

ABA SECTION OF ANTITRUST LAW

**THE ANTITRUST MODERNIZATION COMMISSION AT
MID-COURSE**

***Is There Common Ground On Whether and How The
Antitrust Laws Should be "Modernized"?***

A Special Public-Service Symposium Offered By The ABA Section of Antitrust Law

JUNE 8-9, 2006

**GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, DC**

**CHAIR:
ROBERT T. JOSEPH**

**TRANSCRIPT OF SYMPOSIUM
PROCEEDINGS**

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PROGRAM AGENDA

Thursday, June 8, 2006

8:30 – 8:45 a.m.

WELCOME [PAGE 7]

Donald C. Klawiter, Morgan, Lewis & Bockius LLP, Washington, DC
Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

8:45 – 9:30 a.m.

THE ANTITRUST MODERNIZATION COMMISSION AT MID-COURSE [PAGE 10]

Speaker: Stephen Calkins, Wayne State University Law School, Detroit, MI

9:30 – 11:00 a.m.

CIVIL REMEDIES [PAGE 21]

- What should be the remedies in private antitrust proceedings?
- Should the private treble damages remedy be modified?
- Should the substantive law and procedures applicable to indirect purchaser litigation arising out of competition-related offenses be modified to reduce the complexity and inefficiency now present?

Moderator:

Richard J. Wallis, Microsoft Corporation, Redmond, WA

Panelists:

Kenneth L. Adams, Dickstein Shapiro Morin & Oshinsky LLP, Washington DC
Eleanor M. Fox, New York University School of Law, New York, NY
Abbott B. Lipsky, Latham & Watkins LLP, Washington DC
Richard M. Steuer, Mayer Brown Rowe & Maw LLP, New York, NY

11:00 – 11:15 a.m.

BREAK

11:15 a.m. – 12:45 p.m.

ROBINSON-PATMAN ACT [PAGE 47]

- Should the Robinson-Patman Act be repealed in whole or in part, or otherwise be modified?
- Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?

Moderator:

Harvey I. Saferstein, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Santa Barbara, CA

Panelists:

Barbara O. Bruckmann, Howrey LLP, Washington DC
John Kirkwood, Seattle University School of Law, Seattle, WA
Bruce V. Spiva, Tycko Zavareei & Spiva LLP, Washington DC

12:45 – 1:15 p.m.

LUNCHEON

1:15 – 2:00 p.m.

LUNCHEON PRESENTATION [PAGE 75]

J. Thomas Rosch, Commissioner, Federal Trade Commission, Washington, DC

2:00 – 3:30 p.m.

MERGER ENFORCEMENT – SUBSTANTIVE ISSUES [PAGE 84]

- Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions?
- Has current U.S. merger enforcement policy – including as expressed in the Horizontal Merger Guidelines – been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?

Moderator:

Ronan P. Harty, Davis Polk & Wardwell, New York, NY

Panelists:

Albert A. Foer, American Antitrust Institute, Washington DC
Lee Greenfield, WilmerHale, Washington DC
Janet L. McDavid, Hogan & Hartson LLP, Washington DC
Carl Shapiro, Haas School of Business, University of California at Berkeley, Berkeley, CA

3:30 – 3:45 p.m.

BREAK

3:45 – 5:15 p.m.

MERGER ENFORCEMENT – FEDERAL INSTITUTIONAL AND PROCESS ISSUES [PAGE 110]

- Should merger enforcement at the federal level continue to be administered by two separate agencies?
- If so, should merger review responsibility be divided by industry between DOJ and FTC?
- Differences in treatment (e.g., injunction procedures) arising out of which agency reviews a merger
- Hart-Scott-Rodino Act merger review process

- Should the HSR process be revised to address issues relating to
 - (a) the number and type of transactions requiring pre-merger notification
 - (b) the length of investigations
 - (c) the burden imposed by “Second Requests” and civil investigative demands, and
 - (d) transparency of the decisional process?

Moderator:

Phillip A. Proger, Jones Day, Washington DC

Panelists:

John D. Graubert, Deputy General Counsel, Federal Trade Commission, Washington DC

J. Robert Kramer, Director of Operations, U.S. Department of Justice, Antitrust Division, Washington, DC

Debra J. Pearlstein, Weil Gotshal & Manges LLP, New York, NY

Mark D. Whitener, General Electric Company, Washington DC

Friday, June 9, 2006

8:30 – 8:45 a.m.

INTRODUCTORY REMARKS

Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

8:45 – 10:15 a.m.

ENFORCEMENT ROLE OF THE STATES [PAGE 140]

- What role should state attorneys general play in nonmerger civil enforcement?
- Should state and federal enforcers divide responsibility for nonmerger civil antitrust enforcement based on whether the primary focus of alleged harm is intrastate, interstate, or global?
- What role should state attorneys general play in merger enforcement?

Moderator:

Kevin E. Grady, Alston & Bird LLP, Atlanta, GA

Panelists:

Terry Calvani, Freshfields Bruckhaus Deringer, Washington DC

Patricia A. Conners, Office of the Attorney General, State of Florida, Tallahassee, FL

Michael L. Denger, Gibson Dunn & Crutcher LLP, Washington DC

Robert L. Hubbard, Chair, Multistate Antitrust Task Force, Director of Litigation, Antitrust Bureau of the New York Attorney General’s Office, New York, NY

10:15 – 10:30 a.m.

BREAK

10:45 a.m. – 12:15 p.m.

EXCLUSIONARY CONDUCT [PAGE 167]

- Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under Section 2 of the Sherman Act be revisited?
- Refusals to deal
- Product bundling and bundled pricing
- Denial of an essential facility

Moderator:

Roxane C. Busey, Baker & McKenzie, Chicago, IL

Panelists:

Kenneth L. Glazer, Deputy Director, Bureau of Competition, Federal Trade Commission, Washington, DC

A. Douglas Melamed, WilmerHale, Washington DC

Steven A. Salop, Georgetown University Law Center, Washington DC

Daniel M. Wall, Latham & Watkins LLP, San Francisco, CA

12:00 –1:00 p.m.

LUNCH BREAK

1:00 – 2:15 p.m.

EXEMPTIONS AND IMMUNITIES [PAGE 195]

- Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?

Moderator:

Theodore Voorhees, Covington & Burling, Washington DC

Panelists:

Peter C. Carstensen, University of Wisconsin Law School, Madison, WI

Margaret E. Guerin-Calvert, Competition Policy Associates, Inc., Washington DC

Stephen F. Ross, University of Illinois College of Law, Champaign, IL

2:15 –2:30 p.m.

BREAK

2:30 – 4:00 p.m.

BRINGING IT ALL TOGETHER: ARE THERE POINTS OF CONSENSUS ON WHICH THE AMC CAN BUILD A MEANINGFUL REPORT? [PAGE 217]

Moderator:

Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

Panelists:

Eleanor M. Fox, New York University School of Law, New York, NY

Timothy J. Muris, O'Melveny & Myers LLP, Washington, DC

Robert Pitofsky, Georgetown University Law Center, Washington, DC

Joe Sims, Jones Day, Washington, DC

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Robinson-Patman Act

Moderator

Harvey I. Saferstein

Mintz Levin Cohn Ferris Glovsky and Popeo, PC
Santa Monica CA

Panelists

Barbara O. Bruckmann
Howrey LLP
Washington, DC

Bruce V. Spiva
Tycko Zavareel & Spiva LLP
Washington, DC

John Kirkwood
Seattle University Law School
Seattle, WA

Robert T. Joseph

The Robinson-Patman Act, as you heard from Steve this morning, as far back as the 1955 Attorney-General's Report and up to the current day, continues to engender a significant amount of controversy, debate, criticism, and praise.

This panel is headed by Harvey Saferstein, who is a member of the Los Angeles office of Mintz Levin Cohn Ferris Glovsky and Popeo PC. Harvey has an extensive antitrust practice, which has involved distribution and Robinson-Patman issues. He has lectured widely on the Robinson-Patman Act and was actively involved in the Section of Antitrust Law's working group that prepared the Section's report to the Commission.

Barbara Bruckmann is a partner at the Howrey firm here in Washington. Barbara antitrust practice includes substantial counseling and litigation involving distribution and Robinson-Patman Act questions. Barbara served for a number of years as an officer in the Section of Antitrust Law, was chair of the Robinson-Patman Act Committee, and was also involved in the Section's recent working group.

Bruce Spiva is a partner in the firm of Tycko Zavareei & Spiva here in Washington. Bruce's practice involves antitrust litigation and counseling. His litigation experience has includes

representation of the American Booksellers Association in massive and significant Robinson-Patman Act litigation. Bruce, indeed, as well as Harvey, testified before the Commission.

Jack Kirkwood is a professor at the Seattle University School of Law in Seattle. Jack formerly had a stint at the Federal Trade Commission in Washington, D.C. Jack played a major role in drafting the comments of the American Antitrust Institute to the Commission. Those comments very thoughtfully looked at a number of the Robinson-Patman Act issues.

I am going to turn it over to Harvey, and let's get on with it.

Harvey I. Saferstein

Thank you, Bob. You have done a great job on this whole conference, as well as when we were going through the ABA's comments to the AMC regarding the Robinson-Patman Act.. Roxane Busey and Bob were instrumental in putting together the ABA's comments to the Antitrust Modernization Commission, along with Alicia Downey, who heads up the Robinson-Patman Committee of the ABA. Those are extraordinarily good comments.

I am sure this is the highlight of your two days, the Robinson-Patman Act. This is where the rubber hits the road. This is one of the only places where the AMC is taking a real position, voting 9 to 2 to repeal the Robinson-Patman Act — tentatively. This is all tentative.

It's a fascinating Act. It was passed in the 1930s. It's now seventy years old. As many of you know, when it was passed, it was passed in a very different world that we lived in, economically. Senator Huey Long, who was one of the sponsors of the Robinson-Patman Act, was quoted as saying he would rather have thieves and gangsters in Louisiana than chain stores. That was the atmosphere in which it was passed. I suppose he probably wouldn't say that today.

Professor Bork has said of the Robinson-Patman Act that every literature has its pornography, and in the antitrust literature, it's the Robinson-Patman Act. [Laughter]

Professor Stigler has said that if you put all the economists who favor the Robinson-Patman Act in a Volkswagen Beetle, you would still have room for a portly chauffeur.

So that's where we come from. This is this beloved act that many of us follow through thick and thin. As you can see, the AMC gave it due regard in its vote the other day. But as John Shenefield pointed out, it's only tentative, and you can't tell what's going to happen.

Today we are going to go through the AMC consideration of the Act. Let me briefly try to take you through what the Commission has done. Then we are going to have a lively discussion among three people who have different views on it. We would like to take your views on it as we go along. As we go along, any of you are welcome to speak up with your views. We have roving microphones in the audience. We will take your views and questions as we go through. You don't have to wait until the end. We will have time at the end, but you don't have to wait. We will see where we are mid-course on the Robinson-Patman Act.

On May 4, the Commission issued seventeen study questions for the Robinson-Patman Act, much like the one that Steve Calkins described earlier. It set out major questions, and then minor questions were set out. There are seventeen of them. One of the major questions was,

should the Act be repealed? That was number 1. The rest of them were “if not” — should this happen, should that happen? Fifteen out of those sixteen remaining questions were all questions on how to rein in the Robinson-Patman Act — that is, whether the Act should have market-power screens, whether to broaden the cost-justification defense, or whether to broaden the meeting-competition defense.

There was only one question that went to whether to expand the Act — that is, whether to expand the Act to cover services. Otherwise, the Commission’s questions focused on whether we should repeal the Act; if not, what we should do to make it more “modern”, for lack of a better word.

On July 28, the Commission held its hearings on the Robinson-Patman Act across the street in the Federal Trade Commission building. The presenters were Jay Campbell, who represented the National Grocers Association; Professor Herbert Hovenkamp from the University of Iowa; Bruce Spiva, who is here today, representing the American Booksellers Association; and I testified, coming all the way from sunny Los Angeles to give my views.

What did the panelists say? Jay Campbell opposed any attempts to weaken or repeal the Robinson-Patman Act and made a passionate speech in favor of the Robinson-Patman Act as promoting efficiency and lowering prices. He believes that the Act helps create diversity in retailing. That, in turn, creates lower prices, greater efficiency and greater good for consumers.

Professor Hovenkamp has written extensively on the Robinson-Patman Act and was quite negative about it, saying it was costly in terms of its effects on the market and that it was costly to comply with. He recommended that it be repealed and recommended that anything that was really, truly anticompetitive with regard to discriminatory pricing could be attacked under the Sherman Act, and we should leave it to the Sherman Act.

Bruce Spiva said the loss of the Robinson-Patman Act would — I said it would be a disaster. He corrected me. It wouldn’t be a disaster; it would be harmful to the independent retailers. It has been helpful, to some extent — but not, maybe, extensively — to the continued survival of small, independent booksellers, and there has been a precipitous decline in independent booksellers, the American Booksellers Association believes, as a result, to some extent, of the rise of chain stores and their pricing practices.

I testified that I worry about state laws and, if we repealed the Robinson-Patman Act, what would happen to state laws. If Congress couldn’t or wouldn’t come up with a strong repealer, what would happen with state laws and enforcement in the various fifty states, and whether we might have a worse situation, rather than a better situation? Somewhat along the lines of Commissioner Shenefield’s dissent from the 9-to-2 vote, I suggested that we still really don’t know, after seventy years, how the Robinson-Patman Act really works, both in terms of its burden on business and its effect on stifling prices, which are the main arguments against the Act. Nor do we know how, if at all, it helps small, independent retailers survive — whether it really is helping them or whether the whole mechanics of things are very different now with the Internet. So I made a pitch for greater study and greater resources.

There were also written submissions to the AMC. The American Antitrust Institute submitted a lengthy submission. It was authored primarily by Professor Kirkwood, who is here today. The AAI position was that the Robinson-Patman Act should not be repealed, but reformed. Plaintiffs

in secondary-line cases should be required to prove either that the discriminating seller had market power or that the favored buyer had buyer power.

I think you will explain that more today, won't you Jack? You are not talking about true monopoly power. It's market, not monopoly, power.

Defendants should be allowed to establish cost justification, that prices were reasonably related to cost savings. Sections 2(d) and 2(e) should require showing of competitive injury.

The ABA Antitrust Section, our Section, with the help of Bob, Roxane, and Alicia Downey, and others — Barbara, you were also on that writing committee — stood by its 1987 recommendation that Section 2(c) (that's the brokerage Section) and Section 3 (that's the criminal Section, which no one has ever used or enforced) should be repealed, and that Sections 2(d) and 2(e), which currently do not require competitive injury — they are per se illegal. In other words, if you have discriminatory promotional allowances and services, that is per se illegal. You do not have to show competitive injury. The ABA recommended that those two Sections be changed to require a showing of competitive injury — that they be taken out of a per se classification.

So those were the 1987 recommendations, and we continued to recommend the same thing.

In addition, the ABA comments went on to propound a variety of reforms that could be adopted by the courts and/or the Federal Trade Commission to ameliorate certain portions of the Act, drawing heavily from Irv Scher's work, which is also available — it's not on the AMC website, but it's easy to get it. Just write Irv or write anybody, and you can get it. Irv has been spreading this paper widely, recommending that the Federal Trade Commission take the lead in promulgating cases, rules, whatever, to try to change the Act, especially portions of the Act that really do need modernizing, in Irv's point of view. It's a lengthy paper, and it's quite good.

The Business Roundtable submitted a submission saying the Act should be repealed and it is not consistent with modern antitrust policy.

The United States Chamber of Commerce submitted a submission that does not recommend repeal, except for the criminal provision, Section 3, and favors expansion of the meeting-competition defense and other defenses, and favors requiring proof of competitive injuries for 2(d) and (e), as well as a more market-oriented test for Section 2(a), competitive injury.

What did the AMC Commissioners ask about at the hearing? I have to tell you, as Bruce and I both testified, they certainly hid any intent at the time to repeal the Act. The questions were neutral and fair and quite probing at the actual hearing. It was a long, involved hearing. We all got a chance to testify.

The main focus of the hearings that were held — again, there is the actual testimony — is, should the Act be repealed? Hovenkamp said, yes, it should be repealed. It would reduce cost and increase competition. Campbell and Spiva said no.

I did not favor repeal, but I didn't imagine that repeal would be earth shattering. I don't think life would change that greatly.

Number 2, the AMC hearing spent a fair amount of time on the question: Should full-blown competitive injury be required in secondary-line cases? For the people with the glazed eyes out there, I guess I have to give you a two-second primer.

In Section 2(a) of the Robinson-Patman Act, you have to show discrimination and all the details of price discrimination case. Then you have to show competitive injury. But so far, the courts have come up with something that is not quite what we think of as competitive injury in the Sherman Act rule of reason sense. You don't necessarily bring economists in. You don't necessarily define a relevant market and show that there is injury to competition in that defined market. There are some shortcuts. One of them is called the *Morton Salt* presumption — whether that can be rebutted. There is too much to get into.

But in any event, there is this huge division of thought about whether you should require full-blown market-definition, economists-coming-in competitive injury in Section 2(a) price discrimination cases.

One more background fact. Section 2(a), with regard to primary line — that is sellers suing each other — is sort of dead already. People don't bring these cases after the Supreme Court's Brooke Group decision setting out how to prove predatory pricing.. So primary-line cases have sort of come to a screeching halt. So the most enforcement we have is in buyer cases-- buyers suing sellers for discriminatory pricing. There they have the shortcut to showing competitive injury.

So the argument really was, what happens if you require full-blown competitive injury? I said I thought that would be the end of buyer cases, just like it has been the end of primary-line seller cases. Bruce and Jay Campbell said they don't want it because they don't want to take the chance. Professor Hovenkamp, I thought, agreed with me, but then said, "No. We haven't tried it yet, so we don't know. But maybe it wouldn't mean the end of Section 2(a) buyer cases." So he favored putting in a true competitive-injury requirement to Section 2(a).

How about market-power screens? That is the third thing that we spent some time on at the AMC hearing. That was really Professor Kirkwood's requirement. That is, if you are not going to show a competitive injury, shouldn't you at least show that the buyer who is asking for the discriminatory price had market power or that the seller had market power ? Hovenkamp thought any reform was a good idea. Spiva and Campbell, again, thought this kind of narrowing of the Robinson-Patman Act was not a good idea.

Costs of compliance: Here is where the Commission hit a stumbling block, both informally and at the hearings. The Commission was struggling to get a handle on what the compliance costs are: How much are you spending on lawyers? What do the lawyers do? How is it really impacting people's distribution system? We hear all these horror stories. And both sides use it. In other words, the pro-Robinson-Patman people use the argument that it's helping the small, independent sellers survive, so don't repeal it. The anti-Robinson-Patman people say it is an incredible compliance problem--we have piles and piles of meeting-competitive forms, they're driving us crazy, and we could do better things with our money.

But in point of fact, none of the people at the table could do much other than continue to offer anecdotal evidence. There is really no hard evidence either way. Bruce has figures on the decline in the number of booksellers. They have gone down.

One of the seventeen questions was, should the Act be extended to services? I don't think anybody had any great love for expanding the Robinson-Patman Act to services, although Jay Campbell thought it might be a good idea with regard to things that help small retailers, like credit card services.

Has the RP Act had any effect on the rise of grocery and bookstore chains and the loss of the small, independent bookseller? We saw at the hearings, as well as later during the AMC deliberations, people trying to figure out this more global public policy question: Why do we have all these giant bookstores and Home Improvement stores, and fewer small sellers? Is something else going on in the economy? Does the Robinson-Patman Act have anything to do with it? If so, why? People, I think, are sort of doing a lot of guessing about that.

State laws: We talked about the worry of what would happen with state laws, if you couldn't fully preempt state laws when you repealed the Robinson-Patman Act.

Repeal Section 3: I think everybody agreed that it has outlived its usefulness.

Broaden the cost-justification defense: This is something that a lot of people think is really important. Spiva said no. I thought yes. I think it really is one that has to be expanded.

Was there any consensus? No, except on repealing Section 3. I think there was pretty good consensus on that. There may also have been some consensus about adding competitive injury to Sections 2(d) and (e) and making it similar to Section 2(a).

On January 17, between the hearings and the next AMC meeting, we had the Supreme Court decision, *Reeder-Simco v. Volvo*. I don't want to go into detail. We are going to discuss it later. But it has clearly impacted people's thinking, either positively or negatively, about repeal, modification, and the question of whether the Supreme Court and the courts are capable of reining in the Robinson-Patman Act.

On May 19, the AMC staff issued its report. As Steve Calkins said, those are great pieces, and you really should look at them. They go through all seventeen issues. They give the pros and the cons. They go through the record and give the support from both the people who testified and from the submissions. They are wonderful pieces and wonderful source material for anybody who wants to understand this.

On May 23, the Commission met, and nine members, again, tentatively, voted for repeal and two voted to modify the Act. One was missing. I don't know how that person would vote on this. Again, these are tentative votes.

In terms of the various issues, a lot of them were not answered. Nine Commissioners voting for repeal — I have given the names up there on the screen — found that the Robinson-Patman Act does not serve any purpose not already served by Sections 1 and 2 of the Sherman Act, and that the Robinson-Patman Act imposes significant costs on U.S. businesses and consumers that outweigh its benefits to consumers and competition.

The two dissenting Commissioners, Yarowsky and Shenefield, recommended a lot of changes in the law, repeal of Section 3, adding competitive injury to Sections 2(d) and (e), repeal of Section

2(c), and expanding cost justification. Commissioner Shenefield noted that he thinks we need more information to understand the issues.

During debate, there was much discussion of the likelihood that Congress could or would repeal. That has sort of been an overarching problem. Some people think that the AMC doesn't have jurisdiction to decide whether Congress is competent, itself, to modify or repeal the Robinson-Patman Act. Other people are deeply worried, even if they oppose the Robinson-Patman Act, about the ability of Congress to craft even a simple repeal, much less a repeal plus a preemption of state laws that would make it fully effective. There you are talking about states' rights, and you might get into some very, very nasty political situations.

So that's where we are today. Today our wonderful panel is going to discuss the issues. We are going to start off with a straw vote on how we would do it here. If the AMC can take a straw vote, we can take straw votes. So we are going to take a straw vote so you can see where people are coming from, so you will know where they are likely to end up.

Professor, I will let you go first.

Professor John Kirkwood

I would vote for substantial reform, but not repeal.

Mr. Saferstein

Bruce Spiva.

Bruce V. Spiva

I would vote against repeal and reform, but I mean strengthening the Act.

Mr. Saferstein

This is an honest man here.

Barbara O. Bruckmann

I would vote for repeal.

Mr. Saferstein

As I have already testified, I would vote for modification, not repeal, for the reasons I have stated before.

So now you know where the straws are in this panel. As I said, we are going to discuss a bunch of issues that go to the heart of what is happening at the AMC and in the Robinson-Patman Act. We will end up with the repeal issue at the end. As I say, anybody who wants to chime in, we have two roving mikes. If you want to ask questions as we go along, feel free.

Barbara, what do you think *Reeder-Simco* does? Has the Supreme Court killed the Act or given it new life, or somewhere in the middle?

Ms. Bruckmann

Good morning to all the diehard RP folks in the audience. We are delighted that you have come back to this program this morning to listen to us debate these issues.

I would like to answer the questions on Harvey's slides directly and then explain to you my reasons. Given the sophistication of this audience — I know a lot of you — I am going to assume general familiarity with the opinion.

In my view, the Supreme Court has not killed the Act. I think Part IV of the opinion, in which the Court said Robinson-Patman Act did not represent a large departure from antitrust norms, could be construed as a signal that Congress should not scrap the Act. But in my view, the opinion does not provide a clear analytic framework that will necessarily result in the Court's reining in the Act.

A close reading of *Volvo*, in my view, bears this out. You will recall that this involved allegations of discrimination in bid support — the Court started out with the legislative intent and recited, as we all know, that the purpose of the Act is “to target the perceived harm to competition occasioned by powerful buyers” and that Congress was responding to “the advent of large chain stores, enterprises with the clout” to demand lower prices.

Then the Court followed that with a caution that it would be “mindful of the purposes of the Act and of the antitrust laws generally.” Then, citing *Brooke Group*, it said the “act proscribes price discrimination only to the extent that it injures competition,” so far, consistent with broader antitrust concerns. But then the Court lurches back into an intrabrand world and basically stays there through the disposition of the issue. It says “secondary-line cases,” which was the matter before the Court, “involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships.)” It recites mainstream RP principle, gives no indication that it was going to undermine or overrule it, and said “a hallmark of the requisite competitive injury ... is the diversion of sales or profits from a disfavored purchaser to a favored purchaser,” singular.

It recognized the *Morton Salt* inference and then, examining the evidence of discrimination, said “selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act.”

What a lovely opening. What did the Court say? Well, first, most of the comparisons involve situations in which Reeder did not compete against a favored dealer — singular — for the same dollar. As to the instances where there was head-to-head competition, or could be construed to be head-to-head competition, the Court said Reeder did not prove it was disfavored. Even if it were disfavored, the Court said that \$30,000 in lost profits was not of such magnitude as to affect substantially competition between Reeder and the favored Volvo dealer. It faulted Reeder, not for not looking at the interbrand world, but faulted Reeder for not providing a systematic study to show that, on average, it was consistently disfavored as against other Volvo dealers.

That is the end of the disposition of the issue. The Court never strayed from an intrabrand world.

Then we come to Part IV, which has all of us excited.

Mr. Spiva

Not me. [Laughter]

Ms. Bruckmann

As you will tell, Bruce and I disagree on most everything about the Robinson-Patman issue.

The Court said four things. Number one, interbrand competition is the primary concern of antitrust law. Then it said, with a straight face, the Robinson-Patman Act signals no large departure from that main concern. It says “we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition,” but added no footnote suggesting it would overrule four major circuit court of appeals decisions holding contrary to that, and then purports to limit the reach of the Act by declining to apply RP to cases like Reeder, in which there was no evidence that any favored purchaser possessed market power, the favored purchasers did not resemble large, independent department stores or chain operations, and that “the supplier’s selective price discounting fosters competition among suppliers of different brands.”

What a lovely footprint. But that is not the standard the Court applied to the facts, which it could have done. Instead, the outcome rested on, one, the failure to prove competition against another dealer, without mention of whether that dealer had market power — it certainly didn’t resemble a department store — and the substantiality of harm to intrabrand competition, without mention of whether the effects in an interbrand market would render the substantiality inquiry moot.

So what does this say? The views of the impact of this decision have ranged from, “It’s no big deal. It simply raises the threshold for substantiality,” to, “It fundamentally guts Robinson-Patman, and from now on you will not have a 2(a) violation where you do not also have a Sherman Act violation.”

The response of the courts to *Volvo* is not encouraging if the aim is to bring RP within the ambit of the antitrust laws. An early application of *Volvo* is *Wiegand Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, Eastern District of Pennsylvania, at the end of March. The issue of *Volvo* was before the court. The court began by saying — familiar land here — competitive injury can be shown by proof of lost sales or profits or proof of substantial price discrimination over time, and then it addressed *Volvo* by simply distinguishing the facts and said, here, we have head-to-head competition, and no selective comparisons. It did not examine market power. It did not look at whether these selected discounts could foster interbrand competition.

Even more remarkable, a month ago, out of the Middle District of Pennsylvania, we have *Feesers, Inc. v. Michael Foods, Inc.*, involving allegations of discrimination in the food service business. Competitive injury was the issue, and *Volvo* was not even cited. The court followed the very narrow holding of the Third Circuit.

So what does *Volvo* mean? If you look at the history in the courts since it was decided, it may be a lot of to-do about nothing. But if we are moving to a standard that, under *Volvo*, requires harm to interbrand competition, I think that *Wiegand* and *Michael Foods* suggest that we have a long way to go.

Mr. Saferstein

Bruce, what do you think?

Mr. Spiva

I know this is not what you want, Harvey, but I have to say that, her editorial comments about Section IV apart, I tend to agree with most of what Barbara said. I think that the *Volvo* decision was very fact-bound. It was almost as if Justice Ginsburg, in her usually careful way, was reweighing the facts. I think that was the beef that Justice Stevens and Justice Thomas had in dissent — “hey, it’s not our job to reweigh the facts here. The allegations here are within the text of the Act, and it was up to the jury to decide whether or not they were competing,” et cetera.

But Justice Ginsburg was very careful not to go as far as saying that you could never apply the Act in a competitive bidding situation like this. She basically just said, “Look, they weren’t in competition. They didn’t show competition here.”

Section IV I read as saying no more than, “If there is a gray area here, and where there are gray areas, we are going to come down in a way that we view as more consistent with the other antitrust laws.” Again, I think Justice Stevens was saying, “Look, there’s a text here.” Actually, this is similar to what Justice Scalia said in his concurrence in *Hasbrouck* sixteen years ago: “You may not like it” — Stevens even said, “I don’t like it” — “but there’s a text, and that’s what we should apply. These economic arguments are to be addressed to Congress.”

Mr. Saferstein

How about the professor? What do you think about *Volvo*?

Professor Kirkwood

Barb and Bruce have done a nice job summarizing the opinion for you. They have picked out what I think are the two key parts of it: One, in *Volvo*, the Supreme Court did not jettison any of the basic protectionist features of the Act. They didn’t even criticize them. On the other hand, in Part IV, they both expressed a desire to promote overall competition and said, where there is an issue of interpretation, they would resist any interpretation that didn’t further overall pro-competitive goals. So they created an opening, and we will see how broad it is.

Mr. Saferstein

Yes, Bob?

Mr. Joseph

I tend to agree with the interpretations, but for the AMC isn’t *Volvo* a possible message? The Court is resisting expansive interpretations. In, “close cases” the Court is going to rein in the Act. Perhaps, in interpreting *Morton Salt* going forward, one way of rebutting the *Morton Salt* inference would be to bring in the Part IV factors, even if they weren’t part of the holding,

because, at the end of the day, there is a Part IV. The Court didn't have to be put Part IV in the opinion, but it is stuck in there.

Volvo might have this relevance to proposals for repealing the Act. Someone opposing repeal might say, "Why would we want to put the question of repeal before the same Congress that gives us something like the Price Gouging Act of 2006? Presented with a recommendation to repeal the Act, Congress could, (a) not repeal it; (b) but be upset with a recommendation to repeal; (c) with an extensive legislative debate or controversy engendered; and (d) the debate leading to some amendment of the act, which amendment would only be more problematic than what we now have. Rather than a legislative approach, why not just ride it out with *Volvo* and cases like *Volvo*, which incrementally restrict the Act's application, putting up with the inefficiencies of a case-by-case approach?"

Mr. Saferstein

Those are good thoughts, Bob. One thing is, it did reverse the verdict for the plaintiff. The plaintiff had received a very large treble-damage award at the trial level and was affirmed by the Eighth Circuit. So the plaintiff went back with zero.

There are a number of practitioners out there who read *Volvo* as much more pro-defense than I think you might have gotten from some of us, who think it is going at least partway toward overruling a *Morton Salt* presumption and taking the D.C. Circuit versus the Ninth Circuit views of how you show competitive injury.

As I said, we have to look at the cases and how they do it. Right now the two returns show that is not occurring.

Ms. Bruckmann

I have three observations.

One, with respect to the message for the AMC, I think that, given the short-term effects of *Volvo* in the courts, you are looking at a long haul here to get Robinson-Patman readjusted, if you will.

Secondly, I do think that this is a defense-oriented decision, because there is no defendant, from the day that *Volvo* was decided, that is not going to raise all of the issues in Part IV. But they will bear the burden on that. They will be coming in as rebuttal evidence instead of having the burden on the plaintiff. I think if you go back and read *Boise Cascade* in 1988, you will be struck by how closely it resonates with where *Volvo* might get us. It's not going to get us all the way there, and it is going to be a long time.

So the question is, how much patience does the AMC have? Are you willing to just sit and let this rock along? It may take a decade before Robinson-Patman is adjusted.

Finally, with respect to whether or not recommending appeal is going to be an unpopular move or whether Congress could or could not handle that effectively, maybe there is room for a backup position — in other words, "If, Congress, this is unpalatable to you because of the political ramifications in your district, we are talking about antitrust policy and we should have a backup position."

But I think the message to the AMC is *Volvo* is not a fix. So the issues are alive and they are there.

Mr. Saferstein

Bruce or Professor?

Mr. Spiva

I don't think there is any indication — as Barbara said, Justice Ginsburg nodded to the *Morton Salt* inference. She didn't give any indication that they were signaling that they were going to draw back from that. So I don't see anything in *Volvo* that suggests that the Court is going to try to repeal the Act, because I think the *Morton Salt* inference is grounded in the text of the Act. I think you would see some surprising bedfellows if you had a case that squarely presented that question. As I said, Scalia's concurrence in the *Hasbrouck* case takes the same view of that, and we have Thomas and Stevens on record.

So there is nothing in the *Volvo* opinion that I see that signals that that is where they were going. All I read IV — which is really dicta — to say is that where there are close factual cases or unique factual situations, we are going to read it on one side of the line rather than the other.

Mr. Saferstein

Professor? The RP Act has produced more Supreme Court decisions than any other antitrust law in recent years, that's for sure.

Professor Kirkwood

If you believe that repeal is desirable, that we can't tolerate further inefficiency from the Robinson-Patman Act, you are not going to get that solution very quickly by following the incremental change that *Volvo* calls for. Whether repeal is wise I will address in a minute, in response to Harvey's next question.

Mr. Saferstein

Okay. Any questions? Professor Ross? We have professor on professor here.

Professor Stephen F. Ross

There is some famous Oliver Wendell Holmes saying about "law is what the courts say it is." Here, I have a bias. I was Justice Ginsburg's first clerk. But I think trying to figure out what she meant is far less relevant than what the lower courts are going to do with it. There is certainly enough language in that opinion, and I think, in general, lower courts are not likely, necessarily, to go for the parsing of her psychobiography to explain what she meant there.

Only a lawyer — you know, the plural of "anecdote" is "data" — would go by two cases. So it may be too early to tell.

I was struck by — and maybe this is a segue into the next question that Harvey wanted to get to — the fact there was anecdotal but not reliable evidence of substantial compliance costs that

firms engage in to do this. They are extremely costly, for very little gain either to society or, quite frankly, to the plaintiff's bar from this.

At the same time, what I was particularly struck by in Harvey's summary was that the Chamber of Commerce took a very moderate position on this. I am wondering what this says about how truly costly the repeal is going to be. Would the defense bar or major corporations significantly affected by Robinson-Patman be willing to trade anything in the horse trading that will go on in Congress in order to get a Robinson-Patman Act repeal, et cetera?

So I am hoping that perhaps in the repeal portion of this, the panel can address what the real costs are to American businesses, and if they aren't that substantial, why we should waste our time repealing it. If they are that substantial, why haven't the Chamber of Commerce and all the clients of the leading members of the defense bar who are represented in the ABA Section councils been rising up to try to get this repealed?

Mr. Saferstein

Any comments?

Ms. Bruckmann

Shall we jump to the cost question?

Mr. Saferstein

We can jump to the cost question, but any rebuttal to that? Bruce?

Mr. Spiva

I actually think there is real evidence that compliance costs are not high. I know that that wasn't the finding of the AMC. But if you look at the citations, they cite back to a 1977 report. If you look a little further up — this is page 7-8 in the pros and cons document — they show that the number of cases brought by the FTC and by the private bar is just way down, from twenty-seven complaints annually in the 1960s to one FTC case since 2000, and that was in 2000, the McCormick case — not one since then. In the private bar, there were twenty decisions last year in the whole country, and that has been true for years.

Presuming that businesses are rational actors, and in these days of supposedly perfect information and rational markets, I can't believe that they are expending such great compliance costs for an Act that nobody ever enforces and that is hard to win under, even if you try.

Mr. Saferstein

We can skip to that one. We're flexible, folks. We will skip to our number 5 question.

Barbara Bruckmann, you were going to take the lead on this one. How bad are compliance costs, both the direct, the legal ones, and the indirect, pricing rigidity?

Ms. Bruckmann

I would like to just address something that Steve said about courts saying what the law is. I am fully respectful of that.

What was startling to me in looking at the cases — there are about a dozen of them since *Volvo* was decided — was the difference in the reaction of the courts when you contrast that to how they responded to *Brooke Group*. When *Brooke Group* was handed down and there were primary-line cases, it was as though someone called the world to attention, and there was a shift. There hasn't been the same call to attention after *Volvo*. I do think that, over time, we are going to move in the *Volvo* direction over time. But I think the immediate response is notable— but I do agree that we can't say today that this is what the world is going to look like a year from now, two years from now, three years from now.

Mr. Saferstein

And we will stop analyzing Justice Ginsburg.

Ms. Bruckmann

That's right, absolutely.

Mr. Saferstein

Okay, Barbara, compliance costs.

Ms. Bruckmann

We can't quantify costs.

Let me make one observation about the litigation issue. In the 1980s, Robinson-Patman litigation was pretty flat, and, if you recall, before 1990, a number of the circuits did require injury to competition. Because that was very difficult to show if you were talking about a discrepancy within a single distribution system, Robinson-Patman didn't have much teeth in terms of whether sellers were going to devote the resources to it.

In 1990, we had *Hasbrouck*, we had *Feesers*, we had *Alan's of Atlanta*, and we had a beginning shift toward the injury-to-a-competitor standard. Those issues were squarely in front of four circuits during the early 1990s, and they all came out in favor of “you hurt one of my resellers and you're in the world of Robinson-Patman.” So there was a rise in lawsuits filed after 1990. The number of cases is probably not as great as what we see under the Sherman Act, but there is increased sensitivity on the part of sellers.

In terms of costs, a good bit of what I do is counseling. A number of the calls that I get on a day-to-day basis involve what the in-house lawyer views as Robinson-Patman. Now, the question may not always be Robinson-Patman; it may touch on Sherman Act or contract issues. But these issues come up regularly. There are certainly calls, although we can't quantify them — there is inside and outside counsel time in providing legal advice and monitoring company processes, the

time and distraction for businesspeople in training and in strategy sessions that are intended to mitigate potential RP consequences of a proposed marketing strategy.

Professor Hovenkamp noted in his testimony that RP makes it costly to reward a seller's more aggressive dealers or to invest resources behind them if, in the process, the seller will discriminate against other resellers. That is consistent with my experience. I see that all the time. Generally, in that situation, if the issue is supporting an aggressive dealer, oftentimes you can get there with a functional discount. But it's not always the case.

The U.S. Chamber noted that it receives reports of entire departments dedicated to tracking and processing meet-comp information. This is true. This is my experience.

In fact, in some situations I do not recommend that a client begin a formal meet-comp form process, simply because of the cost.

Most antitrust compliance manuals continue to flag the Act, and most of them that do flag the Act require the businesspeople to get certain approvals from the law department before selective price cuts can occur. That, in every instance, slows down the responsiveness of the company. I have seen on more than one occasion where a company has simply walked away from a marketing approach, even if it thought it made it more competitive in a particular channel of distribution, because it viewed that it would likely receive complaints from others in its distribution system.

How can you quantify the loss if a company forgoes what the seller believes would likely result in an increase in competition, where the monies aren't there to fund comparable programs throughout its distribution system? I don't think you can put a cost figure on that.

But my point is that this happens.

So I do think there are costs. I don't think they can be quantified. That is where I come out on the cost issue.

Mr. Saferstein

Any thoughts from Jack or Bruce?

Mr. Spiva

I think that the companies that have entire departments devoted to meeting-comp letters aren't smart enough to have hired you, Barbara, because I know you would have told them that with twenty cases per year in the whole country, they would be better off devoting that kind of time to their civil rights compliance or, if they are a communications company, their FCC compliance or any of the myriad of issues that companies have to consult their legal department on. I think the fact that a company has to consult their legal department before taking certain decisions is not in any way support for a finding that there are significant compliance costs.

I think you have to look at: What is the risk of being sued? What is the risk of losing if you are? What is the cost of defense? What is the exposure if you lose?

These damages often are not very significant. You still have to prove causation — it's a very stringent standard — to get damages. If you are talking about a disfavored purchaser that is a small business, they have to show they have lost profits or lost sales. The potential damages are not very high.

So I think it has to be the outlier and the ill-advised company that is devoting these millions of dollars to attempting to comply with an act that is never enforced and that is hard to win under even if it is.

Ms. Bruckmann

Let me just interject here. Enforcement of the act: The act is enforced in lots of different ways, not just in filing a lawsuit. It comes up in telephone calls from a disfavored customer. It comes up informally within a distribution system in which a seller, then, needs to make an adjustment or take a position or deal with a compliant. So the issues with respect to, quote, enforcement of the act are not just simply the fact that you have lawsuits filed. These issues come up in all sorts of circumstances within a distribution system, when a seller is engaged in distribution through multiple channels.

Mr. Saferstein

Let me go back to number 4, which is a parallel to this, or a corollary or follow-on. How do we get better knowledge? How would you answer this question, if you were Commissioner Shenefield and you said, "How do I find this out?"

We at the ABA thought about whether to do a survey to assist the AMC. We kind of came up empty, on the grounds that they are not easy to do, and we are not sure whether people will give us the correct answers or honest answers. It's hard to survey legal departments and say, "How much is your legal department spending on Robinson-Patman compliance?" We were a little bit at a loss to figure out how you would quantify the legal costs of compliance and the non-legal costs — that is, price stratification. I couldn't figure out how to do it. You need economics people to try to figure that out.

Then, conversely, from Bruce Spiva's point of view, how do you show that it is helping small businesses? I don't know how you do that. You have, again, the anecdotal statements from Bruce that it has been some help to the small retailers, and from Jay Campbell about help to the National Grocers Association. I don't know how you show that one either.

So we have a lack of information. It is a little bit puzzling. We don't know what to do about it. Any help from our panel here?

Ms. Bruckmann

I hate to be a contrarian, but I think that is the wrong question to ask: Do we have enough information? With respect to the Antitrust Modernization Commission, I think the question is, let's assume that we know that Robinson-Patman helps small firms buying small volumes in a complex distribution system; is that the appropriate object of our antitrust policy?

Mr. Saferstein

Bruce?

Mr. Spiva

Well, here I go again. I think I might agree with Barbara on the question. We probably would come out differently on what the answer to that is.

When I testified in front of the AMC — and I feel a little bit like this today — I kind of feel like the team they bring in to play the Harlem Globetrotters. [Laughter] The question is, how should we repeal it, or how quickly, and if not repeal it, how do we disfigure it?

If you begin with the premise that the only thing that the antitrust laws care about is price, then it's hard to fight with the notion that there should be some kind of market-power or competitive-injury requirement of the type that is required in a Sherman Act case. I think there are instances where you could make that kind of a showing. But, in some ways, why bother having RP if you are going to require that? You probably have a Sherman Act case if you could.

Two points about that. It's an ahistorical view. We have had over the last twenty-six years the total ascendance of the Chicago School and total dominance of antitrust policy by that school. It started with the Reagan administration walking away from antitrust, and its hostility to antitrust enforcement.

But, historically, the Robinson-Patman Act certainly did not just care about price at the end of the day. It cared about service; it cared about economic diversity; it cared about economic pluralism. I think those are still values that the act promotes, in helping small businesses stay alive.

It's no panacea. The reason I kind of quibbled with Harvey when he said that my position was that it would be a disaster if it were repealed is that I think it's a tough law to win under, it's a tough law to enforce, and it doesn't change fundamental market forces. But I know in the bookselling context, it certainly has given efficient, good small booksellers a chance to compete.

Going beyond that, even looking at the history of the Sherman Act — and Professor Pitofsky wrote about this before the Reagan Revolution, the political content of antitrust — there were other values, other than just price.

So I guess that's where I am coming from. If you start from that premise, repeal and all these other requirements follow from that. But that's not the place that I am coming from, and I think that is an ahistorical view of the antitrust laws. It is, unfortunately, an ascendant view in the antitrust community.

Mr. Saferstein

We have a question. My panelists clearly don't want to answer this question.

Andy, how are you doing?

Professor Andrew Gavil

My question really segues off of Bruce's point. Maybe it really gets us to the heart of the question.

I think part of the problem with analyzing the Robinson-Patman Act is that we feel compelled at this point to view it as an antitrust law. Antitrust has changed a lot in the seventy years since the Robinson-Patman Act was passed. Is it possible to take it out of the mode of our modern antitrust thinking and actually just judge it on its own terms? Do we want a law that is about fairness? Do we want a law that is about helping smaller businesses to continue on, because maybe they give higher-quality services?

Why can't we actually debate it on its terms, instead of trying to force it into the antitrust analysis that we use for everything else?

Maybe it doesn't work. Maybe you conclude that the costs of fairness are too high.

I will tie this back, and then leave the question, to something Barbara said. To the extent that I still do consulting, I find the following scenario very troubling, because it has been pushed under antitrust. It is the manufacturer that wants to promote a distribution system in a certain way, it wants to favor some distributors over others because it is going to make more sales, and it has made some determination about that, and it comes to you for advice. "What am I going to do? I have this smaller dealer" — maybe it's size, maybe it's quality, maybe it's newness of the facility, on with the list — "I want to favor this one over this one because I think I'm going to sell more. I don't have any market power. It's going to make me a better interbrand competitor. What should I do?"

Under the current state of antitrust law, one of the pieces of advice we have to give us, "You would be better off terminating the small distributor than selling to them at a higher price."

Mr. Saferstein

That's right.

Professor Gavil

That is because we are continuing to think about Robinson-Patman in this antitrust mode.

So I guess my question is, either we keep it or we don't keep it; if we keep it, would it be helpful to just sever it and stop talking about it as an antitrust law and just judge it on its own terms?

Mr. Saferstein

What do you think, Bruce? Jack, maybe you can answer this. I think we have gone too far, is the problem.

Professor Kirkwood

Andy, it's hard to think of it totally as an antitrust law, because, as you have pointed out in the way you asked your question, there are costs to pursuing fairness, there are costs to pursuing the

protection of small business, and those are costs to consumers. Of course, antitrust law is now targeted primarily at protecting consumers.

And I think I agree with your analysis of the value of the Act. One reason AAI has supported reform rather than repeal is that there is some value — maybe not a large value, but some value — in promoting fairness to small business and some value in the contributions that these small businesses make. The industries where small businesses most fervently supported RP are groceries and bookselling, based on the testimony before the AMC. In both of them, the small businesses are not mom-and-pop outlets anymore, but, measured on an outlet-by-outlet basis, they are as big as the chains. They simply aren't chains. They contribute sometimes higher services, a distinctive selection, sometimes better quality. Therefore, protecting them provides at least some benefits to consumers.

Mr. Saferstein

We have Sal Romano, who has done a lot of RP work.

Mr. Sal Romano

I have a couple of observations and then a question that leads into the policy issue.

This morning's *Wall Street Journal* had an interesting head note. I didn't read the entire article, but Wal-Mart was threatening Coca-Cola with a make-or-break situation, and if Coke didn't give them the right price on its product, Wal-Mart was going to make it.

This leads into a couple of observations. Some of the reasons for the Robinson-Patman Act — while everybody thinks it was just for small retailers or wholesalers, manufacturers wanted it as well, because it gave them protection against big buyers, so that they could confront a big buyer by saying, "Look, I can't discriminate in price. I have to follow the law." That was one of the elements.

The other element was that it was during the Depression, where everybody wanted to get prices up, not necessarily get prices down. So that was another reason for passing the act.

This leads into the question. The real policy issue is — and I think it's an antitrust law; I agree with his policy statements, but I still think it's an antitrust law — do we want a law that protects the distribution system, small manufacturers, small wholesalers, small retailers? Sure, in the modern era, they may be small chains. But the point is, do we still want a law to protect them, or do we want to just have the Sherman Act that says, "If it doesn't affect consumers or it doesn't affect the price to consumers, we don't care about it"?

I think that is the policy issue. Whether it works or doesn't work — we don't even know if the Sherman Act works. We have more cartels operating today, supposedly, than we ever had. I don't know of any empirical data that says the Sherman Act works or that any of the laws work.

I think it's a policy question. What is the policy of the United States going to be with respect to this particular issue?

Mr. Saferstein

That's why I switched to issue number 6. Bruce, can you respond to that?

Mr. Spiva

Sure. I agree with a lot of what was said. In my testimony to the AMC, I kind of used the bookselling industry as a case study of this. Beyond protection of a small retailer — if that was all that it was about, there would be a real question about whether or not that was a sufficient policy rationale for the act — there are values that it protects that are consumer values, but that may go beyond price.

In the case study of the bookselling industry, the argument that we made is that, first of all, it protects diversity of titles available. People look at me askance when I say that. Barnes & Noble has 100,000-and-some titles, and your mom-and-pop small bookseller, many fewer titles. How can you say that this somehow protects diversity?

There are two types of diversity. Having multiple buyers — I would argue it's better to have 1,000 or 2,000 independent buyers across the country making decisions about the inventory in their stores. So even though any given store may have fewer titles than any given Barnes & Noble, they all have different inventories, not totally overlapping inventories with each other. So you get more diversity because you have more decision makers. The chains make their buying decisions, by and large, centrally. So if we only have Barnes & Noble and Borders, we only have two decision makers — and Amazon now.

Also there is diversity of promotion. You walk into a typical chain and you may see twenty copies of Oprah's latest book piled up high. I'm not being disparaging, but that is space that is paid for by the publishers. The independents are known — it's anecdotal, but there have been, actually, what I would call rigorous examinations of this by the Authors Guild — for hand-selling. So books like *Cold Mountain* or *The Kite Runner* originated from this type of hand-selling.

I think the problem is, you can't quantify this, because if the independents disappear, it is going to have an effect on what books get noticed. Barnes & Noble carries *Cold Mountain* and it carries *The Kite Runner*, and for some of these books, they may have done it from the day they were published; some, maybe not. But if they weren't promoting it, nobody is going to know about it. That is a key function, I think, of independent stores, getting the word out there. If they disappear, I think you will have lots of that, and eventually you will have fewer titles published. You really can't quantify that, because if it's never published, we won't know what we are missing.

Ms. Bruckmann

A word on diversity. I think in Bruce's example, in his litigation, there were multiple publishers involved, and so his commentary on diversity may resonate more squarely with antitrust norms, because I do think diversity and consumer choices are values that we do hold when we are talking about antitrust. But in the normal situation, if you are just talking about diversity with respect to a single product, I am not sure that you can make that same argument with respect to the distribution of a product in a distribution channel. That is diversity within an intrabrand

world. I think the issue is diversity within an interbrand world. I think that Bruce's comments are moving in that direction because of the nature of his litigation.

But as a value for Robinson-Patman purposes, I think if we hail diversity, it's going to fall out most regularly in a situation where we are talking about different formats for a brand. I am not sure that is where we want antitrust policy to go.

To Andy's point on whether we should just stop talking about RP as an antitrust law, I think that is a valid point. I think it is a policy decision, but I am not sure that we want a fairness-in-distribution act with treble damages attached to it. That's a policy choice, whether or not we want to have a fairness law for distribution.

Mr. Saferstein

Jack, you were on the FTC's booksellers case, as FTC counsel, right?

Professor Kirkwood

Right.

Mr. Saferstein

Was there any development in that case of whether the Robinson-Patman Act was a good thing for preservation of small businesses and the growth of chain stores?

Believe it or not, the AMC seems quite interested in this topic. It came up both times, this macro question of whether Robinson-Patman really is quite helpful to the small booksellers and to the small grocers, and conversely, whether, in fact, the chain stores are something nobody can stop, and it really has to do with China and macroeconomic issues and not the Robinson-Patman Act.

Professor Kirkwood

Barbara once told me that she thought the FTC's case against the booksellers was the best secondary-line RP enforcement case she had ever seen. Both Bruce and I have participated in litigation in this industry, and it does strike me as useful to think about the case as, perhaps, the ideal of the kind of case one would want to preserve. So our reforms are designed to cut RP back and to preserve the ability to go after a case like *Booksellers*, where you had two powerful buyers, neither of them a single-firm monopsonist (so you couldn't reach them under Sherman Act Section 2), and you had systematic discrimination — not *Volvo*-like idiosyncratic or sporadic discrimination, but systematic discrimination — against an entire class of independent booksellers, where, as Bruce has pointed out, literally thousands went out of business, and where you had an argument, not proof — if we had proof that it would harm consumers, as well as small business, we might have been able to proceed under the Sherman Act or Section 5 — you had a significant argument that there would be consumer harm from the destruction of this sector, for the reasons that Bruce has given.

Mr. Saferstein

Don Baker?

Mr. Donald Baker

The question I have is, why do we stop and focus just on price discrimination? In 1975, we tossed out resale price maintenance, which had the same kind of goals. Congress tossed it out almost over its shoulder. You look around the world, and in the name of fairness, the Article 82 abuse-of-dominance cases are both requiring people to deal and going after people for higher charges.

We reject all that stuff, and yet we sit here and make these arguments about price discrimination.

Mr. Saferstein

Anybody want to take that on?

I think it is the thing that came up at the — the people from the AMC may know better than this. It was a little bit hard to read the ABA summary. But, apparently, at the end of the discussion of the repeal vote, there was a discussion of — people often feel very strongly about discrimination, especially in price, and it came up with regard to the cable industry, I believe. Somebody asked, why don't we extend the Robinson-Patman Act to the cable industry? How do you do things like price discrimination? People often worry about things like price discrimination, as opposed to resale price maintenance, which is keeping prices up. This is charging one person differently than another. People care about it in their personal lives, and I think it resonates to some people in terms of fairness.

Mr. Baker

Yes, but we only do it in goods. In an economy in which goods are becoming less and less important —

Mr. Saferstein

That's right. That's why the AMC did ask whether it should be extended to services, like lawyer services. We want to be part of the Robinson-Patman compliance program, right? We have Barbara to design ours.

Yes? We have a Commissioner.

Commissioner Jonathan M. Jacobson

Honestly, the thing that would be most helpful for me is to get a sense of how credible we really think organized opposition to a repeal of the Robinson-Patman Act would be. I would like to hear the panelists address that.

In setting up our panels, we found support for the act very hard to find. For the reasons that Bruce has articulated, I suspect there is not the level of support that, I believe, a myth out there says is lodged behind the act. So the question for our panelists is, is that residual support still there, the way it was in the late 1970s, or is the time different now for looking at the Act anew?

I am on record on my position on this, but just let me make one comment. I think a Commission tasked with modernization of the antitrust laws cannot responsibly fail to look at repeal of this statute.

Mr. Saferstein

That was Commissioner Jacobson. Any thoughts on that?

My sense is that, as Professor Ross has pointed out, what is odd about the Robinson-Patman Act is that the pro and the con don't come from the normal sources that we see in the Sherman Act. There is not a huge plaintiff's bar that is pursuing Robinson-Patman cases, as there is in the Sherman Act. Basically, there are very few people doing it. Carl Person — I don't know that he has been called to testify. I think people have invited him to a couple of events. He writes quite a bit and he talks quite a bit, but I don't know what type of following he has. He obviously brings a lot of cases. My guess is that he could be bringing as many as 25 to 50 percent of the cases being brought.

I don't think you will see the organized plaintiff's bar, the Trial Lawyers Association, there.

On the defense side, conversely, I don't think you will see a lot of major corporations running in and saying, "We don't like it," because they don't like to talk about it a lot. That was one of the problems we ran into in thinking about our survey. Big corporations don't really want to talk about their Robinson-Patman compliance.

I see a big corporation GC right there, Rich Wallis.

Richard J. Wallis

I don't talk on Robinson-Patman very much at all, or think about it very much at all. But coming from the perspective that I have, what I wonder about, and what I want to get the panel to wonder aloud about, is if you repeal it and the states replace it, what sort of mess are you going to have? The prior panel dealt with *Illinois Brick*. *Illinois Brick* came out and you had twenty-some-odd states do repealers. Then you get a bunch of supreme courts that interpret their state laws to repeal. Then you have this everywhere.

Given my choice between having one set of rules that apply across fifty states and having twenty-six other ones, I'm not so sure that I don't keep the one set of rules and deal with that sort of litigation.

I hope that the panel is going to talk about that.

Mr. Saferstein

We will go right there right now. What number was it?

Ms. Bruckmann

Number 15, at the end.

Mr. Saferstein

That's the next panel.

I will get back to your question on the lobbying. Let me finish that up, by the way.

My understanding is, on the lobbying of Congress, what you will get, especially on the House of Representatives side, is a small — like the plaintiff in *Reeder-Simco*. That's my sense. They speak to the local representative. That's the sense of the person who would come in and the small business entrepreneurs — I think we were all surprised that the Eighth Circuit Court of Appeals affirmed that. It was a fairly large treble-damage verdict, on a pretty far-out theory in a lot of ways. Yet the Eighth Circuit Court of Appeals affirmed it.

So there is this body of people out there who believe it. I can't tell you who they are. I am not sure I could speculate. I'm not sure we would want to test it, but I guess we could.

On your point, the state law, there are a couple of things. One is, I think Barbara believes that the state laws maybe don't pose a big problem, because for years we have been talking about the threat of state laws, and not much happens.

I tend to think they are a bigger problem. We saw it in *Eddins v. Redstone*. *Eddins v. Redstone* is a recent California case involving a secret rebate. The secret-rebate provision is somewhat similar to but not identical to the Robinson-Patman Act.

It was similar to a case that some people may know about called the *Blockbuster* case, which was brought in Texas against the entire movie industry and Blockbuster for discriminatory pricing on the sales of VCRs and DVDs to mom-and-pops versus Blockbuster. They lost in the district court in Texas before they went to a jury, and the Fifth Circuit affirmed that. So they went to California and sued under California state law and the secret-rebate law, and the court of appeals has just given them a green light to go ahead on at least the secret-rebate portion of that case.

I think that's pretty frightening. The reason we worry about it is that at least those state laws are under cover right now because Robinson-Patman exists, and you have Robinson-Patman decisions which tend to give guidance to state court judges who are looking for something to look at. If you get rid of the Robinson-Patman Act, our notion is that you wouldn't have that body of decisions that would inform state court judges who are trying to decide cases under similar laws. They wouldn't have to follow it, but they might well.

So I think there is a genuine concern that if Congress can't stomach a strong preemption, you would have a real problem of dealing with fifty states.

I have talked too long. Let me hear some of my panelists on this. Jack?

Professor Kirkwood

Jonathan's and Richard's questions actually seem linked analytically. I will get to that in a moment.

To address yours first, my impression is that there is still significant small business support for the Act. You had both the independent grocery sector and the independent bookseller sector in. In addition, if you look at comments by the business groups, you had the Business Roundtable proposing repeal, but the U.S. Chamber of Commerce coming out for limited reforms, suggesting that their small business members pushed them against repeal.

In addition, I was told just this morning that there would be quite a fight if the Commission recommends repeal.

I suppose, though, to show the link between the two, if small business could not prevent a federal repeal, maybe there would not be much support at the state level. But I don't know.

Mr. Saferstein

Bruce?

Mr. Spiva

In terms of the state law question, I think the reason you don't see many of these cases under the federal law — the reason you don't now and the reason you wouldn't, even without the federal law, under state laws — is that they are expensive to bring, they are difficult to win, and the damages are not that great. I spent seven, eight years in the vineyard litigating the bookseller cases against both publishers and the chains. I was fortunate enough to work for an association that had the resources to pay for the litigation. I now have my own firm, where I do contingency-fee antitrust work. I would never take an RP case on a contingency-fee basis.

You are talking about small businesses. They have to prove their lost profits. They have a very rigorous — we hired Frank Fisher to do the analysis, and it still wasn't good enough for the judge in California. At the end of the day, even if it had been, we are talking about \$8 million in damages. No contingency-fee lawyer is ever going to take that. And that's a big case. That's a big RP case. It would be a teeny Sherman Act case.

Mr. Saferstein

A question here. Give everybody your name for the record.

Albert A. Foer

Bert Foer, AAI. When Jon talks about modernization requiring repeal, modernization of an act passed on the basis of the power of chain stores — what has happened in the interim? It's the elephant in the room. We now have Wal-Mart. We now have big-box retailers that are different from the chain stores in many, many ways. This is where your political opposition is going to come from. You have small business, you have labor, you have environmentalists, you have consumers up in arms (although consumers have voted for Wal-Mart with their feet). There is a welling-up of concern about what you do in the future about Wal-Mart. Do we really want this?

I keep getting questions from the press and from all these other groups about what antitrust has to say about Wal-Mart. You can't answer that question without referring to Robinson-Patman or, perhaps, some new approach to interpreting the Sherman Act.

So I think there is kind of a requirement, if you are talking about modernization. How do you deal with this? Is there a question there? What does it mean? What are all the implications? Politically, what are the ramifications if you ignore it?

Mr. Saferstein

Anybody want to tackle that?

The only thing I can say is that I'm the only person who had the audacity to suggest in our ABA comments that if you were going to keep the Robinson-Patman Act, you might well want to strengthen the law with regard to buyer liability. Right now buyer liability for inducing price discrimination under Section 2(f) is effectively a dead letter. So the Wal-Marts might be complying with it for some other reason, but as a matter of liability, the likelihood that Wal-Mart can be hit with 2(f) is pretty low.

With the booksellers, you sued the buyers, right?

Mr. Spiva

We did both. We originally had suits against the publishers, the sellers, and the last suits were against Barnes & Noble and Borders.

Mr. Saferstein

Those are really tough suits, because you have to get through a double layer of proof. Those are really tough.

Mr. Spiva

I tend to agree. Also there is no 2(d) or 2(e) liability for buyers.

Mr. Saferstein

I forgot to mention, to Rich's question, the same secret-rebate law in California is one of the two counts in one of the biggest antitrust cases going right now, which is interesting, in the fight between AMD and Intel. AMD has sued Intel in the District of Delaware — O'Melveny on one side and Gibson Dunn on the other side, these giant law firms — for monopolization and attempted monopolization.

But the other count is for violation of the California secret-rebate law. They decided not to use the Robinson-Patman Act, for I don't know what reason, but it's a violation of the secret-rebate law of California.

Who has something that we haven't hit yet? How about 11? Any thoughts on this? Jack, do you want to add competitive injury to 2(d) and (e)?

Professor Kirkwood

Sure. This is a relatively easy one, because this would allow Congress to cut back the Act, while still preserving some protection for small business, some fairness and diversity values. It would simply impose on 2(d) and (e) the same competitive-injury test that is now under Section 2(a).

The appeal of this seemed obvious for all of us who recommended reforms. Both the Antitrust Section of the ABA and the Chamber of Commerce supported AAI in recommending this change. It also has the value of avoiding the distortion or disincentive effect created by the existing Robinson-Patman Act, which makes it more difficult for a plaintiff to sue for price discrimination than promotional discrimination. To put it the other way, it makes a seller more likely to be liable if it wants to reward dealers using promotional benefits rather than price. To equalize the competitive-injury test for both would avoid that distortion.

Mr. Saferstein

You also ought to go to number 10, since the AAI has its own proposal for a way to craft an injury-to-competition test that is not a full-blown rule-of-reason Sherman Act case, but is something more than the current *Morton Salt* presumption, right?

Professor Kirkwood

Actually, not quite. What we suggest is a power requirement, which fundamentally would require proof of buyer power, but also we would leave open the possibility that a plaintiff might prove market power on the part of the seller.

The point of these requirements is, one, to focus Robinson-Patman Act litigation on its original purpose – to combat the inducement of discriminatory advantages by power buyers and concessions to them by sellers; two, to reinvigorate the cost-justification defense. The test wouldn't be, as Harvey said, either monopoly power on the seller's part or single-firm monopsony power on the buyer's part, but the power of a seller to grant and the power of a buyer to induce a non-cost-justified discount. This is a statutory term, but it has not gotten serious attention by the courts since the FTC largely eviscerated the cost-justification defense. This would be a way of giving some spine to it.

Finally, it is connected to competitive injury. If there were a buyer-power test, you would get rid of the troubling consulting case that Professor Gavil had, and you are more likely, as he has pointed out in his own article, to have cases of systematic rather than sporadic discrimination. If you do have a powerful buyer present, you are more likely to have discrimination against a class of disfavored buyers.

Mr. Saferstein

Let me throw this question number 3 that we had up there. I know we have little time left. Do you think the FTC could do this, Professor? Irv Scher wants the FTC to take all these reforms and lead the charge, so to speak.

Professor Kirkwood

It would be possible for the FTC to do this through enforcement, but they have been massively disinclined to do that for a number of years. Hence, what is most realistic is simply for them to hold hearings and issue a report. But the Commission can do that as well.

Mr. Saferstein

We are almost at the end of our time. Any closing remarks? We have gotten through all our numbers. I appreciate all the help from the audience. Any parting shots from any of our panelists?

Mr. Spiva

I will just take one. I would not be in favor of — I appreciate where you are coming from. Already, under existing law, you have to show, even to get the *Morton Salt* inference, a substantial price difference over time, not some one-off thing. You have to show that it is not cost-justified. You have to show that it is not meeting competition. If you are doing a buyer suit, you have to further show that the buyer knew that it was not cost-justified, knew that it was not meeting competition, which almost requires direct evidence of malice, essentially, and —

Mr. Saferstein

You are here to say there are enough obstacles already.

Mr. Spiva

Yes, I think that's right. Also I do think these new tests — I don't know if you talked about this, the notion that the cost-justification defense would be kind of watered down. It would be almost impossible to administer, because it's very amorphous. What is a reasonable relationship? There is already the judicially created functional-discount defense, which, as Scalia said in *Hasbrouck*, is not in the Act. For those reasons, I wouldn't be in favor of any of these changes.

Mr. Saferstein

Thank you all, panelists. This was wonderful. I'm glad you all came here to hear how much fun the Robinson-Patman Act is. We have a Meg Ryan movie with it and the whole thing.

Thank you.