UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak

In the Matter of Southern Glazer's Wine & Spirits, LLC
Commission File No. 2110155

December 12, 2024

We begin with first principles.[1] The goal of antitrust can be stated in one word: competition. Competition promotes rivalrous markets, facilitates the allocation of resources to their best and most highly valued use, spurs innovation, and maximizes consumer welfare. It also stimulates growth and expands economic opportunity. But effective competition depends upon the freedom of firms to choose prices that reflect the information and knowledge available to them.[2] Indeed, price competition is the electric cord that links today's ideas with tomorrow's economic prosperity.[3] Of course, a firm's prerogative to set its prices does not give it license to engage in anticompetitive conduct or otherwise impede the competitive process. And yet the fact remains that vigorous competition can harm rivals while benefiting consumers. Because competition on the merits may cause harm to rivals,[4] the antitrust agencies and courts often struggle to calibrate antitrust policy so that it promotes conduct that facilitates competition while proscribing conduct that harms it.[5] For example, while there is general consensus that agreements among competitors to set prices, allocate customers, or divide sales territories are inherently problematic, potentially

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[1] *See United States v. Lopez*, 514 U.S. 549 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

[2] F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 527 (1945) ("It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust their activities to changes of which they *may never know* more than is reflected in the price movement.").

[3] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) (describing the price system as "the central nervous system of the economy").

[4] A Congressional Committee Report evaluating the Robinson-Patman Amendment noted: "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. 'Competition,' as Mr. Justice Holmes observed, 'is worth what it costs.' We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition." H.R. Rep. No. 1422, 81st Cong., 1st Sess. 5 (1949).

[5] *See, e.g.*, Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

exclusionary conduct does not enjoy similar consensus, routinely presenting the antitrust agencies with conduct that can be difficult to evaluate.[6]

But today's Complaint presents no such difficulty—it condemns conduct that is plainly innocuous or even procompetitive. Specifically, the Complaint condemns Southern Glazer's Wine and Spirits, LLC (Southern Glazer's) for selling its product at lower prices to some retailers relative to others. Such a theory of antitrust harm is based on a patently untrue assertion that mere price differences offered to downstream buyers diminish competition in the retail sale of wine and spirits.[7] Indeed, it manifestly defies logic to suggest that the mere presence of discounting is dispositive proof that there has been harm to competition.

Critically, the Complaint's approach to antitrust harm—elevating the interests of competitors over competition—is at odds with the plain text of the Robinson-Patman Act. And it flies in the face of efforts by courts, scholars, and practitioners to reconcile the Robinson-Patman Act with broader antitrust law. Not only does the Complaint fail to identify harm to competition or consumers, the proposed remedy would likely impede price competition and harm consumers.

That is not to say that enforcement of the Robinson-Patman Act is never warranted. As a Federal Trade Commissioner, I take seriously that *Congress* enacted the Robinson-Patman Act. And as law enforcers, the Commission must faithfully execute the law. But we must take care to enforce the law as Congress wrote it and should only bring those cases that satisfy the statutory requirements Congress has outlined. Today's Complaint is inconsistent with the statute Congress has written.[8] As the Supreme Court has instructed, the Commission should not advance arguments that require us to "construe[]" the Robinson-Patman Act inconsistent "with broader policies of the antitrust laws," especially where that inconsistent application harms consumers.[9]

In the present case, I do not have "reason to believe" that the Commission's Complaint satisfies these requirements.[10] In fact, I have reason to believe that today's Complaint fails to hew to the Supreme Court's guidance to "reconcile" the language of the Act to avoid a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[11] Beyond the legal failings of the Complaint, the lack of harm to competition—and the remedy's potential to harm

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[6] Susan Creighton, Director, Bureau of Competition, Fed. Trade Comm'n, Remarks Before: Charles River Associates 9th Annual Conference, Current Topics in Antitrust Economics and Competition Policy (Feb. 8, 2005), https://www.justice.gov/archives/atr/cheap-exclusion.

[7] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved.").

[8] *Cf.* Dissenting Statement of Commissioner Melissa Holyoak, *In the Matter of Chevron Corporation & Hess Corporation*, Commission File No. 241-0008 (Sept. 30, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commn-holyoak-chevron-hess-dissenting-statement-09-30-2024.pdf; Joint Dissenting Statement of Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson, *In the Matter of ExxonMobil Corporation*, Commission File No. 241-0004 (May 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.

[9] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

[10] 18 U.S.C. § 53(b).

[11] *Automatic Canteen Co. of Am. v. Fed. Trade Comm'n*, 346 U.S. 61, 63, 73-74 (1953).

competition—suggests today's action certainly is not "in the interest of the public," which is required before we bring an enforcement action.[12] Therefore, I must dissent.

Section I traces the history of Section 2 of the Clayton Act including the Robinson-Patman Act, the Commission's early enforcement efforts, and the causes of the Commission's decision in the 1970s and early 1980s to curtail its enforcement of the statute.

Section II explains why: (A) today's Complaint fails to meet the "in-commerce" requirement of Section 2(a); (B) the Complaint fails to satisfy the Act's statutory requirement to identify paired retailers; (C) Southern Glazer's receipt of supplier discounts are cognizable under the Act's cost-justification framework; and (D) Southern Glazer's pricing practices were undertaken in good-faith effort to meet competition.

Section III begins by noting the complete absence of any evidence suggesting harm to competition and then argues that mere harm to competitors does not satisfy the competitive effects proviso of the Robinson-Patman Act. It also explains that the Complaint's misguided reliance on the *Morton Salt* inference is undermined by the Commission's own Bureau of Economics Report—a landmark study conducted by a former Bureau of Economics Director—which found that the *Morton Salt* case was based on dubious factual premises. Indeed, the findings of the Bureau of Economics Report not only suggest that the Commission's order in *Morton Salt* harmed consumers, it further suggests that if the Commission relies on the *Morton Salt* inference, as it does today, it will invariably commit false positive errors when bringing Robinson-Patman Act claims.

Section IV, using standard canons of statutory construction, argues that the competitive effects language of Section 2(a) must be read consistently with the other sections of the Clayton Act, as well as the other antitrust laws. Based on the history, text, and structure of the Act, Section IV concludes that raising rivals' costs is the appropriate framework to use when evaluating secondary-line theories of harm.

Finally, Section V outlines concerns with the relief sought by the Majority, including the risk that such a remedy may, contrary to the interest of the public, harm independent retailers, diminish price competition, and harm consumers. And Section VI concludes.

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[12] *Id*.

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I. HISTORY OF THE ROBINSON-PATMAN ACT.

Those who do not learn from history too often repeat it. Equally true—and relevant to today's Complaint—is that those who are wrong about history refuse to be disabused. The mistaken views of the history of the Robinson-Patman Act (the Act) illustrate this point well. Indeed, as Section I will demonstrate, while the most vocal proponents of what became the Robinson-Patman Act sought to create a *per se* ban on discrimination, they did not ultimately succeed. Nonetheless, the Commission approached enforcement of the Robinson-Patman Act in the 1960s and 1970s as if the *per se* ban had been passed into law. My colleagues today make the same mistake, to the detriment of competition and consumers. While my arguments below (Sections II-V) regarding how the Act should be interpreted are based on the text and structure of the statute, the revisionist history of the Robinson-Patman Act's origins is important to understanding the errant approach taken by today's Complaint.

A. 1914: The Original Section 2 of the Clayton Act.

While the Robinson-Patman Act (which amended Section 2 of the Clayton Act) was passed during the Great Depression, the original Section 2 was enacted because of dissatisfaction with the Supreme Court's *Standard Oil* decision.[13] Indeed, at the turn of the twentieth century large trusts were becoming more common, with John D. Rockefeller's Standard Oil Trust being the most well-known of all the large trusts. The Department of Justice sued Standard Oil, claiming it violated Section 2 of the Sherman Act. The trial court in the matter ordered the dissolution of the trust and the Supreme Court affirmed in 1911.[14] But because the Court did not reach the merits of two practices that would later become central to the Robinson-Patman drafters, there was momentum to draft a law that more directly proscribed the two practices.

The first practice was "area price discrimination" or "local price cutting." This type of conduct involves a firm with monopoly power in one market reducing its price in a separate market to eliminate a competitor or perceived competitor. Such conduct—where the impacted firm competes with the firm employing the discriminatory pricing—is what we now call primary-line discrimination.[15] Predatory pricing, where one firm underprices others with the goal of running them out of business and later recouping the losses, is one flavor of primary-line discrimination.

The second practice involved Standard Oil's ability to obtain rebates and drawbacks from the railroads it used to transport its oil to market. Because Standard Oil's rivals were not able to obtain the same rebates from the railroads, Standard Oil allegedly acquired—and maintained—its monopoly position in part through its ability to secure these discounts from the railroads.[16] This

[13] RICHARD A. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES 17 (American Enterprise Institute 1976); *see also Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[14] *Standard Oil Co. of New Jersey*, 221 U.S. 1.

[15] *Infra* Section IV.A.2.

[16] POSNER, *supra* note 13, at 17-18 ("The second allegation against the Standard Oil Trust that is relevant here was that the trust was receiving secret rebates from railroads. Standard was thought to owe its rise to a monopoly position—and its continued possession of that position—in part to its ability to extract secret discounts from the railroads that transported its oil to market—these secret discounts being in the form of rebates that were denied to the competitors

type of conduct is one form of "secondary-line discrimination"—*i.e.*, where the party allegedly harming competition receives a discriminatory discount, to the alleged detriment of one or more of its rivals.[17]

Because the Supreme Court in *Standard Oil* did not reach the issues of whether Standard Oil's area price discrimination conduct or receipt of drawbacks and rebates from the railroads violated the Sherman Act, "the courts created (perhaps unjustifiable) doubts whether the existing law [Sherman Act] was adequate to curb these abuses."[18] These doubts, in part, led to the enactment of the Clayton Act and the Federal Trade Commission Act (FTC Act).[19] In fact, "[a] principal purpose of both statutes [Clayton Act and FTC Act] was to suppress specific anticompetitive practices of the kind that Standard Oil and other trusts were alleged to have engaged in but the illegality of which had been left unclear by the *Standard Oil* decision."[20] Section 2 of the original 1914 Clayton Act thus directly addressed the alleged shortcomings of the *Standard Oil* decision by making price discrimination illegal where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[21] Accordingly, Section 2's language was designed to capture the types of conduct Standard Oil engaged in, including area price discrimination and the receipt of rebates and drawbacks, *i.e.*, primary and secondary-line discrimination.[22]

B. 1914-1936: Events Leading to the Robinson-Patman Act.

In the intervening years after Congress passed the Clayton Act, the emergence of chain stores rapidly and dramatically changed the way retail products were marketed and sold to

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of Standard, thereby raising their costs relative to those of Standard. It was further alleged that these rebates reflected not any lower costs of selling to Standard but simply the economic muscle of the trust."); *see also* Elizabeth Granitz & Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J. L. & ECON. 1 (1996); Benjamin Klein, *The "Hub-And-Spoke" Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012); Daniel Crane, *Were Standard Oil's Railroad Rebates and Drawbacks Cost Justified?*, 85 S. CAL. L. REV. 559 (2012); *see infra* Section IV.C.

[17] POSNER, *supra* note 13, at 17-18.

[18] *Id.* at 23.

[19] *Id*.

[20] *Id*.

[21] The full text of the original section 2, 38 Stat. 730, was as follows:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selling their own customers in bona fide transactions and not in restraint of trade.

[22] POSNER, *supra* note 13, at 23-24.

consumers, becoming a fixture in the lives of many Americans. Unsurprisingly, this new business model was not welcomed by all. Rather, this new perceived threat—combined with the Great Depression—created intense calls for government intervention.[23] Small stores joined the chorus of government complaints, expressing concerns about competing with chain stores. The Great Atlantic & Pacific Tea Company, better known as A&P, was their primary target.

Before the rise of A&P, the supply chain for everyday retail goods tracked a standard three-level system involving manufacturers, wholesalers/distributors, and retailers.[24] Each level of this system had discrete roles in the supply chain that delivered retail goods from the manufacturers to the consumers.[25] The manufacturer obviously made the goods, while the wholesaler/distributor accepted the credit risk and typically stored and delivered the goods to the retail outlets.[26] In exchange for these services, the manufacturer compensated the wholesaler with a reasonable margin through discounts or rebates.[27] Importantly, the manufacturer did not sell directly to the retailers and the wholesalers did not sell to the end consumers.[28] The market equilibrium thus generated profits for both manufacturers and wholesalers.

Chain stores shattered that equilibrium. Specifically, modern forms of retailing and mass marketing ushered in the chain store paradigm that invested in "a high-volume, low-margin operation, whose prime appeal to the buying public centered on price."[29] Chain stores bypassed wholesalers and other intermediaries, preferring to bargain directly with the manufacturers. Through this process, chains were able to save money by eliminating the margin traditionally reserved for the wholesaler. Simultaneously, chain retailers were able to secure other pecuniary benefits from manufacturers by advertising or otherwise promoting the product.[30] Combining these acquisition practices with other operating efficiencies, chain stores were able to offer lower prices to consumers relative to the small, independent retailers.[31]

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[23] *Id.* at 25 ("The depression of the 1930s created all sorts of demands for government assistance to businessmen.").

[24] FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, at 3-5 (1962); Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty Year Perspective*, 57 COLUM. L. REV. 1059, 1061 (1957) [hereinafter Rowe, *The Evolution of the Robinson-Patman Act*].

[25] ROWE, *supra* note 24, at 3-5 (The different levels in the supply chain "performed distinctive functions in the distribution process of moving goods from plant to consumers.").

[26] *Id*.

[27] Timothy J. Muris, *Neo-Brandesian Antitrust: Repeating History's Mistakes* at 12 (Am. Enter. Inst. Working Paper No. 2023-02, 2023), https://www.aei.org/wp-content/uploads/2023/01/Muris-Neo-Brandeisian-Antitrust-WP.pdf?x85095; ROWE, *supra* note 24, at 3-5.

[28] Muris, *supra* note 27, at 13 ("manufacturers mostly refrained from selling to retailers and wholesalers mostly declined to sell directly to the public").

[29] *Id*.

[30] *Id.* ("With these advantages, the mass retailers developed low margin, high turnover businesses, superior to the wholesale model."); *see also* DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 170-175 (1977) [hereinafter DOJ REPORT] ("The total gross margin for a consumer item purchased through an independent included not only the retailer's gross margin but also the gross margin of the wholesaler, broker or other middlemen from whom the independent purchased.").

[31] ROWE, *supra* note 24, at 4.

Critically, the chain store paradigm shift revolutionized the American market and threatened the livelihoods of both wholesalers and independent retailers. In response, wholesalers and independent retailers employed a variety of tactics. For example, an early tactic used by independents was to designate "so-called 'legitimate' channels of trade" and brand as "illegitimate any operation which short-circuited the wholesaler."[32] "Manufacturers reluctant to cooperate were victimized by organized coercion, black lists, boycotts, and punitive tactics."[33] Generally speaking, these measures failed to impede the rise of chains and, whenever scrutinized by the antitrust agencies, were condemned as illegal restraints of trade or unfair methods of competition.[34]

Frustrated by the antitrust agencies—and unable to convince consumers to ignore the lower prices offered by their new competitors—wholesalers and independent retailers turned to Congress and state legislatures to stem the tide of competition with their new chain rivals.[35] Of course, A&P was the chief target of the anti-chain lobby. Independent retailers and wholesalers accused A&P of procuring discriminatory price advantages from its suppliers through a variety of means that included advertising allowances and rebates.[36] And in response to heavy lobbying from aggrieved wholesalers and independent retailers, numerous states passed anti-chain tax bills and generally imposed punitive taxes on the operation of large chain establishments.[37] Around the same time, Congress directed the newly formed Federal Trade Commission to investigate the operation of chains.[38] But to the dismay of the anti-chain lobby, the Commission concluded that competition between the chains and independents was unlikely to produce a monopolist in retail distribution and that the "chains' lower cost of goods sold was but a minor factor in the chains' ability to sell at a lower price."[39] Indeed, "according to the Commission's own data, about 85 percent of the differences in selling price between chain and non-chain stores was attributable to the chains' lower operating costs."[40]

The anti-chain lobby was then dealt another blow when the Supreme Court handed down *Schechter Poultry,* which declared the National Industrial Recovery Act's (NIRA) delegation to

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[32] *Id*. at 5.

[33] *Id.*

[34] *See, e.g.*, *Arkansas Wholesale Grocers' Assn. v. Fed. Trade Comm'n*, 18 F.2d 866 (8th Cir. 1927); *United States v. Southern California Wholesale Grocers' Assn.*, 7 F.2d 944 (S.D. Cal. 1925).

[35] ROWE, *supra* note 24, at 8; Rowe, *The Evolution of the Robinson-Patman Act*, *supra* note 24, at 1064 ("Amid the general distress of the Great Depression, Big Business and Wall Street were popular scapegoats for the misfortunes suffered by the 'little man.'"). And as Representative Celler observed, "The advocates of this bill [Robinson-Patman Amendments] include many independents unable to meet competition which is easily met by their efficient fellow dealers . . . ." H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936).

[36] POSNER, *supra* note 13, at 26.

[37] ROWE, *supra* note 24, at 8; Rowe, *The Evolution of the Robinson-Patman Act*, supra note 24, at 1065.

[38] Additionally, Representative Patman, along with seventy-four other co-sponsors, introduced a federal chain store tax bill in 1933 that reportedly only failed when Congress learned that it made A&P liable for $523 million in taxes on an annual net income of $9 million. *Id*.

[39] FED. TRADE COMM'N, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., (1st Sess. 1934) [hereinafter 1934 FTC Chain-Store Report]; *see also* POSNER, *supra* note 13, at 26 ("There is grave doubt that the charges of anticompetitive conduct leveled against the chains were true."); DOJ REPORT, *supra* note 30, at 107-108.

[40] ROWE, *supra* note 24, at 9.

the President to impose "codes of fair competition" unconstitutional.[41] The NIRA embodied the objectives of the independent merchants whose goal it was to impede the growth of chain stores and otherwise freeze into place the traditional supplier, distributor, and retailer model.[42] Indeed, the anti-chain groups had hoped that the NIRA would provide some refuge from meaningful competition.[43] With the loss of the NIRA, the anti-chain lobby would have to seek refuge elsewhere.

C. 1936: Passing the Robinson-Patman Act.

Emboldened by the loss in *Schechter Poultry*—and undeterred by the FTC's findings regarding chain stores—in 1935, the U.S. Wholesale Grocers Association produced the first draft of what would later become the Robinson-Patman Amendment.[44] As originally drafted, the proposed bill by Representative Patman (Patman bill) went far beyond the FTC's recommendations[45] and proposed unconditionally banning discriminations in price, limiting quantity discounts, prohibiting brokerage, and barring the payment of advertising allowances except on "proportionally equal terms" to all competing customers.[46]

The Patman bill was effectively a *per se* ban on all price discrimination, *without any requirement* that the discrimination have an adverse effect on competition.[47] As described by the leading treatise on the Robinson-Patman Act, "[t]he Patman bill superimposed on Section 2 a veritable code of pricing restrictions designed to cripple the mass distributor and protect the wholesaler's business position."[48] For advocates of the Commission's early anti-consumer interpretation of the Robinson-Patman Act, it is Representative Patman's bill—along with his characterization of the industry and his colorful rhetoric—that is often the baseline against which the Robinson-Patman Act is evaluated. Importantly, however, the Patman bill did not become law.

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[41] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[42] 48 Stat. 195 (1933).

[43] ROWE, *supra* note 24, at 11.

[44] H.R. 8442, 74th Cong., 1st Sess. (1935); ROWE, *supra* note 24, at 11-12 ("The original Patman bill was drafted by . . . counsel for the [United States Wholesale Grocers] Association, which at its convention in the spring of 1935 endorsed the draft.").

[45] The findings of the report suggested that the chains' lower purchase prices were a minor factor in their ability to sell at lower prices relative to the independents. 1934 FTC Chain-Store Report, *supra* note 39, at 55. Indeed, it was the chains' direct-from-the-manufacturer purchasing strategy, along with their more efficient operations, that appeared to allow the chains to offer lower prices. *See* M.A. Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. of Pa. L. Rev., 222, 22 (1955); *see also* Paul H. LaRue, 55 ANTITRUST LAW J. 135, 137 n. 8 (1979).

[46] H.R. 8442, 74th Cong., 1st Sess. (1935); ROWE, *supra* note 24, at 12.

[47] *Id*.

[48] Rowe, *The Evolution of the Robinson-Patman Act*, *supra* note 24, at 1067. The vitriol directed against chains was nothing short of extraordinary; the DOJ's 1977 Report, for example, quotes Representative Patman: "I am convinced that there is a conspiracy existing between a few Wall Street bankers and some of the heads of the biggest financial institutions in this Nation to absolutely get control of retail distribution. They expect to do that through the chain-store system." DOJ REPORT, *supra* note 30, at 108.

The Committee hearings on the Patman bill revealed two flaws, which ultimately prevented the proposed legislation from being adopted.[49] *First*, extant Supreme Court precedent at the time suggested that a legal prohibition on price discrimination that did not affect interstate commerce was constitutionally suspect.[50] *Second*, there were concerns that the Patman bill would not reach predatory pricing—that is, primary-line discrimination.[51] These concerns led the Senate Judiciary Committee to jettison the Patman bill and restore the competitive effects clause of the old Section 2. Thus, the Robinson-Patman Amendment retained the original competitive effects language of Section 2 but *added* one clause to the competitive effects language:

> [W]here 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 receives the benefit of such discrimination, or with customers of either of them* . . . .[52]

Despite the common—and mistaken—refrain that the added language to Section 2's original competitive effects language was meant only to proscribe secondary-line harm, the evolution of the Act from the Patman bill to the final language, along with the plain text, suggests otherwise. As the Chairman of the House conferees Representative Utterback stressed, when passing the Robinson-Patman Amendment Congress maintained its concern with primary-line harm where the "nonresident competitor, armed with the privilege of price discriminations . . . is able to come into that local community . . . [and] cut prices below costs."[53] And although one objective of the Robinson-Patman Amendment was to preserve competition among competing retailers at the customer level, "[o]ddly, the broadening of the competitive effects provision as explained in the legislative debates focused entirely on price discrimination injurious to competition with the seller quoting the price, and did not analyze the problems of competition on the level of customers paying different prices."[54] Thus, the added language to the competitive effects language was intended to address both primary and secondary-line theories of harm. Accordingly, when evaluating harm to competition under Section 2(a), Congress clearly intended

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[49] ROWE, *supra* note 24, at 14-15; *see* S. Rep. No. 1502, 74th Cong., 2d Sess. 2 (1936).

[50] *See Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 144, 239 (1935).

[51] ROWE, *supra* note 24, at 121 ("[T]here was some uncertainty whether the bill would invalidate predatory price discrimination injurious to competition among sellers, since the bill's draftsman believed that the concept of 'discrimination' denoted only to those differentials between competing purchases where a price differential would naturally threaten some competitive detriment. In short, [the Patman bill] might not reach predatory pricing tactics by sellers who, in order to destroy their competitors, slashed prices across the board in one area without differentiating among competing buyers."); *see Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 144, 252 (1935) ("Without the addition of a clause extending the scope of the bill to discriminations lessening competition, there is the danger that it might be construed to apply only to discriminations between customers of the same sellers who are in competition with each other . . . .").

[52] S. Rep. No. 1502, 74th Cong., 2d Sess. 2 (1936) (emphasis added).

[53] 80 Cong. Rec. 9416-9417 (1936).

[54] ROWE, *supra* note 24, at 123.

for the same definition of antitrust injury to apply across both primary- and secondary-line theories of harm.[55]

Additionally, the Robinson-Patman Amendment added several new prohibitions to the Clayton Act, including what became Sections 2(c),[56] (d), and (e), which respectively outlaw commissions and brokerage unconnected to services provided, as well as differential compensation for marketing and distribution services to customers who compete with one another.[57] Notably, and contrary to Section 2(a), these provisions *do not* require a showing of substantial lessening of competition or that the conduct injured, destroyed, or prevented competition[58]—making them essentially *per se* violations.[59]

Despite this history and the fact that the Senate Judiciary Committee specifically made certain that harm to competition continued to be a required element to an antitrust law violation under Section 2(a), my colleagues—reflected in today's Complaint—effectively proceed as if the original Patman bill had been passed into law and generally assert that mere price differences charged to two different buyers is *per se* unlawful under Section 2(a).[60] That reading belies the text of the statute and the history of its creation. Had Congress intended the text it enacted to outlaw all price differences—with no regard to whether the price discrimination adversely affects competition—then Congress would have passed the original Patman bill.

Further, because Congress all but ignored the Patman bill, the often-cited quotations from the legislative history that are about the Patman bill have limited import.[61] This includes Representative Patman's statement reflecting a goal to guard against "Goliath" chain stores.[62] Moreover, this routinely cited quotation is inapposite in this case because the defendant is not a chain store or even a retailer. Rather, the defendant is a wholesaler—an ironic twist of fate and a sign of the misguided nature of this case given that it was the U.S. Wholesale Grocers Association (*i.e.*, middlemen like Southern Glazer's) that drafted the first version of what ultimately became the Robinson-Patman Act.[63]

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[55] *Infra* IV.C

[56] ROWE, *supra* note 24, at 540 ("If anything is clear in the annals of the Federal Trade Commission's Robinson-Patman enforcement, it is that Section 2(c) has become a featherbedding guarantee for the organized food brokers aboard a legal gravy train….").

[57] 15 U.S.C. § 13(c) (prohibit the use of commission or brokerage "except for services rendered in connection with the sale or purchase of goods"); *id.* at § 13(d)-(e) (prohibiting the provision of or payment for distribution services unless such offers were available to all competitors of the customer receiving such benefits).

[58] *Id.* at § 13(c)-(e).

[59] Finally, the Robinson-Patman Amendments added a provision, Section 2(f), that prevents retailers from knowingly inducing or receiving an unlawful discrimination. *Id.* § 13(f).

[60] *See, e.g.*, Compl. ¶¶ 1, 5-6, 75-76.

[61] *See, e.g.*, *id.* ¶ 6.

[62] *See id.*; *see also*, 79 CONG. REC. 9077 2 (June 11, 1935) (Remarks of Representative Wright Patman introducing H.R. No. 8442).

[63] H.R. 8442, 74th Cong., 1st Sess. (1935).

D. Early Interpretation and Enforcement of the Robinson-Patman Act.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, specifies the circumstances under which price differentials are illegal. It contains "four jurisdictional elements and five basic prohibitions, subject to three important defensive provisos."[64] Importantly, Section 2(a) proscribes "direct" or "indirect" discriminations in price by the seller 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 injury, 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."[65] Between 1937 and 1974, the Commission issued nearly 1,400 Robinson-Patman Act complaints.[66] Seventy percent of these cases were brought under Sections 2(c), (d), and (e), likely in an effort to take advantage of the lower evidentiary burden needed to satisfy these provisions.[67] Indeed, because meeting the prima facie burden required by these provisions amounts to a *per se* violation, proving harm to competition is not required. By contrast, Congress made it clear that proving harm to competition was a necessary element to a Section 2(a) claim. Nonetheless, beginning in the 1950s and continuing into the 1960s, the Commission's approach to Section 2(a) mirrored its approach to the rest of the Act. Ignoring Congress's textual directive, the Commission routinely asserted that mere price differences—whether received or granted—represented a *per se* violation.[68] The Commission also discarded the meeting-competition defense specified in Section 2(b), going so far as to ask Congress to write it out of the statute entirely.[69]

Departing from the plain text of the Act had significant consequences for the American economy. *First*, because the burden of proving harm under an effectively *per se* approach was low, the Commission dramatically increased the number of Robinson-Patman cases it brought in the 1950s and 1960s. Indeed, the Commission's enforcement of the Robinson-Patman Act peaked in the early 1960s, with 144, 105, and 215 cases brought in 1960, 1961, and 1963, respectively.[70]

Second, commentators universally agreed that compliance with the Commission's doctrinaire interpretation of the "meeting-competition" defense had deleterious consequences.[71] For example, declaring mere price differences anticompetitive "seem[ed] to require firms to violate

[64] ROWE, *supra* note 24, at 36.

[65] 15 U.S.C. § 13(a).

[66] POSNER, *supra* note 13, at 30.

[67] *Id*. (The Commission pursued actions under 2(c), (d), and (e) in an effort to limit "the scope of the evidentiary inquiry in Robinson-Patman litigation.").

[68] *Infra* Section III.

[69] Frederick Rowe, *Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 98, 99 (1971) ("Traditionally, the Federal Trade Commission took a narrow, if not jaundiced, view of the meeting competition concept. Thus, in the landmark *Standard Oil* case of the fifties, the FTC sought to nullify the defense entirely. Then the FTC sought legislation to overturn the Supreme Court's decision, which established meeting competition as an *absolute* defense to price discrimination charges. Subsequently, restrictive FTC interpretations erected a variety of roadblocks to a seller's effective resort to the meeting competition defense.").

[70] POSNER, *supra* note 13, at 33.

[71] 15 U.S.C. §13(b); *see also* Rowe, *supra* note 24, at 98.

one of the other antitrust laws, most notably Section 1 of the Sherman Act."[72] Because price differentials alone were *per se* unlawful under the Commission's early interpretation of the Robinson-Patman Act, firms had every incentive to coordinate to make certain prices were uniform. And if asked by the Department of Justice's criminal division why prices were uniform, firms could point to the Commission's interpretation of the Robinson-Patman Act.[73] As a result, the Commission's enforcement posture "encouraged and promoted price coordination or price exchanges among competitors in tension with—or even in violation of—[the] Sherman Act."[74]

The rigid interpretation of the meeting-competition defense also impeded price competition. By proscribing price differences, firms were faced with a choice of either implementing uniform pricing in line with their competitors or risking private treble damage suits and Commission actions. The risk of either—or both—presented firms with a constant risk of litigation for every single price cut.[75] And the risk prevented price cuts that would otherwise facilitate competition and benefit consumers.[76] For example, the ability to lower prices without facing antitrust liability facilitates entry into new markets and increases the prospect of potential and perceived potential competition. To enter a new market and gain traction among consumers who will otherwise continue to purchase the incumbent's products, potential entrants must offer attractive promotions, lower prices, or a combination of both. But because of the Commission's early enforcement activity on primary-line discrimination, companies refrained from price competition, as it was legally perilous for a firm to enter a new market by offering lower prices.[77] And suppliers faced the prospect of legal action when attempting to cut prices in certain markets—for example, if the supplier did not offer the same low price to each buyer, the Commission would likely find it liable for secondary-line harm.[78] Consequently, the Commission's atextual interpretation of the Act impeded new entry into markets and created arbitrary barriers that entrenched firms with market power—allowing them to maintain monopoly profits. Taken together, the Commission's misguided approach to the Robinson-Patman Act had dramatic and direct consequences on the price system and consumers.[79]

The indirect consequences, while not as dramatic, were equally deleterious. Professors Areeda and Hovenkamp note that the "ways in which the mere presence of the Robinson-Patman

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[72] PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (CCH) ¶ 2340a.

[73] ROWE, *supra* note 24, at 99 ("How much should a seller know about his competitor's prices before he can meet their equally low price in good faith under Section 2(b) – without at the same time risking Sherman Act illegality from excessive curiosity?"); DOJ REPORT, *supra* note 30, at 60 ("[T]he potential Robinson-Patman justification implicit in the meeting competition requirements encourages the exchange of price information, and [this] exchange clearly promotes price stabilizing agreements.").

[74] Muris, *supra* note 27, at 27-28; *see* DOJ REPORT, *supra* note 30, at 58-63.

[75] *See* DOJ REPORT, *supra* note 30, at 40.

[76] ROWE, *supra* note 24, at 550 n.66 (describing an empirical study that concluded that the Commission's doctrinaire interpretation of the Act had diminished price competition).

[77] *See, e.g.*, *Utah Pie Co. v. Cont'l Baking Co.*, 366 U.S. 685 (1967). *Brooke Group* revisited the same issue explored in *Utah Pie*. *Infra* Section IV.A.2.

[78] *See*, *e.g.*, *Texaco v. Hasbrouck*, 496 U.S. 543 (1990).

[79] Muris, *supra* note 27, at 30-32.

Act has encouraged firms to undertake evasive but costly distribution strategies are legion."[80] Professor Brozen, in his forward to Judge Posner's seminal book on the Act, wryly noted the "overwhelming number of absurdities resulting from the application of the Robinson-Patman Act by the Federal Trade Commission and the courts makes it difficult to pick any one to illustrate undesirable features of the Act."[81]

E. 1977: U.S. Department of Justice Report on the Robinson-Patman Act.

By the 1970s, there was near universal agreement that the Commission's rigid and anti-consumer interpretation of the Robinson-Patman Act was untenable—leading the Commission's own staff to condemn the agency's approach.[82] To evaluate how the Commission's interpretation of the Robinson-Patman Act affected the U.S. economy, the U.S. Department of Justice (DOJ) wrote a detailed report that it published in 1977.[83] Much of the Report focused on the negative effects of the Commission's enforcement efforts.

First, the Report described in detail how the Commission's enforcement posture incentivized information sharing among competitors, likely violating the Sherman Act and increasing retail prices for consumers:

> The former chief prosecutor for the Antitrust Division testified . . . how the exchange of data tends to keep prices at a stabilized level even without an express price fixing conspiracy. When a customer claims he has received a lower price, the supplier may call his competitor to learn whether that price quote was actually given. If it is believed that the claimed discount had not been given then the original seller will, of course, not lower his price. Where, on the other hand, the competitor confirms the offer of a lower price, the seller need only meet that price. Without such confirmation, the seller would be forced to rely on his buyer or to guess at the actual price offered by the competitor. Under these circumstances, the seller might, in the short run, offer lower prices than necessary to meet the competition. Thus, lack of communication would create uncertainty on the part of a seller when faced with the claim that a competitor is charging a lower price; this uncertainty would

[80] AREEDA & HOVENKAMP, *supra* note 72, at ¶ 2340b3.

[81] Yale Brozen, *Foreword* to POSNER, *supra* note 13.

[82] By the 1970s, the Commission's Bureau of Economics was strenuously pushing back against the Commission's effectively *per se* approach to the Robinson-Patman Act. For example, in 1975 a hearing was called by the House of Representatives where the then-Bureau of Economics Director—an academic, Professor F.M. Scherer—provided wide-ranging analysis about the Commission's approach to the Robinson-Patman Act. Professor Scherer emphasized that the Commission's approach to the Robinson-Patman Act, due in part to its lack of economic rigor, prosecuted small producers of retail goods and therefore hampered the very businesses the Act's advocates intended it to help. *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Bus.*, 94th Cong. 141 (1975) (statement of Frederic M. Scherer, Director, Bureau of Econ., FTC).

[83] *See* DOJ REPORT, *supra* note 30, at Preface.

very likely lead to the outbreak of true price competition and a lower price to the consumer.[84]

The DOJ concluded that the Commission's approach to Robinson-Patman Act enforcement imposed "an overwhelming legal barrier for those firms contemplating price adjustment in response to specific demands by less than all customers," because the "charging of prices sufficiently different in amount to affect resale prices creates a virtual presumption of illegality and rebuttal of that presumption is difficult if not impossible."[85]

Second, the DOJ observed that the Commission's enforcement reduced the incentive for firms to lower prices. The Report stated that "[t]o the extent that the businessman sees extensive exposure to liability under the statute as a result of any pricing strategy that might involve lowering pricing selectively, it is reasonable to conclude that his inclination to adjust prices downward on a selective basis will be reduced."[86]

Price competition is the lifeblood of a commercial society. One supplier's reduction in price signals to its competitors—and the broader market—that fundamental market realities have changed, at least from its perspective, and creates an incentive for its competitors to lower prices as well. The effects from the initial price reduction cascade through the broader market and facilitate competition on the merits.[87] Indeed, the DOJ Report concluded that the Commission's approach to the Robinson-Patman Act likely *raised* retail prices by one-half to one percent, totaling approximately $6 billion in additional costs to consumers in 1977.[88] In today's economy that number would be approximately $31 billion.[89]

Third, the Report discussed how overzealous enforcement of Section 2(f) also presented consumer-welfare reducing incentives to retailers. Simply put, the Robinson-Patman Act's 2(f) provision imposes liability on a buyer who "knowingly . . . induce[s] or receive[s] a . . . price" that

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[84] *Id.* at 61-62.

[85] *Id.* at 35.

[86] *Id.* at 9, 27 ("The practical difficulty of establishing defenses to Robinson Patman charges thus deters a rational businessman from engaging in selective price reductions.").

[87] *Id.* at 48-53.

[88] *Id*. at 40.

[89] *Id.* at 39-40. Using data from the Bureau of Labor Statistics, between January 1977 and January 2024, the All Consumer Price Index for All Urban Consumers increased by 427%, indicating that $6 billion in 1977 equals more than $31 billion in current dollars. *See* BLS Data Viewer, U.S. Bureau of Labor Statistics, https://data.bls.gov/dataViewer/view/timeseries/CUUR0000SA0 (last visited Nov. 20, 2024) (identifying the January 1977 Consumer Price Index for All Urban Consumers equal to 58.5 and the January 2024 Index equal to 308.417, yielding growth of (308.417 – 58.5)/58.5 = 4.27 or 427%). Because of real growth of the U.S. economy, retail sales have grown faster than prices. According to the Census Bureau's Annual Retail Trade Survey, U.S. retail sales increased from $724 billion in 1977 to more than $6.9 trillion in 2022, the most recent year for which complete data are available. *See* Annual Retail Trade Survey: 1977, U.S. Census Bureau (1977), https://www.census.gov/data/tables/1977/econ/arts/annual-report.html (reflecting 1977 U.S. retail sales); *New* Annual Retail Trade Survey: 2022 (restated), U.S. Census Bureau (2022), https://www.census.gov/data/tables/2022/econ/arts/2022restated/annual-report.html (reflecting 2022 U.S. retail sales).

is the product of illegal price discrimination.[90] Retailers that are attempting to secure the lowest price possible for their customers are presented with a paradox. On the one hand, competition in the market inherently involves the traditional give and take between buyer and supplier, with the buyer pressing every advantage to secure the lowest price. But on the other hand, the Commission's interpretation of Section 2(f) cautions that same purchaser against inducing a price that may, in the eyes of the Commission, be viewed as a product of illegal price discrimination. As the DOJ observed, the Commission's approach to enforcing Section 2(f) undermined the negotiation process that allowed buyers to reach the lowest possible price.[91] The buyer liability provision interacted with the meeting competition defense to create deleterious results. As former Chairman Tim Muris explained:

> In bargaining, buyers often tell sellers that they have better offers elsewhere. That not only is normal and pro-competitive but also creates a basis for sellers to justify providing selective discounts to particular buyers under the meeting competition defense without running afoul of Robinson-Patman. In short, such back and forth can lower prices—surely a good thing even if the buyer uses gamesmanship, obfuscation, and exaggeration about competitive offers to induce a lower price. To impose an affirmative buyer duty to disclose and compete "honestly," whatever that might mean, would be counterproductive.[92]

It was not until 1979 that the Supreme Court finally rebuffed the Commission and held that a buyer was not liable for violating Section 2(f) unless the seller was also liable for providing the discount under Section 2(a).[93]

Fourth, the DOJ analyzed the Commission's efforts to condemn backhauling under the Robinson-Patman Act. Retailers who make deliveries to their respective stores often find themselves near a supplier's warehouse and, on the occasions when the retailer needs to make a purchase, could find it beneficial to have the truck stop by the supplier and bring back the relevant goods to the retailer's warehouse. Doing so allows the retailer to use otherwise idle delivery truck space and avoid paying a delivery fee to the supplier. For several decades, the Commission's Robinson-Patman interpretation disallowed this practice, costing the American economy nearly $300 million annually.[94]

Fifth, the Report discussed enforcement of Sections 2(c), (d), and (e) and some of the pernicious incentives and results that followed. For example, Section 2(c) prohibits a seller from paying a brokerage to a buyer "except for services rendered."[95] The purpose of Section 2(c) is to

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[90] 15 U.S.C. § 13(f) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.").

[91] DOJ REPORT, *supra* note 30, at 32 (2(f) enforcement "str[uck] at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price.").

[92] Muris, *supra* note 27, at 31.

[93] *Great Atl. & Pac. Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69, 76-81 (1979).

[94] DOJ REPORT, *supra* note 30, at 90-91.

[95] 15 U.S.C. § 13(c).

prevent large chains from disguising discounts as brokerage payments, when in reality no brokerage services were provided.[96] Because large chains—for example, A&P—deal directly with suppliers, they may try to obtain a lower price by arguing they are saving any broker fees associated with using a middleman. The Commission not only prevented this type of price competition but even went so far as to bring an enforcement action against a seller's payment of brokerage fees even when appropriate services were provided.[97]

As the DOJ Report found, the Commission's approach to Section 2(c) ironically "interfere[d] with and complicate[d] the distribution of goods by independent grocers who have organized in cooperatives."[98] Though organized to compete against large chains, the independent retailers were prohibited from paying broker fees to the buying cooperatives, which ultimately undermined independent retailers' ability to compete.[99] Further, the Commission's approach to Section 2(c) prevented buyers who wanted to make purchases direct from a manufacturer when that manufacturer also used a broker because any discount for purchase without a broker would "be considered a discount 'in lieu of brokerage' and a *per se* violation."[100] The problems were exacerbated by the Commission's robust enforcement of Section 2(c) from the time the Act was passed until 1969, constituting 180 of 439 Robinson-Patman final orders.[101]

The Commission's approach to Sections 2(d) and 2(e) presented their own set of problems to both consumers and competition. Sections 2(d) and 2(e) prohibit suppliers from discriminating in services or promotional assistance between buyers.[102] The Commission's approach to these provisions effectively prevented sellers from providing useful or beneficial services to downstream customers.[103] Indeed, in response to *Federal Trade Commission v. Fred Meyer*, the Commission issued guidance—known as the "Fred Meyer Guides"—to assist businesses navigating the Act. The guides proved difficult to write—at least in a way that assisted legitimate businesses wishing to comply the law—with the DOJ finding the "guides so complex as to be totally unworkable."[104]

Finally, the DOJ report focused on the effect of Robinson-Patman enforcement on small business.[105] Perhaps the most paradoxical consequence of the Commission's approach to enforcement of the Act was its negative effect on small business. Of course, the Robinson-Patman Act applies to both large and small business alike. But the compliance costs associated with complying with the Act—consistent with all regulation—disparately impact small business relative to larger ones, further incentivizing consolidation. But beyond the compliance cost

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[96] *See* POSNER, *supra* note 13, at 44.

[97] *See id.* at 45.

[98] DOJ REPORT, *supra* note 30, at 80.

[99] *Id.* at 81.

[100] *Id.*

[101] *Id.* at 82.

[102] 15 U.S.C. § 13(d), (e).

[103] DOJ REPORT, *supra* note 30, at 92.

[104] *Id.*

[105] *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3d ed. 1990) ("[T]he brunt of the Commission's effort fell upon the small businesses Congress sought to protect.").

disparity, the Commission routinely chose to bring enforcement actions against small and independent companies. Indeed, Professor Scherer—a former Bureau of Economics Director—testified to Congress that smaller firms are "more likely to get into trouble" with the Act, due in part because smaller companies cannot afford legal counsel to the degree larger firms can.[106] Commission staff also apparently preferred to bring cases against smaller companies because the cases were less complex and presumably easier to resolve.[107] The available evidence suggests that the Commission's misguided approach did little to effect the Act's purported goal, namely to help small and independent businesses.[108]

Taken together, my colleagues' reinvigoration of the Commission's 1960s-era interpretation portends significant consequences for both consumers and the American economy. Indeed, describing the difficulty in administering the Robinson-Patman Act, Justice Robert Jackson observed that "[w]e have vacillated and oscillated between the [National Recovery Act] theory, roughly, and the Sherman Antitrust Law theory ever since I can remember, and we are still wobbling."[109] Justice Jackson further observed that he had "difficulty in knowing where we are with [the Robinson-Patman Act], and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me but once a term but it must trouble them every day."[110]

Writing a decade after Justice Jackson, the leading Robinson-Patman Act scholar of his time, Professor Fred Rowe, concluded that the "[Robinson-Patman Act] remains a legal enigma whose mysteries are familiar to many but fathomed by few."[111] Elaborating on these mysteries, a former president of U.S. Steel remarked that business executives were faced with a choice of either "go[ing] broke" or running their business from "Sing Sing, Leavenworth, or Alcatraz" and paradoxically observed that "if a businessman and his competitor quote the same price on a product, they may be accused of violation of the Sherman Act. If one businessman tried to undersell his competitor by cutting his price . . . he may be violating the Robinson-Patman Act."[112] Every one of these problems was a consequence of the Commission's doctrinaire and atextual interpretation of the Act, an interpretation my colleagues intend to reinvigorate.

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[106] DOJ REPORT, *supra* note 30, at 92.

[107] *Id*.

[108] *See, e.g.*, Frederick M. Rowe, *Political Objectives and Economic Effects of the Robinson-Patman Act: A Conspicuous U.S. Antitrust Failure*, 136 J. INST. AND THEORETICAL ECON. 499, 501 (1980). ("The Act has failed to achieve its political goals of shielding small merchants from economic displacement by mass distributors.").

[109] *Standard Oil Co. v. Fed. Trade Comm.*, 340 U.S. 231 (1951), Transcript of Oral Argument, Oct. 9, 1950, p. 49.

[110] *Id.* at 49, 88.

[111] ROWE, *supra* note 24, at ix.

[112] N.Y. Times, May 19, 1950, p. 37, col. 1.

II. THE MAJORITY'S COMPLAINT FAILS AS A MATTER OF LAW BECAUSE IT CANNOT SATISFY THE JURISDICTIONAL "IN COMMERCE" REQUIREMENT; NOR DOES THE COMMISSION ADEQUATELY ASSESS PRICE DISCRIMINATION AND SOUTHERN GLAZER'S AFFIRMATIVE DEFENSES.

Southern Glazer's is the largest national distributor of wine and spirits in the U.S.[113] Indeed, in 2023 Southern Glazer's sales were approximately $26 billion.[114] The Complaint alleges that Southern Glazer's has disadvantaged independent retailers by charging them higher prices relative to national or regional chains,[115] and that Southern Glazer's pricing practices violate the Robinson-Patman Act.[116] Specifically, the Complaint alleges that, since at least 2018, Southern Glazer's has discriminated in price between independent purchasers and large chain purchasers of wine and spirits.[117] The Complaint is therefore a secondary-line case, which involves price discrimination that injures competition among the *customers* of the discriminating seller, which are generally referred to as "favored" and "disfavored" purchasers.[118]

In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the Supreme Court stated that to establish a secondary-line claim under Section 2(a), the plaintiff must show (1) that the alleged sales were made "in interstate commerce"; (2) the products were of "like grade and quality"; (3) the defendant "discriminate[d] in price between" two of its purchasers; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition to the advantage of a favored purchaser, *i.e.*, one who receive[d] the benefit of such discrimination."[119]

The allegations in the Complaint fall short of what the law requires. Specifically, I believe the Commission has failed to satisfy the Act's "in commerce" requirement (Section II.A). Even if such a requirement were met, the Complaint does not adequately allege price discrimination because it fails to identify paired retailers or demonstrate that such retailers knowingly received the benefit of any alleged discrimination (Section II.B). Further, because the Complaint ignores a legally cognizable cost justification (Section II.C) and today's enforcement decision does not properly account for Southern Glazer's attempt to meet competition, a statutorily provided affirmative defense (Section II.D), today's action is not in the public interest.

A. The Alleged Price Discrimination Did Not Occur "In Commerce."

To proceed with a Section 2(a) claim, the alleged price discrimination must, among other things, arise from sales that occur "in commerce"[120]—an inquiry that generally turns on the particulars of how a given defendant operates and the related context for the relevant sales. To understand the nature of the Complaint, I first provide background regarding how state law impacts

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[113] Compl. ¶ 1.

[114] *Id.* ¶ 2.

[115] *Id.* ¶ 3.

[116] *Id.* ¶ 6.

[117] *Id.* ¶ 32.

[118] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

[119] *See id.* at 176-77 (quoting 15 U.S.C. § 13(a)).

[120] *See* 15 U.S.C. § 13(a).

the highly regulated wine and spirits industry, along with the commercial realities that affect Southern Glazer's business practices within that industry. Both issues are predicates to understanding and evaluating the Commission's claims.[121]

In 2022, the Treasury Department issued a report analyzing competition in the alcohol market. Among its many observations, the report noted that:

> The 21st Amendment, which ended Prohibition in 1933, incorporates special deference to state laws regarding intoxicating liquors. Consequently, state regulation has a particularly significant role in the markets for alcohol. Many states require beverage alcohol to be sold through a "three-tier" supply chain in which beverages pass from a producer/supplier, to a distributor/wholesaler, to a retailer—and in which no business operating in one tier may hold a significant ownership interest in another tier.[122]

Generally speaking—as a consequence of the 21st Amendment and related state regulation relevant to this case—each segment of the alcohol supply, distribution, and retail markets operate independent of the others. For example, in general, no supplier of alcohol may own a distributor or even a retailer.[123] Producers/suppliers make the spirits, beer, or wine.[124] And suppliers contract with distributors, who in turn sell the products to retailers.[125]

In addition to the required vertical separation, states impose a battery of regulations governing the way alcohol may be priced.[126] Some states, for example, have post-and-hold laws that require distributors to post and maintain wholesale prices for a particular statutory period.[127] Other states have laws that impose other price-related requirements.[128]

Distributors, in particular, are subject to varying and extensive state regulations.[129] These state schemes generally fall into three primary categories: "open," "franchise," and "control."[130] In open states, distributors provide a full range of services including buying and selling alcohol, as well as promotional and marketing services.[131] Suppliers can choose which distributor to

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[121] *See generally* Compl. ¶¶ 24-26.

[122] U.S. DEP'T OF THE TREASURY, COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS, at 10 (Feb. 2022), available at https://home.treasury.gov/system/files/136/Competition-Report.pdf [hereinafter TREASURY]. The 21st Amendment reads, in relevant part: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

[123] TREASURY, *supra* note 122, at 10.

[124] *See id.*

[125] *See id.* at 10-11. As explained in more detail below, the vertical separation state law requires or has resulted in for distributors is key for analysis of whether any given allegedly discriminatory transaction occurred "in commerce."

[126] *See* Compl. ¶¶ 25-26; TREASURY, *supra* note 122, at 14-17.

[127] *See* TREASURY, *supra* note 122, at14-16; *see, e.g.*, N.Y. Alco. Bev. Cont. Law § 101-b.

[128] *See* TREASURY, *supra* note 122, at 16-17.

[129] *Id.* at 11 ("The distributor tier is subject to extensive and varying regulation by state governments.").

[130] Compl. ¶ 25; TREASURY, *supra* note 122, at 11.

[131] TREASURY, *supra* note 122, at 11.

contract with and can, subject to contractual limitations, switch distributors when needed.[132] By contrast, in franchise states a supplier must show "cause in a legal proceeding before terminating its relationship with a distributor, and, in practice, suppliers rarely switch distributors. As a result, the distributor landscape is much more fragmented in franchise states than open states."[133] Finally, in control states, suppliers sell directly to the state and then a state-run monopoly facilitates distribution.[134]

Because state regulations demand vertical separation, most suppliers[135] work with distributors like Southern Glazer's, and distributors like Southern Glazer's must compete in two markets. In the first, or upstream, market, Southern Glazer's competes with other distributors to secure contracts with its suppliers.[136] And Southern Glazer's wins contracts with suppliers—or fails to—depending on its ability to meet each particular supplier's business needs. In some cases that may mean maximizing brand awareness, adequately competing with rival suppliers' products, satisfying point-of-distribution goals, or otherwise meeting suppliers' targets.[137] In each state, distributors typically have exclusive rights to sell a particular supplier's products.[138]

And in the second, or downstream market, Southern Glazer's competes with other distributors for the business of retailers, who are themselves competing with other retailers to make sales to individual consumers. Accordingly, when rival distributors offer more attractive pricing or promotions than those offered by Southern Glazer's, retailers may switch to, or favor the products offered by, rival distributors.

Southern Glazer's customers are a mix of both chain and independent retailers.[139] Indeed, independent retailers make up approximately 50% of Southern Glazer's nationwide business. Because independents tend to carry a wider variety of products relative to chains, Southern Glazer's must satisfy a wider range of independent-specific demand for products relative to chains. To meet this demand, Southern Glazer's salespeople are assigned specific retailers to service.[140] And Southern Glazer's compensates its salespeople based on sale quantity. Tying a salesperson's compensation to the quantity sold ensures that each salesperson has an incentive to maximize sales to the retailers they are assigned to—regardless of whether the retailer is a chain or independent. That Southern Glazer's assigns certain salespeople directly to independent retailers, and ties their compensation to quantities sold, demonstrates Southern Glazer's investment in sustaining its

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[132] *Id.*

[133] *Id.* at 11-12.

[134] *Id.* at 12. Today's case is limited to Southern Glazer's actions in open and franchise states. *See* Compl. ¶ 25.

[135] The largest suppliers of spirits in the U.S. include Diageo, Beam Suntory, Sazerac, Brown Forman, Bacardi, and Pernod Ricard; while the largest suppliers of wine include Gallo, Constellation, The Wine Group, and Trinchero Family Estates. *See, e.g.*, TREASURY, *supra* note 122, at 23.

[136] Other major national distributors include Republic National Distributing Company (RNDC), Breakthru Beverage Group, and Johnson Brother's Liquor Company. *See id.* at 24.

[137] Point-of-distribution goals are a supplier's expectation that the distributor places its product in a minimum number of retail locations.

[138] *See generally* Compl. ¶ 26.

[139] *Id.* ¶¶ 29, 31.

[140] *See id.* ¶ 68.

business with independents—and further suggests the importance of independent retailers to Southern Glazer's success.[141]

How the prices of alcohol products are set within the three-tier system drives Southern Glazer's business model. Among its considerations in determining prices, Southern Glazer's works with its suppliers to set a pricing strategy that accounts for supplier goals. Because state laws prevent suppliers from setting prices for downstream retailers, Southern Glazer's facilitates several types of discounts that ultimately affect Southern Glazer's prices to retailers, such as volume or quantity discounts, promotions, cumulative quantity discounts, and scan rebates.[142]

Southern Glazer's is responsible for setting—and negotiating—prices with retailers as a matter of law. But, as in any industry, the commercial realities of the alcohol market mean that a supplier's pricing has significant effects on the business decisions and pricing practices Southern Glazer's employs. Because of the mandated three-tier system, suppliers have a strong incentive to put in place a pricing structure that creates incentives for its distributors and retailers to maximize sales and output. When suppliers offer cumulative quantity discounts, for example, the discounts reduce the costs of acquisition to distributors like Southern Glazer's and ultimately reduce the price that is paid by retailers, minimizing the triple marginalization problem a legally mandated three-tier system presents.[143] This general background on the state regulatory regime and industry characteristics, and how each affects the approach of independent distributors like Southern Glazer's, is essential for understanding what shapes Southern Glazer's practices in the relevant wine and spirits markets.

Turning back to the "in commerce" issue, to satisfy the threshold jurisdictional requirements of the Robinson-Patman Act, the Commission must demonstrate that the discriminatory sales were "in commerce."[144] It is generally understood that the "commerce coverage of the Robinson-Patman Act falls short of the broad sweep of the Sherman Act."[145] Courts apply the Sherman Act's proscriptions so long as interstate commerce is affected by the conduct in question.[146] By contrast, the Robinson-Patman Act's reach under Section 2(a) extends only "where either or any of the *purchases involved in such discrimination* are in commerce."[147] Thus, as the Supreme Court observed, courts of appeals consistently apply Section 2(a) "only

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[141] To sustain long-term success, Southern Glazer's would need to keep these salespeople assigned to independent stores satisfied with their compensation and long-term trajectory—a task Southern Glazer's would make much more difficult if it favored larger chains in a way that undermined the salaries of these salespeople supporting independents.

[142] "Volume discounts" apply where a retailer purchases a sufficient quantity of cases of product. These discounts can vary depending on the quantity levels. "Promotions" involve mix and match deals where a retailer receives a discount when it also orders a particular amount of another product. Retailers can earn "cumulative quantity discounts" when they purchase a certain quantity of a product over a set timeframe. And "scan rebates," where a retailer is reimbursed for scan discounts that consumers receive, are earned when retailers sell certain quantities of a product over a specific period. *See generally* Compl. ¶¶ 35, 38, 42, 46.

[143] *Cf.* Sreya Kolay, Greg Shaffer, & Janusz A. Ordover, *All-Units Discounts in Retail Contracts*, 13 J. ECON. & MGMT. STRATEGY 429 (Sept. 2004).

[144] 15 U.S.C. § 13(a).

[145] ROWE, *supra* note 24, at 78.

[146] *See generally, e.g.*, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-201 (1974).

[147] 15 U.S.C. § 13(a) (emphasis added).

where 'at least one of the two transactions which, when compared, generate a discrimination [that] cross(es) a state line.'"[148] Because of Section 2(a)'s "clear language" that jurisdiction turns on whether the transaction is "in commerce," the Supreme Court has declined to expand Section 2(a) to activities that merely have a substantial effect on intrastate commerce.[149]

The Fifth Circuit case *Hiram Walker, Inc. v. A & S Tropical, Inc.* is directly on point.[150] In *Hiram Walker*, a retail liquor store in Florida brought a Section 2(a) claim against Hiram Walker, a national supplier of alcoholic beverages, and two Florida distributors of alcohol.[151] After determining that Hiram Walker could not be held liable because it was not a "seller" under the Robinson-Patman Act, the district court addressed whether the distributors' allegedly discriminatory sales were "in commerce."[152]

The court explained that Section 2(a) was designed to address discriminatory pricing policies, *i.e.*, where "there were two sales made by the same seller to at least two different purchasers."[153] Accordingly, in assessing the Section 2(a) "in commerce" jurisdictional requirement, the court looked to whether at least one of the distributors' discriminatory sales crossed a state line.[154] Because the distributors in *Hiram Walker* sold only to retail customers within Florida, the court held that the alcohol sales were not made in interstate commerce.[155] Drawing on Professor Rowe's treatise, the court observed:

> When the supplier himself does not engage in sales transactions across state lines—by deploying his franchised distributors or bona fide independent subsidiaries so that each satisfies only local market demands—Robinson-Patman liability may be minimized. For any price differentials made by an *autonomous local subsidiary or distributor* solely as between customers within the state would arise from a sale on

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[148] *See Gulf Oil Corp.*, 419 U.S. at 200 & n.17 (quoting *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969)); *see also Misco, Inc. v. U.S. Steel Corp*., 784 F.2d 198, 202 (6th Cir. 1986) ("The in commerce jurisdictional prerequisite is met only if one of the alleged discriminatory sales crossed a state line."); *Belliston v. Texaco, Inc*., 455 F.2d 175, 178 (10th Cir. 1972), *cert. denied*, 408 U.S. 928 (1972) (explaining that "it is not enough to show that a defendant is engaged in interstate commerce; rather, it must be established that the sale complained of was one occurring in interstate commerce"); *see also* ROWE, *supra* note 24, at 78-79. The original House bill would have adopted a more expansive "effect on commerce" clause, but the Senate-House Conference struck that language. *Id.* at 78 (citing H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936)).

[149] *Gulf Oil*, 419 U.S. at 199, 201.

[150] 407 F.2d at 6 (holding the district court erred in denying defendants' motions for summary judgment, which were made on the grounds "that the allegedly discriminatory sales had not taken place in interstate commerce, and . . . hence, those transactions were not within the scope of the Robinson-Patman Act").

[151] *Id.*

[152] *Id.* at 8 (explaining "in order to come within the provisions of the Robinson-Patman Act, the appellee must demonstrate that the discriminatory sales were 'in commerce'") (quoting 15 U.S.C. § 13(a)).

[153] *Id.* at 7.

[154] *Id.* at 9.

[155] *Id.*

the part of the intrastate distributor or subsidiary rather than of the supplier, beyond the commerce criteria of the [Robinson-Patman] Act.[156]

In other words, it may be more complicated to determine whether a transaction is "in commerce" if an out-of-state manufacturer uses its subsidiary to distribute inventory. But when a wholly *independent* distributor sells within a state, those intrastate transactions are not "in commerce." The Fifth Circuit thus concluded that because the discriminatory transactions by the Florida distributors were intrastate sales by independent distributors, the sales were not within the scope of the Robinson-Patman Act "as a matter of law."[157]

Due to the facts of today's case, the Complaint does not set forth allegations sufficient to satisfy the Robinson Patman Act's jurisdictional "in commerce" requirement. The Complaint alleges that Southern Glazer's—operating as an independent distributor pursuant to state laws that regulate the alcohol industry and prevent distributors like Southern Glazer's from integrating upstream or downstream[158]—generally makes sales to any relevant paired retailers[159] *within* the same state.[160] The Complaint does not allege that the relevant sales to any paired retailers crossed state lines[161]—that is, Southern Glazer's in one state sold products to a favored retailer in the same state and a disfavored retailer in different state. Consistent with the Court's analysis in *Hiram Walker*, the relevant sales do not meet the "in commerce" requirement. That conclusion is unsurprising given the regulatory structure of the alcohol industry, which prevents a distributor located in one state from making sales to a retailer located in another. Indeed, *Hiram Walker* addressed the same, heavily-regulated and legally-segmented industry that is at issue in today's case.

Despite these shortcomings, the Complaint alleges that it meets the "in commerce" demands of Section 2(a) because Southern Glazer's purchases and resells its wine and spirits in a "continuing flow of interstate commerce."[162] Specifically, it alleges that Southern Glazer's purchased inventory from suppliers "with the intent that the purchased goods are to go to [a] specific retailer," "to meet the purchase commitments made by specific large chain retailers," and "to meet the anticipated needs of its specific large chain retailer customers."[163] The Complaint's allegations are directed to meet the "flow of commerce" test. Yet that test is inapplicable here.

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[156] *Id*. (quoting ROWE, *supra* note 24, at 81) (emphasis added).

[157] *Id.*; *see also B.J.L.M. Liquor Store, Inc. v. Block Distrib. Co., Inc*., 1987 WL 13811, at *3 (S.D. Tex. Apr. 2, 1987) (relying on *Hiram Walker* to find that in commerce requirement was not satisfied relative to a Texas wholesale distributor of alcoholic beverages where none of the relevant transactions crossed a state line).

[158] Compl. ¶¶ 24-27.

[159] The term "paired retailers" refers to two retailers who purchase from the same upstream seller: *i.e.*, a favored retailer that allegedly benefits from the discriminatory price; and the disfavored retailer that is allegedly harmed by the favored retailer's receipt of the discriminatory price. As explained below, the Complaint fails to adequately identify paired retailers.

[160] *See id.* ¶ 82; *see generally id.* ¶¶ 24-25, 32, 45, 48, 52-53, 56-64.

[161] *See Gulf Oil Corp.*, 419 U.S. at 200.

[162] Compl. ¶ 80.

[163] *Id.* ¶ 84.

The "flow of commerce" test looks to whether "the goods had come to rest."[164] The doctrine originates from the Supreme Court's 1943 *Walling v. Jacksonville Paper Co.* case arising under the Fair Labor Standards Act.[165] In assessing whether employees were "engaged in commerce within the meaning of [Section] 6(a) and [Section] 7(a) of the Act," the Court focused on whether there was "practical continuity of movement of goods."[166] To that end, under the flow-of-commerce test, goods shipped into a state remain within the flow "[1] where they are purchased by the wholesaler or retailer upon the order of a customer with the definite intention that the goods are to go at once to the customer; [2] where the goods are purchased by the wholesaler or retailer from the supplier to meet the needs of specified customers pursuant to some understanding with the customer although not for immediate delivery; and [3] where the goods are purchased by the wholesaler or retailer based on anticipated needs of specific customers, rather than upon prior orders or contracts."[167]

A handful of Fifth Circuit cases have applied this three-part, flow-of-commerce test to Robinson-Patman claims.[168] Those cases were subsequent to the Fifth Circuit's *Hiram Walker* decision, however, and none calls into question the applicability of *Hiram Walker*'s holding here—intrastate sales by an independent distributor do not satisfy Section 2(a)'s "in commerce" demands. I question the continued viability of the flow-in-commerce test,[169] particularly if it is applied in a manner that is inconsistent with the plain text of Section 2(a)—*purchases in commerce*—by overlooking the discriminatory *transaction*. But even if such test were valid, it has no application here. That is because delivery of goods to an independent distributor breaks any interstate flow.

The Supreme Court recognized that an independent distributor breaks the flow of commerce in its 1951 *Standard Oil* decision.[170] In that case, the Commission accused Standard Oil of price discrimination under the Robinson-Patman Act when Standard Oil sold gasoline to

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[164] *Mayer Paving & Asphalt Co. v. Gen. Dynamics Corp.*, 486 F.2d 763, 769 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

[165] 317 U.S. 564 (1943).

[166] *Id.* at 566-68.

[167] *Walker Oil Co. v. Hudson Oil Co. of Mo.*, 414 F.2d 588, 590 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (citing *Walling*, 317 U.S. 564).

[168] *See id.*; *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 210 (5th Cir. 1969); *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1116 (5th Cir. 1982); *Hampton v. Graff Vending Co.*, 516 F.2d 100, 103 (5th Cir. 1975).

[169] *Walker Oil*, 414 F.2d at 590 (Brown, J., concurring) (questioning the court's reliance on *Walling* because its findings are "doubtful, and now time eroded pronouncement having a Delphic (but questionable) ring"); *see also Mayer Paving & Asphalt Co.*, 486 F.2d at 769 (noting that the flow of commerce "doctrine was inferentially undercut in Mr. Justice Clark's opinion for this court in *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1166 (7th Cir. 1972)"); *cf. Gulf Oil Corp.*, 419 U.S. at 200-01 (holding that jurisdiction requires one of the discriminatory transactions to have crossed state lines and refusing to extend beyond that based on Section 2(a)'s "clear language").

[170] *Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. 231. Nor did the Supreme Court apply the flow of commerce test in *Gulf Oil*. 419 U.S. 186. There, the Court noted that "in commerce" meant "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Id.* at 195. But the Court recognized that for Robinson-Patman claims, with "almost perfect consistency," the courts of appeals require "at least one of the two transactions which, when compared, generate a discrimination . . . cross(es) a state line" and refused to extend beyond that. *Id.* at 200-01.

Michigan jobbers at lower prices relative to other small service station customers.[171] Standard Oil refined the gasoline outside of Michigan but used its storage facilities in Michigan to deliver that transformed product to jobbers and other customers upon request.[172] Because Standard Oil's use of local storage facilities within Michigan was part of its broader and vertically integrated interstate operation, the Supreme Court held that Standard Oil's "temporary storage" of the gasoline did not meaningfully interrupt the flow of commerce.[173]

Importantly, the Supreme Court noted that its decision was consistent with other cases that hold "interstate commerce *ceased* on delivery to a local distributor."[174] It distinguished Standard Oil's sales, which involved "an interstate producer and refiner [selling] to a local distributor."[175] Stated differently, when Standard Oil, a supplier, shipped its gasoline across state lines to *itself*, the gasoline remained in the flow of commerce; by contrast, when goods are shipped across state lines to an independent distributor, the flow of commerce ends.[176]

The Ninth Circuit's *Zoslaw v. MCA Distributing Corp.* is also instructive.[177] *Zoslaw* involved the plaintiffs' California store, which specialized in the retail sale of music records and related products.[178] Shortly after opening, the store faced financial difficulties due in part to new competition from department stores, grocery stores, and drug stores that sold similar products.[179] The Zoslaws sued a number of record distributors and retailers for various antitrust claims, including claims against distributors under Section 2(a) of the Robinson-Patman Act.[180] The district court evaluated the "in commerce" issue using the "flow of commerce" test and concluded the Zoslaws failed to meet the in commerce requirement.[181] The Ninth Circuit held that the district court prematurely granted summary judgment.[182]

Two of the distributors the Zoslaws sued were wholly owned subsidiaries of corporations that produced records, and the other two distributors manufactured and distributed records nationwide.[183] Just as the integrated refining and storage of gasoline in *Standard Oil* was central to the Supreme Court's holding, the integrated supply and distribution of records was key to the

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[171] *Standard Oil v. Fed. Trade Comm'n*, 340 U.S. at 233-34.

[172] *Id.* at 237.

[173] *See id.* at 237-38.

[174] *Id.* at 238 & n.6 (emphasis added).

[175] *Id*.

[176] *Id.*; *see also Belliston*, 455 F.2d at 180-81 (finding "in commerce" of Robinson-Patman not satisfied where gasoline was delivered to an independent distributor and distinguishing *Standard Oil* where "Standard shipped the gasoline to itself across a state line").

[177] 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

[178] *Id.* at 874-76 (reversing in part district court's grant of summary judgment for defendants on Robinson-Patman Act discrimination claims, and holding the court erred in finding plaintiffs failed to satisfy the Act's "in commerce" jurisdictional requirement).

[179] *Id.* at 874.

[180] *Id.* at 874-75.

[181] *Id.* at 878.

[182] *Id.* at 879.

[183] *Id.* at 876-77, 879.

Zoslaw Court.[184] With respect to the two distributors that manufactured records, the Ninth Circuit explained that "interstate producers of goods produced out of state do not meaningfully interrupt the flow of commerce by simply storing them in the state of eventual sale."[185]

But for the two distributors who were wholly owned subsidiaries of the manufacturers, the Ninth Circuit explained that "[s]ales to subsidiaries in such instances do not necessarily remove such transactions from Robinson-Patman jurisdiction."[186] Notably, when instructing the district court on how to evaluate the "in commerce" question on remand, the court emphasized the importance of evaluating whether the "subsidiaries acted as *independent* distributors in their pricing and marketing decisions, in effect, breaking the flow of commerce between the manufacturer and local retailer."[187]

To reach its decision, the Ninth Circuit pointed to the Supreme Court's decision in *United States v. American Building Maintenance Industries*.[188] There, two janitorial service companies were not "in commerce" for purposes of Section 7 of the Clayton Act because the firms purchased their products in intrastate transactions from local distributors: "the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased."[189] Applying this principle in *Zoslaw*, the question remained whether the "record retailers were in fact insulated from interstate commerce" by the independence of the subsidiary distributors.[190] Consequently, because a subsidiary may be adequately independent from its parent manufacturer to end the flow of commerce, when a distributor like Southern Glazer's is wholly independent from the supplier, there is no question that the flow of commerce ends when it purchases product from upstream alcohol suppliers.[191]

Zoslaw is consistent with the "[t]he majority of cases and commentators elaborating on the flow of commerce theory [that] have held that the flow of commerce is broken once the goods are

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[184] *Id.*

[185] *Id.* at 879 ("[I]n this light we think the district court prematurely granted summary judgment to the appellee distributors. In particular, the declarations and answers to interrogatories submitted by ABC and MCA indicate that both manufactured records and tapes outside of California, which were then placed in California warehouses for eventual sale to retailers. Those actions were not alone sufficient to remove the goods from the stream of commerce. WEA and Polygram did not themselves manufacture records, but they were wholly owned subsidiaries of companies engaged in record and tape production.").

[186] *Id.* at 879.

[187] *Id.* at 880 (emphasis added).

[188] *Id.* (citing *American Building*, 422 U.S. 271, 285 (1975)).

[189] *Id*. at 880 & n.12 (quoting *American Building*, 422 U.S. at 285). *American Building* was superseded by statute with respect to Section 7's jurisdiction. *See* H.R. Rep. No. 871, 96th Cong., 2d. Sess. 4-7 (1980) (explaining amendment to § 7 of the Clayton Act, 15 U.S.C. § 18, as expanding coverage from business activities "engaged in" interstate commerce to those "affecting commerce" and overruling *American Building*); *see also United States v. Gillies*, 851 F.2d 492, 493 (1st Cir. 1988) (same).

[190] *See* 693 F.2d at 880 & n.12.

[191] *See Hiram Walker*, 407 F.2d at 9 (holding that independent distributors' intrastate sales were not in commerce as a matter of law).

sold to an independent distributor."[192] That makes sense, since the flow-of-commerce doctrine developed so that large interstate manufacturers could not avoid liability by simply owning a local storage facility—"shipping the product interstate from the manufacturing plant to those facilities, and then claiming that any subsequent *intra*state sale of the product was not in 'interstate commerce.'"[193]

Simply put, this is not a case involving an "interstate *supplier's* local storage."[194] In fact, Southern Glazer's operates outside of an industry that permits the kind of vertical integration that informed the courts' reasoning in *Zoslaw* and *Standard Oil*, where there was little or no legal distinction between the corporate form of the suppliers or manufacturers of the relevant goods and the distributors of those goods. As state law demands, Southern Glazer's is legally distinct from the relevant wine and spirits suppliers.[195] Since the Complaint lacks any allegation that Southern Glazer's is itself the out-of-state manufacturer or supplier of the goods it purchases to subsequently sell,[196] the flow of commerce ceased when products were delivered to Southern Glazer's.

That an independent distributor's intrastate sales are not "in commerce" is consistent with the Act's text that "either or any of the purchases involved in such discrimination are in commerce."[197] Any other reading contradicts the plain text and offends the federalism canon. Courts require a "clear statement" before concluding that Congress meant to alter the "usual constitutional balance of federal and state powers."[198] The Complaint's reading of the Robinson-Patman Act's in commerce clause seeks to dilute the heightened demand Congress required that the *transactions* be in commerce and thereby upends the balance of power in an industry highly-regulated by the States.

Finally, even if the flow-of-commerce test were applicable, I do not have reason to believe Southern Glazer's intrastate sales would actually meet that test.[199] Of course, like every business, Southern Glazer's generally anticipates demand from retailers (and supply from suppliers) and plans accordingly.[200] Such planning can be legally relevant in the context of a vertically integrated supplier-distributor, and where the planning is in response to a particular customer's orders or anticipated needs.[201] But again, Southern Glazer's is not vertically integrated so such analysis does not apply here. And even if the analysis were relevant, my understanding is that the vast majority

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[192] *Callahan v. A.E.V., Inc.*, No. CIV. A. 92-556, 1994 WL 682756, at *6 (W.D. Pa. Sept. 26, 1994) (citing *Zoslaw* and *Hiram Walker*); *see generally Taggart v. Rutledge*, 852 F.2d 1290, 1988 WL 79483, at *4 (9th Cir. 1988) (unpublished opinion) ("The flow of commerce ends when goods reach either their intended destination *or an independent distributor*.") (emphasis added).

[193] *See Callahan*, 1994 WL 682756, at *5 (citing P. Areeda and D. Turner, Antitrust Law, ¶ 233b (1978)).

[194] *See* ROWE, *supra* note 24, at 80 (emphasis added) (citing *Standard Oil v. Fed. Trade Comm'n*, 340 U.S. at 238).

[195] *See* Compl. ¶ 24.

[196] *See, e.g.*, *Zoslaw*, 693 F.2d at 879-80 (focusing on vertical integration between manufacturers and distributors); *Standard Oil v. Fed. Trade Comm'n*, 340 U.S. at 237-38 (describing vertical integration).

[197] 15 U.S.C. § 13(a).

[198] *Bond v. United States*, 572 U.S. 844, 858 (2014) (cleaned up).

[199] *See* Compl. ¶ 84.

[200] *See id.* ¶ 83.

[201] *See, e.g.*, *Zoslaw*, 693 F.2d at 878-79.

of Southern Glazer's inventory purchases are generally based on its experience and knowledge of the relevant state markets within which it operates, along with a number of related factors driven by commercial and regulatory realities.

Put differently, much of Southern Glazer's demand planning is not a direct function of the orders of particular retailers for products the Commission's Complaint focuses on. Nor is it the case that Southern Glazer's immediately transfers out of state purchases from its in-state warehouses to retailers. Simply because Southern Glazer's engages in general demand planning, along with considering a number of other factors—and outside the context of a vertically-integrated industry—does not place Southern Glazer's purchases "in commerce."[202] Relatedly, Southern Glazer's sells wine and spirits at its own discretion to the retailers it alone chooses to deal with. In other words, suppliers of wine and spirits do not instruct Southern Glazer's to sell its products to specific retailers.[203] If the flow-of-commerce test could be satisfied based on such general planning of anticipated inventory, businesses that exclusively make intrastate sales from inventory purchased from out-of-state manufacturers would face dramatically increased legal exposure under the Act, undermining the text's "in commerce" language.

In short, I do not believe that the "in commerce" jurisdictional requirement is satisfied in this matter. Accordingly, the Complaint fails on that basis.

B. The Complaint Fails to Identify "Paired Retailers" and Fails to Allege that the Favored Retailers Knowingly Received the Alleged Discrimination.

The Complaint fails to allege facts that satisfy Section 2(a)'s requirement that there be harm to competition among paired retailers—*i.e.*, a *favored* retailer and a *disfavored* retailer. Section 2(a) provides: "It shall be unlawful for any *person* . . . to injure, destroy, or prevent competition with any *person* who either grants or knowingly receives the benefit of such discrimination . . . ."[204] The discrimination must harm competition faced by the person *receiving* the favored discount and thus requires identifying both the favored retailer (*i.e.*, the retailer receiving the discount) and that retailer's disfavored competitor (*i.e.*, the retailer harmed by the discriminatory practice). In other words, the "injure, destroy, or prevent" language requires evidence beyond price differences between two random or unconnected retailers.[205]

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[202] Of course, it seems conceivable as a matter of commercial reality that Southern Glazer's, like all businesses, may have relied more or less on the anticipated demand for any given client—especially its largest ones. *See, e.g.*, Compl. ¶ 56. But to the extent the Commission has evidence of Southern Glazer's ordering particular products for a particular customer at a particular time, the Commission should set forth those facts relative to particular transactions and customers. Instead, the Complaint generally makes allegations within just a handful of paragraphs, relating to this theory of satisfying the in-commerce requirement. *See, e.g.*, Compl. ¶¶ 82-83 (setting forth general allegations about Southern Glazer's practices relative to some of its largest chain retail clients). The Complaint should set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). We have failed to do so here.

[203] Again, such integration would violate state law. *See generally* Compl. ¶ 25.

[204] *See* 15 U.S.C. §13(a) (emphases added).

[205] *See also Infra* Section IV.C.

The Supreme Court's *Volvo* decision illustrates this point. In *Volvo*, plaintiff Reeder-Simco was an authorized GMC dealer for heavy duty-trucks manufactured by Volvo.[206] Reeder-Simco brought a Section 2(a) claim against Volvo, claiming that its decline in sales and profits was caused by the discriminatory discounts Volvo granted to its other authorized Volvo dealers (Reeder-Simco's competitors).[207] The Court observed that the "Robinson-Patman [Act] does not 'ban all price differences charged to different purchasers of commodities of like grade and quality,' . . . rather, the Act proscribes 'price discrimination only to the extent that it threatens to injure competition.'"[208]

At trial, Reeder-Simco produced evidence that demonstrated Volvo frequently offered higher prices to Reeder-Simco compared to other regional dealers.[209] Nevertheless, the Court concluded that Reeder's comparisons failed to show injury to competition.[210] The Court explained that none of the price differences occurred when the favored and disfavored Volvo dealers were competing for the sale of trucks to "*the same customer*."[211] Indeed, the plaintiff's case was fatally flawed because the plaintiff failed to demonstrate that the disfavored dealer *actually competed* with the dealers who received favored pricing from Volvo.[212]

Today's Complaint pleads no facts to demonstrate any pairings of retailers. Sure, it alleges that Costco and other large retailers receive favored pricing, and that small or independent retailers do not receive the same favored pricing.[213] But never does it allege that a favored retailer such as Costco competes with a specific disfavored retailer and that competition between those retailers was harmed. Nor am I aware of any such evidence. There is no mention of diversions—as required by *Volvo*—or any other metric to conclude that the Commission has evidence relevant to the "injure, destroy, or prevent" competitive effects language. As the *Volvo* Court explained: "Absent actual competition with a favored [purchaser]," a plaintiff alleging a secondary-line Robinson-Patman injury "cannot establish the competitive injury required under the Act."[214]

To be sure, the Complaint makes several assertions that independent retailers pay more for certain types of products.[215] But because the Complaint fails to tie the price differences to specific

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[206] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169 (2006).

[207] *See id.*

[208] *Id.* at 176 (quoting *Brooke Grp.*, 509 U.S. at 220).

[209] *Id.* at 183 (Stevens J., dissenting).

[210] *Id.* at 178.

[211] *Id.* (emphasis in original); *see also id.* ("Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months."). There were two bids where Reeder competed directly with another Volvo dealer. *Id.* at 179. But these examples did not meet 2(a)'s requirements because in the first instance, the favored discount was given to the non-Reeder dealer only after it had won the bid for the business, and in the second instance, Reeder was ultimately granted the same discount and neither Volvo dealer won the bid. *Id.* at 180.

[212] *See id*. at 177-79.

[213] *See, e.g.*, Compl. ¶ 63.

[214] *See Volvo Trucks North America, Inc.*, 546 U.S. at 177.

[215] *See, e.g.*, Compl. ¶¶ 75-76.

evidence demonstrating that the relevant paired retailers compete, the Complaint effectively relies on price differences across broad geographic regions.[216] However, absent evidence of harm to a disfavored retailer that competes with a favored retailer, the Complaint cannot rely on the phrase "injure, destroy, or prevent" and instead must prove that the price discrimination lessens competition or tends to create a monopoly—which, as discussed below in Section IV, requires a traditional showing of antitrust harm. Even then, the Complaint is still deficient. The Complaint focuses on undefined "geographic areas" and alleged scenarios where Southern is selling products to retailers who sell to the "same pool of end consumers."[217] The Complaint conspicuously avoids using standard antitrust tools to define the relevant antitrust markets.[218] While harm to competition may be established with direct evidence, in modern antitrust cases courts typically expect a formal definition of a product and geographic market to aid in its determination of whether the alleged conduct may substantially lessen competition. When evaluating retail mergers, for example, the Commission routinely defines a product and geographic market and then examines how the proposed transaction would affect competition in that market. Yet today's Complaint provides no formal definition of the relevant product and geographic markets, making it impossible for my colleagues to claim that there is a substantial lessening of competition. Indeed, because the Complaint does not define either a geographic or product market, there is no zone of commerce in which to evaluate the effect of Southern Glazer's conduct on competition.

Further, the Complaint fails to allege that any of the favored retailers *knew* they were receiving a discriminatory price. The word *knowingly* makes two appearances in the Robinson-Patman Act. *First*, it appears in the last clause of the competitive effects language in Section 2(a), which prohibits discriminations that "injure, destroy, or prevent competition with any person who either grants or *knowingly* receives the benefit of such discrimination."[219] "Knowingly" appears again in Section 2(f), which governs buyer liability and makes it unlawful for a buyer "*knowingly* to induce or receive a discrimination in price which is prohibited by this section."[220] The Supreme Court has held that a plaintiff cannot satisfy Section 2(f) without demonstrating that the buyer *knew* it was receiving a discriminatory price.[221] As the plain text of Section 2(a) makes clear, a similar knowledge requirement exists for satisfying Section 2(a)'s competitive effects test.

As Professor Hovenkamp has argued, ignoring the knowledge requirement in Section 2(a) is "patently inconsistent with the statutory language" and "disturbing, because the word 'knowingly' in Section 2(a) is clearly intended to limit that provision's application in secondary-

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[216] *Id.* ¶ 74 (alleging generally that "[i]n each instance of price discrimination alleged herein, the disfavored independent retailer(s) competed with the favored large chain retailer(s) in the same geographic area(s) for sales of identical bottles of wine and spirits to the same pool of end consumers").

[217] *See, e.g.*, *id.* ¶ 77. Again: "Absent actual competition with a favored [purchaser], however, a [disfavored purchaser] cannot establish the competitive injury required under the [Robinson-Patman] Act." *Volvo Trucks North America, Inc.*, 546 US. at 177.

[218] *See generally* U.S. DEPT. OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES at § 4 (Aug. 19, 2010) [hereinafter 2010 HORIZONTAL MERGER GUIDELINES] (identifying tools).

[219] 15 U.S.C. § 13(a) (emphasis added).

[220] *Id.* § 13(f) (emphasis added).

[221] *See Automatic Canteen Co. of Am. v. Fed. Trade Comm'n*, 346 U.S. 61, 79 (1953); *Great Atl. & Pac. Tea Co.*, 440 U.S. at 76-77.

line situations to instances that were at the heart of the 1936 concern—namely, price discriminations induced by powerful buyers."[222] This knowledge element was important, as Professor Hovenkamp explained, because the Robinson-Patman Act was not just concerned "with price discriminations that injure the disfavored purchaser's ability to compete with the favored purchaser, but with the special situation where the favored purchaser knew that this was happening."[223] Yet the Majority's Complaint makes only a passing reference to the favored purchasers' awareness of "pricing schedules" and "special solicitations and negotiations."[224] But such vague references do not amount to a plausible allegation that the favored retailers *knew* they were receiving a discriminatorily low price.[225] Failure to identify the relevant paired retailers and that such retailers had knowledge of the alleged discrimination is fatal to the Majority's Complaint.

C. Southern Glazer's Price Differences Are Driven, In Part, By Supplier Discounts that Are Cognizable under the Robinson-Patman Act's Cost-Justification Proviso.

The Robinson-Patman Act "contain[s] two affirmative defenses that provide protection for two categories of discounts—those that are justified by savings in the seller's cost of manufacture, delivery, or sale, and those that represent a good-faith response to the equally low prices of a competitor."[226] The latter meeting-competition defense is discussed below in Section II.D. As for the cost justification defense, the Majority assert that Southern Glazer's allegedly discriminatory lower prices, which it charges to favored chain retailers, are not cost justified.[227] The Majority's Complaint, however, fails to account for Southern Glazer's acquisition costs, which are legally cognizable under the Robinson-Patman Act. Specifically, the Majority excludes supplier support—discounts Southern receives from its suppliers that decrease Southern Glazer's costs of acquiring its inventory.[228]

Section 2(a) provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."[229] If the defendant can establish that the price differential was cost justified, it is a

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[222] Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L. J. 125, 142 (2000).

[223] *Id*.

[224] Compl. ¶ 32.

[225] Nor would such vague statements satisfy the knowledge requirement under Section 2(f). *See Automatic Canteen Co. of Am.*, 346 U.S. at 73 (knowing about price differences is not enough—"the inquiry must be into the buyer's knowledge of the *illegality*") (emphasis added).

[226] *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 555-56 (1990) (citation omitted).

[227] Compl. ¶ 5; *id.* ¶ 33 ("These disparities in pricing are not justified by differences in Southern Glazer's cost of providing goods to the large chain retailers and the independent retailers—whether in terms of economies of scale or the logistics of delivering the goods to different sized stores."); *id.* ¶ 71 ("The discriminatorily higher prices Southern charged disfavored independent retailers were not justified by cost savings Southern accrued doing business with the favored chain retailers. That is, the pricing differentials between favored and disfavored retailers exceed any cost savings achieved by Southern when selling and delivering wine and spirits to the favored national chains.").

[228] *See, e.g.*, *id.* ¶ 33.

[229] 15 U.S.C. § 13(a).

complete defense to a charge of price discrimination under Section 2(a).[230] As the Commission itself has explained to the public in extant guidance on the Robinson-Patman Act: "Price discriminations are generally lawful, particularly if they reflect the different costs of dealing with different buyers . . . ."[231]

Congress envisioned savings in costs as a "prime defense" for companies charged with price discrimination. Nonetheless, the cost-justification proviso has historically confounded the Commission, due in part to the "dubious causal nexus between costs and prices in competitive markets."[232] Confusion around this defense also stems from the Commission's historically narrow and atextual reading of the defense.[233] Because most firms' pricing practices range across numerous factors and reflect the cost of not only raw material but the entire firm operation, in most instances it can be difficult for firms to determine granular cost differences.[234] Of course, the final price of the relevant product reflects all costs. Still, itemizing each and every element that goes into a final price and reflecting those elements in accounting terms can prove difficult for even the most sophisticated of firms.[235]

But the difficulty associated with tracking costs and providing evidence satisfying the cost-justification is not at issue here as Southern Glazer's clearly tracks supplier discounts received from suppliers. Instead, the question is whether such costs can be considered at all under the Act. Critical to Southern Glazer's cost structure as a distributor is the cost of acquiring the goods or services needed to operate its business, often referred to as the "cost of sales." Accounting guidance suggests that the cost of sales refers to any costs that are "directly related to creating the products that a[n] . . . entity sells, or providing the services that generates service revenue."[236] An obvious cost for a distributor or wholesaler is the cost of acquiring the product from the supplier. In fact, the costs borne by Southern Glazer's—*i.e.*, a middleman—are precisely the type of costs "typical

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[230] *See id.*; *see, e.g.*, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 64 (1959); ROWE, *supra* note 24, at 265-66.

[231] *Price Discrimination: Robinson-Patman Violations*, Fed. Trade Comm'n, *available at* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations (last visited Dec. 9, 2024).

[232] Frederick M. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 COLUM. L. REV. 584, 584 (1959); ROWE, *supra* note 24, at 303; *cf. id.* at 306 n.165 (repeating early concerns that "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") (quoting Corwin D. Edwards, *The Struggle for Control of Distribution*, 1 J. MARKETING 212, 216 (1937)).

[233] *Cf.* 1 CALLMANN ON UNFAIR COMP., TR. & MONO. § 7:34 (4th ed. 2024) ("The Commission's requirements with respect to the proof of cost justification are unusually rigorous; and the guidelines are few, and the hazards are many.") (cleaned up).

[234] *See generally Automatic Canteen Co.*, 346 U.S. at 79.

[235] A Yale Law professor writing in 1937—the year after the Act was enacted—presciently observed that, "[n]o accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork," any "trial is to proceed by the ordeal of cost accountancy," and that administration of the cost-price provisions "seems destined to raise more questions than it settles." Walton Hamilton, *Cost as a Standard for Price*, 4 L. & CONTEMP. PROBLEMS 321, 323, 328, 333 (1937).

[236] *See, e.g.*, *Cost of Sales*, PwC (Aug. 31, 2024), at 3.5,

https://viewpoint.pwc.com/dt/us/en/pwc/accounting_guides/financial_statement_/financial_statement___18_US/chapter_3_income_sta_US/36_cost_of_sales_US.html.

of the wholesale grocers whose counsel drafted the Patman bill in 1935, which was codified in the cost proviso of the Robinson-Patman Act."[237]

> In the case of a reseller of groceries—or for that matter, of any merchandising organization whose fast-moving dollar turnover is high but whose "contribution" to the ultimate value of each product unit is low—the invoiced cost of the finished goods bought from a supplier for resale may be paramount. The cost of plant and general "overhead" per unit of sale for such finished commodity for immediate resale is relatively small in comparison with the costs of acquiring the product. Hence the costs of inventory, if *any* costs, are the key to resale price.[238]

The cost of acquiring inventory is, by any measure, a critical and legitimate cost of doing business. That is true of course for all methods of sale or manufacturing. But it is "paramount" for distributors.[239] Of course, supplier support—discounts that suppliers offer to distributors—reduces the "cost of . . . sale" and is the type of acquisition cost the plain language of the cost-justification proviso covers.[240] Reducing acquisition costs to its distributors is an obvious and rational business strategy for suppliers. Because of the three-tier structure,[241] suppliers cannot directly interact or negotiate with retailers on price or related issues.[242] To properly align incentives between suppliers and distributors like Southern Glazer's, suppliers in the alcohol market provide discounts and related pricing support for certain quantity deals.

Pricing support is offered in a variety of ways, including cumulative quantity discounts.[243] Critically, the discounts are tethered to specific volume goals. A simple example is illustrative. Suppose supplier X agrees to provide a $2,000 discount to Southern Glazer's each time it sells 500 cases or more of Y liquor. Southern Glazer's is only able to procure the payment after it sells 500 cases. Each time Southern Glazer's receives the discount, it reduces Southern Glazer's costs of acquiring the inventory with respect to Y liquor by $2,000.

Simply put, the Complaint's emphasis on "economies of scale" or other related references to the costs of production are a non-sequitur.[244] The text of Section 2(a) is clear: Southern Glazer's may make "due allowance for differences in the cost of . . . sale." Since supplier support reduces Southern Glazer's cost of sale, Southern Glazer's may legally defend allegations of price discrimination by demonstrating that the price differences are driven by supplier discounts.[245]

The other major cost component for Southern Glazer's is its operating expenses, which vary depending in part on the differing methods of sale and delivery to chains and independents.

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[237] ROWE, *supra* note 24, at 304.

[238] *Id*. (cleaned up).

[239] *See* Rowe, *supra* note 232, at 611.

[240] 15 U.S.C. § 13(a).

[241] *See* Compl. ¶¶ 24-25.

[242] *See generally* TREASURY, *supra* note 122.

[243] *See supra* Section II.A; *see also, e.g.*, Compl. ¶ 35.

[244] *See* Compl. ¶¶ 5, 33.

[245] 15 U.S.C. § 13(a).

Southern Glazer's has provided reliable evidence that the costs associated with sale and delivery to chain stores are lower than the relative costs to service independents. The costs associated with servicing a chain store tend to be lower due to the purchasing habits of larger stores. Larger chains tend to buy less frequently, and when they do buy, they make larger purchases. And large chains leverage an infrastructure that is built to effectively streamline the process, further reducing Southern Glazer's costs. Indeed, Southern Glazer's sales are often delivered in bulk to chains' centralized distribution centers, from which the retail chains make their own deliveries to individual locations—as opposed to Southern Glazer's more costly small-volume deliveries to numerous independent stores. Independent retailers simply do not have the infrastructure to match the chains and their buying habits are more varied and frequent. Simply put, more time and more labor—and ultimately, more costs—are required per case to meet demand from independents relative to large chain stores. Indeed, based on my review of the available evidence, the price or margin differences between independents and chains, where they exist, are substantially narrowed once discounts and operating costs are properly accounted for. As a result, this action, from my perspective, is not in the public interest and may harm competition.[246]

The Supreme Court has recognized that costs may differ in dealing with different groups of customers and courts must look to the "true indicia of the cost of dealing with those particular consumers."[247] The Commission too must not ignore market realities.[248] One market reality is that it costs Southern Glazer's less to deal with larger chains when supplier support is provided because Southern' Glazer's cost of acquisition for that inventory is less. Another market reality is that the structure of many of the rebates enables Southern Glazer's to extend discounts to retailers without the risk that it will fail to achieve the sales goals set by suppliers. This is because Southern Glazer's is only liable for paying cumulative quantity discounts to its retail customers if they meet the sales goals that trigger the suppliers to pay the support to Southern Glazer's. Ignoring the costs of acquiring inventory cuts against the Supreme Court's observation that the difficulties of cost justification require courts to employ "fairness and convenience" when evaluating cost justification claims.[249]

It also contradicts elementary accounting principles. If supplier discounts do not reduce the costs of acquiring the relevant inventory, it is difficult to imagine how a distributor or wholesale is to account for such discounts as a matter of law. And, if the Majority is correct and supplier discounts that lower the acquisition costs of distributors cannot justify pricing differences, that finding would risk substantially lessening competition in the distributor market because—even with the benefit of supplier support—distributors would have less incentive to offer lower prices and expand output.[250] Ultimately, without the ability to price differently based on the benefits of supplier support in the sales process, distributors may choose to exclusively deal with chains or

[246] *See* 15 U.S.C. § 53(b); *see also infra* Section III.D (discussing the Majority's failure to demonstrate harm to competition in this case).

[247] *See United States v. Borden Co*., 370 U.S. 460, 470 (1962).

[248] *Cf. Eastman Kodak Co. v. Image Tech. Servs., Inc*., 504 U.S. 451, 466-67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

[249] *Cf. Automatic Canteen Co.*, 346 U.S. at 78.

[250] Supplier discounts incentivize distributors and retailers to promote and sell the suppliers' product.

independents to avoid the reach of the Robinson-Patman Act.[251] That, in turn, would reduce or eliminate price competition. As further described below, this effectively happened in the aftermath of the canonical *Morton Salt* case.[252]

It may be, as the Treasury report on Alcohol Competition recently suggested, that the three-tier system is an ineffective way to regulate alcohol distribution. But that decision is the prerogative of the states, not the Federal Trade Commission.[253] The Majority's proposed approach, which will hold firms liable for cost-justified pricing differences, shears the alcohol suppliers of an important and lawful mechanism by which to ensure that lower prices reach their end consumers. The Majority ignores these commercial realities and, in effect and through enforcement, attempts to regulate away the ability of firms to make commercial decisions based on their own cost of resources, an approach that is inconsistent with the Robinson-Patman Act's plain text.

D. Southern Glazer's Pricing Practices Were Undertaken in Good Faith to Meet Competition.

Section 2(b) of the Robinson-Patman Act provides a second affirmative defense for Southern Glazer's: "a seller rebutting the prima-facie case" may "show[] that his lower price . . . was made in good faith to meet an equally low price of a competitor."[254] To satisfy the meeting-competition defense's requirements, a seller must "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[255] As with the cost-justification proviso, a seller that can establish that the relevant price differential was offered to meet competition has a complete defense to an allegation of price discrimination.[256]

The Supreme Court's decision in *Great Atlantic & Pacific Tea* (*A&P)* is instructive here. In *A&P*, the FTC alleged that A&P violated Section 2(f) of the Robinson-Patman Act "by knowingly inducing or receiving illegal price discriminations from" the Borden Company.[257] A&P and Borden had a long-standing arrangement where Borden would supply "brand label" milk, *i.e.*, milk sold under the brand name of Borden at A&P stores.[258] To reduce its costs, A&P wanted to

[251] 15 U.S.C. § 13(a) (establishing liability for discrimination in price "between *different* purchasers of commodities of like grade and quality") (emphasis added); *infra* Section III.A.2 (explaining that after the Supreme Court's *Morton Salt* decision, Morton Salt stopped supplying smaller quantity sales of salt).

[252] *Infra* Section III.A.2; JOHN L. PETERMAN, FED. TRADE COMM'N, BUREAU OF ECONOMICS, THE SALT PRODUCERS' DISCOUNT PRACTICES BEFORE AND AFTER THE ROBINSON-PATMAN ACT AND THE FTC'S CHALLENGE TO THEM: THE MORTON AND INTERNATIONAL SALT CASES 441 (1995), https://www.ftc.gov/sites/default/files/documents/reports/salt-producers-discount-practices-and-after-robinson-patman-act-and-ftcs-challenge-them-morton-and/199510saltproducers.pdf [hereinafter FTC BE REPORT].

[253] *See* U.S. Const. amend. XXI.

[254] 15 U.S.C. § 13(b).

[255] *Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. at 246 (quoting *Fed. Trade Comm'n v. A.E. Staley Mfg. Co*., 324 U.S. 746, 759-60 (1945)); *see also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 438 (1983).

[256] *See Standard Oil Co. v. Fed. Trade Comm'n*, 340 U.S. at 246-47.

[257] *Great Atlantic & Pacific Tea Co*., 440 U.S. at 71, 73-74.

[258] *Id.* at 72.

switch to selling "private label" milk—milk sold under the A&P label.[259] A&P asked Borden to submit an offer to support A&P's private-label offering of milk.[260] Borden's initial offer would have reduced A&P's yearly costs by $410,000.[261] Nonetheless, A&P rejected Borden's offer and solicited others.[262] In response to A&P's inquiry, a competitor of Borden, Bowman Dairy, submitted an offer that would have saved A&P $737,000 a year.[263] A&P went back to Borden, informing their chain store sales manager that Borden was "so far out of line it is not even funny…[y]ou are not even in the ball park," and that a $50,000 improvement in what Borden bid "would not be a drop in the bucket."[264] A&P gave Borden no further details.[265] Importantly, because Borden had just invested more than $5 million in a new dairy facility, and A&P was one of Borden's largest customers, Borden risked underutilizing the new facility if it lost A&P as a customer.[266] Borden therefore doubled the proposed annual savings, from $410,000 to $820,000, securing the contract with A&P.[267] Based on these facts, the Commission sued A&P, alleging that A&P knowingly induced or received an illegal price discrimination in violation of Section 2(f).

The case ultimately reached the Supreme Court. Though the question presented was whether A&P—the Goliath chain store that Representative Patman intended to slay—violated Section 2(f) by knowingly inducing or receiving an illegal discrimination from its milk supplier Borden,[268] the Court observed that "[u]nder the plain meaning of § 2(f), . . . a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense."[269] In other words, "buyer liability under § 2(f) is dependent on seller liability under § 2(a)."[270] Turning to whether Borden had a valid meeting-competition defense, the Court concluded that it did, shielding A&P from liability:

> A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the §2(b) defense. Since good faith, rather than absolute certainty, is the touchstone

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[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.* at 72-73.

[263] *Id*. at 73 n.2.

[264] *Id.* at 73.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.* at 71, 73-75; *see also* Remarks of Representative Wright Patman introducing H.R. No. 8442, 79 Cong. Rec. 9077 (1935) ("In the field of merchandise distribution a Goliath stands against divided forces, plying a powerful weapon with a skillful hand against the vulnerable weaknesses of his opponents. The Goliath is the huge chain stores sapping the civic life of local communities with an absentee overlordship, draining off their earnings to his coffers, and reducing their independent businessmen to employees or to idleness.").

[269] *Id.* at 76.

[270] *Id.* at 77.

> of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.[271]

The Court concluded that Borden acted reasonably and in good faith in making its second bid.[272] It reached this conclusion despite Borden's lack of knowledge regarding the precise price its competitor offered.[273]

The *A&P* Court refused to interpret the Robinson-Patman Act in a manner that would "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[274] Observing that in a competitive market sellers compete by offering lower prices to buyers, the court emphasized that the antitrust laws seek to facilitate this process by, among other things, preventing competitors from exchanging price information.[275] Rejecting the idea that to avoid Robinson-Patman liability Borden had a duty to find out the exact price A&P received from another milk supplier, the Court reasoned: "Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers."[276]

Rejecting the Commission's arguments, the Court concluded that "we decline to adopt a construction of § 2(f) that is contrary to its plain meaning and would lead to anticompetitive results."[277] Indeed, "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price paid by a competitor."[278] Accordingly, to reconcile the tension between the Robinson-Patman Act and the Sherman Act, and to avoid enforcement that would harm the

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[271] *Id.* at 82-83 (cleaned up); *see Falls City Indus., Inc.*, 460 U.S. at 441 ("At the heart of Section 2(b) is the concept of 'good faith.' This is a flexible and pragmatic, not a technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.") (internal quotation marks omitted); *cf. Fed. Trade Comm'n v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945) ("Section 2(b) does not require the seller to justify price discriminations by showing that *in fact* they met a competitive price.") (emphasis added).

[272] *Great Atlantic & Pacific Tea Co*., 440 U.S. at 83.

[273] *Id.* at 73, 83-84; *cf. Fed. Trade Comm'n v. Standard Oil Co.*, 355 U.S. 396, 402-404 (1958) (holding that Standard's lower prices were not given merely because the customer preconceived qualifications but rather because competitive pressures necessitated the lower prices to particular customers).

[274] *Great Atlantic & Pacific Tea Co*., 440 U.S. at 80 (quoting *Automatic Canteen*, 346 U.S. at 63).

[275] *Id.*

[276] *Id.*; *see also*, *e.g.*, *In re Beatrice Foods Co. & the Kroger Co.*, 76 F.T.C. 719, 1969 WL 101224, at *76 (Dec. 1, 1969) (Elman, dissenting) ("It puts too heavy a burden on the Robinson-Patman Act to convert it into a 'truth-in-bargaining' statute. That Act is aimed at illegal and anticompetitive price discriminations, and nothing else. No one has heretofore conceived of the Robinson-Patman Act as imposing a duty of affirmative disclosure on buyers engaged in price negotiations with sellers . . . . Even when Congress passed the Truth-in-Negotiations Act dealing with defense contracts, . . . it did not go so far."); *cf. Fed. Trade Comm'n v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

[277] *Great Atlantic & Pacific Tea Co*., 440 U.S. at 81.

[278] *Id*. at 83 n.16 (quoting *Standard Oil*, 340 U.S. at 249).

competitive process, the Court applies a "liberal interpretation of the 'meeting competition' defense under § 2(b)."[279]

In this case, Southern Glazer's must meet competition in both its upstream market when securing supplier contracts—as well as in the downstream market when selling to retailers. Southern Glazer's has presented substantial evidence that both suppliers and retailers routinely threaten to switch—and do actually switch—to rival distributors.[280] Efforts to defend against pricing challenges from Southern Glazer's competitor distributors appears to have animated Southern Glazer's pricing strategy. The evidence I have reviewed in this case makes *A&P* apt. The Complaint alleges that "the discriminatory pricing and benefits Southern provided to favored chain retailers [were not] a good faith attempt to meet, but not exceed, the equally low price of a competing distributor of wine and spirits."[281] However, the evidence the Commission has received suggests the "existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[282] It is clear that Southern Glazer's competes against other distributors for the business of both suppliers and retailers—and that competition affects its pricing strategy.

The evidence presented to the Commission convinces me that our approach in this case inadequately accounts for the evidence Southern Glazer's has presented and may present with respect to the meeting-competition defense.

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[279] *Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Lab'ys*, 460 U.S. 150, 178 n.7 (1983) (O'Connor, J., dissenting) (citing *Standard Oil*, 340 U.S. at 251).

[280] The Supreme Court has relied on the existence of competitive threats to conclude that the meeting competition defense is satisfied. *See, e.g.*, *Fed. Trade Comm'n v. Standard Oil Co.*, 355 U.S. at 402-404; *cf. William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1046 (9th Cir. 1981) ("Under the circumstances of this case, we cannot say that the defense is unavailable. The defendant knew of competitive prices actually available throughout the market, even though it did not document, with the rigor for which [plaintiff] argues, that each buyer received specific offers from competitors.").

[281] *See* Compl. ¶ 72; *see also id.* ¶ 5 (alleging Southern Glazer's pricing does not "reflect bona fide attempts to meet prices offered to chain retailers by competing distributors").

[282] *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 82 (cleaned up).

III. THE ROBINSON-PATMAN ACT PROSCRIBES CONDUCT THAT HARMS COMPETITION, NOT COMPETITORS; THE MAJORITY'S COMPLAINT FAILS TO ALLEGE COMPETITIVE INJURY.

The previous discussion reveals significant shortcomings in the Majority's Complaint and case. Setting those issues aside, the Complaint's approach to injury to competition is incompatible with the plain text of Section 2(a). As a result, I do not have reason to believe the law has been violated and do not believe that this enforcement action serves the public interest.[283] Unlike Sections 2(c)-(e), Section 2(a) of the Robinson-Patman Act is not a *per se* prohibition—that is, to prove a 2(a) violation, the government must demonstrate that the discriminatory practice may cause a substantial lessening of competition or injure, destroy, or prevent competition.[284] But the Complaint effectively ignores these words, citing speculative harm to competitors as evidence of harm to competition.[285] Critically, the Complaint's approach to antitrust harm—elevating the interests of competitors over competition—is at odds with the plain text of the Act. And it flies in the face of efforts by courts, scholars, and practitioners to reconcile the Robinson-Patman Act with broader antitrust law. Legal precedent, scholarship, and relevant evidence illustrate the Complaint's anachronistic and atextual approach.

A. *Morton Salt*'s Focus on Harm to Competitors was Legally, Factually, and Economically Unsound.

To argue that harm to competitors—rather than harm to competition—satisfies the competitive effects proviso of the Robinson-Patman Act, the Complaint cites the familiar *FTC v. Morton Salt Co.* case.[286] The *Morton Salt* "inference" of competitive harm comes from the 1948 Supreme Court opinion. There, the FTC challenged Morton Salt's method of quantity discounts under the Robinson-Patman Act where the per-case price of salt varied from $1.35 to $1.60, depending upon the volume purchased.[287] Only five of Morton Salt's customers purchased enough salt to qualify for the largest quantity discount.[288] The Court opined that the effect of a discount "may be substantially to lessen competition,"[289] when "price differentials between competing purchasers [was] sufficient in amount to influence their resale price of salt."[290]

As described above, to establish a secondary-line claim under Section 2(a), the plaintiff must show (1) that the alleged sales were made "in commerce"; (2) the products were of "like grade and quality"; (3) the defendant "discriminate[d] in price between" two of its retailers; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition with

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283 15 U.S.C. § 53(b).

284 15 U.S.C. § 13(a).

285 Compl. ¶ 78 ("As a result of Southern's unlawful practices, independent retailers have lost sales and customers to favored large chain retailers, have been unable to be price-competitive with favored large chain retailers so as to attract customers, have sold lower volumes of wine and spirits than they would have sold in the absence of price discrimination, and have made lower profits on the products they did sell.").

286 Compl. ¶ 7 (quoting *Fed. Trade Comm'n v. Morton Salt Co*., 334 U.S. 37, 43 (1948)).

287 *Morton Salt Co.*, 334 U.S. at 41.

288 *Id.*

289 *Id.* at 46.

290 *Id.* at 47.

any person who . . . knowingly receive[d] the benefit of such discrimination."[291] *Morton Salt* creates a permissible inference to satisfy the fourth element—*i.e.*, competitive injury may be inferred from significant price differentials over a substantial period of time.[292]

Decided nearly eight decades ago, *Morton Salt* has been the subject of extensive debate. Its oversimplification of price differentials as competitive injury led the Commission and courts in the 1960s to focus on protecting *competitors* rather than competition. Beginning in the 1970s, the courts and the Commission corrected course. Yet my colleagues seek to repeat past mistakes, relying on the misguided theory that price differentials are enough to satisfy Section 2(a)'s competitive injury requirement. Importantly, because of the dearth of FTC Robinson-Patman activity in the last forty years, the Majority appears unaware that during the nadir of Robinson-Patman activity the Commission conducted a robust empirical study of *Morton Salt*—and the findings of that study undermine continued reliance on the idea that competitive injury can be inferred from price differentials.[293] This Section will first trace the history of the Commission's and the courts' treatment of *Morton Salt*, followed by a discussion of the Commission's empirical study of *Morton Salt*.

1. Post-*Morton Salt*, the Commission and courts charted a course away from anti-consumer and atextual interpretations of the Robinson-Patman Act.

Since *Morton Salt*, prominent Supreme Court opinions—as well as Commission commentary and actions—have charted a course away from protecting competitors, and towards protecting competition. The leading treatise on the Robinson-Patman Act describes the *Morton Salt* inference as mere dicta that created a paradox: "The doctrinal antinomy between injury to competition and injury to competitors derives from freewheeling dicta in the Supreme Court's *Morton Salt* decision in 1948."[294] That antinomy was apparent even to the Commission shortly after the Court decided *Morton Salt*. In fact, in the ensuing years after the decision, the Commission declined to adopt *Morton Salt's* competitor-focused approach.[295]

In its 1948 Policy Statement on Geographic Pricing Practices, for example, the Commission observed that "[e]xcept where such a tendency toward monopoly appears, the Commission does not regard an effort to get business from a competitor by sporadic price reductions as illegally injurious to that competitor."[296] Injury to competitors, the Commission observed, does not lead to injury to competition without evidence of a "tendency toward monopoly."[297] Then, in response to a query from Congress in 1950 asking whether the FTC regarded "the purpose and the function of the Clayton Act to be protection of 'competition' against

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[291] *Id.* at 176-77 (quoting 15 U.S.C. § 13(a)).

[292] 546 U.S. 164, 177 (2006).

[293] *Infra* Section III.A.2.

[294] ROWE, *supra* note 24, at 127. Professor Rowe, nearly two decades before Judge Bork, described the effect of Robinson-Patman enforcement as a "paradox of antitrust at war with itself." *Id.* at xi.

[295] *Id.* at 127.

[296] FTC Policy Toward Geographic Pricing Practices, 1 CCH Trade Reg. Rep. 5341, 5348 (10th ed., Oct. 12, 1948).

[297] *Id.*

injury by discriminations, or does it regard the purpose and function of that act to be protection of individual competitors against such injury," the FTC again declined to adopt the broad *Morton Salt* language.[298] Instead, the Commission specifically rejected the idea "that injury to a competitor in all cases constitutes injury to competition. The loss of a single sale as a result of price discrimination obviously constitutes an injury to the competitor who lost the sale, but it does not automatically follow that competition is injured thereby."[299]

The courts followed suit. In 1951, for example, the Supreme Court observed in *Standard Oil* that:

> The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent. . . . We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it . . . .[300]

And then in *Automatic Canteen*, the Supreme Court took another significant step forward toward reconciling the broader antitrust laws when it clarified that a buyer's liability under Section 2(f) of the Robinson-Patman Act was contingent on first establishing seller liability. Rejecting the Commission's approach to the Robinson-Patman Act, the Court cautioned against interpretations of the Act that could "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[301] Observing that "[e]ven if the Commission has, by virtue of the Robinson-Patman Act, been given some authority to develop policies in conflict with those of the Sherman Act in order to meet the special problems created by price discrimination," the Court maintains its "duty to reconcile [interpretations of the Robinson-Patman Act] with the broader antitrust policies that have been laid down by Congress."[302]

In 1954, the Commission again emphasized that injury to competition was the focus of the Robinson-Patman Act, noting that "it was not [Congress's] intention . . . to liberalize the test of injury to the extent of making it one of injury to an individual competitor. The language used in the amendment, it may be noted, refers to injury to 'competition' . . . [and] it does not follow in every case that because a competitor has been injured, competition has been affected."[303]

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[298] Letter of Aug. 14, 1950, to Chairman, Senate Committee on Interstate and Foreign Commerce, By Fed. Trade Comm'n., *quoted in Purex Corp.*, Ltd, 51 F.T.C. 100, 113-114 (1954).

[299] *Id*.

[300] 340 U.S. at 248-49 (citations omitted), *quoted in Anheuser-Busch, Inc. v. Fed. Trade Comm'n*, 289 F.2d 835, 840 (7th Cir. 1961); *Sun Oil Co. v. Fed. Trade Comm'n*, 24 F.2d 465, 474 (5th Cir. 1961).

[301] *Automatic Canteen Co. of Am.*, 346 U.S. at 63.

[302] *Id.* at 74.

[303] *Purex Corp.*, 51 F.T.C. 100, 112 (1954).

Soon thereafter, several circuit courts of appeals rhetorically emphasized the Act's focus on competition rather than competitors. For example, in 1955, the Seventh Circuit emphasized that the issue was whether discrimination "adversely affects the health of competition."[304] The Second Circuit in 1959 similarly acknowledged that the Robinson-Patman Act "speaks of effects on competition—not on competitors."[305] And in 1961, the Seventh Circuit revisited the meaning of Section 2(a) of the Robinson-Patman Act:

> The Act is really referring to the effect upon competition and not merely upon competitors. . . . In this respect §2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. The competition which is sought to be protected by this section is a contest between sellers for the buyer's business, because, competition is, in its very essence, a contest for trade.[306]

Despite this trend toward reconciliation in the courts, the Commission began aggressively enforcing Section 2(a) in the 1960s—ignoring the plain text of the Act and relying heavily on the inference found in *Morton Salt*—which caused significant harm to consumers and competition.[307] But by the late 1970s, the Commission tacked away from asserting harm based on mere price differences and toward a "more nuanced interpretation of the statute,"[308] which increased the evidentiary burden required to sustain a Robinson-Patman complaint and led to a "marked drop-off" in complaint filings.[309]

The Commission's trend toward reconciliation was facilitated in part by the persistence of then-Commissioner Philip Elman, who on several occasions argued that the Commission's enforcement of the Act was misguided.[310] His views of the Act—which were often presented in dissents that led to reversals by courts of appeal—pared back the Commission's frequent misuse of presumptions of harm in court.[311] The momentum toward reconciliation was "reinforced by an

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[304] *National Lead Co. v Fed. Trade Comm'n*, 227 F.2d 152, 155 (7th Cir. 1955), *rev'd on other grounds*, 361 U.S. 419 (1967).

[305] *Standard Motor Products, Inc. v Fed. Trade Comm'n*, 265 F.2d 674, 676 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959).

[306] *Anheuser-Busch, Inc.*, 289 F.2d at 840.

[307] *See*, *e.g.*, DOJ REPORT, *supra* note 30; Muris, *supra* note 27, at 23-27.

[308] Muris, *supra* note 27, at 36.

[309] POSNER, *supra* note 13, at 31.

[310] RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 988-989 (2d ed. 1981); *see also* Phillip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal* 42 WASH. L. REV. 1, 3 (1966) ("If a Businessman is advised that he can protect himself against a charge of violating the Robinson-Patman Act only by engaging in conduct which may subject him to prosecution under the Sherman Act, he is not the only one that suffers. The public is also the loser.").

[311] *See, e.g.*, *Sunshine Biscuits, Inc.*, 59 F.T.C. 674 (1961) (Elman, Comm'r, dissenting from a finding of Robinson-Patman violation), *rev'd*, 306 F.2d 48 (7th Cir. 1962) (adopting Elman's position).

increasing judicial hostility to Commission enforcement," which routinely employed a "mechanical simplification and extension" of the Robinson-Patman Act.[312]

Meanwhile, scholars and practitioners did not pull their punches when evaluating the Commission's doctrinaire interpretation of the Robinson-Patman Act. In addition to the myriad government reports that were issued in the 1950s and 1960s,[313] in 1977, the U.S. Department of Justice, as discussed above in Section I.E, issued a paradigm-shifting report that condemned the Commission's anti-consumer interpretation of the Robinson-Patman Act. As one former senior official of both the FTC and DOJ explained:

> The tension between Robinson-Patman and the remainder of the antitrust laws led to three developments in FTC policy and enforcement. First was a trend of increasingly narrow construction of the Act. Second, partly a result of the first, was a decline in cases. Finally, and most importantly, the Commission followed the lead of the courts in seeking to harmonize the statute with the other antitrust laws.[314]

Shortly after the Department of Justice's report, the Commission lost a landmark Robinson-Patman case at the Supreme Court. And this time it was against Representative Patman's "Goliath," Great Atlantic & Pacific. Refusing to interpret the Robinson-Patman Act in a manner that would impose price uniformity, the Court rebuffed the Commission's rigid interpretation of the Act and declined to "adopt a construction of [the Robinson-Patman Act] that is contrary to its plain meaning and would lead to anticompetitive results."[315] This loss marked the beginning of the end of the Commission's Robinson-Patman Act enforcement.

Having just lost *Great Atlantic & Pacific Tea Co.*, the Commission entered the early 1980s with just three Robinson-Patman cases on its docket. In *General Foods Corp.*, the complaint alleged that General Foods had illegally discounted its Maxwell House Coffee in certain markets

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[312] POSNER, *supra* note 13, at 31.

[313] Report of the Attorney General's National Committee to Study the Antitrust Laws at 164-165 (1955) [hereinafter 1955 Attorney General] ("[T]his Committee recommends that analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to individual businessmen. For the essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consumer public. . . . Nor should a competitive price reduction be singled out as responsible for 'injury' if alternative means of access to goods at the lower price are in any event available to the buyer. Such a view comports with the text of Section 2(a). We emphasize that is not 'injury' to competitors but adverse effects on 'competition with' parties privy to discriminations that the statute expressly forbids. Hence, we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law."); Phil C. Neal et al., *Report of the White House Task Force on Antitrust* Policy, 2 ANTITRUST L. & ECON. REV. 11, 41 (1968). As one scholar noted, "[w]ithin a period of seven months [during the late 1970s] the President, the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Antitrust Division and two of his assistants all made statements attacking the Act." Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1115 n.8 (1983).

[314] William C. Macleod, *Regulating Beyond the Rule of Reason*, 30 GEO. MASON L. REV. 1056-1057 (2023). In addition, "[w]arfare between the FTC Bureau of Competition and Bureau of Economics staff erupted" during the 1970s "because the Bureau of Economics opposed nearly all Robinson-Patman cases due to the negative economic effects of enforcement of the Act." D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 G. WASHINGTON L. REV. 2064, 2074 (2015).

[315] *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 81.

to impede the growth of Procter & Gamble's Folgers brand.[316] Since it was unlikely that General Foods could monopolize the coffee market by discounting Maxwell House Coffee, the Commission declined to use Section 5 of the FTC Act to expand the reach of the Robinson-Patman Act: "While Section 5 may empower the Commission to pursue those activities which offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed . . . ."[317]

The Commission later emphasized the same point in *General Motors*, where the Commission alleged that General Motors gave promotional allowances to some rental companies but not others.[318] But because the promotional allowances applied to rentals, rather than sales, the Commission determined that the practice was not covered by the Robinson-Patman Act. Section 5 was still a potential avenue for prosecution but the Commission declined to proceed, acknowledging that "[w]hile the 'spirit' theory, as embraced by the courts, may provide a useful technique in some cases, we decline to apply it in cases such as this where there has been no demonstration of an anticompetitive impact."[319]

In the one remaining Robinson-Patman case, the D.C. Circuit reversed the Commission's opinion. The matter stemmed from a Commission complaint issued in 1980—over a vigorous dissent by a future Democratic Chair of the FTC[320]—alleging that Boise Cascade, acting as a "dual distributor" of office products (*i.e.*, wholesaler plus retailer), had violated Section 2(f) of the Robinson-Patman Act.[321] The "complaint alleged that Boise's receipt of wholesale discounts from manufacturers on products that it then resold in a retail capacity to consumers constituted price discrimination for purposes of Section 2(a) [and] that Boise received these discounts knowingly."[322]

The Commission found that the sale of office products occurred at three separate levels: manufacturer, wholesaler, and retailer. While firms could specialize at one level of the vertical chain, there were also "dual-distributors" who purchased office products from manufacturers and sold to both retailers and ordinary consumers.[323] Boise Cascade was one such dual-distributor.[324] At issue in *Boise Cascade* were the trade and functional discounts offered by manufacturers. Manufacturers offered trade discounts based on both the level of trade the purchaser operated at

[316] *In re Gen. Foods Corp.*, 103 F.T.C. 204, 206 (1984).

[317] *Id.* at 365.

[318] *In re General Motors Corp.*, 103 F.T.C. 641, 683-84 (1984).

[319] *Id.* at 701.

[320] *Boise Cascade Corp.*, 107 F.T.C. 76, 79 (Pitofsky, Comm'r, dissenting) ("The Commission today has issued an extremely unwise Robinson-Patman complaint. I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment.").

[321] *Boise Cascade Corp v. Fed. Trade Comm'n*, 837 F.2d 1127, 1130 (D.C. Cir. 1988).

[322] *Id.* (emphasis removed).

[323] *Id.* at 1131.

[324] *Id.*

(*i.e.*, wholesaler or retailer) as well as who the purchaser resold to (*i.e.*, retailers or consumers).[325] By contrast, functional discounts were awarded to purchasers who assumed and performed tasks for the manufacturer, such as marketing or storing goods.[326] Because of its status as a dual-distributor, Boise Cascade received a hybrid of both discounts. Colloquially, such hybrid discounts were referred to as a "wholesale discount."[327] Consequently, Boise Cascade was able to procure wholesale discounts that were unavailable to 23 other retailers selected by the Commission for comparison, causing those retailers to pay between 5% and 33% more than Boise Cascade paid for the same purchases from manufacturers.[328]

Turning to the competitiveness of the office product market generally, the D.C. Circuit made several observations. *First*, the industry was "characterized by intense competition."[329] *Second*, there was a steady rise in the number of retailers competing both nationwide and in the states where the FTC's selected retailers were located.[330] *Third*, "[m]ore relevantly for Robinson-Patman purposes, an analysis of the financial condition of 18 of the selected dealers revealed that all 18 had enjoyed an increase in sales during the period in question" and noted that net profit for retailers remained consistent during the period in question.[331] Finally, the court found that there were minimal accounts lost to Boise Cascade from the retailers who faced higher prices.[332]

Confronting the Commission's decision, which relied heavily on the *Morton Salt* inference and ignored the competitive effects outlined above, the D.C. Circuit emphasized that the

> Robinson-Patman [Act] is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws. The Supreme Court warned early on of the dangers of doctrinaire interpretations of Robinson-Patman that could lead to "conflict with the purposes of other antitrust laws."[333]

For the D.C. Circuit, the threshold question was whether the discounts Boise Cascade received caused competitive injury.[334] And a Commission order armed with the *Morton Salt* inference did not remove the need to answer the competitive injury question. In fact, the Court held that since competitive injury could be "overcome by evidence breaking the causal connection

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[325] *Id.* at 1132.

[326] *Id.*

[327] 837 F.2d at 1132.

[328] *Id.* at 1134.

[329] *Id.* at 1135.

[330] *Id.*

[331] *Id.*

[332] *Id.* ("[T]here is another aspect of this case that is relevant to resolution of this controversy and unusual in the context of a Robinson-Patman proceeding—a virtually complete absence of sales lost to Boise by the selected dealers traceable to the price differential caused by wholesale discounts to Boise.").

[333] 837 F.2d at 1138 (quoting *Automatic Canteen Co.*, 346 U.S. at 63, 73).

[334] *Id.* at 1143.

between a price differential and lost sales or profits,"[335] the *Morton Salt* inference could "also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman Act. That is to say, a sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury."[336] Recapitulating the relevant data points Boise Cascade presented, including the absence of lost sales and the competitive health of the office product industry, the D.C. Circuit concluded that the Commission did not give proper weight to the evidence indicating a lack of competitive injury and remanded for further proceedings.[337]

Finally, though it has been more than three decades since the Commission has litigated a Robinson-Patman claim, its most recent legal filing in a Robinson-Patman case was in the 2016 case *Woodman's Food Market, Inc. v. Clorox Co.*[338] There, the Commission took a position directly at odds with today's Complaint. In *Woodman's*, Clorox sold a range of consumer goods, many of which Woodman's purchased for resale to its customers.[339] Clorox sold some of its products in large packs, such as 460-count plastic food-storage bags.[340] Woodman's had historically purchased large packs but in 2014 Clorox announced that moving forward it would only sell large packs to wholesale discount clubs (*e.g.*, Costco).[341] Woodman's responded to Clorox's decision by bringing a Section 2(e) claim under the Robinson-Patman Act, which prohibits indirect price discrimination disguised as promotional services or facilities.[342] Specifically, the suit alleged that Clorox's large packs were a "promotional service" and that the Robinson-Patman Act therefore requires Clorox to make the services available on proportionally equal terms, *i.e.*, Clorox must offer the large packs to Woodman's.[343]

The district court declined to grant Clorox's motion to dismiss, relying in large part on two FTC administrative decisions: *Luxor, Ltd.*,[344] and *General Foods Corp.*[345] The 75-year old *Luxor* decision concluded that "junior" sized packages were a "service or facility" protected under Section 2(e) because the junior sized packages increased retail demand.[346] Fifteen years later, the

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[335] *Id.* at 1144 (quoting *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983)).

[336] *Id.*

[337] *Id.* at 1148.

[338] 833 F.3d 743 (7th Cir. 2016).

[339] *Id.* at 745.

[340] *Id.*

[341] *Id.*

[342] *Id.* (citing 15 U.S.C. § 13(e)). In contrast with 2(a), discriminatory promotional payments, services and facilities are unlawful under Sections 2(d) and (e) of the Act whether or not they injure competition or are cost-justified. Beginning in 1960, the FTC issued and routinely revised interpretive guides (Fred Meyer Guides) to assist compliance with Sections 2(d) and (e) of the Robinson-Patman Act. Though "the text of the two sections contains a spate of semantic variation, § 2(e) has long been viewed as coterminous with § 2(d), and courts have consistently resolved the two sections into an harmonious whole." *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973).

[343] *Woodman's Food Market, Inc.*, 833 F.3d at 745.

[344] 31 F.T.C. 658, 664 (1940).

[345] 52 F.T.C. 798, 826 (1956).

[346] 31 F.T.C. at 663.

Commission reaffirmed *Luxor* in *General Foods*, concluding that a manufacturer violated Section 2(e) by failing to offer coffee in package sizes commensurate with the purchasing capacity of smaller retailers.[347] Taking both cases as good law, the district court followed relevant FTC precedent and determined that differential package sizes were cognizable under Section 2(e).

The Commission took significant issue with the district court's holding. Disputing the prudential value of the two precedents the district court relied on, the Commission's amicus argued:

> [*Luxor*] ignores antitrust's modern focus on sound economic policy. *Luxor* predated (and *General Foods* ignored) the Supreme Court's 1953 admonition that an overbroad reading of the Robinson-Patman Act could "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Courts now interpret the Act in a manner consistent with "the broader antitrust policies that have been laid down by Congress."*[348]

The Commission concluded that because the two Robinson-Patman precedents elevated "competitors above the competitive process [the cases do not] reflect an antitrust-grounded interpretation of the Robinson-Patman-Act" and the "FTC does not consider [the precedents] good law."[349]

Predictably, on appeal, Woodman's relied on both *Luxor* and *General Foods* to argue that a manufacturer violates Section 2(e) when it sells products at different sizes to favored and disfavored retailers.[350] The Seventh Circuit agreed that Woodman's position would have legs if the FTC precedents it relied on were still good law.[351] But because the Commission expressly repudiated both cases in its amicus, the Court declined to adopt Woodman's argument and concluded that the Robinson-Patman Act "must be narrowly construed so as to be consistent with the purposes of the Act and antitrust law as a whole."[352]

2. The Commission's own expert research undermines the *Morton Salt* inference.

If the Supreme Court's charted course away from *Morton Salt* did not alone prompt cautionary application of the *Morton Salt* inference, a report by the Commission's Bureau of Economics ("FTC BE Report") should have militated against the Commission's reliance on it today. Congress created the Commission to be an expert body that investigates national competition and consumer protection issues. Based on its expertise, Congress expected the

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[347] 52 F.T.C. at 826.

[348] Brief of Amicus Curiae The Fed. Trade Comm'n In Support of Defendants-Appellants and Reversal at 18, *Woodman's Food Market, Inc.*, 833 F.3d 745 (2016) (emphasis added) (quoting *Automatic Canteen*, 346 U.S. at 63 and *Volvo*, 564 U.S. at 181), *available at* https://www.ftc.gov/system/files/documents/amicus_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf.

[349] *Id*. at 16, 20.

[350] *Woodman's Food Market, Inc.*, 833 F.3d at 750.

[351] *Id.*

[352] *Id.*

Commission to generate significant research and to move the competition ball down the field as needed to keep pace with changing business practices.

Answering that call, in 1995, the FTC Bureau of Economics published a report—authored by a former Bureau Director who served across Republican and Democratic administrations—which analyzed the evidence relied upon in the *Morton Salt* litigation in addition to *ex post* evidence gathered by the Bureau of Economics.[353] The FTC BE Report found that the principal factual predicate for the case was nonexistent because Morton Salt's pricing practices almost certainly did not harm competition.[354] Nor did the pricing practices discriminate unlawfully. Yet the Majority ignores this report entirely, anachronistically citing *Morton Salt*[355] as if the Commission's expertise had never revealed its significant defects. The Majority also ignores that the Supreme Court deemed the Commission's factual findings regarding competitive harm as "adequate" and largely deferred to the Commission on that issue.[356] Similar to the Seventh Circuit's reliance upon the Commission's updated views on *Luxor* and *General Foods* in *Woodman's* to reach its decision—any reviewing court should incorporate the findings of the FTC BE Report when evaluating the precedential value of *Morton Salt*.[357]

In its wide ranging and scholarly treatment of the case, the FTC BE Report concludes that the apparent price discrimination in the *Morton Salt* case was illusory.[358] In fact, the largest volume discounts that Morton Salt granted to large customers were likely justified by cost differences, and the only harm to competition occurred *after* the FTC enjoined Morton Salt's pricing practices.[359] Indeed, in response to the Commission's order, Morton Salt eliminated all small quantity sales of salt, harming the small purchasers who relied on these smaller quantity purchases, along with the consumers who ultimately purchased from the small purchasers.[360]

A principal focus of the *Morton Salt* decision was the difference in price that Morton Salt charged for "full-carload" orders of its Blue Label salt shipped by rail, which was $1.50 per case, compared to the price for "less-than-carload" shipments shipped by rail, which was $1.60 per

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[353] FTC BE REPORT, note 252, at 441; *see also* John L. Peterman, *The Morton and International Salt Cases: Discounts on Sales of Table Salt*, 21 RSCH. L. & ECON. 127 (2004).

[354] *See* FTC BE REPORT, *supra* note 252, at 433-53.

[355] Compl. ¶ 7.

[356] 334 U.S. at 46-47.

[357] The Majority have on occasion placed "Warning Labels" on past Commission Reports that are inconsistent with their political ideology. As of December of 2024, the FTC BE Report does not have any warning label on it. *See* FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005) at Cover Page, *available at* https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managersownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf (reflecting the current Commission's efforts to disavow prior reports).

[358] "In discussing the annual discounts in the various Chapters below, my aim is to discover whether price discrimination or cost differences seem the more likely explanation of them. My answer is cost differences." FTC BE REPORT, *supra* note 252, at 13.

[359] *Id.*

[360] "The order thus seems to have eliminated an option to purchase in very small lots, and no doubt this made those buyers who on occasion chose it worse-off." *Id.* at 149.

case.[361] Based on the findings of the FTC BE Report, almost no customers purchased salt at the higher price because less-than-carload shipments were typically consolidated into a "pool car," which resulted in those customers also receiving the full-carload price.[362] The only apparent exception to this pricing involved occasional small retail shipments that were sent by local freight, which, according to Morton Salt, "were so infrequent [. . .] that the surcharge could not 'injure competition'" among resellers.[363] Put simply, it is unclear how a trivial incidence of price differences among customers could "injure, destroy, or prevent competition," much less "substantially lessen competition or tend to create a monopoly."[364]

Regarding the annual discounts that Morton Salt offered to large purchasers of its products,[365] the principal defense addressed in the case was whether the differences in the costs of selling to different buyers justified the discounts the buyers received.[366] Neither the Commission nor the Supreme Court were persuaded by this argument, despite the detailed cost study that Morton Salt undertook.[367] The FTC BE Report reaches a different conclusion in its analysis of the evidence, at least with respect to the largest discount of fifteen cents off the price of a case of Blue Label salt for purchasers of at least 50,000 cases in a year.[368] The FTC BE Report found that "[w]hat these figures suggest, at least for the very large chains, is that the avoidance of merchandising expense alone justified the discount to them."[369] The FTC BE Report's conclusion is consistent with testimony in the case that "the large chains were Morton's most profitable customers," despite receiving the lowest prices.[370]

Finally, after the Commission ordered Morton Salt to discontinue its discounts, Morton Salt predictably eliminated the purchasing options that benefited small customers.[371] Prior to the Supreme Court's ruling, Morton Salt offered customers in New York, Michigan, and Ohio the

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[361] *Morton Salt*, 334 U.S. at 41.

[362] FTC BE REPORT, *supra* note 252; *id.* at 146; *id.* at 95 (discussing the evidence on the infrequency of sales at $1.60 per case); *id.* at 106 (FTC found that "the only example of a sale at $1.60 that counsel presented in its statement of the facts was the 30 cases shipped to Interstate Wholesale").

[363] *Id.* at 94.

[364] 15 U.S.C. § 13(a).

[365] Morton offered a discount of 15 cents per case to customers who purchased 50,000 cases of Blue Label salt in a year, a lower discount of ten cents per case to customers who purchased 5,000 cases of Blue Label salt in a year, and a separate discount on non-Blue Label salt to customers who purchased $50,000 worth of salt in a year. *See* FTC BE REPORT, *supra* note 252, at 8-9 (describing the discount tiers).

[366] Morton Salt also asserted a meeting competition defense, but it was rejected by the Commission. *Id.* at 379 ("[T]he Commission had little difficulty in rejecting the meeting competition defense.").

[367] *See id.* at 399-423 (discussing Morton's study of order-related expense). Based on the record before it, the Supreme Court was unpersuaded by Morton's cost defense. *Morton Salt*, 334 U.S. at 48 ("Such discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost. The trouble with this phase of respondent's case is that it has thus far failed to make such proof.").

[368] Peterman, *supra* note 353, at 168; FTC BE REPORT, *supra* note 252, at 420-21.

[369] FTC BE REPORT, *supra* note 252, at 420.

[370] *Id.* at 322, 420. Not surprisingly, Southern Glazer's also argues its margin on sales to large chains are greater than the margin it makes on sales to independent retailers.

[371] Peterman, *supra* note 353, at 168; *id.* at 156 ("Buyers who occasionally purchased LCL from Morton were not made better-off by this.").

option to purchase non-Blue Label salt in two-to-five ton volumes as part of a pool car, so long as they paid a surcharge.[372] After the Commission determined that this surcharge violated the Act, Morton Salt eliminated this option by imposing a five-ton minimum purchase requirement.[373] Similarly, when "less-than-carload" surcharges on Blue Label salt were disallowed by the Commission, Morton responded by refusing to accept less-than-carload orders.[374] This response is consistent with the conclusion that the observed price differences were, in fact, due to cost differences of selling these relatively small quantities. It is also consistent with the proposition that the Commission's atextual interpretation of the Robinson-Patman Act harmed competition and consumers.

Moreover, the FTC BE Report's findings that Morton Salt's discounts were cost-justified and otherwise did not harm competition illustrate the dubious nature of relying on mere price differences—without evidence of harm to competition—to satisfy Section 2(a). As the FTC BE Report concludes: "Morton's discounts to the large chains did not discriminate in their favor. In fact there are suggestions in the evidence that Morton's prices to the large chains discriminated against them when compared with its prices to wholesalers who secured no discounts."[375] In a stunning rebuke of the Commission's case against Morton Salt, the FTC BE Report concludes that "the FTC seems to have so simplified its task [*i.e.*, by relying on mere price differences] that pricing that is not discriminatory can be challenged and found illegal as easily as that which is."[376]

Alleging antitrust law violations using price differences alone conflicts with the Commission's mission to protect consumers and the competitive process. Indeed, the BE Report's findings suggest that continued reliance on the *Morton Salt* inference will likely lead to false positives. Given *Morton Salt's* prominence in Robinson-Patman Act jurisprudence—and its central role in today's Complaint—the Commission should have updated its approach to 2(a) cases to reflect the Commission's understanding of how it had previously erred in *Morton Salt*. That the Supreme Court deferred to the Commission's dubious findings of fact in *Morton Salt* is not a mandate to recycle the same dubious findings in today's Complaint.

3. Modern economic understanding demonstrates that price discrimination can have negative or positive effects on competition and consumers.

As explained below, judicial application of the antitrust laws depends heavily upon economic learning.[377] The Supreme Court's charge that the Robinson-Patman Act be interpreted consistent with the other antitrust laws therefore makes the economics of price discrimination

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[372] FTC BE REPORT, *supra* note 252, at 149.

[373] *Id.* at 149.

[374] As the FTC BE Report dryly notes: "Buyers who previously purchase LCL from Morton were undoubtedly made worse off by this, although one cannot believe by a very great deal. Nevertheless, those who the FTC might have wished to help by its actions were actually injured." *Id.* at 116.

[375] *Id.* at 431.

[376] FTC BE REPORT, *supra* note 252, at 433.

[377] *See infra* Section IV.A.2.

critical to any Robinson-Patman Act case or investigation.[378] Particularly when, as is the case here, the Commission takes the view that price differences alone can adversely affect competition. A review of the economics of price discrimination reveals that price differences alone—or even the presence of price discrimination—does not automatically harm competition and consumers. In fact, price discrimination can have both positive and negative effects on competition and consumers.

For example, there is a substantial theoretical economics literature which analyzes the effects of price discrimination by sellers in intermediate goods markets (*e.g.*, sales by a distributor—like Southern Glazer's—rather than a retailer). The findings suggest that the welfare effects of price discrimination are mixed. Some literature identifies circumstances where price discrimination benefits final consumers, compared to the alternative of requiring uniform prices across all sales. Other papers, however, identify circumstances in which price discrimination harms final consumers. The mixed nature of the literature suggests that the effect of price discrimination on competition and consumers depends on the characteristics of the market in question. Accordingly, the applicable theory and the anticipated effects depend upon a fact-intensive exercise, requiring an economic analysis of market realities. Identifying mere price differences, as the Complaint dubiously relies on, fails to reveal the actual effects.

It should not be surprising that the effects of price discrimination on competition and consumers are variable. If in an unfettered market some retailers face higher wholesale prices than other retailers, then a required uniform price—*i.e.*, a uniform price that would apply to all retailers absent price discrimination—would be somewhere in between the highest and lowest wholesale prices. The overall effect of switching to uniform prices would depend upon whether more consumers were impacted by the higher prices or lower prices, and by how much. If the price charged to the higher-priced retailer became the uniform price, for example, then the consumers at the lower-priced retailer would be harmed. But if the price charged to the lower-priced retailer became the uniform price, then the consumers at the higher-priced retailer would benefit. If the new uniform price were somewhere in between the higher and lower prices, then the effect of uniform pricing on consumers would depend upon the magnitude of overall costs to consumers who would face higher prices compared to any benefits to consumers who would face lower prices. Unfortunately, the Complaint ignores the relevant economic evidence and condemns price differences as per se unlawful.[379]

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[378] *See Brooke Grp.*, 509 U.S. at 220.

[379] For a discussion of the conditions under which price discrimination enhances welfare, *see* Youping Li & Jianhu Zhang, *The Welfare Effects of Input Price Discrimination Revisited*, 95 INT'L J. INDUS. ORG 1 (2024). In Li and Zhang's model, retailers have different marginal costs. The price-discriminating supplier charges a retailer with a lower marginal cost a higher wholesale price than the retailer with a high marginal cost. This pattern of prices arises in other models of sales of intermediate goods where pricing is linear. *See, e.g.*, Patrick Degraba, *Input Market Price Discrimination and the Choice of Technology*, 47 AMER. ECON. REV. 326 (1990). If larger sellers have lower costs than smaller sellers, a switch from differential to uniform pricing would then result in higher wholesale prices to small sellers. These models do not address the possibility that the supplier will have lower costs to supply large sellers, which would tend to cause the supplier to charge them lower prices.

Setting aside the uncertainty about effects, possible procompetitive effects of price discrimination in intermediate product markets can arise from several mechanisms that undermine the likelihood of price discrimination causing harm to consumers. By tailoring nonlinear pricing schedules to retailers' specific characteristics, a supplier can potentially offer its retailers prices that create the incentive for them to sell more products—*i.e.*, increase output—and lower prices. In this scenario, all sellers may face higher costs if suppliers are required to set uniform wholesale prices. Sellers would pass these cost increases on to customers, which would result in decreased output and increased retail prices.[380]

Price discrimination can also facilitate competition by creating additional incentives for firms along the supply chain to make cost-reducing investments (*e.g.*, investments that make the supply chain more efficient for the retailer or supplier). Suppliers can create this effect by offering better terms to lower-cost retailers. Furthermore, retailers that demonstrate a capacity to increase the sales and output of a supplier's product create incentives for suppliers to lower their margin in exchange for the increased output. A retailer, when deciding whether to make investments to lower its costs, recognizes that suppliers, in exchange for the retailer's investment in expanding the supplier's output, will give the retailer better prices and lower its costs of acquisition to allow it to sell more product. Price discrimination, therefore, can further provide a powerful incentive for a retailer to make cost-reducing investments. If, however, price discrimination is prohibited and a supplier must grant the decreased input price to all retailers—even if they did not implement the cost-reducing or output-inducing investment—then the retailer will have less incentive to make the cost-saving investments. Retailers could simply free ride on the investments made by their competitors—or more realistically, because of the free-rider problem, none of the retailers would make the cost-saving investments.[381]

While price discrimination can increase downstream competition, it may have the opposite effect in some circumstances. Some proponents of imposing uniform prices contend that if a uniform price is imposed, disfavored purchasers will receive the same terms as their favored competitors thereby promoting competition between them. One example in the literature where a uniform price may not cause harm involves the scenario where certain favored retailers may be able to extract lower input prices because they can credibly threaten to vertically integrate and self-supply the input. Other retailers, for a variety of reasons (*e.g.*, lack of scale), could not credibly threaten to self-supply. When price discrimination is allowed, the supplier would grant a discount to the favored retailers that can credibly threaten to self-supply but would not extend the discount to the other retailers. Without price discrimination, however, if the favored retailers credibly threaten to self-supply, the supplier would be forced to provide the same lower price to all retailers.

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[380] *See* Daniel O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J. L. ECON & ORG. 296 (1994) (showing through a model that imposing uniform pricing results in prices increasing for all retailers in a model of a monopolist upstream supplier and competing downstream retailers).

[381] *See* Roman Inderst & Tommaso Valleti, *Price Discrimination in Input Markets*, 40 RAND J. ECON. 1, 14 (2009) ("In the long run, however, our model predicts that the imposition of uniform pricing may reduce both consumer surplus and welfare, as it stifles downstream firms' incentives to improve efficiency.").

The favored retailer's threat to self-supply would protect the disfavored retailers.[382] This line of argument does not apply, of course, to the retailers in this matter because regulatory restrictions prevent retailers from self-supplying wine and spirits.

Another criticism of price discrimination involves the scenario where it may cause a "waterbed effect." The waterbed effect refers to a situation where the "more-advantageous terms of trade for larger or otherwise more powerful buyers could lead to worse terms for their less powerful rivals."[383] For example, if a favored retailer's lower prices or discounts cause sales to shift from disfavored retailers to the favored retailer, it may further weaken the disfavored retailers' bargaining positions. Importantly, the Complaint in this matter does not plead this effect, nor have I seen evidence suggesting the waterbed effect has occurred here.

While much of the literature on price discrimination in the intermediate goods market addresses situations where a monopolist supplier sells a product to sellers who compete with each other downstream, price discrimination nonetheless can be an important element of competition among competing suppliers more broadly.[384] Because the Robinson-Patman Act includes a defense for meeting competition, using price discrimination as a method of competition between suppliers could even be permissible under the Act. Of course, the Majority's atextual interpretation of the defense likely precludes otherwise valid meeting competition defenses.[385]

Because economic theory has identified circumstances where price discrimination has both pro and anticompetitive effects, the effect of a particular price discrimination will depend upon a fact-specific inquiry. And despite assertions that no one has identified empirical evidence of harm caused by misguided Robinson-Patman Act enforcement,[386] empirical evidence demonstrating that

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[382] *See*, *e.g.*, Michael Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 AMER. ECON. REV. 154 (1987); Inderst & Valleti, *supra* note 381.

[383] Roman Inderst & Tommaso M. Valletti, *Buyer Power and the "Waterbed Effect"*, 59 J. INDUS. ECON. 1 (2011). The UK Competition Commission examined whether there was a discernible waterbed effect in the supply of groceries to supermarkets and concluded that there was not. *See* COMPETITION COMMISSION, THE SUPPLY OF GROCERIES IN THE UK MARKET INVESTIGATION, at 8 (2008), https://webarchive.nationalarchives.gov.uk/ukgwa/20140402194746/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry.

[384] This idea has been developed in the literature on price discrimination in final goods markets, which finds that firms may earn lower profits when price discrimination is possible because of the intensification of competition. *See*, *e.g.*, Ken Corts, *Third-degree Price Discrimination in Oligopoly: All-out Competition and Strategic Commitment*, 29 RAND J. ECON. 306 (1998); James Cooper, Luke Froeb, Daniel O'Brien, & Steve Tschantz, *Does Price Discrimination Intensify Competition—Implications for Antitrust*, 72 ANTITRUST L. J. 327 (2005).

[385] "Following *Morton* [*Salt*], meeting competition would provide little or no defense for systematic price differences adopted as an industry practice, or by an individual seller, so cost justification seems the main defense." *See* Peterman, *supra* note 353, at 267; *see also* Section III.A.2 (discussing the FTC BE Report and the work of Peterman).

[386] "Returning to Fairness," Prepared Remarks of Commissioner Alvaro M. Bedoya, Fed. Trade Comm'n, Midwest Forum on Fair Markets, https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf (Sep. 22, 2022) ("To my knowledge, some 86 years after its passage, there is not one empirical analysis showing that Robinson-Patman actually raised consumer prices.").

price discrimination can promote competition does exist.[387] When price uniformity is mandated (*e.g.*, by erroneous Robinson-Patman enforcement like today's Complaint), empirical evidence suggests that the supplier may simply stop selling its products to the disfavored buyers. Indeed, the FTC BE Report described above concluded that this was exactly the effect of the Commission's prohibition on surcharges for orders of salt that ranged between two and five tons (the smaller orders purchased by the allegedly disfavored retailers). In fact, the Commission's prohibition resulted in Morton Salt simply imposing a five-ton minimum on orders, effectively cutting off sales to customers who did not require such a large order.[388] Unfortunately, I fear that Southern Glazer's may curtail or limit sales to independent retailers post enforcement if it is forced to comply with the Complaint's arbitrary remedy.

B. Recent Supreme Court Precedent Confirms that Price Differences Alone Are Insufficient to Bring a Section 2(a) Robinson-Patman Case.

While the Commission has not litigated a Robinson-Patman case in three decades, the Supreme Court had occasion to address the Act in two recent cases, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp* (1993) and *Volvo* (2006), which each stand for the same proposition: the Robinson-Patman Act protects competition, not competitors.[389]

In *Brooke Group*, cigarette manufacturer Brooke Group sued a competitor, Brown & Williamson, for allegedly violating Section 2(a) of the Robinson-Patman Act.[390] Following Brown & Williamson's entry into the generic cigarette market, a price war ensued.[391] Among other claims, Brooke Group alleged that Brown & Williamson's volume rebates to wholesalers "amounted to price discrimination that had a reasonable possibility of injuring competition in violation of § 2(a)."[392] Because Brown & Williamson provided discounts to wholesalers that had the effect of allegedly harming its rival Brooke Group, the theory of harm was primary-line discrimination.[393]

Turning to the issue of whether Brown & Williamson's conduct violated the Robinson-Patman Act, the Court quoted the text of Section 2(a) and explained that the statute has "important

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[387] *See, e.g.*, Matthew Grennan, *Price Discrimination and Bargaining: Empirical Evidence from Medical Devices*, 103 AMER. ECON. REV. 145, 146 (2013) (finding that in a medical device market "more uniform pricing actually works against hospitals through a competition softening effect").

[388] *See* Peterman *supra* note 353, at 168 ("The Commission's order thus appears to have eliminated an option to buy in very small lots (under 5 tons/100 cases down to the 2-ton minimum order). No doubt this made those wholesalers who occasionally purchased under 5-tons/100 cases worse-off. The 5 tons/100 case minimum order requirement was soon adopted by the producers in the other territories, except Kansas, where a smaller minimum was retained.").

[389] *Volvo*, 546 U.S. at 181 ("[W]e would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." (emphasis in original)); *Brooke Grp.*, 509 U.S. at 223-24 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986)) ("'To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.'"); *id.* at 224 (*quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'") (emphasis in original)).

[390] 509 U.S. at 213, 216.

[391] *Id*. at 216.

[392] *Id.* at 216-17.

[393] *Id.* at 220.

limitations," including that the Section "condemns price discrimination only to the extent that it threatens to injure competition."[394] Emphasizing Section 2(a)'s instruction to only condemn price discrimination when it adversely affects competition, the Court observed that "Congress did not intend to outlaw price differences that result from or further the forces of competition."[395] Indeed, "cutting prices in order to increase business often is the very essence of competition."[396] "Thus, 'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'"[397]

The Court analyzed the primary-line claim coterminously with predatory pricing claims under Section 2 of the Sherman Act, *i.e.*, whether the competitor's sales were below costs and the competitor had the prospect of recouping those below-cost prices.[398] The Court concluded that Brown & Williamson's below-cost sales were not enough to demonstrate competitive injury as a matter of law because it failed to show that Brown & Williamson had the prospect of recouping its costs.[399]

The Majority today appears to ignore *Brooke Group* and instead proceeds with a secondary-line price discrimination claim based solely on whether Southern sold products at different prices to different customers, *regardless* of whether such price differences may substantially lessen or injure competition. This argument appears to be based, at least in part, on the view that *Brooke Group* only applies to primary-line discrimination. This argument is wrong and has no support in either the text or legislative history of the Robinson-Patman Act.

To begin with, the plain text of the Act does not ascribe a more rigorous antitrust harm requirement to primary-line relative to secondary-line injury. In fact, the Act makes no distinction between the two theories of harm at all. Secondary-line injury refers to the alleged harm that is suffered by a firm that competes with the person who "receives the benefit" of the alleged discriminatory price (*i.e.*, one buyer is disadvantaged because a competitor rival buyer gets a better deal from a supplier). Primary-line injury, by contrast, refers to the alleged harm that is suffered by a firm that competes with the person who "grants . . . the benefit"[400] of the alleged discriminatory price (*i.e.*, one supplier prices below cost and disadvantages a rival supplier). Rather than treat the two theories of harm differently, Congress wrote that both types of conduct only violate the Robinson-Patman Act 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

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[394] *Id.*

[395] *Id.*

[396] *Id.* at 226 (quoting *Cargill*, 479 U.S. at 122, n.17).

[397] *Id.* at 220 (quoting *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 69, 80, n.13); *see also Automatic Canteen Co. of America*, 346 U.S. at 63.

[398] 509 U.S. at 209.

[399] *Id.* at 231.

[400] 15 U.S.C. § 13(a).

> competition with any person who either *grants* or *knowingly receives the benefit of such discrimination*, or with customers of either of them . . . .[401]

Separating the second clause (injure, destroy, or prevent) into primary-line and secondary-line theories of harm makes the analysis more tractable:

- "injure, destroy, or prevent competition with any person who . . . ***grants*** . . . **such discrimination**" **[Primary-line]**
- "injure, destroy, or prevent competition with any person who . . . ***knowingly receives the benefit of such discrimination***" **[Secondary-line]**

The same competitive effects language applies to both types of discrimination. And because each theory of harm is qualified by the injury to competition requirement, it is textually impossible that *Brooke Group*'s competitive effects requirement can be limited to only primary-line theories of harm.[402]

The legislative history of the Act provides no refuge for the Majority against *Brooke Group*'s requirement that primary- and secondary-line injury be evaluated using the same standard for competitive harm. The initial Patman bill in the House and the companion Robinson bill in the Senate proposed an unqualified prohibition on price discrimination.[403] The competitive effects requirement found in the original Section 2 of the Act, along with the meeting competition provision, were absent from both proposals. But many in Congress thought the Patman bill's wholesale ban on price discrimination would fail to reach predatory price discrimination that harmed competition among sellers because "a bill banning discrimination, without more, might not reach predatory pricing tactics by sellers who, in order to destroy their competitors, slashed prices across the board in one area without differentiating among competing buyers."[404]

The importance of including language that could deal with primary-line harm (*e.g.*, predatory pricing) was emphasized by Representative Utterback, Chairman of the House conferees, who took issue with the "nonresident competitor, armed with the privilege of price discriminations and allowances [who is] able to come into that local community [and] cut prices below cost, and crush [the local merchant or manufacturer] with no other weapons than those of greater size and the power of outside resources."[405] As Professor Rowe observed, "the broadening of the competitive effects provision as explained in the legislative debates focused entirely on price discrimination injurious to competition with the seller quoting the price [*i.e.*, primary-line], and did not analyze the problems of competition on the level of customers paying different prices [*i.e.*,

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[401] *Id.* (emphasis added).

[402] *See, e.g.*, *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 213 (2d Cir. 2015) (rejecting secondary-line Robinson-Patman case for failure to show harm to competition generally); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 227-28 (3d Cir. 2008) (similar).

[403] ROWE, *supra* note 24, at 121.

[404] ROWE, *supra* note 24, at 121; *see Hearings Before the Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong. 212-13 (1935) (statement of H.B. Teegarden describing why it was necessary to include the Clayton Act competitive effects language).

[405] 80 Cong. Rec. 9417 (1936); *cf.* John S. McGee, *Some Economic Issues in Robinson-Patman Issues in Robinson-Patman Land*, 30 LAND AND CONTEMPORARY PROBLEMS 530, 550 (1965).

secondary-line].”[406] Accordingly, Congress jettisoned the original Patman bill and ensured that the final amendments to Section 2 would reach both primary-line and secondary-line theories of harm.[407]

Over a decade after *Brooke Group*, the Supreme Court again read the Robinson-Patman Act consistently with the broader antitrust laws. In *Volvo*, as explained above, the Court held that because there was no evidence that the favored and disfavored Volvo dealers were actually competing, the comparisons and alleged price differences could not support an inference of competitive injury.[408] The *Volvo* Court resolved the secondary-line issue in favor of protecting competition, rather than competitors.

C. The Plain Text of the Robinson-Patman Act Undermines the *Morton Salt* Inference.

Taken together, *Brooke Group* and *Volvo* demonstrate that the Supreme Court demands more than just price differentials to satisfy competitive injury. And while *Volvo* recognized the existence of the *Morton Salt* inference—that competitive injury may be inferred from price differentials—it did not address the soundness of the inference. I am doubtful that the Court would or should uphold such an inference today. *First*, the judicially created *Morton Salt* inference contradicts the plain text of the Robinson-Patman Act. Section 2(a) requires *both* price discrimination and competitive injury:

> It shall be unlawful for any person . . . [1] to ***discriminate in price*** between different purchasers of [2] commodities of like grade and quality, [3] where either or any of the purchases involved in such discrimination are in commerce, . . . and [4] 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 . . . .[409]

Indeed, the *Volvo* Court recognized that discrimination and competitive injury are separate elements.[410] But the *Morton Salt* inference—as relied on by the Majority in today’s Complaint—

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[406] ROWE, *supra* note 24, at 123; 80 Cong. Rec. 9417 (1936).

[407] The general misunderstanding of the history, text, and structure of the Robinson-Patman Act has led to erroneous results. For example, in *Chroma Lighting v. GTE Products Corp.*, the court “decline[d] to extend the reasoning of *Brooke Group* to secondary line cases because of the significant differences between primary-and secondary-line cases.” 111 F. 3d 653, 658. As an example of the differences, the court argued that the original Clayton Act addressed only primary-line injury. *Id*. But that is not true. Then, the court asserts that the legislative history of the Robinson-Patman Act focused on secondary-line harm rather than primary-line. *Id*. Again, and as described in Section I.A and I.B above, the Patman bill was only concerned with secondary-line harm, but that bill was not adopted. Rather, because of Congress’s continued concern for primary-line harm, the original Section 2 competitive effects language was reinserted and the final Robinson-Patman Act language reflects an equal concern for primary and secondary-line theories of harm.

[408] ROWE, *supra* note 24, at 179; 80 Cong. Rec. 9417 (1936); *supra* Section II.B.

[409] 15 U.S.C. § 13(a) (emphasis added).

[410] Again, *Volvo* requires four elements for a Section 2(a) claim: (1) that the alleged sales were made “in commerce”; (2) the products were of “like grade and quality”; (3) the defendant “discriminate[d] in price between” two of its

illogically collapses the first and fourth requirements of the statute, allowing a plaintiff to satisfy requirement four (competitive injury) by only providing evidence satisfying requirement one (discrimination in price). Such a reading violates the plain text of the statute by eliminating the Act's requirement that there must be competitive injury for a violation of Section 2(a). Statutory interpretation disfavors readings (or the creation of inferences) that write out portions of the statute. As the Supreme Court explained, "The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . ."[411]

Thus, despite the fact that there is no economic evidence to suggest that the mere presence of price discrimination injures competition, the *Morton Salt* inference erroneously treats them as one and the same, reading the competitive injury requirement out of the statute.[412]

Second, while the Supreme Court has sought to reconcile Section 2(a) of the Robinson-Patman Act with other antitrust laws, the *Morton Salt* inference instead creates a chasm between the Robinson-Patman Act and the Sherman Act and the remainder of the Clayton Act, both of which require plaintiffs to prove competitive injury. No canon of statutory interpretation justifies an abandonment or lessening of a plaintiff's burden in antitrust matters, especially when the courts have repeatedly placed the burden upon plaintiffs, except in narrow circumstances where *per se* illegality has been adopted.[413]

Third, the Majority cannot argue that the inference is permissible because there is an opportunity for rebuttal. Had the Robinson-Patman Act envisioned an inference-rebuttable framework, it would have included the rebuttal in 2(b). For example, the Act deliberately and expressly provides an opportunity for "rebutting the prima facie" case in Section 2(b), where a defendant can show that price differences were "made in good faith to meet an equally low price of a competitor."[414] Notably, neither Section 2(b) nor the rest of the statute specifies any other method of rebuttal. If Congress had intended to create an inference and rebuttal framework, it could have done so.

And *finally*, the basis on which the *Morton Salt* inference was founded is a house of cards. As the Commission's subsequent expert analysis revealed, the price differentials in *Morton Salt*

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retailers; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who . . . knowingly receive[d] the benefit of such discrimination." 546 U.S. at 176-77 (quoting 15 U.S.C. § 13(a)).

[411] *See United States v. Menasche*, 348 U.S. 528, 538 (1955) (citations and internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 364 (2000) (similar); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (applying same principle when interpreting Section 4 of the Clayton Act).

[412] The fact that price differences alone equate to price discrimination under the Act exacerbates the problem with the *Morton Salt* framework.

[413] *See, e.g.*, *United States v. Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir. 1990) (burden shifting framework for mergers, where plaintiff bears the initial burden and ultimate burden of persuasion); *Ohio v. Am. Express*, 585 U.S. 529, 541-42 (2018) (burden shifting framework for Section 1 restraints, where plaintiff bears the initial burden and to demonstrate that the efficiencies could have been achieved by "less anticompetitive means").

[414] 15 U.S.C. § 13(b).

did not cause competitive injury.[415] In antitrust law, the courts have applied presumptions and burden-shifting frameworks based upon economic learning and the courts' experience analyzing similar conduct or restraints.[416] In this context, neither economic learning nor judicial experience has revealed that price discrimination causes consistent anticompetitive effects that justify any such inference or presumption.

D. Because the Commission Relies on Price Differences Alone, It Is Not in the Interest of the Public to Proceed with the Complaint.

The Majority's Complaint is not in the interest of the public and does not provide reason to believe that the law has been violated.[417] To state a Section 2(a) Robinson-Patman Act claim, the Commission must show: (1) sales made in commerce; (2) products of "like grade and quality"; (3) price discrimination between two competing retailers; and (4) competitive injury.[418] The Majority's Complaint seeks to satisfy its competitive injury burden by relying on the *Morton Salt* inference, *i.e.*, inferring competitive injury from mere price differences.[419] Indeed, the primary focus of the Complaint is the identification of nothing more than price differences and does not seriously grapple with why those price differences arise or what their impact is on consumers or the competitive process. By condemning Southern Glazer's pricing practices based on price differences alone, the Complaint discards the text of the statute, which condemns price discrimination only when it adversely affects competition.

As described above, the *Morton* Salt inference contradicts the plain text of the Robinson-Patman Act. And though that case has not been directly overruled, the Commission's own FTC BE Report demonstrates that the case relied on a dubious factual basis. Consequently, even if the Commission *can* rely on the *Morton Salt* inference, that does not mean the Commission *should*.

For starters, even if the *Morton Salt* inference is enough to justify a complaint, the Commission still must demonstrate that the price differentials harm competition. And this would include addressing rebuttal evidence from Southern Glazer's that would undermine the Commission's required showing of competitive harm. The *Morton Salt* inference may "be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman. That is to say, a sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury."[420] In fact, *Boise Cascade* demands proper weight be given to proffered rebuttal evidence of competitive injury.[421] And when deciding whether to expend significant resources with an enforcement action, the Commission should take into account its ability to successfully litigate the matter including, in this instance, any response to Southern Glazer's rebuttal. Since I have not seen evidence of harm to

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[415] *See* FTC BE REPORT, *supra* note 252.

[416] *See infra* Section IV.A.

[417] 15 U.S.C. § 53(b).

[418] *See Volvo*, 546 U.S. at 176-77.

[419] Compl. ¶ 75.

[420] *See Boise Cascade Corp*, 837 F.2d at 1144.

[421] *Id.*

competition or consumers, I do not have reason to believe that the law has been violated. Nor is the public interest served by the Commission's decision to devote significant resources to an enforcement action where the Commission lacks evidence of competitive injury.

Both *Boise Cascade* and *Brooke Group* instruct the Commission to consider the competitive health of the relevant industry it is evaluating. In *Brooke Group*, the Court relied upon the performance of the cigarette industry when determining whether it was likely that the defendant would be able to recoup losses and harm competition.[422] And in *Boise Cascade*, the court looked to the competitive health of Boise Cascade's competitors, along with their profitability and ability to compete generally. Here, the competitive nature of the alcohol market should be considered when determining whether the price differentials identified in the Complaint adversely affect competition. One such relevant factor, which the Complaint effectively ignores, is the complicated regulatory structure for the sale of alcohol, and how the structure impacts the price differences we see across the states where Southern Glazer's operates. The regulatory framework for alcohol, as explained above, varies dramatically depending upon the method of regulation adopted by each state. The sustained differences in price may be the result of the regulatory overlay that impacts the structure and function of the market, but the Majority has not analyzed—or even considered—how such price differences may be the result of state-law differences. And besides a few conclusory statements in the Complaint, the Majority ignores *Boise Cascade* and does not attempt to investigate the competitive health of independent retailers, or whether independent retailers have seen revenue growth or decline during the relevant period.[423]

Indeed, the Commission adopts what amounts to a *per se* condemnation of mere price differences. But Congress knew how to create a *per se* standard and did not authorize one for Section 2(a) claims. Indeed, when passing the Robinson-Patman Act, Congress recognized that one method manufacturers may use to circumvent Section 2(a)'s prohibition was by concealing price discriminations as promotional services.[424] To close that perceived loophole, the Robinson-Patman Act categorically forbids any manufacturer from "'discriminat[ing] in favor of one purchaser against another purchaser. . . by . . . furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale' of the product, without making the same terms available to all purchasers. Subsection [2](d) goes hand-in-hand with subsection [2](e) by forbidding reimbursement for the same."[425]

Indeed, under Sections 2(c), 2(d), and 2(e)—unlike 2(a)—a plaintiff does not need to show that paying a "brokerage" or providing "services or facilities" substantially lessens competition or injures, destroys, or prevents competition.[426] Thus, the Majority proceeds with the same *per se* approach found in Sections 2(c), 2(d), and 2(e), thereby undermining the careful balance Congress

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[422] *Brooke Grp.*, 509 U.S. at 238.

[423] Compl. ¶ 78.

[424] *See e.g.*, *Simplicity Pattern Co.*, 360 U.S. at 69; *Fed. Trade Comm'n v. Fred Meyer, Inc.*, 390 U.S. 341, 351 (1968) (noting that purchasers were able to "shift to [the manufacturer] substantial portions of [their] own advertising cost[s]").

[425] *Woodman's Food Market, Inc.*, 833 F.3d at 747.

[426] 15 U.S.C. § 13(a), (c)-(e).

struck, which imposes a *per se* ban on, *e.g.*, discriminatory promotional services or advertisements, but still requires proof of harm to competition for Section 2(a) price discrimination claims.[427] By relying on mere price differences to satisfy Section 2(a), the Majority's Complaint backdoors a *per se* test that avoids the need to do the textually required competitive effects analysis under Section 2(a).

Finally, the Commission's reliance on mere price differences is wrong because the Commission's own expert analysis demonstrates the fallacy of equating price differentials with competitive injury. As explained above, the Commission's subsequent analysis of the factual predicate for *Morton Salt* revealed that Morton Salt's pricing practices did not harm competition.[428] To make matters worse, after the Commission ordered Morton Salt to discontinue its discounts, Morton Salt ceased offering the purchasing options that benefited small customers.[429] Accordingly, even if the law allowed the Commission to simply rely on the *Morton Salt* inference for filing its complaint, proceeding without evidence of competitive injury is not in the public interest. As the FTC BE Report showed, the Commission may end up on the same wrong path it took us down in *Morton Salt* and consequently condemn conduct that neither harms competition nor consumers. Or even worse, if the Commission is ultimately successful it may end up forcing Southern Glazer's to change its business practices to the detriment of consumers, the same way the Commission's action did in *Morton Salt*.[430]

In short, the case law and the text of the Robinson-Patman Act require a showing of harm to competition and consumers. I have seen no evidence demonstrating that Southern Glazer's pricing practices reduce output, raise prices, or otherwise harm consumers or competition generally, much less in any relevant market, consistent with what is required to demonstrate competitive injury. That there is no evidence of competitive injury is not surprising. Half of Southern Glazer's business is made up of independent retailers. The Complaint makes no effort to explain why Southern Glazer's is motivated to either injure half of its customers (*i.e.*, independent) or facilitate an increase in the market power of its already large customers (*i.e.*, chains)—market power that could be used against Southern Glazer's. Without evidence of harm to competition, the Commission should not proceed with the Complaint.

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[427] *Cf. Woodman's Food Market, Inc.*, 833 F. 3d at 749-750 ("If any product attribute that made the product more desirable automatically became a promotional 'service or facility' by virtue of that fact, then subsection 13(e) would cover all products. This would undermine the balance that Congress has struck between subsection 13(a)'s broad prohibition (which is limited by the need to show harm to competition) and subsection 13(e)'s narrow but categorical prohibition.").

[428] *See supra* Section III.A.2.

[429] *Id.*

[430] *Id.*

IV. THE ROBINSON-PATMAN ACT'S COMPETITIVE EFFECTS LANGUAGE SHOULD BE READ CONSISTENTLY ACROSS ALL OF THE CLAYTON ACT PROVISIONS; TO PROVE A SECONDARY-LINE CASE, THE COMMISSION SHOULD PROCEED UNDER THE ANTITRUST THEORY OF RAISING RIVALS' COSTS.

The competitive effects proviso of Section 2(a) includes two forms of injury: (1) "substantially to lessen competition or tend to create a monopoly in any line of commerce;" or (2) "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."[431] My colleagues incorrectly assume that injury to competitors satisfies Section 2(a)'s competitive effects language.[432] But the text makes no mention of rivals. My colleagues' approach is therefore inconsistent with the plain text of the statute and how courts interpret identical language in the Clayton Act—and related language in the Sherman Act—all of which require evaluating whether the relevant conduct harms competition, rather than competitors.

This Section begins by discussing the courts' treatment of the identical competitive effects language found in Sections 2, Section 3, and Section 7 of the Clayton Act—*i.e*., substantially to lessen competition—and how courts have interpreted the Sherman Act under the rule of reason (Section IV.A). Next, it explains why the phrase "injure, destroy, or prevent competition with any person" should similarly be interpreted consistent with the other antitrust laws to require more than injury to rivals (Section IV.B). And finally, drawing from *Brooke Group*'s approach to primary-line claims, and consistent with the Robinson-Patman Act's text and structure, it posits that secondary-line claims should be evaluated under the raising rivals' costs framework (Section IV.C).

A. Section 2(a)'s "Substantially to Lessen Competition" Language Should Be Interpreted Consistent with Identical Language in Other Provisions of the Clayton Act That Require Harm to Competition, Not Merely Harm to Rivals.

Section 2(a) condemns discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly."[433] This critical language appears in the very next section of the Clayton Act, Section 3, and also in Section 7, both of which also require that the effect of the challenged conduct "may be substantially to lessen competition or tend to create a monopoly."[434] In *Brooke Group*, the Supreme Court recognized that this identical language should be interpreted in the same way across the Act because "the normal rule of statutory construction [requires] that identical words used in different parts of the same act are intended to

[431] 15 U.S.C. § 13(a).

[432] Compl. ¶¶ 3, 9, 78; *see also supra* Section III.D.

[433] 15 U.S.C. § 13(a).

[434] 15 U.S.C. § 14 ("[T]he effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly . . . ."); 15 U.S.C. § 18 ("[T]he effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.").

have the same meaning."[435] It is blackletter law that Section 3 and Section 7's "substantially to lessen competition" language require a showing of anticompetitive effects—*e.g.*, higher prices, diminished innovation, or reduced quantity—and not simply harm to rivals. Robinson-Patman's Section 2(a) thus requires the same showing.

Brooke Group also recognizes that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."[436] Harmonizing the Robinson-Patman Act with the other antitrust statutes follows the canon of statutory interpretation—known as the *in pari materia* rule—that language used across statutes addressing related subject matters should be construed consistently.[437] Accordingly, consistent with the other antitrust statutes, analysis under the Robinson-Patman Act should focus on competitive effects, as informed by the latest economic learning.

1. Courts require evidence of potential adverse effects on competition to satisfy the competitive effects language in Sections 3 and 7.

Section 3 of the Clayton Act prevents or eliminates unlawful "tying" contracts where, for example, a "seller conditions its sale of a [] product (the 'tying' product) on the purchase of a second product (the 'tied' product)."[438] During the early years of Section 3 enforcement, and when dealing with the concept of tying more generally,[439] courts condemned tying arrangements as *per se* illegal.[440] That ultimately changed in *Jefferson Parish Hospital District No. 2 v. Hyde*.[441] Because of tying's potential salutary effects on competition, the Court explained that tying, in specified circumstances, should not be *per se* illegal:

> It is clear, however, that every refusal to sell two products separately cannot be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. For example, we have written that if one of a dozen food stores in a community were to refuse to sell flour

[435] 509 U.S. at 230 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)); *see also* ANTONIN SCALIA & BRYAN GARNER, READING LAW, THE INTERPRETATION OF LEGAL TEXTS 170 (2012) ("A word or phrase is presumed to bear the same meaning throughout a text . . . .").

[436] 509 U.S. at 220 (quoting *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80, n.13).

[437] *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW, THE INTERPRETATION OF LEGAL TEXTS 252 (2012).

[438] *Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006).

[439] The standard for tying cases is effectively the same under Section 3 of the Clayton Act and the Sherman Act. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 23 (1984), *abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) ("[Section 3's] analysis is also applicable to § 1 of the Sherman Act, since with respect to the definition of tying the standards used by the two statutes are the same."); *Grappone, Inc. v. Subaru of New England*, 858 F.2d 792, 794 (1st Cir. 1988).

[440] *See, e.g.*, *Int'l Salt Co. v. United States*, 332 U.S. 392, 396 (1947), *abrogated by Illinois Tool Works Inc.*, 547 U.S. at 28; *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305 (1949) ("Tying agreements serve hardly any purpose beyond the suppression of competition.").

[441] 466 U.S. 2 (1984).

> unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself.[442]

Later that same year, the Court explained that "while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis."[443]

As academic commentators have explained, the Court's evolution away from *per se* illegality for tying arrangements tracked the evolution of economic understanding of tying:

> Tying is common under competition. Product-specific scale economies are a major factor in making tying efficient. By limiting product selection—for example, by refusing to sell the tied good without the tying good—firms can reduce overall costs. The product-specific scale economies that give rise to tying under competition are just as likely to be present and to result in tying when firms have market power. Like other practices that are common under competition, tying should be treated under the rule of reason. The fact that product-specific scale economies are not easy to document in practice, together with the fact that tying is presumptively efficient, leads us to argue that defendants should not bear too onerous a burden of proving efficiencies.[444]

As a result, commentators have concluded that the effect of a particular tie requires a factual analysis of the market realities because "economic theory by itself only says that tying ***might be*** anticompetitive (in the same sense that owning a knife might enable one to engage in lethal actions)."[445]

After *Jefferson Parish*, whether the challenged tie "may substantially lessen competition" turned on whether the seller that combines two separate products has market power such that it can force buyers to purchase products that they may not otherwise purchase. The effect of *Jefferson Parish* was to limit the breadth of the *per se* rule, because now, a tie is *per se* illegal only after assessing market power in the tying market—analysis normally conducted under the rule of

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[442] *Id.* at 11-12; *id.* at 35 (O'Connor, J., concurring) ("The time has therefore come to abandon the '*per se*' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever.").

[443] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) (citation omitted).

[444] David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. REG. 37, 89 (2005).

[445] Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 ANTITRUST BULL. 287, 291 (2004) ("One must conduct a factual analysis to determine whether tying has anticompetitive effects—economic theory by itself only says that tying ***might be*** anticompetitive (in the same sense that owning a knife might enable one to engage in lethal actions). . . . One must also conduct a factual analysis to determine whether tying has pro-competitive effects—again economic theory by itself only says that tying ***might be*** efficient; however the pervasiveness of tying in competitive markets provides considerable support to the existence of these efficiencies generally." (emphasis added)).

reason.[446] Beyond the assessment of market power, courts have specifically required a finding of anticompetitive effects[447] and other courts have allowed for procompetitive justifications.[448] Thus, when courts apply the statutory language requiring a substantial lessening of competition under Section 3 of the Clayton Act, they conduct a fulsome analysis that includes assessments of market power, competitive effects, and any offsetting procompetitive benefits.

Section 7 of the Clayton Act prohibits mergers and acquisitions where—like Sections 2 and 3—the effect of such merger "may be substantially to lessen competition or tend to create a monopoly."[449] To many in Congress at the time of its passage, Section 7—similar to Section 2—was intended to resolve the monopoly power of the great industrial trusts.[450] But the original Clayton Act left a number of perceived gaps in its coverage.[451] To fill some of these gaps (*e.g.*, asset acquisitions and complementary mergers), Congress enacted the Celler-Kefauver Amendments in 1950.[452]

The legislative history of the Amendments, similar to the Robinson-Patman Amendment, reflected mixed motivations. Like the Robinson-Patman Amendment, one theme that animated the Celler-Kefauver Amendments' passage was a perceived fear of economic concentration in the economy. Indeed, Professor Derek Bok observed that the "curious aspect" of the Celler-Kefauver Amendments was the "paucity of remarks having to do with the effects of concentration on prices, innovation, distribution, and efficiency.[453] Echoing this observation, the *Brown Shoe* Court also remarked that Congress was not only concerned about concentration "but also [about] the threat

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[446] The standard elements for tying are (1) "[t]wo products"; (2) "[t]he two products are tied together or customers are coerced"; (3) "[t]he supplier possesses substantial economic power over the tying product"; (4) "[a]nticompetitive effect or threshold potential for injuring competition"; and (5) "[a] not insubstantial volume of commerce is affected." AREEDA & HOVENKAMP, *supra* note 72, at ¶ 1702; David I. Gelfand & Linden Bernhardt, *Vertical Restraints: Evolution from Per se to Rule of Reason Analysis* at 14 (Nov. 16, 2017), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/2017/publications/aba-antitrust-section-fall-forum-vertical-restraints-evolution-from-per-se-to-rule-of-reason-analysis-11-16-17.pdf ("While Supreme Court precedent still suggests that *per se* treatment is generally the appropriate standard to use when analyzing tying cases, the Court has been careful to place limits on the applicability of *per se* treatment by including prerequisites to its use, including requiring that the defendant must have market power in the market for the tying product, that the tying arrangements must lead to substantial foreclosure of competition in the market for the tied product, and that there must be some element of force on the consumer to purchase the tied product as part of the bundle, rather than purchase it separately.").

[447] *See generally* AREEDA & HOVENKAMP, *supra* note 72, at ¶¶ 1722-27; *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988) ("The tying claim must fail absent any proof of anti-competitive effects in the market for the tied product.").

[448] *See* AREEDA & HOVENKAMP, *supra* note 72, at ¶ 17E; *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348 (9th Cir. 1987) ("[A]ntitrust defendants may demonstrate a business justification for an otherwise per se illegal tying arrangement.").

[449] 15 U.S.C. § 18.

[450] *See* DANIEL FRANCIS & CHRISTOPHER JON SPRIGMAN, ANTITRUST PRINCIPLES, CASES, AND MATERIALS 13-14 (2nd ed. 2024) (noting that the Clayton Act rules were designed to "remove all doubt" from the existing practice of Sherman Act enforcement of mergers and "were intended to complement and reinforce the existing Sherman Act prohibitions").

[451] *See id.*

[452] *Id.* at 15.

[453] Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 236 (1960).

to other values a trend toward concentration was thought to pose."[454] Nonetheless, no serious scholar or antitrust practitioner would suggest that, if the facts of *Brown Shoe* were presented to the agencies today, that the DOJ or Commission would even issue a second request, much less that a challenge would be brought. That is true because modern courts have routinely interpreted the antitrust statutes consistent with the promotion of competition and the welfare of consumers, not the welfare of rivals.[455]

Unsurprisingly, the courts' interpretive capacity has evolved as their economic understanding of competition evolved. During the 1960s, courts interpreted Section 7 in a haphazard manner. Horizontal mergers between competitors with marginal shares were condemned as easily as mergers involving large players.[456] Then, the Court held in *United States v. Philadelphia National Bank* (*PNB*) that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[457] In reaching the "*PNB* presumption," the court relied upon the economics available to it at that time, explaining that its holding was "fully consonant with economic theory" that "competition is likely to be greatest when there are many sellers, none of which has any significant market share."[458]

As economists continued advancing their understanding of competition, the courts applied that understanding to Section 7.[459] A little more than 10 years after *PNB*, the Court determined in *United States v. General Dynamics* that despite the merging parties' undisputed "undue

[454] *Brown Shoe*, 370 US at 315-16.

[455] *See, e.g.*, *Volvo*, 546 U.S. at 181 ("[W]e would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." (emphasis in original)); *Brooke Grp.*, 509 U.S. at 223 (quoting *Cargill, Inc*, 479 U.S. at 116) ("'To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.'"); *id.* at 224 (*quoting Brown Shoe Co.*, 370 U.S. at 320 ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'") (emphasis in original)).

[456] *See Brown Shoe Co.*, 370 U.S. at 344 ("[I]n this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition."); *Von's Grocery Co.*, 384 U.S. at 290 (Stewart, J., dissenting) (noting that even the leading grocery chain in Los Angeles had market share declining from 14% to 8%); *see also* LOUIS KAPLOW & CARL SHAPIRO, ANTITRUST, Ch. 15, at § 4.4.2, 1160, HANDBOOK OF LAW & ECONOMICS (2007) (discussing early merger decisions).

[457] *United States v. Phila. Nat. Bank*, 374 U.S. 321, 363 (1963).

[458] *Id.*

[459] For decades, the so-called "structure-conduct-performance" paradigm was the main framework that industrial organization economists used to analyze competition. This approach hypothesized that there was a causal relationship in which the *structure* of an industry influenced its constituent firms' *conduct* that resulted in predictable changes in market *performance*. As a leading antitrust text notes, industrial organization economists now recognize that this "causal story . . . is too simplistic; more causal relationships are running around than was originally described." VISCUSI, HARRINGTON AND SAPPINGTON, ECONOMICS OF REGULATION AND ANTITRUST 88 (5th ed. 2018); *see also* Michael Whinston, *Antitrust Policy Toward Horizontal Mergers*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2369, 2411 (M. Armstrong and R. Porter ed. 2007) (discussing the use of structural empirical evidence in merger challenges, and the associated pitfalls and methods for addressing them).

concentration," courts can consider "changes in the market" that would make concentration statistics "insufficient to sustain [a] case."[460] After *General Dynamics*, it became Section 7 black-letter law that a prima facie case based on concentration can be rebutted.[461]

Because of the unique nature of mergers—along with significant legal and procedural changes to the merger process via the Hart-Scott-Rodino Act and amendments to the Expediting Act—the Supreme Court has not evaluated a proposed merger in 50 years.[462] But Section 7 black-letter law nonetheless continues to incorporate economic understanding. In *United States v. Baker Hughes*, the D.C. Circuit set forth the burden shifting framework that has become the modern core of merger law. The court explained that a plaintiff meets the prima facie burden by "showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area."[463] Such a showing "establishes a presumption that the transaction will substantially lessen competition."[464] The burden then shifts to the defendant to rebut the prima facie showing, which, if successful, then shifts the burden back to the plaintiff to "produc[e] additional evidence of *anticompetitive effect* . . . which remains with the [plaintiff] at all times."[465] *Baker Hughes*'s focus on anticompetitive effects—*i.e.*, the merger's effect on competition—is now a central feature of merger analysis, with the ultimate question being whether a merger causes harm to consumers and the competitive process.[466]

The methods for assessing competitive effects also evolved over time, with periodic agency guidelines issued to take stock of the best methods by which to detect anticompetitive mergers. That intellectual journey culminated in the Commission and DOJ's 2010 Horizontal Guidelines, which focus primarily upon two types of effects: unilateral and coordinated.[467] The methods adopted by the 2010 Horizontal Merger Guidelines are based upon economic learning and advancement. The increased focus on unilateral effects, for example, was driven by "considerable new economic learning about unilateral effects,"[468] and through the 2010 Horizontal Merger

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[460] *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497-98, 501 (1974).

[461] Kaplow & Shapiro, *supra* note 456, at 1160. The structure-conduct-performance paradigm of merger analysis has been uniformly rejected by the economics literature. *See supra* note 459.

[462] *See* 15 U.S.C. § 18a; 15 U.S.C. § 29(b); R. Hewitt Pate, *Antitrust Law in the U.S. Supreme Court* at 6, address by Assistant Attorney General, Antitrust Division, U.S. Dep't of Just., Presented at British Institute of International Comparative Law Conference (May 11, 2004), https://www.justice.gov/atr/file/517986/dl.

[463] *Baker Hughes*, 908 F.2d at 982.

[464] *Id*.

[465] *Id.* (emphasis added).

[466] *See, e.g.*, Compl., *In the Matter of Tapestry, Inc., and Capri Holdings Limited*, No. 9429, ¶ 42 (F.T.C. Apr. 22) ("The Proposed Acquisition would eliminate this fierce competition, which manifests through pricing, discounts, promotions, innovation, design, marketing, and brick-and-mortar store experiences—all of which benefit consumers.").

[467] *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 218; Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L. J. 49, 56 (2010) ("The revised Guidelines emphasize that merger analysis ultimately is about competitive effects.").

[468] Shapiro, *supra* note 467, at 60; *id* at 64 ("[T]he economic literature relating to unilateral price effects, including the estimation of demand and full merger simulation, developed over the past eighteen years. Many Ph.D. theses have been written about estimating demand systems with differentiated products, and considerable strides have been made

Guidelines, "the treatment of unilateral price effects . . . rests on a rock solid economic foundation."[469] Similarly, the reduced emphasis on market shares,[470] the focus on innovation,[471] the implementation of the hypothetical monopolist test and market definition,[472] and revisions in the section on powerful buyers,[473] were all driven by economic learning. Historically, courts have routinely relied on the Guidelines—including their emphasis on the important role of evidence of anticompetitive effects, rather than rote reliance on measures of market structure—when determining whether a proposed merger violated Section 7.[474]

2010 Horizontal Merger Guidelines aside, courts today have fully embraced the importance of assessing anticompetitive effects when determining whether a merger violates Section 7 of the Clayton Act. For example, earlier this year in *United States v. JetBlue Airways Corporation*, the court relied on *Baker Hughes*'s burden shifting framework.[475] After discussing the Government's prima facie case, the court turned to the direct evidence of anticompetitive effects, evaluating whether the merger would eliminate head-to-head competition between the merging parties and/or

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in developing simpler approaches that are feasible when data are limited. I cannot possibly do justice to that literature here; in any event, it has been well surveyed quite recently. Suffice it to say that enormous strides have been made in theory and in practice.").

[469] *Id.* at 75.

[470] *Id.* at 64 ("As economic learning and practice evolved, the emphasis on market shares found in Section 2.21 of the 1992 Guidelines became less helpful to achieve transparent and accurate merger enforcement using a unilateral-effects theory.").

[471] *Id.* at 83-85.

[472] *Id.* at 86-91.

[473] *Id.* at 94-95.

[474] *ProMedica Health Sys., Inc. v. Fed. Trade Comm'n*, 749 F.3d 559, 569 (6th Cir. 2014) ("Unilateral-effects theory, on the other hand, holds that '[t]he elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition.'" (quoting 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 218, at § 6)); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 81 (D.D.C. 2011)) ("'The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects.'" (quoting 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 218, at § 6); *id.* at 88 ("The case law and the Merger Guidelines, however, require that 'repositioning' be considered in assessing unilateral effects, and the repositioning inquiry necessarily entails a consideration of the likely actions of other competitors in response to a price increase."); *id.* at 77 (discussing § 7 of the 2010 Horizontal Merger Guidelines in context of coordinated anticompetitive effects); *United States v. JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876, at *28 (D. Mass. Jan. 16, 2024) (relying upon § 6 of the 2010 Horizontal Merger Guidelines to analyze direct evidence of anticompetitive effects); *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) ("Although . . . the court is not bound by, and owes no particular deference to, the Guidelines, this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers."); *Fed. Trade Comm'n v. Sanford Health*, 926 F.3d 959, 965 n.2 (8th Cir. 2019) ("[C]ourts have repeatedly deemed" the 2010 Horizontal Merger Guidelines a "helpful tool."); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021) ("While courts aren't bound by the Guidelines, they're a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing mergers." (ellipses and internal quotation marks omitted)); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are not binding on the courts, they are often used as persuasive authority." (citation and internal quotation marks omitted)).

[475] *United States v. JetBlue Airways Corp.*, No. CV 23-10511-WGY, 2024 WL 162876, at *23 (D. Mass. Jan. 16, 2024).

cut off competition from third parties.[476] Thus, courts today, when determining what it means to have a substantial lessening of competition under Section 7, focus on anticompetitive effects.[477]

The evolution from *per se* illegality to the rule of reason for nearly all vertical agreements provides another relevant example of antitrust law's journey toward its current focus on consumers and the competitive process. To be sure, the text of the Sherman Act may be read to condemn all agreements that restrain trade, regardless of whether they are pernicious or benign.[478] But from the early years of interpreting the Sherman Act, the Supreme Court determined that the Sherman Act only condemns *unreasonable* restraints—prompting the creation of the rule of reason.[479] Under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[480] To do so, the court conducts "an inquiry into market power and market structure designed to assess the combination's actual effect."[481] Certain conduct, however, is sufficiently pernicious that it "would always or almost always tend to restrict competition and decrease output."[482] Such conduct has been analyzed under a standard of *per se* illegality.[483] Application of the *per se* rule, however, "is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[484]

Conduct condemned as *per se* illegal has evolved over the history of the Sherman Act. In fact, the application of *per se* illegality and the rule of reason for vertical restraints has not only seen an evolution—but a full reversal. Today, the Court recognizes that "nearly every . . . vertical restraint" should be analyzed under the rule of reason.[485]

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[476] *Id.* at *27-28.

[477] *See, e.g.*, *Fed. Trade Comm'n v. Sysco Corp.*, 113 F. Supp. 3d 1, 61 (D.D.C. 2015); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 215-31 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017); *United States v. Bertelsmann SE & Co. KGAA*, 646 F. Supp. 3d 1, 38-46 (D.D.C. 2022); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 233-39 (S.D.N.Y. 2020); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 43-47 (D.D.C. 2017).

[478] *See Standard Oil Co. of New Jersey*, 221 U.S. at 87 (Harlan, J., concurring) ("Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?").

[479] *Id.* at 62 ("[I]t becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve.").

[480] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007); *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (Under the rule of reason, "courts . . . conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.") (brackets, ellipses, citations, and internal quotation marks omitted)).

[481] *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

[482] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotation marks omitted).

[483] *Id.* at 886-87 (citation omitted).

[484] *Id.* (citations omitted).

[485] *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018).

In *Continental T.V., Inc. v. GTE Sylvania Inc.*,[486] the Court confronted its ten-year-old ruling that geographic restrictions (*i.e.*, nonprice vertical restraints) on franchises were *per se* illegal.[487] In *Continental*, the Court abandoned *per se* illegality for nonprice vertical restraints in favor of the rule of reason. The Court explained that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[488] After summarizing the views of various economists,[489] the Court overruled its past precedent and held that the rule of reason applies. The court also made "clear" that when analyzing future vertical restrictions, the "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[490]

In a 10-year period from 1997 to 2007, the Court then reversed its position on resale price maintenance (RPM) in two cases. *First*, in *State Oil Co. v. Khan*, the Court held that maximum RPM should be analyzed under the rule of reason. *Then*, ten years later, in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*,[491] the Court held that the rule of reason also applies to minimum RPM. Maximum RPM had been *per se* unlawful since 1968[492] and minimum RPM since 1911.[493] In both cases, economic learning convinced the Court to reverse course.[494] In *State Oil*, the court "conclude[d] that there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing."[495] The Court also observed that the concerns prompting the *per se* rule were hypothetical and had not materialized.[496] In *Leegin*, the Court recognized that it had "abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors" and explained that "[r]espected economic analysts . . . conclude that vertical price

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[486] 433 U.S. 36, 58 (1977).

[487] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The Court has classified *Continental* as removing the *per se* rule for nonprice vertical restraints. *See State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

[488] *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 (1977).

[489] *Id.* at 54-57.

[490] *Id.* at 58-59; *see also* Gelfand & Bernhardt, *supra* note 446, at 5 ("The Court therefore overruled Schwinn and further found that, while it did not rule out the 'possibility that particular applications of vertical restrictions might justify *per se* prohibition,' there had been no evidence that 'vertical restrictions have or are likely to have a "pernicious effect on competition"' and therefore 'the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to Schwinn.'").

[491] 551 U.S. 877 (2007).

[492] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[493] *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *overruled by Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

[494] In *Leegin*, the Court specifically cited studies by economists in the Commission's Bureau of Economics that "cast doubt on the conclusion that the practice meets the criteria for a *per se* rule." 551 U.S. at 890 (citing THOMAS R. OVERSTREET, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE, BUREAU OF ECONOMICS STAFF REPORT, FED. TRADE COMM'N, (1983), https://www.ftc.gov/sites/default/files/documents/reports/resale-price-maintenance-economic-theories-and-empirical-evidence/233105.pdf); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J. LAW & ECON. 263 (1991).

[495] *State Oil*, 522 U.S. at 18.

[496] *Id.* at 19.

restraints can have procompetitive effects."[497] "[R]ecent cases," explained the Court, "formulate antitrust principles in accordance with . . . economic effect."[498] Though "each side of the debate can find sources to support its position, it suffices to say here that the economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[499] The Court summarized the economic literature[500] and concluded that because the effect of minimum RPM does not "always or almost always tend to restrict competition and decrease output," the conduct was "ill-suited for *per se* condemnation."[501]

The transition from a *per se* standard to the rule of reason in these contexts—and the near-abandonment of the *per se* standard under Section 3—demonstrates how modern courts interpret the antitrust laws. They focus on competitive effects, evaluated with the aid of the latest economic learning available. Price discrimination likewise involves vertical restraints that may be procompetitive or anticompetitive. As the Supreme Court has observed, "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved."[502] This market reality, along with *Brooke Group*'s instruction that the Robinson-Patman Act be "construed consistently with broader policies of the antitrust laws," suggests that the Commission should focus on competitive effects as informed by the latest economic learning when evaluation Section 2(a) claims.

2. *Brooke Group*'s holding is consistent with the broader evolution towards harmonizing Robinson-Patman with the broader antitrust laws.

The Supreme Court's decision in *Brooke Group* to move beyond stale case law demonstrates the Court's willingness to interpret antitrust statutes consistent with a modern understanding of economics. The leading primary-line case before *Brooke Group* was *Utah Pie Co. v. Continental Baking Co.*[503] There, Utah Pie alleged Sherman Act Sections 1 and 2 conspiracy claims, as well as a Robinson-Patman Section 2(a) claim, all leveled against three respondents—the Pet Milk Company, the Carnation Milk Company, and the Continental Baking Company—who had allegedly harmed competition by selling frozen fruit pies at discriminatory prices in the Salt Lake City market.[504]

[497] *Leegin*, 551 U.S. at 882.

[498] *Id.* at 888.

[499] *Id.* at 889.

[500] *Id.* at 889-894.

[501] *Id.* at 894 (brackets omitted).

[502] *Brooke Group* at 223.

[503] 386 U.S. 685 (1967). Observing the numerous errors contained in the Supreme Court's opinion, one of the leading antitrust scholars in the country at the time remarked that the Supreme Court's decision was consistent with its "growing determination in its antitrust decisions to convert laws designed to promote competition into laws which regulate or hamper the competitive process" and that the holding in *Utah Pie* "strike[s] directly at price competition itself." Ward Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 71 (1967).

[504] The jury found for respondents on the Sherman Act violations but for Utah Pie on the Robinson-Patman count. *Utah Pie*, 386 U.S. at 687.

The facts in *Utah Pie* are straightforward. After three decades of baking fresh pies, Utah Pie earnestly entered the frozen pie business in 1957, and by 1958 had built a new plant in Salt Lake City.[505] In 1958, Utah Pie experienced rapid expansion and held a significant share of the local frozen pie market.[506] With local production advantages and an aggressive marketing campaign driven by low prices, Utah Pie successfully diverted significant market share from the incumbent, rival pie makers (*i.e.*, the respondents).[507] Faced with Utah Pie's aggressive campaign, respondents lowered their prices in the Salt Lake City market and consequently recovered some of the market share captured by Utah Pie.[508] Because of the price competition in the Salt Lake City market, respondents on occasion charged lower prices in the Salt Lake City market than in other markets where they competed.[509] At trial, the jury "found that respondents had individually violated 2(a) by [its] price discrimination."[510] On review, the Tenth Circuit overturned this verdict[511]— concluding that there was not sufficient evidence to support a finding of probable injury to competition.[512]

The Supreme Court reversed, paradoxically concluding that Section 2(a) "reached price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact," and that "the evidence shows a drastically declining price structure which the jury could rationally attribute to continued or sporadic price discrimination."[513] In other words, the Court used evidence of competition and the working of the competitive process to conclude that there was an antitrust violation.[514]

Utah Pie's holding was left undisturbed for three decades, until *Brooke Group,* where the Court observed:

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[505] *Utah Pie*, 386 U.S. at 689.

[506] *Id*.

[507] *Id.* at 690-91.

[508] *Id*. at 690-701.

[509] *Id.* at 692-93.

[510] *Bowman*, *supra* note 503, at 71.

[511] *Continental Baking Co. v. Utah Pie Co.*, 349 F.2d 122 (10th Cir. 1965).

[512] *Utah Pie Co.*, 386 U.S. at 688; *cf*. Elman, *supra* note 310, at 13 ("In a local market dominated by a few firms, the entry of a national seller prepared to lower its price in order to secure a foothold in the market may be the only cure for a rigid price structure characteristic of oligopoly. Such a national seller may be unwilling to lower its price in such a local market if it is required to make the same price reduction in all the other geographic markets in which it does business. Selective local price cutting may also be a necessary first step in a general lowering of prices. A national seller, reluctant to initiate a uniform and general price reduction, might want to experiment with a price reduction in one or several local markets before establishing it throughout its entire marketing area. In general, a lack of uniformity in the prices of a national seller, competing in many geographic markets, may simply reflect the seller's flexibility in adjusting price to meet different competitive conditions in different markets. Insistence on price uniformity in such situations could lead to high, rigid prices and thereby hurt competition seriously.").

[513] *Utah Pie*, 386 U.S. 703.

[514] Bowman, *supra* note 503, at 73, 84 ("The result is not very serious to pie-eaters in Utah. They can eat cake. But it is indeed serious that the antitrust law has been turned into a law against price competition."); *see also Utah Pie*, 386 U.S. 706 (Justice Stewart dissenting) ("I cannot hold that Utah Pie's monopolistic position was protected by the federal antitrust laws from effective price competition, and I therefore dissent.").

> *Utah Pie* . . . has been criticized on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition. We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act.[515]

Accordingly, the Supreme Court concluded that merely showing harm to a competitor does not satisfy Section 2(a)'s competitive effects requirement.[516] Instead, the Court generally declared—without reference to primary- or secondary-line theories of harm—that the Robinson-Patman Act's competitive effects test requires a showing of competitive harm consistent with antitrust laws broadly.[517] As further described below (Section IV.C), to evaluate the Section 2(a) claim, the Court relied upon the analogous predatory pricing framework found in Section 2 of the Sherman Act.[518]

In sum, *Brooke Group* recognizes that the Robinson-Patman Act is not an island among the antitrust laws. It must be harmonized with the other antitrust law statutes to reflect extant economic understanding.

B. The Robinson-Patman Act's "Injure, Destroy, or Prevent Competition with Any Person" Language Requires Proof of Harm to Competition, Not Merely Harm to Competitors.

Section 2(a) includes two forms of injury: (1) substantially to lessen competition or (2) injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of a discriminatory price.[519] The Complaint selectively quotes from the legislative history of the Robinson-Patman Act and cites the addition of the phrase "injure, destroy, or prevent competition" to the text of Section 2(a) as evidence that differential pricing to downstream buyers alone satisfies the Robinson-Patman Act's competitive effects language.[520] But such a reading of the legislative history, as demonstrated earlier, is plainly wrong.[521] Indeed, for decades the Commission appeared to enforce language that was never passed into law. Instead of enacting a *per se* ban on all price discrimination as first proposed by Representative Patman—the Patman bill's language read: "That it shall be unlawful for any person engaged in commerce . . . to

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[515] *Brooke Grp.*, 509 U.S. at 221 (citations omitted).

[516] *See id*.

[517] *Brooke Grp.*, 509 U.S. at 220; *see also supra* Section III.B.

[518] *Brooke Grp.*, 509 U.S. at 222 ("[W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson–Patman Act, two prerequisites to recovery remain the same."); *see, e.g.*, *Matushita Elec. Industrial Co. v. Senith Radio Corp.*, 475 U.S. 104 (1986).

[519] 15 U.S.C. § 13(a).

[520] Compl. ¶¶ 6, 77.

[521] *Supra* Section I.A-I.C.

discriminate in price or terms of sale between different purchasers of commodities . . ."—the Robinson-Patman Act requires that the discrimination have an adverse effect on competition.[522]

Plainly, the text of Section 2(a) does not support my colleagues' interpretation. The preceding discussion notes that Section 2 of the Clayton Act contains the same competitive effects language found in Sections 3 and 7—"substantially to lessen competition or tend to create a monopoly." When courts evaluate whether conduct violates this language, they require a fulsome analysis of market power, competitive effects, and any offsetting procompetitive benefits. Indeed, the hallmark of anticompetitive effects is the reduction of output and increase of price.[523]

Nor does the phrase "injure, destroy, or prevent competition" provide refuge for my colleagues' theory of harm, which is predicated on harm to rivals.[524] Put simply, the Complaint's reliance upon harm to rivals is inconsistent with the plain text of the statute.[525] Section 2(a) proscribes price discrimination 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 . . . .[526]

Nowhere in the competitive effects proviso—or any other part of Section 2—is harm to rivals mentioned. More important, there is no reason to interpret "competition" in the clause "injure, destroy, or prevent competition" any differently than "competition" in the "substantially lessen competition" clause in Section 2(a). Rules of statutory interpretation instruct that "identical words used in different parts of the same act are intended to have the same meaning."[527] That rule of construction applies across a statute, indicating, *a fortiori*, that a word should be given the same meaning if found in the same *clause* of a statute. Accordingly, it would contradict the plain text and rules of statutory construction to transform the word "competition" into the word "rival" as my colleagues seek to do.

Both substantially to lessen and injure, destroy, or prevent require a showing of anticompetitive effects. The difference between the two clauses is the *scope* of the relevant analysis. When evaluating mergers under Section 7's "substantially to lessen competition," the Commission routinely defines a product and geographic market and then examines how the proposed transaction would affect competition in the relevant markets. The "substantially to lessen

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[522] *See* H.R. 8442, 74th Cong., 1st Sess. (June 11, 1935).

[523] *Brooke Grp.*, 509 U.S. at 233 ("Supracompetitive pricing entails a restriction in output."); *ProMedica Health Sys., Inc. v. F.T.C.*, 749 F.3d 559, 565 (6th Cir. 2014) ("Market power is itself a term of art that the Department of Justice's Horizontal Merger Guidelines (which we consider useful but not binding upon us here) define as the power of 'one or more firms to *raise price, reduce output*, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives.'" (citation omitted)).

[524] Compl. ¶¶ 3, 9, 78; *see also supra* Section III.D.

[525] *Id.* ¶¶ 74-78.

[526] 15 U.S.C. § 13(a) (emphasis added).

[527] *Brooke Grp.*, 509 U.S. at 230 (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)).

competition" language under Section 2(a) would similarly require the Commission to define a product and geographic market and look to how competition has been harmed in that defined market. Rather than focusing its analysis on a geographic market, the phrase "injure, destroy, or prevent competition" evaluates competition with "any person" and thus need only look to a pair of market participants—competition between a favored and disfavored retailer. But even when evaluating the relevant pair of market participants, the focus remains on harm to competition, not merely harm to the disfavored retailer.

This "more aggressive injury standard" is designed to catch harm in its incipiency.[528] The harm to competition under the "injure, destroy, or prevent competition" standard, if allowed to continue and expand, would satisfy the substantially lessen language. Indeed, the Senate Report describes it as such, concluding that the amendments to the Clayton Act:

> Accomplish[] a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediate important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.[529]

Taken together, the injure, destroy, or prevent prohibition cannot refer merely to injury to a competitor. It must be the type of harm that, if allowed to grow, would "substantially lessen competition or tend to create a monopoly."[530]

If the Commission were to interpret the phrase "injure, destroy, or prevent competition" to mean that harm to rivals is enough to violate the statute, as it does in today's Complaint, it would be entirely inconsistent with the way the courts and the Commission interpret the other competitive effects language found in Section 2 and the remainder of the Clayton Act. Instead, the entire competitive clause—both "substantially to lessen competition" and "injure, destroy, or prevent competition"—must define antitrust harm in a consistent manner.

The *Volvo* decision confirms that the "injure, destroy, or prevent" standard requires harm to competition, not merely to competitors. As discussed above, in that case, plaintiff Reeder-Simco was an authorized dealer of Volvo heavy duty-trucks and claimed that it was harmed by discriminatory discounts Volvo granted to its other authorized dealers.[531] To be sure, the Court recognized from its previous decisions that "[a] hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser."[532] But the Court's recognition that diversions may reflect competitive injury does not mean the Court

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[528] *See* Hovenkamp, *supra* note 222, 136-37.

[529] 41 S. Rep. No. 1502, 74th Cong., 2d Sess., at 4 (1936) (emphasis added). The House Report provided a similar conclusion. 27 H.R. Rep. No. 2287, 74th Cong., 2d Sess., at 8 (1936).

[530] *See* Hovenkamp, *supra* note 222, 136-37.

[531] *Volvo*, 546 U.S.at 169.

[532] *Id.* at 177.

endorsed a "harm to rivals" approach for secondary-line cases. As an initial matter, diversions do not *necessarily* reflect injury to competition. It is of course a truism that a natural consequence of two firms competing may be that sales or profits divert from one firm to another. But diversions may result for a range of reasons, including from robust competition on the merits. Indeed, the entry of a more efficient competitor into a market may result in diversion of sales away from less efficient incumbent sellers. But those resulting diversions reflect an increase in competition, not a lessening of competition. In short, the presence of diversions tells us little about whether or not there has been antitrust harm. The relevant issue is whether the conduct that leads to the diversions is anticompetitive in nature.

More important, the *Volvo* Court never fully grappled with what was required for a secondary-line claim. That is because it did not need to. The Court concluded that Reeder-Simco's claims failed because it did not *actually compete* with the dealers who received favored pricing from Volvo.[533] And even though the Court did not grapple with the relevant antitrust injury framework under secondary-line claims, the Court nevertheless made clear that it would not interpret the Robinson Patman Act in a manner "geared more to the protection of existing competitors than to the stimulation of competition."[534] Accordingly, *Volvo* does not hold that the phrase "injure, destroy, or prevent competition" means harm to rivals but instead, reaffirms that the Supreme Court will interpret the word "competition" consistent with broader antitrust laws.

C. Consistent with the Text and Structure of the Robinson-Patman Act—along with *Brooke Group*'s framework—Secondary-line Cases Should Be Assessed Under the Antitrust Framework of Raising Rivals' Costs.

Brooke Group stands for the proposition that Robinson-Patman Act claims must be analyzed consistent with the broader antitrust laws.[535] There, cigarette manufacturer Brooke Group alleged that a rival manufacturer discriminated in price when offering volume rebates to downstream customers in the market for cigarettes.[536] Because the rival's discounts allegedly harmed competition with Brooke Group, the theory of harm was primary-line discrimination.[537] Consistent with the plain text of the Robinson-Patman Act, and without reference to primary or secondary-line theories of harm, the Supreme Court held that the Act's competitive effects test requires a showing of competitive harm consistent with antitrust laws broadly.[538] To determine whether the volume rebates in *Brooke Group* adversely affected competition, the Court relied upon the predatory pricing framework used in analogous Sherman Act Section 2 cases.[539]

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[533] *See id*. at 177-79.

[534] *Id.* at 181.

[535] *Brooke Grp.*, 509 U.S. at 220.

[536] *Id*. at 215-16.

[537] *Id*. at 220.

[538] *Id.*; *see also supra* Section III.B.

[539] *Brooke Grp.*, 509 U.S. at 222 ("[W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson–Patman Act, two prerequisites to recovery remain the same."); *see, e.g.*, *Matushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 104 (1986).

While the Court acknowledged that the Robinson-Patman Act's requirement that there only "be 'a reasonable possibility' of substantial injury to competition before its protections are triggered" was less burdensome than the Sherman Act's requirement of "dangerous probability of actual monopolization," it nonetheless concluded that "whatever additional flexibility the Robinson–Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[540]

Though the Court recognized the importance of evaluating antitrust conduct using frameworks with a demonstrated capacity to effectively distinguish competitive and anticompetitive conduct, until *Brooke Group* was decided, the courts had simply used injury to competitors as the relevant Robinson-Patman framework. So the Court looked to a framework that had elsewhere proven to ferret out price discrimination and anticompetitive harm among competing sellers: predatory pricing. Predatory pricing occurs when prices are "below an appropriate measure of its [the allegedly harmed plaintiff] rival's costs" and there is a dangerous probability that the rival "recoup[s] its investment in below-cost prices."[541] That the *Brooke Group* Court harmonized the Robinson-Patman Act with a framework used to evaluate analogous conduct under the Sherman Act is consistent with standard canons of interpretation. Indeed, as Justice Scalia observed: "laws dealing with the same subject—being *in pari materia*—should if possible be interpreted harmoniously."[542]

Moreover, given the original motivation for Section 2 of the Clayton Act, it should not be surprising at all that the Court used the Sherman Act's predatory pricing framework to evaluate the volume rebates at issue in *Brooke Group*. As described in Section I, Section 2 of the Clayton Act was drafted out of a concern that the *Standard Oil* decision failed to condemn Standard Oil's area price discrimination conduct, as well as its receipt of drawbacks and rebates from the railroads.[543] But while the *Brooke Group* Court understood to look to the widely-accepted predatory pricing framework to evaluate competitive effects at the seller level of the distribution chain (*i.e.*, primary-line), there is still uncertainty as to which antitrust framework to use when evaluating anticompetitive conduct at the buyer level (*i.e.*, secondary-line).

To be sure, the *Brooke Group* Court's recognition that the Sherman Act's predatory pricing scheme was the appropriate framework to evaluate primary-line conduct grew out of a consensus that formed among scholars and practitioners suggesting as much.[544] Similarly, scholars have articulated a framework for evaluating buyer-side exclusionary conduct that can be used to

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[540] *Brooke Grp.*, 509 U.S. at 222 (quoting *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 (1983)).

[541] *Id.* at 221-24; *see, e.g.*, Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test* 81 ANTITRUST L. J. (2017) ("There are two overarching law and economics paradigms for analyzing exclusionary conduct in antitrust—predatory pricing and raising rivals' costs (RRC) foreclosure.").

[542] *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW, THE INTERPRETATION OF LEGAL TEXTS 252 (2012).

[543] POSNER, *supra* note 13; Klein, *supra* note 16; *supra* Section I.

[544] *See, e.g.*, *Bowman*, *supra* note 503, at 83-85.

evaluate secondary-line theories of harm.[545] Generally speaking, anticompetitive "overbuying" by large buyers involves significant purchases of an input with the purpose and effect of maintaining or gaining market power in the output market—or gaining monopsony power in the input market. While both results are theoretically possible, the appropriate focus for today's Complaint is whether favored retailers are overbuying inputs as an exclusionary strategy to raise disfavored retailers' input costs and accordingly gain market power in the wine and spirits market. Such conduct is referred to as *Raising Rivals' Costs overbuying* (RRC).[546]

The RRC framework addresses the situation where a firm's vertical conduct causes an increase in the costs of one or more rivals.[547] This framework can be used to analyze the competitive impact of a variety of vertical practices,[548] including the volume rebates that are at the heart of today's Complaint. Specifically, today's Complaint asserts that various favored buyers benefit from the receipt of volume discounts from Southern Glazer's. The RRC framework can be used to evaluate whether a favored retailer's receipt of the discounts raised a disfavored retailer's costs and ultimately "injures, destroys, or prevents" the ability of the disfavored retailer to compete.[549] If the favored retailer's receipt of the discounts does raise a disfavored retailer's costs, it will likely enable the favored retailer to exercise greater market power in the wine and spirits market—or even potentially monopolize that market—to the detriment of the disfavored retailer and consumers. For example, this result could occur if the favored firm's conduct caused the disfavored rival's costs to increase relative to what its costs would be in the absence of the conduct, harming the disfavored rival's competitiveness and leading to harm to consumers and the

[545] *See* Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669 (2005).

[546] *Id.*

[547] *See, e.g.*, Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L. J. 209 (1986) ("[W]e demonstrate that, in carefully defined circumstances, certain firms can attain monopoly power by making arrangements with their suppliers that place their competitors at a cost disadvantage. Our central argument is that claims of anticompetitive exclusion should be judged according to whether the challenged practice places rival competitors at a cost disadvantage sufficient to allow the defendant firm to exercise monopoly power by raising its price.").

[548] There have been noteworthy cases where firms with buyer power induce input suppliers to discriminate against its downstream rivals. *See*, *e.g.*, *In re Toys R Us, Inc.*, 126 F.T.C. 415, 610 (1998) ("It is noteworthy that the boycott restrained both intrabrand and interbrand competition in the retail toy market. Thus, we do not face the difficult balancing process of weighing a loss of intrabrand competition (often resulting from non-price vertical restraints) against benefits to interbrand competition."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

[549] *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 325 (2007) (plaintiff alleged that Weyerhauser attempted to cause input hardwood lumber prices to increase with the intent of driving competitors out of the market, allowing Weyerhaeuser to monopsonize the relevant input market and monopolize the relevant output market).

competitive process.[550] Faced with competitively impaired rivals, the favored retailer employing an RRC strategy could then increase its own price, to the detriment of consumers.[551]

Importantly, while harm to competition could result from conduct that potentially raises RRC concerns, the same conduct could also have potentially beneficial competitive effects. For example, exclusive dealing arrangements can improve investment incentives by both an input supplier and its downstream customer and potentially mitigate double marginalization concerns of the sort discussed earlier. Because of the potentially beneficial competitive effects from volume discounts (and similar conduct that gives rise to secondary-line concerns), determining that there is a net anticompetitive RRC effect requires an inquiry into whether the conduct in question has likely resulted in an overall diminution of competition. While it may not be defensible to say that discounting practices, which can in theory result in RRC effects, are immune from antitrust enforcement, it manifestly defies logic for today's Complaint to suggest that the mere presence of discounting is dispositive proof that there has been harm to competition.

An important part of this inquiry involves formulating an explanation for why each participant in the scheme would have an incentive to engage in conduct that enabled the favored retailer to exercise greater market power.[552] Thus, an RRC theory in this case would need to address whether there exists a coherent economic theory under which favored retailers, Southern Glazer's, and wine and spirits suppliers all individually have an incentive to participate in a set of pricing and discounting practices that would, ultimately, enable a set of favored retailers to charge supracompetitive prices. As discussed above, ordinarily suppliers have an interest in reducing their downstream customers' exercise of market power, and they accordingly may use a variety of contractual mechanisms to attempt to enhance downstream competition.

Discounts to downstream retailers for the purchase of additional units of a good are squarely in the universe of conduct that can have procompetitive effects. Applying the RRC framework to this case, therefore, would ordinarily require at least some inquiry into whether it is

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[550] For example, there were allegations in a Second Circuit case that the defendant, Alcoa, attempted to raise rivals' costs by overbuying bauxite, a critical input for Alcoa and its aluminum-making rivals. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945).

[551] As Professor Salop explains, "In *Socony Vacuum* the large oil companies ('majors') coordinated excessive purchases of distress gasoline from independent refiners. The goal of this overbuying was to stabilize the spot price of gasoline, which was used as an index for the price at which the majors sold to jobbers under their long-term contracts. However, if one views the jobbers and independent retailers also as downstream distribution rivals of the majors, then the conduct also raised the costs of competitors." Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 ANTITRUST L.J. 669, 670 n.6 (2005).

[552] A standard critique of early exclusive dealing cases was that they posited that downstream customers were complicit in their upstream supplier's effort to install itself as a monopoly supplier, when ordinarily these customers would benefit from competition among suppliers. More recent literature has identified circumstances where this critique does not necessarily apply, such as when a supplier can exploit coordination failures among its customers or when it is able to share rents that would otherwise be competed away if it faced competition. For a discussion of the role of coordination failures, *see, e.g.*, Eric Rasmussen, Mark Ramseyer & John Wiley, *Naked Exclusion*, 81 AMER. ECON REV. 1137 (1991). For a discussion of situations where a seller is able to profitably compensate some or all of its customers for exclusivity, *see, e.g.*, Ilya Segal & Michael Whinston, *Naked Exclusion: Comment*, 90 AMER. ECON. REV. 296 (2000); John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AMER. ECON. REV. 672 (2014).

likely that prices would fall and output would rise if Southern Glazer's, and perhaps other wine and spirits distributors, adopted a set of pricing and discounting practices consistent with the remedy the Majority appears to prescribe in today's Complaint. In other words, an RRC theory requires showing that a favored retailer's receipt of lower prices from Southern Glazer's places a disfavored rival at a sufficient cost disadvantage such that it allows the favored retailer to exercise market power. Put yet a different way, if a disfavored retailer's costs increase, it will reduce output.[553] Unlike predatory pricing, where the ultimate harm arises when a rival's ability to compete is eliminated entirely, a firm employing an RRC strategy to reduce a rival's efficiency can benefit from a relaxed competitive constraint, even if the rival remains in the market.[554] A weaker competitive constraint leads to increased prices and the ultimate concern under the RRC framework: consumer harm.[555] In fact, "[t]he main focus of the entire analysis should be placed on the impact on consumers in the output market."[556] Indeed, "consumer harm requires power over price, that is, the power to raise or maintain supra-competitive prices, as well as raising rivals' costs."[557] Accordingly, the RRC framework breathes economic coherency into the Commission's pursuit of secondary-line theories of harm and is consistent with the text of the last clause of Section 2(a)'s competitive effects language: that is, to satisfy a secondary-line claim, the recipient of the discriminatory price must "injure, destroy, or prevent" competition by increasing the cost of doing business borne by the disfavored retailers.

Employing the RRC framework when evaluating secondary-line cases would not only provide the Commission with an effective framework to evaluate anticompetitive conduct at the buyer level, it would also provide a framework to evaluate the exact type of conduct Congress was concerned with when it passed Section 2 of the Clayton Act. As described earlier, Congress was concerned with the rebates and drawbacks Standard Oil procured from the railroads. Indeed, as Professors Granitz and Klein have demonstrated, it was Standard Oil's raising rivals' costs tactic—through the use of rebates and drawbacks—that allowed Standard Oil to acquire and maintain its monopoly in refining oil.[558] Accordingly, since it was Standard Oil's receipt of rebates and

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[553] Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AMER. ECON. REV. 267, 267 (1983).

[554] *See* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 385-86 (2017).

[555] *See* Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AMER. ECON. REV. 267, 270 (1983); *see* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 376 (2017) ("The RRC foreclosure paradigm generally describes exclusionary conduct that totally or partially 'forecloses' competitors from access either to critical inputs or customers, with the effect of causing them to raise their prices or reduce their output, thereby allowing the excluding firm to profit by setting a supracompetitive output price, with the effect of harming consumers.").

[556] *Id.* at 372-73; *see* Patrick DeGraba et al., Bureau of Economics, Fed. Trade Comm'n, *Conditional Pricing Practices—A Short Primer* (Sep. 2017), https://www.ftc.gov/reports/conditional-pricing-practices-short-primer (explaining that quantity discounts, like those used in this case, are conditional pricing practices).

[557] Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 391 (2017) (quoting Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Gain Power over Price*, 96 YALE L.J. 209, 242-43 (1986)).

[558] Granitz & Klein, *supra* note 16 ("The evidence is overwhelming that Rockefeller expanded his position in refining by raising rivals' costs"); Crane, *supra* note 16.

drawbacks that led Congress to adopt Section 2 of the Clayton Act, it is appropriate that we use the RRC framework to evaluate secondary-line theories of harm.

Surprisingly, no effort is made in today's Complaint to allege facts explaining why Southern Glazer's would want to effectively work with favored buyers to drive out half of Southern Glazer's customers and allow the favored buyers to increase their potential market power over Southern Glazer's.[559] Nor does it provide evidence that the favored retailers are in fact driving disfavored retailers out of business. Instead, the house of cards the Complaint has built is based entirely on its patently absurd assertion that mere price differences diminish competition in the retail sale of wine and spirits.[560] Indeed, the Complaint cites to neither evidence nor analysis establishing that Southern Glazer's pricing practices are better understood as a mechanism for reducing downstream competition rather than having the precise opposite effect.

The threshold question the Majority ignores in today's Complaint is whether a favored retailer's receipt of the alleged discriminatory price from Southern Glazer's increases a competing disfavored retailer's per unit cost of the relevant product. For the Commission, getting the answer could be straightforward: where possible, simply evaluate the per unit cost of the relevant product a disfavored retailer paid before the favored retailer entered the market. If recent entry has not occurred, then the Commission should evaluate changes in prices paid over time—*i.e.*, evaluate whether an increase in the favored retailer's marginal discount increased the per unit cost to the disfavored retailer. Evaluating secondary-line harm consistent with established economic theories harmonizes secondary-line theories of harm with the *Brooke Group* Court's approach in primary-line cases. Such an approach also harmonizes the Commission's approach to questions across the Clayton Act, *i.e.*, Section 3 and Section 7.

Based on the foregoing analysis, if it is determined that the disfavored retailer's per-unit cost is unaffected by the presence of a favored retailer, then by definition the alleged price discrimination cannot injure, destroy, or prevent competition between the observed paired retailers since it is not the type of injury that, if allowed to grow, would substantially lessen competition.

In sum, the plain text and structure of Section 2's competitive effects language, and consistent with how analogous conduct is evaluated under other antitrust statutes, suggest secondary-line theories of harm such as those alleged in the Complaint should be analyzed under the raising rivals' costs framework.

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[559] *Cf.* Benjamin Klein, *The "Hub-And-Spoke" Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012).

[560] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved.").

V. ANY REMEDY IMPOSED BY THE COURT—IF WORKABLE AT ALL—MAY SUBSTANTIALLY LESSEN COMPETITION.

The Complaint seeks injunctive relief and asks that a reviewing court order Southern Glazer's to stop violating Section 2(a) of the Robinson-Patman Act,[561] as construed and interpreted by the Majority. Plainly, the Majority's remedy, based upon its view of cognizable cost justifications, essentially requires that Southern Glazer's implement uniform prices. Specifically, the prayer for relief asks the court to:

> Order Southern to cease and desist from price-discriminating, within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its products to any purchaser at a net price higher than that charged to any competing purchaser, where the discrimination may cause competitive harm as contemplated by the statutory language . . . .[562]

If granted, such an order, in light of how broadly the Majority's complaint defines competitive harm, will likely require Southern Glazer's to charge uniform prices to all retailers. Obviously, no such order would bind Southern Glazer's rivals, who would remain free to charge different prices.

As I explained above,[563] uniform pricing can have anticompetitive effects, including increased prices and decreased output.[564] Given that the uniform prices would result from a court order, threat of contempt actions and monetary relief may cause a chilling effect that extends beyond the strictures of the order, potentially dissuading procompetitive behavior—*e.g.*, competitive price cutting, by not just Southern Glazer's or even just its competitors, but other suppliers and retailers across the economy who will look at the order and potentially change their conduct. Thus, because we find ourselves in a scenario where the Commission is bringing an enforcement action with no evidence of harm to consumers or competition, rather than preventing harm by bringing an enforcement action, we may cause affirmative harm to consumers if the Commission prevails and obtains its desired injunctive relief.

Setting the chilling effect issue aside, it is unclear whether we could effectively monitor such an order, particularly with the current Majority's self-inflicted budget woes. Put simply, I am unable to imagine a world where effective monitoring could be done. Nor have I seen a plan that even outlines how such an injunction would be monitored. Based upon the Majority's Complaint—and because of the Complaint's *per se* treatment of price differences—at a minimum, over many years the Commission would have to engage in detailed pricing review and oversight where it compares, one at a time, the different prices Southern Glazer's provides to each retailer for each product. And then somehow the Commission would have to make comparisons for relevant paired

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[561] *See* Compl. Prayer, ¶ 10.

[562] Compl. Prayer.

[563] *Supra* Section III.C.

[564] *See, e.g.*, Daniel O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J. L. ECON & ORG. 296 (1994) (showing through a model that imposing uniform pricing results in prices increasing for all retailers in a model of a monopolist upstream supplier and competing downstream retailers).

retailers—again, with no guiding principles to draw geographic markets since there are none in today's Complaint—to determine whether an offending price discrimination has occurred. Plus, the Commission would have to assess competitive harm, which at a minimum, even based upon the Majority's Complaint, would also require assessing cost justifications and efforts to meet competition. This level of government oversight—*i.e.*, central planning—far exceeds traditional antitrust remedies, let alone standard Commission practice. For this reason, among the many others I identify, I do not believe this enforcement action is in the public interest—even if I believed the law had been violated.[565]

Moreover, since the Complaint's theory of harm is limited to allegations of price differences, any remedy in this matter would compel Southern Glazer's to charge effectively uniform prices to all retailers and forbid Southern Glazer's from passing on supplier discounts to retailers. To make matters worse, the Complaint does not remotely attempt to grapple with the competitive costs and benefits of impeding the distribution of discounts to downstream retailers. Indeed, the discounts serve two critical purposes that appear to be lost on the Majority. *First*, suppliers use discounts tied to purchases at the retail or consumer level to align incentives across the distribution chain. The three-tiered structure required by state-law requirements—where the supplier, distributor, and retailer must be separate entities—results in the familiar double marginalization problem. Double marginalization occurs when each firm in the supply chain has some level of market power and charges a markup above its costs. In this case, the supplier, distributor, and retailer each charge a markup so long as they have some level of market power.[566] By granting discounts conditioned on retailers purchasing or selling more units, suppliers can mitigate the double marginalization problem and create incentives for output-increasing efforts.[567] *Second*, supplier discounts tied to specific sales goals reduce Southern Glazer's exposure to financial risk while still providing sufficient incentives for downstream retailers to invest in selling the supplier's products.[568]

Forcing Southern Glazer's to redistribute the supplier discounts evenly across all downstream retailers—as envisioned by the Complaint[569]—would likely harm the competitive process. Suppliers of wine and spirits compete with other suppliers by attaching discounts to certain quantity purchases or sales. For Southern Glazer's retailer customers to benefit from the quantity discounts, the retailers must purchase or sell sufficiently large volumes. And to incentivize retailers to promote the products where suppliers have offered the discounts, Southern Glazer's passes the discounts to the retailers, thereby lowering the retailers' acquisition costs. Taken together, the volume discounts increase interbrand competition—that is, competition between suppliers of wine and spirits. As interbrand competition increases, the result is lower prices and more output, again the hallmark of competition.

[565] 15 U.S.C. § 45(b).

[566] It goes without saying that the downstream chain buyers in this matter enjoy some level of buyer power.

[567] *See*, *e.g.*, Daniel P. O'Brien, *All-units Discounts and Double Moral Hazard*, 170 J. ECON. THEORY 1 (2017).

[568] *Id*.

[569] *See* Compl. Prayer, ¶ 10.

If a court grants the relief requested by the Complaint and prohibits Southern Glazer's from offering discounts to high-volume retailers who meet certain volume targets, incentives will change. To be sure, it is unclear how Southern Glazer's would change the way it offers discounts to downstream retailers, but it could likely adopt some version of the following four options: (1) distribute the discounts ordinarily given to the high-volume retailers who reach the volume targets to all retailers (even the low-volume retailers); (2) increase prices for the high-volume retailers in order to avoid having to extend the lower prices to the low-volume retailers; (3) abandon quantity discounts entirely; or (4) only make sales to high-volume retailers (and avoid the reach of the Robinson-Patman Act, similar to what Morton Salt did). Each of these options would reduce the incentives for retailers to engage in promotional competition for the suppliers' products—that is, the requested relief would decrease interbrand competition. Consequently, a potential outcome in any of the scenarios would be decreased interbrand competition, lower output, and higher prices for consumers.

The dynamics at play here are analogous to the circumstances in *Volvo*. Southern Glazer's—along with its competitors—carries a wide variety of brands and each of those brands offers similar forms of supplier discounts. Interbrand competition between profit-maximizing suppliers drives the pricing practices employed in the wine and spirits industry—*e.g.*, through the use of volume discounts. In *Volvo*, the plaintiff, a Volvo dealer, tried to condemn Volvo's cost cutting when Volvo granted discounts to other Volvo dealers (plaintiff's rivals) who were competing against other dealers that sold non-Volvo trucks (*i.e.*, interbrand competition). The court was unconvinced:

> Interbrand competition, our opinions affirm, is the primary concern of antitrust law. The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder [*i.e.*, inconsistent with antitrust laws], we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition* . . . ."[570]

Understanding that "a vertical practice, such as a change in a supplier's distribution system, may be a 'simultaneous reduction of intrabrand competition and stimulation of interbrand competition,'" the Court "declin[ed] to extend Robinson-Patman's governance" to condemn conduct that stimulates interbrand competition.[571]

By authorizing this Complaint, the Majority contravenes the *Volvo* Court's holding that the Robinson-Patman Act must be read to promote, not thwart, interbrand competition. As a result, the Majority has dramatically extended the Robinson-Patman Act. In fact, today's Complaint seeks relief likely *more problematic* than the relief contemplated in *Volvo*. Forcing Southern Glazer's to discontinue supplier discounts—without evidence of harm to competition and consumers—for high-volume *retailers* may actually harm *both* intrabrand and interbrand competition. Without volume discounts, retailers supplied by Southern Glazer's will have less incentive to compete against each other for sales of the same product (*i.e.*, intrabrand competition). And at the same

[570] *Volvo Trucks North America, Inc.*, 546 U.S. at 180-81 (internal quotations and citations removed).

[571] *Id.* at 181 (quoting *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52).

time, wine and spirit suppliers would cut back promotional efforts that drive competition with other wine and spirit suppliers (*i.e.*, interbrand competition). Taken together, by condemning Southern Glazer's pricing practices without evidence of harm to competition, the Commission ignores the Supreme Court's most recent Robinson-Patman Act holding in *Volvo*, along with Supreme Court precedent that cautions against interpretations of the Act that "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[572]

[572] *Automatic Canteen Co. of America,* 346 U.S. at 6.

VI. CONCLUSION

Commissioner Philip Elman once observed that if "the Robinson-Patman Act as administered serves mainly as an obstacle to effective competition, it is surely a matter of concern."[573] Today's Complaint reinvigorates an interpretation of the Robinson-Patman Act that should cause great concern. To make matters worse, the Complaint presents competition as an exercise in equality of outcome, attempting to preserve the interests of competitors at the expense of the American people. But "social security is not the province of this Commission. The only way to have competition is to compete."[574]

I respectfully dissent.

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[573] Phillip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal* 42 WASH. L. REV. 1, 3 (1966).

[574] *National Lead Co.* 49 F.T.C. 791, 887 (1953).