Price Discrimination and Labelling

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The Robinson-Patman Act applies primarily to the sales of goods “of like grade and quality.” To determine the scope of the Act's

1. 15 U.S.C. § 13(a) (1970). This article is concerned exclusively with sections 2(a) and 2(b) of the Robinson-Patman Amendments to the Clayton Act (15 U.S.C. §§ 13(a), (b) (1970)). Section 2(a) provides:

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 of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Id. § 13(a) (emphasis in original). Section 2(b) provides:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Id. § 13(b) (emphasis in original).
applicability to sales by a seller of brand-name goods at one price and sales by him of unbranded or "private label" goods at a different price, it is crucial to understand the extent to which different brand names will be seen as creating differences in the grade or quality of the goods to which they are attached.²

The label-differentiation question arises in both primary- and secondary-line cases.³ In each class of cases a focus of attention has been upon the "worth" of the label.⁴ The prevalent view is that discrimination which does not exceed the label's worth is lawful because it does not adversely affect competition.⁵ A competing viewpoint urges that when the worth of the label becomes sufficiently great, the labelled product acquires a "grade and quality" different from that of the unlabelled product.⁶ Although both approaches focus upon the "worth" of the labelled product, it is a thesis of this article that the "worth" of the label should not generally be of major significance in either the primary- or secondary-line cases.

Early in the life of the Robinson-Patman Act, the Federal Trade Commission took the position that physically similar goods were "of like grade and quality," despite differences in the brand names under which they were sold.⁷ The earlier Commission decisions, however, did not openly confront the question of how brand differences were related to the quoted statutory phrase. Thus, in Goodyear Tire & Rubber Co., a primary-line case⁸ decided by the Commission under the

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². The discussion uses the terms "branded" and "labelled" interchangeably. In the usage employed in the text, products which are referred to as "branded" or "labelled" are those sold under brands or labels which carry significant economic values. Products which are referred to as "unbranded" or "unlabelled" are not necessarily sold without any identifying brand or label. Rather, they include so-called private-label products and those sold under other brands or labels which carry no significant economic value.

³. Actual or potential injury to competition in a market in which a discriminating seller sells is generally referred to as primary-line injury, while actual or potential injury to competition in a market in which the discriminating seller's customers sell is generally referred to as secondary-line injury.

⁴. See Borden Co. v. FTC, 381 F.2d 175, 180, 181 (5th Cir. 1967); Report of the Attorney General's National Committee to Study the Antitrust Laws: 158-59 (1955).

⁵. Borden Co. v. FTC, 381 F.2d 175, 181 (5th Cir. 1967); Report of the Attorney General's National Committee to Study the Antitrust Laws 159 (1955).


old section 2 at the time Congress was debating the Robinson-Patman legislation, the Goodyear Company conceded that the private-label tires which it sold to Sears, Roebuck & Co., were "comparable in quality" to its own Goodyear-label tires which it sold at higher prices to its own dealers. In other cases under the amended section 2 where the Commission found unlawful discrimination, effected by lower prices on private-label goods than were offered on goods bearing the seller's regular label, the Commission merely asserted, in the conclusory language of the statute, that the differently labelled goods were "of like grade and quality," but offered no rationale for its finding.

The Commission's position has support in the legislative history of the Robinson-Patman Act which contains reference to, and approval of, the Commission's Goodyear decision. The Commission's position is further supported by the 1955 Report of the Attorney General's Committee to Study the Antitrust Laws, which expressed the concern that the Act's price-discrimination prohibitions not be evaded by a mere difference in the labels which a seller attached to his wares. There appears to be general agreement among the Commission and its critics that the Act should not be read so that a mere difference in labels would legitimize price discrimination which the Act would otherwise forbid. This general agreement necessarily encompasses treating as "of like grade and quality" physically identical goods sold by a single seller under different labels, so long as such labels do not carry any significant economic value.

The major dispute over the last 20 years has been over the proper treatment of a product which bears a label having measurable economic value in the sense that the demand for the labelled good is significantly higher than the demand for the same good without that label. A minority of the Attorney General's Committee argued in 1955 that recognition of this economic or commercial value required that a good with an economically valuable label be treated as of a different grade or quality than a good without it. In assessing similarities or differences in the grade or quality of goods, differences in consumers' 

10. 22 F.T.C. at 290.
14. Id. at 158.
acceptance of the goods were considered to be as important as physical differences.

The Attorney General's Committee. The majority of the Committee did not deny the economic reality of product differentiation, including preferences caused by heavy advertising, but it objected to recognizing this differentiation in construing the "like grade and quality" phrase of section 2 (a). Rather, the majority preferred to find advertised and unadvertised goods to be of like grade and quality while recognizing the economic appeal of an advertised brand in applying the anticompetitive tendencies and cost-justification provisions of the Act.\(^\text{15}\)

The majority members justified their position on several grounds. First, they asserted that a marketing comparison of intrinsically identical goods in applying the "like grade and quality" provisions might "enmesh the administrators of the statute in complex economic investigations for every price discrimination charge."\(^\text{16}\) The force of this objection, however, depends upon the extent to which physical identity would be taken, under the approach to which the majority objected, as establishing a presumption of "like grade and quality," with the respondent bearing the burden of establishing a marketing difference. Adopting the latter approach would tend to involve the administrators in complex economic investigations to no greater degree than utilizing physical identity as the test of like "grade and quality," while permitting a defense of no tendency to lessen competition—based on marketing differences—with the burden of proof on the respondent. If, however, the Commission must demonstrate a tendency to lessen competition, then the exact significance of basing a marketing-differences defense on the tendency-to-lessen-competition criterion rather than on the "like grade and quality" provision, is unclear. Second, the majority thought that the preservation of physical identity as the test of "like grade and quality" prevented evasion of the Act by "artificial variations in the packaging, advertising or design" of the goods sold.\(^\text{17}\) However, this reasoning is specious. The majority and minority agreed that labels carrying no significant economic value should not legitimize otherwise illegal price discrimination as this would be placing form over substance. In the minority's view, it was exactly the "substance" of the marketplace which ought to be preserved from subservience to the physical "form" of the product. The minority urged that only

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15. Id. at 158-59.
16. Id. at 158.
17. Id.
those labels which possessed a demonstrable economic value, in the sense that the labelled product possessed a significantly higher demand than the unlabelled product, be deemed to create a difference in grade or quality.

Finally, the majority asserted that by preserving a physical test under the "like grade and quality" phrase and by evaluating marketing differences under the tendency-to-lessen-competition and cost-justification provisions, the Commission would be able to attack "exorbitant discriminations favoring private brand customers over the seller's regular distributors." The majority seems to have been asserting that so long as a physical test for like grade and quality was retained, the Commission would possess the power to decide whether the price spread between labelled and unlabelled products was too great (under the tendency-to-lessen-competition or cost-justification clauses); whereas if a heavily advertised brand were taken as creating a difference in grade or quality, the Commission would lack such power. The majority was correct in this aspect of its rationale. The Act's structure requires that in order for the Commission to exercise a supervisory power over the extent or scope of a discrimination the sales compared must be of goods deemed to be of "like grade and quality." The extent to which a price spread between advertised and unadvertised products would be lawful and the criteria appropriate for assessing the lawfulness of the spread, however, are problematical.

The Borden litigation. The differing positions within the Committee were echoed in the Borden litigation of the 1960's. In that litigation the Commission rejected the respondent Borden Company's assertion that evaporated milk sold under the Borden label and that sold under private label were of different grades or qualities and ordered Borden to cease selling private-label evaporated milk at prices below those at which it sold its Borden-label milk. The Fifth Circuit adopted a position similar to the minority of the Attorney General's Committee and reversed. The court indicated that different labels might lack economic significance, in which case the court would refuse to attach legal consequences to them. But asserting that when

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18. Id. at 159.
20. 62 F.T.C. at 182, 193; id. at 181. The Commission expressed willingness, however, to permit differentials among brands which could be cost justified. Id. at 181.
"labels are proven to have demonstrable commercial significance... they can change the grade of a product," the court held that the Borden label was commercially significant. The court therefore concluded that the private-label and the Borden-label milk were of different grades or qualities and that no violation of section 2(a) had occurred.

The Supreme Court reversed the Fifth Circuit and remanded the case to that court. While the Court's opinion was reminiscent of the majority position of the Attorney General's Committee, the Court added a note of sophistication to the dialogue. In effect, the Court challenged the argument that a price differential necessarily creates a different "grade" of good. The Court reasoned that if such were the case, a price differential would be self-justifying and any amount sold under one brand would differentiate that brand in "grade" from sales of the same good under other brands. Under such an approach, any seller would be able to discriminate at will merely by attaching different labels to goods sold at each price level.

On remand, the Fifth Circuit again set aside the Commission's order, this time on the ground that no tendency to lessen competition existed. The court reached this result with respect to secondary-line competition by finding that no competitive advantage was conferred on the buyer of the lower-priced, private-label milk. Its reasoning followed that of the majority of the Attorney General's Committee, and it nicely skirted the earlier Supreme Court opinion. The Fifth Circuit held that the price differential could not confer a competitive advantage when it did no more than reflect consumer preferences. If the Fifth Circuit had held that a brand price difference necessarily had no effect on competition, it would have been in conflict with the Supreme Court, which had held that brand price differentials could not be self-justifying. The Fifth Circuit brought its decision into harmony with the prior Supreme Court ruling by holding that brand differentials may or may not tend to lessen competition depending on whether they are too large. In dealing with brand-name price differentials the Fifth Circuit accepted the Supreme Court's position that price differentials on differently-branded goods could not be self-justi-

22. 339 F.2d at 137-38.
25. Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967).
26. 381 F.2d at 181.
27. 383 U.S. at 644-45.
fying. However, it held that the justification depended upon the extent of the differential. In so deciding, the court accepted the propriety of a brand price differential so long as the price differential reflected the difference in worth between the two products. The differential in worth was seen by the Fifth Circuit as a differential in "consumer appeal."[28]

Measuring differences in "worth." It now becomes necessary to address the problem of how the differences in worth between two brands or between labelled and unlabelled products can be measured. Does the very fact that the "public" will pay more for a labelled product than for an unlabelled product mean that a price spread between the two products measures the difference in their worth and, therefore, that no advantage accrues to the buyer of the lower-priced product? If so, then the court in *Borden* may be correct in finding that no "injury" to secondary-line competition is likely to result from the price difference. If this approach is taken then, it is legitimate to ask when, if ever, a price difference between a private brand and an advertised brand can be unlawful. The response would be: When the price difference exceeds the difference in worth of the two products. But if the very fact that the public is paying two prices is conclusive evidence of their difference in worth, then this analysis is circular. The Supreme Court condemned reasoning of this type in applying the "like grade and quality" provision to goods sold under different labels at different prices.[29]

If any credence is to be given to the assertion that a price differential between a labelled and an unlabelled product is lawful when it equals, but not when it exceeds, the difference in worth between the two products, some method of measuring their relative worths must be found. If a seller sold a major portion of his unlabelled goods at one price, but sold some of his unlabelled goods at a lower price to a few large customers, then it might be possible to view the price at which the major portion of the unlabelled goods were sold as establishing their worth. The sales of the unlabelled goods to the few favored customers would confer on them an advantage over those buyers who bought the unlabelled goods at a higher price. The favored customers would gain a similar advantage over buyers who purchased a labelled

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28. 381 F.2d at 181.
29. 383 U.S. at 644-45. The problem of measuring the "worth" of a brand is obviously complicated by the fact that at different differentials over similar unbranded products different amounts of the branded product will be sold. For some buyers, the brand may be worth more than for other buyers. Compare the Supreme Court's unsuccessful attempt to articulate an analogous concept in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503-04 (1969).
version of the product from that seller at a price higher than any price at which he sold unlabelled items. In this situation, it could be said that the difference in price between the labelled goods and those unlabelled goods sold to the large favored customers exceeded the difference in "worth" between the labelled and unlabelled products. However, since the seller would be discriminating in the sale of his unlabelled product, an offense often might be established in these circumstances without even considering the sales of the labelled product. Hence a measurement of the difference in worth between the labelled and unlabelled products might here be superfluous.30

When a seller sells his unlabelled product at a standard price to all customers, he cannot be accused of discriminating in the sale of his unlabelled products. However, according to the Fifth Circuit and the majority of the Attorney General's Committee, this seller could be accused of discriminating between buyers of his labelled product and buyers of his unlabelled product if the difference between the prices which he charges for the two products exceeds the difference in their worths. If buyers do not distinguish the unlabelled product from similar products offered by other firms, then there may be a basis for calculating a market price by which to measure the worth of the unlabelled product. Were a seller to sell his unlabelled product below that price, then there would be a basis for finding that the price differential between the labelled and unlabelled products exceeded the difference in worth between the two products.

Such an analysis may have been the basis for the Commission's objection to Borden's private-label selling. The Commission may have felt that Borden's private-label prices were below the normal "market" level for unlabelled milk and, hence, that the differential between the Borden-label product and the private-label product exceeded the difference in worth (which would be measured by the difference between the Borden-label milk and the general market price for unlabelled milk). This approach would require the Commission to attack private-label prices which were allegedly below market level even though the seller sold all of his unlabelled goods at a single price. By focusing its attack on the secondary-line effects of such pricing, the Commission probably hoped to avail itself of the presumption established by the Supreme Court in *FTC v. Morton Salt Co.*31 that competitive injury

30. Measurement of the worth of the brand might be necessary, however, to establish injury to buyers of the branded product who competed with the favored large buyers of the unbranded product.

arises merely from the fact that sales of a product were made to competing customers at substantially different prices. This would enable the Commission to avoid any inquiry into the actual effects of such pricing.

The Borden Company, however, avoided the impact of this presumption and defeated the Commission’s claim of secondary-line harm by showing that it would sell unlabelled milk to any buyer who wanted it. The general availability of the Borden private-label milk protected all dealers against unfair advantages accruing to their rivals because of the latter’s access to low-priced Borden private-label milk. No milk dealer handling the Borden labelled milk need to have lost sales because a rival was selling the private-label milk, even at a price below its “worth,” since he also had access to the unlabelled milk at the same low price.

This disposition of the secondary-line harm issue is instructive. Secondary-line harm is most likely to occur either when sales of the private-label product are not made at the same prices to everyone, or when sales of the unlabelled or private-label product are made to only one or to a few favored customers, as in the early Goodyear case. Analyses of price differentials between labelled and unlabelled products generally focus upon justifications for the price premiums demanded for labelled products. However, such analyses are misleading because the harm, if any, is caused by the low price of the unlabelled product. Following the Fifth Circuit’s direction, the inquiry, for secondary-line purposes, should determine whether the low price asked for the unlabelled goods was available to all dealers buying the un-

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32. The Commission conceded that there was no evidence that Borden refused to sell private-label milk to any customer who requested it. 383 U.S. at 661 n.20 (Stewart, J., dissenting); 381 F.2d at 178, 180; cf. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 389 F. Supp. 1334, 1341 (N.D. Cal. 1975).


labelled goods. If the unlabelled goods were available, then analysis of the relative "worths" of the branded and unbranded products ought to be irrelevant. If they were not available, then inquiry into relative worth again seems basically unproductive. If the seller's unlabelled goods are being sold at a prevailing price and if similar goods can be obtained elsewhere for the same price, then no dealer is disadvantaged because his rivals have access to lower-priced goods. If, however, the seller is selling his unlabelled goods below the generally prevailing price at which physically identical goods can be obtained from other suppliers, then his sales of these lower-priced goods confer advantages upon those buying his goods. Furthermore, these advantages cannot be duplicated by rival dealers to whom he does not sell the unlabelled product. If he also sells a labelled product to those rival dealers at his standard price for his labelled product, then he should be subjected to the Morton Salt presumption. The competitive injury incurred by the disfavored dealers, however, is not properly measured by the "worth" of the label attached to the products sold to them. Rather, it is measured by the difference between the low price at which the seller offers the unlabelled product and the generally prevailing price for that product.

Primary-line aspects. Harm on the primary line—which was the Commission's predominant concern—could exist only when Borden's private-label sales were lower in price than the private-label sales of Borden's competitors. The Fifth Circuit viewed the evidence as showing that Borden's rivals were injured because Borden sold its private-label milk cheaper than they did. But the evidence did not show that the harm to the rivals occurred because Borden maintained a price difference between the two kinds of milk. Thus, the Fifth Circuit found the requisite causal connection between the discrimination and the competitive harm to be missing.

It is apparent that Borden's conduct can be described in causal terms which link its discrimination to potential seller-line injury if its higher-priced sales of its premium brand milk is accepted as a given. For example, if private-label milk of its rivals is selling for $2.00 per case, potential injury to seller-line competition could occur, in the

36. See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 703-04 (9th Cir. 1964); F. Rowe, supra note 35, at 186, 193-95.
37. See not 31 supra.
39. Borden Co. v. FTC, 381 F.2d 175, 178, 180 (5th Cir. 1967).
40. 381 F.2d at 180.
court's view, if and when Borden undercuts its rivals by selling private-label milk at $1.50 per case. But the act by which Borden sells private-label milk for $1.50 is the same act by which Borden sells private-label milk for $1.00 less than it charges for its Borden-label milk, and it is the $1.50 sales which the court admitted caused injury to Borden's rivals. So viewed, the lower-priced sales constituted the act of discrimination which "caused" the harm to Borden's rivals.

The Court, however, demanded more than this type of causation. It apparently required that a causal connection be shown between the level of the higher price to Borden-brand customers and the level of the lower price to the private-brand customers. The court was almost asking—in the classic attitude of anti-price-discrimination crusaders 41 —whether the higher brand price in some way "subsidized" the lower price to private-label customers. This question is not always easily answered. If revenues generated by sales of the labelled product covered all of the fixed charges associated with production, it is possible that a producer would find it profitable to sell his private-brand product for a price below his average production cost. This course of action would maximize the seller's profits if the below-average-cost selling price of the unlabelled product was the highest price at which he could dispose of his excess production. 42 The receipts from the below-average-

41. A "subsidy" analysis of discriminatory pricing has long found favor among supporters of the price-discrimination law. At the time of the enactment of the original section 2 of the Clayton Act (later amended by the Robinson-Patman Act), multi-market sellers were perceived as subsidizing below-cost operations in competitive markets from monopoly prices in other markets. S. REP. No. 698, 63d Cong., 2d Sess. 3 (1914); H.R. REP. No. 627, 63d Cong., 2d Sess. 8-9 (1914). When the Robinson-Patman Act was enacted, chain stores and other large buyers were perceived as coercing their suppliers—who were suffering from excess capacity and the pressure of large fixed costs—into offering their goods at marginal-cost prices and then recouping their unit-cost deficits from sales at higher prices to smaller customers. See S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. REP. No. 2287, 74th Cong., 2d Sess. 8 (1936). See also, e.g., 80 Cong. Rec. 6621, 6622, 7324 (1936). See also International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 725 n.32 (5th Cir. 1975); Borden Co. v. FTC, 381 F.2d 175, 180 (5th Cir. 1967); In re Dean Milk Co., 68 F.T.C. 710, 808-09 (1965) (Elman, J., dissenting), aff'd in part and rev'd in part, 395 F.2d 696 (7th Cir. 1968).

42. See M. ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY 142-49 (1959). Adelman makes the point that a seller of a brand-name product who has covered his fixed costs on sales of that product and who still experiences excess capacity will find it profitable to employ his excess capacity in the production of goods which can be sold for any price above the incremental cost of producing them, i.e., their sales price need not cover an equally allocated share of total (fixed and variable) costs. This is a slight oversimplification which is strictly true only if sales in the higher-priced market are taken as given or if marginal costs are constant. Total profits would be maximized in a strict sense if price and volume were set in both the higher- and lower-priced markets interdependently. See J. ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 179-202 (1933). Recently the Fifth Circuit has come close
cost sales would add to his profits so long as they exceeded the marginal cost of producing the unlabelled product because the fixed charges would have been fully recovered in the sales receipts from the labelled product. In this situation, the receipts from the sales of the labelled item would be necessary to enable the seller to continue, over the long run, to sell the unlabelled item at the below-average-cost price. The receipts from the sales of the branded items thereby “subsidized” the lower-priced operations. The causal connection between the discrimination and the competitive harm, required by the Fifth Circuit in its second Borden opinion, would thus be established.48 This illustration is but one application of a general method of discriminatory pricing which is consonant with short-run profit maximization: setting the price in each market at the point consistent with equalizing marginal cost for total production with marginal revenue for each market.44

Much legal and economic literature,45 as well as much conventional wisdom, assumes that pricing for short-run profit maximization is the pricing norm in a competitive economic system. It is thus highly interesting that the subsidy approach to Robinson-Patman causation would tend to support a determination of illegality in a circumstance in which prices had been set under a short-run profit-maximization criterion. Moreover, when the price level in the lower-priced market is higher than average cost, a decrease in price in the higher-priced market which did not affect the volume of sales in that market—perhaps an unrealistic assumption46—would not cause a seller who sought

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43. More recently, the Fifth Circuit seems largely to have precluded itself from finding a subsidy when a seller's prices equal or exceed marginal cost. International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 724 n.25 (5th Cir. 1975).

44. J. Robinson, supra note 42, at 182.

45. See Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 703 (1975). These authors, while assuming short-run profit maximization as a norm, appropriately point out various circumstances in which deviations from the norm may be proper.

46. A decrease in price would, of course, be expected to increase the amount of the product which would be demanded in the marketplace so long as demand was not perfectly inelastic. But if marginal cost were rising, sales in the higher-priced market could not be increased without decreasing sales in the lower-priced market. Since a price reduction from the optimal level in the higher-priced market would decrease the net marginal return from sales in that market to a level below the net marginal return from sales in the lower-priced market, there is some reason to believe that a seller who (for whatever reason) was selling at a sub-optimal price in one market would not fulfill the demand for that product in that market at the sub-optimal price. To do so would replace sales producing a greater net marginal return with sales producing a smaller net marginal return.
to maximize his short-run profits to increase his price in the lower-priced market. Nor would any increase in price in the lower-priced market result from a decrease in price in the higher-priced market which did affect the volume of sales in that market in a circumstance of constant marginal costs. These considerations seem to weaken the "causal" connection between the high prices and the low prices which divert sales from rivals. Under Mrs. Robinson's classic approach to price discrimination, the price level in each market is basically independent of the price level in the other market. The price level in each market is chosen to maximize operating profits in that market. The price levels in the two markets are related only through their effect on volume sold which, in turn, affects the total level of production. Once volume is determined, however, reduction of the price in the higher-priced market would not exert an upward pressure on price in the lower-priced market. It is only when the price in the lower-priced market is below average cost that it begins to be realistic to speak of a subsidy. The subsidy does not affect the level of prices in the lower-priced market since so long as the firm sells in that market, the firm's price in that market would in any event be set at its existing level in order to maximize net operating revenue. Rather, the "subsidy" is one which keeps the firm in an aggregate profit position despite its below-cost sales in one market.

Since the "below-cost" sales add to the firm's profits, "subsidy" is not the best descriptive term. The "subsidy" does not seem to affect the price level in the lower-priced market nor does it compensate the firm for unprofitable operations. It merely permits the firm to continue in business and, over the long run, to make some sales which do not earn sufficient revenue to cover their pro rata share of fixed production costs. This situation exemplifies the type of marginal-cost pricing which is feasible for a firm selling in two or more markets and

47. Price in any market is a function of marginal revenue in that market and marginal cost. So long as the two markets are independent, marginal revenue in the lower-priced market will not be affected by occurrences in the higher-priced market. And when total volume is unchanged, marginal cost will be unchanged. Therefore, in a situation of constant costs, prices and sales in the lower-priced market will not be affected by a sales increase in the higher-priced market.

48. Sales volume in the lower-priced market would be determined by the offering price in that market which, in turn, would be set at the level which brought marginal revenue in that market and marginal cost into equality. When marginal cost is constant, a sales increase in the higher-priced market will not affect the level of marginal cost.

49. See J. Robinson, supra note 42.

50. Since sales in the lower-priced market add to the firm's overall profits (or decrease its deficit) so long as the revenues produced by those sales exceed the incremental costs incurred in making them, it is misleading to suggest that these sales are unprofitable.
which sometimes may give it an advantage over a rival whose sales are confined to a single market. In the long run both firms must cover their average costs. However, the former need cover, in any one market, only its marginal costs of operation while the latter must cover its total average cost in its only market of operations.51

At this point it is necessary to understand how the price level at which the unlabelled product is sold compares with the price at which rival goods are sold. If the firm's unlabelled product is being sold at the same rate as similar unlabelled products, then the higher price for the labelled product would have no impact on the price level at which the unlabelled goods were sold. They are sold at the going price—which is the only practicable price at which they can be sold. The availability of substitutes at that price would make it impossible to sell unlabelled products at a higher price, and so long as the going price can be obtained for the firm's entire production, it would be economically unwise to sell for less.

If, however, a seller cannot dispose if its excess production at the going prices of its rivals, it will seek to cut price to dispose of its product. Indeed, an examination of the "demand" for its unlabelled product may show a downward-sloping demand rather than a horizontal, perfectly elastic demand at the going price. If so, then this seller may find that profit maximization may occur at a point below the so-called going price. Such a firm may begin by offering concessions to selected customers.52 If it can dispose of its excess production through a combination of "going price" sales and discount sales, its total revenues are likely to be larger than they would be through a general price cut. On the other hand, if the price concessions are many and large and if the selling expenses incurred in obtaining discount sales are large, such a firm may eventually find that it can maximize its profits by openly reducing price across the board. This may be especially true when the firm's rivals are inhibited from matching the firm's price reduction.53 For example, Borden's prices from its southern plants may

51. See, e.g., Amalgamated Sugar Co., 54 F.T.C. 943, 945 (1958), where, in its opinion accompanying a consent order, the Commission expressed its concern that single-plant sellers were particularly vulnerable to geographic price cutting by multi-plant rivals.

52. The firm may offer concessions initially only to selected customers whose purchases are significantly large, rather than reduce price across-the-board to all buyers in order to retain pre-existing unit-profit margins on as large a sales base and for so long a period as possible. Stigler has suggested that oligopolists may offer concessions initially to large buyers as a means of reducing the chances that their rivals will learn of the concessions and respond to them with similar concessions. Stigler, A Theory of Oligopoly, 72 J. Pol. Econ. 44, 47 (1964).

53. A seller's demand elasticity would be expected to increase as rivals were in-
have been lower than rivals' prices because its rivals were located outside of the south and sold milk at a uniform delivered price throughout the nation. Borden, in pricing f.o.b. from its southern plants, would thus have had a natural freight advantage over its rivals in selling to southern customers. Since Borden would predictably have won any extended price contest in the southern region, its competitors may have decided to eschew price rivalry and to continue with their existing policy of selling at a uniform delivered price throughout the nation. In this instance, Borden's freight advantage aided its prediction of its rivals' behavior and increased the elasticity of the demand which it perceived for its unbranded product.

In these circumstances, the subsidy analysis discussed above, becomes relevant. To the extent that the lower-priced, unlabelled product is selling not only below market price but below average unit cost, a causal connection may be established between the discrimination, qua discrimination, and the low prices. In these circumstances the inquiry must focus on the actual and potential impact on rivals and upon the likely significance of this impact upon the maintenance of competition in the market place at a level of suitable intensity.

But in these primary-line injury cases—as in secondary-line injury cases—the connection between the seller's labels (or lack of them) with his discriminatory price structure generally will not be of primary significance. So long as the unlabelled product is selling below unit cost, the causal argument is likely to be the crucial one, and the causal argument turns upon the extent to which profitable sales are "subsidizing" below-cost sales. So long as the labelled product's price exhibited from matching his price reductions. See Bishop, Elasticities, Cross-Elasticities, and Market Relationships, 42 Am. Econ. Rev. 779, 786-89 (1952). See also E. Chamberlin, The Theory of Monopolistic Competition 90-91 (8th ed. 1962); R. Triffin, Monopolistic Competition and General Equilibrium Theory 100 (1940); cf. Markovits, Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare, 26 Stan. L. Rev. 493, 498 (1974), whose approach to oligopoly is largely based upon the relationships between demand elasticity and cross-elasticity.

54. 381 F.2d at 178-79.

55. That is, after the causal connection between discrimination and market effects is determined, it is necessary to evaluate those effects for their long-run consequences. In the Dean Milk Co. case, for example, the Commission stated, in effect, that primary-line injury would be found if the market effects of the discrimination would be likely significantly to increase concentration in the market. In re Dean Milk Co., 68 F.T.C. 710, 750 (1965), aff'd in part and rev'd in part, 395 F.2d 696 (7th Cir. 1968). See also Dean Milk Co. v. FTC, 395 F.2d 696, 709, 711, 714 (7th Cir. 1968); cf. Yale & Towne Mfg. Co., 52 F.T.C. 1580, 1598 (1956). Some attention to this matter is given in my work, Evolution of Standards for Assessing Primary-Line Injury Under the Robinson-Patman Act, March 6, 1976 (unpublished manuscript).

56. See text accompanying notes 29-37 supra.
ceeds unit cost, it can be seen as subsidizing below-unit-cost sales of the unlabelled product.57

The advertising expense approach to value. The Attorney General's Committee also recommended a second approach to the matter of brand-name price differentials. Under this approach a lower price for an unlabelled product than for a labelled product would be cost-justified by savings in advertising expenses.58 By this method, a price differential between labelled and unlabelled goods would be justified when the differential did not exceed the advertising costs incurred in marketing the labelled goods. This approach, however, appears inconsistent with the incentive to advertise. A firm advertises so long as the additional revenue which it expects to receive from the selling of an advertised product exceeds the extra costs it incurs from the advertising. The extra revenue spent by the firm must raise per-unit revenue by more than the firm's advertising expenditure allocated over its sales of the advertised goods. Otherwise, the advertising expenses will reduce, rather than increase, the firm's profits.59

57. In the situation described, the Commission or a court would be able to impute a causal connection between the discrimination and the market effects. The imputation of that causal connection would not be compelled, however. Robinson-Patman causality is discussed in my forthcoming article, Promotional Price Discrimination and the Robinson-Patman Act.

A caveat to the statement in the text might be entered here. The traditional approach to Robinson-Patman subsidy analysis would see below-cost sales (or even sales earning below normal profits) as subsidized by sales earning supracompetitive profits. Former Commissioner Elman, for example, taking this approach would find no subsidy when supracompetitive profits were not earned in sales of the higher-priced goods, See Dean Milk Co., 68 F.T.C. 710, 799-800 (1965), aff'd in part and rev'd in part, 395 F.2d 696 (7th Cir. 1968). Under this approach the "worth" of the product label could be thought relevant to determining whether the labelled product was earning greater than normal profits. "Normal" profits for the labelled product would be measured by the aggregate of (i) normal profits for an unlabelled product plus (ii) the "worth" of the label. If the labelled product was selling for a price which exceeded unit cost plus normal profits computed in this way, then it would be producing supranormal profits and could be seen as subsidizing the below-cost sales of the unlabelled product. But the very articulation of this kind of analysis exposes its artificiality. The relevant factors to subsidy of below-cost sales are profits from other sales—whether those profits be characterized as above or below normal. In this light the worth of the label has no significance. Moreover, the label is always worth the differential at which labelled goods can be sold above the price of unlabelled goods and higher-priced sales by the fact of their occurrence prove that worth. But although the "worth" inquiry is thus circular, it is irrelevant. A court which is unwilling to find a subsidizing effect in circumstances in which higher-priced sales produce profits and lower-priced sales at below-cost levels add to profits is employing the flexibility inherent in attributing causal connections to absolve such pricing on policy grounds. Cf. International Aid Indus., Inc v. American Excelsior Co., 517 F.2d 714, 723-25 (5th Cir. 1975).

58. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 159 (1955).

Brand-name differentiation in applying the "meeting competition" defense. While the Commission has apparently ignored brand differences as an element of price discrimination under section 2 (a), it has nonetheless recognized that an economic value attaches to advertised brand-name products in applying the "meeting competition" defense of section 2 (b). The Commission has asserted that the meeting-competition defense is unavailable to a seller of a heavily advertised product, which has generally commanded a premium price over lesser advertised brands, when that seller has attempted to lower price sufficiently to meet the lower prices of non-premium brands. According to the Commission, that defense is available to the seller of a premium-priced product to justify such conduct only when his price reduction does not impinge on the usual differential between premium and non-premium products.

The Commission has been criticized for recognizing the economic value of an advertised brand under the section 2 (b) meeting-competition defense while refusing recognition to that value in its interpretation of the "like grade and quality" clause of section 2 (a). However, the Commission has not necessarily been inconsistent. Its recognition of the economic reality of a customer brand preference under section 2 (b) does not automatically require it to conclude that an advertised product is of a different grade or quality from an unadvertised one. The Commission can admit that two items are the "same" product and of the same "grade and quality" without denying the economic reality of a differentiation within a larger product grouping. In its Anheuser-Busch, Inc. decision, for example, the Commission condemned Anheuser-Busch for discriminatorily reducing the price of its "Budweiser" premium beer in the St. Louis marketing area to the level of non-premium beers sold by three regional breweries located in St. Louis. Yet the Commission denied Anheuser-Busch the meeting-competition defense so long as its prices fell below a premium-product

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60. "[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C. § 13(b) (1970).


differential. This decision was based on the assumption that nationally-advertised "premium" beer is of sufficiently the "same" grade and quality as regionally-sold non-premium beer as to be in the same competitive market with it. Thus, the harm the Commission found was to competition in the St. Louis market for all beer, whether premium or non-premium. In its section 2 (b) holdings, then, the Commission was not asserting that the labelled and unlabelled products were different. Rather, it was indicating that the meeting-competition defense is available to the seller of the advertised product only when he does not impinge on the usual differential between advertised "premium" and unadvertised non-"premium" products. These section 2 (b) rulings thus are concerned with the variations in economic values within the same product classifications—with what constitutes "an equally low price" of a competitor—rather than with determining what constitutes the same product.

In the Fifth Circuit's second Borden decision, the court justified the different prices which were charged for the labelled and unlabelled milk on the ground that the difference in price measured the difference in economic value between the goods. The court reasoned that if this were so, then there could be no adverse competitive effect. While the verbalization is different, the result harmonizes with the Commission's section 2 (b) position. Under both sections 2 (a) and 2 (b), the labelled and unlabelled goods would be accepted as the same product and as of the same grade and quality. Under each section, the Commission's position can be defended as consistent to the extent that it asserts that prices between a labelled product and an unlabelled product should differ by the economic value attached to the brand. Where there is a real value—attested by prior trading at a price differential—the Commission incorporated the economic reality of this differential into its reading of the "equally low price" clause of section 2 (b). Similarly, where there is a demonstrable economic reality attaching to the label, the Fifth Circuit, applying section 2 (a), would find a price difference not in excess of this value to be consistent with the maintenance of competitive market conditions. This position harmonizes with the Commission's section 2 (b) position. Where, however, the Commission finds a label to be economically valueless, it could not deny its owner the right, under section 2(b), to meet the actual prices of similar products sold by rivals, and it would necessarily have to reject an asserted justification for discrimina-

64. Borden Co. v. FTC, 381 F.2d 175, 181 (5th Cir. 1967).
tion which was premised upon the presence or absence of that label.

But while the Commission's approaches under sections 2 (a) and 2 (b) are consistent, they are not equally valid in their entirety. As the Commission has asserted, under section 2 (a), differences in the economic value of the labels ought not to be deemed to produce different products. A search for the "worth" of the various labels, however, often may not be a profitable endeavor for the enforcement agencies. Since recourse to the 2 (b) defense should be unnecessary for a firm which decides permanently to jettison a previously-established premium-product differentiation, the requirement that a firm maintain a premium differential which it itself has established for purposes of applying the section 2 (b) defense does not seem unduly objectionable.

Summary and Conclusion. Sellers offering labelled and unlabelled versions of an otherwise similar product at different prices may sometimes find themselves charged with violations of the Robinson-Patman Act. In some such cases, a determination of the "worth" of the label in question may be relevant to the proof of an offense or to the establishment of the plaintiff's injury. Nevertheless, the extent of that "worth" cannot be shown merely from the fact that the labelled and unlabelled versions of the product sell for different amounts; otherwise, the discrimination involved in the sales at different prices would always be self-justifying. Fortunately, in many secondary-line cases a determination concerning the worth of a label may be unnecessary to establish an offense. Moreover, a seller should always be able to protect himself against a charge of secondary-line injury by offering the unlabelled product to all buyers. In addition, a seller ought generally to be able to defend against charges of primary-line injury whenever he sells the unlabelled version of the product for a price equal to or above his average total cost of production and distribution.