman enactment, the overriding purpose was to squelch spurious packaging variations or bogus brands as easy devices for dodging the act.¹⁸³ This consideration, however, inheres in the operation of the "fungibility" principle itself. Analogous products are deemed "fungible" unless the differentiation at issue is translatable into tangible consumer appeal expressed in the marketplace. Consequently, faked variations in brand or design without promotional value could not negate "fungibility" to serve as successful subterfuge. It is true, on the other hand, that a negative ruling on "like grade and quality" would automatically oust the applicability of the act, and thereby exempt (from Robinson-Patman, not other antitrust bans) a seller's price differentials among analogous products even in amounts disproportionate to the value of an authentic differentiation. But genuine discriminations can be, and have been, prosecuted under the Sherman Act and the general pro-

179. Contrast the *Bruce's Juices* decision.

180. Section 2 of the original Clayton Act exempted all differentials made "on account of differences in the grade, quality, or quantity" of the product in question. "Grade" and "quality" were deemed disjunctive by the FTC in the *Goodyear* case. See text at p. 6 *supra*.

181. See text at p. 9 *supra*.

182. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63, 74, 78 (1953).

183. See text at pp. 8-9 *supra*.

hibitions on "unfair methods of competition" in the Federal Trade Commission Act.¹⁸⁴ Moreover, Robinson-Patman inability to reach truly discriminatory prices is no novel inroad, but only one further limitation of the type already confining its scope. For the Robinson-Patman Act is impotent to control even grossly discriminatory pricing by a diversified seller among the *different* products in his line;¹⁸⁵ or to interdict nominally uniform but *economically* discriminatory pricing among a seller's "like" products.¹⁸⁶

In short, any instances of genuinely discriminatory pricing that escaped Robinson-Patman thanks to a stricter test of "like grade and quality" would not thereby gain antitrust immunity. Enforcement would simply be shifted into another antitrust domain. Any attendant readjustments of administrative technique appear vastly overbalanced by the liberation of product differentiation programs from the jeopardy of current Robinson-Patman interpretations.

CONCLUSION

Unless rescued by a reorientation of prevailing doctrine, the modern trend of product differentiation is fated to collide with the Robinson-Patman Act—whether at the hands of the Federal Trade Commission or treble damage claimants.¹⁸⁷ Since innovistic product differentiation enriches the economy and

184. Discriminatory practices, whether exploitative or predatory, may be actionable under the Sherman Act and the Federal Trade Commission Act. Sherman Act: *e.g.*, *United States v. Paramount Pictures*, 334 U.S. 131, 160 (1948); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *United States v. New York Great A&P Tea Co.*, 173 F.2d 79, 88 (7th Cir. 1949). FTC Act: *e.g.*, *FTC v. Cement Institute*, 333 U.S. 683, 721 n.19 (1948); *E. B. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

185. A seller might commit genuinely discriminatory practices in pricing a diversified line of distinct products, dropping his prices on those facing competition while maintaining high prices on the others. *Cf.* *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 349 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See also Machlup, *Characteristics and Types of Price Discrimination*, in *BUSINESS CONCENTRATION AND PRICE POLICY* 397, 398-99 (1955); *ATT'Y GEN. REP.* 335-36 (1955). The Robinson-Patman Act is of course powerless to reach price differentials quoted in the sale of entirely different products.

186. Uniform price quotations irrespective of circumstances rendering them "discriminatory" in the economic sense have long been held exempt from the Robinson-Patman Act. *E.g.*, *Bird & Son, Inc.*, 25 F.T.C. 548 (1937); 81 *CONG. REC. APP.* 2339-40 (1937).

187. Complaints could take any among a multitude of conceivable forms: The Commission might charge that a seller's price differential for differentiated products "injured" competition among the customers paying the higher and lower prices, or even among the seller's competitors who for some reason felt pinched by his differential pricing policy. *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, 238-39 (1936); *United States Rubber Co.*, 46 F.T.C. 998, 1000-04 (1950). Also, the Commission may challenge accompanying promotional campaigns for lack of availability to rival customers on "proportionally equal" terms, *Atlanta Trading Corp.*, FTC Dkt. 6464 (May 21, 1956), or may question a failure to market the differentiated product itself through all competing distributors, *General Foods Corp.*, FTC Dkt. 6018 (Feb. 15, 1956). Private damage claims could be filed by customers paying a higher price, *Bruce's Juices, Inc. v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), or by competing sellers who complain of the effects of the differen-

catalyzes competition in many markets, legal bars on its development frustrate major objectives of national economic policy. The test of "fungibility" proposed for administering the statutory condition of "like grade and quality" would not only temper the law with the realities of business. It would also implement the Supreme Court's directive to "reconcile" the Robinson-Patman Act with "the broader antitrust policies laid down by Congress."

Thereby a legal legacy of the Great Depression could be modernized to fit the economic scenery of a brighter era.

tial pricing on their own market fortunes, *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N.D. Ill. 1941). In the same way, customers who do not receive "proportionally equal" promotional treatment may sue, *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945), and even rival sellers prejudiced by their competitor's promotional policy can bring action, *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir. 1946).