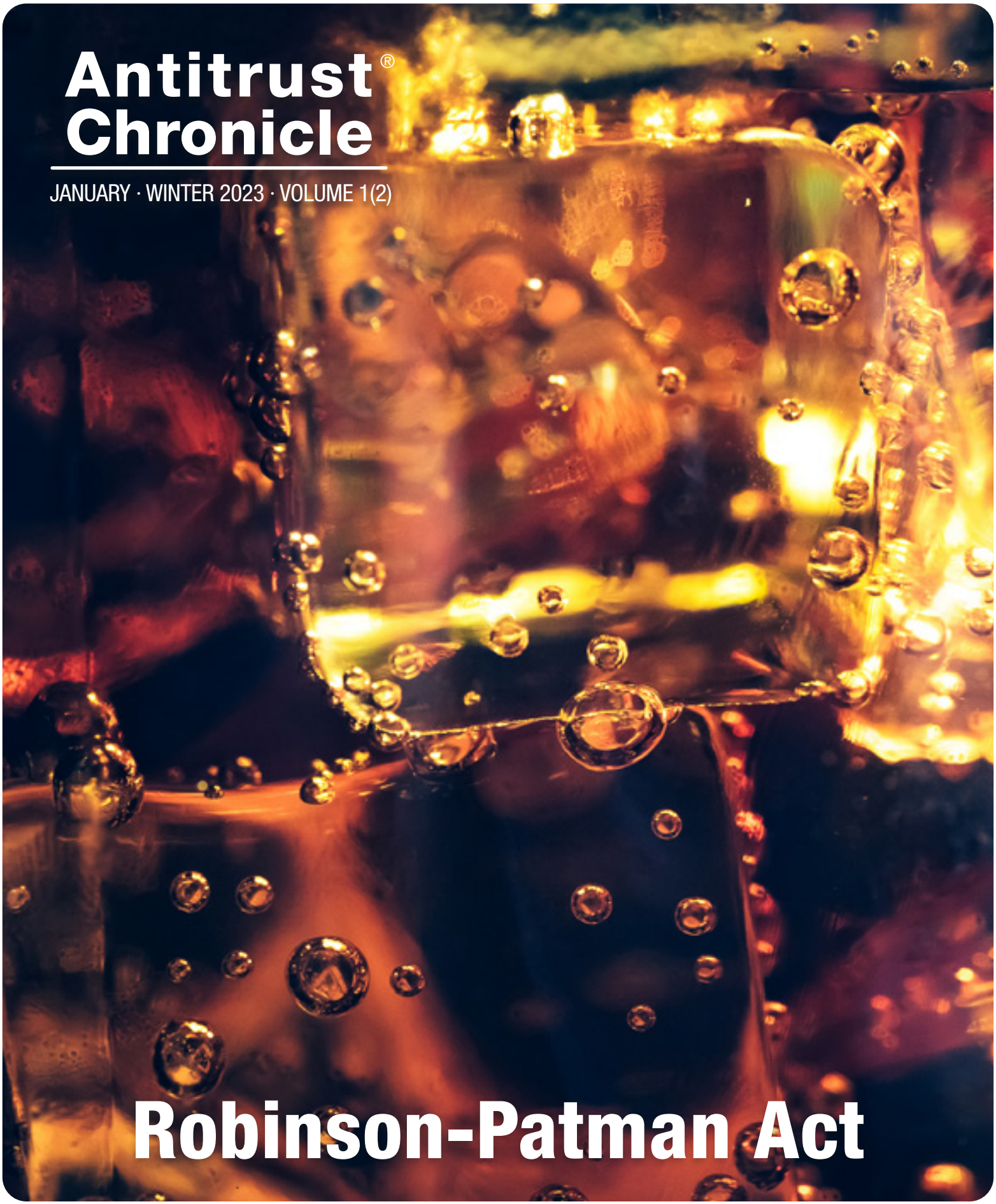

Antitrust Chronicle®

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Robinson-Patman Act

CPI COMPETITION POLICY® INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The story of antitrust is often a story of ebbs and flows. What may at one point in time be a "vogue" issue can occasionally fade from the agenda of enforcers, only to return (perhaps decades later) once an issue enters the spotlight again. This is true of the U.S. Robinson-Patman Act of 1936 ("RPA"). Originally introduced as an amendment to the Clayton Act to curb alleged price discrimination by large U.S. chain retailers at that time, it is primarily enforced by the Federal Trade Commission ("FTC").

After an initial period of relatively active enforcement, the key provisions of the RPA fell into "desuetude," particularly from the 1980s (albeit with a brief revival in the 1990s). This is due in large part to the difficulty in interpreting its provisions. As Justice Frankfurter once famously wrote, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." Recently, however, the RPA is undergoing another renaissance. The latest pronouncements from FTC Commissioners suggest that its provisions may have a new-found role in regulating the modern economy. The pieces in this Chronicle analyze the RPA and its potential implications for this purpose.

To lay the table, **Steven Cernak & Luis Blanquez** note how Government enforcement and private litigation of the RPA has been minimal during the past decades. However, now, the FTC — among many others — seems to want to revive its application. The article elaborates on how the evolution of courts' views on RPA cases, and how any attempt would need to account for decades worth of court opinions that have questioned its policy and narrowed its interpretation. In the author's view, a new attempt to revive the RPA to its former glory will need to deal with that precedent.

Taking an almost poetic perspective, **Max M. Miller & Bryce Tuttle** look at the RPA through the lens of a trip to Pine Ridge, South Dakota. They argue why, in their view, enforcement of the RPA is a necessity for rural consumers. Across the rural U.S., consumers rely on small, independent retailers for their basic needs; as "big box" stores are often absent from their communities. This renders protection against price discrimination in the supply chain all the more urgent.

John B. Kirkwood, in turn, deals with perceived flaws in the Robinson-Patman Act that are well known. Allegedly, it protects competitors at the expense of consumers and rarely stops the buyer-induced discrimination it was meant to prevent. Taking a constructive approach, the article proposes reforms that would greatly reduce both problems and explains why adopting those reforms would be preferable to repealing the RPA altogether.

Taking a very contemporary perspective, **Patrick A. Bradford** notes how the Biden administration's DOJ and FTC appointees have signaled an intent to renew enforcement of the RPA against *unfair* as opposed to inefficient practices. This note considers potential RPA enforcement action against certain e-commerce platforms of today, as well as the viability of available defenses. Similarly, **David Munkittrick & Colin Kass** pick up the story of the state of the RPA today, explore how the FTC might wield it going forward, and discuss whether the weight of the last 40 years of RPA jurisprudence might still keep the RPA down.

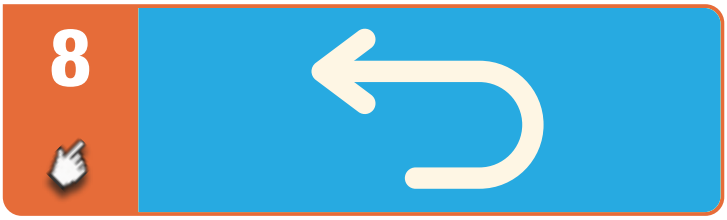
Finally, **Lawrence D. Silverman** develops on these topics, noting how the FTC's proposed new policies create the possibility of a paradigm shift for both private and governmental enforcement of Robinson-Patman and price discrimination. The piece explores two related possibilities arising from the latest developments: (1) the FTC's enforcement of price discrimination principles beyond the limitations of Robinson-Patman; and (2) the potential broader availability of Robinson-Patman and Section 5 price discrimination claims to civil litigants through state deceptive and unfair practices statutes..

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES



ROBINSON-PATMAN: HOW DID WE GET HERE? COULD WE GO BACK?

By Steven Cernak & Luis Blanquez

Government enforcement and private litigation of the Robinson-Patman has been minimal during the past decades. However now the FTC — among many others — seems to want to revive its application. In this article we illustrate the evolution of courts' views on Robinson-Patman cases, and how any attempt would need to account for decades worth of court opinions that have questioned its policy and narrowed its interpretation. Courts have interpreted all antitrust laws, including Robison-Patman, as focused on protecting competition and consumers. As a result, courts have ridiculed Robinson-Patman's policy and narrowed its interpretation for years. Any attempt to revive Robinson-Patman to its former glory will need to deal with that precedent.

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

By Max M. Miller & Bryce Tuttle

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.

REFORMING THE ROBINSON-PATMAN ACT

By John B. Kirkwood

The flaws in the Robinson-Patman Act are well known. It protects competitors at the expense of consumers and rarely stops the buyer-induced discrimination it was meant to prevent. This article proposes reforms that would greatly reduce both problems and explains why adopting those reforms would be preferable to repealing the Act altogether.

THE ROBINSON-PATMAN ACT: EVERYONE OLD IS NEW AGAIN

By Patrick A. Bradford

Originally passed in the mid-1930s to protect small grocery businesses in the face of fast-growing chain supermarkets that could negotiate steep discounts for bulk purchases, the Robinson-Patman Act prohibits price discrimination to protect against unfair competition. Over the past several decades as efficiency and consumer welfare took center stage in the antitrust academy, policy and common law, the Robinson-Patman Act has become a disfavored relic of antitrust law, with DOJ and FTC enforcement effectively ceasing more than twenty years ago. The Biden administration's DOJ and FTC appointees have signaled an intent to brush the dust off of the Robinson-Patman Act and renew enforcement of *unfair* as opposed to *inefficient* practices. This note considers potential Robinson-Patman Act enforcement action against certain e-commerce giants of today, such as Amazon and Walmart, and analyzes the strength of a *prima facie* case of price discrimination, as well as the viability of available affirmative defenses.

SUMMARIES

WHAT'S NEXT?

For February 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Mergers as Monopolization**; and (2) **White Collar Defense**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2023, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES March 2023

For March 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **China Edition**; and (2) **Interlocking**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

ROBINSON-PATMAN: HOW DID WE GET HERE? COULD WE GO BACK?

BY STEVEN CERNAK & LUIS BLANQUEZ[1]

1 Partners, Bona Law PC, Detroit and San Diego, respectively.

The Robinson-Patman ("RP") Act's price and promotional discrimination prohibitions are still on the books, but government enforcement and private litigation has been minimal for decades. Yet, some commentators — even some FTC Commissioners — would like to revive RP. Any such attempt must account for decades worth of court opinions that have questioned its policy and narrowed its interpretation.[2]

Below, we illustrate this evolution of courts' views on RP through quotes from both old and recent opinions. Because a generation (or more) of antitrust lawyers have grown up professionally thinking they would never need to understand the elements of and policy behind RP, we also summarize some of these cases to illustrate how different they are from other more recent antitrust actions.

I. ROBINSON-PATMAN ORIGINS

In 1936, the RP Act amended the earlier Clayton Act and attacked some of the perceived advantages enjoyed by certain big buyers, like the A&P grocery store chain, and tried "to keep open the door of opportunity for the small-business man."[3] Generally, it prohibits certain discriminatory price discounts and provision of or reimbursement for certain promotional services. The statutory language is lengthy and convoluted, especially compared to the Sherman Act, and a plaintiff must satisfy several elements, and often fend off several potential defenses, to successfully make a claim.

In one of its earliest RP cases, the Court's majority in 1948's *Morton Salt* made it easier for a disadvantaged buyer by allowing a re-buttable presumption of the requisite injury to competition merely from a showing of sustained higher prices to the disadvantaged buyer.[4] The Court's views on RP's general purposes and how the law should handle quantity discounts were clear:

> Furthermore, in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions . . . ." The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."

Still, even at this early date, the *Morton Salt* dissent recognized that interpreting RP to protect certain competitors might come at the cost of harming consumers:

> The Robinson-Patman Act itself, insofar as it relates to quantity discounts, seems to me, on its face and in light of its history, to strive for two results, both of which should be kept in mind when interpreting it.
>
> On the one hand, it recognizes that the quantity discount may be utilized arbitrarily and without justification in savings effected by quantity sales, to give a discriminatory advantage to large buyers over small ones. This evil it would prohibit. On the other hand, it recognizes that a business practice so old and general is not without some basis in reason, that much that we call our standard of living is due to the wide availability of low-priced goods, made possible by mass production and quantity distribution, and hence that whatever economies result from quantity transactions may, and indeed should, be passed down the line to the consumer.

Just five years later in *Automatic Canteen*, the Court picked up that concern of the Morton Salt dissent about RP's potential conflicts with other antitrust laws as it disagreed with the FTC and narrowed the times when an advantaged buyer would be liable under Section 2(f) of RP:

> Although due consideration is to be accorded to administrative construction where alternative interpretation is fairly open, it is our duty to reconcile such interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress.[5]

2 https://www.ftc.gov/news-events/news/speeches/returning-fairness-prepared-remarks-commissioner-alvaro-m-bedoya-midwest-forum-fair-markets.

3 *Ibid.*

4 https://supreme.justia.com/cases/federal/us/334/37/.

5 https://www.law.cornell.edu/supremecourt/text/346/61.

Perhaps the height of the Court's focus on competitors, not consumers, under RP came in 1967's *Utah Pie*.[6] Plaintiff was a local maker of frozen pies. Defendants were three larger but non-local competitors. Plaintiff sold more than 60% of the pies in the market before it and defendants began lowering price and expanding volume. Defendants sold pies at prices lower in this market than in other markets, perhaps some below total costs. A few years later, plaintiff still had more than 40 percent of the much larger output and prices were much lower to consumers. The Court reversed the appellate court and found that the jury could find injury to competition, saying:

> [RP] does not forbid price competition which will probably injure or lessen competition by eliminating competitors, discouraging entry into the market or enhancing the market shares of the dominant sellers. But Congress has established some ground rules for the game.
>
> In this context, the Court of Appeals placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit. But we disagree with its apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit.
>
> The frozen pie market in Salt Lake City was highly competitive. At times Utah Pie was a leader in moving the general level of prices down, and at other times each of the respondents also bore responsibility for the downward pressure on the price structure. We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact.
>
> Again, the dissent focused more on the effects on consumers resulting from the price war and any price discrimination:
>
> In 1958, Utah Pie had a quasi-monopolistic 66.5% of the market. In 1961 -- after the alleged predations of the respondents -- Utah Pie still had a commanding 45.3%, Pet had 29.4%, and the remainder of the market was divided almost equally between Continental, Carnation, and other, small local bakers. Unless we disregard the lessons so laboriously learned in scores of Sherman and Clayton Act cases, the 1961 situation has to be considered more competitive than that of 1958. Thus, if we assume that the price discrimination proven against the respondents had any effect on competition, that effect must have been beneficent.
>
> That the Court has fallen into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition, can be seen from its unsuccessful attempt to distinguish cases relied upon by the respondents. Those cases are said to be inapposite because they involved "no general decline in price structure," and no "lasting impact upon prices." But lower prices are the hallmark of intensified competition.

II. ROBINSON-PATMAN TODAY

In the ensuing years, the Court narrowed its interpretation of RP and found new defenses for defendants. For instance, in 1990's *Hasbrouck*, the Court's majority followed a recommendation from an earlier expert study of the antitrust laws plus amicus briefs from the Antitrust Division and FTC and found a "functional discount" defense for suppliers selling to both wholesalers and retailers.[7] In general, the Court found that a "reasonable" discount to compensate a wholesaler-buyer who performed some functions that retailer-buyers did not could be found not to lessen competition. In the Court's words:

> A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.

While the Court found that the defendant's evidence did not support the functional discount in this case, it provided a roadmap for subsequent defendants to follow. In 1998, the Second Circuit found an appropriate functional discount in *American Booksellers*. There, the plaintiff alleged that defendants had violated RP by offering more advantageous promotional allowances and price discounts to certain large national chains and buying clubs. The court, however, found that discounts given by book publishers to vertically integrated bookstore chains were permis-

6 https://casetext.com/case/utah-pie-co-v-continental-baking.

7 https://supreme.justia.com/cases/federal/us/496/543/.

sible functional discounts. The court expanded the defense by rejecting the argument that functional discounts could be given only to third-party wholesalers unaffiliated with purchasing retailers.

Other lower courts have easily overcome the *Morton Salt* presumption and found no injury to competition even in the face of evidence of persistent higher prices to the plaintiff. In *Living Essentials LLC*, the defendant maker of 5-Hour Energy drinks convinced the Ninth Circuit that it did not violate RP by offering instant rebates and otherwise selling its product to Costco, a large retailer, at prices below what it had charged other wholesalers, finding that Costco and the plaintiff wholesalers were not direct competitors.

In 2015, the Second Circuit in *Cash & Henderson* upheld a summary judgment in favor of defendant pharmaceutical manufacturers accused of price discrimination stating that "[a]lthough Section 2(d) does not require plaintiffs to establish competitive injury, it does require them to establish antitrust injury." Here, plaintiff retail pharmacies alleged that the lower drug pricing offered to staff-model HMOs and pharmacy benefit managers was unlawful price discrimination under RP. But only 1-3 percent of potential lost customers were identified as customers who later filled prescriptions with a favored purchaser. The court concluded that this de minimis loss of customers was insufficient to establish a competitive injury. The court held that although *Morton Salt* allows a discrimination claim based on a substantial discount to a competitor over a significant period of time,

> [I]f the loss attributable to impaired competition is de minimis, then the challenged practice cannot be said to have had a 'substantial' affect [sic] on competition.

The Court's transformation to treating RP consistently with other antitrust statutes and focusing on injury to competition and consumer welfare was complete by 2006's *Volvo* case. There, the Court's majority found the plaintiff's "mix and match" evidence of price discrimination and injury to competition was insufficient to support a jury verdict, even though the likely effective result was no RP application for custom-built products. The majority went out of its way to explicitly state how RP should be interpreted (cleaned up):

> Interbrand competition, our opinions affirm, is the "primary concern of antitrust law." The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by [Plaintiff] and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend [RP's] governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws."

While the dissent thought the lower court opinions were supported by RP's text, it too could not resist some criticisms of the law:

> As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chain stores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate but may well merit Judge Bork's characterization as "wholly mistaken economic theory." I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

III. CONCLUSION

Clearly, Robinson-Patman was passed to protect competitors — namely, small retailers — and not competition or consumers. RP, however, is an amendment of the Clayton Act, one of the antitrust laws. And for decades, courts have interpreted all antitrust laws, including RP, as focused on protecting competition and consumers. As a result, courts have ridiculed RP's policy and narrowed its interpretation for decades. Any attempt to revive RP to its former glory will need to deal with that precedent.

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

BY MAX M. MILLER & BRYCE TUTTLE[1]

1 The authors are advisors to Commissioner Alvaro M. Bedoya at the Federal Trade Commission. Although the inspiration for this article and supporting materials were developed from their work at the FTC, the views expressed in this article are wholly those of the authors and do not necessarily represent the views of Commissioner Bedoya, any other Commissioner, or anyone else at the agency.

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.[2] 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.[3]

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.[4]

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."[5] We reject the assumption that small businesses are inherently inefficient.[6] 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.[7]

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."[8]

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.[9] Representative John Robsion of Kentucky warned that the destruction of local business would also destroy employment opportunities for young people.[10] 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.[11]

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.[12]

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.[13]

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.[14] 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.[15] 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.[16] 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.[17]

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."[18] 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

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=85782https://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.[19] Their wholesalers say they are also told that these deals are for the big box stores alone.[20]

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.[21] 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."[22]

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."[23]

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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.

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 (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.[24]

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.[25] 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."[26]

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.[27] 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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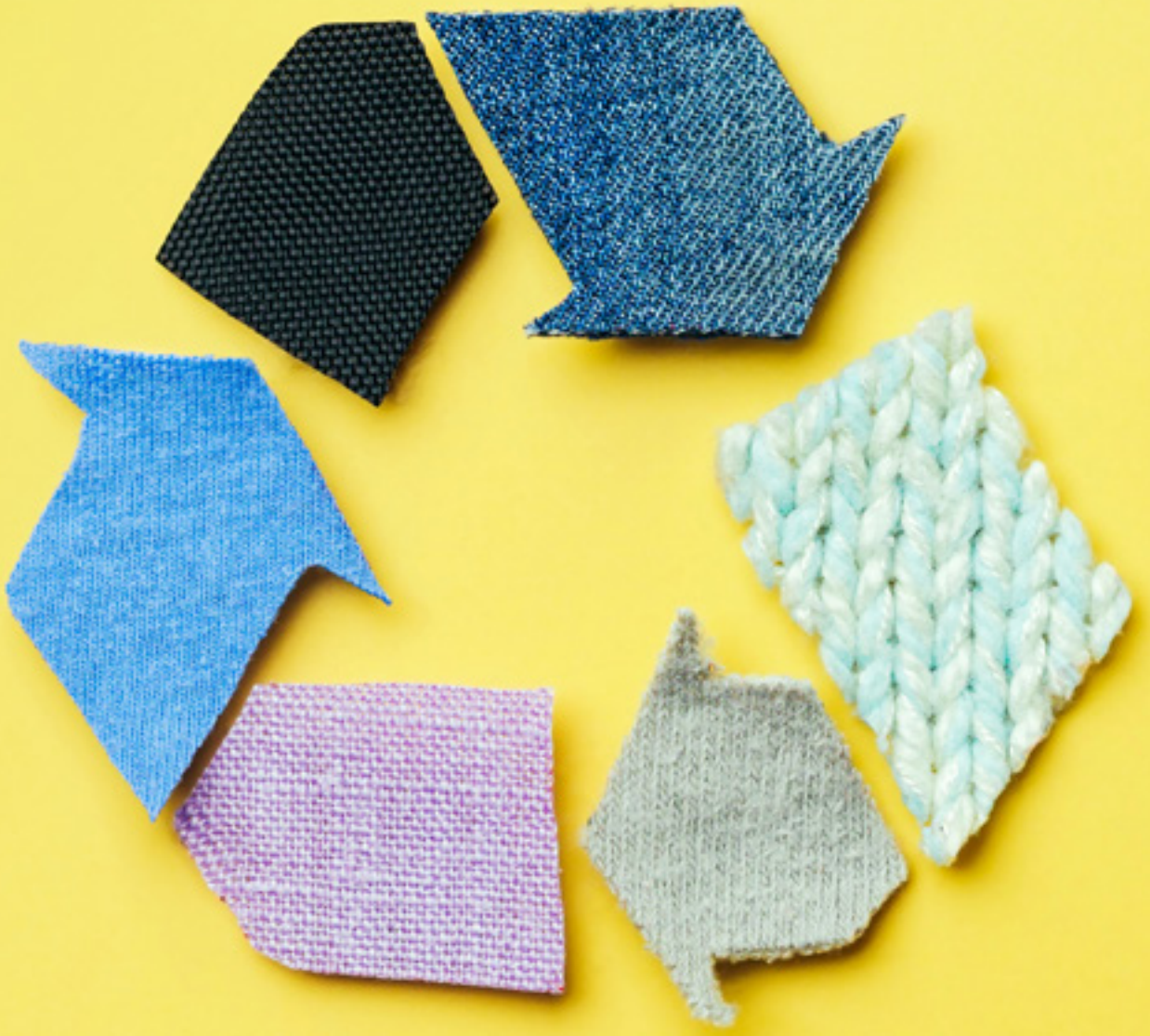
24 Melissa Repko, *Kroger agrees to buy rival grocery company Albertsons for $24.6 billion*, CNBC (Oct. 12, 2022), https://www.cnbc.com/2022/10/14/kroger-agrees-to-buy-albertsons-for-24point6-billion.html.

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/.

REFORMING THE ROBINSON-PATMAN ACT



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I. INTRODUCTION

The Robinson-Patman Act has two fundamental flaws. First, it is a protectionist statute. Passed during the Great Depression, its aim is not to promote competition in order to benefit consumers, but to protect small businesses from competition. Its principal goal is to prevent large buyers from inducing discriminatory price cuts and using the resulting advantage to undermine smaller rivals, depriving them of sales and profits. This behavior, however, frequently benefits consumers because a large buyer normally undercuts its rivals by lowering prices, increasing services, or otherwise making its product more attractive to consumers.[2]

Second, the Act typically fails to prevent the very buyer-induced discrimination it was passed to prevent. In part, that is due to the Act's technical and jurisdictional requirements. But the main reason is the Act's meeting competition defense, which allows a seller to grant a discriminatory price or promotional benefit to a large buyer if the seller believes in good faith that a competing seller is making a comparable offer. This provision, designed to protect innocent sellers, protects large, aggressive buyers as well, since they typically induce concessions by playing sellers off against each other. This gives each seller a meeting competition defense but insulates the resulting discrimination from attack. It is likely, for example, that Walmart and Amazon have obtained preferential terms from many of their suppliers. Yet they have never been successfully sued under the Robinson-Patman Act, almost certainly because of the meeting competition defense.

These flaws can be eliminated by reforming the Act. Congress can alter the Act's injury language to make it impossible to challenge discrimination under the Act without showing harm to competition (and thus to consumers or vulnerable suppliers). Congress can also curtail the Act's two principal defenses, meeting competition and cost justification. Because these defenses have a legitimate purpose, they could be eliminated only in purely equitable actions. In other words, if a plaintiff seeks only equitable relief, the defenses would be unavailable. Alternatively, the defenses could be removed when the plaintiff seeks attorneys' fees but not damages. But whatever option is chosen, neither defense should stand in the way of relief when a plaintiff establishes that a powerful buyer has induced a discriminatory concession that is likely to reduce competition and harm consumers or vulnerable suppliers.

Reforming the Robinson-Patman Act is preferable to repealing it. Many people have called for repeal, including the Department of Justice in 1977 and the Antitrust Modernization Commission thirty years later. But wiping out the Act appears imprudent. Buyer-induced discrimination can harm consumers or vulnerable suppliers in a variety of circumstances, and there is evidence that in some cases powerful buyers have induced concessions that hurt consumers. Repealing the Act would largely, if not completely, eliminate the ability of antitrust law to counteract this threat, since neither the Sherman Act nor the FTC Act are reliable bulwarks against buyer-induced discrimination. Because powerful buyers like Walmart and Amazon exist and are likely to grow in the future, it seems wiser to reform the Robinson-Patman Act than abolish it.

II. HARM FROM BUYER-INDUCED DISCRIMINATION

Buyer-driven discrimination can reduce competition and harm consumers or vulnerable suppliers in at least ten different settings. The first five describe the ways in which such discrimination can reduce competition upstream, in the market or markets in which the buyer purchases inputs from suppliers. In the second group, buyer-driven discrimination diminishes competition downstream, in the market or markets in which the buyer and its rivals sell their products to consumers.

A. Harm to Upstream Competition

When a buyer exercises countervailing power to obtain discriminatory price cuts or promotional benefits from a supplier with market power,[3] competition among suppliers may be reduced in at least five ways: (1) the buyer's exercise of countervailing power could diminish the returns that suppliers earn from research and development, curbing their incentive to innovate; (2) by depressing suppliers' profits, the exertion of countervailing power may cause suppliers to curtail the variety of products they offer, reducing consumer choice; (3) if the powerful buyer concentrates all its purchases in a single supplier, it could give that supplier monopsony power over small, powerless suppliers further upstream; (4) the exercise of countervailing power may turn into monopsony power if the structure of the supplying tier changes and suppliers

2 See John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, Antitrust Bull. (2015) (discussing the issues addressed in this article in more detail).

3 This essay focuses on the exercise of countervailing power against suppliers with market power — rather than the exercise of *monopsony* power against suppliers without market power — since suppliers without market power cannot ordinarily engage in price discrimination. But when a buyer's behavior creates monopsony power that would not otherwise exist, as in cases (3) and (4) on this list, the resulting injury to vulnerable suppliers is a matter of antitrust concern.

lose their market power; and (5) the powerful buyer's exercise of its power may cause suppliers to collude in response, which may lead to higher consumer prices.

Amazon's power and behavior already have triggered the fifth scenario. Reacting to its below-cost pricing of many e-books, and fearing the exercise of its buyer power, five of the nation's leading book publishers, with Apple's enthusiastic assistance, colluded to adopt a new pricing model for e-books. They imposed the new model on Amazon and other retailers and raised retail prices sharply.[4] Prompted by a complaint from Amazon, the Justice Department challenged the conspiracy, obtaining settlements from all five publishers. Apple insisted on litigating but lost. In an elaborate and sometimes scathing opinion, Judge Cote held that the high-tech giant had collaborated with the publishers to elevate e-book prices, a decision that was affirmed on appeal.[5]

Amazon's buyer power may also hurt consumers in the ways described in the first two scenarios. In other words, Amazon's well-known reputation for tough negotiations may eventually reduce publisher profits to such a degree that it diminishes the number or variety of new books they offer. At this point, there is no systematic evidence that Amazon's exercise of countervailing power has diminished the volume, variety or quality of titles published. Instead, to date Amazon has used its buyer power to produce lower prices and better services for consumers.

But there is reason to fear that Amazon's power may cause consumer harm in the future. Its market shares, already large, are likely to grow as Barnes & Noble struggles and Amazon relentlessly pursues lower costs and greater volume. As Amazon expands, moreover, its demands may escalate, reducing the profits of publishers and the advances of authors. Franklin Foer warns that author advances are "the economic pillar on which quality books rest."[6] Paul Krugman agrees: "By putting the squeeze on publishers, Amazon is ultimately hurting authors and readers."[7]

In short, there is reason to be concerned that buyer power may harm competition upstream and injure both vulnerable suppliers and consumers.

B. Harm to Downstream Competition

By inducing suppliers to discriminate in its favor, a large buyer can also reduce rivalry in the downstream sale of its products or services, harming consumer welfare and economic efficiency. Like upstream harm, these adverse effects can occur in at least five different settings: (1) the large buyer may induce its suppliers to raise its rivals' costs, enabling it to increase prices or otherwise exploit consumers in downstream markets; (2) the buyer may extract price cuts or other concessions from its suppliers, who may react to the decline in their profits by increasing prices to the large buyer's rivals, allowing it to raise its prices or otherwise harm consumers; (3) the buyer may obtain discriminatory concessions that are so large and long-lasting that they enable it to drive out or greatly diminish the market share of smaller rivals, increasing downstream concentration and making tacit or explicit collusion more likely; (4) even if downstream prices never rise as a result of the elimination of the buyer's rivals, their destruction may deprive consumers of choices they preferred and depress overall consumer welfare; and (5) the discriminatory concessions induced by the buyer may permit it to become less efficient, less dynamic, and less responsive to changing consumer preferences.

The first scenario occurred in Toys "R" Us,[8] where the nation's largest toy retailer induced leading toy manufacturers to refuse to sell popular models to Costco and Sam's Club, then a new and rapidly growing threat to established retailers. By raising the costs of these emerging rivals, Toys "R" Us curtailed their growth and deprived consumers of the option to purchase desirable toys at warehouse club prices. Had the big retailer simply forced the toy makers to charge higher prices to the warehouse clubs — without horizontal or vertical collusion — the Sherman Act would not have been available. A reformed Robinson-Patman Act, however, would have provided a remedy.

The second scenario — what Dobson and Inderst have called the "waterbed effect"[9] — may have taken place during the bookstore wars of the 1990s and early 2000s, when Barnes & Noble and Borders, then the nation's leading bookstore chains, obtained substantial price

4 See John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. Miami L. Rev. 1, 102 (2014).

5 See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013), aff'd, 791 F.3d 290 (2d Cir. 2015).

6 Franklin Foer, *Amazon Must Be Stopped*, New Republic, Oct. 10, 2014.

7 Paul Krugman, *Amazon's Monopsony is Not O.K.*, N.Y. Times, Oct. 20, 2014.

8 See *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

9 See Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 Wis. L. Rev. 331, 333 (explaining that a "waterbed effect" arises when "better supply terms for powerful buyers [lead] to a worsening of the terms of supply for smaller or otherwise-less-powerful buyers").

and promotional concessions from book publishers.[10] In response, the publishers reportedly increased the average list price of their books,[11] causing prices at independent bookstores (who typically sell books at list) to rise. This also made it easier for Borders and Barnes & Noble to raise their own retail prices.

The bookstore wars also exemplified the third scenario. Armed with substantial discriminatory advantages, the national chains gained market share at the expense of independent bookstores, driving literally thousands of them out of business. With independents weakened, retail markets concentrating, and publishers raising list prices, the national chains reduced the discounts they offered consumers.[12] The American Booksellers Association summarized the effect: "Rising list prices combined with disappearing discounts to consumers has meant that the chains have actually ultimately driven higher prices to consumers."[13]

The destruction of thousands of independent bookstores may also have led to the fourth scenario, in which consumer welfare falls, even though prices remain low, because consumers lose the ability to shop at outlets they value highly. An even better illustration of this scenario is the devastating impact that Wal-Mart's entry has had on many local retailers, which has hollowed out the centers of numerous small towns and left them blighted and vacant.[14] Concern over this effect has caused almost three dozen local jurisdictions to vote to prohibit the entry of Wal-Mart (or other big box stores) into their communities.[15] These votes suggest that consumers in these areas valued the preservation of a vibrant community center more than they valued Wal-Mart's low prices.

In sum, the inducement of discriminatory terms by powerful buyers like Amazon, Barnes & Noble, and Walmart has frequently led to the destruction or weakening of smaller competitors. In some instances, the result was higher retail prices. More often, retail prices remained low, but consumers lost the ability to choose among a wide and diverse array of small businesses. This reduction in consumer choice may have outweighed the benefits provided by the powerful buyers' low prices. At a minimum, the historical record suggests that there is a significant risk that buyer-driven price and promotional discrimination may harm not only upstream suppliers but downstream consumers as well. When that is the case, a reformed Robinson-Patman Act would provide a remedy. The other antitrust laws, however, are unlikely to be a reliable bulwark against this injury.

III. OTHER ANTITRUST LAWS UNLIKELY TO FILL THE GAP

The Sherman Act and the FTC Act are not protectionist statutes. Their goal is to prevent anticompetitive conduct that harms consumers, not insulate small business from competition.[16] But despite their purpose and their breadth, these statutes rarely halt anticompetitive discrimination induced by a powerful buyer like Walmart or Amazon. On the contrary, many courts have stated that the Sherman Act does not apply to buyer-driven discrimination, and the FTC has shown no interest in challenging such discrimination for almost forty years.

A. Sherman Act

Section 1 of the Sherman Act prohibits agreements in restraint of trade. In theory, that prohibition would reach a discriminatory price cut induced by a powerful buyer that is likely to harm competition upstream or downstream. The discriminatory price would be embodied in an agreement — the contract of sale between the supplier and the buyer — and if the discrimination was likely to harm competition, the agree-

10 See Bruce V. Spiva, Comments Of The American Booksellers Association To The Antitrust Modernization Commission Robinson-Patman Act Panel 4–10 (2005).

11 See *id.* at 15 ("[I]n response to the chains' demands for ever larger discounts, publishers have gradually raised the average list prices of new books, particularly hardcovers, in order to maintain their own profitability.").

12 See *id.* at 14–15 (citing David D. Kirkpatrick, *Quietly, Booksellers Are Putting an End to the Discount Era*, N.Y. Times, Oct. 9, 2000).

13 *Id.* at 15.

14 See e.g. Robert B. Reich, *Don't Blame Wal-Mart*, N.Y. Times, Feb. 28, 2005, at A1 (declaring that Wal-Mart turns "main streets into ghost towns by sucking business away from small retailers."); Peter Applebome, *Who Killed This Little Bookstore? There Are Enough Suspects to Go Around*, N.Y. Times, Mar. 22, 2009, at A24 ("A store shutting down these days isn't exactly startling news. You drive around any suburban downtown these days, and you see the yawning, empty storefronts; ghosts of better days."

15 See *Store Size Caps*, Inst. For Local Self-Reliance (Mar. 15, 2012) (identifying twenty-eight cities and five counties that have "enacted zoning rules that prohibit stores over a certain size"). In addition, community protests have stopped Wal-Mart from opening hundreds of stores. See Paul Ingram, Lori Qingyuan Yue, & Hayagreeva Rao, *Trouble in Store: Probes, Protests, and Store Openings by Wal-Mart, 1998–2007*, 116 Am. J. Soc. 53, 53 (2010) ("[T]he principal obstacle to the expansion of Wal-Mart has been protests by local activists. During the period starting from 1998 and ending in 2005, Wal-Mart floated 1,599 proposals to open new stores. Wal-Mart successfully opened 1,040 stores. Protests arose on 563 occasions, and in 65% of the cases in which protests arose, Wal-Mart did not open a store.").

16 The Sherman Act and FTC Act also protect suppliers when the case challenges anticompetitive conduct that creates monopsony power.

ment would restrain trade. There are many reasons, however, why section 1 would not be an adequate safeguard against anticompetitive discrimination.

First, the courts have never upheld its use for this purpose. Section 1 clearly reaches a conspiracy of competing buyers to force a supplier to engage in price discrimination. But if the discriminatory price is contained in a purely vertical contract between the supplier and the buyer, and that contract does not require the supplier to discriminate against other buyers — the price in the contract is simply lower than the price charged competing buyers — the courts have been very reluctant to find a violation. Indeed, no case has ever held that a vertical, non-exclusionary contract containing a discriminatory price offends section 1.

Some decisions have implied that such a contract could never offend section 1. A Tenth Circuit opinion declared, "We do not think section one of the Sherman Act requires the manufacturer to offer the same price to all its customers."[17] A Ninth Circuit decision stated that "the courts have held that such an agreement, without proof of an arrangement to exclude others from the buyer's market does not give rise to a section 1 claim."[18] A Third Circuit panel, after noting that "price discrimination simpliciter ... is usually not a Sherman Act violation,"[19] suggested that a violation could be found only if the discrimination had been induced by a group of conspiring dealers.[20]

Second, courts have argued that price discrimination should rarely, if ever, be challenged. For example, then-Judge Breyer declared for the First Circuit: "If suppliers must cut prices to all competing dealers or to none, if they cannot decide to favor a single dealer, ... they may well decide not to cut prices at all, perhaps to the benefit of the dealers, but certainly to the detriment of the Sherman Act's ultimate beneficiary, the consumer."[21] For this reason, several other courts have declared that price discrimination furthers the aims of the Sherman Act.[22]

Finally, some courts have stated that section 1 does not bar discriminatory price cuts offered to meet competition. In Zoslaw, a Ninth Circuit panel stated that "the Sherman Act is intended to encourage ... competition between sellers," and thus, if sellers are competing for the business of a large buyer, section 1 does not apply.[23] In *AAA Liquors*, the Tenth Circuit noted that Congress created defenses for meeting competition, cost justification, and changing conditions in the Robinson-Patman Act. This shows, the court declared, that "Congress considered price discrimination to be reasonable in at least these circumstances."[24] If this means that a discriminatory price cannot be an unreasonable restraint if it was granted to meet competition, it would largely eliminate Sherman Act enforcement, since large buyers commonly induce preferential benefits by forcing suppliers to compete for the buyer's business.

B. FTC Act

Like section 1 of the Sherman Act, section 5 of the FTC Act is broad enough to reach many categories of buyer-induced price discrimination. Over forty years ago, the FTC successfully established that buyers who induce discriminatory promotional benefits engage in unfair methods of competition.[25] But like section 1, section 5 is unlikely to serve as a solid bulwark again anticompetitive buyer-driven discrimination.

In the first place, the FTC may refuse to pursue any concessions given to meet competition, which would remove most buyer-induced discrimination from challenge. In addition, the Commission may refuse to pursue price discrimination on the ground that it is generally procompetitive. This attitude has increasingly typified the agency's approach to Robinson-Patman enforcement, which has now withered to the point of non-existence. Its last Robinson-Patman case was filed twenty-two years ago, and it was targeted at exclusionary behavior by a seller, not

17 *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982).

18 *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 886 (9th Cir. 1982).

19 *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 248 (3d Cir. 1999).

20 *Id.* at 249. There are exceptions. See e.g. *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989) (Breyer, J.) (indicating that a violation of the Robinson-Patman Act could constitute a Sherman Act offense if the plaintiff demonstrated injury to competition, not just injury to competitors).

21 *Monahan's Marine*, 866 F.2d at 527-28.

22 See e.g. *Zoslaw*, 693 F2d at 886 ("[T]he Supreme Court has recognized that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act").

23 *Id.* at 885.

24 *AAA Liquors*, 705 F.2d at 2107 n.5.

25 See e.g. *Grand Union Co. v. F.T.C.*, 300 F.2d 92 (2d Cir. 1962).

discrimination induced by a powerful buyer.[26] The last time the Commission attacked buyer-driven price discrimination was in 1988, when it sued six publishers for favoring Barnes & Noble and Borders over independent bookstores. It eventually dismissed all six cases, however, without obtaining relief.[27] Even if the Commission were willing to sue, the deterrence effect of a section 5 action is modest, since it does not result in treble damages, fines, or attorneys' fees. And neither the Justice Department nor private parties can enforce section 5, further diminishing its deterrent effect.[28]

In short, if the Robinson-Patman Act were repealed, it would be risky to rely on the other antitrust laws to stop anticompetitive buyer-driven discrimination. While some cases might proceed, many would not because of concerns about discouraging procompetitive discrimination and inhibiting meeting competition. If Congress wants to prevent protectionist Robinson-Patman enforcement, but preserve a weapon against harmful buyer-driven discrimination, it should reform, not repeal, the statute.

IV. REFORMS

Congress should make three principal changes to the Clayton Act: the competitive injury language added by the Robinson-Patman Act should be removed, the meeting competition defense should be eliminated in certain actions, and the cost justification defense should be similarly restricted.

A. Competitive Injury

Section 2 of the Clayton Act has three effects tests. Price discrimination may be illegal if the "effect of such discrimination may be" (1) "substantially to lessen competition"; or (2) to "tend to create a monopoly"; or (3) "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[29] The third test was added by the Robinson-Patman Act, and it is this test that allows section 2 to be enforced in a protectionist manner. Unlike the first two tests, which require an impact on market wide competition, the third is satisfied simply by showing that the challenged discrimination made it harder for the disfavored customer to compete with the favored customer. Eliminating the third test would harmonize the Robinson-Patman Act with the other antitrust laws by making harm to competition, rather than injury to a competitor, the ultimate test of liability. It would mean, in the ordinary Robinson-Patman case, that a violation could be established only by showing that the challenged discrimination threatened to harm consumers.[30]

B. Meeting Competition Defense

The rationale of the meeting competition defense is understandable. When a large buyer tells a supplier that it will lose the buyer's business unless it meets the price a competing supplier has offered, the supplier often has no choice but to comply. But the meeting competition defense is another example of the Act's protectionism. In this instance, the protected party is a supplier, not a small competitor of a large buyer, but it is protectionist, nonetheless. It insulates discrimination from Robinson-Patman attack even if the discrimination reduces market-wide competition and consumer welfare.

To control harmful buyer power more effectively, therefore, the meeting competition defense needs to be cut back. It does not make sense to eliminate it entirely. There are legitimate reasons to protect a supplier from treble damages and attorneys' fees when a large buyer demands that it meet a competitor's offer. If the demand is credible, the supplier faces a significant loss of business if it does not match the competitor's offer. And it cannot realistically predict, during a time-sensitive negotiation, whether the concession is more likely to reduce rather than promote competition. It would be unfair, therefore, to penalize a supplier with treble damages and attorneys' fees if it decides it has to meet competition and the concession turns out to diminish competition.

26 See *McCormick & Co.*, FTC Dkt. No. C-3939 (Apr. 27, 2000).

27 See e.g. *Harper & Row Publishers, Inc.*, 122 F.T.C. 113 (1996).

28 The FTC's recent policy statement on the scope of Section 5 identifies price and promotional discrimination as practices that may constitute unfair methods of competition, but does not suggest that these practices have any enforcement priority. The statement identifies many practices that may violate Section 5. See Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

29 15 U.S.C. § 13(a).

30 In two kinds of cases, described in the third and fourth scenarios in Part II.A, a violation could be shown by demonstrating threatened harm to suppliers without market power. In both scenarios, the suppliers are injured by the exercise of monopsony power.

To avoid this unfairness, the meeting competition defense could be eliminated only in purely equitable actions. In other words, if a supplier establishes the defense, it would not be exposed to treble damages or attorneys' fees. This approach has a significant drawback, however; without the prospect of treble damages or attorneys' fees, the incentive of private plaintiffs to bring Robinson-Patman actions would be sharply reduced. One alternative is to allow the recovery of attorneys' fees but not damages where the plaintiff demonstrates harm to competition and the defendant establishes the meeting competition defense. But whatever approach is chosen, it is essential to curtail the meeting competition defense. Otherwise, the Robinson-Patman Act will remain a largely ineffective instrument for combatting buyer-induced discrimination.

C. Cost Justification Defense

Whatever option is chosen for the meeting competition defense, the cost justification defense should be treated similarly. While the cost justification defense frequently fails, as Professor Hovenkamp has documented, it "has been accepted numerous times."[31] And when it is accepted, it could insulate anticompetitive buyer-driven discrimination from attack.

V. CONCLUSION

Critics have condemned the Robinson-Patman Act for decades because its goal is to protect small competitors from discrimination induced by large buyers, even when that discrimination benefits consumers, as it frequently does. The Act also fails to stop the worst forms of buyer-driven discrimination. For example, when powerful buyers induce discriminatory prices that drive out so many smaller rivals that the buyers can raise prices to consumers, the buyers are typically entitled to the meeting competition defense, which insulates them from liability even though consumers are injured.

These two flaws can be eliminated by requiring plaintiffs to show harm to competition, not just individual competitors, and by severely curtailing the Act's meeting competition and cost justification defenses. These reforms would rehabilitate the Robinson-Patman Act, turning it into a statute whose goals are identical to those of the other antitrust laws. More importantly, the reforms would enable the FTC and private plaintiffs to halt powerful buyers like Amazon and Wal-Mart when they induce discriminatory concessions that are likely to hurt consumers or vulnerable suppliers.

31 Herbert Hovenkamp, Antitrust Law 174 n.8 (3d ed. 2012).

THE ROBINSON-PATMAN ACT: EVERYONE OLD IS NEW AGAIN

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The Biden Administration's antitrust enforcement leaders, the Federal Trade Commission's Lina Khan, and the Antitrust Division of the Department of Justice's Jonathan Kanter, have announced themselves as aggressive, policy-driven, outcome-determinative antitrust enforcers. This is consistent with the Biden's administration's preferences. But these preferences are prompted by a confluence of realities.

· First, the almost unchecked growth of the e-commerce, tech, and digital sectors, including their domination in the everyday lives of most Americans. The public's dissatisfaction big tech data breaches, price increases, and disruption of traditional socialization, are causes for genuine concern.
· Second, the FTC and DOJ have for many years been conservative in their court case selection, preferring to compromise via consent degrees and settlements, letting most major tech combinations go through with minimal changes.
· Third, the agencies' conservatism reflects, in pertinent part, the pro-business common law established by federal courts over the past few decades, and Chicago School tenets that razed Brandesian principles.
· Fourth, the comparatively more potent EU antitrust regulatory regime, has underscored the relative weakness of U.S. antitrust enforcement.
· Finally, certain U.S. states are moving to pass more aggressive antitrust laws in response to perceived weakness in the federal regime. And so the FTC and DOJ are looking for new ways to win. Even if that means reviving older, mostly forgotten laws like the Robinson-Patman Act. In this sense, the old may well be "new." At least to the current crop of antitrust agency staff, practitioners, and businesspeople.

I. OVERVIEW AND HISTORY OF THE ROBINSON-PATMAN ACT

The Robinson-Patman Act ("RPA"), also called the Anti-Price Discrimination Act, was enacted in 1936 as an amendment to the Clayton Act. Its purpose was to protect small businesses from being driven out of the marketplace, and also to protect wholesalers from being excluded from the purchasing chain. Its core feature is the prohibition of price discrimination by sellers among purchasers of commodities. The impetus for the act was the growth of large grocery chains that essentially eliminated the middleman wholesalers used by smaller grocery firm competitors. This enabled large firms such as A&P to buy goods directly from sellers in large quantities, and negotiate a discount for bulk-purchases, unavailable to smaller retailers. The sheer size of the chain stores enabled them to command discounts even when the discounts were unrelated to lower production and distribution costs. Smaller competitors that could not match the price were driven out of business. At the time, chain stores accounted for one in every ten physical stores, and one in five dollars' worth of merchandise sold.[2] Between 1920 and 1930, the top twenty chain stores grew by more than 250 percent.[3] In keeping with the prevailing antitrust policy at the time, the Robinson-Patman Act sought to aid smaller businesses to compete with larger retailers. The Act has been referred to as the "Magna Carta of small businesses."[4]

The central provision of the act, Section 2(a) makes it unlawful "for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality" when the effect may be to injure competition at either the seller or customer levels.[5] Such price discrimination is expressly permitted, however, when it is justified by cost savings, the need to meet a competitor's equally low price, or changing conditions.[6] Certain jurisdictional elements are required to establish a price discrimination claim under the RPA: the defendant seller must have made: (1) at least two consummated sales, (2) of commodities, (3) of like grade and quality, (4) at discriminatory prices, (5) by the same seller, (6) to different purchasers, (6) that occurred contemporaneously or within the same approximate period, and (7) that occurred "in commerce."[7]

Price discrimination claims under section 2(a) involve allegations of either primary-line or secondary-line injury. Primary line cases involve competitors of the seller and secondary line cases involve competitors of the favored purchasers who buy from the seller.

2 4 The Legislative History of the Federal Antitrust Laws and Related Statutes at 2958 (Earl W. Kintner ed., 1980)

3 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 Bull. 279, 282 (2015) (citing Godfrey Lebhar, *Chain Stores in America*, 1859–1962, at 55–56 (1958) (noting that the top twenty chains grew by more than 250 percent— from 9,912 to 37,524 stores—between 1920 and 1930)).

4 Earl W. Kintner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 ANTITRUST BULL. 571, 571 (1986).

5 Section 2(a), codified at 15 U.S.C. § 13(a).

6 *Id.*

7 See Hugh C. Hansen, *Robinson- Patman Law: A Review and Analysis*, 51 Fordham L. Review 1113, 1125029 (1983) (discussing jurisdictional elements with case citations).

In one of the early Supreme Court cases construing the Robinson-Patman Act, FTC v. Morton Salt Co.,[8] the court identified the competitive injury contemplated by RPA as injury to the *"competitor victimized by discrimination,"*[9] highlighting the protectionist nature of the RPA in contrast to other antitrust laws concerned only within injury to *competition*. The Court went on to establish a "self-evident" inference of injury to competition in cases in which the difference in price is substantial or "sufficient in amount to influence . . . resale prices." Later cases have referred to this *Morton Salt* rule as one in which "injury to competition is established *prima facie* by proof of a substantial price discrimination . . . over time."[10]

In the 1980s and early 1990s, the Supreme Court ruled on several Robinson-Patman Act cases, which collectively made it harder for a price discrimination claim to succeed.[11] The expansion of affirmative defenses included cost justification (the lower price is justified by the different costs faced by the seller), functional availability (the lower price would have been available to competing purchasers), changing conditions (the price was lowered in response to changes in the market, such as seasonal nature of goods) and meeting competition (the price was lowered in good faith to meet — but not undersell — a competitor's lower price).

Over time, the "injury to competitor" feature of the RPA was given less prominence, as jurisprudence heightened the standard for competitive injury, sometimes apparently requiring injury to competition (and not just to competitors). For example, in 1993, in *Brooke Group Ltd v. Brown & Williamson Tobacco Corp*, the Court instructed that the Act be construed "consistently with broader policies of the antitrust laws" and wrote that the Act prohibits "price discrimination only to the extent that it threatens to injure competition."[12]

In 2006, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[13] the Court again tightened the competitive injury required for RPA liability, and ruled that the requirement was not met where Volvo gave smaller concessions to the Plaintiff (Reeder) than to other car dealers for *different sales*. Only direct "head-to-head" competition for the same customers (or sales) could support an RPA violation, but because the evidence in the case showed the loss of only one such sale, it was insufficient to establish competitive injury.

While the *Volvo* court heightened the standard by conducting this transaction-specific analysis and discounting similar sales which were not head-to-head, the decision still reaffirmed the central holding of *Morton Salt*, that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price deduction over a substantial period of time.[14]

II. FROM PROTECTING THE SMALL BUSINESS TO PROTECTING THE CONSUMER

Federal Trade Commission ("FTC") enforcement of RPA peaked in the 1960s, when it brought more than 500 cases. But the tide turned as antitrust analysis shifted to protection of competition, rather than protection of competitors.[15] While the concern that animated the RPA was survival of the mom-and-pop shop, the focus of most other laws, and the trend in antitrust analysis has sought to protect market efficiencies and procompetitive behavior, even at the expense of (inefficient) mom-and-pop market participants. Efficiency gained ground as the goal of antitrust law. In the consumerist view of society, low prices were almost always beneficial, and protection of producers and small businesses fell out of favor.

In a 1977 report, the DOJ described the RPA as reflecting "questionable economic assumptions prevalent in the 1930s," and stopped RPA enforcement actions. The FTC followed suit and FTC actions waned over the years. The FTC has not brought an RPA price discrimination suit in over 20 years.[16]

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8 334 U.S. 37 (1948).

9 *Id.* at 49-51 (emphasis added).

10 *Falls City Indus. v. Vanco Beverage*, 460 U.S. 428, 435 (1983).

11 See *Brooke Group Ltd. v. Brown & Williamson*, 509 U.S. 209 (1993); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); Falls City, 460 U.S. 428 (1983); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979).

12 *Brooke Group*, 460 U.S. at 420.

13 546 U.S. 164 (2006).

14 *Id.* at 177 ("A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser… We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.")

15 See, e.g. *Brooke Group*, 509 U.S. at 224 ("It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.") (internal citations omitted).

16 Prepared Remarks of Commissioner Alvaro M. Bedoya Federal Trade Commission, September 22, 2022 available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

In 1998, the Secretary of the Federal Trade Commission[17] discussed interpretation of the Act against the backdrop of the objectives of "consumer welfare and economic efficiency," pointing to Supreme Court language in *Brooke Group* urging interpretation consistent with "broader policies of the antitrust laws."[18] Thus, he concluded, "the best way to effectuate this objective is to interpret the Act so as to emphasize the prohibition of discriminatory practices that injure or threaten to injure competition."

As a result of this shift, FTC actions waned and ultimately stopped —In addition, in recent years, the FTC has supported narrower construction of the RPA in private cases.[19]

III. A NEW SHERIFF IN TOWN

The Biden administration has demonstrated a renewed interest in vigorous antitrust enforcement, calling for a review of all enforcement tools, including statutes that have fallen into disuse by the enforcement agencies, among them the RPA.[20]

FTC Commissioner Alvaro Bedoya recently called for renewed enforcement of the RPA. In prepared remarks, he called for a return to "fairness," rather than "efficiency" as the lodestar of antitrust law:[21]

> If efficiency is so important in antitrust, then why doesn't that word, "efficiency," appear anywhere in the antitrust statutes that Congress actually wrote and passed?
>
> If efficiency is the goal of antitrust, then why am I charged by statute with stopping unfair methods of competition, and not "inefficient" ones?
>
> We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness…
>
> Certain laws that were clearly passed under what you could call a fairness mandate –laws like Robinson-Patman – directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.

IV. POTENTIAL RPA CLAIMS AGAINST RETAIL GIANTS

With no enforcement of the RPA for decades, giant e-retailer market players were permitted to grow unchecked, by demanding discounts and forcing suppliers to guarantee their margins.[22] E-Commerce giants like Amazon, Walmart and Target use their scale to command more favorable supply terms and lower pricing. It is common for these firms to use their purchasing clout to extract discounts from suppliers, unavailable to their smaller rivals, squeezing the suppliers and eliminating small businesses.[23] The situation is not all that different than it was in the 1920s and 1930s when chain grocery stores used their power to exploit suppliers and win market share. In essence it is the exact situation — arguably on a larger scale —that the Robinson-Patman Act was designed to combat.

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17 See Donald S. Clark, Secretary of the Commission, *The Robinson-Patman Act: Annual Update*, April 2, 1998.

18 *Brooke Group*, 460 U.S. at 420.

19 See e.g. *Brief of Amicus Curiae The Federal Trade Commission, Woodman's Food Market, Inc. v. The Clorox Co.*, No. 14-cv-00734-slc, available at https://www.ftc.gov/system/files/documents/amicus_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf.

20 See *Executive Order on Promoting Competition in the American Economy*, July 9, 2021, which mentions the RPA by name.

21 See Alvaro M Bedoya, *Returning to Fairness*, prepared remarks of FTC commissioner Alvaro M Bedoya, September 22, 2022 available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

22 See Brian Callaci and Sandeep Vaheesan, *How and Old U.S. Antitrust Law Could Foster a Fairer Retail Sector*, Harvard; Business Review, Feb. 9, 2022.

23 See *id.*, describing how the squeeze is felt throughout the supply chain. For example, in 2003, Carolina Mills, a North Carolina textile company, blamed its collapse on Walmart squeezing the apparel manufacturers it had supplied with thread, yarn, and textile finishing. Amazon, for its part, has flexed its buyer power to squeeze suppliers. For example, its "Gazelle Project" targeted the smallest and weakest book publishers for the toughest price squeeze.

With growing concern about e-commerce giants, ranging from causing wage stagnation and labor abuses, poor working conditions at various stages in the supply chain, to locking consumers into an ecosystem of products and services and leveraging market power in one line of business to gaining monopolies in others, there are currently several ambitious proposals making their way through Congress. The RPA has been identified as one underused tool that could help rein in e-retailers such as Amazon and Walmart. But would it be successful?

Section 2(a) of the RPA is worded to prohibit a party from discriminating in price between different purchasers of commodities — this targets the supplier who offers price differentials. However, Section 2(f) imposes liability on favored buyers when the "knowingly…induce or receive a discrimination in price which is prohibited," putting the giant e-retailers squarely within the RPA's reach as favored buyers who induce price discrimination in a second-line form of antitrust claim.

A. The Prima Facie Case

Most of the jurisdictional requirements of a prime facie case discussed above would easily be met, except that enforcement might be limited to certain types of sales or certain goods. For example, one requirement is the showing of "two sales" — one at a higher price and one at a lower price — to competing retailers. In Volvo, the Supreme Court addressed a competitive bidding scenario. The Court raised but did not answer the question of the RPA's applicability to markets characterized by competitive bidding and special-order sales, as opposed to traditional sales from inventory.[24] Certain aspects of Amazon or Walmart's business, especially in the digital market, may be deemed not to satisfy this requirement, but most sales would fall under the RPA's ambit.

Establishing competitive injury may be a pressure point in any enforcement action against retail giants. To establish a prima facie violation of §2(a), one of the elements a plaintiff must show is a reasonable possibility that a price difference *may* harm competition. Notably, § 2(a) "does not require that the discriminations must in fact have harmed competition."[25]

Direct evidence of sales or profits diverted from a disfavored purchaser is one way to establish the competitive harm requirement.[26] However, this type of evidence is harder to marshal. It would require identifying customers who did not purchase a product from an Amazon or Walmart-competitor because of Amazon or Walmart's lower price, or some other proof of lost sales to those favored purchasers.

The other avenue to competitive injury is via the *Morton Salt* presumption, where indirect evidence of a prolonged and substantial difference in price between competing purchasers could also establish a rebuttable presumption that competition has been injured:[27] "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time."[28] Volvo adds the requirement that the "competition" must be head-to-head for the same customer.[29]

Courts have sometimes looked to 16 C.F.R. § 240.5 for guidance on what constitutes "competing purchasers" for purposes of the *Morton Salt presumption*.[30] That regulation defines "competing customers" as "all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary." For example, in *Lewis v. Phillip Morris*, the Court of Appeals for the Sixth Circuit addressed the parties' dispute over whether vending machines distributing cigarettes competed at the same functional level of distribution as convenience stores selling the same. The Court ruled that while a cross-price elasticity study is not necessary to show competition, there must be some evidence of purchaser overlap.[31] While the argument that brick-and-mortar stores do not compete at the same functional level of distribution as giant e-retailers is conceivable, it would likely be rejected in the face of evidence of some consumer overlap. This is even more so for online retailers, where the comparison price shopping online is common and easily demonstrable.

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24 546 U.S. at 180 ("Volvo and the United States argue [that] the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. We need not decide that question today.").

25 *Falls City*, 460 U.S. at 435, citing *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945).

26 *Volvo*, 546 U.S. at 177.

27 *Id.*, citing Morton Salt at 49-51.

28 *Falls City,* 460 U.S. 428, 435 (1983).

29 546 U.S. at 179-180.

30 See e.g. *Lewis v. Philip Morris, Inc.*, 355 F.3d 515, 531 (6th Cir. 2004).

31 *Id.*

While this analysis holds for Amazon's retail, first-party seller business, Amazon's third-party marketplace line of business would likely fail this requirement. Under Amazon's third-party seller program, independent sellers sell directly to Amazon shoppers, and Amazon acts as an intermediary, charging commissions for sales. In this context, because Amazon is not acting as a retailer, but rather as a platform for other vendors to sell directly to consumers, Amazon would not likely be deemed a "competing purchaser," or even a purchaser at all.[32]

Next, to establish the *Morton Salt* presumption, evidence must establish that the favored buyer received "prolonged and substantially better pricing."[33] Neither the "prolonged" nor the "substantially better" prongs have been quantified into a precedential standard. Applications of the presumption to particular circumstances "does not depend on the large or small amount of the price discrimination *per se*. It depends on the large or small effect that the price discrimination has on business rivalry."[34] That said, any price reduction amounting to over five percent of the purchase price probably will be considered a significant or substantial discrimination.[35] But even smaller price differentials (as little as 2.3 percent over eleven months) can be sufficient in highly competitive and price-sensitive market with low profit margins.[36] The "prolonged" or "over time" requirement has been found met in as little as eleven months.[37]

The RPA claim would require evidence of sustained price differentials for a particular product on the wholesale level, where Amazon or Walmart paid a "substantially" lower price for a "prolonged" period of time. Studies comparing item-level price competition across the U.S. online retail industry shows a 2022 average price advantage across all categories of 13 percent for Amazon, 6 percent for Walmart, and 15 percent for Target.[38] Historically, Amazon's average retail price advantage was even higher — 16 percent in 2020, and 14 percent in 2021. While these are percentage differences in *retail* prices, and not the percentage difference in *supplier/wholesale prices* relevant to an RPA analysis, the numbers are still instructive as to the differential discounts e-commerce giants may be receiving. It may be an evidentiary challenge to obtain sufficient data of supplier pricing in order to survive dismissal before that data may be obtained via discovery.

This analysis is premised on the continuing viability of the *Morton Salt* presumption to establish competitive injury. It is probably safe to assume that a Court would apply the presumption, especially in light of the Supreme Court's 2006 affirming this central holding in *Volvo*. In particular, the *Volvo* Court did not require harm to *competition*, as it had previously hinted a decade earlier in *Brooke Group*. Thus, even if a wholesaler's discrimination has an overall effect of lowering prices for end consumers (which is the case with Amazon and Walmart as retailers), an RPA claim might still succeed.

However, any RPA enforcement action against a e-retail giant will likely bring this decades-long debate into focus, with the retailer giant arguing that consumer welfare is enhanced by low pricing, ease of access, convenient shipping, and other features that attract Amazon's 147 million U.S. annual subscribers.[39] In addition to the legislative history of the RPA and *Volvo's* affirmation of the *Morton Salt* doctrine, other counterarguments include other forms of consumer injury by eliminating smaller sellers, such as eliminating convenient locations, specialty stores, physical browsing opportunities, which also contribute to consumer welfare.

B. Affirmative Defenses

Even if a prima facie case can be made, an RPA claim will not be an easy win. Two significant affirmative defenses might defeat the claim: cost justification and meeting competition.

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32 See *Furniture Royal, Inc. v. Schnadig Int'l Corp*, No. 2:18-CV-318 JCM (CWH), 2018 U.S. Dist. LEXIS 210108, at *5 (D. Nev. Dec. 13, 2018) (finding plaintiff brick-and-mortar store failed to state a Robinson-Patman claim against supplier who sold directly to consumers via wayfair.com, because the RPA is inapplicable to price discrimination between retailers and ultimate purchasers, as "retailers are not in competition with end-use consumers.")

33 *Morton Salt*, 334 U.S. at 49-51.

34 *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1428 n. 20 (11th Cir. 1990)

35 3 Von Kalinowski, *Antitrust Laws and Trade Regulation* § 39.02[3][d][i](2d ed. 1996). *See e.g., Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 679 (5th Cir.), cert. denied, 382 U.S. 959, 15 L. Ed. 2d 362, 86 S. Ct. 435 (1965) (an approximate five percent advantage was sufficient, even though resale prices were not affected). *See also Allied Sales & Serv. Co. v. Glob. Indus. Techs., Inc.*, No. 97-0017-CB-M, 2000 U.S. Dist. LEXIS 7774, at *37 (S.D. Ala. May 1, 2000) (finding a 5 percent differential to be sufficient).

36 *Mathew Enter. v. Chrysler Grp. LLC*, No. 13-cv-04236-BLF, 2016 U.S. Dist. LEXIS 108693, at *1 (N.D. Cal. Aug. 2, 2016)

37 *Id.* See also *Foremost Dairies v. FTC*, 348 F.2d at 679 (two years was sufficient); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 193 (1st Cir.), cert. denied, 519 U.S. 927, 136 L. Ed. 2d 214, 117 S. Ct. 294 (1996) (18 months was sufficient).

38 See profitero.com. Profitero's "Price War Study" has been conducted for the past 6 consecutive years, and compares everyday online prices on nearly 15,000 items in 15 categories across 13 leading retailers, including Amazon, Walmart, target, and specialists like Chewy, the Home Depot, Best Buy and Wayfair. Prices for the same items are collected within 24 hours of each other.

39 See https://www.businessofapps.com/data/amazon-statistics/.

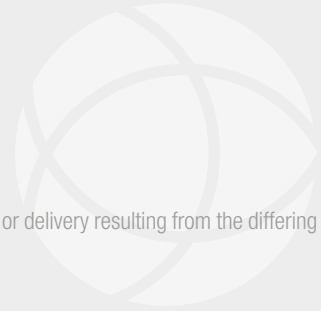
Per the statutory terms of the Robinson-Patman Act, if the favored purchaser can show cost justification for the price differential, then an RPA claim fails.[40] For example, cost differences resulting from freight and delivery, manufacturing, legal compliance, and methods of sale may justify the price discrimination.

The "meeting competition" defense, codified at 15 U.S.C. § 13(b), provides that a prima facie case may be rebutted "by showing that [the] lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." This defense requires "that the seller offer the lower price in good faith for the purpose of meeting the competitor's price, that is, the lower price must actually have been a good faith response to that competing low price."[41]

This defense may be specifically helpful to Amazon, in light of its third-party seller platform. For example, in any given product market, a wholesaler may be able to show that other sellers offer the product at a lower price on Amazon marketplace, and thus, it was forced to offer Amazon a lower price to induce it to purchase — just to meet the competition.

V. CONCLUSION

The contours of any antitrust litigation are driven by any number of variables. And so the analysis above is, of necessity, a thought exercise in the application of the RPA to Amazon. But the exercise is helpful in thinking about a possible revival of an Act passed with the express intent of helping "the little guy" competitor. This, in a current world where antitrust law continues to eschew the protection of any specific competitors and seeks to protect competition. In truth, however, it is not possible to protect competition, without simultaneously preferring certain competitors over others. This fact is underscored by the original purpose of the RPA. This tenet has been operative in antitrust policies for many years. By way of example, when the FTC or DOJ order a divestiture as a condition of permitting a merger to go forward, the agencies must approve the buyer. The approved buyer is almost always a competitor of the to-be-merged entities, and its purchase is almost always premised on its strength as a competitor. The divestiture seeks to preserve competition, but this is accomplished by preferring one competitor over all others in the market. The RPA may provide one avenue to level the playing field for all competitors.



40 "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a)

41 *Falls City*, 460 U.S. 428, at 445–46.

ROBINSON-PATMAN ASCENDANT?

BY DAVID MUNKITTRICK & COLIN KASS[1]

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Six years ago, we filed a brief in federal court with this opening: "You pay a lower price if you buy more stuff. It is as American as apple pie and drives the nation's economy." It was true then, and it remains true today. It almost goes without saying that Walmart gets the best prices, which are then passed on to customers in the store. You go to Walmart for deals because Walmart gets deals.

But this wasn't always the prevailing American view. In the depths of the Great Depression, a distrust of competition festered, as well as an animosity to big business: primarily, the big chain stores of the day. Enter the Robinson-Patman Act ("RPA"). First titled the "Wholesale Grocers Protection Act," it was originally proposed by a wholesale grocer seeking protection from competition. As Representative Patman would later testify, it was the Great Atlantic & Pacific Tea Company ("A&P") – the world's largest retailer at the time – at the heart of the concern. The RPA's primary provision directly attacked the notion that buying more should lead to a lower price, prohibiting discrimination "in price … of commodities of like grade and quality" that substantially lessens competition.[2]

The RPA has never been an object of praise. Rather, it has spent its nearly 90 years on the books the subject of befuddlement ("a dense undergrowth of confusion") and even outright ridicule ("the misshapen progeny of intolerable draftsmanship"). The DOJ hasn't touched it since the 1960s. The FTC, in contrast, dove in with gusto, leading to much of the defining RPA jurisprudence today. But by the 1980s, the FTC's fervor had waned, and it has not brought an RPA case in over 20 years. The country, it seemed, had moved on, from the RPA as well as from A&P. Competition, efficiency, and Walmart were ascendant.

Until this year, this was the story of the rise, fall, and languishment of the RPA. But the RPA could be entering a new chapter of prominence at the FTC. As FTC Commissioner Lina Khan recently said, "We're taking a fresh look at the Robinson-Patman [and] Robinson-Patman is absolutely going to be fair game." In this article, we pick up the story with the state of the RPA today, explore how the FTC might wield it going forward, and discuss whether the weight of the last 40 years of RPA jurisprudence might still keep the RPA down.

I. A BRIEF OVERVIEW OF THE ROBINSON-PATMAN ACT

While the RPA is most known for its prohibitions on price discrimination (§ 2(a) of the statute), the statute also prohibits commercial bribery (§ 2(c)). Both are potentially at play at the new FTC.

Section 2(a) provides:

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

The RPA engenders a lot of debate, but perhaps the most consequential is what constitutes harm to competition under § 2(a). The antitrust laws are supposed to protect competition, not competitors, but RPA supporters repeatedly cast it as a protectionist statute. Representative Patman, for instance, said "the law … is a bulwark of protection for … small entrepreneurs." Indeed, there was a time that, relying on the "injure … competition with any person" clause of the RPA, some courts found injury to a single competitor sufficient to establish injury to competition, making price discrimination tantamount to a per se antitrust violation. But the most recent Supreme Court RPA decision – *Volvo Trucks* – seemingly put that debate to rest.[3] There, the Court said it would "resist interpretation geared more to the protection of existing competitors than to the stimulation of competition."[4] Most cases today hold that an RPA plaintiff must show injury to competition, which generally means evidence of diverted sales from disfavored to favored purchasers.

Consider an incentive program – a near-ubiquitous tool used by manufacturers to incentivize retailers to promote and sell their products. *If you sell more of our products, we'll give you a better deal.* A retailer that doesn't sell quite enough to quality for the incentive might lose some money and be harmed, but absence diverted customers, there is no harm to competition. It is almost universally recognized that the competition to achieve the incentive (and lower prices to do so) is good for consumers and good for competition.

2 15 U.S.C. § 13.

3 *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

4 *Id.* at 169.

Section 2(c), however, has continued to follow the *per se* approach of the RPA. It makes it "unlawful … to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods…." It does not require proof of harm to competition, just proof of the payment.

II. A NEW FTC, A REVITALIZED RPA?

Since the 1980s, antitrust enforcement and jurisprudence has largely focused on consumer welfare: basically, the idea that if conduct does not result in lower prices for the consumer, it is not an antitrust violation. In 2015, the FTC formalized this in a policy statement that its Section 5 enforcement would be "guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare."[5]

Section 5 of the FTC declares unlawful "[u]nfair methods of competition … and unfair or deceptive acts or practices….."[6] Unfair competition is undefined, leaving its contours to the FTC. The FTC has been issuing increasingly strong signals that it views the RPA not just as an antitrust statute but as an unfair competition statute to once again protect small businesses from competition with the giant corporations of today. First, the FTC rescinded the 2015 policy statement on consumer welfare. And a few months ago, Commissioner Bedoya said the FTC is looking to "reactivate" the RPA. Chair Lina Khan confirmed it is once again "fair game" for the FTC. On November 10, 2022, the FTC issued a new statement on Section 5, to "supersede all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act." It included in its list of potential Section 5 claims, "price discrimination" and "commercial bribery."[7]

The FTC cited six cases for the inclusion of price discrimination, all Robinson-Patman Act cases, all from the 1960s, 70s, or 80s, and none from the Supreme Court.[8] Interestingly, none involve § 2(a) liability on a manufacturer. Instead, they are exclusively cases challenging efforts at the middle of the supply chain – the big box retailers – to extract payments and other benefits from suppliers. The FTC brought those actions under sections 2(d) and (e) of the RPA, which prohibit the discriminatory provision of, or payment for, services. But given the change in antitrust and RPA jurisprudence since the 80s, is Section 5 really the FTC's road to expanded enforcement against price discrimination? We discuss.

The Case for the FTC. True, today's Supreme Court is quite wary of regulatory power. Last year, it rolled back the FTC's authority to seek equitable monetary remedies such as disgorgement and restitution,[9] and in January 2022, it agreed to hear a case challenging the constitutionality of the FTC's administrative review procedures.[10] But when it comes to the scope of its Section 5 enforcement purview, the FTC has both text and history in its favor, two things the current Supreme Court majority cares about a great deal.

First, the text. Section 5 is undeniably broad and imbued with discretion: "unfair competition" is barred. If the FTC decides to go after a practice it believes is unfair, Section 5 would seem to give it the authority to do so, even if it is to protect small businesses *from* competition rather than protecting competition itself. This broad textual playground was not available when the FTC lost its equitable monetary remedies. There, the FTC Act conferred the power to issue a "permanent injunction." The FTC read that provision to also empower it to seek other kinds of equitable relief, including monetary equitable relief, but the Supreme Court found that was not supported by the text. Not so with "unfair competition." From the plain language alone, the FTC has a much better textual position for broad Section 5 authority than for monetary equitable remedies. That, coupled with courts' historical (and Supreme Court-mandated) deference to agency interpretations of their own statutes, should give the FTC good grounds to go after price discrimination under Section 5.

Second, history. The FTC might argue its Section 5 authority is not bound or limited by cases narrowing the RPA. But even if it faced the question of what Congress meant by "unfair competition" and whether it included price discrimination, it would have good arguments. As noted above, it is hardly arguable that Congress passed the RPA to address what it viewed at the time as an unfair method of competition that advantaged big box retailers over mom-and-pops. It can even argue – and has been arguing since Khan took the reins – that the concerns mo-

5 FTC Statement of Enforcement Principles Regarding *Unfair Methods of Competition* Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

6 15 U.S.C. § 45(a)(1).

7 FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

8 *Id.*

9 *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

10 *Axon Enter., Inc. v. Fed. Trade Comm'n*, 142 S. Ct. 895 (2022).

tivating the RPA were not anomalous to the RPA. No less an authority than Professor Herbert Hovenkamp – though he believes the RPA should be repealed – has noted that "a belief that the legislative history of the Robinson-Patman Act reveals that the statute was motivated by different concerns than the ones that inspired the Sherman and Clayton Acts generally … is false." He notes that the 1950 amendments Section 7 of the Clayton Act – the provision outlawing anticompetitive mergers – were concerned with avoiding "larger firms that could undersell smaller ones." "In sum, a great deal of revisionism has gone into our interpretations of the Sherman Act. … Mergers are tolerated today that would never have been accepted by the framers of the 1950 Celler-Kefauver amendments to Section 7."[11] The FTC can even point to a Supreme Court case: *Jefferson County Pharm. Ass'n v. Abbott Labs.*, in which Justice Powell noted, "There is no reason … to think that [Congress] intended to deny small businesses … protection from the competition of the strongest competitor of them all."[12]

But the FTC does not need to be against competition in order to pursue price discrimination as an unfair business practice rather than as an anticompetitive one. There is nothing wrong, it can say, with the desire to help and protect small businesses, because small businesses help bring vibrancy and vitality to the marketplace. Allowing price discrimination may favor competition at the manufacturer level, because it allows manufacturers to potentially sell more product. And it arguably doesn't hurt competition among competing retailers to *purchase* goods for resale. But it does arguably impede downstream competition when big box retailers use their leverage to prevent their rivals from obtaining goods at similar prices, effectively "raising the costs" for competing, smaller retailers. This can eventually lead to smaller rivals going out of business, allowing the big boxes to recoup whatever (small) concessions they had to make – if any – to get the manufacturer to discriminate in price.

The FTC also argues that competition is not just about the lowest prices, it is also about quality. Small retailers can bring a level of individuality and distinctiveness to service and sales that big chains simply cannot. As Justice Brandeis put it in 1933:

> There is a widespread belief … that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored … and … the moral and intellectual development which is essential to the maintenance of liberty.[13]

The FTC would argue those mom-and-pop benefits mean little if mom-and-pops cannot even maintain a toehold in the door because they can't get the same prices as their biggest competitors.

The Case for the Modern Status Quo. On the text, there is little chance the FTC can bring a so-called "stand-alone" Section 5 claim on price discrimination without grappling with the RPA and the cases interpreting it. The truth is, the RPA is where federal jurisprudence on price discrimination has developed. So if the FTC thinks Section 5 may be its ticket to avoid having to prove up harm to competition, it should think again. Courts have had nearly eight decades to consider what sort of price discrimination might be unfair and harmful to competition. In *Volvo Trucks* – the Supreme Court's latest word on the RPA – the Court wrote, "The Robinson-Patman Act signals no large departure from [antitrust law's] main concern" for "interbrand competition."[14] Further, "[W]e would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*."[15] Given this, it is difficult to see how the FTC could argue that a difference in price – even if it harms recipients of the higher price – is somehow "unfair" if it doesn't cause a diversion of customers, that is, harm to competition.

On history: History is worthy of study, but time is the greatest teacher. Stephen Hawking said, "We spend a great deal of time studying history, which, let's face it, is mostly the history of stupidity." And Pericles: "Time is the wisest counselor of all." Time has taught that vertical price restrictions are more often than not a good thing. It used to be that resale price maintenance was *per se* illegal. In recognizing the procompetitive benefits controlling from *where* distributors could sell products, the Supreme Court wrote in 1977, "[T]he state of the common law 400 or even 100 years ago is ***irrelevant*** to the issue before us: the effect of the antitrust laws upon vertical distribution restraints in the American economy

11 Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 125,132 (2000).

12 460 U.S. 150, 171 (1983).

13 *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).

14 546 U.S. at 180-81.

15 *Id.* at 181.

today."[16] Then, by 2007 the "economics literature [was] replete with procompetitive justifications for a manufacturer's use of resale price maintenance," and the Court overruled its prior cases treating RPM as *per se* illegal.[17] Time over history.

As noted, this process has already occurred with respect to the RPA. After *Volvo*, the RPA cannot be read to protect small retailers from competition

III. IMPLICATIONS OF A RENEWED RPA

Are we headed back to the heyday of RPA? Unlikely. Buying more stuff to get better prices is still quite American, and still a hallmark of competition. But a first-in-decades FTC enforcement action under the RPA, or a price discrimination case under Section 5, would be a significant event, and a momentous shift in priorities. It would mean the FTC found a case it thinks it can win, or one that it thinks would result in at least some good rulings for it. It will almost certainly be a case where the FTC thinks it can utilize the so-called *Morton Salt* presumption[18] – a rebuttable presumption of harm to competition where there is a large price differential over a significant period of time.

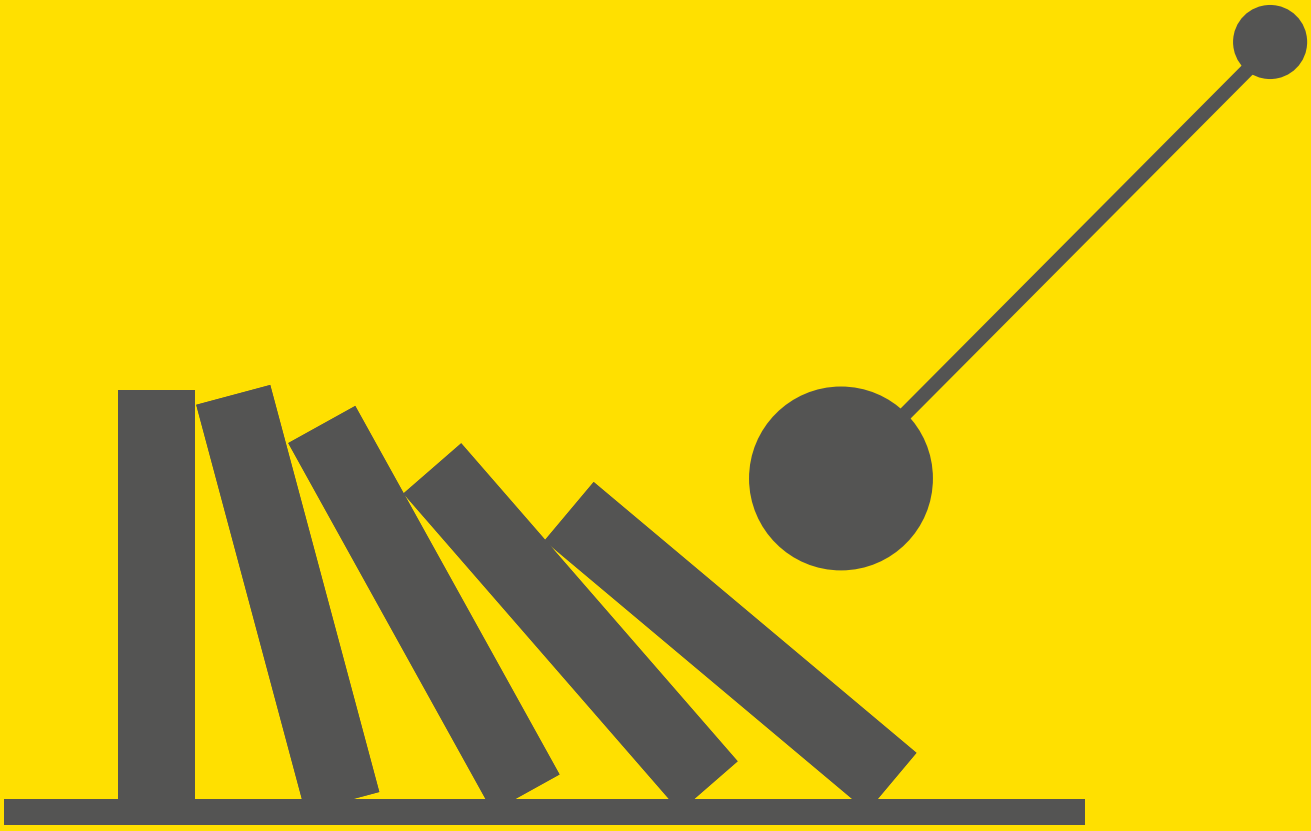
But that is just peering in the crystal ball. For now, because the law hasn't changed, there is little need to change RPA compliance programs. But companies that haven't thought about the RPA in a while would be well served to do so. Affirmative defenses – meeting competition and cost justification – will be important. And remember, both buyers and sellers can be targets. (Thinking of you, Amazon).

16 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

17 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007).

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

RESUMED FTC ENFORCEMENT AGAINST PRICE DISCRIMINATION, AND RAMIFICATIONS OF A CONSCIOUS UNCOUPLING OF PRICE DISCRIMINATION FROM ROBINSON-PATMAN



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On September 22, 2022, Federal Trade Commissioner Alvaro M. Bedoya ("Commissioner Bedoya") announced that the Federal Trade Commission ("FTC") would resume enforcement of the Robinson-Patman Act, 15 U.S.C. § 13(a) *et seq.* ("Robinson-Patman"), after a multi-decade period of enforcement inactivity. While surprising, this resumption of enforcement of Robinson-Patman would customarily only require the application of well-established legal methodologies to a new set of market realities.

However, the FTC's subsequent announcement creates the possibility of a paradigm shift for both private and governmental enforcement of Robinson-Patman and price discrimination. On November 10, 2022, the FTC announced that it would restore "rigorous enforcement" of Section 5 of the FTC Act.[2] In the formal FTC Policy Statement accompanying that announcement, the FTC indicated that price discrimination will be enforced under Section 5 even if the underlying conduct may not constitute a technical violation of Robinson-Patman.[3]

This article explores two related possibilities arising from these developments: (1) the FTC's enforcement of price discrimination principles beyond the limitations of Robinson-Patman; and (2) the potential broader availability of Robinson-Patman and Section 5 price discrimination claims to civil litigants through state deceptive and unfair practices act ("DUTPA") statutes.

I. THE FTC'S PROPOSED RESUMPTION OF ROBINSON-PATMAN ENFORCEMENT

As described by Professor Robert Bork, Robinson-Patman is "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory."[4] In 1977, the United States Department of Justice ("DOJ") issued a report criticizing Robinson-Patman, which led to a curtailment of governmental enforcement.[5] The DOJ Antitrust Division has neither enforced the Robinson-Patman Act since the 1970s nor brought a criminal case under Robinson-Patman since the 1960s.[6] The last FTC Robinson Patman enforcement action occurred in 2000.[7]

As a populist statute, concerns regarding the continuing relevance of Robinson-Patman in the modern age are well documented.[8] That said, the statute is still valid, and governmental enforcement of Robinson-Patman has been a long-standing interest and priority of FTC Chair Lina Khan.[9]

On September 22, 2022, Commissioner Bedoya presented a speech titled "Returning to Fairness."[10] As hinted by the title, Commissioner Bedoya outlined a desire for the FTC to seek fairness rather than just efficiency:

> I think we need to step back and question the role of efficiency in antitrust enforcement.
>
> If efficiency is so important in antitrust, then why doesn't that word, "efficiency," appear anywhere in the antitrust statutes that Congress actually wrote and passed? If efficiency is the goal of antitrust, then why am I charged by statute with stopping unfair methods of competition, and not "inefficient" ones?
>
> We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness.

2 FTC Press Release, "FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition," November 10, 2022. https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition.

3 Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

4 Robert Bork, The Antitrust Paradox 382 (1978).

5 U.S. Department of Justice, Report on the Robinson Patman Act (1977); Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2075–76 (2015).

6 Antitrust Modernization Commission, Report and Recommendations 316 (2007).

7 See Order at 1, *McCormick & Co.*, Docket No. C-3939 (F.T.C. Apr. 27, 2000).

8 See generally Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P* (George Mason K. & Econ. Research Paper No. 18-15, 2018).

9 Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 716 (2017).

10 Alvaro M. Bedoya, Commissioner, Fed. Trade Comm'n, Remarks to the Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street Hosted by the Institute for Local Self-Reliance & the Open Markets Institute (Sept. 22, 2022).

> Certain laws that were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman—directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.
>
> But Congress did more than that. As Chair Khan explained last week at Fordham, Congress deliberately charged the FTC to go beyond the limits of the Sherman Act. And then, the Supreme Court came in and repeatedly reaffirmed the idea that our Section 5 authority goes beyond Sherman. So I support Chair Khan's goal to reactivate enforcement under our unfairness authority, and to issue a policy statement setting out the scope of that authority.[11]

While Commissioner Bedoya does not apologize for a desire for fairness, he disputes the premise that Robinson-Patman is contrary to the principles of efficiency. Specifically, Commissioner Bedoya states that to his "knowledge, some 86 years after its passage, there is not one empirical analysis showing that Robinson-Patman actually raised consumer prices."[12] In support of this statement, Commissioner Bedoya relies on a negative inference — he does not cite any articles that calculate the price impact or non-impact of Robinson-Patman, but instead cites other articles that note the lack of empirical studies or proof.[13] As noted by Thomas W. Ross, "[t]he Robinson-Patman ("R-P") Act has the distinction of being almost universally unpopular among antitrust scholars. This is probably because it looks less like an antitrust measure than like legislated relief for small business. That the law wears an antitrust cloak is probably a measure of the cunning of its original proponents. The statute's poor reputation owes more to theory than to evidence, however."[14]

II. SECTION 5 AS A DISTINCT TOOL FOR FTC "PRICE DISCRIMINATION" ENFORCEMENT

Commissioner Bedoya's call for resumed Robinson-Patman enforcement was soon followed by a November 10, 2022 FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (the "Policy Statement").[15] The Policy Statement proclaims a strong desire to reaffirm the FTC's role as an active enforcer, and states that Section 5 enforcement will include:

> Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws. As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:
>
> · price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,[16]
>
> · *de facto* tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market.

In the Policy Statement, the FTC cites prior decisions in which Robinson-Patman price discrimination violations "not covered by the Clayton Act" were determined to constitute Section 5 violations.[17] However, none of those decisions involved conduct that was outside the general definitions

11 *Id.*

12 *Id.*

13 See Daniel P. O'Brien, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets: The Case of Bargaining*, 45 Rand J. Econ. 92, 108 (2014) ("A formal study of the effects of the Robinson-Patman Act on prices has not been conducted, to my knowledge."); see also Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 Antitrust Bull. 733, 734 (1986) ("It is difficult to estimate accurately the effects of the Robinson-Patman Act . . . [M]any of the effects are unobservable and therefore particularly hard to estimate. . . . These conceptual problems are compounded by data problems."); Antitrust Modernization Commission, Report and Recommendations 322 (2007) ("In general, estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.").

14 Thomas W. Ross, *Winners and Losers under the Robinson-Patman Act*, 27 J. L. & Econ. 243, 243–271 (1984).

15 Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202*, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

16 Robinson-Patman is an amendment to Section 2 of the Clayton Act.

17 *Alterman Foods v. Fed. Trade Comm'n*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. Fed. Trade Comm'n*, 450 F.2d 733 (5th Cir. 1971); *R.H. Macy & Co. v. Fed. Trade Comm'n*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. Fed. Trade Comm'n*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. Fed. Trade Comm'n,* 300 F.2d 92 (2d Cir. 1962); *In re Foremost-McKesson, Inc.*, 109 F.T.C. 127 (1987).

of Robinson-Patman. Instead, those cases mostly imposed buyer liability for practices where Robinson-Patman restricted conduct was implicated but the rules would otherwise only impose seller liability.[18] For example, in *Alterman Foods*, the Fifth Circuit stated that "[t]he terms of the [FTC] order closely parallel the provisions of 2(d) and 2(e) but do not extend beyond them."[19] Similarly, in *Grand Union Co.*, the Second District stated that the FTC contended that the "petitioner's activity violates § 5 regardless of whether or not it may be a violation of the Clayton Act; we see no objection to consideration of this contention without an examination of § 2(f)."[20]

The FTC appears to have drafted the Policy Statement regarding price discrimination appears in an intentionally broad manner. The phrase "price discrimination claims such as disproportionate promotional allowances against buyers not covered by Clayton Act" is worded to encompass a multitude of potential claims that are not covered by Robinson-Patman. As a semantic canon, the use of "such as" is similar to a nonexclusive "include," which introduces examples.[21] For this reason, the antitrust community has generally interpreted the Policy Statement to mean that Section 5 can cover 'price discrimination that is not otherwise barred by the Robinson-Patman Act.' As discussed in further detail below, this could allow attacks on price discrimination practices (such as price discrimination of non-commodities or even non-physical goods) that are broader than Robinson-Patman and outside the expectations or prior legal policies of businesses and practitioners.

III. POTENTIAL GOVERNMENTAL ENFORCEMENT OF PRICE DISCRIMINATION BEYOND THE DEFINITION OF ROBINSON-PATMAN

Even under the recent lull in Robinson-Patman governmental enforcement, private Robinson-Patman litigation has not disappeared completely.[22] Accordingly, Robinson-Patman remains a mandatory compliance training item for many companies. Despite populist protestations, it is unlikely that sophisticated businesses are completely ignoring Robinson-Patman because of the lack of governmental enforcement. But existing training programs and policies focus on complying with what Robinson-Patman covers — not what it expressly does not cover.

One obvious example for concern is price discrimination of non-commodity or non-tangible products. As explained by Donald S. Clark, former Secretary of the FTC,

> The [Robinson-Patman] jurisdictional elements are interpreted strictly and technically, and three of them may be of particular interest. First, as the first element indicates, the plaintiff must establish that actual sales occurred. The Act does not apply, for example, to long term leases; to mere offers to sell; to acting as an intermediary between a seller and its customers; or to licensing computer software. Second, as the third element indicates, the Act applies only to commodities; it does not apply to intangible products. Thus, for example, electricity has been classified as a commodity subject to the Act, because "[e]lectric power can be felt, if not touched. It is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities."
>
> By contrast, courts have concluded that the Act does not apply to intangible products such as cellular telephone service and cellular telephone activation service; the printing of comic books; newspaper advertising; real estate leases; long distance voice telecommunications services; and cable television service. When a transaction involves both the sale of goods and the sale of services, the Act applies "only if the 'dominant nature' of the transaction is a sale of goods." [23]

18 The FTC made a similar threat in the Fred Meyer Guides, where it stated that "the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price." 16 C.F.R. § 240.13 (2023.

19 *Alterman Foods*, 497 F.2d at 1001.

20 *Grand Union Co. v. Fed. Trade Comm'n*, 300 F.2d 92, 96 (2d Cir. 1962). These cases involve discriminatory allowances or services under Robinson-Patman Section 2(d), rather than traditional price discrimination under Section 2(a). Antitrust practitioners frequently refer to Section 2(a) as price discrimination while referring to Section 2(d) violations as services or allowances violations. The two sections are separated in this manner because 2(a) requires a showing of injury to competition, while 2(d) does not. However, both forms of prohibition appear to fall under "price discrimination" in the Policy Statement.

21 See Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 132 (2012).

22 See, e.g. *Woodman's Food Mkt. v. Clorox Co.*, 833 F.3d 743, 746 (7th Cir. 2016), cert. denied, 137 S. Ct. 1213 (2017); *Cash & Henderson Drug, Inc. v. Johnson & Johnson*, 799 F.3d 202, 213 (2d Cir. 2015); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 227 (3d Cir. 2008); *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 864 (6th Cir. 2007); *Dahl Auto. Onalaska v. Ford Motor Co.*, 588 F. Supp. 3d 929 (W.D. Wis. 2022).

23 Donald S. Clark, *The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues*, Fed. Trade Comm'n (June 7, 1995), https://www.ftc.gov/news-events/news/speeches/robinson-patman-act-general-principles-commission-proceedings-selected-issues.

This Robinson-Patman summary reflects the understanding of the legal and business community as to the limits of Robinson-Patman and the FTC's scope of enforcement. It is unclear whether this still applies under the current Policy Statement. Moreover, the following common commercial transactions were explicitly excluded from Robinson-Patman (as acknowledged under the FTC's prior guidance) but could now be subject to reexamination under the category of "price discrimination claims . . . not covered by Clayton Act":

1. Leases (as opposed to sales);
2. Software;
3. Telephone, wireless and internet service; and
4. Advertising.[24]

An injection of price discrimination restrictions in these cutting-edge industries would be unexpected and disruptive.

IV. PRIVATE ENFORCEMENT OF SECTION 5 CLAIMS UNDER DUTPA AND "LITTLE FTC ACTS"

While there is no private right of action under Section 5 of the FTC Act, many states have enacted their own DUTPA or "Little FTC" statutes, which adopt Section 5 standards of unfairness while providing an avenue for private rights of action and class actions.[25] By adding "price discrimination" outside of Robinson-Patman as a potential Section 5 violation in an official policy document, the FTC inadvertently created a private state civil right of action for price discrimination untethered by Robinson-Patman.

Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA")[26] provides a good example of how the FTC Policy Statement could have a wide-reaching impact in private civil litigation. FDUTPA explicitly provides that:

> 501.204 Unlawful acts and practices
>
> (1) Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2017.[27]

The Florida Legislature specifically included language in FDUTPA to allow periodical updates to its adoption of FTC rules and interpretations. Florida requires these formal updates because "a statute simply adopting all future changes to federal law would be an unconstitutional delegation of the power to legislate."[28] Therefore, the Florida Legislature frequently updates its reference to the FTC interpretations. Once FDUTPA is updated to include 2022 FTC interpretations, the FTC's 2022 Policy Statement becomes the binding standard under which FDUTPA violations are measured.

FDUTPA does contain an exemption for "an act or practice required or specifically permitted by federal or state law,"[29] but the extent to which price discrimination of non-tangible or non-commodity products is "specifically permitted" under the intersection of Section 5 and Robinson-Patman is unclear.

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24 For a chart of state Little FTC Acts which expressly defer to the FTC's interpretations, see Appendix A, "Follow-On State Actions Based on the FTC's Enforcement of Section 5," Justin J. Hakala, https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00002/537633-00002.pdf.

25 The broad nature of state DUTPA civil litigation includes *Illinois Brick* repealer status, which allows indirect purchasers to make claims under antitrust laws. See, e.g. *Mack, et al. v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st DCA 1996). The applicability of *Illinois Brick* to Robinson-Patman claims is an open question. See *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016 (S.D.N.Y. 1979).

26 Fla. Stat. § 501.204 et *seq.* (2023).

27 Similarly, FDUTPA provides that "'Violation of this part' means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2017:
(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;
(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; or (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices."

28 *Porsche Cars N. Am., Inc. v. Diamond*, 140 So.2d 1090, 1097 (Fla. 3d DCA 2014).

29 Fla. Stat. § 501.212(1) (2023).

V. CONCLUSION

Pricing strategy is one of the most important decisions faced by any economic actor in a competitive economy. By injecting a new and uncertain legal framework over pricing, and then creating strong private enforcement mechanisms for that uncertain framework, the FTC has injected a disruptive force into the pricing calculus. In the short term, the demand for Robinson-Patman compliance assistance is sure to rise. The long-term results are less obvious.

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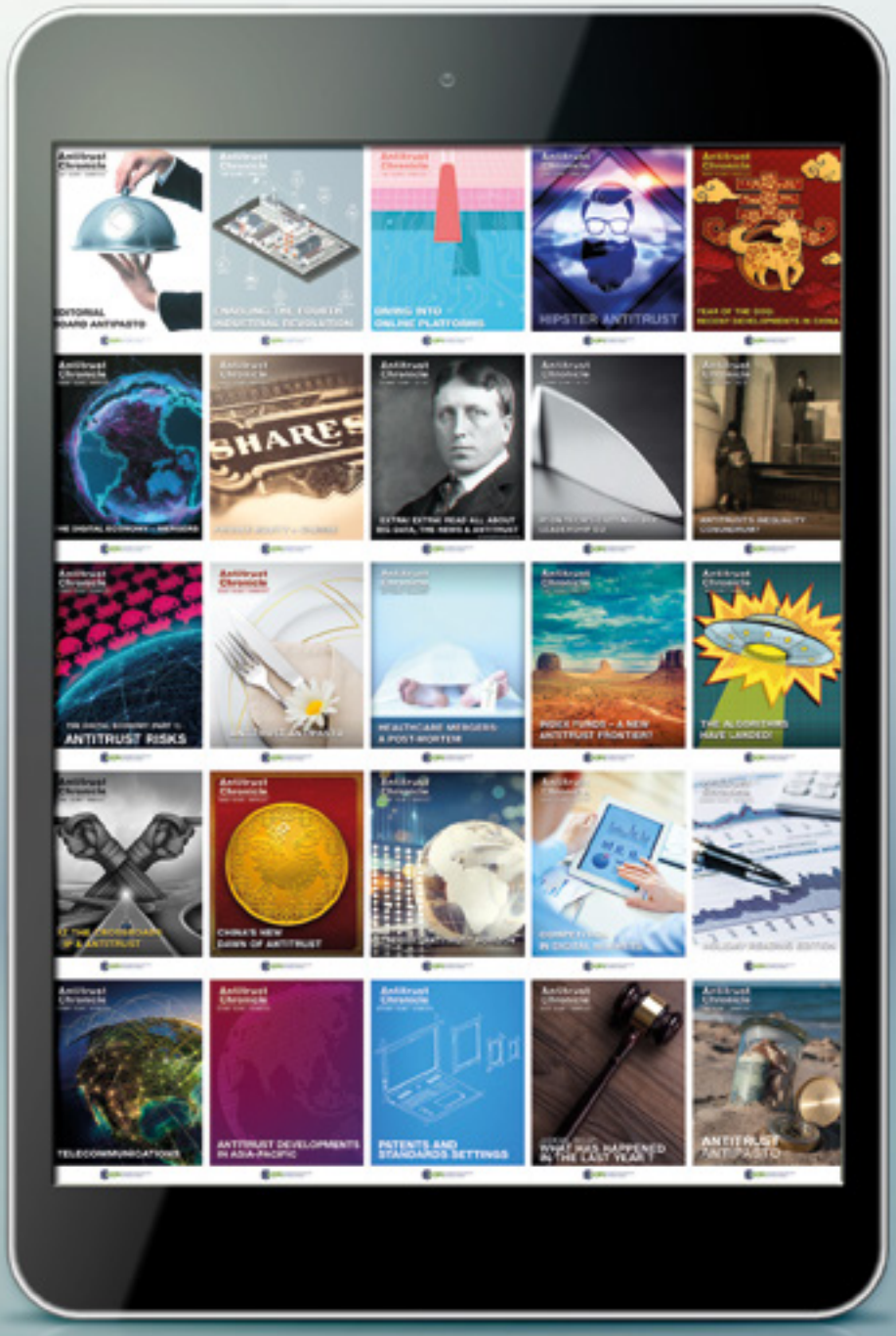


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