# The Robinson-Patman Act and Consumer Welfare: Has *Volvo* Reconciled Them?

*John B. Kirkwood*[†]

## I. INTRODUCTION

The Robinson-Patman Act is the black sheep of antitrust. Like much other New Deal legislation, the principal purpose of the Robinson-Patman Act (the Act) was protectionist.[1] Instead of trying to enhance competition for the benefit of consumers, like other antitrust laws, the Act's predominant goal was to protect small business from competition.[2] It did this by tightening the 1914 Clayton Act proscriptions against "secondary-line" discrimination—discrimination by a seller that favors some of its customers over others.[3] Congress was concerned that large buyers

† Associate Professor, Seattle University School of Law; Co-Editor, *Research in Law and Economics*; and Member, Board of Advisors, American Antitrust Institute. I presented an earlier version of this article at the 2006 Spring Meeting of the Antitrust Section of the American Bar Association. Alicia Downey, Stephen Cernak, and Heather Kirkwood commented on that version. Heather Kirkwood, Anthony Kirkwood, and the editors of this review suggested numerous improvements in this version.

1. *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–45, 371 (1999) (showing that in many areas of the economy, "the New Deal's technique was . . . to suppress competition, or at least to modulate its destructive effects"). One example was the "Robinson-Patman Act of 1936," the prohibitions of which were "a way of insulating 'mom-and-pop' corner stores against aggressive price pressure from the high-volume giants." *Id.* at 372.

2. Terry Calvani and Gilde Breidenbach state: "It is quite clear that the underlying predicate of the Robinson-Patman Act was *not* consumer welfare. Rather, the Act is protectionist legislation." Terry Calvani & Gilde Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 770 (1991). Terry Calvani, a former Commissioner of the Federal Trade Commission, authored the Commission decision in *In re General Motors Corp.*, 103 F.T.C. 641 (1984), which came to the same conclusion. The Act contains elements that soften its protectionist thrust, including a cost-justification defense, *see* 15 U.S.C. § 13(b) (2006), and a meeting competition defense, *see* 15 U.S.C. § 13(a) (2006).

3. Most significantly, Congress added language to Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), that relaxed the injury requirement in a secondary-line case. Under the new language, a plaintiff could prevail by proving that the discrimination reduced its ability to compete, even if overall competition remained vigorous. *See, e.g.*, Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653,

could force sellers to give them lower prices and other benefits and then use these advantages to take business or profits from smaller firms.[4] By curbing secondary-line discrimination, the Act helped protect small business from the aggressive competition of powerful buyers. At the same time, it reduced the ability of those buyers to extract lower prices from their suppliers and pass them on to consumers.

In recent years, the Supreme Court has repeatedly narrowed the conflict between the Act and other antitrust laws. Between 1979 and 1993, the Court decided four Robinson-Patman Act cases and in all four adopted interpretations that made it harder for plaintiffs to prevail, either by "expanding affirmative defenses [or] heightening requirements for a prima facie case."[5] In *Brooke Group*, the last of the four, the Court reiterated its admonition that the Act should be construed "consistently with broader policies of the antitrust laws."[6] In addition, the Court specifically declared that the Act bans "price discrimination only to the extent that it threatens to injure competition."[7] If taken literally, this statement would eliminate the protectionist purpose of the Act, making secondary-line discrimination illegal only when a plaintiff could show a threat to market-wide competition.

After *Brooke Group*, defendants frequently argued that the statement should be read literally. The appellate courts rejected this argument, however, finding it difficult to believe that the Supreme Court meant to eviscerate what Congress had done in 1936.[8] The Supreme Court itself

---

655 (9th Cir. 1997) (this language "shifts the focus of the statute from protecting competition to protecting individual disfavored buyers from the loss of business to favored buyers").

4. In *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948), the Supreme Court declared: "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity-purchasing advantage." *Morton Salt* also recognized that liability under the Act could be established merely by showing injury to the "competitor victimized by the discrimination." *Id.* at 49.

5. Elaine Foreman and Robert Skitol, Volvo v. Reeder: *Narrow Holding, Broader Implications*, theantitrustsource (March 2006), at 1, *available at* http://www.abanet.org/antitrust/at-source/06/03/Mar06-Skitol3=22f.pdf. The four cases were *Brooke Group Ltd. v. Brown & Williamson*, 509 U.S. 209 (1993); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); and *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979). In three of the four cases, the Court ruled for the defendants; the plaintiff prevailed only in *Hasbrouck*.

6. *Brooke Group*, 509 U.S. at 220 (quoting Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979)).

7. *Id.*

8. *See, e.g.*, *Chroma Lighting*, 111 F.3d at 653. *See also* Richard M. Steuer, *Bidding for a Rational Robinson-Patman Act*, 20 ANTITRUST 61, 67 (2006) ("[C]ourts in six circuits refused to apply *Brooke Group's* injury to competition standard beyond primary-line cases."). The appellate courts were able to distinguish *Brooke Group* because, as Steuer points out, it was a "primary-line" case, not a secondary-line case. *See id.* In a primary-line case, the plaintiff is a *competitor* of the discriminating seller; in a secondary-line case, the plaintiff is a *customer* of the discriminating seller.

did not address the issue again until thirteen years later when it decided *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[9] in 2006. Although the case involved a significant question of Robinson-Patman Act interpretation—whether the Act applies to a competitive bidding situation—the most interesting and important aspect of the decision was whether the Court would follow *Brooke Group* and eliminate the conflict between the Act and other antitrust laws.

In this article, I address that broader question. In Part II, I summarize the facts and opinions in *Volvo*, particularly the final section of the majority opinion where the Court observed that Volvo's discrimination was procompetitive. In Part III, I review the growing consensus in antitrust law that the fundamental goal of the antitrust statutes (other than the Robinson-Patman Act) is to promote consumer welfare. Today when most courts say that a practice furthers competition, they mean that it improves consumer welfare—specifically, the welfare of consumers in the relevant market. In Part IV, I use that interpretation of furthering competition to test the Court's view that Volvo's price discrimination was procompetitive. I conclude that the Court was probably correct because it is likely that Volvo's conduct benefited users of trucks. Finally, in Part V, I confront the ultimate question: did *Volvo* impose new standards for secondary-line liability that would require all future Robinson-Patman Act plaintiffs, not just primary-line plaintiffs, to show probable harm to consumer welfare? I conclude that it did not: while *Volvo* is not entirely clear, the Court's decision does not appear to jettison any of the basic protectionist features of the Act. Instead, it strengthens the Court's existing, incrementalist approach under which issues of Robinson-Patman Act interpretation are resolved in ways that promote competition and consumer welfare. Where there is an issue of statutory interpretation—as there will be in any case the Court takes—the Court is likely to choose the interpretation of the Act that best advances the interests of consumers. Where a plaintiff has brought a completely traditional secondary-line case, however, the Court still appears unwilling to rule that the plaintiff must show harm to market-wide competition.

## II. THE *VOLVO* DECISION

*Volvo* presented a significant question of Robinson-Patman Act interpretation because it involved a competitive bidding situation rather than the usual secondary-line setting. In the usual secondary-line setting,

---

*See infra* note 28. The issue remained alive, however, because the Court's controversial statement in *Brooke Group* was not expressly limited to primary-line cases. *See Brooke Group*, 509 U.S. at 220.

9. 126 S. Ct. 860 (2006).

the favored and disfavored customers have already purchased the defendant's products, and thereafter, hold the products in inventory to compete with each other in *reselling* these products.[10] In *Volvo*, however, the ultimate consumers—end users of trucks—sought competitive bids from dealers for truck manufacturers and then purchased from the dealer offering the best bid.[11] Such a competitive bidding situation led neither Reeder, the plaintiff, nor the asserted favored customers to sell from their inventory.[12] Instead, they bought trucks from Volvo only *after* they won a bid to supply trucks to a particular end user.[13] Thus, even in instances in which two Volvo dealers were competing for the business of a particular end user, only one dealer was a reseller of Volvo trucks—the dealer who won the bid.[14]

In this particular setting, it might be impossible for a plaintiff to establish a Robinson-Patman Act violation. Relying on the statutory language, most commentators state that a secondary-line price discrimination violation requires *two sales*—one at a higher price and one at a lower price—to *competing resellers*.[15] While these elements are satisfied in the usual secondary-line setting, they are arguably not met in a competitive bidding contest. In *Volvo*, Reeder never identified another Volvo dealer who purchased Volvo trucks at a better price than Reeder received (meeting the "two sales" requirement) and resold them in competition with Reeder (meeting the "competing resellers" requirement).[16]

The Supreme Court could have resolved *Volvo* relatively easily, therefore, by agreeing with Volvo and the Solicitor General that a secondary-line case cannot be brought in a competitive bidding situation. The Court did not do this.[17] Nor did the majority end its opinion once it concluded that Reeder did not satisfy the standards that might permit a plaintiff to prevail in a competitive bidding situation. Instead, the Court added a final section to its opinion in which it addressed the relationship of its

---

10. *See generally* FTC v. Morton Salt Co., 334 U.S. 37 (1948).

11. 126 S. Ct. at 866–68.

12. *See id.*

13. *Id.*

14. In fact, Volvo dealers did not generally compete with other Volvo dealers; rather, they typically bid against dealers for other truck manufacturers. *See* Steuer, *supra* note 8, at 61 (truck users "rarely solicited bids from more than one Volvo dealer, and Reeder rarely bid against another Volvo dealer").

15. *See, e.g.*, Allen M. Huss, Presentation, *The Elements of Price Discrimination Under the Robinson-Patman Act*, American Bar Association Antitrust Section Meeting, Spring 2006, at 3 (the elements of unlawful price discrimination include "[t]wo sales," a "price discrimination," and "competing resellers") (on file with the author).

16. *Volvo*, 126 S. Ct. at 866–68.

17. *See id.* at 869–73.

decision to the procompetitive policies of the other antitrust laws.[18] The basic facts on which the Court erected its analysis were straightforward and undisputed.

### *A. Facts*

Volvo manufactures heavy-duty trucks.[19] It distributes its trucks through a network of franchised dealers, who then supply them to Volvo's retail customers—end users such as trucking firms and dairies.[20] In order to bid for the business of an end user, a Volvo dealer would ask Volvo for a discount off Volvo's list price.[21] According to Volvo, the discount it was willing to give off its list price depended on the competitive situation it faced.[22] If two Volvo dealers wanted to bid for the business of the same customer, Volvo's policy was to grant them both the same discount.[23]

Reeder was a Volvo dealer in Arkansas who alleged that its sales and profits fell because Volvo gave other dealers better discounts than it received.[24] According to Reeder, Volvo wanted to reduce the size of its dealership network but could not terminate Reeder because it would risk liability under Arkansas franchise law.[25] As a result, Reeder asserted, Volvo decided to eliminate Reeder by discriminating against it.[26] Reeder principally measured its losses by comparing the discounts it received on bids to supply certain end users to the discounts other Volvo dealers received on bids to supply different end users.[27] Reeder could identify only two instances where another Volvo dealer had allegedly received a better discount than Reeder to supply the *same* end user.[28] And in both instances, there was evidence that Volvo had not in fact discriminated against Reeder.[29]

---

18. Part IV is the most intriguing and provocative part of *Volvo* since, standing alone, it could be read to apply *Brooke Group* to secondary-line cases. Read in connection with Parts II and III of the opinion, however, it does not appear that the Court has taken this step.

19. *Volvo*, 126 S. Ct. at 866.

20. *Id.* at 866–67.

21. *Id.* at 866. Volvo's list price depended on the specifications for the trucks in question. *Id.*

22. For example, Volvo tended to grant a smaller discount if the end user had been a long-standing Volvo customer and a larger discount if the end user had to be persuaded to switch from another manufacturer. *See* Brief for Petitioner Volvo Trucks N. Am., Inc. at 3, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2005) (No. 04-905) [hereinafter Petitioner Brief]. *See also Volvo*, 126 S. Ct. at 866–67.

23. *Volvo*, 126 S. Ct. at 867.

24. *Id.* at 866.

25. *See* discussion *infra* Part IV.C.1. *See also Volvo*, 126 S. Ct. at 867.

26. *See* discussion *infra* Part IV.C.1. *See also Volvo*, 126 S. Ct. at 867.

27. *Volvo*, 126 S. Ct. at 867.

28. *Id.*

29. *See id.*

### *B. Majority Opinion*

Writing for the majority,[30] Justice Ginsburg proceeded in two stages. First, in Parts II and III, she ruled that Reeder's case was deficient as a matter of law. Then, in Part IV, she indicated that even if Reeder had offered a permissible interpretation of the Act, the Court would have rejected it because it would have penalized procompetitive behavior. In neither stage did the Court conclude that it was ready to discard the Act's long-standing competitive injury test and replace it with a requirement that a secondary-line plaintiff must show harm to market-wide competition and consumer welfare.

#### 1. Resolution of Reeder's Claims

Justice Ginsburg began her analysis by laying out the contours of a secondary-line price discrimination violation in Part II of her opinion, and market-wide competition injury was not within those contours. She noted that the Act does not bar all price differences; rather, the Act "proscribes price discrimination only to the extent that it threatens to injure competition."[31] Although Justice Ginsburg quoted the controversial language from *Brooke Group*, the context of Part II indicates she apparently utilized the quote only to make clear that a plaintiff in a secondary-line case cannot prevail merely by establishing that it paid more than another customer for the defendant's product; she was not referring to a need to prove market-wide competition. In addition, the plaintiff must also show that this disadvantage threatened to cause some injury to competition.[32] The three sentences following the quote made it evident that the kind of injury to competition she was referring to was injury to competition among the favored and disfavored customers, not injury to market-wide competition. More specifically, she stated in these sentences that there are "three categories of competitive injury that may give rise to a Robinson-Patman claim"[33] and that the second category, secondary-line injury,

---

30. In *Volvo*, seven Justices concluded that Reeder had not proven sufficient facts to establish a Robinson-Patman Act violation (Justice Ginsburg, Chief Justice Roberts, and Justices Breyer, Kennedy, O'Connor, Scalia, and Souter); Justices Stevens and Thomas dissented. *See id.* at 866, 873.

31. *Id.* at 870 (quoting Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 220 (1993) (internal quotations omitted)).

32. According to Justice Ginsburg,

> To establish the secondary-line injury of which it complains, Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of "like grade and quality;" (3) Volvo "discriminated in price between" Reeder and another purchaser of Volvo trucks; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, i.e., one who "received the benefit of such discrimination."

*Id.*

33. *Id.*

involves "[injury to] *competition among the discriminating seller's customers*."[34]

Justice Ginsburg concluded Part II, moreover, by describing what a secondary-line plaintiff must show to establish such competitive injury. In this review, she did not state that a plaintiff had to show harm to market-wide competition, nor that it had to demonstrate any of the familiar components of such harm, such as market power, entry barriers, or adverse effects on consumers. Instead, she declared that a "hallmark" of that injury is "the diversion of sales or profits from a disfavored purchaser to a favored purchaser."[35] She also reaffirmed the inference of competitive injury established in *Morton Salt*, which allows a plaintiff to satisfy its injury burden by showing a significant and persistent price differential; a plaintiff need not prove actual injury to itself, nor harm to market-wide competition. She stated: "We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time."[36]

In Part III of her opinion, Justice Ginsburg applied these standards to Reeder's claims of competitive injury. She turned first to Reeder's claim that it was hurt when the discounts it was offered on bids to supply certain end users were lower than the discounts other Volvo dealers received on bids to supply different end users. She rejected these comparisons because "in none of [these] instances . . . did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*."[37] Absent such head-to-head competition, she stated, Reeder and the other Volvo dealers were not "competitors," and these instances could not support a claim of competitive injury under the Act.[38]

Justice Ginsburg acknowledged, though, that Reeder and the other Volvo dealers did compete for invitations to bid. Since a dealer cannot bid on a customer's business unless it receives an invitation to bid, Reeder and the other dealers were competing for these invitations. If

---

34. *Id.* (emphasis added). Justice Ginsburg stated:

> Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line. Primary-line cases entail conduct . . . that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships); cases in this category typically refer to "favored" and "disfavored" purchasers.

*Id.* (citations omitted).

35. *Id.*

36. *Id.* (citing FTC v. Morton Salt Co., 334 U.S. 37, 49–51 (1948)).

37. *Id.* at 871. (Emphasis in original.)

38. *Id.* at 872.

Reeder had acquired a reputation as an inferior supplier because Volvo consistently gave other dealers better discounts, Reeder may have received fewer invitations to bid. If so, Reeder might have had a valid claim of competitive injury. Justice Ginsburg did not pursue this theory, however, "because Reeder did not present—or even look for—evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers."[39]

Justice Ginsburg then evaluated Reeder's contention that it had been injured in the two instances in which it actually bid against another Volvo dealer for the business of a particular end user. In these instances, Volvo and the Solicitor General argued there could be no Robinson-Patman Act violation because the dealers were not competing resellers. Once again, the Court left an opening for a disfavored dealer in a competitive bidding situation, ruling that it "need not decide . . . today" [40] whether Volvo's and the government's argument was correct. Instead, the majority ruled in Volvo's favor because of flaws in Reeder's proof: in one instance, Reeder did not actually lose a sale to another Volvo dealer because the end user selected another brand of truck; in the second instance, the lost sale would have enhanced Reeder's gross profits by only $30,000, an amount too small by itself to satisfy the requirement of "substantial" discrimination.[41]

Although Justice Ginsburg resolved Reeder's claims in Parts II and III of her opinion, she did not stop there. Instead, she added in Part IV a comment on the relationship between the Robinson-Patman Act and the procompetitive policies of other antitrust laws.

### 2. Competition and the Robinson-Patman Act

In Part IV, the most provocative section of her opinion, Justice Ginsburg asserted that the majority's decision was consistent with the "broader policies of the antitrust laws."[42] Her beginning statement in Part IV, that "[i]nterbrand competition . . . is the 'primary concern of antitrust law . . .'", indicates that the policies she was referring to were the antitrust policies that promote competition in the market as a whole.[43] To

---

39. *Id.* at 871 n.3.

40. *Id.* at 872.

41. *Id.* (citing 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 478–79 (5th ed. 2002) ("No inference of injury to competition is permitted when the discrimination is not substantial.")).

42. *Volvo*, 126 S. Ct. at 873 (quoting Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 220 (1993)).

43. *Id.* at 872 (quoting Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51–52 (1977)). Interbrand competition is competition between brands (e.g., between Volvo trucks and Freightliner

support her assertion, she then identified three reasons why Volvo's conduct enhanced interbrand competition: "In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands."[44]

What Justice Ginsburg did not say in Part IV is as important as what she did say. As in Part II, she did not say that these characteristics were hurdles that all future secondary-line plaintiffs had to surmount. In particular, she did not declare that all future plaintiffs had to show that the favored buyers had market power or that the defendant's conduct reduced market-wide competition. Rather, she indicated that the Court would look at the competitiveness of the defendant's conduct when the Court had to choose between two permissible interpretations of the Act: "Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*."[45] In other words, if the law is genuinely unclear—if both the plaintiff and the defendant present reasonable interpretations of it—the Court will select the interpretation that is more likely to promote competition.

It appears, therefore, that Part IV is not a radical reconstruction of the Act, but rather a pointed reaffirmation of the Court's desire to reject interpretations of the Act that threaten to reduce competition. Although Part IV does not indicate which interpretations of the Act are permissible and which are not, the Court's endorsement of the traditional tests of competitive injury strongly suggests that interpretations that eliminate those tests would not be permissible.

The dissenters offered an entirely different perspective. In their view, Reeder had not advocated an unreasonable or even an expansive interpretation of the Act. Instead, Reeder had established an entirely traditional Robinson-Patman violation.

---

trucks), as opposed to competition within a brand (e.g., between Volvo dealers). Interbrand competition thus refers to competition in the market as a whole, often simply called "competition."

44. *Id.* at 872–73 (expressly concluding in the last clause of this sentence—"the supplier's selective price discounting fosters competition among suppliers of different brands"—that Volvo's price discrimination enhanced market-wide competition).

45. *Id.* at 872. In the previous sentence, Justice Ginsburg had asserted that the "Robinson-Patman Act signals no large departure from [the] main concern [of antitrust law]." *Id.* While this assertion would be surprising standing alone, Justice Ginsburg followed it with the sentence just quoted in text. This suggests she reasoned that the Act is not a "large departure" from the other antitrust laws because ambiguities in it must be resolved in ways that promote competition. She offered no other explanation for the assertion.

### C. Dissenting Opinion

Writing for Justice Thomas and himself, Justice Stevens contended that Reeder had introduced substantial evidence that Volvo "sought to cut back its number of dealers"[46] and "frequently gave worse prices to [Reeder] than to other regional dealers"[47] in order to accomplish this goal. According to the dissenters, the Court made most of this evidence irrelevant by "adopting a novel, transaction-specific concept of competition,"[48] which eliminates the "statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time."[49] This approach, Justice Stevens contended, "requires us to ignore the fact that competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events."[50] Even if the Act was unsound economic policy, as Justice Stevens thought it was, the Court would have no excuse for "refusing to adhere to the text of the Act."[51]

While the dissenters criticized the majority for failing to apply the Act to the competitive bidding contests at issue in *Volvo*, they did not argue that the majority had ignored the Act's protectionist aim and substituted an injury to competition test for the Act's traditional competitive injury test.[52] Moreover, because both the majority and the dissenters focused primarily on injury to competitors rather than injury to market-wide competition, neither opinion analyzed the competitive effects of Volvo's conduct in any detail or set forth a general test for determining whether conduct furthers market-wide competition. In contrast, an increasing number of decisions over the last three decades have articulated such a test, the consumer welfare test.

## III. THE CONSUMER WELFARE TEST

Ever since the Supreme Court's suggestion in 1979 that the Sherman Act is a "consumer welfare prescription,"[53] courts have been stating with growing frequency that the overarching goal of antitrust laws

46. *Id.* at 874 (Thomas, J., dissenting).

47. *Id.*

48. *Id.* at 873.

49. *Id.*

50. *Id.* at 876

51. *Id.* Justice Stevens agreed with Judge Bork that the Act's protectionist mission amounted to "wholly mistaken economic theory." *Id.* (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382 (1978)).

52. To the contrary, Justice Stevens stated: "*As the Court recognizes*, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chain-stores and other large volume purchasers." *Id.* at 876 (emphasis added).

53. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

(other than the Robinson-Patman Act) is consumer welfare. Many courts have also indicated that conduct is procompetitive if it benefits consumers and anticompetitive if it harms them. Overall, a consensus is emerging among the courts that the ultimate test for determining whether a practice promotes market-wide competition is its impact on consumers in the
relevant market.

In *Brooke Group*, for example, the Supreme Court refused to follow its most recent primary-line precedent because its "low standards of competitive injury are at odds with the antitrust laws' traditional concern with consumer welfare and price competition."[54] The Court also refused to condemn non-predatory price cutting, even if it resulted in prices below marginal cost, because such low prices are generally a "boon to consumers."[55] The Court's emphasis on consumer welfare led the Ninth Circuit, in its first predatory pricing case after *Brooke Group*, to hold that "a primary-line plaintiff must demonstrate an injury flowing from an aspect of the defendant's conduct injurious to consumer welfare."[56]

Numerous other decisions have also identified consumer welfare as the fundamental goal of antitrust laws and consumer impact as the ultimate measure of whether a practice is procompetitive or anticompetitive.[57] For instance, in evaluating the reasonableness of conduct under § 1 of the Sherman Act, the Seventh Circuit stated that "the focus of the procompetitive justifications for the business practice remains the ultimate consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers."[58] Additionally, in *United States v. Microsoft Corp.*, the Second Circuit formulated the first step in its test for monopolizing conduct: "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers."[59]

Moreover, there appears to be no contrary view of the ultimate goal of antitrust law that can be used to determine whether a practice reduces competition. While courts frequently say that the purpose of antitrust law is to protect competition, not competitors,[60] this statement does not de-

54. Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 221 (1993).

55. *Id.* at 224.

56. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1446 (9th Cir. 1995).

57. For a much more extensive analysis of this issue—recent case law; the debate between Bork and Lande; and the views of law professors, economists, and government agencies—see John B. Kirkwood, *Consumers, Economics, and Antitrust*, 21 RES. L. & ECON., ANTITRUST LAW AND ECONOMICS 1 (John B. Kirkwood ed., 2004).

58. SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958, 965 (10th Cir. 1984).

59. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

60. *See* Kirkwood, *supra* note 57, at 30–31 (in a recent five-year period, 133 decisions used this phrase). Justice Ginsburg reiterated this principle when she wrote that "we would resist interpre-

fine competition; rather, it simply distinguishes competition from protectionism. This statement says, for example, that antitrust law should not protect competitors from price cuts that promote competition, but it does not help us determine when price cuts promote competition. At present, the only general test that can resolve the issue and that enjoys substantial judicial support is the consumer welfare test.

There are, however, two potential exceptions to this test. The first exception relates to the debate over whether consumer welfare should be measured by the well-being of consumers in the relevant market or by economic efficiency.[61] In the federal courts, that debate is largely over: in instances where judges have confronted the issue, they have typically, if not always, elevated the well-being of consumers in the relevant market over economic efficiency. For example, in *Brooke Group*, the Court measured consumer welfare by examining the impact on prices in the relevant market, not by economic efficiency.[62] The Court noted that unrecouped below-cost pricing may lead to some "inefficient substitution," but nevertheless stated that it generally improved consumer welfare because it resulted in "lower aggregate prices in the market."[63] Likewise, other courts have ruled that economic efficiencies cannot save an otherwise anticompetitive merger unless the efficiencies are likely to be passed on to consumers in the relevant market.[64] Although a merger that reduces cost but raises price can increase economic efficiency, numerous judicial decisions have held that in evaluating a merger, the impact on consumers in the market is decisive, not the impact on efficiency.[65]

The second exception relates to whether it is appropriate to examine supplier welfare rather than consumer welfare in cases involving anticompetitive practices by buyers rather than sellers. Where buyer conduct

---

tation geared more to the protection of existing *competitors* than to the stimulation of *competition*." Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 872 (2005).

61. In essence, economic efficiency measures the ability of a society to maximize the total economic value it derives from its limited resources. *See* Kirkwood, *supra* note 56, at 2. When economic efficiency is enhanced, consumers in the society as a whole benefit because everyone in the society, including producers, is a consumer. In this sense, an improvement in economic efficiency—in total social welfare—always improves consumer welfare. *Id.* at 47 n.11. As noted below, however, conduct that enhances total social welfare can harm consumers in the relevant market. Thus, if the overarching goal of antitrust law generally is to protect consumers in the relevant market from exploitation by firms with market power, economic efficiency is not the correct measure of consumer welfare.

62. Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 224 (1993)

63. *Id.*

64. *See, e.g.*, FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); United States v. United Tote, Inc., 768 F. Supp. 1064, 1084–85 (D. Del. 1991).

65. *See* Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-Price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727, 761 n.93 (1999) (citing nine court decisions and one FTC decision).

clearly harms suppliers but does not benefit consumers, the impact on suppliers should be dispositive. A buyer cartel, for example, may sharply reduce the price that suppliers receive for their products, but create no discernible impact on the ultimate consumers. In such cases, courts tend to focus on upstream injury, rather than injury to downstream consumers, and hold that competition has been reduced when suppliers have been hurt, even if consumers have not.[66] In contrast, for some buy-side cases, consumers may benefit even though suppliers are harmed; and in that circumstance, at least one court has held that the impact on consumers would be decisive. For instance, in *Balmoral Cinema, Inc. v. Allied Artists Pictures Corp.*, the Sixth Circuit refused to hold as per se illegal an agreement among film distributors to refrain from bidding against each other for films because the agreement "may lower prices to moviegoers at the box office and may serve rather than undermine consumer welfare."[67]

In *Volvo*, the appropriate standard for evaluating the defendant's conduct was consumer welfare, not supplier welfare. *Volvo* contained no allegation that any dealer, or group of dealers, had engaged in a practice likely to harm suppliers like Volvo.[68] Instead, Reeder claimed that Volvo had engaged in discrimination in order to exploit some of its retail customers and eliminate some of its dealers. Volvo stressed the downstream consequences of its behavior, claiming that its conduct would increase interbrand price competition and benefit consumers. Thus, to test whether the Court was correct that Volvo's price discrimination enhanced competition, I will examine the impact of Volvo's conduct on the well being of consumers in the relevant market.

## IV. IMPACT OF VOLVO'S DISCRIMINATION ON CONSUMERS

As noted above, Reeder claimed that Volvo practiced price discrimination to achieve two aims: exploit its most vulnerable customers and eliminate its least desirable dealers. Volvo, however, claimed that it discriminated in order to compete more effectively with other truck manufacturers. These theories differ in their strength and in their implications for consumer welfare.

---

66. *See, e.g.*, Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1133–34 (10th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003) ("The Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users.").

67. 885 F.2d 313, 317 (6th Cir. 1989).

68. As Justice Ginsburg emphasized, there was no evidence that any favored dealer had market power as a buyer. *See* discussion *infra* Part V.A.1.

### *A. Reeder's Theory of Consumer Harm: Exploitative Price Discrimination*

#### 1. Elements of the Theory

Although the Court never mentioned it, Reeder actually advanced a theory of consumer harm. In a footnote near the end of its brief, Reeder pointed out that economists recognize that price discrimination can be inefficient in certain cases.[69] Here, Reeder asserted, there were "strong reasons to believe that price discrimination of the kind Volvo practices [had] a negative effect on consumer welfare."[70] In support of this theory, Reeder cited earlier portions of its own brief and the amicus brief of the National Association of Automobile Dealers (NADA), and contended that "Volvo's pricing practices are simply a form of haggling designed to extract the highest possible price from a given retail truck customer."[71] "By its own admission," Reeder continued, "the purpose of the concession methodology is to 'allow[] Volvo to sell at a higher profit to someone who will pay more.'"[72]

NADA's brief bolstered this argument. NADA noted that Volvo claimed it would give a "larger discount for a retail customer that has historically purchased a different brand of truck" and "offer an even greater discount if that customer is expected to purchase a large number of trucks in the future."[73] This meant, NADA declared, that "Volvo would like to price discriminate against existing Volvo fleet owners and against small fleet owners who cannot be 'expected to purchase a large number of trucks in the future.'"[74] NADA also asserted that Volvo might have the power to engage in such exploitation: "Volvo may be able to price discriminate against existing Volvo fleet owners in the short term because of the high costs to switch to another truck brand."[75] Reeder's theory of consumer harm, in short, was that Volvo discriminated among its dealers in order to discriminate among its retail customers, forcing the most vulnerable of them to pay higher prices.

---

69. Respondent's Brief on the Merits at 41 n.16, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2005) (No. 04-905) [hereinafter Respondent Brief] (citing W. VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 286 (3d ed. 2000)).

70. *Id.*

71. *Id.* at 8.

72. *Id.* at 9 (quoting from the record).

73. Brief of the National Automobile Dealers Association as Amicus Curiae in Support of Respondent at 24, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2005) (No. 04-905) [hereinafter NADA Brief].

74. NADA Brief, *supra* note 73, at 25 (quoting Brief for Petitioner Volvo Trucks N. Am., Inc. at 3, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2005) (No. 04-905)).

75. *Id.*

### 2. Defects in Reeder's Theory

Reeder's theory had two serious flaws. First, the theory did not explain why Volvo's discrimination made Volvo's retail customers worse off overall. Even if Volvo had been charging supracompetitive prices to some of its retail customers, Volvo was nevertheless charging lower prices to others. Why did the losses to the former exceed the gains to the latter? Volvo may have had more customers in the former category (long-standing customers subject to switching costs), but why did these customers lose more than other customers gained (customers who received lower prices for switching to Volvo)? To show an adverse effect on Volvo's retail customers as a whole, Reeder might have tried to prove that Volvo's price discrimination caused its customers as a group to pay a higher average price for its trucks than they would have paid had Volvo charged a uniform price. Reeder did not make such a showing—or otherwise demonstrate an adverse effect on Volvo's customers as a whole—perhaps explaining why Reeder placed its theory of consumer harm in a footnote.[76]

The second flaw to Reeder's theory is that competition among manufacturers may have severely limited Volvo's ability to engage in exploitative price discrimination. In describing the heavy-duty truck industry, both Reeder and NADA maintained that interbrand competition was vigorous. Reeder argued: "Because each manufacturer offers similar commodities that perform the same essential function (e.g., hauling a load from point A to B), Class 8 trucks are highly substitutable products, and competition is keen and profit margins are thin in the Class 8 market."[77] NADA concurred: "The heavy-duty truck market in the United States is characterized by intense interbrand . . . competition."[78]

This competition, however, may not have completely precluded Volvo from engaging in exploitative price discrimination. As NADA contended, switching costs may have rendered existing Volvo fleet owners vulnerable to some exploitation.[79] Moreover, Volvo never argued that its discrimination was cost-justified. If such a contention reflected the underlying reality, rather than the practical difficulties of establishing the cost-justification defense, then Volvo in fact had some market power. A seller cannot ordinarily practice economic price discrimination—price discrimination that is not based on cost differences—without some mar-

76. *See* Respondent Brief, *supra* note 69, at 41 n.16.
77. *Id.* at 5.
78. NADA Brief, *supra* note 73, at 6.
79. *See id.* at 25.

ket power.[80] Yet if interbrand competition had been intense, Volvo would not have had significant market power and thus could not have engaged in substantial customer exploitation. In an intensely competitive environment, Volvo could not afford to gain a reputation for mistreating its repeat customers.[81]

Reeder's theory of consumer exploitation was thus quite weak. Reeder did not show that Volvo's price discrimination harmed its retail customers as a whole, nor did Reeder explain how Volvo could have harmed its customers significantly in light of the intense interbrand competition that assertedly prevailed in the heavy duty truck market. In contrast, Volvo and the Solicitor General argued that price discrimination in this market actually benefited consumers.

### *B. Volvo's Rejoinder: Selective Discounting Benefits Consumers*

#### 1. Uniform Pricing: A Cure Worse than the Disease

Both Volvo and the Solicitor General asserted that price discrimination by truck manufacturers improved the well being of consumers because the alternative—prohibiting manufacturers from discriminating among their dealers—would impede the ability of manufacturers to engage in interbrand price competition. The Solicitor General stated: "Imposing liability for differences in concessions offered to dealers bidding on different sales would limit suppliers' ability to tailor prices to the competitive situation, and thus diminish the vigor of interbrand price competition."[82] Volvo made the same point: "Economists and antitrust scholars have long recognized that competition is generally harmed, and consumers are made worse off, if manufacturers cannot selectively discount their products."[83]

---

80. The leading antitrust economics textbook defines "price discrimination" as nonuniform pricing that is not due to cost differences. *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 308 (4th ed. 2005) [hereinafter "Carlton & Perloff"] ("Not all nonuniform pricing is due to price discrimination; some is due to cost differences."). Ordinarily, such economic price discrimination requires market power. *See, e.g.*, *id.* at 294 (for successful price discrimination, a "firm must have some *market power* (the ability to set price above marginal cost profitably)"); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 574 (3d ed. 2005) ("[P]ersistent price discrimination requires that a seller (or group of sellers) have at least some market power.").

81. Reeder and NADA may have exaggerated the degree of interbrand competition, however, in order to dramatize the impact of Volvo's discrimination on Reeder. Since Reeder mainly competed with dealers for other manufacturers, it was more likely to be hurt if interbrand competition was intense.

82. Brief for the United States as Amicus Curiae Supporting Petitioner at 27, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2005) (No. 04-905) [hereinafter U.S. Brief].

83. Petitioner Brief, *supra* note 22, at 24.

This argument was valid. With the manufacture of heavy-duty trucks concentrated in five or six manufacturers,[84] there was a real risk that oligopolistic coordination would be enhanced if selective discounting were banned.[85] Therefore, even if Reeder's theory of exploitative discrimination were correct, the cure may have been worse than the disease. By strengthening oligopolistic coordination, a ban on discrimination could raise the average price level in the market, making Volvo's retail customers as a whole worse off. While some customers might benefit from uniform pricing, overall consumer welfare could fall.[86]

Reeder attempted to minimize the significance of Volvo's selective discounting by pointing out that "Volvo conceded at trial that it knew the actual prices competitors were offering to customers only in 10–15% of its transactions."[87] However, Volvo did not need to know its rivals' exact offers to undercut them. Volvo could simply use price cuts to gain business if it had a "general sense of market prices for competitive trucks," as Reeder acknowledged Volvo had.[88] Moreover, Reeder's contention that Volvo rarely engaged in price competition was inconsistent with its claim that "Class 8 trucks are highly substitutable products, and competition is keen and profits margins are thin in the Class 8 market."[89]

---

84. *See id.* at 2; NADA Brief, *supra* note 72, at 6.

85. In an oligopoly—a market dominated by a few firms—supracompetitive pricing is less likely if the firms engage in selecting discounting. Not only do selective price cuts lower the average price level in the market, but they are a form of "cheating" on the oligopolistic consensus that weakens the consensus and may destroy it altogether. As a result, a ban on selective discounting is likely to strengthen oligopolistic coordination, diminish interbrand price competition, and (in the absence of countervailing effects from the elimination of exploitative price discrimination) raise average price levels in the market. *E.g.*, HERBERT HOVENKAMP, 14 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 122 (1999) (stating that

> [I]n situations in which collusion or oligopoly already exists, the Robinson-Patman Act often serves to preserve rather than undermine it. This is so because firms typically 'cheat' on cartels or oligopolies by making relatively large sales at prices below the level that the parties have otherwise settled on. To that end, the Robinson-Patman Act . . . makes a selective price cut more expensive by requiring that the cut be given to other customers as well. . . . Faced with such a situation, the firm will likely refrain from making the cut at all, with the result that the oligopoly is maintained.).

86. If a ban on price discrimination resulted in a uniform market price that was above the average price that prevailed when selective discounting was permitted, the ban would raise the average price level in the market and consumers as a whole would be worse off. The retail customers that paid the highest prices under discrimination might still benefit, however, if the uniform price was below the price they previously paid.

87. Respondent Brief, *supra* note 69, at 9.

88. *Id.*

89. *Id.* at 5.

### 2. The Court Accepts Volvo's Theory

The majority agreed with Volvo and the Solicitor General that Volvo's price discrimination enhanced interbrand competition. The Court not only noted that Volvo's "selective price discounting fosters competition among suppliers of different brands,"[90] but also quoted a prior admonition the Court had given against construing the Act in ways that "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[91] Justice Ginsburg did not, however, attempt to weigh Volvo's theory against Reeder's, asking whether the costs of reduced interbrand competition, if Volvo could not price discriminate, would outweigh the benefits from reduced exploitative price discrimination. Presumably, she did not make this tradeoff for the same reason she did not mention Reeder's theory: it was poorly substantiated.[92] Comparing the strength of Volvo's theory of consumer benefit against the weakness of Reeder's theory of consumer harm, it was relatively easy for the Court to conclude that Volvo's price discrimination improved consumer welfare. At oral argument, moreover, Justice Breyer identified another reason why Volvo's discrimination benefited consumers: it probably increased Volvo's distributional efficiency.

## *C. Justice Breyer's Focus: Distributional Efficiency*

### 1. Reeder's Theory of Dealer Harm

As noted above, Reeder claimed that Volvo engaged in price discrimination not only to exploit vulnerable retail customers, but also to eliminate unwanted dealers. Volvo's desire to pare back its dealership network was evident, as Reeder pointed out: "In the period relevant to this case, Volvo adopted a policy called 'Volvo Vision' to eliminate smaller dealers. Volvo's goal was . . . to reduce the number of dealers by roughly 50%. . . ."[93] The existence of this policy was not in dispute.[94] The issue was whether Volvo could use price discrimination to effectuate it.

---

90. *Volvo*, 126 S. Ct. at 873.

91. Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 63 (1953). *See also Volvo*, 126 S. Ct. at 873 (citing *Automatic Canteen Co*, 346 U.S. at 63).

92. As a small business, Reeder may not have had the resources to develop and prove a convincing theory of consumer harm.

93. Respondent Brief, *supra* note 69, at 10 (citation omitted).

94. *See* Petitioner Brief, *supra* note 22, at 8 (noting, but not disputing, Reeder's evidence that Volvo had adopted a business strategy called "Volvo Vision").

Ordinarily, of course, a manufacturer can simply terminate dealers it does not want. According to Reeder, this route was not available to Volvo, forcing it to turn to price discrimination:

> Volvo was constrained by its self-renewing franchise agreement, which prevented termination of the franchise except for cause, from simply refusing to deal with a targeted dealer. Moreover, even aside from Volvo's binding and voluntary contractual commitments, federal and state law both prohibit termination of dealerships without cause. Volvo, however, could terminate dealers for failing to makes their sales and other objectives. . . . Thus, price discrimination was a powerful way for Volvo to manufacture "cause" to terminate unwanted dealers.[95]

Reeder's theory, in short, was that Volvo engaged in price discrimination in order to evade contractual and statutory restrictions on its ability to cut off dealers. At oral argument, however, Justice Breyer summarily dismissed this theory.

### 2. Breyer's Assessment: Proconsumer

Justice Breyer pounced on Reeder's dealer-elimination theory at oral argument because he thought that it simply showed that Volvo wanted to improve the efficiency of its dealer network and thereby benefit consumers. While he agreed that Reeder's theory probably explained Volvo's behavior, he thought that its implications were plainly procompetitive: "[W]hat worries me . . . is . . . forbidding Volvo from doing what it probably wants to do here. If it wants to get rid of its dealers, it's because it wants to compete better with other brands. And that means lower prices for consumers, though individual dealers might be hurt."[96] If Reeder's counsel disagreed, he did not say so on the record. In the colloquy that followed, he did not offer any reason why the "Volvo Vision," if carried out, would harm consumers.[97]

### 3. The Court's Concurrence With Breyer's Evaluation

The Court also rejected Reeder's dealer-elimination theory. In a footnote in Part IV of the opinion, the majority concurred with Justice Breyer that Volvo's strategy was procompetitive and stated that the Robinson-Patman Act would not prohibit it: "The dissent assails Volvo's decision to reduce the number of its dealers. But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to

---

95. Respondent Brief, *supra* note 69, at 10–11 (citations omitted).
96. Transcript of Oral Argument at 41, *Volvo*, 126 S. Ct. 860 (2005) (No. 04-905).
97. *See id.* at 41–44.

improve the efficiency of its operations."[98] Instead, the plaintiff would have to seek other remedies: "If Volvo did not honor its obligation to Reeder as its franchisee, '[a]ny remedy . . . lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act.'"[99] All the Justices in the majority concluded, in short, that Volvo's desire to shrink the size of its dealership network was beneficial for competition and consumers.

### *D. Overall Evaluation of Volvo's Behavior*

The Court's conclusion in Part IV of its opinion was almost certainly correct. It appears highly likely that Volvo's selective discounting improved consumer welfare and thus enhanced market-wide competition. Reeder's theory of consumer harm (exploitative price discrimination) was inadequately supported and inconsistent with its claim that interbrand competition was intense. In contrast, the theories of consumer benefit advanced by Volvo, the government, and Justice Breyer (interbrand price competition and distributional efficiency) were more fully developed and more likely to be true. In addition, as noted below, Reeder never showed that Volvo's discrimination was induced by powerful buyers.[100] As a result, while buyer-induced discrimination can harm consumers in several ways, there was no basis for concluding that any of these harms had occurred in *Volvo*.[101] The majority had good reason to want to protect Volvo's behavior.

## V. THE MEANING OF *VOLVO*

The larger question presented by *Volvo* is whether the Court not only rejected Reeder's claim, but also substantially cut back the scope of the Act. To analyze that question, it is helpful to focus initially on one aspect of the Court's opinion: buyer power. In both its legal analysis of Reeder's claims and its economic assessment of Volvo's conduct, the Court stressed Reeder's failure to show buyer power. As I explain in Section A, it is possible to derive most of the significance of *Volvo* by analyzing the Court's treatment of buyer power. In Section B, I consider other factors and offer an overall appraisal of the decision.

---

98. *Volvo*, 126 S. Ct. at 873 n.4 (citations omitted).
99. *Id.* (quoting U.S. Brief, *supra* note 82, at 28).
100. *See* discussion *infra* Part V.A.1.
101. *See* discussion *infra* Parts V.A.2 & V.A.3.

### *A. Buyer Power*

#### 1. Important to the Court

The Court repeatedly pointed out that Reeder had not shown that Volvo's discrimination was driven by powerful buyers. In explaining why this conduct was procompetitive, Justice Ginsburg twice cited the absence of buyer power, noting that "there is no evidence that any favored purchaser possesses market power"[102] and that "the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations."[103] Earlier in the opinion, she referred to powerful buyers two additional times, noting that the Act was directed at them yet they were missing from the case. By passing the Act, she observed, "Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers. . . ."[104] In rejecting most of Reeder's evidence of discrimination, she wrote: "Here, there is no discrete 'favored' dealer comparable to a chain store or a large independent department store. . . ."[105]

The Court's references to the absence of systematic discrimination also highlighted the absence of buyer power, since systematic discrimination is more likely when a few buyers have significant power. For instance, the Court observed that Reeder had not shown that it was systematically disfavored compared to other Volvo dealers: "Reeder did not present—or even look for—evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers."[106]

#### 2. Mixed Impact on Consumer Welfare

While the Court criticized Reeder for failing to show buyer power, such power is not inevitably harmful to consumers. Powerful buyers frequently improve consumer welfare when they wield their bargaining power to extract concessions from suppliers and then pass on those concessions to consumers. The Antitrust Section's Monograph on the Robinson-Patman Act states: "[P]rices may be made more fluid and the general price level in the market lowered if . . . major purchasers can use their countervailing power to force producers to grant price concessions."[107]

---

102. *Volvo*, 126 S. Ct. at 873.
103. *Id.*
104. *Id.* at 869.
105. *Id.* at 871.
106. *Id.* at 872 n.3. *See also id.* at 868, 871.
107. 1 ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW 29 (Paul H. LaRue et al., eds. 1980).

At other times, as the Court indicated, buyer power can reduce competition, and thereby harm suppliers, consumers, or both. Such reduction and resulting harm is clearest when a powerful buyer exercises monopsony power, thus exploiting upstream suppliers and, to the extent it restricts output, driving up prices to downstream consumers.[108] Consumer welfare may also be reduced when a powerful buyer exerts its bargaining power to obtain a discriminatory concession that is not cost justified. In comments to the Antitrust Modernization Commission, the American Antitrust Institute Working Group on the Robinson-Patman Act explained how this can occur. Initially, the Group identified three ways in which a persistent, non-cost-justified discrimination induced by a large buyer can harm consumers directly:

> *First,* it can allow the favored buyer to take business or profits from disfavored buyers, reducing their number or vigor and depriving consumers of the convenient locations, distinctive services, superior selection, or other attractive features they would have offered. If consumers who value those features lose more than other consumers gain from the lower prices (or other enhanced offerings) offered by the favored firm, non-cost-justified discrimination has reduced consumer welfare.
>
> *Second,* a lower price induced by a large buyer may lead to *higher* consumer prices if the large buyer uses its unjustified advantage to gain so much market share that it acquires market power as a seller. It can then raise prices to consumers, so long as its unjustified advantage or other circumstances create a barrier to entry and expansion. The same result can occur if several buyers exact unjustified concessions and use them to acquire shared market power. In short, secondary-line violations may produce higher prices if they increase concentration in product markets and enable the favored buyers to exercise market power, either individually or collectively.
>
> *Third,* buyer-induced non-cost-justified discrimination may result in higher prices to consumers when a powerful buyer induces sellers to discriminate not by *lowering* their prices to the favored buyer, but by *raising* them to other buyers. By forcing up its rivals' costs, the

108. *See* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 636 (2005) (monopsony power—the mirror image of monopoly power—means the power of a buyer to profitably depress the price of an input below the competitive level) [hereinafter "Kirkwood II"]. *See also id.* at 653, 663–64 (describing the effects of monopsony power on suppliers and consumers).

> favored buyer can, in the presence of entry barriers, acquire market power as a seller and raise its own prices.[109]

Then, the Group noted two ways in which unjustified buyer-induced discrimination may harm consumers indirectly:

> *Fourth,* buyer-induced discrimination may harm consumers by allowing the favored buyer to become less efficient. Because an unjustified concession confers a competitive advantage on the favored buyer, it can use that concession to shelter itself from competition, permitting it to survive when its costs are excessive. These inflated costs not only waste resources, but tend to make the favored firm less innovative and less responsive to changing consumer tastes.
>
> *Fifth,* unjustified discrimination induced by large buyers may harm consumer welfare by reducing the profitability of suppliers and causing them to curtail their investment in the industry. This is most likely to harm consumers if the suppliers were not making excess profits prior to the unjustified discrimination. In that case, future investment may be less than optimal and consumers may eventually pay higher prices or have fewer choices.[110]

Thus, in five scenarios, an unjustified discrimination induced by a powerful buyer may harm consumers and reduce competition.

### 3. Consumer Harm Not Required

In *Volvo*, the anticompetitive scenarios just described were not at issue because Reeder had not shown that any of the favored buyers had enough power to cause them. The Court did not recognize, however, that Volvo's discrimination could still have been anticompetitive since, as Reeder argued, even purely seller-driven price discrimination can harm consumers. When a seller discriminates among its customers by charging some higher prices than others, the losses to the consumers who pay higher prices may exceed the gains to the consumers who pay lower prices. The absence of buyer power, in short, was no guarantee that Volvo's discrimination was procompetitive.

The Court similarly did not ask whether the presence of powerful buyers could have *improved* consumer welfare. When powerful buyers force oligopolistic sellers to grant concessions that would not otherwise have extended and then pass these concessions on to consumers, con-

---

109. THE AMERICAN ANTITRUST INSTITUTE, THE ROBINSON-PATMAN ACT SHOULD BE REFORMED, NOT REPEALED, COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON THE ROBINSON-PATMAN ACT 13–14 (2005), *available at* http://www.antitrust institute.org/recent2/425.pdf.

110. *Id.* at 14.

sumers will be better off in the short run and are frequently better off in the long run as well.[111] In *Volvo*, where there was a significant risk of oligopoly pricing,[112] users of trucks may well have benefited had some dealers been large and powerful. The Court's failure to note this possibility—well-recognized in the antitrust literature[113]—may suggest that the majority was less interested in the economic consequences of buyer power than its legal role. Buyer power is significant legally because it is a component of the classic secondary-line violation, the type of violation that most concerned Congress.[114] By emphasizing buyer power, the Court may have wanted to signal that future secondary-line plaintiffs should not be allowed to succeed unless they show buyer power. As the next section indicates, however, this seems unlikely.

It is more probable that the Court did not explore the possible effects of buyer power on consumer welfare because the Court was not willing to create a consumer harm requirement. Justice Ginsburg did not say that future secondary-line plaintiffs must establish harm to consumers, nor did she criticize older cases that did not require such proof.[115] Had the Court intended to take such a radical step—eliminating the conflict between the Act and other antitrust laws—it would almost certainly have spelled out the proof requirements for future plaintiffs. Since the Court did not set forth standards for determining when buyer power hurts consumers and when it benefits them, the Court probably did not expect future plaintiffs to make such a distinction.

It seems more likely that the majority emphasized buyer power in order to highlight the difference between Reeder's case and the classic secondary-line case. Buyer-induced discrimination was the type of favoritism that most animated Congress, since harm to small business is most likely to occur—and most likely to be substantial and persistent—when the favored buyer is powerful. Stressing the absence of buyer power was a way for the Court to point out how far Reeder's case was from the secondary-line offenses of greatest concern to Congress and small business.

---

111. *See* Kirkwood II, *supra* note 108, at 645–47.

112. *See* discussion *supra* Part IV.B.

113. *See, e.g.*, Kirkwood II, *supra* note 108, at 646–47. *Cf.* Carlton & Perloff, *supra* note 79, at 675 ("One consequence of the Robinson-Patman Act is higher prices to consumers, who are deprived of the benefits of economies of scale in purchasing that the chain stores would otherwise be forced by competition (among themselves) to pass along to consumers.").

114. *See Volvo*, 126 S. Ct. at 869. Justice Ginsburg referred to this classic violation as the "chain-store paradigm," *id.* at 871, because Congress was responding "to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand." *Id.* at 869.

115. *See, e.g.*, Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990); Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

4. Buyer Power Not Required Either

Despite its stress on buyer power, the Court never declared that secondary-line injury can only be caused by a powerful buyer. While the majority made clear that it is unlikely to adopt an expansive construction of the Act if the plaintiff cannot show buyer power, it never stated that even when a plaintiff brings a traditional case—showing two sales, comparable products, competing resellers, diverted business, and so on—it cannot prevail unless it also demonstrates that the favored purchaser had buyer power. To the contrary, in reviewing the elements of competitive injury, Justice Ginsburg did not mention either consumer harm or buyer power.[116] Instead, she wrote that a "hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser."[117] She even endorsed the *Morton Salt* inference, which does not require proof of diverted sales or profits, much less consumer harm or buyer power.[118]

Similarly, in the Court's most recent secondary-line cases, *Texaco Inc. v. Hasbrouck*[119] and *Falls City Industries, Inc. v. Vanco Beverage, Inc.*,[120] the Court did not adopt either a consumer harm or a buyer power requirement. Indeed, in *Falls City*, the Court expressly rejected a buyer power test: "Although concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, [the text of the Act] is of general applicability and prohibits discriminations generally."[121] Finally, in *Volvo*, the Court did not criticize *Hasbrouck*, *Falls City*, *Morton Salt*, or any other decision that allowed a plaintiff to establish competitive injury without proving buyer power or consumer harm.

*B. Overall Appraisal*

While it seems clear that the Court did not adopt either a consumer harm or a buyer power requirement in *Volvo*, the majority opinion does contain language that could be read in isolation to suggest that future Robinson-Patman plaintiffs must establish an adverse effect on market-wide competition. The Court declared that "the Act proscribes 'price discrimination only to the extent that it threatens to injure competition,'"[122]

---

116. *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 869–70 (2006).

117. *Id.* at 870.

118. *See id.*

119. 496 U.S. 543 (1990).

120. 460 U.S. 428 (1983).

121. *Id.* at 436 (internal quotations and citation omitted).

122. *Volvo*, 126 S. Ct. at 870 (quoting Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 220 (1993)).

and it asserted that the "Act signals no large departure" from the "main concern" of antitrust law, namely interbrand competition.[123] It also added an entire section to its opinion in order to emphasize that Volvo's discrimination was procompetitive and that it would "resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*."[124]

As a whole, however, *Volvo* does not appear to reconcile the Act with other antitrust laws by requiring secondary-line plaintiffs to show harm to market-wide competition and consumer welfare. As explained above, the first two statements are tempered by their context in the opinion, and all the Court's references to market-wide competition are tempered by Parts II and III, which set forth the standards for showing competitive injury in a secondary-line case and apply them to Reeder without mentioning either a buyer power or a consumer-harm requirement. It appears, therefore, that the function of Part IV is more limited: it indicates, as the Court has indicated before, that ambiguities in the Act should be resolved in ways that promote competition. [125]

## VI. CONCLUSION

It is difficult to read *Volvo* as a radical shift in Robinson-Patman Act law, imposing a requirement that all secondary-line plaintiffs must show buyer power and a significant threat to consumer welfare. Had the Court intended to make such a major change in traditional law, one would have expected it to be clear. Written by the careful Justice Ginsburg, the majority opinion seems to convey a more modest message, a message the Court has communicated before—that issues of Robinson-Patman Act interpretation must be resolved in light of the competition policies and consumer orientation of other antitrust laws. While *Volvo* adds considerable weight to that message, the Court does not appear willing to disregard the fundamental features of the Act Congress passed in 1936.[126]

---

123. *Id.* at 872.

124. *Id.*

125. *See id.* at 873 (citing Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209 (1993); Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953)).

126. See Foreman and Skitol, *supra* note 5, at 5, who argue that

> [t]he Court's sharp distinction between competitive bidding/special order situations and 'the chain-store paradigm,' under which competing dealers resell goods from inventory, suggest the opinion offers no comfort for discriminatory pricing in the latter garden-variety circumstances under which most [Robinson-Patman] cases have arisen over the course of the past 70 years and will continue to arise in many industries over the years ahead.

In contrast, Richard Steuer suggests at one point that *Volvo* held that secondary-line plaintiffs must prove both buyer power and harm to market-wide competition: "The majority . . . did hold that unless the favored purchaser possesses market power, the discrimination is substantial, and the effect on interbrand competition is substantial, the requisite injury to competition is not established . . . ." Steuer, *supra* note 8, at 64. In fact, the holding of the case is more limited. *See supra* Part II. *See also* Foreman and Skitol, *supra* note 5, at 1 ("the holding is narrow," applying to "'competitive bidding' and 'special order' situations, as opposed to far more common situations of dealers reselling standardized goods from their own inventories"). Later, Steuer offers a more measured interpretation: "*Volvo* teaches that the Robinson-Patman Act has come another step closer to being harmonized with the rest of the antitrust laws." Steuer, *supra* note 8, at 67.