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The "Like Grade and Quality" Clause of the Robinson-Patman Act: A Construction To Effect the Objectives of the Act

Recent judicial and Federal Trade Commission decisions have raised important questions concerning the construction of the "like grade and quality" clause of the Robinson-Patman Act. The author of this Note analyzes some of these questions in the light of both economic and legal considerations. He concludes that the clause ought not be construed to preclude application of the act to commodities which are mutually competitive even though consumers prefer one over the other because of physical or brand distinctions.

INTRODUCTION

Viable competition may exist among products which, although adapted to similar purposes, are differentiated in the minds of consumers, who consequently will pay different prices for them. Such product differentiation may be based upon actual differences in the physical characteristics or quality of the products, or upon subjective evaluations made by consumers. Since such differentiation results in preferences for certain products manifested by the willingness of buyers to pay "premium" prices for them, a seller may find that the market within which he competes will be larger or smaller depending upon the degree to which consumer preferences are reflected in price differentials. Thus a seller of low grade gasoline may find his product marketable only at a price two or three cents below that of premium gasoline. Similarly, a nonbranded product may be competitive with one bearing the brand of a nationally known manufacturer only at a significant discount, despite the fact that the two products are physically identical. This competitive situation differs, therefore, in two major respects from that illustrated by models of "pure" competition in which all sellers deal in identical products and

2. See id. at 56–57; Scitovsky, Welfare and Competition 403–10 (1951).
all buyers are rational and omniscient. First, products which are
not physically identical may nevertheless be competitive with
one another. Second, physically identical products may not be
equally acceptable to consumers, whose preferences will be reflec-
ted in the premium prices commanded by the favored products.

Within this economic framework, the Robinson-Patman Act\(^5\)
operates to prohibit discriminatory pricing practices deemed to
be injurious to competition. The application of the act is ex-
pressly confined to discrimination by a seller in the sale of two
or more commodities of “like grade and quality.” It is the purpose
of this Note to examine the present interpretation of the “like
grade and quality” requirement and to consider whether, in light
of the objectives of the act, this interpretation takes proper
account of the problems arising from competition among dif-
ferentiated products.

I. ECONOMIC ASPECTS OF PRICE DISCRIMINATION

Mr. Justice Frankfurter has said that “precision of expression
is not an outstanding characteristic of the Robinson-Patman
Act ...”\(^6\) This seems a particularly appropriate characterization
of the “like grade and quality” clause. In view of the ambiguity
of its legislative history,\(^7\) the precise scope of the clause will neces-
sarily be a product of judicial creativity. It would seem, however,
that wise interpretation of “like grade and quality” would be
facilitated if undertaken with an eye to the act’s economic goals.

The purpose of the act as stated in section 2(a) is to make it
unlawful for any person engaged in commerce “to discriminate
in price between different purchasers of commodities of like

[It shall be unlawful for any person engaged in commerce . . . to
discriminate in price between different purchasers of commodities of
like grade and quality . . . where the effect of such discrimination
may be substantially to lessen competition or tend to create a
monopoly in any line of commerce, or to injure, destroy, or prevent
competition . . . .


7. See Cassady & Grether, The Proper Interpretation of “Like Grade
and Quality” Within the Meaning of Section 2(a) of the Robinson-Patman
Act, 30 So. Cal. L. Rev. 241, 243 (1957). The only congressional comments
on the meaning of “like grade and quality” are to the effect that the act
should prevent the practice of spurious branding or designing of products.
80 Cong. Rec. 8234–35 (1936) (remarks of Congressman Patman). See also
Hearing Before a Subcommittee of the House Committee on the Judiciary,
grade and quality.\textsuperscript{18} The act reflects a determination by Congress that price differentials among various purchasers which cannot be explained in terms of cost or competition\textsuperscript{9} are probably caused by concentrations of market power.\textsuperscript{10} It further reflects a congressional value judgment that such concentrations should not be permitted to take advantage of their power by granting or obtaining price concessions to the disadvantage of others.\textsuperscript{11}

The act has often been criticized for fostering price rigidity in conflict with the purposes of the other antitrust laws.\textsuperscript{12} Some commentators seem to take the position that the act is therefore bad and should be narrowly construed wherever possible.\textsuperscript{13} The merits of this controversy have been discussed elsewhere.\textsuperscript{14} However it is resolved, the courts are in the final analysis faced with a congressional determination that discriminatory pricing practices are undesirable. To the extent, therefore, that "like grade and quality" is defined so as to oust the act of jurisdiction over discriminatory pricing practices which tend to injure competition, attainment of the congressional objective will be frustrated.

\section{Primary Line Discrimination}

Section 2(a) seeks to prohibit practices deemed injurious to competition in either the primary or secondary line.\textsuperscript{15} Since the


\textsuperscript{9} The act excepts from its proscriptions differentials "which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities in which such commodities are . . . sold or delivered . . . ," 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964), and those which result from good faith efforts to meet equally low prices of competitors, 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964).


\textsuperscript{12} E.g., Edwards, op. cit. supra note 10, at 457. See generally Schwartz, op. cit. supra note 10, at 509-12.

\textsuperscript{13} See, e.g., Rowe, Price Discrimination Under the Robinson-Patman Act 555 (1962).

\textsuperscript{14} See, e.g., Schwartz, op. cit. supra note 10, at 509-12.

\textsuperscript{15} The original price discrimination provision in the Clayton Act was aimed at practices lessening competition in the primary line. Att'y Gen. Nat'l Comm. Antitrust Rep. 155 (1955). It was not until 1929 that the Supreme Court recognized its applicability in secondary line cases. Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929). But the Robinson-Patman Act was intended as a weapon against secondary line discrimination, as evidenced by its characterization as an "anti-chain store measure." See
economic ramifications of primary line discrimination differ substantially from those of secondary line price discrimination, these phases of the problem should be considered separately. One ground for violation of the act, price discrimination resulting in competitive injury at the primary line, occurs when a seller discriminates among different buyers in an attempt to enhance his own market position vis-a-vis his competitors. Such discrimination is generally on a territorial basis and takes the form of charging lower prices in areas where the seller faces greater competition.\(^\text{16}\) The evil in conduct of this type is that the seller who operates in more than one market has an advantage over the seller who competes with him in only the more competitive one. The profits which he derives from higher noncompetitive prices in the other market may give him a “war chest” which enables him to absorb the losses of a price-cutting campaign against his competitor or to finance advertising or promotional measures which his competitor cannot match.\(^\text{17}\)

To an economist price discrimination occurs whenever the difference between the prices of two products does not accurately reflect the difference between their costs of production.\(^\text{18}\) As


\(^\text{17}\) See Edwards, MAINTAINING COMPETITION — REQUISITES OF A GOVERNMENT POLICY 20 (1949). In regard to geographic price discrimination, the Court stated in Moore v. Mead’s Fine Bread Co., supra note 16, at 119: “If this method of competition were approved, the pattern for growth of monopoly would be simple. . . . The profits made in interstate activities would underwrite the losses of local price-cutting campaigns.” A thorough analysis of the effects of selective price cutting by geographically diversified sellers may be found in Porto Rican Am. Tobacco Co. v. American Tobacco Co., supra note 18. Professor Adelman argues that only where such “war chest” tactics are employed should the Robinson-Patman Act be applied in primary line cases. He distinguishes the situation where price discrimination is accompanied by no “predatory” intent, and different prices are charged because economic conditions differ from market to market. Adelman, Price Discrimination as Treated in the Attorney General’s Report, 104 U. PA. L. REV. 222, 228–30 (1956).

Professor Adelman has stated: “[S]ince price less cost equals profit . . . price discrimination, in the economic sense, is rigorously defined as a difference in the profit earned from one customer as against another.”20 Thus similarity between the products involved is not a prerequisite of price discrimination in an economic sense.21 In FTC v. Anheuser-Busch, Inc.,22 the Supreme Court held that products need not be competitive with each other at the resale level for discriminatory prices in their sale at the primary level to violate section 2(a). While this decision involved discrimination in price between buyers in markets which were noncompetitive because territorially segregated, the principle seems equally applicable as an economic matter to cases of price discrimination between buyers of functionally segregated products.23 In either case the seller who operates in both markets has an advantage over the seller who competes with him only in the more competitive market. Moreover, a seller who markets a physically identical product under his brand name at a premium price and without the brand name at a lower price is apt to attain the same advantage relative to a seller who deals only in the unbranded product provided that the promotion of the branded product does not consume the entire price differential. Thus, in furthering the economic objectives of section 2(a) with respect to primary line competition, strict construction of the “like grade and quality” clause is completely out of place.24 A possible explanation for the inclusion of this apparently irrelevant limitation upon application of the act to primary line discrimination may lie in the fact that the act was drafted with secondary line discrimination primarily in mind.25 In any event,

22. See Edwards, Maintaining Competition—Requisites of a Governmental Policy 20 (1949). In fact discrimination involving totally different products may pose an even greater threat than territorial discrimination. The amount of discrimination possible on a territorial basis is limited to the cost of transportation between the two markets, since goods can be purchased in the lower-priced market and shipped to the other. See Leontief, Theory of Limited and Unlimited Discrimination, 54 Q.J. of Economics, 490, 491 (1949).
23. In adopting the Robinson-Patman Act, Congress rejected an alternative bill offered by the FTC which simply forbade a seller to “discriminate unfairly or unjustly in price between different purchasers of commodities . . . .” See FTC, Final Report on the Chain Store Investigation 96–97 (1935); Cassady & Grether, supra note 7, at 276.
24. See note 15 supra.
consideration of the objectives of the act with respect to primary line discrimination is of no value in construing "like grade and quality." 25

B. SECONDARY LINE DISCRIMINATION

When purchasers of a given product are in competition with each other in its resale, the effect of a discrimination in the prices charged them by the seller may be felt in the purchasers' or secondary line of competition, since the purchaser paying the higher price is at an obvious competitive disadvantage. 26 Price discrimination of this type may be initiated by the seller in an attempt to increase his sales through such means as quantity discounts, 27 or by a large, powerful buyer who is in a position to demand price concessions. 28

While the economics of primary line price discrimination place no limit on the construction of "like grade and quality," the same cannot be said of secondary line price discrimination. The purpose of the Robinson-Patman Act with respect to the secondary line of competition is to assure that buyers who compete in the resale of goods receive equal prices in the purchase of the goods from a common seller. In FTC v. Morton Salt Co., 29 the Supreme Court stated that it was obvious "that the competitive opportunities of certain merchants were injured when they had to

25. Professor Edwards suggests that in measuring "injury to competition" when applying the Robinson-Patman Act, different standards should be used in primary line cases and secondary line cases. Edwards, The Price Discrimination Law 544 (1959). It might be argued that dual definitions could also be employed in determining the existence of "like grade and quality." Such an interpretation would probably violate congressional intent, however, since the language of the act makes "like grade and quality" a jurisdictional requirement without reference to the "injury" clause. Further, if the "like grade and quality" concept were treated differently in primary and secondary line cases so as to effect the economic purpose of the act as applied to the case at issue, an impossible situation would arise for a seller who must contend with both possible applications of the act. See text paragraph accompanying note 62 infra.

26. A third aspect of price discrimination is that which affects the tertiary line of competition, and occurs when price concessions are passed on through an intermediate buyer and result in an unfair advantage for customers of the favored buyer. Tertiary line discrimination is similar in effect to secondary-line price discrimination. See Rowe, op. cit.: supra note 15, at 897; Murray & Fidler, supra note 15, at 897.


28. E.g., the "chain" store. See note 15 supra; Note, 86 COLUM. L. REV. 1285 (1936).

pay ... substantially more for their goods than their competitors had to pay." 30 The economic significance of secondary line price discrimination is that the operating margin or mark up of the unfavored purchaser will be lower than that of his competitor. Thus, if other factors are equal, his effectiveness as a competitive factor in the market will be lessened. 31 The importance of the "margin" was stressed by the Federal Trade Commission (FTC) in Standard Motor Products, Inc.: 32 "A more advantageous price to one customer gives him increased margin of profit, permits additional services to customers, more vigorous selling and other opportunities for the extension of his business at the expense of his less-favored competitors." 33 Thus it may be seen that to achieve the economic objectives of the Robinson-Patman Act in regard to secondary line price discrimination, a standard should be developed which will require pricing by the seller such that each buyer's cost-price ratio will equal that of other buyers with whom he is in competition. 34

II. CONSTRUCTION OF "LIKE GRADE AND QUALITY" BY THE COURTS AND THE FTC

The basic issues presented in interpreting "like grade and quality" as that term appears in section 2(a) of the Robinson-Patman Act are (1) the extent to which physical identity between the commodities involved will be required and (2) the extent, if any, that brand preferences will be taken into account, resulting in the creation of one or more premium products out of a group of products which are otherwise physically identical. To date neither Robinson-Patman Act litigation nor antitrust scholars have given a great deal of consideration to the interpretation of "like grade and quality." 35 However, an examination of the available authority in the courts and the FTC does disclose certain trends in the construction of the clause. 36

30. Id. at 46-47.
32. 54 F.T.C. 814 (1957).
33. Id. at 825.
34. Subject, of course, to statutory defenses of cost justification and good faith meeting of competition. See note 9 supra.
35. Among the discussions of the problems presented by the clause are: Att'y Gen. Nat'l Comm. Antitrust Rep. 156-59 (1955); Cassidy & Grether, The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241 (1957); Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1 (1956).
36. Cases dealing with the issue of "like grade and quality" are also
A. **Requirement of Physical Identity**

Under section 2 of the "old" Clayton Act, the original price discrimination law, the Eighth Circuit held that it was a defense to a charge of price discrimination in the sale of gloves that the gloves were made of different materials by labor of different degrees of skill. This physical comparison test was again employed under the Robinson-Patman Act in *Atlanta Trading Corp. v. FTC*, where the Second Circuit held that differences among various cuts of pork negated the existence of "like grade and quality," and overruled the conclusion of the FTC that the test of "like grade and quality" had been met because "ham is ham." The latest judicial pronouncement on the question occurred in *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, where the court assumed without discussion that differences in ingredients precluded a finding that various grades of ice cream were of "like grade and quality." In none of these cases did the court inquire into the extent to which the commodities involved were in competition with each other. In *Atlanta Trading Corp.*, the question was dismissed by the court as being of no significance. Thus it appears that the clause "like grade and quality" has generally been construed to permit application of the act only where the commodities in question are physically identical.

In a few cases the strict requirement of physical identity has collected in *Rowe, Price Discrimination Under the Robinson-Patman Act* 62-76 (1962, Supp. 1964, at 9-11). The earlier cases may be found in authorities cited note supra. 37. 38 Stat. 730 (1914). Under the 1914 act, it was a defense to demonstrate that price differentials were due to variations in "grade, quality or quantity" between the products involved, while the 1936 act required a showing of "like grade and quality" to establish a prima facie case of violation. The provision relating to quantity differences was eliminated by the Robinson-Patman amendment.


39. 258 F.2d 365 (2d Cir. 1958). This case was brought under § 2(d) which contains no "like grade and quality" clause, but requires the presence of the same "products or commodities." The court treated the two standards as if they were identical.


42. See 258 F.2d at 370-71.

43. Another case involved the sale of a "combination" item at a price less than the total of the prices at which individual parts could be bought separately. The court held that the combination and parts were not of "like grade and quality." *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972.
been relaxed. Where a seller markets a "line" of related products, such as automobile parts, and discriminates in price through discounts which apply to the entire line, the courts and the FTC have not required the plaintiff to demonstrate that any particular product within the line has been sold at discriminatory prices to establish the existence of "like grade and quality." And in a case which seems to have attracted no support, American Can Co. v. Bruce's Juices, the Fifth Circuit held that differences in the height of cans sold to producers of fruit juice would not negate a finding of "like grade and quality." Different considerations would appear to have been involved in that case, however, since the cans were not to be resold as end items, but were integrated into commodities which themselves were highly competitive and probably would have satisfied the requirement of physical identity.

Two 1964 FTC decisions make it clear, however, that the FTC still requires physical identity to find "like grade and quality" in the usual case. In the first, Universal-Rundle Corp., the Commission for the first time expressly dealt with the question whether section 2(a) could be applied to the discriminatory sale of functionally interchangeable but physically different commodities. The respondent was a manufacturer of plumbing fixtures. In addition to its regular "Universal-Rundle" line, it produced a special "Homart" line which was sold to Sears

(2d Cir. 1944). See also Champion Spark Plug Co., 50 F.T.C. 30, 47 (1959), where a complaint charging discrimination in price between buyers of spark plugs which differed in their brand names and in their "insulators" and "ribs" was dismissed for want of "like grade and quality." Rowe, supra note 35, at 13. But cf. a dictum in Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc., 295 F.2d 375 (7th Cir. 1961), cert. denied, 369 U.S. 812 (1962), indicating that if television programs were commodities within the meaning of the Robinson-Patman Act, they may well be "of like grade and quality" if they have "demonstrated comparable audience drawing power," notwithstanding their differences in format.


45. 187 F.2d 810 (5th Cir.), pet. for rehearing denied, 190 F.2d 73 (5th Cir.), cert. dismissed on petitioner's motion, 382 U.S. 875 (1961).

46. See the opinion of the trial court, 87 F. Supp. 985, 987 (S.D. Fla. 1949).


48. Previous cases in the FTC had not faced this question as a direct issue. See Cassady & Grether, supra note 35, at 244 n.11.
Roebuck. Items in the “Homart” line differed in physical characteristics from those in the “Universal-Rundle” line and commanded a lower price at both the retail and wholesale levels. Citing such variations as differences in the height and width of bathtubs in the two lines, and the absence of a platform or seat and a soap dish in the “Homart” bathtub,49 the Commission held the requisite similarity in grade or quality lacking, and dismissed the complaint. The other decision, The Quaker Oats Co.,50 involved the sale of Quaker’s “run 14” oat flour to the Gerber Products Company at prices below those charged to other buyers for other runs of flour. “Run 14” differed from other runs in that it contained a higher hull content, although the costs of production were the same as for other runs. The hearing examiner found that since the flour was not intended for sale to ultimate consumers, and because Quaker manufactured all of its runs of oat flour to suit the specifications of each particular buyer, the physical variations would not prevent satisfaction of the “like grade and quality” requirement.51 In reversing the hearing examiner, the FTC cited Universal-Rundle and held that “if there are substantial physical differences in products which affect consumer preference or marketability, such products are not of like grade and quality, regardless of whether manufacturing costs are the same....”52

B. RECOGNITION OF CONSUMER PREFERENCES AMONG OTHERWISE IDENTICAL PRODUCTS

The sale of identical products under different brand names is a common business practice.53 When the presence of a particular label creates a consumer preference for a product because of the good will enjoyed by the manufacturer or seller, sellers commonly obtain a higher retail price for the product. Thus it may be contended that the products are not of “like grade and quality.” While the courts and the FTC are agreed that different labels which do not affect consumer preference will not operate

to oust the operation of the Robinson-Patman Act, the treatment of branding which does affect consumer preference has received recent reappraisal. In 1936 the FTC held in Goodyear Tire & Rubber Co., that the original Clayton Act provision was applicable where the respondent, in addition to selling a "regular" tire line under its own label, sold physically identical tires to Sears-Roebuck and Company for resale under a different brand name, even though it was clear that the Goodyear-branded tire commanded a much higher price on the retail market. In 1964, the Fifth Circuit reversed, in Borden Co. v. FTC, an FTC decision which, like Goodyear, had held that physically identical products which had attained considerably different degrees of consumer acceptance because of the presence of different labels were of "like grade and quality." Because of the high degree of good will attached to its brand name, Borden's evaporated milk sold at a premium retail price. The company also sold the identical product, at considerably lower prices, to retailers who marketed it under their own labels. The court held that attaching different labels to identical products will not in itself dispel the existence of "like grade and quality." However, where the brand name on one carries with it "demonstrable commercial significance" the branded product would be differentiated so as to oust the operation of the Robinson-Patman Act. Although the court attempted to harmonize its decision with Goodyear, it seems clear that the latter was effectively overruled.

To summarize, the courts and the FTC have established general guidelines for determining whether commodities are of "like grade and quality" under section 2(a). Borden, Universal-

54. See, e.g., Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 910 (5th Cir. 1962); Hansen Incubator Co., 26 F.T.C. 303 (1938). See note 7 supra.
55. 22 F.T.C. 239 (1936), rev'd on other grounds, 101 F.2d 620 (6th Cir. 1939); see U.S. Rubber Co., 46 F.T.C. 998 (1959); U.S. Rubber Co., 28 F.T.C. 1439 (1939). In none of these cases was the issue of "like grade and quality" seriously contested by the respondent.
56. 22 F.T.C. at 295.
57. 339 F.2d 133 (6th Cir. 1964).
59. 339 F.2d at 137.
60. The FTC has asked the Solicitor General to seek review of the Borden decision in the Supreme Court. Representative Joe L. Evins, Chairman of the House Small Business Committee has stated that there is "little doubt regarding the severe impact that the appellate court decision is expected to exert on small business problems . . . ." Trade Regulation Reports, No. 186, Feb. 8, 1965, p. 4, in TRADE REG. REP.
Rundle, and Quaker Oats, in particular, indicate that physical
differences and brand differences which affect consumer prefer-
ences or marketability preclude the existence of “like grade and
quality,” while brand differences which do not affect consumer
preferences do not preclude its existence.61

III. TOWARD AN INTERPRETATION OF “LIKE GRADE
AND QUALITY” CONSISTENT WITH THE
OBJECTIVES OF THE ACT

A. INTRODUCTION

If its objectives were to be carried out to their logical extreme,
the Robinson-Patman Act would require that pricing conform to
relative cost data to eliminate primary line price discrimination
and to consumer preference data to eliminate secondary line
discrimination. Such an approach seems impracticable, however,
since a seller must contend with the possibility of both appli-
cations of the act in formulating his pricing policies. Moreover,
the fullest application of the objectives of the act in primary
line cases would require that all of a firm’s products be priced
on the basis of their relative costs. Such an approach would be
impossible from an administrative standpoint, would conflict
with general antitrust policy,62 and would altogether ignore the
limiting phrase “like grade and quality.” On the other hand,
application of the act so as to effectuate its purposes in all
situations where the possibility of secondary line injury is present
seems feasible and can be accomplished without indulging in un-
reasonable statutory construction.

61. The unexplored question of whether physical differences which are
unreflected by consumer preference will oust the operation of the act is
probably of limited importance, since a seller seldom markets two physically
different products which compete with one another and which sell for
exactly the same price. However, this might occur where physically different
products are sold for reincorporation into end products which consumers
do not differentiate. The language quoted from the Quaker Oats opinion
in the text accompanying note 52 supra would seem to indicate that physical
differences unaccompanied by an effect on comparative consumer accepta-
 NIR: would be disregarded for “like grade and quality” purposes. This may
explain the result in Bruce’s Juices. See note 45 supra and accompanying
text. If this is the case, however, Quaker Oats was wrongly decided under
its own standard since “run 14” flour was ultimately incorporated in a
product indistinguishable to consumers from products produced from the
other runs of flour.

349 (D. Mass. 1953), aff’d per curiam, 347 U.S. 521 (1954); ATT’Y GEN.
B. Thesis

As noted above, the "like grade and quality" clause of the Robinson-Patman Act has been construed as excluding from the jurisdiction of the act the price relationship between those products as to which varying levels of consumer acceptability exist due to differences in brand name, design, or physical characteristics. As a result the act is inapplicable to many situations where competition exists in the presence of some product differentiation. To the extent that this happens and sellers are consequently permitted to establish price differentials in excess of differences in consumer demand, realization of the secondary line objectives of the act is obstructed.

The narrow construction of "like grade and quality," and the limited appreciation of the scope of competition among differentiated products which it reflects, represent a departure from other areas of trade regulation law where it has consistently been recognized that competition may exist among products which differ in brand name, design, or physical characteristics. For example, the McGuire Act permits commodities to be fairly traded if they are in "free and open competition with commodities of the same general class produced or distributed by others..." Similarly, the Supreme Court has held that in determining whether a monopoly exists in the production of cellophane in violation of section 2 of the Sherman Act, all flexible packaging material with which the demand for cellophane is reasonably cross-elastic must be considered as being within the same "relevant market." Finally, the Supreme Court ruled in a recent decision construing section 7 of the Clayton Act that there is sufficient competition between glass jars and metal cans for a merger between producers of each to come within that act's proscription of any acquisition whose effect may be substantially to lessen competition in a "line of commerce."

It is submitted that rather than requiring complete product identity, the application of a more liberal test would better comply with the act's secondary line objectives. It should be


recognized that cross-elasticity and functional interchangeability may produce meaningful competition notwithstanding varying levels of consumer appeal.66 Thus, differences in consumer preference would not be considered in determining whether the jurisdictional requirements of the act had been met. Commodities which are intended for similar uses and compete with each other, but which command different retail prices because of brand or physical differences would be included within the jurisdiction of section 2(a).

In Universal-Rundle,67 the FTC recognized that physical differences can affect "consumer preference or marketability," but held as a result that the two products in question were not of "like grade and quality" so that the Robinson-Patman Act was unavailable to limit the price differential between them. The Fifth Circuit reached a similar result in the Borden case,68 where consumer preference arose from a difference in brand name between two physically-identical products. It would seem that in both cases the significance of consumer preference for one of two similar products was misconstrued. The differentiation upon which such preference is based, whether involving physical characteristics or brands, creates separate markets for products in most cases only when the resulting price differential does not exceed the difference in value in the minds of consumers.69 For example, competition between the "Big Three" tobacco companies and the cut-rate manufacturers in the sale of cigarettes was found in American Tobacco Co. v. United States70 to attain stability only when the cut-rate cigarettes were sold for about four cents below the price of the premium cigarettes. If the price differential reached five cents, the percentage of the market enjoyed by the cheaper product would steadily increase, while a

66. See Cassady & Grether, supra note 85, at 277-78, which seems to indicate that such a standard would be desirable. Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 45 (1956), suggests a test of "fungibility," but would limit its application to physically different products having differences which do not affect consumer preferences. A test of cross-elasticity under the Robinson-Patman Act was specifically rejected in Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958).
67. See text accompanying notes 47-52 supra.
68. Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964).
difference of three cents enabled the "Big Three" to control almost the entire market.\textsuperscript{71}

Thus, the "like grade or quality" decisions exaggerate the importance of relatively slight product differences in holding that a consumer preference will completely preclude operation of the act. The consequence of these holdings is to deprive a retailer who buys a premium product of protection from sales of nonpremium products by his distributor to his competitors at discounts which far exceed the value of the consumer preference for the premium product. For example, \( X \) sells a product which commands a one dollar premium over the price which \( Y \) receives in the sale of his nonpremium product. It seems clear that sales by a distributor who supplies both \( X \) and \( Y \) will be economically discriminatory if \( Y \) is able to buy the nonpremium product for two dollars less than \( X \) pays for the premium product.\textsuperscript{72} The result of such sales will be just as destructive to \( X \)'s profit margin as would a differential of one dollar in the wholesale prices paid by \( X \) and \( Y \) for products between which no consumer preference exists.

An approach to product differentiation has been taken in other contexts under the Robinson-Patman Act which seems to be at odds with that used recently in interpreting "like grade and quality." In these situations it appears to have been recognized that the competition which the Robinson-Patman Act is designed to protect includes competition between sellers of products which are differentiated because of physical characteristics or brand names. For example, it has been held that the competitive injury which must be shown in order to apply the act may take the form in a primary line case of harm to another seller whose products are not identical with those of the defendant with respect to physical characteristics or other constituents of relative consumer appeal.\textsuperscript{73} Moreover, in \textit{Liggett

\textsuperscript{71} In United States v. Continental Can Co., 373 U.S. 441, 454–55 (1963), decided under § 7 of the Clayton Act, the Court stressed the importance of relative pricing of differentiated products in stating that "manufacturers in each industry [glass jars and metal cans] take into consideration the price of the containers of the opposing industry in formulating their own pricing policy."

\textsuperscript{72} See Note, 54 COLUM. L. REV. 580, 588–90 (1954).

\textsuperscript{73} See E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944). See also ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 157 n.100 (1955): "It is, of course, clear that the 'like grade and quality' concept is relevant solely to compare two or more items sold by one seller to his several customers, and not to measure the similarity of his goods with those of a competitor."
& Myers Tobacco Co.\footnote{supra} a secondary line case, the FTC found sufficient competition between cigarettes sold in vending machines and those sold over-the-counter to sustain a finding of injury to competition even though the different methods of sale differentiated the products at the consumer level. Similarly in Thompson Products, Inc.\footnote{supra} the Commission found injury to competition between buyers of automobile parts which the seller marketed under different brand names, one of which was preferred by consumers. Further, in applying the provision in section 2(b) of the act for justifying a price differential on the ground that it is necessary to meet competition, not only have the courts realistically treated premium and nonpremium products as competing within the same market, but they have also recognized the significance of consumer preference by refusing to permit the premium seller to reduce his price below the point at which the difference between it and the price of the nonpremium product reflects consumer preference.\footnote{supra} Thus the type of competition which the present interpretation of “like grade and quality” also \cite{McWhirter v. Monroe Calculating Mach. Co., supra} defines. But cf. Midland Oil Co. v. Sinclair Ref. Co., \cite{Midland Oil Co. v. Sinclair Ref. Co., supra}. \footnote{supra} And McWhirter v. Monroe Calculating Mach. Co., \cite{McWhirter v. Monroe Calculating Mach. Co., supra}. But cf. Midland Oil Co. v. Sinclair Ref. Co., \cite{Midland Oil Co. v. Sinclair Ref. Co., supra}. \footnote{supra} 56 F.T.C. 221 (1959).

\footnote{supra} 55 F.T.C. 1252 (1959).

\footnote{supra} 54 F.T.C. 277 (1957), rev’d on other grounds, \cite{Anheuser-Busch, Inc., supra}. \footnote{supra} rev’d, \cite{Anheuser-Busch, Inc., supra}. \footnote{supra} reversal upheld, \cite{Anheuser-Busch, Inc., supra}. \footnote{supra} 259 F.2d 835 (7th Cir. 1961); Minneapolis-Honeywell Regulator Co., \cite{Anheuser-Busch, Inc., supra}. \footnote{supra} 191 F.2d 786 (7th Cir. 1951), cert. dismissed, \cite{Anheuser-Busch, Inc., supra}. \footnote{supra} While the Borden court felt that this analogy supported its position on the meaning of “like grade and quality,” \cite{Anheuser-Busch, Inc., supra} at 138–39, its reliance seems misplaced. The rationale of the § 2(b) premium products cases that selling a premium product at the same price as a nonpremium product undermines the latter in price assumes a basically competitive relationship between the two and the necessity of maintaining the price spread attributable to the consumer differentiation. This is thus contrary to the view, implicit in the Borden decision, that differentiated products are not comparable for price regulation purposes. The restriction on the use of § 2(b) by premium sellers is designed to determine a permissible range within which a price may be lowered rather than to make the defense wholly inapplicable. \textit{Rowe, Price Discrimination Under the Robinson-Patman Act} 242–45 (1962).

The Borden court’s apparent misunderstanding of the treatment accorded premium products under § 2(b) may be due in part to its reliance on a seemingly erroneous FTC decision which read a “like grade and quality” requirement into the § 2(b) defense. See Bigelow Sanford Carpet Co., \textit{Trade Reg. Rep.} (11th ed.) \cite{Bigelow Sanford Carpet Co., supra}. It is clear that the “like grade and quality” clause is wholly inapplicable to § 2(b). See note 73 supra and accompanying text.
and quality” seems to exempt from the regulation of the act is identical to that which has been expressly recognized by the courts and the FTC as coming within the scope of other regulatory provisions of the act.

Consumer preferences should be taken into account only to the extent necessary to permit price differentials to reflect differences in value of the products upon resale. Under such a test preference would be considered in relation to the “injury to competition” requirement, rather than in determining whether the products are of “like grade and quality.” Thus, where two products otherwise meet the requirements of “like grade and quality,” but one of them, because of physical characteristics or brand name, commands a premium retail price, a lower wholesale price for the nonpremium product would be considered injurious to competition only to the extent that it affords an advantage over the premium product in the retail market. Since the resale value “spread” between the two products will probably vary from time to time and place to place, the precise extent of the permissible wholesale differentiation may not be ascertainable; nevertheless determination of the general retail price spread will afford a basis for requiring a pricing policy which is basically fair to competing purchasers in light of available information.

Where a consumer preference exists among products because of a physical difference or the attraction of a brand name, but the products are still competitive within a standard of cross-elasticity or interchangeability, the seller should, of course, be permitted to rely upon statutory cost justification in setting differential prices as an alternative to showing consumer prefer-

77. In Att'y Gen. Nat'l Comm. Antitrust Rep. 159 (1955) it is proposed that “whenever a seller's price differentials to intermediate distributors . . . reflect no more than the spread between the prices the public will pay . . . no 'injury' to competition should reasonably be found.” See also Cassady & Grether, note supra, at 275 Sec 8. Rowe considers the proposal but concludes that it is inadequate to protect the manufacturer's interest in his good will with respect to possible applications of the Robinson-Patman Act's proscriptions of discriminatory services or advertising payments. In such cases no competitive injury need be shown. Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 41 (1956). It is difficult to understand how this reasoning has any bearing upon the propriety of using the “injury to competition” approach in § 2(a) cases.

The defendant in Borden argued that the retail value of the brand name should be subtracted in determining the price for purposes of ascertaining the existence of discrimination, but the Commission rejected this argument. "Trade Reg. Rep. (11th ed.) (1961-1963 FTC Complaints, Orders, Stipulations) ¶ 16191, at 21019 (1962).
ence when his cost justification exceeds the consumer preference. 78

The approach for treating consumer preferences among similar competitive products which is outlined above seems preferable to either of the two possible alternatives. Complete disregard of consumer preferences, as under Goodyear, requires pricing policies which do not conform to the realities of product differentiation. 79 On the other hand, the Borden-Universal-Bundle-Quaker Oats approach, which views the existence of a consumer preference as negating the existence of “like grade and quality,” permits price differentiation far in excess of that justified by the preference, and therefore withholds the protection of the Robinson-Patman Act from buyers competing in the resale of differentiated products. 80

While the injury to competition approach to the problems raised by product differentiation would require a standard which, as to differentiated products, would be based upon maintaining price ratios rather than price identity, this would not be a radical

78. The ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 159 (1955) suggests that justification based upon the higher promotional and advertising costs involved in the sale of “premium” products should be possible. See also C. E. Neihoff & Co., 51 F.T.C. 1114 (1956), aff'd, 241 F.2d 37 (7th Cir. 1957), judgment vacated on other grounds, 355 U.S. 411 (1958); ROWE, PRICE DISCRIMINATION AND THE ROBINSON-PATMAN ACT 298 (1962). In Borden the FTC indicated that this would be possible but rejected the preferred cost data on other grounds. TRADE REA. REP. (11th ed.) (1961-1963 FTC Complaints, Orders, Stipulations) ¶ 16191, at 21028-25.

79. The proposed test would not be altogether inconsistent with the Goodyear approach, since “like grade and quality” was virtually conceded by the respondent in that case, 22 F.T.C. at 290. The Commission predicated its finding of injury to competition largely upon statistics indicating that the discrimination in price far exceeded the price increment commanded by the premium products. 22 F.T.C. at 304-18. However, the injunction granted by the Commission would appear to have required pricing which would not permit sale of the favored product at a price reflecting the consumer preference. 22 F.T.C. at 333-34.

80. Once consumer preferences have been recognized as a ground for permitting price differentials between the preferred and nonpreferred products, it might be argued that a seller should be required to maintain a differential equal to the consumer preference. If the price differential is less than the amount of the consumer preference the buyer for resale of the cheaper product would suffer in competition. However, requiring maintenance of the price differential would be of dubious social value, since it would encourage practices which induce irrational consumer buying. The approach suggested in this Note would recognize as an economic reality the existence of subjective product differentiation and permit pricing in accordance with it without requiring such pricing or preventing price movements which would tend to eliminate it.
departure from Robinson-Patman Act dogma. The act prohibits only price discrimination which may substantially injure competition; it does not prohibit price differentials. Moreover, a proportional approach was employed in one case where it was held that a seller who sold at different prices in different areas, presumably without violating the act, must accompany a price reduction in one area with a proportional reduction in the other.

It may be thought that this approach imposes an excessively heavy burden upon the seller to determine whether products the consumer appeal of which is differentiated in various ways would come within the jurisdictional requirement of "like grade and quality" and, if so, the amount of the price spread justified by this differentiation. However, the problems suggested by this objection would only be encountered by a seller who markets two similar and highly competitive products differentiated by brand or physical characteristics and who has chosen to make the cheaper product available solely to his favored customers. The basic tenet of the Robinson-Patman Act is that a seller should not accord favored treatment to one particular buyer or group of buyers. Therefore, a seller who makes different but similar products available to different customers is not unreasonably burdened if he has an obligation to insure that he does not thereby injure competition among them. It would be naive to suppose that a seller who handles products which are substantially similar in appearance and function does not realize that these products are in competition inter se, or that a seller who creates

82. Anheuser-Busch, Inc., 54 F.T.C. 277, 304 (1957), rev'd on other grounds, 265 F.2d 677 (7th Cir. 1959), rev'd, 363 U.S. 536 (1960), reversal upheld on other grounds, 289 F.2d 835 (7th Cir. 1961).
83. A seller who markets two or more products or lines differentiated by brand or physical characteristics can avoid the labeling of the practice as "discriminatory" by making all the products or lines available to all purchasers. Tri-Valley Packing Ass'n v. FTC, 329 F.2d 99, 703-04 (9th Cir. 1964); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 922-23 (5th Cir. 1962); Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768, 770 (8th Cir. 1934). Cassady & Grether, supra note 35, at 270 n.65, suggest that the sale of the cheaper commodity may constitute a service or payment in violation of § 2(d) or § 2(e). Cf. Luxor, Ltd., 31 F.T.C. 658 (1940). Under this rationale a seller could not rely on that proviso of the act which gives him the right to select his own customers in refusing to sell the cheaper product to some of his customers. On refusals to deal under the proviso generally, see Naifeh v. Ronson Art Metal Works, 219 F.2d 202 (10th Cir. 1954).
a special product or brand for a chain store does not realize that such products are meant to be sold in competition with his higher priced regular products. It might also be objected that it would be an impossible task to prove the consumer preference in justifying price differences, but this objection seems adequately met by the fact that such consumer preferences must be proved at present for other purposes under the Robinson-Patman Act.

**CONCLUSION**

The present interpretation of "like grade and quality" under section 2(a) of the Robinson-Patman Act unduly hampers the act's effectiveness in preventing price discrimination which injures competition at the secondary line. Since products are often competitive notwithstanding differences in consumer appeal, the present requirements of physical and brand-name identity to invoke the jurisdiction of the act are artificial. The economics of cross-elasticity and functional interchangeability — products of the theory of monopolistic competition — require the adoption of an expanded and more sophisticated interpretation of the clause. Other areas of antitrust law have recognized these concepts, and they could reasonably be encompassed by "like grade

85. Moreover, even though a price differential is not justifiable by consumer preference, the seller might invoke cost justification. See note 78 supra and accompanying text. While the objection might be raised that judicial history has proved cost justification to be a very difficult matter for a seller to prove, a close examination indicates that most of the difficulties involved are peculiar to attempts to justify different prices on the basis of different selling costs as between different groupings of customers, and would have little or no applicability to cost justification on the basis of different manufacturing costs involved in the production of different products. The FTC has recognized the ease of computing production costs as compared with distribution costs. FTC, CASE STUDIES IN DISTRIBUTING COST ACCOUNTING FOR MANUFACTURING AND WHOLESALING 28-30 (1941). See generally Edwards, THE PRICE DISCRIMINATION LAW 589-97 (1939). A basic problem in regard to justification on the basis of different costs in selling to different customers is showing that all buyers within one cost-grouping are homogeneous, i.e., that the particular data utilized in allocating costs to a group is applicable to all members of the group. See United States v. Borden Co., 370 U.S. 460 (1962). Such a problem would not be faced by a seller who attempted to justify differentials on the basis of differing manufacturing costs, since all items of cost in this case would be applicable to all units of the particular product.

86. See note 76 supra and accompanying text. See also The Pure Oil Co., TRADE REG. REP. (10th ed.) (1959-1960 FTC Complaints, Orders, Stipulations) ¶ 27791 (1959), where the essence of the discrimination was the sale at different prices which lessened the "margin" of Pure's price over that of the nonpremium brands.
and quality," since nothing in that clause inexorably requires absolute identity. A pricing standard reflective of differences in consumer preferences possessed by various products could be achieved through the more flexible test of injury to competition. Under such a scheme products competitive at the consumer level would be deemed to be of "like grade and quality." However, the seller could maintain a differential to the extent of any consumer preference, since the resulting equality of his buyers' cost-price margins would prevent any injury to competition.