

# A TRIP TO PINE RIDGE: AN OLD ANTITRUST LAW AND ITS FORGOTTEN PROMISE FOR RURAL AMERICA



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## JANUARY 2023

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## **A TRIP TO PINE RIDGE: AN OLD ANTITRUST LAW AND ITS FORGOTTEN PROMISE FOR RURAL AMERICA**

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Through the lens of a recent trip to Pine Ridge, SD, we argue why enforcement of the Robinson-Patman Act is a necessity for rural consumers. Across rural America, consumers rely on small, independent retailers for their basic needs because big box stores are often absent from their communities. If these independent retailers are forced to pay higher prices to stock their shelves as a result of illegal price discrimination, these rural consumers ultimately pay the price. Congress, in line with America's antimonopoly tradition, passed Robinson-Patman with those consumers and their communities in mind. We contend Robinson-Patman Act enforcement is needed to ensure that rural consumers and communities receive the benefits of fair competition and fair prices.

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CPI Antitrust Chronicle January 2023

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# I. INTRODUCTION

Last year, we came across the congressional testimony of R.F. Buche, a fourth-generation independent grocer whose 21 stores serve Indian country in South Dakota. Testifying remotely from his office in Sioux Falls, Buche spoke movingly about the difficulties he said he faced during the pandemic. He testified that suppliers of essential items, such as baby formula, ground beef and canning supplies cut him off or put him on strict allocations – while fully stocking the shelves of big box stores in the region. He claimed he was denied access to the same products as the big boxes.<sup>2</sup> And according to his wholesaler, even when Buche’s orders are bundled with those of other grocers, approaching the order size of big box stores, Buche still cannot access the prices of the big boxes.<sup>3</sup>

Last December, our office organized a trip to see Buche at his store in Pine Ridge, at the heart of the Oglala Lakota’s Pine Ridge Reservation. We had expected to spend most of our time in the small manager’s office overlooking the store. We wanted to understand the economics of small retail groceries like Buche’s. We wanted to know if he was indeed facing illegal price discrimination – or if his experience reflected other trends in the grocery industry. Instead, we spent most of our time in the dairy aisle, speaking with the incoming members of the Oglala Lakota’s tribal council, along with other local leaders.<sup>4</sup>

This was a different conversation. The tribal leaders spoke of a pervasive inability to access affordable, healthy food, even for families with small children. They described 13-year-olds who suffered from ulcers as a result of a diet dominated by soft drinks and processed foods, the only thing their families could afford on low, fixed incomes. They talked about children hoarding food from school lunch programs to feed themselves and their families.

“The government tells us what we should eat, what a healthy diet looks like,” said Frank Star Comes Out, the incoming tribal council president. “You need to have money to eat like that.”

Upstairs in the manager’s office, R.F. Buche explained that it wasn’t always like this. “Twenty years ago, if you shopped our coupons, we could usually beat the prices of the big boxes.” Not anymore. Today, Buche says he pays his wholesaler almost \$4.50 for a head of lettuce while the nearest big box store sells that to customers for \$1.88.

The conventional economic wisdom is that this is acceptable: If large retailers can secure rock-bottom prices and beat out smaller competitors, then we should let them. The reality in Pine Ridge, and in countless other places in rural and urban America, seems very different. In Pine Ridge, the nearest big box store is a 110-mile round trip — an hour drive each way. Meanwhile, most Pine Ridge residents do not own a car.

The Robinson-Patman Act has been criticized as a protectionist measure passed to “elevate the interests of inefficient companies over those of consumers.”<sup>5</sup> We reject the assumption that small businesses are inherently inefficient.<sup>6</sup> But Pine Ridge reminds us that Robinson-Patman was not just passed to provide a level playing field for small grocers like Buche Foods. It was also passed to benefit the communities those small businesses serve.

Of course, the challenges facing the Oglala Lakota are older and deeper than the modern lapse in Robinson-Patman enforcement. The solutions to their problems are wide ranging and span many areas of policy and law. We cannot say with certainty what impact Robinson-Patman enforcement could have to improve the lives of Pine Ridge residents. But if investigations were to reveal that the Robinson-Patman Act has been violated in grocery markets, we believe enforcement could lead to lower prices for everyday grocery items for consumers across rural America and strengthen their local communities. And, we can say with certainty, that Congress, in passing the law, intended that we at least try to do just that.

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2 *Ending Hunger in America: Food Insecurity in Rural America Before H. Comm. on Rules*, 117th Cong. (2021) (oral testimony of R.F. Buche, President, Buche Foods), <https://www.youtube.com/watch?v=ACQp7q0refA&t=2220s>.

3 *Beefing up Competition: Examining America’s Food Supply Chain Before the S. Comm. on the Judiciary*, 117th Cong. (2021), (written testimony of David Smith, President & CEO, Associated Wholesale Grocers) <https://www.judiciary.senate.gov/imo/media/doc/Smith%20-%20Testimony.pdf>; (oral testimony of David Smith, President & CEO, Associated Wholesale Grocers) at 1:16:30, <https://www.judiciary.senate.gov/meetings/beefing-up-competition-examining-americas-food-supply-chain>.

4 Sydney Thorson, *Federal Trade Commissioner visits Buche Foods in Pine Ridge*, KELOLAND (Dec. 2, 2022), <https://www.keloland.com/news/local-news/federal-trade-commissioner-visits-buche-foods-in-pine-ridge/>.

5 Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P, GEORGE MASON L. & ECON.*, Research Paper No. 18-15 (2018) at 22.

6 See Mark A. Glick, David G. Mangum, & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 ANTITRUST BULLETIN 279, 285 (discussing the literature about small businesses and efficiency in relation to Robinson-Patman).

## II. THE LOCAL ECONOMY CASE FOR ROBINSON-PATMAN

Throughout the debates on Robinson-Patman, congressmen described how important independent stores were to their constituents. They drew on a 1934 study of chain stores by our predecessors at the Federal Trade Commission, which showed how independent retailers offered their customers delivery, allowed them to buy on credit, and offered them a range of services that chain stores did not.<sup>7</sup>

These services were more than convenient: They were a lifeline. “When you plant a man in a corner store he carries on his business for the benefit of the community, granting his neighbors credit for the very victuals they eat and the clothing they wear on their backs,” said Representative John Nichols of Oklahoma. “No chain store in my community has ever carried the widow Jones and her two little kids on their books for 30 days or 60 days or any length of time while she was getting together a few pennies to pay for the things which she had to buy from the store.”<sup>8</sup>

Members of Congress also knew that small, locally owned businesses were critical to the local economy. Representative Wright Patman of Texas, for whom the act is named, described how one dollar spent at a locally owned business “will do the work of \$20, \$30, or \$50 before it leaves town” compared to a dollar spent at a chain headquartered elsewhere.<sup>9</sup> Representative John Robsion of Kentucky warned that the destruction of local business would also destroy employment opportunities for young people.<sup>10</sup> It may seem incongruous to modern practitioners to factor the downstream economic impact of conduct into antitrust analysis, but it was clearly Congress’s intent throughout decades of antitrust policymaking.<sup>11</sup>

Congress also cared about the unquantifiable societal value of small businesses: How they invest in their communities and make them stronger, outside of the context of a particular sale or job offer. As Congressman John Robsion explained in that same speech:

When some poor person dies in the community, or some widow and orphans need help, or churches or colleges are to be built, or other welfare or civic improvements are to be undertaken in our respective communities, we do not go to the chain stores. They have splendid men and women in charge of them, but they will say to you very promptly and truthfully that they have no authority to make these contributions. But each community has always been free to call upon the home merchants, the small wholesale house, and their officers for help.<sup>12</sup>

The congressmen’s language may seem grandiose, but when we visited Pine Ridge, Buche Foods seemed to play a similar role in its community. Buche Foods’ workforce is overwhelmingly made up of tribal members. Buche’s stores offer customers suffering from COVID a special quarantine delivery service. The grocery is also developing remote refrigerated food lockers to better provide the community with access to fresh and healthy foods throughout the reservation.<sup>13</sup>

Buche’s stores also reflect the social role that small grocers play in their communities. Store walls are lined with clothing and other merchandise to raise funds for local schools. The signs above and around them are in both English and Lakota. During our conversations in Pine Ridge, one of the council members showed us the photo of an elder’s dilapidated trailer – with no heat, no electricity, and no running water. He was going hungry. As she was heading out, Buche quietly handed her a gift card to help the man put food on the table. And recently, RF Buche donated \$4,000 to provide holiday presents to kids in the community whose families could not celebrate due to hardships stemming from recent winter storms.

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7 See Federal Trade Commission, Final Report on the Chain-Store Investigation (1934) at 66-67, 74. Congress drew on the Chain-Store report’s findings during legislative debate, but its final bill did differ from the FTC’s recommended legislation. *Id.* at 94-97 (legislation recommendations of the chain-store report); see e.g. H.R. Rep. No. 72-2287, pt. 1, at 3-4 (citing the chain-store report). The FTC did recommend amending the Clayton Act to ensure independents could compete on equal terms with chains—a recommendation that became a key provision of the Robinson-Patman Act. See ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1935) at 33 (“[T]he Commission recommended an amendment of section 2 which would eliminate the provisos regarding such [price] differences and other permissible discriminations, substitute a broad prohibition of unfair and unjust discrimination, and thus make it a judicial rather than a legislative matter.”)

8 80 CONG. REC. 8135 (1936) (statement of Rep. John Nichols). See also, e.g. 80 CONG. REC. 9415 (1936) (statement of Rep. Herbert Utterback).

9 79 CONG. REC. 11706 (1935) (statement of Rep. Wright Patman).

10 80 CONG. REC. 8130 (1936) (statement of Rep. John M. Robsion).

11 See e.g. Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 130 (2000) (noting how Congress sought to help small businesses throughout all of the antitrust laws.)

12 80 CONG. REC. 8130 (1936) (statement of Rep. John M. Robsion).

13 Courtney Stewart, Buche Foods: Making Healthy Food More Accessible in South Dakota, REINVESTMENT FUND (accessed Dec. 16 2022), <https://www.reinvestment.com/insights/buche-foods/>.

Scholars argue that stores like Buche Foods are better able to tailor themselves to local needs than large chains bound by nationwide policies and larger inventory demands.<sup>14</sup> Indeed, one of the goals of Robinson-Patman was to protect these businesses' ability to offer these benefits, while competing on a level playing field with national chains. In a world of fair competition, Congress believed that the best of both types of businesses could compete with each other and thrive.

That said, while some of these businesses' strengths — like the quality, availability, and nature of small grocers' services — fit squarely into antitrust analysis, other aspects of their work—like their altruistic and social contributions — are much more difficult to weigh in a court of law. Congress had *all* these factors in mind, however, when they passed Robinson-Patman, and these hard-to-quantify factors underscore the urgency of enforcing the law. An economy that leaves room for mutual aid as well as robust competition is one worth fighting for. Robinson-Patman was meant to be a key weapon in that fight for a fair and beneficial economy and should remain one today.

### III. THE RURAL CONSUMER CASE FOR ROBINSON-PATMAN

We believe Robinson-Patman enforcement will benefit rural consumers because they are the most likely consumers to be served primarily by independents.<sup>15</sup> Arguments in favor of price discrimination implicitly assume that *all* independents are competing down the street from big box stores. But that is not how retail works for much of America. While independents' upstream wholesalers *do* compete head-to-head with big box stores for products from suppliers, many independent grocers serve areas, particularly rural areas, that the big boxes do not. If their wholesaler pays higher prices for products from a supplier, the wholesaler will likely pass those higher costs on to those independents, who, in turn, likely pass those costs on to their consumers. Some of those independents compete down the street from big box stores and some, like Buche Foods, serve rural consumers far from the big boxes. But in the end, shoppers at *all* those small independents likely pay higher prices regardless of how close they are to big box competitors.

In both rural and urban America, low-income individuals who live far away from their nearest supermarket are the most likely to be served by independent grocers than larger chains.<sup>16</sup> For these consumers, who have to take expensive, time-consuming trips to the nearest chain supermarket, independent grocers are sometimes their only option. Moreover, in U.S. cities, independent grocery stores are critical to communities where a high proportion of the residents rely on food assistance. They provide fresh, healthy food in areas with little other access to it.<sup>17</sup>

In Pine Ridge, Buche Foods is the only fresh food grocery available. Aside from discount stores that sell processed foods and lack fresh fruits and vegetables, corporate chains do not have a presence. Chadron, NE, an hour's drive away, has a big box store and a large chain grocer, and the closest major commercial center is Rapid City, over 90 miles away.

Moreover, few Pine Ridge residents have cars, making the low prices of the big box stores practically unavailable to them. For the residents that can travel to big box stores, the gas, time, and other transportation costs can wipe out any savings achieved through lower prices. As a result, Pine Ridge residents rely on Buche Foods, and other small grocers in nearby towns, such as Lynn's Dakotamart, to get their fresh groceries. When they visit these retailers, the residents have to pay higher prices, allegedly because these small businesses pay more to stock their shelves than their big box competitors in more populated areas.

Critics of Robinson-Patman contend that it affords small retailers special treatment. This is the opposite of what the law directs. As Representative Patman explained when demanding Congress pass the Robinson-Patman Act, "independent retail dealers in this country... are not asking for special privileges, special rights, or special benefits. They are just asking for a fair, square deal."<sup>18</sup> Yet, 86 years after the passage of Robinson-Patman, we are hearing the same complaints from small grocers that Wright Patman did in 1936. Small grocers say that when they

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14 See generally Katharine Yang Bao et al., *Urban Food Accessibility and Diversity: Exploring the Role of Small Non-Chain Grocers*, 125 APPLIED GEOGRAPHY (2020).

15 The vast majority of communities where consumers primarily depend on independent grocers are in rural America. Clare Cho & Richard Volpe, USDA Econ. Research Serv., *Independent Grocery Stores in the Changing Landscape of the U.S. Food Retail Industry*, USDA ECON. RESEARCH REPORT No. 240, 8 (2017), <https://www.ers.usda.gov/publications/pub-details/?pubid=85782><https://www.ers.usda.gov/publications/pub-details/?pubid=85782> (finding that the vast majority of counties where 50% or more of all grocery spending was at independents were rural counties.).

16 *Id.* at 7-8 (finding that low-income low-access counties have a higher share of independent grocers.)

17 Katharine Yang Bao et al., *Urban Food Accessibility and Diversity: Exploring the Role of Small Non-Chain Grocers*, 125 APPLIED GEOGRAPHY (2020) at 26-27.

18 80 CONG. REC. 9422 (1936).

attempt to negotiate the same prices that large chains get for the same quantity order, they are unable to do so.<sup>19</sup> Their wholesalers say they are also told that these deals are for the big box stores alone.<sup>20</sup>

The result is a public health problem as well as an economic one. Out of necessity, people in rural America turn to cheap, processed food options like ramen noodles and meals-in-a-box to stretch their food dollar. This, in turn, contributes to dangerous health outcomes such as high rates of obesity and diabetes. Residents of Pine Ridge, for example, have the lowest life expectancy in the United States. Over 50 percent of residents over the age of 40 suffer from diabetes.<sup>21</sup> It's not just middle-aged adults who are affected. "I don't know a single twenty-year old man in my family who doesn't have diabetes," said Rep. Peri Pourier, who represents the area in the South Dakota legislature. The residents we spoke with also highlighted issues of food insecurity and connected these issues to the high prices for fresh and healthy food.

When it comes to groceries, therefore, allegations of price discrimination involve more than money. They also involve issues of public health. If Mr. Buche and his stores receive fair prices for fresh and healthy foods, his customers on the reservation benefit, and his community benefits. In rural America, if consumers pay higher prices for fresh and healthy foods from independents because of price discrimination, the status quo comes dangerously close to consumer discrimination — discrimination against poor, rural and working-class people who can least afford it.

The people of Pine Ridge and consumers across rural America deserve an economy where small, independent businesses can get fair prices from their suppliers. Rural consumers need fairness.

## IV. THE ANTI-MONOPOLY CASE FOR ROBINSON-PATMAN

Just as consumers engage in tradeoffs to make personal economic decisions, Congress does the same to make societal economic decisions. The passage of Robinson-Patman is such an exercise and is exemplary of America's antimonopoly tradition. The floor debates around Robinson-Patman went on for 11 months. Most people who read that rich legislative history are drawn to the passion of Representative Patman, or the careful, lawyerly explanations of someone like Representative Hubert Utterback of Iowa.

We were struck by a little-noticed warning issued by Representative Thomas Francis Ford of California. On May 27, 1936, he stood in the well of the House and cautioned his colleagues about what would happen if they failed to address price discrimination driven by powerful chain stores, the big box stores of the era:

"While [price discrimination] may be to the consumers' advantage for the period during which the chain was forcing the small dealer out of business, ultimately, as soon as the small dealers are eliminated, the chain stores will say to the manufacturer, 'We control the distribution of this product now, so we are going to make you accept our price for that product and that price will be whatever we choose to pay.' We are getting to the point where the great distributing chains in this country are able to dictate the price to the producers of many articles; and when they have eliminated competition they are going to dictate to the consumer the price he pays; and, let me tell you, this price will be all the traffic will bear."<sup>22</sup>

He predicted that if these trends were to continue unabated, "we shall at no distant future see the retail trade of this country in the hands of four, five, or six great merchandising institutions." He specifically said that "these chains will control the distribution of two-thirds of the food and clothing of this country."<sup>23</sup>

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19 *Ending Hunger in America: Food Insecurity in Rural America Before H. Comm. on Rules*, 117th Cong. (2021) (oral testimony of R.F. Buche, President, Buche Foods), <https://www.youtube.com/watch?v=ACQp7q0refA&t=2220s>. See also, Testimony of Anthony Pena and Tom at the FTC - DOJ Merger Guidelines Listening Forum (March 28, 2022), 9-12, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/FTC-DOJ%20Merger%20Guidelines%20Listening%20Forum\\_FTC\\_March%2028%202022.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ%20Merger%20Guidelines%20Listening%20Forum_FTC_March%2028%202022.pdf).

20 *Beefing up Competition: Examining America's Food Supply Chain Before the S. Comm. on the Judiciary*, 117th Cong. (2021), (written testimony of David Smith, President & CEO, Associated Wholesale Grocers) <https://www.judiciary.senate.gov/imo/media/doc/Smith%20-%20Testimony.pdf>; (oral testimony of David Smith, President & CEO, Associated Wholesale Grocers) at 1:16:30, <https://www.judiciary.senate.gov/meetings/beefing-up-competition-examining-americas-food-supply-chain>.

21 Re-Member, [About the Pine Ridge Reservation](https://www.re-member.org/pine-ridge-reservation) (accessed Dec. 12 2022), <https://www.re-member.org/pine-ridge-reservation>.

22 80 Cong. Rec. 8125 (Statement of Rep. Thomas Ford).

23 *Ibid.*

Robinson-Patman became law, but in the decades following the law's abandonment, Representative Ford was ultimately proven right, at least in one critical respect: As of 2022, six firms control roughly 60 percent of the retail grocery market.<sup>24</sup>

Congress understood that, in the short term, some big businesses would see higher input costs if Robinson-Patman was enforced. But they rejected the idea that the status quo was helping consumers.<sup>25</sup> And, more importantly, they held fast to the core theory of antitrust: that in the long run, actual competition through the existence of many competitors would ensure lower prices and better service to customers than would the domination of an industry by a handful of “great merchandising institutions.”<sup>26</sup>

Congress passed Robinson-Patman as an important part of America's antimonopoly tradition, which is broader and more robust than the narrow efficiency framework that has been grafted onto antitrust policy in recent decades. In line with this tradition, we believe that benefits to consumers flow from actual competition; and to have competition, you must have competitors, both big and small.

Residents of Pine Ridge and consumers across America need those competitors. They need grocery stores of all sizes competing for their food dollar and bringing in fresh produce at fair prices. Our firm belief is that, if violations of the law are found, Robinson-Patman enforcement will help make this happen.

These consumer-focused arguments for the enforcement of Robinson-Patman are as true today as they were in 1936. It is astonishing that with all the criticism of Robinson-Patman from members of the antitrust community, not a single empirical study has demonstrated that Robinson-Patman enforcement actually ever raised prices for consumers.<sup>27</sup> Instead, what we now have is evidence of what happens when the government stops enforcing Robinson-Patman. Recall R.F. Buche's claim that, twenty years ago, he could match or beat the prices of the nearest big box stores, but not anymore. We believe R.F. Buche and his community may be feeling the effects of the death of Robinson-Patman enforcement coupled with the rising consolidation in the food supply chain.

Through the abandonment of Robinson-Patman enforcement, we have created a system that rewards wealthy, suburban consumers with access to big box store low prices and punishes consumers who rely on small, independent retailers to buy their everyday needs — an economy that punishes rural consumers in Pine Ridge and communities like it around the country. This is not a fair market. It's not a pro-consumer market. It's a system that produces inequality and disadvantages the poorest of our society. And it's time to change that

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24 Melissa Repko, *Kroger agrees to buy rival grocery company Albertsons for \$24.6 billion*, CNBC (Oct. 12, 2022), <https://www.cnbc.com/2022/10/14/kroger-agrees-to-buy-albertsons-for-24point6-billion.html>.

25 80 Cong. Rec. 9415 (Statement of Rep. Utterback) (“[T]his claim assumes that the discriminations in price granted to large mass buyers are actually passed on in lower prices to the consumer. There is no evidence that this is true. There is, on the contrary evidence that it is not true.”).

26 80 CONG. REC. 7761 (statement of Rep. Wright Patman) (“I believe that the interests of the consumers and this country will be served by preserving independent business which forces competition and lower-prices to the consumers.”).

27 Alvaro M. Bedoya, *Returning to Fairness*, AM. PROSPECT (Oct. 10, 2022), <https://prospect.org/economy/returning-to-fairness-rural-america-open-markets/>.

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