Primary Line Injury Under the Robinson-Patman Act: The Development of Standards and Erosion of Enforcement

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Primary-Line Injury Under the Robinson-Patman Act: The Development of Standards and Erosion of Enforcement

Daniel J. Gifford*

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I. Introduction

In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities.1

In these words the House Judiciary Committee described the evil which section 2 of the Clayton Act was designed to remedy. That evil was the predatory behavior of large, multi-market firms which, it was thought, were undercutting local rivals at uneconomic pricing levels while recouping their losses or lost profits through monopoly pricing in other markets. Although the details of the scenario described by the Judiciary Committee might be erroneous,2 few would quarrel with a view of pred-

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atory pricing as anticompetitive. Of course, not all price differentials are anticompetitive, and it is not clear that all discrimination that produces anticompetitive effects is predatorily motivated. Apparently recognizing these points, Congress chose to prohibit only discrimination that was likely to produce anticompetitive effects. Congress also sensed, however, the difficulties in formulating refined criteria for distinguishing between innocuous and non-innocuous discrimination. It therefore limited its prohibition to circumstances "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce," and, thus, provided no guidelines for administrators of the Act to use in identifying the anticompetitive kind of discrimination. The development of such criteria became the responsibility of the newly established Federal Trade Commission and the courts. When Congress amended section 2 by enacting the Robinson-Patman Act in 1936, it was concerned primarily with the impact of supplier discrimination among buyers (secondary-line injury) and among the buyers' customers (tertiary-line injury) and it added language which reflected that concern. Congress did little, however, to clarify

3. "Predatory" is a term used to describe pricing at uneconomic levels employed by a firm to drive rivals from the marketplace, force them to sell out on favorable terms, or discipline them for failure to conform to the wishes of the firm practicing such pricing. See Gifford, Promotional Price-Cutting and Section 2(a) of the Robinson-Patman Act, 1976 Wis. L. Rev. 1045, 1048. See also Telex Corp. v. IBM Corp., 510 F.2d 894, 927-28 (10th Cir. 1975). Predatory intent does not constitute a necessary element of a Robinson-Patman Act violation, but its presence enables the Commission and the courts to dispense with an economic analysis of the marketplace when ascertaining the probable impact of price discrimination on competition. See Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277, 282 (7th Cir. 1967). See also Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702 (1967). Professors Areeda and Turner have recently argued that intent should be irrelevant to the determination of the lawfulness of undercutting pricing. Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975). See text accompanying note 311 infra.

4. Thus, the Commission and the courts have construed the Robinson-Patman Act as forbidding discriminatory pricing that is nonpredatory but nonetheless anticompetitive in its potential effects. See, e.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702-03 (1967).


6. See notes 323-324 infra.


8. In section 2(a) of the Robinson-Patman Act, Congress forbade price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of ei-
the standards to be employed in distinguishing discrimination that might unlawfully reduce competition between the discriminating seller and its rivals (primary-line discrimination).  

Entrusted with the primary duty of enforcing price-discrimination law, the Commission has been constrained to formulate its own enforcement criteria. In theory, the Commission might exhaustively investigate the facts of each case of alleged discrimination and weigh the positive and negative results. However, this would be an impossible task for an agency of limited resources. And no matter how exhaustively the Commission were to investigate particular cases, it necessarily would have to establish its own standards for determining which results should be considered procompetitive or neutral, which results should be considered anticompetitive, and how to balance mixed effects. The Commission’s enforcement responsibilities, however, exert pressure upon it to formulate decisional standards that reduce the scope of the economic investigations which it must undertake in each case.

The Commission and the courts have had forty-three years of experience in applying the Robinson-Patman Act’s rather opaque strictures against discrimination that carries the potential for primary-line competitive injury. An examination and an evaluation of that experience will be undertaken in this Article. During the first twenty-five years after the passage of the Act, the Commission and the courts groped for, but ultimately dismissed as perverse, a per se or presumptive approach to the question of injury to seller-level competition. Although the Commission ultimately strove for a market-oriented test of competitive injury, it was never successful in formulating a workable standard. Its attempts at articulation of such a standard were not received hospitably by the courts of appeals.


11. See text accompanying notes 32-71 infra.

12. See text accompanying notes 117-185 infra.
On the other hand, the Commission's primary-line efforts received significant support from the Supreme Court, but because of that court's limited abilities to intervene and apparent naiveté in price discrimination matters, the Commission ultimately gave way to the views of the courts of appeals. This has been a serendipitous result, in that the courts of appeals have become increasingly sophisticated in applying the Robinson-Patman Act in recent years. The courts' conceptions of competitive injury have at last largely eliminated primary-line cases from the agenda of the Commission. Claims of primary-line injury remain a weapon in the arsenal of private litigants, but are used as claims ancillary to a charge of actual or attempted monopolization.

A. VOLUME DISCOUNTS AND THE ENFORCEMENT IMPERATIVE: A MILD SUCCESS

One area in which the Commission has responded with significant success to the pressure to develop decisional standards is that involving sales at volume discounts. Volume discounts are cumulative quantity discounts pursuant to which the unit price of goods sold to a buyer varies inversely with his respective total purchases over a specified period of time, frequently a period of one year. In its decisions, the Commission has identified certain inherent "anticompetitive" tendencies in these discounts. When the volume required to qualify a buyer for the maximum discount is found to be beyond the reach of many buyers, the Commission has found secondary-line injury to competition due to the "competitive advantage" conferred upon

13. See note 191 infra.
15. See text accompanying notes 190, 304, 322-325 infra.
16. See text following note 304 infra.
17. See text accompanying notes 322-324 infra.
18. This definition of volume discounts follows Professor Adelman's approach in distinguishing discounts for volume measured over a period of time from discounts keyed to quantities shipped at any one time. Adelman refers to the former as volume discounts and to the latter as quantity discounts. M. ADELMAN, A & P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY 140-41 (1959).
large-volume buyers over their smaller rivals. But even in those cases in which the volume required to qualify for maximum or less-than-maximum discounts is attainable by many buyers—although only by concentrating all of their purchases in a single seller—the discount tends increasingly to tie a buyer to a single seller with each additional purchase. Until a buyer's aggregate purchases are large enough to qualify for the maximum discount from more than one seller, the per-unit price paid by the buyer decreases as the number of units purchased by him from a single seller increases. A buyer who switches his purchases from his original supplier to a rival supplier would incur higher per-unit prices, even though the rival offered identical prices for initial purchases and an identical volume discount schedule.

In a number of cases, this inherent tying effect of a volume discount has been found by the Commission to constitute at least a portion of the requisite anticompetitive tendency for a


20. This tying effect is discussed, inter alia, in Dean Milk Co., 68 F.T.C. 710, 766 (1965), rev'd, 395 F.2d 696 (7th Cir. 1968); in Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 397-98 (1948), rev'd, 191 F.2d 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952); and in Simmons Co., 29 F.T.C. 727, 742 (1939). See also American Optical Co., 28 F.T.C. 169, 181 (1939); Bausch & Lomb Optical Co., 28 F.T.C. 186, 198 (1939). But see Dean Milk Co. v. FTC, 395 F.2d 696, 713 (7th Cir. 1968).

In order to remain competitive in price with a seller offering a cumulative volume discount, a rival must offer a sufficiently lower price to compensate the buyer “for the loss of the discount on that portion of its requirements which it has already purchased or which it may be compelled to purchase” from the seller offering the discount. Simmons Co., 29 F.T.C. 729, 742 (1939). In FTC v. Standard Brands, Inc., 189 F.2d 510, 513-15 (2d Cir. 1951), the respondent attempted to obtain part of the business of a customer, who was at the time buying a relatively large quantity from a rival, by offering to sell to that customer a relatively small quantity of the product for a price that was below its own list price for a small quantity, but that was not below the quantity-discount prices of either the rival supplier or itself for the larger quantity that the customer was buying from the rival. Certainly, this technique would mitigate the tying effect of a volume discount and might also mitigate a similar impact of a quantity discount upon a small purchaser. The court, however, affirmed the Commission's holding that such pricing was unlawful, and that the “meeting competition” defense of section 2(b) was unavailable. According to the court, “an equally low price of a competitor means an equally low price for a given quantity.” 189 F.2d at 515. But see Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966), in which a small carpet manufacturer was permitted to “meet competition” by offering quantity discounts at smaller quantity levels than its rivals. Since the firm offered a smaller product line, the court reasoned it would otherwise be unable to meet the prices offered by rivals to customers who, because of purchases from those rivals of products which Callaway did not produce, already qualified for quantity discounts from those rivals.

21. See Dean Milk Co. v. FTC, 395 F.2d 696, 713 (7th Cir. 1968).
violation of the Act. In addition, the Commission has found that volume discounts tend to give undue advantage to sellers offering a large line of products over rival sellers who offer a more limited line. Many buyers would find it advantageous under these circumstances to concentrate their purchases with the former in order to compile a volume of purchases sufficient to qualify for a discount otherwise unavailable to them.

Yet the Commission has not been inflexible in its approach to volume discounts. It has resisted the temptation to utilize the inherent tying tendency of volume discounts as a basis for condemning them generically. Rather, the Commission has distinguished among the situations in which volume discounts have been employed and has, in some cases, found a lack of primary-line harm when the circumstances showed that the tying effect was not present or was offset by other market factors. In short, the Commission has successfully isolated the relevant primary-line factors connected with volume discounts and has employed these factors as guides for its economic investigations in the cases which it has brought.

B. THE ENFORCEMENT IMPERATIVE IN OTHER KINDS OF PRIMARY-LINE CASES: OPAQUE ADMINISTRATION

The enforcement imperative has often been reflected in decisions in which the Commission offers only a summary justification. Thus, a number of quantity and volume discount cases—notably those that were uncontested—have resulted in cease-and-desist orders, the justifications for which were mere unexplained conclusions of primary-line harm. The Commission has disposed of a large number of customer-classification cases and unsystematic-discount cases in the same

22. See note 20 supra.
23. See id.
24. In Yale & Towne Mfg. Co., 52 F.T.C., 1580, 1602-03 (1956), the Commission found that product differences tended to offset the tying or group purchasing effects of a volume discount. It also found that rivals who had not adopted volume discount systems had nonetheless "increased their business and improved their competitive positions." In that case the hearing examiner was willing to concede that "[t]here may be industries or even lines of commerce, perhaps in fungible goods, for example, where . . . a conclusive presumption (of an anticompetitive tendency) may be safely indulged in to the public good," but objected to the universal application of such a conclusive presumption as "mechanistic" and as a "danger." Id. at 1598.
25. See note 18 supra.
27. E.g., Caradine Hat Co., 39 F.T.C. 86 (1944) (application of quantity discount to customer classification by membership in buying group); Binney & Smith Co., 32 F.T.C. 315 (1940); American Crayon Co., 32 F.T.C. 306 (1940), modi-
manner. In cases involving ungraduated geographical price differentials, the Commission also has tended to act without engaging in market analysis. Most of these cases have involved multi-market sellers who have maintained a standard price in most of their marketing areas but have lowered it in a single area in which its rivals were mostly local, single-market firms. In these cases the Commission—perhaps impressed, as it explicitly noted in one case, by the fact that the impact of the price reduction affected only a portion of the multi-market discriminator's sales but affected all of the sales of the local rivals—tended to find anti-competitive tendencies largely without other explanation.

II. SALES DIVERSION AND THE MOSS CASE: THE ENFORCEMENT IMPERATIVE GONE AWRY

A. THE COMMISSION'S APPROACH TO MOSS

The most drastic response to the enforcement problem caused by the Commission's limited resources and concomitant need to simplify and shorten cease-and-desist order proceedings was a "business diversion" test of competitive injury that was formulated by the Second Circuit in Samuel H. Moss, Inc. v. FTC. According to the Second Circuit, competitive injury consists in nothing more than sales diverted—or indeed refused, (diversion is only explanation of primary-line harm); Federal Yeast Corp., 33 F.T.C. 1372 (1941); Republic Yeast Corp., 33 F.T.C. 701 (1941); National Grain Yeast Co., 33 F.T.C. 684 (1941); Vonnegut Hardware Co., 32 F.T.C. 512 (1941).

Price differences are ungraduated when they do not vary systematically with distance from a given location or locations as do, for example, basing-point prices. The latter are computed by adding the costs of transporting goods to the buyer at the price at a specified locality. As a result, basing-point prices change gradually as the distance from the basing point to the buyer increases. By contrast, price differentials such as Anheuser-Busch's "nonpremium" price in St. Louis and its "premium" price elsewhere are ungraduated geographical differences in price. See text following note 95 infra.


tained—by a seller as a result of a price reduction extended to only a portion of its customers.

In the *Moss* case the Commission had condemned discriminatory pricing carried out by a manufacturer of rubber stamps because of an alleged adverse impact on competition at the seller level. In its opinion, the Commission stated that the respondent's discriminatorily low prices were the "inducement" for buyers to transfer their patronage from its rivals to itself. The opinion as a whole, however, does not actually equate diversion of sales from rivals to the discriminator with a tendency to lessen competition. In addition to using the "inducement" and "diversion" rationales, the Commission noted another factor, which provided a basis for its conclusion of illegality. After concluding that the respondent Moss' prices had an anticompetitive impact, the Commission, in the same sentence, stated that "in some instances respondent's prices were such that competitors could not meet such prices without suffering a loss on such business and in one instance a competitor was forced out of business as the result of such acts and practices." There is at least a reasonable argument that the conjunction of the two parts of that sentence means that the Commission based its conclusion of anticompetitive tendencies upon evidence that Moss' discriminatorily low prices were, in a significant number of instances, below its rivals' costs. If this was indeed the Commission's meaning, then the *Moss* opinion...
was not an example of an application of a mechanistic "diversion" test of competitive injury. Rather, the Commission's approach fits more closely a concept of wrongful, although nonpredatory, discrimination which it may have extracted from the now-classic description, contained in the 1914 House Judiciary Report,37 of predatory pricing behavior: a seller makes some sales below cost and subsidizes those below-cost sales from revenues generated from higher-priced sales to other customers. This argument, of course, assumes that if some of Moss' sales were made at prices below its rivals' costs, those sales must have been below its own costs.38

B. THE SECOND CIRCUIT'S APPROACH TO MOSS

When the Moss decision was reviewed by the Second Circuit,39 that court took a radically different approach from the one taken by the Commission. The court read the Commission's opinion as equating diversion with a lessening of competition, an equation which the court then approved. To read the Commission's opinion in such a manner, the court had to ignore the sentence in the Commission opinion quoted above; the court quoted instead—purportedly as the Commission's ultimate findings—the immediately preceding sentence, which speaks of diversion but does not equate diversion with competitive injury. Such an equation was made only in the reviewing court's opinion.40

The court's apparent concern in Moss was that the Commission's burden of proof be sufficiently light so as not to hinder the Commission's enforcement abilities. The court attempted to further this goal in two ways. First, it placed the burden of proving the absence of anticompetitive tendencies on the respondent rather than placing the burden of proving the presence of such tendencies on the Commission.41 Second, the

37. See text accompanying note 1 supra.
38. See text accompanying notes 165-171 infra.
40. The two relevant sentences in the Commission opinion are quoted in note 34 supra. The court quoted the first sentence but ignored the second. The relevant part of the court's opinion is the following passage:

Finally, [the Commission] found that these practices had a 'tendency to induce the purchase of respondent's rubber stamps by various users thereof, and have tended to and do divert trade to the respondent from its competitors.' That these findings supported the order is too obvious to admit of discussion. 148 F.2d at 379.
41. 148 F.2d at 379. Accord, Sano Petroleum Corp. v. American Oil Co., 187
court found anticompetitive effect in preventing, or tending "to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere." Indeed, the court based its allocation of the burden of proof on the fact that the respondent merchant was more likely than the Commission to be aware of whether his low price prevented competitors from taking away his business.

Under the Second Circuit's approach, a firm whose discriminatory prices enabled it to merely retain its sales in a market and a firm that enlarged its sales in that market would both be forced to defend their pricing actions solely under section 2(b)'s meeting-competition defense. The court may have felt that use of "retention" language added little to the Commission's "diversion" language, since a discriminatorily low price that had no market impact in terms of either diversion or retention could be excused under section 2(a), and a price that was necessary to retain business could be justified under section 2(b) so long as it did not undercut a competitor's prices. A


42. 148 F.2d at 379. The Commission had made no finding that the respondent's discriminatorily low prices prevented any of its rivals from taking away business. Indeed, the Commission's findings were all contrary to that position. It found that the respondent's low prices induced buyers away from rivals and to the respondent. 36 F.T.C. at 644-649. The Commission later equated the retaining of existing business through discriminatorily low prices with an anticompetitive tendency in Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 397 (1949), rev'd, 191 F.2d 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

43. 148 F.2d at 379.

44. The court's formulation, quoted in text accompanying note 42 supra, is couched in retention language, even though it literally encompasses both retention of existing business and expansion of existing business by diversion of the business of rivals to the discriminator.

45. Section 2(b), codified at 15 U.S.C. § 13(b), provides as follows:
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.

46. See text accompanying notes 42-43 supra.
firm, however, may sometimes find that it needs to undercut competitors in order to retain its sales volume or its market share. In such a situation, therefore, the Second Circuit's treatment of retention cuts deeper than a simple "diversion" test. Under the latter approach, retention of existing customers\footnote{In addressing the issue of competitive injury, the Commission and the courts have, in later years, focused on market share changes more than on diversion or retention of specific sales. See text accompanying notes 186-198 infra.}— and, arguably, retention of an existing market share in an expanding market—would not violate section 2(a) and thus would not require justification under section 2(b). Under the Second Circuit's approach, however, such retention would require section 2(b) justification, and should a firm need to undercut its competitor to retain business, a section 2(b) defense would be unavailable. Despite the Moss court's emphasis on the seller's retention of business rather than on the diversion of business to the seller, the difference in language should not be emphasized unduly. The court did affirm a Commission order that it characterized as based on a Commission finding of diversion, and the court's opinion itself refers to the offending firm's bidding as "'low enough to get the business,'"\footnote{Id.} a description of an apparently successful attempt to attract rather than retain business. In any event, the differing shades of meaning connoted by the diversion-retention language should not draw attention from the most problematic aspect of Moss: its equation of sales diversion (and sales retention) with competitive injury.

The Second Circuit's adoption and possible expansion of a "diversion" test of competitive injury was not without deliberation. It was fashioned from an asserted interrelationship between sections 2(a) and 2(b) of the Robinson-Patman Act and grounded on the respondent seller's superior knowledge of the facts. The court determined that Congress intended to place on the respondent, because of his superior knowledge, the burden of proving either that "the lower price did not prevent anyone from taking away the business" or that "his lower price did not undercut his competitors, but merely 'met' their 'equally low price.'"\footnote{The burden of proof on the issue of competitive injury (defined by the court to mean business diversion or retention) is thus cast upon the accused. The Commission, under the Moss approach, would be required only to prove discrimination. See FTC v. Standard Brands, Inc., 189 F.2d 510, 515 (2d Cir. 1951) (on rehearing).} Such a diversion test was premised on a simplistic equating of anticompetitive tendencies with sales diversion.
The equation was simplistic because diversion should be the point of departure, not the point of conclusion, in any examination of the impact of the pricing policies of a firm upon competition in the marketplace. Yet the Moss court, composed of Judges Learned Hand, Augustus Hand, and Charles E. Clark, would not have made this apparently simplistic equation unwittingly or naively. Nor was the court's adoption of a diversion test prompted by a deference to the policy judgments of the Commission. The fact that the opinion was couched in the language of statutory construction suggests otherwise. The court probably sensed that the Commission's enforcement responsibilities could be made more manageable if the workload accompanying those responsibilities could be diminished.

Although the court may have been influenced by the enforcement problem, it had already solved that problem by casting the burden of proving a lack of adverse competitive impact upon the respondent. The reason for taking the additional step of adopting the diversion test may be that the two approaches are interrelated. The burden of proof was cast upon the respondent because of its superior knowledge. But the respondent has superior knowledge on this issue only if an adverse impact on competition is equated with sales diversion. Indeed, this may be one reason that the court formulated the diversion test broadly enough to include sales retention: the respondent might have greater knowledge of the connection between its prices and its retention of sales than of the connection between its prices and the diversion of rivals' sales to itself. If, however, an adverse impact on competition must be determined by market analysis, then the respondent's superior competence on the issue would, in most cases, vanish, and

50. See text accompanying note 87 infra.
51. See also NLRB v. Universal Camera Corp., 190 F.2d 429, 431 (2d Cir. 1951) (Frank, J., concurring).
52. See 148 F.2d at 379.
53. Such considerations apparently explain the Supreme Court's adoption of a simplified approach to the competitive injury issue in secondary-line cases. See FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948); Gifford, supra note 8, at 54.
54. Since the respondent is an active participant in the market, it will know better than the Commission which sales it has gained as a result of price concessions, especially if the price concessions have been negotiated. It will have, however, no better knowledge of general market conditions, of how to assess those conditions to determine the intensity of competitive behavior, or of how intense that behavior is likely to become in the future. The latter determinations require the type of information gathering and evaluation that are within the capabilities of the Commission's staff, skills, and resources.
55. Cf. General Foods Corp., 50 F.T.C. 885, 890 (1954) ("As to the fact of
this justification for relieving the Commission of the burden of proof would disappear.

C. THE DENOUEMENT OF MOSS

Like other per se and almost per se tests, the sales "diversion" test embodied in the Moss opinion evidenced significant weaknesses. Indeed, it proved untenable as a single measure of legality. The major substantive objection to Moss is, of course, that "pricing low enough to get the business" is exactly the kind of behavior that a competitive economic system requires of its participants. The Moss diversion test of competitive injury thus rests upon an implicit attribution of a perverse meaning to the term "competition": competitive behavior is labelled inherently anticompetitive. Widespread implementation of the Moss rule would impose a cartel-like rigidity upon all pricing behavior. There is a technical objection to the Moss rule as well. In the form articulated in Moss, the diversion test conflicts with the conditionally phrased language of the Act. The Act certainly contemplates lawful discriminatory sales, since only discrimination that has a tendency to lessen competition or to create a monopoly is prohibited. But discriminatory sales must be successful in attracting the business or they would remain only offers. Since Moss made discrimination that successfully obtains business presumptively unlawful, the decision collapsed the tendency-to-lessen-competition condition into the price discrimination itself, thereby joining elements that the Act is careful to keep separate. For both the substantive and technical reasons, the diversion test as formulated in Moss could not be expected to last long.

The Second Circuit's Moss formulation was prominent in

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56. Competitive behavior consists of continuous attempts by each firm to maximize its profits or minimize its losses by underpricing its rivals whenever necessary to attract business. If the Robinson-Patman Act were to make it unlawful for firms to attempt to obtain business by selective undercutting, this price rivalry among firms would be significantly reduced. Each firm would have to drop its prices across-the-board in order to attract business through price cutting. Such a maneuver, however, would be impractical in an oligopolistic market in which each firm knows in advance that its across-the-board price reductions will be met by rivals and thus will not increase its profits unless industry demand is itself elastic. In such oligopolistic markets, selectively negotiated price reductions are frequently the only reductions that can be made; such price reductions are condemned by the Moss approach. See, e.g., Great Atl. & Pac. Tea Co. v. FTC, 99 S. Ct. 925, 933 (1979); United States v. United States Gypsum Co., 438 U.S. 422 (1978).

the Commission's *Minneapolis-Honeywell* decision later in the same year. In that opinion, the Commission appeared to equate diversion of trade from rivals with competitive injury and—like the Second Circuit—including the retention of existing business with the term "diversion." This strict diversion approach to primary-line injury was short-lived, however. Three years later, the Commission's decision was reversed by the Seventh Circuit Court of Appeals in an opinion premised on the inadequacy of a "diversion" test of competitive injury. In evaluating the primary-line impact of price discrimination by a manufacturer of automatic temperature controls, the court employed a limited market analysis. Basing its conclusion upon several factors, including an increasing number of competitors, a reduction in the discriminator's share of the market, and the patronization of rival manufacturers by some of the discriminator's previous customers, the court found that competition in the marketplace was substantially unaffected.

Soon thereafter, the Commission itself adopted a more crit-

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60. Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952). The Commission had found Minneapolis-Honeywell guilty of discriminatory pricing that was embodied in a standard quantity-discount system. In refusing to uphold a finding of injury to Minneapolis-Honeywell's competitors, the court listed six factors that it considered relevant. In summary form, these were: (i) prices charged by the competitors were generally lower than those of Minneapolis-Honeywell; (ii) a high degree of price competition existed among burner control manufacturers; (iii) the total business of Minneapolis-Honeywell's rivals had increased, and new firms had enjoyed steady growth in sales volume; (iv) Minneapolis-Honeywell's share of the market had declined; (v) Minneapolis-Honeywell had lost 53% of the control business of 31 customers who previously had used only Minneapolis Honeywell controls; (vi) 126 of Minneapolis-Honeywell's other customers had also purchased competitive controls. The court appears to have dealt explicitly with the diversion theory and modified it with a form of market analysis when it stated,

M-H was entitled to meet the competition built up in its field, and even if it did succeed in retaining or diverting some business which might otherwise have gone to some of its competitors, where those competitors were able to enter its field and build thriving businesses in spite of M-H's commanding position and alleged wrongful practices, we think it cannot be said that the effect of those practices was substantially to injure competition.

191 F.2d at 790.

61. See note 60 *supra*. The Second Circuit, however, continues to follow the *Moss* approach to the allocation of the burden of proof. See John B. Hull v. Waterbury Petroleum Prods., Inc., 588 F.2d 24, 28 (2d Cir. 1978), cert. denied, 99 S. Ct. 1502 (1979).
ical attitude toward finding primary-line harm. In 1953, the spark-plug cases evidenced this new attitude. In these cases each of three major spark plug manufacturers sold plugs to automobile and truck manufacturers for use as original equipment at substantially lower prices than they sold similar plugs to the same manufacturers and to other users and distributors for replacement use. Complaint counsel contended that the low prices were used by the respondents to obtain the original-equipment business and that the prestige acquired from that business placed the respondents' plugs in wide demand in the replacement market. In two of the spark-plug cases, the hearing examiner had found that the prices at which the respondents had sold plugs for use as original equipment were below cost. The argument was, therefore, that the low-priced original-equipment sales were subsidized by the replacement-market sales, and that the replacement-market sales were protected to a significant degree from the competition of rival manufacturers through the original-equipment tie.

The Commission, however, failed to give adequate attention to the contentions based on an original-equipment tie, and found no primary-line injury in any of the cases. In one case it bolstered its conclusion by finding that rival sellers suffered no "undue" loss of business that could be attributed to the discriminatory pricing, and virtually ignored the fact that the original-equipment market was dominated by the three major spark plug manufacturers. Instead, it found that price was not the sole factor used by equipment manufacturers in selecting spark plugs. The Commission also bolstered its conclusions in two of the cases by finding that the record did "not disclose any undue mortality rate on the part of smaller spark plug

64. General Motors Corp., 50 F.T.C. 54, 62 (1953); see Electric Auto-Lite Co., 50 F.T.C. 73, 78 (1953); Champion Spark Plug Co., 50 F.T.C. 30, 37 (1953). This practice was, of course, the "original equipment tie" that the Supreme Court, twenty years later, saw as a major impediment to the development of a competitive spark plug industry. Ford Motor Co. v. United States, 405 U.S. 562 (1972).
manufacturers."

In eight years' time the Commission thus moved from a position that equated sales diversion with anticompetitive behavior to a position which ignored, for Robinson-Patman Act purposes, structural factors in the market which gave undue advantages to the three dominant firms of an industry. In 1945, the Commission in effect viewed all discriminatory pricing as anticompetitive, and in 1953, it ignored actual anticompetitive consequences of discriminatory pricing. Substantively, the two positions are dramatically inconsistent. They are positions, however, which are more understandable when adopted by an agency that possessed inadequate resources to conduct a thorough economic analysis of behavior patterns and market conditions in each of the voluminous cases which fell within its enforcement mandate. The Minneapolis-Honeywell position reflected a desire to short-cut market analysis by adopting per se or presumptive approaches to the evaluation of price discrimination; the spark-plug cases' approach reflected an inability to properly assess the impact of significant market relationships. The Commission's Minneapolis-Honeywell opinion and its spark-plug decisions are consistent in another way: the tendency of both sets of decisions is to prevent the market from becoming more competitive. It would be unfair to the Commission, however, to suggest that it was deliberately pursuing anticompetitive policies. After all, the Act's stated goal is the furtherance of competition. It is more reasonable to assume that the Commission was conscientiously attempting to carry out this statutory mandate, but erred, in both cases, through ignorance or lack of insight.

D. THE REJECTION OF MOSS

The Commission's spark-plug decisions seemed to evidence an increasing reluctance to find primary-line injury. That reluctance first emerged ten months after the Minneapolis-Honeywell decision in a Commission policy statement on geographic pricing practices. The policy statement effectively concluded a prolonged campaign by the Commission against

70. See also M. ADELMAN, supra note 18, at 177.
basing-point pricing, a campaign in which it had won three victories in the Supreme Court. In its policy statement, the Commission took the position that systematic geographic price discrimination injures primary-line competition when all sellers employ the same geographic pricing method. "[T]he test of injury" from geographic discrimination, according to the Commission, "is to be found in collusion or in tendencies towards monopoly." The statement implicitly repudiated the Moss equation of discrimination and competitive injury, at least in the circumstances of systematic geographic price discrimination.

In the spark-plug cases, the reference to the absence of "undue" business loss by rivals attributable to the respondents' discriminatory pricing implies a relatively tight causation requirement, which was used to separate the discrimination from the asserted sales losses. This technique is often employed by the courts in primary-line cases, and its use in the spark-plug cases may have been masking a shift in substantive policy by the Commission. The shift, however, seems apparent from the reference to the absence of an undue mortality rate among the discriminators' smaller competitors; such a concern focuses directly on the general economic health of those rivals in the aggregate rather than on business diverted from them.

72. Sellers engage in basing-point pricing when they offer certain prices for goods delivered to the buyers' locations and compute those prices by adding transportation charges to the price at one or more locations. Each location that serves as the base for computation of delivered prices to buyers is a basing point.


75. Causation emerges as a crucial Robinson-Patman issue in a variety of contexts. See, e.g., Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967); Lloyd A. Fry Roofing Co., 68 F.T.C. 217, 261-62 (1965), aff'd, 371 F.2d 277 (7th Cir. 1967). See Gifford, Promotional Price-Cutting, supra note 3, at 1064-67. See also text accompanying note 81 infra.

76. See, e.g., Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968). In Dean, the Commission attributed the demise of a number of local dairies to the discriminatory price undercutting of the respondent. The court, by contrast, concluded that the small companies that went out of business were forced to do so by changes in technology, which had destroyed the relative efficiency of small dairies. It would appear, however, that the impact of the changing technology on the small dairies was exacerbated by Dean's local price-cutting. The demise of the local dairies thus was the result of both changing technology and undercutting. Yet neither the Commission nor the court openly confronted the complexity of the causal issue and explained why it chose a particular contributing cause as the significant one.
The thrust of that reference is a concern with market conditions, which appears more realistic than diversion and other types of per se approaches to competitive injury.\(^\text{77}\)

The emphasis upon market conditions grew stronger in the Commission's *General Foods Corp.*\(^\text{78}\) decision, and in an examiner's decision in *Purex Corp.*\(^\text{79}\) both of which were decided in 1954. Both cases explicitly rejected the position—which they equated with that of the Second Circuit in *Moss*—that sales at different prices create a presumption of primary-line competitive injury. Accordingly, both cases required that something more than a diversion of sales be shown as a basis for inferring competitive injury. Indeed, both cases suggested that an examination of actual market conditions is required in primary-line cases and that this examination should focus on the actual intensity of rivalry among firms. In this connection, *General Foods* reiterated with apparent approval a checklist of market factors employed in the Seventh Circuit's *Minneapolis-Honeywell* opinion as indicative of the state of competition in the marketplace.\(^\text{80}\) *General Foods*, moreover, emphasized its concern with competition in the marketplace by explicitly rejecting the Second Circuit's assertion in *Moss* that the burden of establishing the absence of competitive injury should be upon the respondent.\(^\text{81}\) After articulating this market-analysis approach to competitive injury, both *General Foods* and *Purex* nonetheless phrased their ultimate conclusions on primary-line injury in terms of a failure of proof, and *General Foods* found inadequate evidence to justify the attribution of a causal connection between the respondent's discriminations and its rivals' losses of sales. These cases thus manifest more stringent conditions.

\(^\text{77}\) In *Minneapolis-Honeywell*, the Commission's finding of primary-line harm, which had been based upon a pure diversion analysis, was rejected by the Seventh Circuit in an opinion which listed six market factors that indicated that no injury to competition at the primary burner-control manufacturing level had occurred. *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952). See note 60 supra. It is interesting to observe that the "expert" Commission, which had altered its own approach to follow the Second Circuit's *Moss* theory, abandoned that theory shortly after the Seventh Circuit's utilization of a market analysis in *Minneapolis-Honeywell*.

\(^\text{78}\) See *General Foods Corp.*, 50 F.T.C. 885, 887-90 (1954).

\(^\text{79}\) See *Purex Corp.*, 51 F.T.C. 100, 111-17, 166-68 (1954).


for finding primary-line injury, but this trend may have been partially obscured by references to inadequate evidence and a lack of causal connection between the discrimination and sales losses of rivals.

_Yale & Towne Manufacturing Co._,\(^82\) decided in 1956, probably contains the most articulate statement of a general market-conditions test of competitive injury. There the Commission found discriminatory sales to be harmless in a market that the Commission described as competitive and fluid:

this record affirmatively shows that in this industry in the years in question there has been ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity and flexibility of market and of competition therein. The evidence is unanimous that competition . . . is active, keen, healthy and increasing . . . .\(^83\)

_Yale & Towne_ is explainable on the narrower grounds that sales of the products involved (industrial trucks) were found usually to have been made on the basis of engineering specifications and the particular requirements of the buyers rather than on the basis of price, and that the price differentials, in that context, were insufficient to offset customer product preference.\(^84\) The case does, however, enunciate another checklist of market factors, which, the Commission asserted, showed the presence of a healthy degree of competition. And, coming at the time it did, _Yale & Towne_ seemed to reinforce a trend in Commission decisions to require more than discriminatory sales or discriminatory sales plus some diversion to support a finding of primary-line injury.

### III. SALES DIVERSION AFTER THE REPUDIATION OF MOSS

#### A. THE CONTINUING RELEVANCE OF SALES DIVERSION AS A FACTOR IN MARKET ANALYSIS

Although the Commission has explicitly rejected sales diversion as the sole test of competitive injury at the seller level,\(^85\) diversion has remained a relevant factor and occasionally appears in the cases—especially the consent-order cases—as the sole articulated basis for a finding of competitive in-

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\(^82\) 52 F.T.C. 1580 (1956).

\(^83\) Id. at 1602.

\(^84\) Id. at 1597-98, 1603-04.

\(^85\) See text accompanying notes 78-81 supra.
jury. Diversion, as observed, is a market effect that, barring responsive price cuts by rivals, would be expected to result from a seller's price reduction. A price reduction that provokes no response and diverts no sales has no impact on the price cutter's rivals. The presence of diversion thus indicates that a price reduction has had some impact on rival firms, but does not necessarily reveal the extent of the impact nor the effect on competition in the market. Diversion, then, is a beginning and not an end of analysis. Its occurrence indicates some market impact, but further inquiry is required to assess the significance of that impact.

B. The Apparent Resurgence of Sales Diversion in Maryland Baking and its Progeny

Beginning in 1956 with Maryland Baking Co. and extending into the early 1960s, the Commission decided a number of cases which superficially appear to reembrace a sales-diversion test of price discrimination. In Maryland Baking Co., the respondent, a national seller of ice cream cones, had substantially increased its sales in the Washington and Baltimore areas. As a result of respondent's price cuts, the market share in rolled cones of its only rival in those marketing areas was reduced from 91.3% to 58.2%. The respondent, attempting to turn its rival's market-share loss to its advantage, contended that the effect of its price cut "was to terminate a monopoly and create a competitive market." Moreover, the local rival appeared to have remained a viable business firm that had partially offset its losses in sales to jobbers by increased sales to retailers, and had increased its total business by selling chocolate rolled sugar cones to ice cream manufacturers. The Commission, however, rejected the contention that the respondent's incursions made the market more competitive. It did this because the respondent was substantially larger in size than its

86. See note 110 infra.
87. See text accompanying note 50 supra.
88. See also E. Chamberlin, The Theory of Monopolistic Competition 89-94 (8th ed. 1962) (discussion of the complex price relationships sometimes existing between rival sellers).
89. 52 F.T.C. 1679 (1956), modified and aff'd, 243 F.2d 716 (4th Cir.), order modified, 53 F.T.C. 1106 (1957).
90. See id. at 1688, 1689.
91. Id. at 1689. Cf. National Numbering Machine Co., 30 F.T.C. 139, 140 (1938) (a new entrant utilizing quantity and other discount pricing to break into a four-producer market was held to have been acting in an anticompetitive manner).
one local competitor and because the local firm's loss of sales indicated that it lacked "a monopolistic hold on the market." When later explaining its finding of competitive injury in *Maryland Baking Co.*, the Commission stated that "the primary factors considered by the Commission in its determination were loss of sales and a decline in the injured competitor's share of the market." A crucial factor, however, in the Commission's competitive-injury finding was that the rival had lost the entire jobber market to the respondent. If primary attention is focused on the reduction in the rival's local-market share from 91.3% to 58.2%, the case would appear to be an example of an extreme attachment to sales diversion as a criterion of competitive injury sufficient to override the seemingly procompetitive transformation of the market from a one-seller to a two-seller market. But an accurate reading of the case indicates that the reduction in local "market" sales by the local monopolist from 91.3% to 58.2% was effected by the respondent's acquisition of nearly the entire jobber market for rolled sugar cones. Although the reduction in market share from 91.3% to 58.2% was a reduction of the percentage of total sales made by the local seller in the combined local markets, this decrease was caused by pricing activities that gave the respondent itself a monopoly of the local jobber market. The decision, accordingly, should be read as attributing significance to the impact of the discrimination on the jobber market—as saying, in effect, that the Commission's finding of anticompetitive tendencies occurred in a context in which a discriminating seller abrogated to itself an entire identifiable market through price discrimination. When read in that light, *Maryland Baking Co.* is not a pure "diversion" case; rather, it is a case that looks beyond diversion into the resulting market impact of the diversion.

C. *ANHEUSER-BUSCH: SALES DIVERSION IN TRANSITION*

If the *Maryland Baking Co.* decision is read as unduly emphasizing sales diversion, the Commission's *Anheuser-Busch* decision of the following year can be viewed as playing the role of a transitional case. In that case, the respondent, Anheuser-Busch, Inc., examined its marketing areas in an ef-

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92. 52 F.T.C. at 1689.
94. *See text accompanying notes 117-130 infra.*
fort to expand sales and, after an initial, unsuccessful experiment in Ohio, concluded that the possibilities for increasing profits through price reductions and increased sales volume were greatest in the St. Louis marketing area where its plant was located. Since its distribution system enabled it to reach retailers in St. Louis directly, Anheuser-Busch did not have to depend on wholesalers passing on its price reductions to their own customers in order to increase the volume of its sales. When Anheuser-Busch, in order to take advantage of these market conditions, reduced prices in the St. Louis marketing area in two stages, from a "premium" level to the "non-premium" level of its major rivals in that area, it attracted a large shift of sales—a shift which was not reversed until reestablishment of the premium differential after eight months of reduced prices. The Commission condemned Anheuser-Busch's St. Louis price reduction in an opinion that emphasized the diversionary effect caused by the local price reductions.

The examiner's remark that "death" or "mayhem" probably would have been inflicted on one or more rivals of Anheuser-Busch if the latter's "price raid had continued longer or indefinitely" suggests that he was employing an evaluation standard that involved more than market-share shifts. It also suggests that he was assessing temporary discrimination as if its effects were permanent. On review, the Commission limited itself to sales diversion as the basis for showing anticompetitive impact, and it defined diversion as a substantial shift.

96. Earlier, Anheuser-Busch had passed along increased labor costs by raising the price of its beer. In many areas, its price increases were multiplied by wholesalers' and retailers' markups so that the increase in price at the retail level substantially exceeded the amount of Anheuser-Busch's price increase at the brewery. When the company attempted, experimentally, to roll back its price increase in Ohio, it found that its distributors "were unwilling to give up their total additional markup of $1.20 per case merely because AB reduced its price 15c per case." Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 838 (7th Cir. 1961).

97. Id. at 838.
98. Id. at 839.
99. See 54 F.T.C. at 300.
100. Id. at 291. See also Borden Co., 64 F.T.C. 534, 568, rev'd, 339 F.2d 953 (7th Cir. 1964).
101. By contrast, the Court of Appeals, in its second opinion, focused largely upon the "temporary" nature of Anheuser-Busch's price reductions and consequent shifts of business. See 289 F.2d at 839.
102. The Commission ignored Anheuser-Busch's reestablishment of the premium differential in that part of its opinion that dealt with the section 2(a) charge and, accordingly, avoided explicit comment upon the temporary nature of the discrimination. Its silence indicated, however, that it was taking an ap-
in market shares.\textsuperscript{103} Such a definition of diversion differs significantly from the \textit{Moss} opinion's concept of diversion as capturing or retaining specific sales. If the Commission, in Anheuser-Busch, could be read as equating diversion with substantial market-share shifts that are likely to be permanent, its approach is partially compatible with the Seventh Circuit's position in \textit{Minneapolis-Honeywell}, where the fluidity of market shares was used as a factor indicative of healthy competition.\textsuperscript{104} It would also be compatible with \textit{Maryland Baking Co.}, where market-share shifts were the principal basis for the Commission's decision.\textsuperscript{105}

Moreover, in addition to diversion, other factors may have been involved in the Commission's condemnation of Anheuser-Busch's St. Louis price reduction, which were not mentioned in the opinion.\textsuperscript{106} The Commission noted that Anheuser-Busch maintained a price differential between the widely-advertised "Budweiser" brand and the "non-premium" brands of local and regional rivals in nearly all of its markets except St. Louis. Indeed, it was the elimination of the differential in St. Louis while maintaining it elsewhere that, according to the Commission, constituted the "discrimination."\textsuperscript{107} Anheuser-Busch's behavior thus bore a striking resemblance to a type of pricing toward which the Commission had previously evidenced some degree of hostility: a multi-market seller's departure from standard pricing in one particular market, with resultant substantial harm to its local rivals.\textsuperscript{108} Such a pricing pattern closely resembles that of the classic predator described in the 1914 legislative
history and, even in the absence of a predatory purpose by the discriminator, the Commission has remained sensitive to the disproportionate impact of such pricing on local rivals.

The resemblance is not perfect, however. Not only was no predatory motivation shown, but the pricing in other markets was not uniform. In addition to varying its prices from market to market, Anheuser-Busch did not always maintain a price differential over local and regional rivals. Furthermore, its major rivals in St. Louis were also not confined to that market. Yet, it seems probable that the Commission was influenced by some or all of the following aspects of the Anheuser-Busch case: (i) Anheuser-Busch's rivals did significant shares of their total businesses in St. Louis; (ii) as a result, the conditions of the St. Louis market affected them disproportionately; (iii) Anheuser-Busch maintained the price differential over nonpremium brands in a large proportion of its markets; (iv) the elimination of that differential in St. Louis appeared to be a departure from its usually observed normal pricing behavior; and (v) the Commission may have thought that Anheuser-Busch's St. Louis prices were in some way "subsidized" by its revenues from other markets.

Anheuser-Busch had a long history of litigation in the courts. The Seventh Circuit finally set aside the Commission's cease-and-desist order largely on the grounds that the shifts of business that had occurred were merely temporary, and that competitive injury could not be established by tempo-

109. See text accompanying note 1 supra. See also Anheuser-Busch, Inc. v. FTC, 269 F.2d 835, 841 (7th Cir. 1961).

110. See Amalgamated Sugar Co., 54 F.T.C. 943 (1958); American Brake Shoe Co., 52 F.T.C. 494 (1955).

111. On the basis of an Anheuser-Busch survey used by the Commission, it appears that a differential existed between Budweiser and its regional and local rivals in approximately 90% of the survey's price comparisons. In a sampling of 78 major marketing areas, considered by the company to be a representative cross-section of the United States, increments of five cents or more per bottle over regional and local beers were found in 88.6% of the comparisons and increments of "up to" ten cents per bottle over local beers were found in 53.2% of the comparisons. 54 F.T.C. at 280. The absence of differentials in some price comparisons may have been due to regional or local beer producers asking "premium" prices for their own product. If, in a given market, Budweiser were priced at a level of approximately five cents above most regional and local beers, Anheuser-Busch could not both maintain the general five-cent differential and also prevent any one regional beer producer from increasing its own price to the Budweiser level.

112. See 289 F.2d at 837.

113. See the examiner's findings 21 and 26, 54 F.T.C. at 287-88, 290-91.

rary shifts of business.\textsuperscript{115} Implicitly, the court appeared to adopt the view that substantial and potentially permanent market-share shifts would be at least partial indicia of competitive injury. Because the court felt that Anheuser-Busch employed its "competitive power" with "restraint,"\textsuperscript{116} it found that future adverse effects from the company's price reductions were unlikely.

D. \textit{Borden I: A Market Structure Interpretation}

The Commission's 1964 decision in \textit{Borden Co. (Borden I)}\textsuperscript{117} is similar to its decision in \textit{Maryland Baking Co.}\textsuperscript{118} On a superficial reading of the case the Commission seems to be reverting to a simple diversion test of competitive injury, but on a more intensive analysis the case is explainable in terms of the impact of the discrimination on market structure. In \textit{Borden I}, the Commission also partially clarified its approach to the issue, which had been raised in \textit{Anheuser-Busch}, of how temporary diversions of sales should be assessed and of how, if at all, such diversions might be related to market structure. In \textit{Borden I}, the Commission appeared to say that in assessing the lawfulness of a firm's discriminatory pricing, rival firms' lost sales are significant even if their profits are not reduced.\textsuperscript{119} In that case a large grocery store in an Indiana city started a price war by reducing the price of two brands of milk from 29 to 25 cents per half gallon and later reducing that price to 10 cents. In response to the first price cut, Borden Company reduced its price to the rival A & P store, to which it sold directly, from 32.3 cents to 22.2 cents. It responded to the second cut by reducing its price to A & P to a below-average-cost level of 9.2 cents, a price which it maintained for one week. Borden also insisted that its local distributor, Quality Dairy, resell Borden milk to local grocery store customers at a price of 10 cents per half gallon. As a result of Borden's price reductions, the wholesale sales of Quality Dairy of its own house brand, which Quality continued to offer at 37 cents, were completely eliminated,\textsuperscript{120} and the entire wholesale business of the Dean Milk Company's

\textsuperscript{115} 289 F.2d at 839.
\textsuperscript{116} \textit{Id.} at 843.
\textsuperscript{117} 64 F.T.C. 534 (1964), rev'd, 339 F.2d 953 (7th Cir. 1964). This Borden litigation is referred to as \textit{Borden I} to distinguish it from a second Borden litigation in which the ultimate judicial resolution occurred subsequent to the final judicial resolution of the instant litigation.
\textsuperscript{118} See text accompanying notes 94-99 supra.
\textsuperscript{119} See text accompanying note 122 infra.
\textsuperscript{120} 64 F.T.C. at 567.
local distributor was lost during the period of Borden's 9.2 cent price. Quality Dairy, however, did not lose aggregate business; its losses in "Quality" brand wholesale business volume were much more than offset by a large increase in sales of Borden milk.\textsuperscript{121} Moreover, it received 7 cents per half gallon as a commission for delivering Borden's direct sales to A & P. According to Commissioner Elman's dissenting opinion, Quality Dairy's "profits for the week were apparently greater than normal."\textsuperscript{122}

The diversion emphasis of \textit{Borden I} appears in the Commission's rejection of Borden's assertion that a permanent change in market shares was necessary to establish the anticompetitive tendencies requisite to a Robinson-Patman violation.\textsuperscript{123} Relying on the statutory objective of reaching anticompetitive conduct in its incipiency, the Commission asserted that a "continuation" of the respondent's below-cost discriminations "most assuredly would effect a permanent decrease in the market shares of respondent's competitors."\textsuperscript{124} It then observed that where there are only a few competitors, "an effect on one would be reflected in the strength of competition generally."\textsuperscript{125}

Although the Commission's finding of competitive injury as a result of Quality Dairy's loss of its wholesale business could be read, as Commissioner Elman implicitly suggested in dissent,\textsuperscript{126} as a statement that sales diversion is significantly anticompetitive even though the competitor who lost sales retained or enlarged its profits, this would be a superficial interpretation of the case. Quality Dairy's relinquishment of its wholesale business meant one fewer "brand" of milk in the wholesale market. Accordingly, even though Quality Dairy, the wholesale competitor, was not injured by Borden's price cut, the part of its business that was competitive with Borden in the wholesale market was transformed into a Borden distributorship. Since only three brands of milk were sold in the local market, the loss of one brand would likely affect the level of rivalry in the marketplace and this likelihood lends added meaning to the Commission's expressed concern about a permanent reduction in the market shares of the discriminator's rivals. There is not only a prospect of a permanent shrinkage in the

\textsuperscript{121} See id. at 579 (Comm'r Elman, dissenting).
\textsuperscript{122} Id.
\textsuperscript{123} Id. at 568.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 569.
\textsuperscript{126} Id. at 577-79.
rivals' aggregate market shares, but a prospect of a permanent reduction in the number of products sold. Moreover, the Commission's concern with market structure is shown by its observation that an impact on a single firm tends increasingly to affect competition in general as the number of firms in the market decreases.

The Commission's decision in *Borden I* was reversed by the Seventh Circuit Court of Appeals on the ground that the discriminatorily low prices of the Borden Company were effective for only one week, a fact which led the court to conclude that no substantial injury to competition was possible.\(^{127}\) Earlier, that same court had reversed a Commission decision in *American Oil*,\(^{128}\) a secondary-line case, on the ground that a two-week period of price cutting resulted in only temporary shifts of business. The Seventh Circuit and the Commission both appear to have concluded that a temporary price cut that causes only a temporary diversionary effect on sales and does not make a permanent impact on the price cutter's rivals does not constitute a Robinson-Patman violation.\(^{129}\) The Commission, however, appears to have been more ready to extrapolate future harm premised on a hypothetical extension of temporary price cutting.\(^{130}\) In *Borden I* and *American Oil*, the circumstances indicated that a repetition of the temporary price cuts was improbable. The Seventh Circuit's reversal of the Commission in those cases was, therefore, an appropriate result.

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\(^{127}\) 339 F.2d 953, 957 (7th Cir. 1964).


\(^{129}\) See text accompanying notes 123-24, 127 supra.

\(^{130}\) Thus, in *Borden I* the Commission supported its conclusion on the potential anticompetitive effects of the respondent's discriminatory price cutting by remarking that "[a] continuation of the price discrimination here present, involving sales below cost, most assuredly would effect a permanent decrease in the market shares of respondent's competitors." 64 F.T.C. at 568. The statement suggests an evaluation of the discrimination by projecting it into the future and then assessing the impact on the market. The Commission did reinforce its position by referring to other matter in the record from which it drew the inference that the discriminatory price cutting was not an "isolated instance," might be repeated, and might have been continued so long as necessary to keep Borden's supermarket customer in business. 64 F.T.C. at 570. Clearly, however, the Commission was much more inclined than the court to analyze potential market impact by extrapolating present behavior into the future.
IV. LOSS OF PROFITS AS AN ALTERNATIVE TEST OF COMPETITIVE INJURY

A. THE RELATION OF LOSS OF PROFITS TO DIVERSION

From the beginning, the Commission has viewed loss of profits by rival firms as an alternative to diversion as a basis for ascertaining competitive injury.\textsuperscript{131} Although a price reduction tends to divert trade away from rivals to the price cutter when the rivals make no responsive reductions, diversion may be largely forestalled when the rivals do make responsive reductions. In such cases, where diversion is not apparent, the impact of the price reduction may—depending on the elasticity of market demand—be evidenced by reduced profits of the rival firms. Although rivals' reduced profits show that the price reduction has had some impact on those firms, the discovery of reduced profits does not in itself disclose the extent of that impact nor its ramifications on the market structure. As in the case in which it is discovered that a price reduction has diverted sales away from rivals, the discovery that a price reduction has had an adverse impact on rivals' profits is a starting point for an analysis of the likely short- and long-term impact of the price reduction on the intensity of competition in the marketplace.\textsuperscript{132}

B. THE SIGNIFICANCE OF THE "SIZE" OF PROFIT MARGINS IN ASSESSING THE LAWFULNESS OF A DISCRIMINATORY PRICE REDUCTION

In Forster Manufacturing Co.,\textsuperscript{133} the Commission adopted the secondary-line cases' focus on impairment of the profit margins of adversely affected firms as an indicator of competitive injury, and utilized that approach in determining primary-line injury. In that case, the respondent, who had sold ice cream spoons at different prices to different buyers, defended its pricing actions by using the traditional criteria of sales diversion and rivals' loss of sales volume. It presented the relatively sophisticated defense that loss of particular sales by competitors does not evidence harm to seller's ability to compete unless the seller's reduced sales volume caused such higher unit costs that he could no longer make a profit at mar-

\textsuperscript{131} The Commission's focus on loss of profits is discussed, in connection with the secondary-line cases, in Gifford, \textit{Assessing Secondary-Line Injury}, supra note 8, at 62-65.

\textsuperscript{132} See text accompanying notes 88-89 supra and note 168 infra.

\textsuperscript{133} 62 F.T.C. 852 (1963), \textit{vacated and remanded}, 335 F.2d 47 (1st Cir. 1964).
ket prices, or unless the loss of the particular sales caused the seller to encounter financial difficulties. Furthermore, the respondent asserted that its own sales declined during the year of the discriminatory pricing and that it sold fewer spoons than two of its major competitors during that year. Moreover, the respondent claimed that both of its competitors "were themselves engaged in cutting prices to get the business of other buyers, i.e., that there was a general 'price war' going on," and that as a result one account which the respondent had obtained through price cutting was reacquired by the original holder of the account by a low bid.

The Commission rejected these arguments, however, primarily on the ground that "they attach too much significance to sales volume." Instead, the Commission believed that harm to other sellers should be measured by loss of profits rather than by lost sales volume. Here the Commission focused on the "substantiality" of a price discrimination, which it said is measured by "its size in relation to the profit margins of the parties allegedly affected by it." Citing Corwin Edwards' discussion of secondary-line injury and two secondary-line cases for support, the Commission based its rationale on the increasing significance that firms place on each dollar of profit or loss as the margin between prices and "actual costs" decreases. The Commission then concluded that a "price war"—which, it had asserted, drives prices downward toward actual costs—heightens the probability that a discrimination will injure competing sellers. By substituting injury to competing sellers for the substantiality of price discrimination, the Commission appeared to be equating the two factors. When there is a "substantial" discrimination, there is injury to com-

134. 62 F.T.C. at 902. This argument finds requisite harm when the rivals are experiencing average costs that decline with increases in output and when the respondent's discriminatorily low prices divert sufficient volume away from the rivals to force their operations to higher points on their average-cost curves. Such conditions occurred, or were thought by the court to have occurred, in Standard Oil Co. v. FTC, 340 U.S. 231, 249-50 (1951), and Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., 289 F.2d 950, 956 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960).

135. 62 F.T.C. at 902.
136. Id.
137. Id. at 904.
139. Whitaker Cable Corp., 239 F.2d 253 (7th Cir. 1956); E. Edelman & Co. v. FTC, 239 F.2d 152 (7th Cir. 1956). But see Fred Bronner Corp., 57 F.T.C. 771, 783 (1960), regarding the significance of narrow profit margins in secondary-line cases.
140. 62 F.T.C. at 904.
petitors; a discrimination becomes "substantial" when it is large in relation to the profit margins of the discriminator's competitors.

The "size" of a price discrimination is the amount by which prices to some buyers differ from prices to other buyers.\footnote{141} In assessing secondary-line harm, a comparison of the size of a discrimination to the profit margins of unfavored buyers makes some economic sense. The smaller the profit margins are in relation to the size of a discrimination, the less able are the disfavored buyers to meet the resale prices of favored rivals who pass on the price differential in their own resale prices.\footnote{142} When the size of the discrimination equals or exceeds the profit margins of the disfavored buyers, the latter will be unable to meet the resale prices of their favored rivals who pass on the price differential in their resale prices.

This general approach can be applied to an assessment of primary-line injury. But in the terms in which the Commission has formulated its test—a comparison of the size of the discrimination with the profit margins of adversely affected firms—it has limited applicability. It would apply, as in \textit{Forster}, to cases in which the discrimination was nongeographical and aimed at taking away particular, identifiable accounts from the discriminator's rivals. In such a situation, the discriminator's rivals could compete only by offering equivalently low prices to those accounts. As the size of the discrimination becomes large in relation to the rival sellers' profit margins, however, these rival sellers would be able to meet those prices only by incurring profit reductions of increasing amounts on those sales. As the size of the discrimination equaled or exceeded the profit margins of the rival sellers, the latter would be able to meet those prices and compete only by sacrificing their profits or by incurring losses on those sales.

Many primary-line cases, however, involve geographic discrimination; the Commission's formulation cannot be literally applied to this type of case. Since the size of a geographic discrimination would be measured by the difference between the

\footnote{141} See FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). The size of price discriminations can be compared directly to profit margins of secondary-line buyers or primary-line competitors if it is assumed that all prices are initially at a uniform market level.
\footnote{142} The Commission thus viewed as significant the ratio of the amount by which rivals' prices are undercut to the size of rivals' preexisting profit margins. Narrow profit margins of rivals were deemed a significant factor in later primary-line cases as well. \textit{E.g.}, Dean Milk Co., 68 F.T.C. 710, 750 (1965), \textit{aff'd in part, rev'd in part}, 395 F.2d 696 (7th Cir. 1968).}
discriminating seller’s prices in two areas, it has no relation to the profit margins of the discriminator’s competitors in any particular locality. For example, a sizeable discrepancy could exist between the prices at which a firm sells its products in the northeastern and southeastern parts of the United States. Yet, if the firm is selling at the prevailing market prices in each area, its price discrimination has no adverse effect on its local competitors in either area. Even if the local competitors in the area in which the lower prices prevailed operated at narrow profit margins and the amount of discrimination were greater than those margins, no harm would result.

If the profit-margin focus is to be applied to primary-line cases involving geographic discrimination, the Commission’s formulation must be reworked. The Commission’s basic intuition is that the effects of a discriminatorily low price will be more serious for those competitors of a discriminator whose preexisting prices were close to or below their costs than when the discriminatorily low prices are substantially above the costs of the discriminator’s competitors. To apply the Commission’s Forster approach to geographic discrimination, it would be necessary to restate it: the extent to which a firm undercuts its competitors through a discriminatory price cut is to be compared to the profit margins of those competitors in assessing the anticompetitive tendencies of discriminatory pricing. Forster’s focus on profit margins could be viewed as a movement toward a more productive approach to the evaluation of primary-line harm if it is interpreted as being concerned with the potential impact of the respondent’s pricing behavior upon the abilities of rivals to compete and, hence, upon the permanent market structure. If profit margins are decreased temporarily on a few accounts or even on all accounts, no permanent injury to rivals is likely to occur and thus no permanent reduction in the level of marketplace rivalry will result.

The Commission’s adoption of the profit-margin approach of its secondary-line cases makes sense because its intended focus is upon the economic harm inflicted by the discriminator upon its rivals. Although this newer approach is not without problematic aspects, Forster was another milestone on the

143. An examination of comparative profit margins may not always adequately reflect the impact of the discrimination. In the obvious case in which local industry demand is elastic, a discriminating seller who responds to that demand may force local prices down, narrowing every firm’s profit margins. But the narrowing of profit margins may be offset by increased sales volume, so that all firms earn larger profits. Again, profit margins of rivals may be
road away from a Moss-type diversion approach. In Forster, the Commission, by criticizing the respondent's defense as overemphasizing diversion and by calling instead for an examination of profit margins, seemed to be looking for real—rather than constructive—-injury to rivals, and appeared to be searching for that harm which would affect the viability of the competitive forces in the market in which the discriminator is selling.

V. THE GENERALIZATIONS OF FRY AND DEAN

A. THE DECISION IN FRY

Further criteria governing primary-line competitive injury were articulated by the Commission in Lloyd A. Fry Roofing Co. In that case, the respondent, followed by other national manufacturers of roofing material, set Knoxville, Tennessee, the plant site of a local southeastern roofing manufacturer that did not conform to an industry-observed pricing pattern, as a basing point, and dropped the Knoxville base price to a level below the local manufacturer's costs. There was no evidence, however, that the Knoxville price was below the respondent's costs. The decision—which condemned the respondent's pricing action—seems fully justified on the basis of the respondent's predatory intent. Indeed, the Commission found that the respondent's purpose in lowering its Knoxville price was to discipline the local seller for its deviant pricing. But the Commission chose not to rely on predatory intent and, instead, directly addressed the competitive impact of the local cuts. In so doing, the Commission appeared to
be attempting to use the Fry proceeding as a forum for enunciating criteria which would be applicable to a wider class of cases than those bearing a close factual resemblance to Fry. Thus, the Commission supported its finding of an anticompetitive tendency by listing five factors: (1) a locally dominant seller and (2) price leader (3) was setting long-term prices in a local area (4) at a level below the average cost of some local producers (5) while selling at higher prices elsewhere.\(^{152}\)

It should be observed that these statements were made by the Commission in an opinion that recognized that there was "no allegation of substantial injury to competition generally other than that which would result from injury to individual competitors."\(^{153}\) The Commission thus was apparently applying the language of the Act which outlaws price discrimination "where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who . . . grants . . . such discrimination . . . ."\(^{154}\) In applying this clause, the Commission rejected a superficial diversion theory of injury such as that employed by the Second Circuit in Moss.\(^{155}\) Indeed, the Commission quoted the then-recent opinion of the Seventh Circuit in Anheuser-Busch to the effect that section 2(a) "is not concerned with mere shifts of business between competitors," and construed the clause in question as being concerned "with injury to the health or vigor of competition, including injury to a single firm's ability to compete."\(^{156}\) Despite the permeation of much of the opinion with a market-structure approach toward the evaluation of competitive injury, the five factors listed by the Commission must be read in the explicitly stated context of applying the Act's competitive injury clause to injury to a single competitor.

\(^{152}\) We believe that the showing that Fry, as the price leader and dominant competitive factor in the sale of roofing products in the area served by Volasco and Ohio Paper Company, has discriminated in price by selling asphalt felt in that area at prices below the price at which these two smaller firms could profitably operate and has maintained its prices at or about this level for more than two years, while selling at substantially higher prices elsewhere, is sufficient to establish a violation of Section 2(a).

\(^{153}\) 68 F.T.C. at 263. The Commission bolstered its opinion by finding that Fry's price reductions were made "for the purpose of disciplining small independent concerns . . . ." Id. The significance of this latter finding was weakened by the Commission's decision not to rely on the hearing examiner's finding of predatory intent in predicting the future effects of Fry's price discrimination.

\(^{154}\) 68 F.T.C. at 250-51.


\(^{156}\) See 68 F.T.C. at 260. See text accompanying notes 34-55 supra.
B. A LIMITED CRITIQUE OF THE FRY STANDARDS

All but the third of the five factors listed by the Commission in Fry\textsuperscript{157} could have been applied to the \textit{Borden I} facts to justify that decision.\textsuperscript{158} The third factor, the maintenance of locally discriminatory prices "for more than two years," has been translated as "long-term" discriminatory prices.\textsuperscript{159} Since the discrimination in \textit{Fry} did last more than two years, the Commission's reference to this lengthy period can be viewed as descriptive, and not necessarily as a withdrawal from its earlier position in \textit{Borden I} that a temporary (one-week) price cut could satisfy the requirements for finding the anticompetitive tendency essential for a Robinson-Patman violation.\textsuperscript{160} Yet, in \textit{Fry}, the Commission explicitly adopted the Seventh Circuit's view that mere shifts of business do not constitute competitive injury. The adoption of this view suggests that the Commission referred to the two-year duration of the discrimination in order to show that the discrimination in question was likely to have produced permanent effects.\textsuperscript{161} In this case the permanent effect was the potential crippling of Fry's two local competitors in the Knoxville area.

The Commission's concern in \textit{Fry} with the fact that the discriminator's prices were below the average costs of rival sellers echoed its concern in \textit{Forster} with the rival sellers' profit margins.\textsuperscript{162} In each case, the Commission took an approach that was plausibly traditional, not in the sense of the earlier Moss/diversion line of cases, but in the sense of relationship to the historic concerns of the enacting Congresses. Both the Commission and Congress were concerned about the vigor and health of independent firms. They were concerned that these firms be protected not from the stresses of normal competition

\begin{itemize}
\item 157. See text accompanying note 152 supra; Lloyd A. Fry Roofing Co., 68 F.T.C. 217, 263 (1965), aff'd, 371 F.2d 277 (7th Cir. 1966).
\item 158. See text accompanying notes 117-130 supra.
\item 159. See note 152 supra and accompanying text.
\item 160. See text accompanying notes 110-122 supra.
\item 161. The Seventh Circuit, in Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961), asserted that the Act is not concerned with "mere shifts of business" among competitors and emphasized the "temporary" nature of these shifts. Id. at 835, 839. Skepticism that short periods of discrimination could produce potentially anticompetitive effects on the market was also demonstrated by the Seventh Circuit in Borden Co. v. FTC, 339 F.2d 953, 957 (7th Cir. 1964). See also American Oil Co. v. FTC, 325 F.2d 101, 106 (7th Cir. 1963). Against this background, the Commission's incorporation of the Seventh Circuit's \textit{Anheuser-Busch} language seems designed to emphasize the prolonged period of the \textit{Fry} discrimination. See 68 F.T.C. at 260, 263.
\item 162. See notes 133-144 supra.
\end{itemize}
where the race is won or lost on the basis of efficiency but from "unfair" competitive conditions\textsuperscript{163} in which a locally efficient firm can be driven from the market by a less efficient discriminator through discriminatory pricing.

Both Fry and Forster serve to sharpen and to focus these historic perceptions. The legislative and enforcement histories of section 2 are replete with hostile references to firms' selling below cost or at prices which produce abnormally low profits.\textsuperscript{164} Many of these references reflect the image of the classic predator that gave rise to the original section 2.\textsuperscript{165} Other references reflect the concern of the amending Congress with below-cost sales by producers to favored buyers.\textsuperscript{166} The contribution of Forster and Fry is to reinforce the notion that competitive injury—if it exists—lies in adverse effects on rivals. The issue of whether the discriminator sells below his own costs (however "costs" are defined)\textsuperscript{167} may be relevant to the assessment of the motivation of the discriminator or to his conformity with a competitive-market norm. The injury (or potential injury), however, is measured primarily by the impact of the discriminator's conduct on his rivals.\textsuperscript{168} When rivals are forced to sell at or below their costs, they cannot continue in business indefinitely.\textsuperscript{169} Of course, a firm normally should not be prevented from selling at or below the costs of its rivals when it is in its short-run profit-maximizing (or loss-minimizing) interest to do so.\textsuperscript{170} But if the competitive contest among

\textsuperscript{163} See Gifford, Promotional Price-Cutting, supra note 3, at 1046, 1049, 1062-64. See also H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914), quoted at text accompanying note 1 supra.
 \textsuperscript{165} See note 163 supra.
 \textsuperscript{166} See Gifford, Assessing Secondary-Line Injury, supra note 8, at 49-52.
 \textsuperscript{167} See text accompanying notes 308-313 infra.
 \textsuperscript{168} This, indeed, is the one valid aspect of Moss. If there is no sales diversion or other adverse impact upon the profits of rivals, the discrimination is known, a fortiori, to have had no market impact, and further analysis is unnecessary. Forster and Fry are reminders that market analyses of the potential impact of discriminatory pricing should have as a first step an assessment of the impact of that pricing on other firms.
 \textsuperscript{169} See, e.g., J. DUE, INTERMEDIATE ECONOMIC ANALYSIS 230 (rev. ed. 1950).
rivals is to promote efficient operations, a firm should not be allowed to force its rivals into unprofitable operations when (i) it is enabled to do so by discriminatory pricing and when (ii) its low prices are not justified by its own short-run profit-maximizing interest.\textsuperscript{171}

C. THE DECISION IN DEAN

\textit{Dean Milk Co.},\textsuperscript{172} another primary-line case decided by the Commission during the 1960s, climaxed the Commission's halting development of a market-oriented approach to primary-line injury. That case involved territorial price differentials maintained by the respondent Dean, a milk producer, during its entry into the market in several cities in eastern Kentucky. Although a significant amount of Dean's pricing was found to have been at below-cost levels,\textsuperscript{173} the Commission indicated that it would tolerate some below-cost discriminatory pricing during periods of limited duration in which a seller was entering new markets, presumably on the ground that entry is generally procompetitive.\textsuperscript{174} Dean's pricing was faulted by the Commission, however, because its discriminations exceeded the Commission's limits of toleration for market-entry situations\textsuperscript{175} and because the Commission attributed the demise of a number of local rivals to Dean's discriminatory pricing.\textsuperscript{176}

Although the \textit{Dean} decision is yet another example of a Commission determination of primary-line injury that was reversed on appeal,\textsuperscript{177} its articulation of a developed market approach to primary-line injury is important. In \textit{Dean}, the Commission employed alternative tests of diversion or loss-of-profits as a starting point. It then qualified these initial tests by requiring that the diversion or loss-of-profits must portend one of three results: (1) a financial crippling of the affected competitors, (2) a possibility of an anticompetitive concentration of business in large sellers, or (3) a significant reduction in the

\begin{itemize}
\item \textsuperscript{171} See discussion in Gifford, \textit{Promotional Price-Cutting, supra} note 3, at 1050-60. \textit{But compare} Areeda & Turner, \textit{supra} note 3, at 711, 727, \textit{with id}.
\item \textsuperscript{172} Dean Milk Co., 68 F.T.C. 710 (1965), \textit{aff'd in part, rev'd in part}, 395 F.2d 696 (7th Cir. 1968).
\item \textsuperscript{173} \textit{See} 68 F.T.C. at 771 & n.115, 774.
\item \textsuperscript{174} \textit{Id.} at 775 n.147.
\item \textsuperscript{175} \textit{Id. See also} Gifford, \textit{Promotional Price-Cutting, supra} note 3, at 1080-81.
\item \textsuperscript{176} 68 F.T.C. at 774.
\item \textsuperscript{177} \textit{See} Dean Milk Co., 68 F.T.C. 710 (1965), \textit{aff'd in part, rev'd in part}, 395 F.2d 696 (7th Cir. 1968); Borden Co., 64 F.T.C. 534 (1964), \textit{rev'd}, 339 F.2d 953 (7th Cir. 1964); Anheuser-Busch, Inc., 54 F.T.C. 277 (1957), \textit{rev'd} 265 F.2d 677 (7th Cir. 1965), \textit{rev'd}, 363 U.S. 536 (1960), \textit{order vacated}, 289 F.2d 835 (7th Cir. 1961).
\end{itemize}
number of sellers in the market. The Commission added that diversion or loss-of-profits gives sufficient cause to find a lessening of competition if it should herald (a) a trend toward further losses of business and profits, and (b) an increased concentration of business in fewer sellers or a reasonable possibility that some sellers will be driven out of business. If the two statements are read together, Dean might be construed as saying that a determination that business has been diverted away from the discriminator's rivals or that the rivals have suffered a loss of profits is the first step in finding the anticompetitive tendency requisite for a section 2(a) violation. Once the first step is satisfied, the diversion or loss of profits must portend a trend toward further losses of business or profits, a trend that must include the possibility of concentrating business in larger sellers, or the possibility of eliminating a significant number of sellers from the market. Language in the opinion suggests that the elimination of any number of competitors from the market, regardless of the economic significance of those competitors, would be sufficient to satisfy the statutory anticompetitive-tendency requirement. The totality of the language used, however, suggests otherwise.

The discussion in Dean of primary-line injury standards reemphasizes the Commission's insistence in Yale & Towne Manufacturing Co. on maintaining a competitive market structure. Dean also provides a synthesis in which the post-Yale & Towne cases can be included. In Forster, the Commission rejected respondent's arguments showing that the rivals were able to continue their operations. Such arguments were rejected, not because the continued viability of competitors was deemed irrelevant, but because the respondent had framed its arguments in terms of the actual impact of its discrimination on rivals rather than in terms of the potential impact if continued for a long term. Forster's arguments disregarded the Commission's tendency to project the effect of discrimination. The Dean criteria are phrased in terms of portents for the future rather than as actual occurrences in the present or past. Thus, it is possible to read the post-Yale &

178. 68 F.T.C. at 750.
179. See id. at 750, 774-75.
180. 52 F.T.C. 1580 (1956). See text accompanying note 83 supra.
182. 62 F.T.C. at 904-05.
183. See text accompanying notes 100-102, 122-130 supra, 199-209, 214, 244, 353, 355-357 infra.
Toume cases together as saying that when a seller, through discriminatory pricing, is able to force into unprofitable operations a number of its rivals whose absence from the market would significantly increase the level of market concentration, there is likely to be primary-line injury. The Forster decision adds a further refinement, that of challenging discriminatory pricing that "squeezes" rivals' profit margins sufficiently to portend the demise of a significant number of them. Of course, in a market with few sellers, significance will attach to the continued profitable operations of each seller.

VI. JUDICIAL APPROACHES TO PRIMARY-LINE INJURY

In the courts, primary-line injury has been established most often in cases involving predatory behavior and in cases involving "below-cost" pricing that—properly or not—was perceived by the courts as predatory. In cases involving non-predatory conduct, the courts have evidenced a substantial evolution. In the 1940s and 1950s, the courts did not distinguish themselves for their perspicuity in handling allegations of primary-line competitive injury, except in contexts involving obviously predatory behavior. Although a number of cases were decided as if they involved predatory behavior, the courts' attempts to fit the defendants' conduct into the mold of the classic predator seem unconvincing. In other cases, defendants whose behavior seems suspect were absolved by the courts in analyses that demonstrated an unfamiliarity with the underly-

184. See text accompanying notes 129-136 supra.
185. See text accompanying notes 345-348 infra.
187. Thus, for example, in Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 943 (1960), the court failed to appreciate the impact of scale economies in the production of cinder block. That failure caused it to miss the socially beneficial aspects of the defendant's marginal-cost pricing. In Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), the court failed to analyze why the defendant's discriminatory price cut—which apparently moved it from a profit to a loss position—was not predatorily motivated.
The sophistication of the federal judiciary in dealing with Robinson-Patman issues, however, has gradually increased over time. Recently, a number of reported decisions have exhibited a relatively high level of analytical competence.

Since the late 1950s the courts have exhibited a marked reluctance to infer primary-line injury from discriminatory pricing, even when that discrimination has resulted in significant market-share changes. This reluctance appears to be based on judicial expectations that firms—especially large ones—are capable of withstanding a certain amount of pressure exerted.

This judicial reluctance to find primary-line injury has frequently been illustrated in appellate reversals of Commission or jury determinations of primary-line Robinson-Patman violations. See cases cited supra. In a number of these cases, the court of appeals has itself been reversed by the Supreme Court, but on remand, has found other grounds for reinstating its reversal of the Commission or jury. This scenario was followed in the Anheuser-Busch, Borden II, and Utah Pie cases. See Continental Baking Co. v. Utah Pie Co., 349 F.2d 122 (10th Cir. 1965), rev'd, 386 U.S. 685 (1967), on remand, 396 F.2d 161 (10th Cir. 1965); Borden Co., 62 F.T.C. 130 (1963), rev'd, 339 F.2d 133 (5th Cir. 1964), rev'd, 383 U.S. 637 (1966), on remand, 381 F.2d 175 (5th Cir. 1967); Anheuser-Busch, Inc. v. FTC, 265 F.2d 677 (7th Cir. 1959), rev'd, 363 U.S. 536 (1960), order vacated, 289 F.2d 835 (7th Cir. 1961). But see Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 265 F.2d 950 (10th Cir. 1959).

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by the low prices of their rivals.192

Several other themes have appeared intermittently in the judicial opinions. First, courts have recognized that a multi-market firm can be expected to price differently in different markets because of varying competitive and cost conditions in those markets.193 Since prices that differ from market to market are, by definition, "discriminatory,"194 these courts have been removing effectively the pejorative connotations from "discriminatory" pricing. Moreover, they have emphasized that it is the accuser who must show that the differential prices work injury in the marketplace, a focus which lessens the need for the accused firm to explain or to justify its behavior.195 And since discriminatory pricing is considered normal and to be expected, the plaintiff must overcome larger psychological obstacles in establishing the anticompetitive potential of the discrimination.

A second factor, which nearly all courts have considered to be highly relevant to a finding of primary-line competitive injury, consists of changes—especially dramatic changes—in market shares resulting from discriminatorily low pricing. The cases have tended to say that mere "shifts" in business are not of concern but are, in fact, unsurprising in a vigorously competitive marketplace. Indeed, the Seventh Circuit's Dean Milk Co. opinion developed the point that rival firms have no "vested right" to grow in the proportions indicated by their existing market shares, and that the "practicalities of competition" themselves "necessarily result in some competitors growing at the expense of their smaller or less efficient rivals."196 Nonetheless, when shifts of business are sufficiently large or permanent as to be best described as shifts of market shares, the cases have tended to treat them seriously.197 Here is where the

192. See cases cited in notes 191 supra, 193 infra.
193. See Dean Milk Co. v. FTC, 395 F.2d 696, 701, 702 (7th Cir. 1968); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 367 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956).
195. See text accompanying notes 54-55 supra.
196. 395 F.2d at 711.
197. See, e.g., cases cited in note 191 supra. Although in most of these cases the courts of appeals concluded that no primary-line injury had occurred, in each case, nevertheless, the court found it necessary to explain why the market-share shifts that had occurred did not constitute such injury in the circumstances there present. Often these explanations tended to be that the shifts were only temporary. See text at notes 105, 129-130.
projection\textsuperscript{198} of present events and trends into the future becomes relevant.

Although it is the probability of producing an anticompetitive impact on the market that determines the lawfulness of discriminatory pricing, and although this probability perhaps should be assessed as of the time-period in which the discrimination occurs,\textsuperscript{199} the courts appear to have freely examined the market conditions existing in the post-discrimination period in order best to ascertain the impact of the discrimination. This question of the proper date on which to assess the anticompetitive potential of discriminatory pricing was a focus of contention in \textit{H.J. Heinz Co. v. Beech-Nut Life Savers, Inc.}\textsuperscript{200} In that case, plaintiff Heinz argued that at the time defendant Beech-Nut commenced its discriminatorily low pricing in California the chances were that Heinz would withdraw from the California market and, consequently, that the pricing should be judged anticompetitive. Although conceding that an assessment of probabilities as of that date was proper, Beech-Nut argued that "subsequent events as ultimately developing should be considered,"\textsuperscript{201} and, hence, that the continued presence of Heinz in the California market should be considered in assessing the impact of Beech-Nut's pricing on the California market. The court agreed with Heinz about the time at which the prospective effects of the price cut should be examined, but did not address the modification urged by the defendant.\textsuperscript{202} In later cases, however, reviewing courts have, in fact, assessed the anticompetitive potential of discrimination in the light of subsequent events.

In the \textit{Anheuser-Busch} case, the Seventh Circuit divided the competitive-injury question into two components: (1) actual competitive injury, and (2) probability of future competitive injury.\textsuperscript{203} The court dealt with the first question by referring to actual market effects ascertained through an examination of the market during and after the period in which the

\textsuperscript{198} See text accompanying notes 100-102, 123-130 \textit{supra} and notes 199-209, 214, 244, 352, 354-356 \textit{infra}.

\textsuperscript{199} The Act contemplates that pricing behavior will be evaluated according to the probable market effects of that behavior and that the probable effects are properly assessed at the time of the behavior without the wisdom of hindsight. \textit{See} text accompanying note 5 \textit{supra} and note 202 \textit{infra}.


\textsuperscript{201} \textit{Id.} at 462.

\textsuperscript{202} \textit{Id.} at 464. Because it felt that "the relative competitive strength of the parties" and the "aggressive" nature of the price cuts needed clarification at trial, the court denied the motion of the defendant for summary judgment.

\textsuperscript{203} \textit{See}, e.g., text accompanying notes 206-207 \textit{infra}.
discriminatory prices were in effect. Although the court observed that respondent’s local price cut increased its share of the market from 12.5% prior to the first price reduction to “a monthly average of 36.6% of sales during the eight months of the second price reduction,” it nevertheless found that this dramatic change in market shares did not have any actual anticompetitive effect, because the respondent’s share dropped to 17.5% eleven months after the retraction of the second price reduction, and because one of its rivals had grown from 29.4% prior to the initial price cut to 43.2% eleven months after the retraction of the second price cut.204 Indeed, the principal difference between the court’s evaluation of the impact of Anheuser-Busch’s price cut205 and the Commission’s evaluation was the court’s incorporation, in its analysis, of the market conditions during the period following the withdrawal of the second price cut. Whereas the Commission focused on the dramatic market-share increase achieved by Anheuser-Busch206 at the point of the greatest impact of its price cut and largely ignored the state of the market after the price reduction was withdrawn, the court focused on the market in the post-reduction period.207 The court was able to do this by directing its attention initially to answering the first of the two questions it proposed. In answering the second question, the court admitted the propriety of making “a projection to ascertain the future effect”208 of a respondent’s past discrimination where such a projection is based upon predatory behavior. But since the court concluded that the respondent “exercised a proper restraint in its use of its competitive power,”209 the court refused to project adverse competitive effects into the future.

A third theme in a number of the decisions is the acceptance of business growth of rival firms as negating anticompetitive consequences of discriminatory pricing. It has already been observed that in the *Anheuser-Busch* case, the continued growth of the Falstaff company in the St. Louis market throughout, and subsequent to, the period of Anheuser-Busch’s discriminatorily low pricing was a factor relied on by the court as an indication that those prices produced no actual lessening

204. Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840, 843 (7th Cir. 1961).
205. 239 F.2d at 839.
206. Id. at 839-40.
208. 289 F.2d at 843.
209. Id.
of competition in that market.\textsuperscript{210} And in its recent decision in \textit{International Air Industries, Inc. v. American Excelsior Co.},\textsuperscript{211} the Fifth Circuit's determination that the defendant's discriminatory pricing produced no injury to seller-level competition was supported in part by the fact that rival sellers continued "to exist and even grow as large competitors" of the discriminator.\textsuperscript{212} In \textit{Borden II},\textsuperscript{213} the court reasoned that no adverse impact on seller-level competition could be inferred from Borden's discriminatorily low prices on private-label milk because Borden's private-label rivals who lost sales to Borden gained offsetting sales from other sources. Indeed, the affected rivals had increased their absolute sales volume and had "bettered their market position in approximately the same proportion" as Borden.\textsuperscript{214} Again, the Commission was more willing than the court to project Borden's inroads into its rivals' sales into the future; the court was satisfied that no anticompetitive impact had occurred because of the rivals' offsetting sales. The Commission dismissed the significance of the offsetting sales as caused by a unique set of circumstances which were unlikely to be repeated.\textsuperscript{215} In \textit{Dean Milk Co.},\textsuperscript{216} the sales expansion of and the increased profits earned by many of Dean's rivals played a role in the court's rejection of Commission determinations of primary-line injury.\textsuperscript{217} The events of the Dean case occurred against a background of changing technology, which was producing an efficiency advantage in the larger dairies.\textsuperscript{218} In such circumstances, the continued growth of many of Dean's rivals suggested to the court that the losses suffered by several other firms and even the demise of some firms were not caused by Dean's pricing, but were a result of the increasing inefficiencies of those firms.\textsuperscript{219}

Finally, the concept of causation has been employed by the courts to absolve discriminating firms from Robinson-Patman liability. This application has been accomplished in two ways. First, a court may attribute the demise of rival firms to factors

\begin{footnotesize}
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\item[210.] \textit{Id.} at 839. \textit{See} text accompanying note 115 \textit{supra}.
\item[211.] 517 F.2d 714 (5th Cir. 1975).
\item[212.] \textit{Id.} at 722 n.14. \textit{See also} \textit{id.} at 720.
\item[213.] Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967).
\item[214.] \textit{Id.} at 179-80.
\item[215.] \textit{See} Borden Co., 62 F.T.C. at 173.
\item[216.] Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968).
\item[217.] \textit{Id.} at 702, 711.
\item[218.] \textit{See} \textit{id.} at 703, 705-06, 712, 714; Beatrice Foods Co., 67 F.T.C. 473, 712-13 (1965), \textit{modified and aff'd}, 1967 Trade Cas. ¶ 72,124 (9th Cir. 1967).
\item[219.] 385 F.2d at 711, 712.
\end{itemize}
\end{footnotesize}
other than the discriminatory prices. This, as observed above, was the case in *Dean Milk Co.*, in which the court saw technological changes in production methods as the likely cause of the failing firms' difficulties.  

And, in *Anheuser-Busch*, production and management difficulties of two of the discriminators' rivals were seen by the court as accounting for much of the long-term shrinkage of their market-shares.  

Second, a court may find that injury to rival sellers, although "caused" by discriminatorily low prices, was effected merely by the low level of the prices and not by their discriminatory aspect: the discriminator's maintenance of a higher price elsewhere did not contribute to its ability to price at a low level in the market at issue. In order for the price difference to "cause" competitive injury, under this view, the discriminatorily low prices that impose adverse operating conditions on the discriminator's rivals would have to be subsidized by the revenues produced by higher prices elsewhere. This distinction between injury "caused" by discriminatorily low prices only and injury caused by discrimination has received substantially more recognition from the courts than it has from the Commission.

VII. THE SUPREME COURT'S VIEW: UTAH PIE

The Supreme Court reached the issue of primary-line standards in its 1967 decision in *Utah Pie Co. v. Continental Baking Co.*. That case resulted from four years of intense price rivalry, beginning in 1958, between Utah Pie Co., a local Salt Lake City processor of frozen pies, and three national sellers of frozen pies, each of which was attempting to improve its position in the Salt Lake City market. The Salt Lake City prices of each of the national sellers were shown to be lower than their prices elsewhere and were found to have fallen occasionally below their average costs of producing and selling in Salt Lake City. The Utah Pie Co., which began marketing frozen pies only in 1957, generally met or undercut the local prices of its national rivals. But since it operated only in one market—Salt Lake City—its low prices did not involve it in territorial price

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220. Text accompanying note 219 supra.
221. 289 F.2d at 839.
222. See Borden Co. v. FTC, 381 F.2d 175, 180 (5th Cir. 1967).
223. See, e.g., id.; Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 703-04 (9th Cir. 1964); Shore Gas & Oil Co. v. Humble Oil & Ref. Co., 224 F. Supp. 922, 925-27 (D.N.J. 1963); Dean Milk Co., 68 F.T.C. 710, 799-800, 810 (1965), rev'd, 395 F.2d 696 (7th Cir. 1968) (Commissioner Elman's dissent).
225. See id. at 690, 693, 697, 698-99, 701.
discrimination as did the local pricing behavior of its national rivals.

The Salt Lake City price rivalry among Utah Pie and its three national rivals drove prices downward from 1958 to 1961. Utah Pie, which in 1958 had sales amounting to 66.5% of the market, continuously increased its sales during the period from 1957 to 1961, even though its share of the rapidly expanding market declined to 45.3%.226 Utah Pie's profits, after an initial loss of $6,461 during its first year of marketing frozen pies, rose from $7,090 in 1958 to $9,216 in 1961. Its net worth also increased from $31,651.98 in 1957 to $68,802.13 in 1961. During this same period, the total number of frozen pies sold in the Salt Lake City market increased over four and one-half times.227

Although the Supreme Court held that the jury properly could have found a potential injury to local competition in the pricing behavior of Utah Pie's national rivals, the Court was unclear as to the exact nature of the competitive injury: it referred to a "reasonably possible" injury, both to Utah Pie "as a competitive force" and to competition generally.228 The precise ways in which these injuries might occur were not explained by the Court. An examination of the effects of the price rivalry upon market structure alone would lead to the superficial conclusion that the market had become more, rather than less, competitive.229 Utah Pie, which previously had appeared to dominate the local market with a 66.5% share, remained a significant competitor with its 45.3% share, but no longer dominated the market. Its viability appeared not to have been lessened, since its sales, profits, and net worth had been steadily increasing.230 Moreover, since Utah Pie had met, or undercut,231 the price reductions of its rivals, analysis of the competitive-injury question could not easily have begun with diversion. Utah Pie's responsive price reductions had largely prevented sales from being diverted away from it; indeed, Utah Pie's sales volume continuously increased232 over the years in question. The Supreme Court, therefore, might have focused on lost profits as the point at which the inquiry into competitive

226. Id. at 689.
227. Id.
228. See id. at 700, 702.
229. In dissent, Justice Stewart adopted just such an analysis, concluding that the market was more, not less, competitive. Id. at 705.
230. See text accompanying notes 226-227 supra.
231. See, e.g., 386 U.S. at 698-99 (Utah Pie responded to a price reduction by Carnation by undercutting it).
232. See text accompanying note 226 supra.
injury should begin. Yet, in dealing with the price reductions of a rival firm, Continental, the Court made the curious assertion that "[t]he jury was entitled to consider the potential impact of Continental’s price reduction absent any responsive price cut by Utah Pie." This is apparently a suggestion that the actual impact on Utah Pie in terms of lost profits be ignored in order to ascertain the extent of a hypothetical injury that might have occurred under different circumstances. Or perhaps the Court really meant to apply a diversion approach to injury and, in accordance with this approach, to recast the event in diversion terms, even if the sales diversion had to be hypothetical. But such an approach would almost make diversion the end, rather than the beginning, of analysis. That approach, it would have been thought, had long been discredited.

An important factor in the Court’s view of the case, however, appears to have been the “below cost” aspect of much of the defendants’ pricing. The Court also found significant the large size of the defendants’ price reductions and the “drastically declining price structure” caused by these reductions. Apparently, the drastically declining price structure was projected by the Court as potentially leading to further declines, which Utah Pie would be unable to meet and which would therefore drive Utah Pie from the market or injure it as an independent and viable competitor. Yet, if the Court indeed analyzed the case by projecting present trends, it was remarkably silent about how its use of this projection analysis enabled it to foresee the eventual transformation of the market into a state of oligopolistic interdependence.

233. 386 U.S. at 699. The Commission referred to this curious language with approval in National Dairy, 71 F.T.C. at 1425.

234. It is unclear why the Court resorted to a measure of such a hypothetical injury as a justification for the jury verdict, when a lost-profits measure would seem to have been more appropriate. Perhaps “the impact on Utah Pie as a competitor was negligible,” a possibility that the Court asserted was not incompatible with injury to competition generally. 386 U.S. at 700. But injury to Utah Pie would seem to be required for its antitrust standing. And since computation of injury in the intensely price-competitive Salt Lake City market would be difficult, the Court may have employed the measure of a hypothetical injury as a means of overcoming this difficulty.

235. See text accompanying notes 78-81 supra.

236. See 386 U.S. at 697, 698-99, 701.

237. 386 U.S. at 703 & n.15.

238. See id. at 703 (“statutory test is one that necessarily looks forward on the basis of proven conduct in the past”).

239. A proper use of a projection analysis would include an assessment of how the market structure might be altered as a result of the behavior under
The *Utah Pie* case bears certain resemblances to *Maryland Baking Co.* and to the Commission’s approaches in *Anheuser-Busch* and *Borden*. In those cases price cuts that worked substantial and rapid shifts in market shares were condemned; the success of the price cuts in diverting substantial shares of local markets to a price cutter was apparently seen as indicative of the adversely affected rivals’ lack of power to prevent that diversion. Indeed, the Commission so described its approach to the *Maryland Baking* decision. Once the rivals’ lack of power to maintain their market shares becomes apparent to the Commission, it is liable to project the present pricing into the future and to assess the probable impact of that pricing upon the affected rivals and the market structure. Whether an approach of this kind is correctly employed depends, as explained above, on whether the present pricing behavior under challenge appears likely to be continued for a long term, so that projections are likely to be accurate predictions of future market developments in the absence of official intervention. Regardless of the propriety of its application, however, the projection approach seems the best explanation of the Commission’s approach in the three mentioned cases as well as the Supreme Court’s approach in *Utah Pie*.

The Supreme Court’s *Utah Pie* opinion, by itself, appears...
to have two dimensions of importance. First, it seems to support the approach to the Robinson-Patman Act that draws inferences of predatory intent from below-cost pricing. But its more important dimension appears to consist of its explication of nonpredatory grounds for establishing competitive injury. In context, the factors mentioned by the Court suggest that substantial price reductions that are designed to expand sales volumes quickly and that actually do produce significant changes in market shares—even when they lessen the dominance of a locally dominant firm—may be considered to "erode" competition. This is especially true when some of the price reductions fall to a below-cost level and when the market effects—the falling price levels and market-share changes—appear likely to continue for a substantial period into the future.

**VIII. THE AFTERMATH OF UTAH PIE**

_Utah Pie_ has been the analytic foundation of many of the subsequent primary-line cases. The decision was a primary authority for the Commission's decision in _National Dairy Products Corp._ It was also principally relied on by the Tenth Circuit in _Continental Baking Co. v. Old Homestead Bread Co._ In the latter case, the defendant constructed a high-efficiency, large-volume bakery plant, which could not be operated profitably until the company increased its sales volume by 50%. The bakery then discriminatorily slashed its prices in an effort to obtain the volume necessary to operate its new plant at an efficient level. Quoting _Utah Pie's_ reference to "discriminatory prices [that] consistently undercut other competitors," the court suggested that the defendant bakery's price cutting and construction of a large capacity plant demonstrated "some-

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248. See 386 U.S. at 703.

249. See text accompanying notes 127-130, 182, 207 supra and note 280 infra.

250. 71 F.T.C. 1333, 1425-28 (1967), modified and enforced, 412 F.2d 605 (7th Cir. 1969); see text accompanying notes 264-289 infra.

251. 476 F.2d 97, 104 (10th Cir. 1973).

252. Id. at 101, 104.

253. Id. at 104.
thing more than 'fierce competitive instincts': they constituted a sufficient basis from which a jury could draw inferences of predatory intent.\textsuperscript{254}

There appear to be many flaws in the Tenth Circuit's \textit{Old Homestead} decision.\textsuperscript{255} Defendant's actions in constructing a plant with large economies of scale and then cutting prices to secure requisite sales volume for the plant do not seem to form the basis for inferences of predatory intent, unless predatory intent is redefined to include the intention to succeed in the competitive race by becoming more efficient than one's rivals.\textsuperscript{256} But \textit{Old Homestead} is perhaps more significant for what the Tenth Circuit did not do. The court made no attempt to employ \textit{Utah Pie}'s criteria governing nonpredatory discrimination to justify a finding of competitive injury.\textsuperscript{257} This omission illustrates what is perhaps the most significant aspect of \textit{Utah Pie}: its attempt to formulate standards governing the evaluation of competitive injury caused by nonpredatory discrimination has been ignored by most courts.\textsuperscript{258}

Moreover, in the \textit{Utah Pie} litigation itself, the Supreme Court's opinion seems to have only marginally affected the eventual result in the case. On remand, the Tenth Circuit extensively analyzed the impact on the plaintiff of the discriminatory pricing employed by each of the defendants. Although the court was constrained by the Supreme Court's holding that the jury finding of competitive injury was supported by substantial evidence,\textsuperscript{259} the court analyzed in detail the actual operations of the market and its participants and set aside the damages awarded by the jury.\textsuperscript{260}

Other cases, in distinguishing the Supreme Court's \textit{Utah

\textsuperscript{254} Id.

\textsuperscript{255} The court in that case failed to consider the extent to which the defendant's behavior in building the large plant furthered the efficiency goals of the antitrust laws and also failed to consider the extent to which those efficiencies might have been passed on to the public. \textit{See} Gifford, \textit{Promotional Price-Cutting}, supra note 3, at 1086-97.

\textsuperscript{256} The propriety of the sales agreement between Continental and Five States Supply Company is not meant to be commented on. \textit{See} \textit{476 F.2d} at 102.

\textsuperscript{257} Indeed, aside from mention of a procedural issue, \textit{Old Homestead} cites \textit{Utah Pie} only in connection with the issue of predatory intent. \textit{See} id. at 101, 104.

\textsuperscript{258} An exception is \textit{National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 615-18 (7th Cir. 1969), in which \textit{Utah Pie} is employed to help evaluate the potential and actual results of discriminatory price cutting apart from the issue of predatory intent.

\textsuperscript{259} \textit{See} \textit{Continental Baking Co. v. Utah Pie Co., 396 F.2d 161, 164 (10th Cir. 1968), cert. denied, 393 U.S. 860 (1968).}

\textsuperscript{260} Id. at 183-84, 191-95.
Pie opinion, have made it a two-edged sword. Courts that are disinclined to find primary-line injury can support their position by noting the absence of one or more of the factors listed by the Supreme Court in that opinion. In Borden II, for example, the Fifth Circuit felt that the absence of a "drastically declining price structure" made other references of the Supreme Court in Utah Pie inapposite. This approach facilitated the court's affirmation of the continuing relevance of case law prior to Utah Pie that had suggested that competitive injury is unlikely where the discriminator's rivals are expanding and earning profits.

Utah Pie was later followed in the Commission's National Dairy Corp. decision. In that case, a processor of jams and jellies, which previously had been unable to sell to supermarket chains in the Washington-Baltimore area, offered unlimited quantities of its products at half price for a limited "promotion" period. The offer was extremely successful: vast quantities were ordered and the volume sales of the processor's major regional rivals in the Washington-Baltimore area fell significantly. Finding the offer "below cost," the Commission condemned the local price reductions and supported its condemnation with quotations from the Supreme Court's denunciation of "radical price cuts" in Utah Pie.

The Commission also questioned the ability of regional rivals to respond to the respondent's price cuts. Finding that the prices were "below [the] cost of manufacture," the Commission concluded that the respondent knew those prices could not be met by its rivals. The focus on this issue resembles that of Maryland Baking Co., in which the rival's lack of power to withstand the respondent's aggressions meant that the rival,

261. See generally Hebrews 4:12, Psalms 149:6; Revelation 1:16.
262. Borden Co. v. FTC, 381 F.2d 175, 179 n.12 (5th Cir. 1967) (quoting Utah Pie v. Continental Baking Co., 386 U.S. 685, 703 (1967)). It is true, however, that the Borden II court appeared to view the Utah Pie case as explainable largely on the grounds of predatory intent. See id. at 177, 179 n.12.
263. Id. at 179 & n.12, 180. See Minneapolis-Honeywell Regulator Co. v. F.T.C., 191 F.2d 786, 790 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952) and Purex Corp., 51 F.T.C. 100, 140-43 (1954), both of which were cited by the court; General Foods Corp., 50 F.T.C. 885, 891 (1954); text accompanying notes 78-83 supra. See also Yale & Towne Mfg. Co., 52 F.T.C. 1580, 1602 (1956).
265. 71 F.T.C. at 1425. The respondent's prices were later characterized as "below its cost of manufacture." Id. at 1426. See also id. at 1415.
267. 71 F.T.C. at 1426, 1427. See also id. at 1415.
despite its originally large market share, had no "monopolistic hold" on the market, and thus the shrinkage of its market share as a result of the respondent's discriminations did not make the market more competitive. Rather, the rival's loss of its market share may have impressed upon the Commission the relative power of the discriminator. Similarly, in National Dairy Corp., the rivals' lack of power to withstand the respondent's aggressive price cuts showed the relative power of the respondent, a power that the Commission inferred was derived from the respondent's ability to subsidize its local below-cost prices with sales from its other operations. Thus, the Commission synthesized the factors of rapid changes in market shares, the respondent's, below-cost pricing and inferences of the subsidy effect on respondent's prices from its sales elsewhere, in its assertion that the "respondent could not wait to develop a larger share of the market by a legitimate means but used the power of its treasury to appropriate a share of its competitors' business by a below cost offer which it knew these competitors could not meet."

The Commission further bolstered its negative assessment of the respondent's pricing practices by utilizing a "reasonable foreseeability" analysis: the respondent could reasonably foresee that its rivals could not match its below-cost offer. The Commission could therefore attribute to the respondent the objective intent to behave in such a way as to make competition impossible. The Commission then found it probable that respondent would repeat this kind of behavior: "if not satisfied with its market share," the respondent "could and would engage in offers that not only substantially divert trade but are so designed that other sellers cannot compete." Further analy-


269. See 71 F.T.C. at 1426.

270. Id.

271. See id. at 1419-21, 1426-27. See also Gifford, Promotional Price-Cutting, supra note 3, at 1107 n.247.

272. 71 F.T.C. at 1427. The Commission considered the "projection approach" to have been approved by the Supreme Court's Utah Pie decision. It first considered the Utah Pie Court's approach to the two-week price cut of Continental to be indicative of a proper method of evaluating short-term discriminations. See id. at 1425. The Commission then described the nature of that approach by observing that the Court "held that the jury could rationally have concluded that Continental would have again repeated its offer, that Safeway would have continued to buy from Continental and that other buyers would have followed suit," id., and that "the test of competitive injury," according to Utah Pie, was "one that necessarily looks forward on the basis of proven conduct in the past." Id. at 1428.
sis was held to be unnecessary.

In National Dairy, most of the behavioral elements of the classic predator as described in the 1914 Committee report were before the Commission. National Dairy was a multi-market seller offering its products in a local market at a below-cost price so low that its rivals were unable to compete with it. The Commission attempted to reinforce its evaluation of National Dairy's behavior by casting the firm in the role of the classic predator and, accordingly, attributing to it a discriminatory motivation. To be properly equated with the classic predator, however, National Dairy would have to be shown to have intended to eliminate its rivals from the markets in question. Such intent would demonstrate the likely anticompetitive consequences of its discriminatorily low prices. The Commission did not show that National Dairy intended to drive its rivals permanently from the market, but it did show what it believed to be nearly as sufficient: that the firm knew or should have known that its rivals could not meet its own below-cost prices. If National Dairy could be charged with such actual or constructive knowledge, then regardless of its subjective intent, it could be attributed an "objective" intent, which could substitute for the predatory intent that the courts had long accepted as the basis for an inference of anticompetitive tendencies.

Two serious difficulties and one major flaw permeate the Commission's objective-intent approach. The first difficulty arises from the fact that the predator has an anticompetitive aim: it wants to control the local market. National Dairy does not appear to have desired any control of the marketplace; it claimed that it merely wanted to enter the supermarket seg-

273. See text accompanying note 1 supra.

274. Predatory intent, by definition, is intent to bring about consequences that are anticompetitive. See Gifford, Promotional Price-Cutting, supra note 3, at 1048. A showing of such intent has long been held a sufficient basis for inferring that the intended consequences are likely to occur. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702 (1967); Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277, 281-82 (7th Cir. 1966).

275. 71 F.T.C. at 1426-27. See also id. at 1420.

276. From the evidence of the respondent's behavior in the market, the Commission concluded:

[Respondent, if not satisfied with its market share, could and would engage in offers that not only substantially divert trade but are so designed that other sellers cannot compete. As so motivated, the probability of an adverse effect from respondent's price cuts is established and a close study of the market is not required.

Id. at 1427.
ment of the local market.\textsuperscript{277} The Commission found an intent only to appropriate a market share with undue speed.\textsuperscript{278} By seeking to enter a market segment from which it had previously been excluded, or by seeking to appropriate quickly a share of the market, National Dairy might be said to have intended to make the market more competitive by adding itself as an additional competitive force. The second difficulty arises from the fact that the predator's goal is a long-term goal. National Dairy, even in the Commission's view, did not intend to bring about a major, long-term restructuring of the local market, nor did it intend to restructure the market in an anticompetitive direction;\textsuperscript{279} at most, it sought to establish itself quickly in the local market.

The Commission attempted to meet these difficulties, however, with its objective-intent reasonable foreseeability analysis.\textsuperscript{280} An objective assessment of National Dairy's price cut indicated that it could not be met by the processor's rivals. And, since the product could be stored and offered in unlimited quantities, the temporal effects of the discrimination extended for a time beyond the actual offer period.\textsuperscript{281} Since these effects were readily inferable from its own actions and from knowledge of the market, which, as an experienced seller, it must have had, National Dairy was chargeable with constructive knowledge of these foreseeable consequences of its behavior.\textsuperscript{282} In short, National Dairy was held to have intended the natural and probable consequences of its actions. If those consequences produced an anticompetitive effect by excluding the firm's rivals from the local market, the firm was chargeable with the intent to bring about those consequences. National Dairy's objective intent could now be substituted for predatory intent as a basis for inferring anticompetitive consequences from its behavior.\textsuperscript{283}

The flaw in this approach is clear. To find an objective intent that will be a surrogate for predatory intent, the Commission must first analyze the market consequences of the respondent's behavior and find them anticompetitive or poten-

\textsuperscript{277} Id. at 1419.
\textsuperscript{278} See id. at 1426.
\textsuperscript{279} National Dairy's goal of obtaining a larger share of the Washington-Baltimore market would not require the demise of any firms nor any additions to its own plant. See also J. Dus, supra note 169, at 182.
\textsuperscript{280} See text accompanying notes 275-276 supra.
\textsuperscript{281} See 71 F.T.C. at 1416-17, 1421-22, 1426.
\textsuperscript{282} See id. at 1420-21, 1427.
\textsuperscript{283} See id. at 1419-20, 1427.
tially anticompetitive; it must then conclude that, because the respondent was aware of the likely market consequences, it intended their anticompetitive aspects. Once the Commission has conducted such a market analysis, however, intent becomes irrelevant. A finding of predatory intent is relevant only as a means of short-cutting market analysis, or as corroboration of the conclusions of an independent analysis. Here the objective intent neither short-cuts market analysis nor corroborates it.

The Commission's position thus is reduced to a condemnation of National Dairy for using below-cost prices to substantially undercut the prevailing price in a local market—knowing that rivals would not respond with matching price cuts—in order to acquire a significant market share. The share that National Dairy acquired or sought to acquire was not said to be too large; it was merely said to be acquired too rapidly. The Commission thus appears to have employed a temporal sense of proportion to evaluate market-entry behavior.

The real emphasis in National Dairy, however, was on pricing that is so low that it disables rivals from making responsive price cuts. The ability and willingness to so act was seen as releasing the discriminator from competitive restraint and enabling it to expand its market share at will. The expansion thus coincided with, and was facilitated by, a suppression of competition. This is perhaps one reason why the Commission saw no need to articulate guidelines concerning either the size of the market share objective or the time frame in which expansion might properly proceed. These factors are within the discriminator's discretion so long as it suppresses the ability of its rivals to respond to its moves within the market.

Yet, a market entrant frequently will be forced initially to price below its own costs, because volume in the new market will not be large enough at first to enable the entry price to cover all properly allocated unit cost components and because an entrant's undercutting will not divert sales to it or fa-

284. See, e.g., Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277, 282 (7th Cir. 1965).
286. The Commission repeatedly emphasized the inability of respondent's rivals to respond effectively to its promotion. See 71 F.T.C. at 1418, 1426, 1428. See also National Dairy Prods. Corp. v. FTC, 412 F.2d 665, 618 (7th Cir. 1969).
cilitate the success of its entry attempt if the existing market participants respond by meeting its price.\textsuperscript{288} The entrant must, therefore, undercut the prevailing local market price at a level both below its own costs and at a point that it believes will not be matched by existing market participants. The Commission appears to believe that an entrant may achieve success by less radical undercutting than that undertaken by National Dairy, so that the entrant's prices will be high enough to be potentially matched by its rivals, but low enough so that, in practice, the existing market participants will allow continued undercutting of their own prevailing prices during the entry period. Rivals might be willing to tolerate this undercutting on the basis that, by allowing their market shares to erode somewhat instead of matching the entrant’s prices, their profit positions will be optimized.\textsuperscript{289} They would still retain the ability to respond in kind if necessary. Under such a view, the entrant would be growing in the local market while remaining continuously subject to competitive restraint.

\textit{Dean Milk Co.}\textsuperscript{290} also involved a market-entry situation. The Commission, in addition to attempting to formulate standards for the evaluation of primary-line injury,\textsuperscript{291} did advert specifically to the peculiar problems of entry. The Commission conceded that the low sales volume of an entrant in the early stages of entry may force it to temporarily sell at a level below cost. The Commission asserted, however, that a multi-market seller, while maintaining higher prices elsewhere, might not undercut prevailing prices at a below-cost level, or at a level yielding only negligible profits, for “an extended period.”\textsuperscript{292}

\textit{National Dairy} also dealt with other kinds of promotions. In its opinion, the Commission vindicated one promotion in which all of National Dairy’s sales were above its costs and in which the sales losses of rivals were attributed to factors other than the firm’s discrimination.\textsuperscript{293} The Commission also approved National Dairy’s behavior in a third promotion in which the firm incurred losses in the first year, but not in the second

\begin{thebibliography}{99}
\bibitem{288} Gifford, \textit{Promotional Price-Cutting}, supra note 3, at 1074 n.116.
\bibitem{289} The greater the sales base of an existing seller, the longer it will be inclined to tolerate an entrant's inroads on that base before it will be impelled to reduce its own prices to a level equal to, or approximating, the entrant's price level.
\bibitem{290} Dean Milk Co., 68 F.T.C. 710 (1965), \textit{aff'd in part and rev'd in part}, 395 F.2d 696 (7th Cir. 1968).
\bibitem{291} \textit{See} text accompanying note 178 \textit{supra}.
\bibitem{292} 68 F.T.C. at 775 n.147.
\bibitem{293} \textit{See} 71 F.T.C. at 1433-34.
\end{thebibliography}
and third years, unless advertising expenses were computed into the calculation of its earnings.\textsuperscript{294}

When viewed together, \textit{National Dairy} and \textit{Dean} appear to constitute a Commission statement that even in an apparently procompetitive entry situation, an entrant must not maintain below-cost prices for an "extended period," or at a level that rivals are unable to meet, to achieve quickly even a non-monopolistic share of the market.\textsuperscript{295} In both cases, the Commission seems to be attempting to objectify the standards for territorial discrimination. Its apparent concession that certain expenses, such as advertising, may perhaps be treated differently when determining whether an entrant is operating at a below-cost level,\textsuperscript{296} and its related concession that entrants can be properly expected to price temporarily both below their own costs and below their market rivals' prices,\textsuperscript{297} reflect an attempt to accommodate its entry standards to the realities of actual competitive behavior. Yet its objective approach, even as modified, ultimately fails. It leaves too wide a scope for unguided, and hence unpredictable, evaluation by the Commission.\textsuperscript{298}

\textsuperscript{294} Id. at 1440-46. The Commission relied on subsequent experience which showed that Durkee-Mower, Inc., a principal rival of the respondent, which had lost substantial business during the year of the respondent's promotion, thereafter reversed its sales decline and attained in the affected area a sales volume that exceeded its pre-promotion level. The losses of two other rivals were explained as projections of their earlier lackluster market performances. The Commission relied on these factors to conclude that the promotion was not potentially anticompetitive. \textit{Id.} at 1436-40. The Commission also rejected an allegation of predatory intent based upon sustained below-cost pricing.

Respondent . . . traditionally regards advertising on a new product for the first three to five years as part of its capital investment. In any event, it does not appear to be unusual for a company introducing a new product to sustain a net loss. We are not convinced that the net losses sustained by respondent, particularly since it would have to employ extensive advertising in the [relevant product] market, dominated by a competitor, in order to gain consumer acceptance, is sufficient to warrant a finding of predatory intent.

\textit{Id.} at 1441.

\textsuperscript{295} \textit{Id.} at 1426. \textit{See} text accompanying note 278 supra.

\textsuperscript{296} 71 F.T.C. at 1441. \textit{See} note 294 supra.


\textsuperscript{298} Thus, the Commission has not adequately reconciled or explained its differing reactions to recurrent factors appearing in the cases. The presence of locally dominant sellers was viewed as a factor tending to justify discriminatory undercutting by the respondent in two of the promotions in \textit{National Dairy}. National Dairy Prods. Corp., 71 F.T.C. 1333, 1433, 1441 (1967), aff'd, 412 F.2d 605 (7th Cir. 1969). The presence of locally dominant sellers, however, was held not to justify discriminatory undercutting in \textit{Maryland Baking}. Maryland Baking Co., 52 F.T.C. 1679, 1699 (1956), \textit{modified and aff'd}, 245 F.2d 716 (4th Cir. 1957). \textit{See also} Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 703 n.14
On review of *National Dairy*, the Seventh Circuit adopted the reasonable foreseeability analysis of the Commission.\(^{299}\) Whereas the Commission had employed a reasonable foreseeability analysis in an attempt to establish an objective sense of predatory intent, the Seventh Circuit employed that analysis directly in its evaluation of the respondent's behavior, apart from the predatory-intent question.\(^{300}\) According to that court, the impact of the respondent's offer on its rivals could be foreseen. Therefore, the respondent was responsible for those consequences.\(^{301}\) The court concluded that the preclusion of the rivals from the Washington and Baltimore chain store markets for several months meant that competition was lessened, apparently even if the rivals could later return as vigorous competitors.\(^{302}\)

At the court of appeals level, the *National Dairy* decision may be an aberration. It has not been followed. Later cases in other circuits have manifested even less sympathy to claims of primary-line competitive injury than did the courts in the late 1950s and early 1960s.\(^{303}\) Indeed, a line of recent cases has demonstrated increasing suspicion toward any claims of potential primary-line injury that are not accompanied by proof of sales below marginal cost.\(^{304}\)

\(^{299}\) See *National Dairy Prods. Corp.*, 71 F.T.C. 1333, 1427, 1441 (1967). Entry was found to justify below-cost undercutting in one National Dairy promotion but not in another promotion by the same firm. See *National Dairy Prods. Corp.*, 71 F.T.C. 1333, 1427, 1441 (1967). Entry also did not, in the Commission's view, justify Dean Milk's prolonged below-cost undercutting. See *Dean Milk Co.*, 69 F.T.C. 710, 714 (1965), aff'd in part and rev'd in part, 395 F.2d 698 (7th Cir. 1968). The Commission's apparently willingness to project market effects as of the date of the discriminatory pricing without taking into account subsequent market events, and the reviewing court's reluctance to so project market events, largely explain the different results reached by the Commission and the court in *Anheuser-Busch*. See *Anheuser-Busch*, Inc., 54 F.T.C. 277, 298-301 (1957), rev'd, 265 F.2d 677 (7th Cir. 1959), rev'd, 363 U.S. 536 (1960), order vacated, 269 F.2d 835, 843 (7th Cir. 1961). Subsequent experience, however, was employed by the Commission to reject inferences of adverse market effects in one National Dairy promotion. See *National Dairy Prods. Corp.*, 71 F.T.C. 1333, 1436-37 (1967). In one part of *National Dairy*, the Commission used projections of preexisting business difficulties of firms to show an absence of causal connection between their plight and the discriminatory pricing. The Commission's failure to make such projections, however, was a principal ground for the reviewing court's reversal of the Commission in *Dean Milk Co.* See *Dean Milk Co. v. FTC*, 395 F.2d 696, 706 (7th Cir. 1968); *National Dairy Prods. Corp.*, 71 F.T.C. 1333, 1438 (1967), aff'd, 412 F.2d 605 (7th Cir. 1969).

\(^{300}\) See *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605, 615 (7th Cir. 1969).

\(^{301}\) See *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605, 615 (7th Cir. 1969).

\(^{302}\) See *Dean Milk Co. v. FTC*, 412 F.2d 605, 615 (7th Cir. 1969).

\(^{303}\) See *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605, 615 (7th Cir. 1969).

\(^{304}\) See text accompanying notes 322-325 infra.
At the Commission level, however, *National Dairy* seems to be a critical case. After *National Dairy* was decided in 1967, the Commission has not had occasion to decide an important contested primary-line case. It has effectively ceased issuing complaints alleging primary-line injury, perhaps because it has finally recognized its long-term lack of success in nonpredatory primary-line cases in the courts of appeals. Yet, it is ironic that the Commission decided to abandon such cases after finally having convinced a court of appeals of the validity of a theory of nonpredatory primary-line injury.

Perhaps upon further reflection, however, the Commission recognized the impropriety of pursuing an aggressive attack on price discrimination with primary-line effects. Even if that is so, it is one more instance in which the Commission has fought hard to vindicate a position, has succeeded, and has then withdrawn. This occurred previously both in the case of basing-point pricing and in connection with the use of a section 2(b) defense by suppliers offering selective price reductions to dealers confronted with intense competition at the resale level. But the Commission has often revamped its theories to match those of reviewing courts. Perhaps this is to be expected from an enforcement agency that, despite its expertise, may continuously face judicial review of its decisions. Now that the Commission has revamped its liability theories about primary-line price discrimination, it is unwilling to exploit the victory that its litigation section has obtained for it.

More recently, an article on predatory pricing written by Professors Areeda and Turner has had a profound effect on

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306. See notes 72-73 supra and accompanying text.


308. Thus, for example, the Commission first adopted the *Moss* diversion test of competitive injury and later replaced it with a market approach drawn from the Seventh Circuit's *Minneapolis-Honeywell* opinion. See text accompanying notes 58-61, 71-81 supra. Several aspects of the Seventh Circuit's second *Anheuser-Busch* opinion have also supplanted earlier Commission approaches in the more recent Commission opinions.

309. See *National Dairy Prods. Corp. v. FTC*, 412 F.2d 605 (7th Cir. 1969).

judicial attitudes toward primary-line price discrimination claims. The thesis of the article is that pricing at or above marginal cost should never be considered predatory, because such pricing will not exclude efficient sellers from the marketplace. Because marginal cost is difficult to calculate, Areeda and Turner allowed the use of the more easily computed average variable cost as a surrogate for marginal cost in determining predation. They would also modify their main thesis by permitting pricing below marginal cost when marginal cost exceeds average cost, so long as these prices do not fall below average cost. Areeda and Turner, however, did not limit their analysis to defining and examining predatory pricing. They also argued that nonpredatory pricing, defined by them to be pricing at or above marginal cost, should not be prohibited under either the Sherman Act or the Robinson-Patman Act. The attempts by courts to articulate workable definitions for nonpredatory discrimination that violates the latter Act were summarily dismissed as misguided by Areeda and Turner.

The Areeda and Turner approach has evoked significant critical commentary and a number of lively scholarly exchanges. One challenger has contended that the abolition of intent and the legitimization of all prices above marginal cost, or above average cost when marginal cost exceeds average cost, opens the door to exclusionary behavior by a dominant firm whose lower prices are only temporary. Another challenger has contended that a dominant firm might intentionally con-

311. See Areeda & Turner, supra note 3, at 711. In addition, Areeda and Turner argued that requiring the price to be set at a higher price would be economically inefficient because it would waste potentially available production capacity. Id. The authors also made an exception by permitting pricing below marginal cost when marginal cost exceeds average total cost. Under such circumstances average total cost was to be the lower limit on prices. Thus, their rule can be stated as follows: predatory prices are those prices below the lower of average cost or marginal cost. See id. at 712-13. Marginal costs above average cost would occur in cases in which production approached full plant capacity.

312. Id. at 716.

313. Id. at 712-13.

314. Id. at 727.

315. Id.


struct a plant with chronic excess capacity in order to be in a position to deter entry through pricing that conforms to the Areeda and Turner rules,\textsuperscript{318} that it is uncertain whether courts would apply the Areeda and Turner criteria to condemn a monopolist who has refused to reduce recently expanded production in the face of an entrant's challenge,\textsuperscript{319} and that the rules neglect long-term social welfare.\textsuperscript{320} These critics and others, including the author,\textsuperscript{321} have suggested alternative criteria for evaluating the lawfulness of various types of price-cutting behavior. The Areeda and Turner approach, nonetheless, has received favorable attention from the courts.

A number of courts have adopted the Areeda and Turner analysis as a method for evaluating pricing behavior under the Sherman Act.\textsuperscript{322} Several courts have also applied that analysis

\textsuperscript{318} Scherer, \textit{Predatory Pricing and the Sherman Act, supra} note 316, at 877.
\textsuperscript{319} \textit{Id.} at 873-75.
\textsuperscript{320} \textit{Id.} at 885.
\textsuperscript{321} This author has proposed an “end result” test for assessing the lawfulness of discriminatorily low pricing undertaken by a firm in connection with market entry or in connection with the deployment of new investment. See Gifford, \textit{Promotional Price-Cutting, supra} note 3, at 1098-99. See also R. Posner, \textit{supra} note 170, at 188-96. Professor Posner has proposed as the principal criterion of unlawful pricing, the failure of prices to cover “average balance-sheet costs,” but has required, in addition, that the pricing be intended to exclude an equally efficient, or more efficient, competitor.

\textsuperscript{322} See Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 858 (9th Cir. 1977); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358-59 (9th Cir. 1976), \textit{cert. denied}, 429 U.S. 1074 (1977); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410, 417 (N.D. Cal. 1978). \textit{Cf. Pacific Eng'r & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir.), \textit{cert. denied}, 434 U.S. 879 (1977) (“Although we do not intend to adopt a solely cost-based test, there are no other relevant factors indicating [anticompetitive conduct].” The court does, however, make it clear that “evidence of marginal cost or average variable cost is extremely beneficial in establishing a case of monopolization through predatory pricing.”).

The original article by Professors Areeda and Turner has provoked a dialogue over predatory pricing. Dr. Scherer has claimed that their cost-based test will not promote an efficient allocation of economic resources. He proposes, as an alternative, a more complex multivariable analysis, which includes an inquiry into the subjective intent of the alleged predator. See Scherer, \textit{Predatory Pricing and the Sherman Act, supra} note 316. See also note 3 \textit{supra}; Areeda & Turner, \textit{Scherer on Predator Pricing, supra} note 316; Scherer, \textit{Some Last Words on Predatory Pricing, supra} note 316. Professor Williamson concurs with Areeda and Turner in viewing Scherer's approach as relying on “long run possibilities [that] are intrinsically speculative and indeterminate.” Williamson, \textit{Predatory Pricing, supra} note 316, at 288 n.16 (quoting Areeda & Turner, \textit{supra} note 3, at 897). Williamson modifies the approach of Areeda and Turner, however, by requiring “dominant firms” to refrain from expanding their output when another firm enters the market. See \textit{id.} at 334. See also Areeda & Turner, \textit{Williamson on Predatory Pricing, supra} note 316; Williamson, \textit{A Preliminary Response, supra} note 316. Despite the volume of comment on Areeda and Turner's test, no courts have adopted any of the alternative proposals. \textit{But cf. Pa-
to the evaluation of primary-line injury under the Robinson-Patman Act. Some of these courts have concluded that the Robinson-Patman Act does not prohibit conduct that is not already condemned under the Sherman Act. And when those courts employ the Areeda-and-Turner analysis of predatory pricing, they tend to reach the conclusion that only predatory pricing behavior can be condemned by the Robinson-Patman Act, and that such behavior consists of pricing below marginal cost, or its average-variable-cost surrogate.

The Supreme Court's *Utah Pie* opinion has been occasionally read as upholding the use of below-average-total-cost pricing as a basis for inferring predatory intent and, hence, for inferring competitive injury. Such an inference would, of course, conflict with the recommendations of Areeda and Turner, who object to any prohibition of marginal-cost pricing—even when not profit-maximizing—as promoting inefficiency. For the most part, however, the Supreme Court's opinion tends to be perceived as wrongly decided. It has been indirectly, if not directly, rejected by those courts that have adopted marginal cost as the line dividing predatory from nonpredatory behavior. This new approach rejects not only *Utah Pie*, but also other Supreme Court and lower court opinions that have construed the Robinson-Patman Act as prohibiting some non-predatory price discrimination on the basis of its potential primary-line effects.

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326. See note 308 supra.
IX. PRIMARY-LINE STANDARDS TODAY

Is it possible, on the basis of the preceding examination of the cases, to isolate the factors that produce nonpredatory, primary-line harm cognizable under the Robinson-Patman Act? Any attempt to synthesize the case law is hazardous, given forty-three years of confusing and often conflicting decisions by the courts and the Commission. Yet forty-three years of history provide some indication of the core constituents of primary-line harm.

A. THE ELEMENTS OF A PARADIGM CASE OF INJURY TO PARTICULAR FIRMS

In order to establish competitive injury, the discriminatorily low prices must be at a level which initially undercut the prices of at least some rivals in a local market.\textsuperscript{329} Second, the discriminatorily low prices must force the price level of rivals down to the point where they are likely to be substantially weakened as viable competitors if the lowered price levels remain in effect for long.\textsuperscript{330} Third, the circumstances must indicate that the lowered price level will continue for a substantial period with a concomitant weakening of rivals, or, if it lasts for a short period only, the circumstances must indicate that repetitions of the discriminatory pricing in the same market are likely to have a weakening effect on rivals because of the cumulative impact of these periods of low pricing.\textsuperscript{331} The operation of these weakening effects are examined below.

B. VARIATIONS ON THE PARADIGM CASE

The discriminatorily low prices may not force down the prices of all rivals to their own level. To the extent that rivals refuse to meet the discriminator's low prices, the rivals may lose business. The loss of business by a rival firm will normally involve profit loss by that firm and possibly increased per-unit costs due to the forced shrinkage in the scale of its opera-

\textsuperscript{329} American Excelsior Co., 517 F.2d 714, 724 n.30 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

\textsuperscript{330} Unless the discriminatory prices undercut those of at least some rivals, they will have no adverse impact upon any rival firms and, a fortiori, no adverse impact upon the market structure.

\textsuperscript{331} See, e.g., Dean Milk Co., 68 F.T.C. 710, 750 (1965), aff'd in part, rev'd in part, 395 F.2d 696 (7th Cir. 1968).

\textsuperscript{331} Cf. National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 616 (7th Cir. 1969) (quoting the Commission).
Continuance of the lowered prices is usually necessary to weaken rival firms. Under normal circumstances any firm should be able to withstand a short period of competition from rivals' selling at levels that are below the firm's unit costs or at levels that generate abnormally low profits. Since the prospect of an alteration in the conditions of competition is required for a violation, the low pricing must formally continue for a substantial period, appear likely to continue for a substantial period, or continue for a short period but appear likely to be repeated in the same market with sufficient frequency to produce a cumulative effect equal in its weakening impact upon the discriminator's rivals to a prolonged period of low pricing.

**C. The Weakening Effect on Rival Firms**

The weakening impact on rival firms occurs when, for sustained periods, those firms are forced to sell at prices below their own costs, either because their prices have been forced downward or because their costs, due to a decline in sales volume, have been forced upward. Rivals who are single-market

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332. Sales loss will increase unit costs if the affected firm has been operating on a falling average cost curve, as it might, for example, when fixed costs constitute the major component of its total costs. See, e.g., Standard Oil Co. v. FTC, 340 U.S. 231 (1951); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960); Forster Mfg. Co., 62 F.T.C. 852, 902-04 (1963), vacated and remanded, 335 F.2d 47 (1st Cir. 1964). See also note 134 supra.

333. See text accompanying notes 4-5 supra.


335. In addition to the prospect of an actual weakening of rivals, potentially anticompetitive consequences will result when the discriminator uses his power to force prices down to an unprofitable level as a threat or as a disciplinary device to deter local rivals from price undercutting. This is, of course, predatory behavior in the traditional sense of that term, but is included in this discussion of non-predatorily motivated pricing to illustrate anticompetitive market effects apart from those which result from the demise of rivals. In such an instance, the discriminatory pricing does not primarily threaten the financial strength of rivals; competition is not lessened by crippling or eliminating rivals from the marketplace. Instead, the discriminatory pricing serves to retain the existing number of rivals and to establish an interdependency that protects both the discriminator and its rivals from the rigors of price competition. Accordingly, discriminatory behavior aimed at threatening or punishing rivals may likely engender its own peculiar anticompetitive results. When the threatened rivals fall into line, after only a short period of discriminatorily low prices, the anticompetitive effects may be felt by consumers more quickly than those resulting from the gradual weakening and elimination of competitors. Such a result could occur, for example, when the rivals, mistakenly apprehending great financial strength in the discriminator, sense a threat of prolonged low pricing that the discriminator is in fact unable or unwilling to carry out.
operators must, in the long run, cover their full costs from operations in the local market in which they sell and thus will be particularly vulnerable to competition at levels below their own average costs.\textsuperscript{336} Rivals also operating in other markets unaffected by the discriminatory prices, however, may be able to sustain indefinitely local operations at prices below their average costs, but not below their marginal costs.\textsuperscript{337}

This weakening effect that low prices may have on rival firms is, from one perspective, a function of the degree of encroachment upon costs and the expected time frame during which such encroachment occurs or is likely to occur. If a firm’s costs are only slightly undercut, that firm may be able to weather a period of undercutting much longer than if costs are drastically undercut. The weakening prospect seems to be measured by the degree to which total contributions from the revenues of the affected firms toward their fixed costs are reduced or likely to be reduced. The greater the undercutting of unit costs, the larger is the deficit in fixed-cost contributions and the shorter is the time period in which an actual weakening effect can be expected.\textsuperscript{338}

When marginal costs are undercut, the weakening effect is likely to be drastic. Fixed-cost contributions are not engendered by the firm’s operations. And the more the firm produces, the greater are the losses it incurs. Clearly, a firm is in a significantly different position when its marginal costs are undercut than when its total unit costs are undercut. When it is forced to meet prices above marginal costs, but below total unit costs, every sale contributes to its fixed-cost requirements and thereby lessens the deficit that has been forced upon it.\textsuperscript{339} By contrast, when it is forced to operate, if at all, at a price level below its marginal costs, every additional sale increases its losses. In such a case, actual weakening would occur very quickly.

Low prices forced upon local firms may exert a weakening impact upon those firms even though the low prices produce revenues equal to or in excess of their costs. If low profits result in returns that are decreased sufficiently to interfere with a

\textsuperscript{336} See Gifford, Promotional Price-Cutting, supra note 3, at 1052.

\textsuperscript{337} Indeed, in some cases locally confined marginal-cost pricing may contribute to the overall profits of such multi-market firms. See e.g., M. Adelman, supra note 18, at 142-45. See also Gifford, Price Discrimination and Labelling, supra note 143, at 406-07.

\textsuperscript{338} See text accompanying notes 133-144 supra.

\textsuperscript{339} See note 337 supra.
firm's funding of plant or equipment replacement, the firm has been weakened.\textsuperscript{340} A lowered net-profit position may also interfere with the financing of expansion. When profits are reduced, less margin is available to support interest charges; also, a firm with low profits may be in a disadvantageous position from which to attract borrowed capital at low rates or from which to attract equity capital.\textsuperscript{341} The size of the preexisting profit margins and the amount of their erosion will determine the extent of the remaining cushion, which is the crucial element in borrowing. Lowered per-unit profits may also interfere with expansion by shrinking the margin available to support transportation, delivery, and marketing expenses on the fringes of the firm's marketing areas.\textsuperscript{342} In addition, reduced profits, which decrease a firm's ability to cope with expected cost increases in supply prices of such essentials as raw materials, labor, and overhead expenses, weaken that firm.\textsuperscript{343}

D. Effects on the Market

Some cases suggest that legally cognizable harm occurs only when the weakening effects discussed above afflict rivals sufficient in number or size to produce an impact on competi-

\textsuperscript{340} Thus, for example, decreased returns that are in excess of properly chargeable costs, but that are inadequate to meet contractually-set loan repayment obligations at the dates specified, may significantly interfere with a firm's ability to continue its operations. Any firm with low profits and no accumulated surplus is vulnerable to such financial embarrassment.

\textsuperscript{341} Although a profit shrinkage may adversely affect the terms on which a firm can obtain equity or borrowed capital, the higher return that the firm must pay to acquire funds is not a direct determinant of its market behavior. This is because the payment of such a return to its investors is not relevant to the determination of a price-output policy that will maximize its short-run profits. The higher cost of such capital, however, may prevent expansion and may adversely affect the firm's cash-flow position, increasing its vulnerability to the aggressive behavior of its rivals. See Telex Corp. v. International Business Mach. Corp., 510 F.2d 894, 923, 928 (10th Cir. 1975). For a discussion of interference with capital financing as cognizable injury under the Robinson-Patman Act, see E.B. Muller & Co., 33 F.T.C. 24, 51 (1941), aff'd, 142 F.2d 511 (6th Cir. 1944). See also Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965).

\textsuperscript{342} See also Gifford, Assessing Secondary-Line Injury, supra note 8, at 81-84.

\textsuperscript{343} When decreased profits prevent a firm in close competition with the discriminator from expanding at a rate that would preserve its preexisting market share, the effects are ambiguous from a Robinson-Patman standpoint. So long as that reduction in market share is filled by firms other than the discriminator, the change in market positions may primarily reflect the replacement of an inefficient firm with efficient ones. The resultant level of concentration in the market, the vigor and intensity with which the substitute firms compete, and the pressure that they exert upon price leadership and consciously parallel pricing behavior are, of course, the prime factors requiring examination.
tion. In theory, according to these cases, adverse impacts upon one or several rivals in a market of many sellers would not necessarily constitute harm under the Robinson-Patman Act.\textsuperscript{344} Such a conclusion would be especially appropriate where the adverse impact was likely to be felt only by marginally existing firms whose inefficiencies jeopardized their continued existence.

Yet in many markets there exist only a few sellers or only a few large sellers.\textsuperscript{345} In these circumstances the continued existence and viability of each seller is a significant factor in preserving the existing degree of competition.\textsuperscript{346} A significant weakening of even one such seller can, therefore, constitute the harm contemplated by the Act. Even when the adversely affected seller is a marginal one, its weakening or demise may be significant if it otherwise would have contributed to the maintenance of price competition. The degree, then, to which injury to a competitor equals injury to competition depends upon (i) the extent to which the cost-demand structure of the afflicted firm would otherwise have induced it to engage in competitive pricing behavior,\textsuperscript{347} and (ii) the impact of its continued presence in engendering market uncertainty among its more financially secure rivals with concomitant inducement of price-competitive behavior by them.\textsuperscript{348}

It should also be noted that the marginality of a firm's existence is a matter of degree and of viewpoint. When adverse profit conditions are forced upon a market through the discriminatory pricing behavior of a significant seller, the weaker firms will be the first to go under. Questions will arise over whether the demised firms would have gone under anyway and how sig-

\textsuperscript{344} See Borden Co. v. FTC, 381 F.2d 175, 180 (5th Cir. 1967); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961); Dean Milk Co., 68 F.T.C. 710, 750 (1965), \textit{aff'd in part, rev'd in part}, 395 F.2d 696 (7th Cir. 1968); Purex Corp., 51 F.T.C. 100, 103-17 (1954). See also Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965); \textit{REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS} 163-66 (1955); Areeda & Turner, \textit{supra} note 3, at 727. Although the Act refers not only to injury to general competitive conditions, but also to injury to "competition with any person who . . . grants [a] discrimination," the reference is nonetheless directed to preventing injury to "competition" rather than to competitors as such. See Purex Corp., 51 F.T.C. at 112.

\textsuperscript{345} See also E. CHAMBERLIN, \textit{supra} note 88, at 68, 100.

\textsuperscript{346} See, e.g., Dean Milk Co., 68 F.T.C. 710, 750 (1965).

\textsuperscript{347} The peculiar demand and cost conditions affecting each firm obviously influence its marketing strategies. See also Gifford, \textit{Promotional Price-Cutting, supra} note 3, at 1089-90.

significant, therefore, the long-run competitive condition of the market was to the particular discriminatory price behavior which accompanied their demise.349 Thus, in several cases the Commission or the courts have attributed the demise of some firms to factors other than the discriminatory pricing. Sometimes these factors have been ones peculiar to the failed firms;350 at other times they have been conditions prevailing in the industry.351 To the extent that the demise of these firms was preordained by factors other than the discriminatory pricing, the latter should not be charged with causing that demise. Yet when the cause was the combination of firm or industry conditions and the impact of the discriminatory pricing, the conclusion is not so clear. If the impact of the discriminatory pricing merely delivers the coup de grace to a few firms struggling against insolvency, then it seems correct to consider the pricing a contributing cause of the immediate failure of the firms but deny that competitive conditions in the marketplace have diminished in any real sense.

Finally, the National Dairy analysis requires special mention in a review of market effects. When a firm prices both below its own costs and so low that rivals cannot respond, it exhibits the pattern of behavior that the Commission and the Seventh Circuit condemned in National Dairy.352 This behavior is especially vulnerable to condemnation since it effectively prevents rival firms from competing in the affected market during the period in which the discriminatorily low prices are in effect and possibly thereafter, depending on the storable characteristics of the commodity and the quantities available to buyers during the discrimination period. Moreover, to the extent that the Commission and the courts are willing to project present market impact into the future—either because the discriminator is considered likely to repeat its conduct, or for another reason—vulnerability of this behavior is increased.353 This National Dairy behavior would likely be condemned also under the recent cases which classify any sales below marginal cost as predatory.354

In retrospect, it would appear that, although the Commis-

349. See text accompanying notes 218-19, 298 supra.
350. See note 298 supra.
351. See text accompanying notes 218-19 supra and cases cited.
352. See text accompanying notes 267, 299-302 supra.
353. The Commission was willing, however, to allow post-discrimination experience to affect the results that a pure projection analysis might have supplied in parts of its National Dairy decision. See note 298 supra.
354. See text accompanying notes 322-25 supra.
sion and the courts have generally moved away from the Moss diversion approach to competitive injury, sales diversion nonetheless has remained an important factor in the cases. The Moss focus upon the diversion of specific sales has been replaced by a focus upon diversion of market shares. Despite the qualified assertions by the Commission and the courts that they are concerned with competition in the marketplace, substantial and rapid diversion of market shares has occasionally been treated as tantamount to primary-line injury. Such treatment, of course, is consonant with the approach, employed by both the Commission and the courts, that projects market trends into the future. A projection of rapid market-share changes and rapidly declining price levels will produce a picture of a market in which the affected rivals of the discriminator are eliminated or destroyed as viable and independent competitive forces. Indeed, the rapidity with which market shares are currently changing would appear to bear a direct correlation to the prospect of an official finding of competitive injury under such a projection approach. Gradual changes in market shares will be more likely to be perceived as part of the normal give-and-take functioning of the market and hence as not meriting projection. This is implied by the Commission's apparent sensitivity to major market share shifts and is suggested by the Commission's chiding of National Dairy as being unwilling to wait to expand its market share by the "legitimate" means, which would have taken longer.

Projection of present trends, however, can—as the causation discussion above implicitly suggests—constitute a defensive as well as an offensive device. Sometimes the technique would be available to attribute business failures or market-structure changes to factors other than discrimination. Thus, changes in technology sometimes operate to place particular classes of firms at a disadvantage, and these disadvantages sometimes are evidenced in trends over time. Projecting these trends may result in a characterization of firm failures and market-structure changes as due to factors other than discrimination. Similarly, difficulties experienced by particular firms prior to a rival's price discrimination may be projected to explain the later difficulties of the firms as unrelated to the effects of the discrimination. Moreover, the Commission's projection technique in portions of National Dairy used subsequent events to modify the conclusions that a pure projection analysis might

355. See text accompanying notes 348-51 supra.
otherwise have indicated.\textsuperscript{356} Such an approach increases the flexibility of projection as a defensive device.\textsuperscript{357}

Since the focus of this Article has been on the evaluation of the primary-line effects of non-predatorily motivated price discrimination, the discussion has concentrated on the traditional constituents of primary-line injury: injury to individual firms resulting in injury to competition in the marketplace. The recent proposal of Professors Areeda and Turner, to objectify predatory pricing and to legitimize pricing that, under that objective definition, is nonpredatory, would substantially revise the relevant considerations. To the extent that their objective definition corresponds with predatory discrimination as traditionally conceived, nonpredatory discrimination—regardless of its market effects—would no longer fall under the ban of the Robinson-Patman Act. And regardless of the actual correspondence between objective predation and traditional predation, the focus of inquiry in the cases that remained on the official dockets would be transferred from the marketplace effects to the relation between the discriminator's prices and his costs.

\section*{X. CONCLUSION}

Robinson-Patman Act cases have, over time, reflected a gradual transition from the sales diversion test espoused in \textit{Moss} to increasingly sophisticated approaches based upon market effects and concern with market structure. In earlier years, the Commission's enforcement imperative influenced it to develop simplified criteria of legality. Gradually, perhaps because of the hostile reception these criteria sometimes received from the courts, the felt urgency of the Commission's enforcement task appears to have diminished. Today, increasing skepticism about the social wisdom of the Act's concern with primary-line effects has persuaded the courts to be receptive also to simplified criteria, such as those proposed by Professors Areeda and Turner, which will eliminate from the agenda of the courts and Commission all but the most blatantly anticompetitive pricing. Indeed, the Areeda and Turner criteria are designed to cover the same kind of behavior that in the past was characterized as predatory, but with the difference that predatory pricing is given an objective definition. Accordingly, the need of the Commission and the courts to assess the pri-

\textsuperscript{356} See note 298 \textit{supra}.

\textsuperscript{357} Note, however, that the improvement in versatility also extends to a projection's use as an offensive device. See note 42 \textit{supra}.
mary-line effects of "nonpredatory" price discrimination is, under this approach, eliminated. These newer criteria share with those of the early years the characteristics of simplicity and relative ease of application, but they differ from past criteria because they are based upon a technically respectable framework of economic analysis.