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Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.: A Victory for Consumer Welfare Under the Robinson-Patman Act

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CASENOTES

BROOKE GROUP LTD. V. BROWN & WILLIAMSON TOBACCO CORP.: A VICTORY FOR CONSUMER WELFARE UNDER THE ROBINSON-PATMAN ACT*

The need for clarity, obviously a desideratum for any body of law, has been evidenced by judicial recognition that Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws. The Supreme Court warned early on of the dangers of doctrinaire interpretations of Robinson-Patman that could lead to "conflict with the purposes of other antitrust legislation."

—Kenneth Starr¹

I. INTRODUCTION

The preservation of competition among business entities is vital to the success of any economy. Recognizing the importance of competition, the United States Congress has passed antitrust laws that seek to enhance productivity and protect consumers.

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1. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988) (quoting *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953)). Kenneth Starr made this statement while he was a judge on the United States Court of Appeals, District of Columbia Circuit. Judge Starr would later serve as Solicitor General of the United States during the Bush Administration.

Although the antitrust laws, like all statutes, are vulnerable to a variety of different interpretations, "[t]he language of the antitrust statutes, their legislative histories, the major structural features of the antitrust law, and considerations of the scope, nature, consistency, and ease of administration of the law all indicate that the law should be guided solely by the criterion of consumer welfare."² The antitrust laws are intended to prohibit monopolization, predatory pricing, and other behaviors that adversely affect competition and ultimately consumer welfare.³ In the consumer-driven, capitalist economy of the United States, competition is the foundation of economic success. Price discrimination, when used to undermine competition and destroy consumer welfare, violates the purpose of the antitrust laws.

Price discrimination that involves injury to sellers of products is known as "primary-line" injury.⁴ The Robinson-Patman Act is the major statutory provision that seeks to combat injury to competition by price discrimination. On June 21, 1993, in the first primary-line price discrimination case to reach the United States Supreme Court in over twenty-five years, the Court handed down a decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*⁵ which sought to reaffirm the importance of competition, even if it meant that individual competitors would be adversely impacted. The six to three decision⁶ extensively altered previous primary-line doctrine that had been outlined in the 1967 case of *Utah Pie Co. v. Continental Baking Co.*⁷ These alterations make it much more difficult to show primary-line price discrimination.

2. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 57 (1978).

3. For further in-depth discussions of antitrust law, see PHILLIP AREEDA ET AL., *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (1978 & SUPP. 1993); PETER D. WARD & MARGARET A. GOLDBLATT, *TRADE REGULATION, ANTITRUST AND ECONOMICS: A BIBLIOGRAPHY* (1988).

4. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2586 (1993).

5. *Id.*

6. Justice Kennedy wrote the majority opinion of the Court joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, and Thomas.

7. 386 U.S. 685 (1967).

The Court has continually held that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."⁸ However, in deciding the *Brooke Group* case, the Court refocused on competition, rather than individual competitors, when interpreting the antitrust laws and determined that previous Court rationale had limited the scope of competition rather than enhanced it. This new viewpoint on primary-line cases will have a profound impact on business in the United States. If the majority is correct, consumers, businesses, and the country as a whole will significantly benefit from healthier competition. However, if the majority is wrong, the decision could have disastrous consequences, including monopolization of industries, increased prices for goods, and a general assault on consumer welfare.

This Casenote will examine what impact the *Brooke Group* case has on the welfare of businesses and consumers in the United States. It will begin by examining the federal statutes concerning price discrimination. Next, it will turn to past Supreme Court doctrine on primary-line price discrimination and then to an analysis of *Brooke Group*. Finally, a critical assessment of whether the Robinson-Patman Act achieves its purpose of combating price discrimination will be made.

II. THE PRICE DISCRIMINATION ACTS⁹

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,¹⁰ is the statute of greatest importance to the *Brooke Group* case. This Act condemns any discriminatory pricing schemes that adversely affect competition.¹¹ In order to

8. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979).

9. The three federal statutes that deal with price discrimination and predatory pricing are the Clayton Act, § 2a, as amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13a (1988), the Sherman Act, 15 U.S.C. § 2 (1988), and the Federal Trade Commission Act, 15 U.S.C. § 45 (1988). Since the case of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) only involves the Robinson-Patman Act and Sherman Act, the Federal Trade Commission Act will not be discussed in this Casenote.

10. 15 U.S.C. § 13a (1988). Throughout the remainder of the Casenote, section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, will simply be referred to as the Robinson-Patman Act.

11. Section 13(a) of the Robinson-Patman Act states, in part, that:

It shall be unlawful for any person engaged in commerce, in the course

prevail under the Act, plaintiffs need only show that there was a "reasonable possibility" of substantial injury to competition.¹² However, the "reasonable possibility" standard cannot be met by mere speculation that injury to competition might have occurred.¹³ In "primary-line" cases (i.e., cases involving injury to competing sellers), injury to competition may be shown through market analysis or inferred from the seller's predatory intent.¹⁴ Injury to competition, however, cannot be shown simply by demonstrating that an individual competitor was injured by the seller's actions.¹⁵ The purpose of the Robinson-Patman Act is to protect and promote competition, not individual competitors.¹⁶ Thus, price differences that strengthen competition in a market are not prohibited by the Robinson-Patman Act.¹⁷

Another statute of great importance is the Sherman Act. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."¹⁸ This section of the Sherman Act is especially interested in halting the practice of predatory pricing. Predatory pricing can be defined as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."¹⁹ The United States Supreme Court, in

of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13a (1988).

12. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434-35 (1983).

13. See, e.g., Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960).

14. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 552 (1960). Another type of case under the Robinson-Patman Act is a "secondary-line" case which involves injury to buyers. Since the *Brooke Group* case is a "primary-line" case, "secondary-line" standards will not be discussed.

15. Henry v. Chloride, Inc., 809 F.2d 1334, 1340-41 (8th Cir. 1987).

16. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

17. Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951).

18. 15 U.S.C. § 2 (1988).

19. Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 n.12 (1986).

Cargill, Inc. v. Monfort of Colorado, Inc.,²⁰ stated that predatory pricing is “a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition.”²¹ In addition, the Court went on to say that “[p]redatory pricing is thus a practice ‘inimical to the purposes of the [antitrust laws]’ and one capable of inflicting antitrust injury.”²² Predatory pricing, therefore, is either pricing below the level necessary to sell their products or “pricing below some appropriate measure of costs.”²³ Lowering prices to meet competition does not violate the antitrust laws.

Since the Court’s decision in *Utah Pie Co. v. Continental Baking Co.*,²⁴ primary-line cases under the Robinson-Patman Act have been interpreted under the same standards that are used to decide predatory pricing cases under the Sherman Act.²⁵ Consequently, in the past, price discrimination claims under the Robinson-Patman Act and the Sherman Act have been analyzed under a cost-based test that infers from pricing that is above or below some measure of costs, either predatory or non-predatory behavior.²⁶ Certainly, however, there are

20. 479 U.S. 104 (1986).

21. *Id.* at 117-18. See, e.g., Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

22. *Id.* at 118 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)). “The short-term effect of certain anti-competitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.” *Brunswick*, 429 U.S. at 489 n.14.

23. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986).

24. 386 U.S. 685 (1967).

25. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2110 (1989); *Henry v. Chloride*, 809 F.2d 1334, 1345 (8th Cir. 1987); *D.E. Rogers Assoc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1437 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 351-52 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853 n.16 (5th Cir. Apr.), *cert. denied*, 454 U.S. 1125 (1981); *Pacific Eng’g & Prod. Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

26. This method of analyzing price discrimination was most strongly advocated by Professors Phillip Areeda and Donald Turner of Harvard University. Following *Utah*

some differences between the two statutes. The most important one being that the Sherman Act denounces predatory pricing which has a "dangerous probability" of monopolization,²⁷ while the Robinson-Patman Act only requires "a reasonable possibility" that injury to competition has occurred before behavior is found to be illegal.²⁸

Regardless of the differences, two prerequisites to recovery under the Acts remain the same. First, competitive injury must result from a rival's prices that are below an appropriate measure of the rival's costs.²⁹ Second, the rival must have a reasonable prospect (under the Robinson-Patman Act) or a dangerous possibility (under the Sherman Act) of recouping its investment in below-cost prices.³⁰ Unless the plaintiff proves both of these requirements, a charge of illegal price discrimination will fail.³¹

Pie, Areeda and Turner proposed objective, cost-based rules for distinguishing between competitive pricing in Robinson-Patman Act "primary-line" cases which disregarded direct evidence of subjective intent and suggested that the only test should be whether the seller's price was above or below its "average variable cost." They defined "variable costs" as "costs that vary with changes in output . . . [including] such items as materials, fuel, labor directly used to produce the product, indirect labor such as foremen, clerks and custodial help, utilities, repair and maintenance, and per unit royalties and license fees." Areeda & Turner, *supra* note 21, at 700. They go on to propose that the "average variable cost is the sum of all variable costs divided by output." *Id.* These suggestions drew strong opposition from economic conservatives, including Robert Bork and others from the "Chicago School." See BORK, *supra* note 2. For case examples using this "inference" of price discrimination, see *supra* note 25.

27. *Spectrum Sports, Inc. v. McQuillen*, 113 S. Ct. 884, 890 (1993).

28. *Falls City Indus. Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 (1983).

29. See, e.g., *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698 (1967).

30. 479 U.S. at 119 n.15; 475 U.S. at 589.

31. In the case of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993), only the second requirement, recoupment, is at issue.

III. PREVIOUS PRIMARY-LINE RATIONALE³²A. *The Facts of Utah Pie Co. v. Continental Baking Co.*³³

Utah Pie Co. had been baking pies for over thirty years when it decided to enter the Salt Lake City frozen pie market in late 1957.³⁴ The frozen pie market in the area expanded rapidly between that time and August of 1961, when Utah Pie filed antitrust charges against the three competitors involved in the case.³⁵ Utah Pie's financial position and net worth increased between 1958 and 1961, and its share of the market was 66.5%, 34.3%, 45.5%, and 45.3% respectively.³⁶

Each of Utah Pie's three major competitors had been selling pies in Salt Lake City prior to 1957. However, none had plants in Salt Lake City, and Utah Pie was able to take advantage of its location and offered its product at a lower price.³⁷ Eventually, the three competitors began lowering their prices, precipitating a price war. The competitors ended up selling their pies in the Salt Lake City area for less than they were being sold in other markets. Utah Pie had no choice but to also lower its price. This price war, which resulted in all-time low prices for pies in the market, may have cost Utah Pie some business, but

32. Until the decision in *Brooke Group*, no primary-line price discrimination case had been decided by the United States Supreme Court in more than twenty-five years. The last case was *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), a decision which stood as the definitive authority for primary-line cases until *Brooke Group* substantially altered the interpretation of price discrimination laws.

33. 386 U.S. 685 (1967). For a discussion of *Utah Pie*, see Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

34. 386 U.S. at 689.

35. *Id.* at 684. The three companies charged by Utah Pie of violations of the Robinson-Patman Act included Continental Baking Company, Pet Milk Company, and the Carnation Company.

36. *Id.* at 689. Utah Pie was a very small company. Its net worth increased from \$31,651.98 on October 31, 1957 to \$68,802.13 on October 31, 1961. Total sales were \$238,000 in the year ending October 31, 1957, \$353,000 in 1958, \$430,000 in 1959, \$504,000 in 1960, and \$589,000 in 1961. Utah Pie suffered a loss of \$6,461 in 1957, and had a net income in the remaining years of \$7,090, \$11,897, \$7,636, and \$9,216. *Id.*

37. *Id.* at 690. The majority paid short shrift to the fact that it was Utah Pie that originally undercut prices in the Salt Lake City market.

did not wrestle away Utah Pie's market share or lower its profit margin.³⁸

B. *The Utah Pie Decision*³⁹

Justice Byron White wrote the seven to two majority decision that overturned the United States Court of Appeals for the Tenth Circuit⁴⁰ and reinstated the finding of the United States District Court for the District of Utah that there was a reasonable possibility that Utah Pie's three competitors' behavior injured competition. Although Utah Pie never suffered any apparent financial damage from the price-cutting, Justice White stated that the jury "could . . . have reasonably concluded that a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less competitive force."⁴¹ Justice White insisted that even if the impact on Utah Pie was negligible, possible damage to other firms justified the decision that price cuts might injure competition.⁴²

The majority denounced the Tenth Circuit's view that since Utah Pie's sales and profits continued to grow, it was not injured by the price war.⁴³ The rationale behind the decision

38. See *supra* note 36 and accompanying text.

39. The Supreme Court's decision was the target of much criticism. Commentators viewed the decision as anti-competitive. Robert H. Bork, the victorious counsel in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, had been a long-time critic of the decision. He stated:

There is no economic theory worthy of the name that could find an injury to competition on the facts of the case. Defendants were convicted not of injuring competition but, quite simply, of competing. The Supreme Court's opinion finds a violation of Section 2(a) of Robinson-Patman solely because the market price for frozen pies went down in Salt Lake City. There could be no clearer demonstration than the Utah Pie decision that the statute is essentially anticompetitive and anticonsumer.

BORK, *supra* note 2, at 387.

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

41. 386 U.S. at 699-700.

42. *Id.* at 700.

43. *Id.* at 702. Justice White stated:

[W]e disagree with [the Tenth Circuit's] apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit. Nor do we think that the [Robinson-Patman Act] only comes into play to regulate the conduct of

rested on the belief that the competitors had a predatory intent when the prices were decreased and that their behavior eroded competition by causing a drastically declining price structure.⁴⁴ The Court ruled that knowledge of actual intent can aid the jury in interpreting the facts in antitrust cases and in predicting the consequences of predatory behavior.⁴⁵ The Court also stated that juries could use surrounding economic circumstances, including persistent unprofitable sales below cost for the sellers and drastic price cuts, to ascertain sellers' intent.⁴⁶ Thus, predatory intent and injury to competition could be determined by the sellers' overall behavior. As a result, the Court created the presumption that pricing above some measure of costs creates an inference of predatory behavior, regardless of whether there was apparent economic injury to the plaintiff.⁴⁷

From its very inception, the *Utah Pie* approach to price discrimination met with hostile criticism. Justice Stewart, writing a short but strong dissent in *Utah Pie*, was the first to take on the troubling decision. He condemned the majority for falling into "the error of reading the Robinson-Patman Act as protecting competitors, instead of competition."⁴⁸ It was apparent to him, and ultimately to others, that the majority's approach would lead to business practices that would not promote the welfare of the consumer. It was clear that inefficient and out-

price discriminators when their discriminatory prices consistently undercut other competitors.

Id.

44. *Id.* at 702-03. Justice White defended the holding by asserting:

It might be argued that the respondents' conduct displayed only fierce competitive instincts. Actual intent to injure another competitor does not, however, fall into that category, and neither, when viewed in the context of the Robinson-Patman Act, do persistent sales below cost and radical price cuts themselves discriminatory. Nor does the fact that a local competitor has a major share of the market make him fair game for discriminatory price cutting free of Robinson-Patman Act proscriptions. "The Clayton Act proscription as to discrimination in price is not nullified merely because of a showing that the existing competition in a particular market had a major share of the sales of the product involved."

Id. at 702 n.14 (quoting Maryland Baking Co., 52 F.T.C. 1679, 1689, *aff'd*, 243 F.2d 716 (1957)).

45. *Id.* at 697 n.12.

46. *Id.*

47. For case examples of how this presumption has been applied by the courts, see *supra* note 25.

48. 386 U.S. at 705 (Stewart, J. dissenting).

moded companies would benefit at the expense of innovative and productive firms.

The majority's approach in *Utah Pie* was misguided because it classified a trend towards lower prices as per se price discrimination. Oddly, the majority never considered that lower prices would be good for consumers. Certainly, prices which fall to the point where all but the aggressor in a price war is banished from the market are not ultimately good for competition. However, there is a line which must be crossed before a declining price structure is destructive to an industry.⁴⁹ The majority in *Utah Pie* either failed to realize that there could be a dividing line between good and bad price-cutting or set the line so high that for all intents and purposes the dividing line became meaningless.⁵⁰

IV. BROOKE GROUP: A NEW APPROACH TO PRIMARY-LINE CASES

A. *Factual Background and Procedural History*

In the mid-1980s, a price war erupted in the domestic cigarette industry. Liggett Group, Inc.,⁵¹ in an attempt to regain

49. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993), Justice Kennedy discussed the costs of erroneously inferring price discrimination from simple price cuts:

"[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [.] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.

113 S. Ct. at 2589-90 (1993) (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17 (1986) (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986))).

50. Justice Kennedy wrote in *Brooke Group*:

Utah Pie has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure. The case has been criticized on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition.

Id. at 2586-87.

51. *Brooke Group Ltd.*, during the time of the cigarette price war and when the

market share, introduced, in 1980, a line of "black and white" generic cigarettes that sold for substantially less than branded cigarettes.⁵² By 1984, Liggett held 97% of the generic market, which accounted for 4% of the entire domestic market.⁵³ The "black and whites" were offered to consumers at a list price 30% lower than branded cigarettes and were promoted at the wholesale level by means of rebates which increased with the volume of cigarettes ordered.⁵⁴ The growth of the generic market came at the expense of the other firms' profits from branded cigarettes. Brown & Williamson was hardest hit because its cigarettes were popular with people most sensitive to price changes.⁵⁵ During 1984, Brown & Williamson introduced its own "black and white" cigarette and beat Liggett's prices. Other firms also entered the generic market by introducing private label generics and branded generics, but Brown & Williamson was the only one to challenge Liggett's dominance in the "black and white" market.⁵⁶ Brown & Williamson marketed its "black and whites" by offering large volume discounts to wholesalers.⁵⁷ Liggett responded by increasing its own wholesale rebates, which resulted in a price war at the wholesale level, until it was forced to raise its prices to avoid economic hardship.⁵⁸ Liggett charged that Brown & Williamson was selling its "black and whites" at a loss and filed an antitrust lawsuit.

price discrimination suit was originally filed, was known as Liggett Group, Inc. Since the Court and the parties to the case referred to petitioner by its former corporate name, this Casenote will also use the name Liggett.

52. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2582 (1993). "Black and whites" are generic cigarettes packaged in plain white packages with simple black lettering describing their contents. *Id.*

53. *Id.* Sales of generic cigarettes had accounted for only 1% of the domestic market prior to 1980. *Id.*

54. *Id.* at 2583.

55. *Id.* Brown & Williamson had only 11.4% of the branded cigarettes market, but 20% of those who bought Liggett's "black and whites" had switched from a Brown & Williamson brand. *Id.*

56. *Id.* at 2583-84. R.J. Reynolds had introduced a Value-25 cigarette, dropped its list price on Doral about 30%, and used volume rebates to wholesalers in order to compete at Liggett's price level. R.J. Reynolds, however, never marketed a "black and white" cigarette. *Id.*

57. *Id.* Brown & Williamson marketed its "black and whites" to Liggett's distributors as well as to its own buyers, which included a thousand wholesalers who never sold generic cigarettes. *Id.*

58. *Id.* Liggett raised its rebates five times but still was not able to match Brown & Williamson's prices. *Id.*

In the summer of 1986, a pattern of twice yearly increases in the prices of both generic and branded cigarettes was established. The dollar amount of these increases was the same for both generics and branded cigarettes, which resulted in a narrowing of the price gap from 38% in 1984 to 27% in 1989.⁵⁹ In addition, by 1989, five of the six manufacturers, including Liggett, had introduced subgeneric cigarettes which sold for 50% less than branded cigarettes.⁶⁰ By the time the trial started in 1989, generics had become 15% of the total market and Liggett's total sales volume had increased significantly.⁶¹ However, prices for all cigarettes, including generics, had increased and "black and whites" had declined in market share as consumers shifted toward branded generics.

The district court trial lasted for 115 days and resulted in a jury verdict in favor of Liggett for \$49.6 million in damages, which the district court trebled to \$148.8 million.⁶² The jury decided that Brown & Williamson had engaged in price discrimination that had a reasonable possibility of injuring competition. However, after reviewing the record, the district court ruled that Brown & Williamson was entitled to a judgment as a matter of law because no slowing of the growth rate, and thus no injury to competition, was possible unless there had been tacit coordination of prices by the various manufacturers.⁶³

The Fourth Circuit affirmed the district court decision. However, it greatly expanded the district court's holding by asserting that it is impossible to have competitive injury in an oligopolistic industry. From the court's perspective, "[t]o rely on the characteristics of an oligopoly to assure recoupment of loss-

59. *Id.* at 2585.

60. *Id.*

61. *Id.* Overall, the total sales volume of generic cigarettes increased from 2.8 billion in 1981 to 80 billion in 1989. *Id.*

62. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 748 F.Supp. 344 (M.D.N.C. 1990), *aff'd*, 964 F.2d 335 (4th Cir. 1992), *aff'd*, 113 S. Ct. 2578 (1993). Treble damages are appropriate when injury results from a violation of the antitrust laws. 15 U.S.C. § 15(a) (1988).

63. 748 F. Supp. at 354-55. The district court actually found that three separate grounds for granting the judgment existed: lack of injury to competition, lack of antitrust injury to Liggett, and lack of a causal link between the discriminatory rebates and Liggett's alleged injury.

es from a predatory pricing scheme after one oligopolist has made a competitive move is . . . economically irrational."⁶⁴

B. *The Majority Decision*

Justice Anthony Kennedy, writing for the majority, strongly rejected the theory that recoupment is never possible in an oligopolistic setting.⁶⁵ Justice Kennedy, disagreeing with the Fourth Circuit's holding, stated that a "predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly."⁶⁶ Although Justice Kennedy asserted that it is very unlikely that a competitor can ever expect to recoup the losses of price-cutting in an oligopolistic market, he strongly maintained the view that "when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability."⁶⁷ Nevertheless, the majority decision firmly established that a showing of competitive injury will be highly improbable in situations where price cutting occurs in highly competitive markets.⁶⁸

The majority believed that price-cutting is generally good for competition, so long as the prices are above the firm's own costs.⁶⁹ According to Justice Kennedy, "[l]ow prices benefit con-

64. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 342 (4th Cir. 1992), *aff'd*, 113 S. Ct. 2578 (1993).

65. Justice Kennedy stated: "We decline to create a per se rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2591 (1993).

66. *Id.*

67. *Id.* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S. Ct. 2072 (1992)).

68. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

69. Justice Kennedy wrote:

Although *Cargill* and *Matsushita* reserved as a formal matter the question 'whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost,' the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws.

sumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."⁷⁰ Therefore, discouraging such price cuts, even in an oligopolistic market, would be poor antitrust policy since lower prices promote greater consumption and production of goods and, thus, protect consumer interest and economic well-being.

Ultimately, the Court rejected Liggett's arguments and took a strong stand in favor of competition. The Court vehemently opposed any notion that protecting an individual competitor strengthens competition. "That below-cost pricing may impose painful losses on its target," Justice Kennedy asserted, "is of no moment to the antitrust laws if competition is not injured."⁷¹ Justice Kennedy even rejected the idea that predatory intent is determinative to an analysis of Robinson-Patman cases.⁷² Instead, the Court held that the dispositive question is whether the seller can recoup its losses from price-cutting in the future.

For recoupment to be successful, Justice Kennedy noted, the below-cost pricing must be capable of producing the effects that were intended. Below-cost pricing, in itself, does not create a presumption that recoupment and injury to competition will result. Instead, Liggett needed to show that Brown & Williamson could achieve enough market share from its actions in order to set prices high enough, and sustain those prices over a long period, so that it could earn enough profits to make up for its previous losses.⁷³ Liggett, however, failed to do this.

Brooke Group, 113 S. Ct. at 2588 (internal citations omitted); see *Atlantic Richfield Co. v. U.S.A. Petroleum Co.*, 495 U.S. 328, 340 (1990); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986).

70. *Brooke Group*, 113 S. Ct. at 2588 (quoting *Atlantic Richfield*, 495 U.S. at 340).

71. *Id.*

72. "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws . . ." *Id.* at 2589. Prior to the *Brooke Group* case, some lower courts had held that intent to eliminate competitors would be enough to find a primary-line injury. See *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987) (holding that predatory pricing of one seller which injures a competitor is a violation of the Robinson-Patman Act); *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966) (holding that intent to drive competitor out of the market by pricing below competitor's costs constitutes predatory intent).

73. *Brooke Group*, 113 S. Ct. at 2589.

Liggett did not demonstrate that its theory of tacit collusion by its competitors was a viable reason for finding primary-line injury.⁷⁴ The majority cited *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁷⁵ as support for its belief that predatory pricing is improbable, even in an oligopolistic market such as the cigarette industry. *Matsushita*, a Sherman Act case, held that predatory pricing schemes are highly improbable when coordinated action by competitors is required because each has a powerful incentive to cheat on any agreement that existed among them.⁷⁶ Furthermore, Liggett never even alleged actual coordination of prices by its competitors. It simply asserted that the other firms tacitly agreed to control output and prices. Justice Kennedy correctly rejected this theory. Predatory pricing is very unlikely without express coordination because each firm would be forced to rely on imprecise signals from the other firms when determining their prices.⁷⁷ This setup would not be conducive to smooth or successful price coordination. Tacit collusion is the least likely way of recouping losses because the initial losses must be burdened by the initial predator while later profits will be shared by all firms in the market in proportion to their market share.⁷⁸ As Justice Kennedy pointed out, since Brown & Williamson had only 12% of the market, it would have to make nine dollars in future profits for every dollar spent in under-cutting prices.⁷⁹ Therefore, the likelihood of Brown & Williamson recouping its losses was practically none.

In addition, supracompetitive pricing entails a restriction in output. "In the present setting," Justice Kennedy noted, "in which output expanded at a rapid rate following Brown & Williamson's alleged predation, output in the generic segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent Brown & Williamson's

74. Tacit collusion is a process, not in itself unlawful, in which firms recognize that they have a shared interest in controlling price and output and seek to monopolize a market by setting their profits at price-maximizing, supracompetitive levels. *Id.* at 2590.

75. 475 U.S. 574 (1986).

76. *Id.* at 590.

77. *Brooke Group*, 113 S. Ct. at 2590.

78. *Id.*

79. *Id.*

intervention."⁸⁰ However, the rate at which generic cigarettes were capturing market share did not slow following Brown & Williamson's entry into the segment. Instead, the average rate of growth doubled.⁸¹ Thus, Justice Kennedy was correct in rejecting the argument that a firm should prevail on a Robinson-Patman Act claim when its profits and market share increase, simply because of a specious fear that a price cut might possibly adversely affect competition in the future. Price cuts are the very essence of competition and are used by firms to increase sales volume. The majority, therefore, protected both competition and consumer welfare by adopting an approach that allows price-cutting that increases output and consumer demand.

For the majority, the combination of the unstable status of tacit coordination, the difficulty of a firm with small market share being able to recoup its losses, and the fact that output never decreased made Liggett's claims against Brown & Williamson lacking in merit. This holding is appropriate because it seeks to prevent unfounded fears about possible injuries to competition from interfering with consumer welfare. The majority in *Brooke Group* recognized that positive price-cutting exists. Justice Kennedy properly rejected the previous view by realizing that lower prices in highly competitive markets where monopolization would be very unlikely to occur is pro-consumer and pro-competitive. This view allows companies that can produce goods at lower prices to excel. Thus, the economy of the country is strengthened, because stiff internal competition prepares American industries for the rigors of international competition. Certainly, American companies find no such protection of their individual interests in the world market like those previously given in the domestic market by *Utah Pie*.

The Court in *Brooke Group*, therefore, adopted an approach that took into account the realities of the modern world market.⁸² This approach ensures price discrimination laws that

80. *Id.* at 2593.

81. *Id.*

82. The majority wrote:

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable

will finally be beneficial to consumers. Thus, the majority properly laid to rest the poorly reasoned and economically damaging approach to the Robinson-Patman Act that had been adopted in *Utah Pie*.

C. *The Dissent*⁸³

Justice Stevens strongly criticized Justice Kennedy's analysis in a lengthy dissent.⁸⁴ Justice Stevens wrote that "[t]he fact that a price war may not have accomplished its purpose as quickly or as completely as originally intended does not immunize conduct that was illegal when it occurred."⁸⁵ Accordingly, Justice Stevens viewed the price discrimination laws as intended to halt any conduct that might injure competition whether actual injury ever occurs. "The Robinson-Patman Act was designed to reach discriminations in their incipiency," Justice Stevens asserted, "before the harm to competition is effected."⁸⁶ Therefore, Justice Stevens, as was done in *Utah Pie*, gave support to a finding of competitive injury if there is even a "reasonable possibility" that it might occur.

Justice Steven's most forceful comments concerned the majority's lack of deference to the jury's judgment. He called the majority's rationale "a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence."⁸⁷ Justice Stevens correctly stated that the jury was properly instructed on the law and that, in its judgment, Liggett had satisfied all

risks of chilling legitimate price-cutting "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."

Id. at 2588 (quoting *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986)).

83. Justice Stevens wrote the dissent in which Justices White and Blackmun joined.

84. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2598 (1993) (Stevens, J., dissenting).

85. *Id.* at 2599.

86. *Id.* at 2603 (internal quotation marks omitted) (citing *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945)).

87. *Id.* at 2604.

the requirements of a prima facie case. He intimated that the Court should not be concerned with its own perception of the antitrust laws or whether it could actually be determined that a "reasonable possibility" of recoupment existed.⁸⁸ To Justice Stevens, these issues were ones that the Supreme Court should have left solely to the jury.⁸⁹

Justice Stevens, however, was mistaken in his criticism. The United States Supreme Court has the ultimate job of interpreting federal statutes. When the statutes have not been construed in a way that promotes positive public policy, the Supreme Court has a duty to alter prevailing interpretations and even to reevaluate its own past decisions. The Supreme Court realized that it is good public policy to have lower consumer prices and economic efficiency. Thus, the Supreme Court exercised excellent judgment in sweeping aside the *Utah Pie* decision. Justice Stevens' justifications for his attempt to hang on to the damaging anti-competitive price discrimination rationale that had been created twenty-six years earlier, were therefore lacking sound economic logic.

V. CRITICISM OF THE ROBINSON-PATMAN ACT

The *Brooke Group* decision was responsive to widespread criticism that the Robinson-Patman Act, in and of itself, subverts the interests of consumers. "Critics, in a 'contest of witticisms,' have had much fun with the Act, calling it the 'Typhoid Mary of Antitrust,' a 'grotesque manifestation of the scissors and paste-pot method' of draftsmanship, and something ranking 'high on the list of things with which economic nonsense is associated.'"⁹⁰

Numerous commentators believe that the mere existence of the Robinson-Patman Act is contrary to the broad goals of the antitrust laws because its ideas direct enforcement of the Sherman Act away from protecting consumer welfare and healthy

88. See *id.* at 2605-06.

89. See *id.* at 2606.

90. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1113, 1114 (1983) (internal citations omitted).

competition.⁹¹ Businesses, thus, encounter a situation where the Sherman Act encourages them to "go out and compete," while the Robinson-Patman Act, on the other hand, tells them to "go out and compete, but don't get caught."⁹² This conflict produces widespread disrespect for the price discrimination laws and commercial costs such as higher prices resulting from increased costs of doing business, price rigidity, and price fixing.⁹³ In addition, *Utah Pie* and subsequent lower court decisions only intensified attacks on the Robinson-Patman Act.

Robert Bork, the victorious counsel in the *Brooke Group* case, had argued for years that the *Utah Pie* decision revealed how anti-competitive and anti-consumer the statute was.⁹⁴ To Bork, however, the true problem was with the attempt to tackle price discrimination through the Robinson-Patman Act or any other legislation:

The attempt to counter the supposed threat to competition posed by price discrimination constitutes what is surely antitrust's least glorious hour. The instrument fashioned for the task was the Robinson-Patman Act, the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory. One often hears of the baseball player who, although a weak hitter, was also a poor fielder. Robinson-Patman is a little like that. Although it does not prevent much price discrimination, at least it has stifled a great deal of competition.

Revision of the statute is not the answer, however, for price discrimination is not a proper target for antitrust, and in any event, the phenomenon seems beyond the effective reach of law.⁹⁵

While the majority in *Brooke Group* did not adopt Bork's view that price discrimination laws can never be beneficial, it did embrace the view that excessive regulation of pricing can only result in injury to competition.

91. See, e.g., Wesley J. Liebeler, *Let's Repeal It*, 45 ANTITRUST L.J. 18, 19 (1976).

92. Hansen, *supra* note 90, at 1187.

93. *Id.* at 1187-88.

94. See BORK, *supra* note 2, at 387.

95. *Id.* at 382.

Before *Brooke Group*, interpretations of the Act focused on price differences and only indirectly touched on price discrimination.⁹⁶ Sales at different prices were a prima facie case of price discrimination. Legitimate reasons for price differentials were not taken into account. Thus, the Robinson-Patman Act was misconstrued so greatly that it no longer fulfilled its purposes of combating price discrimination, protecting competition, and promoting consumer welfare. Even after the pro-consumer decision in *Brooke Group*, the approach that the Robinson-Patman Act takes to price discrimination will continue to be difficult to justify.⁹⁷

When the Act was passed in Congress in 1936, the main concern was with protecting small businesses from large "chain stores" that could sell goods more cheaply.⁹⁸ This concern subsequently slanted judicial interpretation of the Act toward protecting individual competitors.⁹⁹ Therefore, the Act became one which protected narrow, individual interests at the expense of general economic efficiency and consumer welfare. The result has been higher consumer prices and declining economic efficiency.

Despite widespread criticism, no movement to repeal the Robinson-Patman Act has ever had much success. Fortunately, the view that the Robinson-Patman Act generally benefits the nation has prevailed. Supporters of the Act believe it has sim-

96. See *Falls City Indus., Inc. v. Vanco Beverage, Inc.* 460 U.S. 428, 434-37 (1983); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

97. Cf. AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT AND RELATED MATTERS, RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT, H.R. REP. NO. 1738, 94th Cong., 2d Sess. (1976) (debating the merits of the Robinson-Patman Act).

98. See 80 CONG. REC. S6346 (daily ed. Apr. 29, 1936); FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962); Paul H. LaRue, *The Robinson-Patman Act: The Great Issues and Personalities*, 55 ANTITRUST L.J. 135, 137 (1986) ("The substantial growth of retail chains in this era was seen as threatening traditional systems of distribution; the chains' direct buying practices were viewed as a threat to the independent wholesaler and broker, and their lower prices were perceived as a threat to the independent retailer.").

99. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726 (1945); *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959); *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957); *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir. 1957); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955).

plified complex pricing structures and discount formulas which made little business sense, discouraged under-the-table deals in advertising and promotion arrangements, and prevented predatory pricing practices to the extent that they actually exist.¹⁰⁰ In addition, "there is a psychological benefit for small businesses to know that at least one law is concerned with 'fair dealing' and was passed for their specific benefit."¹⁰¹

The Act undoubtedly has many problems, but prohibiting behavior that actually injures competition or results in monopolization is necessary. The Supreme Court has recognized that while injury to competition is highly improbable in competitive industries, it is still possible. Justice Kennedy, in *Brooke Group*, correctly reaffirmed this approach. The real problem is how the Robinson-Patman Act has been interpreted. The Act forbids any discrimination which substantially lessens competition or tends to create a monopoly.¹⁰² It does not state that mere price differentials without any actual injury violates the regulations of the Act. This interpretation was created by the courts in *Utah Pie* and other cases. *Brooke Group*, by requiring proof of actual injury, corrected the faulty rationale of previous primary-line cases. Thus, the Act now serves the vital interest of punishing companies who actually injure competition and consumer welfare, but no longer inhibits business practices that benefit the nation's overall economic well-being.

VI. CONCLUSION

For twenty-six years, both businesses and consumers in the United States have contended with the decision in *Utah Pie*. Businesses who lowered prices to gain competitive advantage in the market-place were subjected to costly legal actions. Lower prices should be what public policy strives to achieve. Yet, the Supreme Court defied common sense and handed down a primary-line price discrimination decision that sought to protect narrow, individual interests of certain competitors at the expense of consumers. The Supreme Court failed to realize that

100. *E.g.*, Hansen, *supra* note 90, at 1186-87.

101. *Id.*

102. 15 U.S.C. § 13a (1988).

companies would not deliberately lower prices and sustain losses if they had virtually no chance of recouping those losses. No business would survive if it did. In fact, businesses that practice such self-defeating policies do not exist for long, because a dynamic, growing economy will not tolerate such incompetent business practices. Therefore, since market realities shield against injury from below-cost pricing, the United States Supreme Court need not be concerned with whether the practices of poorly-managed businesses will impede the goals of promoting consumer welfare and ensuring economic competition that the price discrimination laws are meant to achieve.

Certainly, monopolization of industry is a dangerous threat to the economic welfare of the country. However, in industries where it is impossible for one company to control the market, competitors should be left alone to compete. Economic efficiency will never be achieved if businesses have to constantly overcome mountains of regulations and legal red tape in addition to trying to compete and win against industries from all over the world. Fortunately, the Supreme Court finally realized its error and rescinded the erroneous rationale of *Utah Pie*.¹⁰³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* marks a new era of pro-competition and pro-consumer judicial interpretation that can only help the nation prosper economically.¹⁰⁴ Decisions in lower courts are already being influenced by

103. For newspaper accounts of the Supreme Court's decision in *Brooke Group*, see, e.g., Paul M. Barrett, *Justices Reject Cigarette Firm's Antitrust Appeal: Ruling Makes It Tougher to Win Suits Contesting Rivals' Deep Price Cuts*, WALL ST. J., June 22, 1993, at A3, and Linda Greenhouse, *Cigarette Antitrust Suit is Rejected*, N.Y. TIMES, June 22, 1993, at D2.

104. Perhaps the greatest impact *Brooke Group* will have on economic efficiency is that it finally brings a degree of certainty to the subject of primary-line price discrimination. For the past twenty-six years, businesses were unsure whether price-cutting would lead to a lawsuit. Certainly, *Utah Pie* made a declining price structure a per se indicator of "primary-line" price discrimination. Under the *Utah Pie* rationale, the Robinson-Patman Act was used to prevent price discrimination in its incipency without actual proof of injury to other competitors. However, some lower courts in the past twenty-six years recognized the egregious error of the Supreme Court in *Utah Pie* and required a showing of actual injury to competition in the market. In *Boise Cascade Corp. v. FTC*, the court emphasized the need to look at "cold, hard facts" to rebut an inference of competitive injury because "[i]njury to competition is . . . the name of the Robinson-Patman game." 837 F.2d 1127, 1143 (D.C. Cir. 1988). Despite the movement away from the *Utah Pie* rationale by some courts, the inferred injury standard still continued to have its followers. See *Hasbrouck v. Texaco, Inc.*, 830 F.2d 1513 (9th Cir. 1987) (holding that the plaintiff only had to show that a substantial

the *Brooke Group* case.¹⁰⁵ In the future, businesses will be free from legal worries about cutting prices in order to compete more effectively in the world market. Consumers will benefit from the results. Consequently, the basic purpose of the price discrimination laws of benefitting consumer welfare finally will be realized.

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price differential existed over a period of time). Obviously, then, no agreement on the proper standard for price discrimination under the Robinson-Patman Act existed prior to *Brooke Group*. Therefore, *Brooke Group* was a strong effort to end the chaos that had surrounded primary-line cases for the past quarter-century.

105. See *R.W. Int'l Corp. v. Welch Food, Inc.*, No. 93-1704, 1994 WL 9478 (1st Cir. Jan. 20, 1994); *U.S.A. Petroleum Co. v. Atlantic Richfield Co.*, No. 87-5681, 1994 WL 1944 (9th Cir. Jan. 6, 1994); *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455 (9th Cir. 1993); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 998 F.2d 1073 (1st Cir. 1993); see also *United States v. Western Elec. Co.*, Nos. 92-5079, 92-5111 to -5113, 92-5167 to -5168, 1993 WL 532886 (D.C. Cir. Dec. 28, 1993) (Williams, J., dissenting).

