The Robinson-Patman Act as a Fair Competition Measure

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Abstract

The Robinson-Patman Act is the single most unpopular antitrust law among practitioners and scholars in the field. It has been the target of withering criticism for many years. In 1966, Robert Bork disparaged it as "the Typhoid Mary of antitrust." Others, such as the bipartisan Antitrust Modernization Commission in 2007, offered criticisms with more tempered rhetoric but agreed with Bork that the law, by restricting price discrimination and the offering of other special concessions by manufacturers and wholesalers, raised consumer prices and had no sensible rationale. A near consensus has developed among antitrust lawyers and economists that Congress should scale back or repeal the Robinson-Patman Act entirely and that the Department of Justice and Federal Trade Commission should continue their multi-decade tacit policy of non-enforcement of the law.

These criticisms fail to grasp the law's basic function. Business competition is structured by myriad laws, including property, copyright, consumer protection, and antitrust laws. To be sure, if low prices are and should be the only purpose of antitrust law and law in general, the

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Robinson-Patman Act appears suspect. But Congress expressly rejected the ideology of low prices at any cost. Congress granted workers the right to unionize and receive fair wages, notwithstanding any adverse effects these rights may have on consumers. In a similar spirit, Congress enacted the Robinson-Patman Act to protect suppliers and independent retailers from powerful chains that could use their buying clout to extract special discounts and obtain a critical competitive advantage over smaller rivals. The drafters of the law recognized that not all special pricing concessions are the result of buyer power and therefore allowed firms to show that discriminatory discounts are derived from distributional or manufacturing cost savings. The law is not irrational, let alone "the Typhoid Mary of antitrust." The Robinson-Patman Act is a sensible and targeted measure against buyer power and in favor of operational efficiency. The law remains relevant in today's economy because of the growth of large retailers such as Walmart and Amazon and the buyer power of big manufacturers in many industries. After extended non-enforcement by the federal government, the Biden administration's interest in reviving the Robinson-Patman Act is necessary and timely.

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Introduction

The Robinson-Patman Act (RPA) is a fair competition law. Congress did not enact the RPA to insulate small and independent grocers and retailers from chain store rivals nor to preserve traditional retail formats and methods at any cost. Rather, it passed the law to restrict large firms from using their buyer power as a competitive weapon. After the enactment of the RPA in 1936, chain stores such as the A&P and Kroger could not use their buying clout to obtain special discounts and concessions from wholesalers and suppliers.[1] They, however, could receive volume-based discounts provided they were derived from genuine cost savings associated with manufacturing, marketing, or distributing large orders. Congress said no to buyer power and yes to operational efficiencies. After decades of effective non-enforcement by the federal government beginning in the late 1970s, the Biden administration has signaled an interest in reviving the RPA.[2]

In the decades after World War II, the Supreme Court generally aimed to effectuate the congressional intent of the RPA. It announced a bright-line rule holding that sellers' price discrimination between two rival buyers was presumptively illegal. The Court also applied the law to cover

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[1] In enacting the Robinson-Patman Act, Congress also targeted selective price-cutting or predatory pricing by sellers, or "primary-line price discrimination." The bulk of this article will focus on the restrictions on the use of buyer power as a competitive weapon, or "secondary-line price discrimination."

[2] Josh Sisco, *Pepsi, Coke Soda Pricing Targeted in New Federal Probe*, POLITICO (Jan. 9, 2023), https://www.politico.com/news/2023/01/09/pepsi-coke-soda-federal-probe-00077126.

pricing schemes that produced discriminatory pricing among two rivals. It likewise faithfully applied the RPA's provisions on advertising allowances and brokerage payments that operated as disguised discrimination. Critically, it imposed a substantial evidentiary burden on parties that wanted to show their discriminatory pricing was rooted in cost differentials. At the same time, the Court deviated from text and purpose in a few important ways. For example, it limited the force of the law's section on buyer liability for seeking discriminatory discounts and made the meeting-competition defense an absolute bar against liability.

The RPA was part of a New Deal antimonopoly regime that promoted fair competition. The antitrust laws, including the RPA, restricted the use of market and financial power as competitive weapons and growth through mergers and acquisitions. They implicitly encouraged firms to compete instead through service and quality, development of new products and production methods, cost-based discounting, and investment in new capacity. In the retail sector, this translated to the growth of local and regional chains and a more decentralized marketplace.

Opponents of the RPA have leveled intemperate criticisms against it but failed to appreciate its purpose or the legal structuring of business rivalry. Robert Bork called it "the Typhoid Mary of antitrust,"[3] and leading antitrust scholar Herbert Hovenkamp disparaged the law as "irritating to almost anyone who is serious about antitrust."[4] Economists

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[3] Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1114 (1983) (citing Robert Bork, *The Place of Antitrust Among National Goals*, Address Before the National Conference Board, at 9 (Mar. 3, 1966)), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4638&context=flr.

[4] Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000). For examples of other scholars critical of the Robinson-Patman Act, *see* Roger D. Blair &

and allied lawyers who focus exclusively on the output effects of the law do not appreciate this legal structuring of markets. Their economic models, which are often very sensitive to the assumptions used and pervaded by ethical value judgments foreign to the drafters of the law, can provide only limited guidance. Fundamentally, business competition is not a free-for-all by which firms can win by any available means. It is a process structured by law that prohibits or restricts the use of certain economic weapons. Firms are not free to compete through false advertising, property destruction, and below-cost pricing.

By enacting the RPA, Congress sought to restrict buyer power as a competitive weapon[5] while preserving room for businesses to compete and succeed by creating operational efficiencies in manufacturing and distribution. Rather than representing a type of irrational protectionism, the RPA can be summed up as saying no to buyer power and yes to productive efficiency. Through channeling competitive strategy in this direction, the supporters of the law aimed to promote a decentralized economy in which local and regional

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Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act*, 57 J. L. & ECON. S201 (2014); Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495 (2020).

To be sure, some scholars and commentators have defended the law. *See, e.g.,* 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 (2015); Karen Kim, *Amazon-Induced Price Discrimination under the Robinson-Patman Act*, 121 COLUM. L. REV. F. 160 (2021).

[5] The Robinson-Patman Act also restricts the use of predatory pricing. One seller cannot use below-cost pricing to discipline or drive out rivals. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993). This paper will predominantly focus on the anti-buyer power part of the RPA.

concerns would thrive. Rather than being anachronistic, the law remains relevant in today's economy. Amazon and Walmart in retail as well as manufacturers in sectors such as auto manufacturing appear to use their buyer power to maintain their market dominance. The Biden administration's stated intention of reviving the law is necessary and timely.

I. The Origins of the Robinson-Patman Act

Congress enacted the Robinson-Patman Act in 1936 to bolster existing fair competition laws like the Sherman, Clayton, and Federal Trade Commission Acts. With the Supreme Court in 1935 striking down the Title I of the National Industrial Recovery Act that governed much of the economy,[6] Congress turned to a more piecemeal sector specific approach to combating competitive problems.[7]

The legislative history of the RPA reveals several themes. Supporters of the law generally favored a retail sector composed of locally run firms and were suspicious of the growth of national chain stores. Lawmakers, however, did not seek to protect independent retailers from competition at any cost. Rather, they targeted particular competitive practices used by the chains and specifically sought to restrict the use of buyer power as a competitive weapon. Based predominantly on public complaints and a study by the Federal Trade Commission (FTC), sponsors of the law concluded that chain stores like the A&P used their power as buyers to extract discriminatory discounts and other special favors from suppliers. As a result of this cost advantage, they could charge lower retail prices and outcompete small and medium-sized rivals. At the same time, the drafters of the

[6] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[7] ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 250-54 (2d ed. 1995).

RPA were not completely opposed to price discrimination. They allowed firms, including national chains, to obtain special discounts if they were demonstrably the product of distributional or manufacturing efficiencies.

Opponents of the law challenged the sponsors on philosophical and consequentialist grounds. They contended that the use of buyer power as an economic weapon was not unfair. Per their view, Congress was trying to legislate economic equality where it did not, and should not, exist. Further, they argued that depriving firms of the ability to use their buyer power in competition would lead to higher prices for consumers.

A. Views of the Majority

In passing the RPA, lawmakers wanted to advance several goals. They sought to prohibit unfair competitive practices used by grocery chains and protect smaller rivals from these tactics. At the same time, they were not opposed to size per se. Indeed, they wanted to protect *all* firms' ability to attain and take advantage of improved efficiencies in distribution and manufacturing.

During the Great Depression, small and independent grocers faced unprecedented challenges from large retailers. Chain stores used their size and financial power to obtain highly preferential pricing and terms from suppliers and wholesalers. This situation allowed chain stores to undercut the retail prices of their independent counterparts.
In legislative debates over the RPA, members of Congress expressed concern that the decline and disappearance of small businesses would fundamentally and irreparably harm life in the United States.[8] Lawmakers saw small businesses

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[8] 79 CONG. REC. 12658 (1935) (statement of Rep. Boileau); *Bills to Amend the Clayton Act: Hearings Before the H. Comm. on the Judiciary*, 74th

as cornerstones for community life and economic opportunity–providing citizens with good paying jobs where they live and facilitating the growth and investment in their own community.[9] For supporters of the RPA, local control of business meant greater political accountability and more vibrant local democratic life. One senator stated that small businesses have the "best interest of the city at heart."[10]

In the 1920s, the expansion of chain stores was rapid and analogous to the growth of the monopolistic trusts that led to the enactment of the Sherman Act in 1890.[11] For example, between 1918 and 1925, the Great Atlantic and Pacific Tea Company (the A&P) grew from nearly 4,000 stores to over

Cong. 4-7 (1935) (statement of Rep. Patman); *Bills to Amend the Clayton Act: Hearings Before the H. Subcomm. of the Comm. on the Judiciary*, 74th Cong. 394-95 (1936) (statement of Rep. Patman); s*ee* 80 CONG. REC. 3599 (1936) (statement of Rep. Ekwall); 79 CONG. REC. 12657 (1935) (statement of Rep. Patman); *Bills to Amend the Clayton Act: Hearings Before the Subcomm. of the H. Comm. on the Judiciary*, 74th Cong. 391 (1936) (statement of Rep. Patman) ("unless something is done, and done real soon, the independent merchants of this country will soon be institutions of the past."); 80 CONG. REC. 2065 (1936) (statement of Rep. Patman) (discussing the importance of the RPA to assist "farmers, wage earners, and consumers."); 80 CONG. REC. 3446-47 (1936) (statement of Rep. Patman); 80 CONG. REC. 3599 (1936) (statement of Rep. Ekwall); 80 CONG. REC. 5714 (1936) (statement of Rep. Martin); 80 CONG. REC. 8104 (1936) (statement of Rep. Cochran); 80 CONG. REC. 8109 (1936) (statement of Rep. Sumners); 80 CONG. REC. 8125 (1936) (statement of Rep. Ford); 80 CONG. REC. 8130, 8132 (1936) (statement of Rep. Robison); 80 CONG. REC. 8136 (1936) (statement of Rep. Moritz).

[9] *See, e.g.,* 80 CONG. REC. 8130 (1936) (statement of Rep. Robison) ("The money of the community is absorbed just like a great sponge absorbs water. It can be seen at once that this system takes the money and credit from the various counties and communities of the Nation and centers it in the great metropolises like New York and Chicago. About all the service they render to a community is to exchange their goods for the people's money and send the money out of the community.").

[10] 80 CONG. REC. 7323-24 (1936) (statement of Rep. Sadowski).

[11] *See generally* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955).

14,000 – becoming one of the world's largest retailers.[12] Between 1920 and 1929, Kroger expanded around sevenfold, growing from nearly 800 stores to over 5,500.[13] Other chain stores experienced similar rapid growth rates throughout the 1920s and early 1930s.[14] In just eight years between 1919 and 1927, sales of grocery chains quadrupled while sales by non-grocery chain stores more than doubled.[15] By 1936, chain stores accounted for nearly 40% of all retail sales in the United States.[16]

The goal of protecting small grocers from the chain store onslaught motivated many members of Congress. Indeed, the Robinson-Patman Act was drafted by H.B. Teegarden, who was the counsel for the U.S. Wholesale Grocers Association.[17] But whether out of necessary compromise or principle, the sponsors also tailored their solution to the perceived problems.[18] Accordingly, Congress relied on a variety of information sources. In drafting the RPA, Congress held legislative hearings, reviewed letters from the public, and considered the findings of a six-year investigation by the FTC into the business practices employed by chain stores.[19]

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[12] Frederick John Harper, The Anti-Chain Store Movement in the United States, 1927–1940, at 7 (July 1981) (Ph.D. dissertation, University of Warwick); FED. TRADE COMM'N, FINAL REPORT OF THE CHAIN-STORE INVESTIGATION 7 (1934) [hereinafter FTC CHAIN STORE REPORT].

[13] Harper, *supra* note 12, at 7.

[14] GODREY LEBHAR, CHAIN STORES IN AMERICA, 1859-1952, at 41, 56-58 (1952).

[15] CORWIN D. EDWARDS, THE PRICE DISCRIMINATION LAW: A REVIEW OF EXPERIENCE 9 (1959).

[16] MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 227 (1996).

[17] Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059,1067 (1959).

[18] Admittedly, the RPA's final language indicates it is the result of significant legislative compromise.

[19] 80 CONG. REC. 2064 (1936) (statement of Rep. Patman) (describing the sources of information); EDWARDS, *supra* note 15, at 10 (detailing the scope of the FTC's investigation into the chain stores and that the

The overwhelming size and power of the chain stores allowed them to obtain two important competitive advantages. First, chain stores were able to purchase goods in large quantities and compel sellers to grant them highly preferential discounts on those purchases.[20] In some cases, if sellers did not capitulate to the demands of the chain stores, these suppliers would lose a significant amount of business and potentially go out of business altogether as a result.[21] By obtaining preferential prices and terms, chain stores could price their products significantly below the retail prices of their smaller and independent competitors.[22] Since price was the primary determinant for a customer's decision to shop at a chain store rather than an independent business, chain stores obtained an important competitive advantage by securing lower wholesale prices from suppliers.[23] Second, chain stores selectively reduced prices to significantly undercut their rivals in a targeted geographic area.[24]

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investigation opened in 1926 and ended in 1934 with the publication of the final report).

[20] FTC CHAIN STORE REPORT, *supra* note 11, at 24-25, 53 (describing the ability of chain stores to obtain preferential pricing and services as an "outstanding feature" of the growth of chain stores and describing chain stores as using "threats and coercion....to obtain preferential treatment").

[21] *See id.* at 25-26, 29-34.

[22] *Bills to Amend the Clayton Act: Hearings Before the H. Comm. on the Judiciary*, 74th Cong. 193-94 (1935) (statement of Rep. Patman); *Bills to Amend the Clayton Act: Hearings Before the H. Subcomm. of the Comm. on the Judiciary*, 74th Cong. 393, 395 (1936); 80 CONG. REC. 3117 (statement of Sen. Logan); 80 CONG. REC. 6282(1936) (statement of Sen. Logan); 80 CONG. REC. 8122, 8124 (1936) (statement of Rep. Boileau); 80 CONG. REC. 8128 (1936) (statement of Rep. Shannon); 80 CONG. REC. 9416 (1936) (statement of Rep. Utterback); FTC CHAIN STORE REPORT, *supra* note 11, at 23, 66, 85-86.

[23] FED. TRADE COMM'N, FINAL REPORT OF THE CHAIN-STORE INVESTIGATION 66 (1934) ("The most frequently stated reason for patronizing chain stores is lower prices, and no other one reason for buying from chains approaches it in importance.") [hereinafter FTC CHAIN STORE REPORT].

[24] FTC CHAIN STORE REPORT, *supra* note 11, at 29, 34, 38-39.

Members of Congress believed these two competitive methods were unfair. They asserted that chain stores were using their market dominance and financial power—as opposed to superior operational efficiency alone—to win the competitive struggle against smaller rivals.[25] Senator Majority Leader Joseph Robinson (namesake of the law) stated that the RPA sought to "prevent large buyers from taking unfair advantage of independents by securing terms that are out of proportion to the differences in cost, thus enabling them to destroy their competitors and to monopolize the market."[26]

Congress's interest in targeting the use of buyer power as a competitive weapon was not new. It had already attempted to restrict price discrimination in the Sherman Act in 1890 and Clayton Act of 1914.[27] In drafting Section 2 of the Sherman Act broadly, Congress targeted price discrimination and buyer coercion through its prohibition on "Every" method of competition that "monopolize[s], or attempt[s] to monopolize, or [conduct where firms] combine or conspire with any other person or persons, to monopolize[.]"[28] Drafters of the Sherman Act wanted to limit price discrimination.[29] Section 2 of the Clayton Act was specifically

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[25] *See, e.g.,* United States v. Reading Co., 253 U.S. 26, 57 (1920) (in a case brought under the Sherman Act the Supreme Court implicitly codified the requirement that firms should be incentivized to engage in internal expansion by using fair methods of competition).
[26] 80 CONG. REC. 6335 (1936) (statement of Sen. Robinson).
[27] Sherman Antitrust Act, § 2, 26 Stat. 209 (1890), codified at 15 U.S.C. § 2; Clayton Antitrust Act, § 2, 38 Stat. 730 (1914), amended by the Robinson-Patman Act, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13).
[28] 15 U.S.C. § 2.
[29] *See, e.g.,* 21 CONG. REC. 2457 (1980) (statement of Sen. Sherman) ("It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production *on equal terms and conditions and under like circumstances*. This is industrial liberty and lies at the

enacted to proscribe price discrimination that was "[a] method[] of the great corporations…to sell[] their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country."[30]

At the time of the enactment of the RPA, both laws had limited effect in practice. The Supreme Court narrowly interpreted Section 2 of the Sherman Act. In 1920, the Supreme Court decided *United States v. United States Steel Corporation* (*U.S. Steel*) in favor of the steel producer. In its decision, the Court imposed such significant legal burdens on antitrust enforcers that it rendered the Sherman Act ineffective in checking the growth of the chain stores.[31] Among other doctrinal revisions,[32] the Supreme Court in *U.S. Steel* required plaintiffs to show that the alleged violator had an intent to monopolize a market.[33] This increased procedural burden made enforcing the Sherman Act much more difficult.

Further, Section 2 of the Clayton Act had two primary deficiencies. First, the law allowed sellers to grant and buyers to obtain discriminatory discounts based solely on the size of

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foundation of the equality of all rights and privileges.") (emphasis added).

[30] H.R. REP. NO. 63-627, pt. 1, at 8 (1914).

[31] United States v. U.S. Steel Corp., 251 U.S. 417 (1920); FTC CHAIN STORE REPORT, *supra* note 11, at 19-20, 65, 87-91 (Generally describing the weakness of the antitrust laws to stop the conduct of the chain stores. Special emphasis was placed on Section 2 of the Sherman Act and Section 2 of the Clayton Act).

[32] RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 67-68 (rev. ed. 2000) (explaining the adverse impact that the Supreme Court's *U.S. Steel* decision had on antitrust enforcement).

[33] *U.S. Steel*, 251 U.S. at 445 (1920); *see also* Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 759 (1949).

an order.[34] According to the House report accompanying the RPA, the quantity loophole as it became known,[35] "so materially weakened [S]ection 2 of that act, which this bill proposes to amend, as to render it inadequate, if not almost a nullity."[36] Second, Section 2 incorporated defenses that were exceptionally broad – specifically the meeting competition defense. Under Section 2 of the Clayton Act, the meeting competition defense allowed a party to escape liability for otherwise illegal price discrimination if the "discrimination in price in the same or different communities made in good faith to meet competition."[37] Members of Congress believed that the defense "permit[ted] discriminations *without limit* where made in good faith to meet competition."[38] Because a firm could satisfy the meeting competition defense by simply asserting their discriminatory price was offered in "good faith," some members believed the meeting competition defense allowed powerful chain stores to "go into a local market, cut the price down so low that it would destroy local competitors and make up for their losses in other places where they had already destroyed their competitors"[39]

Multiple members of Congress cited the inadequacy of the Clayton Act as a primary justification for enacting the RPA and strengthening the existing prohibition on price discrimination.[40] During the RPA legislative debates, a

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[34] 38 Stat. 730 (1914).
[35] *Id.*; EARL W. KINTNER, A ROBINSON-PATMAN PRIMER: A BUSINESSMAN'S GUIDE TO THE LAW AGAINST PRICE DISCRIMINATION 13 (1st ed. 1970) (describing the "quantity discount loophole" of Section 2 of the Clayton Act) [hereinafter KINTNER RPA PRIMER].
[36] H.R. REP. NO. 74-2287, pt. 1, at 7 (1936).
[37] Clayton Antitrust Act, § 2, 38 Stat. 730-31.
[38] H.R. REP. NO. 74-2287, pt. 1, at 16 (1936) (emphasis added).
[39] 80 CONG. REC. 8235 (1936) (statement of Rep. Patman); *see also* 80 CONG. REC. 6622 (1936) (statement of Rep. Miller).
[40] 79 CONG. REC. 9078 (1935) (statement of Rep. Patman) ("Section 2 of the Clayton Act…raises a feeble gesture against price discrimination"); S. REP. NO. 74-1502, at 4 (1936); 80 CONG. REC. 2138 (1936) (statement of

senator called the Clayton Act's meeting competition defense the "chief defect" of Section 2.[41] Likely as a result of the Clayton Act's deficiencies, the government tepidly enforced the law.[42]

In amending the Clayton Act through the RPA, Congress also drew on non-discrimination rules governing railroads. Several supporters of the RPA cited the Interstate Commerce Act of 1887 and its prohibition on unjust rate discrimination by railroads.[43] In other words, Congress recognized the undue ability of powerful buyers to obtain special concessions from suppliers and passed the RPA to solve a longstanding problem.

Sen. Logan); 80 CONG. REC. 3113, 3119 (1936) (statement of Sen. Logan); 80 CONG. REC. 6152 (1936) (statement of Sen. Logan); 80 CONG. REC. 6281(1936) (statement of Sen. Logan); 80 CONG. REC. 3599 (1936) (statement of Rep. Ekwall) (calling Section 2 of the Clayton Act "impotent" and a "feeble gesture"); 80 CONG. REC. 6622-23 (1936) (statement of Rep. Miller); H.R. REP. NO. 74-2287, pt. 1, at 3, 7 (1936).

[41] 80 CONG. REC. 6281 (1936) (statement of Sen. Logan).

[42] For the tepid enforcement of Section 2 of the Clayton Act and the hostile judicial interpretation, *see* EDWARDS, *supra* note 15, at 6-8 (1959) ("In the 22 years between the enactment of the Clayton Act and the enactment of the Robinson-Patman Act, the Federal Trade Commission issued 43 complaints under the price discrimination provisions of the Clayton Act, but dismissed 31 of them. It issued 12 cease and desist orders, of which 4 were subsequently appealed and reversed by the courts. Thus before the Robinson-Patman Act only 8 valid cease and desist orders were issued in price discrimination cases, and the courts reversed the Commission in every case that reached them.").

[43] *Bills to Amend the Clayton Act: Hearings Before the H. Comm. on the Judiciary*, 74th Cong. 193-94 (1935) (statement of Rep. Patman); 80 CONG. REC. 6621 (1936) (statement of Rep. Miller); *Bills to Amend the Clayton Act: Hearings Before the H. Subcomm. of the Comm. on the Judiciary*, 74th Cong. 393-94 (1936); 80 CONG. REC. 7323-24 (1936) (statement of Rep. Sadowski); 80 CONG. REC. 7759 (1936) (statement of Rep. Patman); 80 CONG. REC. 8111-12 (1936) (statement of Rep. Patman); 80 CONG. REC. 8129 (1936) (statement of Rep. Robsion); 80 CONG. REC. 8131 (1936) (statement of Rep. Robsion); 80 CONG. REC. 8137 (1936) (statement of Rep. Michener).

Members of Congress were also aware that businesses attempted to conceal the granting or receipt of discriminatory discounts. One common and "favorite disguise for price discriminations" involved retailers granting "advertising allowances" to buyers.[44] Some advertising allowances functioned as price reductions that were granted to buyers based on the buyer performing a specified service.[45] The allowances either exceeded the cost of services performed or were awarded when no service was performed at all.[46] In other words, advertising allowances were being used to conceal discounts granted to powerful buyers.

Firms also used sham brokerage fees, ostensibly extended to buyers for facilitating wholesale transactions, to mask price concessions.[47] Congress designed the RPA to prohibit circumvention techniques like these and others to ensure

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[44] 80 CONG. REC. 3600 (1936) (statement of Rep. Ekwall).

[45] 80 CONG. REC. 6150-52 (1936) (statement of Sen. Logan); 80 CONG. REC. 6277 (1936) (statement of Sen. Robinson); 80 CONG. REC. 6282(1936) (statement of Sen. Logan); 80 CONG. REC. 4683 (1936) (statement of Rep. Patman) (calling the shame brokerage fees and payments a "form of bribery" the RPA will "eliminate"); 80 CONG. REC. 6623 (1936) (statement of Rep. Miller); 80 CONG. REC. 7759 (1936) (statement of Rep. Patman) ("Large manufacturers have been coerced into giving certain large mass buyers great reductions in prices under the guise of advertising allowances."); 80 CONG. REC. 8111-12 (1936) (statement of Rep. Patman); 80 CONG. REC. 9418-19 (1936) (statement of Rep. Utterback); S. REP. NO. 74-1502, at 7-8 (1936).

[46] H.R. REP. NO. 74-2287, pt. 1, at 15 (1936); S. REP. NO. 74-1502, at 7 (1936); 80 CONG. REC. 9418 (1934) (statement of Rep. Utterback); FTC CHAIN STORE REPORT, *supra* note 11, at 53-61.

[47] 79 CONG. REC. 12020 (1935) (statement of Rep. Patman) ("over half of the net profits of the Great Atlantic & Pacific Tea Co. in 1934 were realized from these secret and confidential rebates."); 80 CONG. REC. 3114-16 (1936) (statement of Sen. Logan); 80 CONG. REC. 6282 (1936) (statement of Sen. Logan); H.R. REP. NO. 74-2287, pt. 1, at 15-16 (1936); 80 CONG. REC. 8137 (1936) (statement of Rep. Michener).

that all businesses were afforded proportionally similar terms with access to equal business opportunities.[48]

The legislative debates show that Congress differentiated between methods of competition that are socially harmful and unfair and those that are desirable and fair.[49] Businesses could obtain economies of scale and thereby reduce their prices, develop new products and production methods, and increase wages to attract and retain workers. These methods of competition are permitted under the RPA as well as the other antitrust laws. Congress enacted the RPA to channel business strategy in these directions. Representative William Ekwall aptly described the RPA in these terms when he stated that:

> [The RPA was] designed to protect and to secure in the field of merchandising fair and decent competition. It establishes again the birthright of every free American to equal opportunity-equal opportunity to devote his talents and resources to the service of the public, where the homely attributes of honesty and fair dealing...[where] equal opportunity [is provided] to secure for himself that reasonable return which is commensurate with the service, devotion, and quality value of his contribution to the public.[50]

The supporters of the RPA recognized that a stronger price discrimination law could raise consumer prices but, as

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[48] 15 U.S.C. §§ 13(c)-(e). 79 CONG. REC. 12022 (1935) (statement of Rep. Patman); 80 CONG. REC. 6281(1936) (statement of Sen. Logan); H.R. REP. NO. 74-2287, pt. 1, at 3 (1936).

[49] 79 CONG. REC. 14412 (1935) (statement of Rep. Patman); 80 CONG. REC. 7243 (1936) (statement of Rep. Sadowski); 80 CONG. REC. 3112 (statement of Sen. Logan); 80 CONG. REC. 3600 (1936) (statement of Rep. Ekwall); S. REP. NO. 74-1502, at 4 (1936).

[50] 80 CONG. REC. 3600 (1936) (statement of Rep. Ekwall).

Congress did many other laws, rejected the philosophy of low prices at any cost.[51] Fair competition and fair treatment of businesses, fair wages to workers, and fair prices to producers took precedence over solely low prices to consumers and competition by any means.

Relying on this framework, Congress did not intend to protect small businesses against all forms of competition. Instead, Congress wanted to ensure that a business's success or failure resulted from fair methods of competition, such as a proprietor's own diligence, ingenuity, and efficiency, not their power in the marketplace.[52] Businesses that attained

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[51] 80 CONG. REC. 7761 (1936) (statement of Rep. Patman) ("The consumer should always have the benefit of the lowest prices consistent, however, with a fair price to the producer of the raw material, a fair wage to the wage earner who converts the raw material into the finished product, and a fair cost of distribution, including transportation."); 80 CONG. REC. 81112-14 (1936) (statement of Rep. Patman); *Bills to Amend the Clayton Act: Hearings Before the H. Subcomm. of the Comm. on the Judiciary*, 74th Cong. 394-95 (1936) (statement of Rep. Patman) ("we want low prices, consistent with good prices to the farmer who produces the raw materials, and consistent with good prices to the wage earner who converts that raw material into the finished product for retail distribution.").

Take the Federal Power Act as an example. Instead of mandating low electric rates, Congress required the Federal Power Commission (now Federal Energy Regulatory Commission) to ensure "just and reasonable rates." 12 U.S.C. § 824d.

[52] *Bills to Amend the Clayton Act: Hearings Before the H. Comm. on the Judiciary*, 74th Cong. 193-94 (1935) (statement of Rep. Patman); S. REP. NO. 74-1502, at 4 (1936); H.R. REP. NO. 74-2287, pt. 1, at 17 (1936) ("There is nothing in [the RPA] to penalize, shackle, or discourage efficiency, or to reward inefficiency."); 80 CONG. REC. 7323-24 (1936) (statement of Rep. Sadowski); 80 CONG. REC. 7325 (1936) (statement of Rep. Sadowski) ("It does not prevent the distributor or retailer, whether he be chain store or independent, from passing along to the consumer every saving that efficiency can devise."); 80 CONG. REC. 7761 (1936) (statement of Rep. Patman); 80 CONG. REC. 8111 (1936) (statement of Rep. Patman); 80 CONG. REC. 81112-13 (1936) (statement of Rep.

economies of scale and operational efficiencies could put these advantages to use. Per RPA supporters, a retailer that saved money by picking up goods at a manufacturer's plant, instead of having them delivered to its own store or warehouse, should be permitted to pass this cost saving along to consumers. Members of Congress stressed fair opportunity for all businesses and emphasized that the RPA was not an indiscriminate "anti-chain store" law.[53] Indeed, Congress could have passed such an anti-chain store law through a chain store tax, as several states had done by that time, but elected not to do so.

Congress tailored the RPA to target buyer power and included several legal defenses to protect what it deemed fair competition.[54] Congress sought to channel competition away

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Patman); 80 CONG. REC. 9422 (1936) (statement of Rep. Patman); 80 CONG. REC. 3117 (statement of Sen. Logan).

[53] 80 CONG. REC. 81122 (1936) (statement of Rep. Boileau); 80 CONG. REC. 6281 (1936) (statement of Sen. Logan); 80 CONG. REC. 7781 (1936) (statement of Rep. Patman).

[54] The RPA only applies to a specific set of firm conduct. In general, the RPA only applies when there is:

1. A difference in price;
2. Of two or more sales for use, consumption, or resale (so not including an arrangement like a lease);
3. Of commodities;
4. That are contemporaneous with each other;
5. That are also "in commerce";
6. That are also of "like grade and quality";
7. By the same seller to two or more different purchasers;
8. Located within the United States or any Territory;
9. That....
    a) may be substantially to lessen competition; or
    b) tend to create a monopoly; or
    c) Injure[s], destroy[s], or prevent[s] competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.
10. Which also isn't encompassed within any of the listed defenses (listed below).

from the use of buyer and financial power and toward economies of scale, fair prices and fair wages, and investment in new capacity.

Congressional interest in promoting operational efficiencies is reflected in the inclusion of a cost-justification defense in the RPA. The cost-justification defense provides that discriminatory price concessions are allowed under the RPA if they are the result of lower costs of manufacturing, marketing, or distribution. Congressman Hubert Utterback described the importance of the cost-justification defense in clear terms. He stated that the defense "rewards of efficient methods in production and distribution…There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods of purchase and delivery make them possible."[55] The burden of showing such cost savings falls on sellers. They must establish that their discriminatory discounts are the product of legitimate cost savings in serving their favored customer.

B. Views of the Minority

The RPA faced significant opposition in Congress. The bulk of the criticism can be distilled into two distinct themes. The first concerns the purpose of the act, while the second concerns potential consequences of the RPA.

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15 U.S.C. § 13(a).

The RPA also has several legal defenses. The RPA's legal defenses include (1) meeting competition; (2) cost-justification defense, (3) changing conditions; and (4) functional availability. 15 U.S.C. §§ 13(a)-(b).
[55] 80 CONG. REC. 9417 (1936) (statement of Rep. Utterback).

Opponents raised concerns that banning quantity discounts, would impede operational efficiency.[56] These lawmakers particularly took issue with the RPA's requirements that all firms, regardless of size, should be treated equally. In a report, the minority claimed that the RPA was trying to "make equals of unequals."[57] On top of their philosophical objection, they contended the law would compel and result in firms underutilizing their production capacity.[58] The opposition based its belief on the idea that the RPA would increase prices and thus reduce demand for goods, leading to producers with excess production capacity.[59] This minority also asserted that increased costs to consumers and compliance costs on businesses stemming from the RPA would hurt wage growth for workers.[60]

Opponents further argued that the RPA would facilitate price-fixing, based on the idea that compliance with the RPA would compel greater standardization of wholesale prices.[61] With legal promotion of standard prices (with exceptions for cost-justified and meeting-competition discriminatory discounts), manufacturers would be less likely to deviate from collusive arrangements.

Lastly, the minority opposing the RPA claimed additional regulation was harmful and the bill would grant the government too much power, depriving businesses of pricing freedom.[62] Along similar lines, opponents took issue with the

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[56] H.R. REP. NO. 74-2287, pt. 2, at 2-3, 5, 7 (1936).
[57] *Id.* at 5 (1936).
[58] *Id.* at 2-4, 8-9, 19.
[59] *Id.*
[60] *Id.* at 2, 5, 6-7, 19 (1936).
[61] *Id.* at 23 (1936); 80 CONG. REC. 8109 (1936) (statement of Rep. Celler).
[62] H.R. REP. NO. 74-2287, pt. 2 at 3-4, 5, 7 (1936). On the government having too much power, *see id.* at 4, 11, 14-15.

potential compliance costs the RPA would impose and asserted that the penalties for violations were too harsh.[63]

The proponents of the RPA responded by arguing that fair wages for workers were more important than low prices for consumers.[64] They contended that fair wages to workers would translate to a better standard of living for everyone, whereas low prices were more emblematic of chain stores engaging in wealth extraction from communities.[65] Proponents also warned that just because the chain stores currently offered low prices, it did not mean they would continue to do so–prices could increase once they destroyed the competition exerted by the independents.[66]

<u>II. The Comparative Golden Age of the Robinson-Patman Act—and Independent Retailers</u>

A. In General, the Supreme Court Faithfully Follows the Text and Purpose of the RPA

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[63] *Id.* at 12, 24-25 (1936).

[64] 80 CONG. REC. 6624 (1936) (statement of Rep. Miller) ("For the more equal the competitive opportunity which we can secure to those now oppressed by the abuses against which this bill is directed, the more they will have with which to pay that laborer for his work and those farmers for their products."); 80 CONG. REC. 7887 (1936) (statement of Rep. Patman) (detailing how the asserted low prices provided by the chain stores are illusory and not guaranteed forever and that the long run societal effects end up costs much more); 80 CONG. REC. 8125 (1936) (statement of Rep. Ford). This concern tracked with the legislative impulse animating the National Industrial Recovery Act. *See generally* HAWLEY, *supra* note 7.

[65] *See, e.g.,* 80 CONG. REC. 6622 (1936) (statement of Rep. Miller); 80 CONG. REC. 7324 (1936) (statement of Rep. Sadowski).

[66] *See, e.g.,* 80 CONG. REC. 7887 (1936) (statement of Rep. Patman) (detailing how the asserted low prices provided by the chain stores are illusory and not guaranteed forever and that the long run societal effects end up costs much more).

In the era following World War II, the Supreme Court generally sought to faithfully interpret and apply the Robinson-Patman Act. The Court frequently looked to the text and legislative history of the law in construing it and aimed to carry out what it identified as Congress's purposes. Given these sources of authority, the Court applied the law as a vigorous anti-buyer power and anti-discrimination measure. It announced rules that restricted the ability of firms to obtain special concessions from suppliers and interpreted some defenses narrowly.

While the law is comparatively more specific than the other federal antitrust laws, the RPA still requires interpretation. The law's core provision prohibits discriminatory prices in the sale of commodities "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[67] This language parallels other sections of the Clayton Act,[68] but goes further in protecting individual competitors from price discrimination. It requires enforcers and courts to decide what conduct "substantially lessens competition," "tends to create a monopoly" *or* "injures, destroys, or prevents competition." The plain text of the law does not provide guidance on what types of price discrimination are illegal.

In articulating the RPA, the Supreme Court examined the text and legislative history of the law. The Court reviewed the words of the law to develop rules on prohibited conduct as well as defenses and justifications for parties accused of Robinson-Patman violations. Because "precision of expression is not an outstanding characteristic of the

[67] 15 U.S.C. § 13(a).
[68] 15 U.S.C. §§ 14, 18.

[RPA],"[69] the Court also examined the Congressional debates and reports to ascertain the legislature's aims in enacting the law in 1936. While out of vogue among certain judges in the present day, such reliance on legislative debates and reports has long been a conventional approach to statutory construction.[70]

During this period, the Court's statutory construction emphasized text and accompanying legislative materials—an approach that is mostly unfamiliar to antitrust practitioners in recent times. It deferred to legislative judgments, stating "this Court is not in a position to review the economic wisdom of Congress."[71] This is radically different from how the Court has approached the Sherman Act since the late 1970s. When identifying the aims and rules of the first federal antitrust law, the Court in 1988 declared the Sherman Act to be a "common-law statute" that it can revise over time based on its understanding of economics, notwithstanding statutory enactments or earlier precedents.[72]

In 1948, the Supreme Court announced a bright-line rule implementing the anti-price discrimination provision in the RPA. In *FTC v. Morton Salt Co.*, the Court confronted the question of what constitutes an illegal secondary-line price discrimination under section 2(a) of the RPA.[73] The Court

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[69] Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).
[70] INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).
[71] FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959).
[72] Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988); Leegin Creative Leathers Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007).
[73] 334 U.S. 37 (1948). This probabilistic approach is a defining feature of the Clayton Act. For instance, Section 7 bars mergers and acquisitions whose effects "*may be* substantially to lessen competition, or to *tend* to create a monopoly." 15 U.S.C. § 18 (emphases added). In interpreting Section 7, the Supreme Court concluded that Congress' "concern was

held that "the Commission [or other plaintiff] need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors."[74] It announced this bright-line rule on the basis of the text which prohibits discriminations "where the effect of such discrimination may be 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."[75] The Court stressed that combined with sections of the Clayton Act that used similar phrasing, Congress's use of the word "may" as evincing concern with a "reasonable possibility" of injury to competitors of the favored purchaser, as opposed to certainties.[76]

In developing and applying this presumption, the Court examined the legislative history of the law. It concluded that "Congress considered it to be an evil that a larger buyer could secure a competitive advantage over a small buyer *solely* because of the large buyer's quantity purchasing ability."[77] Although the case concerned table salt (a small item among the thousands of goods sold in a typical grocery store), the Court held that price discrimination was still illegal, absent the manufacturer presenting a defense. Recognizing Congress's intent in passing the RPA, the Court stated, "Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."[78]

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with probabilities, not certainties." Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

[74] *Morton Salt*, 334 U.S. at 45.

[75] *Id.* (quoting 15 U.S.C. § 13(a)).

[76] *Id.* at 47.

[77] *Id.* at 43 (emphasis added).

[78] *Id.* at 49.

The Court applied the prohibition on price discrimination expansively. It ruled that Robinson-Patman covered functionally discriminatory pricing systems too. Manufacturers often used base point-pricing systems that identified a "base"–usually a major manufacturing center–at which a price was set and on top of which the cost of transportation from the base to the destination was added. For instance, if a base point-pricing system used Chicago as the base, the price in Kansas City would be the base price in Chicago plus the cost of transporting the product from Chicago to Kansas City.

The Supreme Court ruled that base point-pricing could result in improper and illegal price discrimination. Under an industry-wide base point-pricing scheme, manufacturers located in Kansas City might use Chicago as their pricing base. Even if the commodity was produced locally, purchasers in Kansas City would pay a higher price than rivals in Chicago because they were paying a "phantom freight" charge to "transport the commodity from Chicago to Kansas City.[79] When the purchasers in Kansas City competed with the purchasers in Chicago in reselling the good or selling a product that incorporated the purchased item, the Kansas City purchasers would be at a competitive disadvantage. They were paying a higher price even though their costs of transportation were lower than for their rivals in Chicago.

The competitive implications of this system were clear. In a case before the Court, "Since the cost of glucose, a principal ingredient of low-price candy, is less at Chicago, candy manufacturers there are in a better position to compete for business, and manufacturers of candy located near other factories producing glucose, distant from the basing point, as

[79] Corn Prod. Ref. Co. v. FTC, 324 U.S. 726, 732 (1945).

Kansas City, are in a less favorable position. [80] The Court noted that the Conference Committee on the RPA indicated that the law applied to "indirect as well as direct discriminations in price."[81]

As the example of glucose and candy makes clear, the Court concluded that the RPA applied regardless of whether the item is resold as-is or processed and combined with other commodities. The law is "aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, in all cases where the commodity is to be resold, whether in its original form or in a processed product."[82]

The prohibition on price discrimination applies to commodities of "like grade and quality,"[83] a phrase that required judicial interpretation. The Court rejected the argument that branded and private-label goods were automatically not of like grade and quality and stressed that the chemical and physical composition of the commodity is what mattered.[84] It drew on the legislative history of the law to conclude that different branding did not defeat the like grade and quality requirements of the law. Congressman Wright Patman had stated manufacturers "will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package, and this will remedy the situation to which the gentleman refers. ...[S]o long as it is the same quality."[85] Congress had rejected an amendment that would have prohibited price discrimination among goods that are of "like grade, quality, and brand."[86] Based on this legislative record,

[80] *Id.* at 732-33.
[81] *Id.* at 740.
[82] *Id.* at 744.
[83] 15 U.S.C. § 13(a).
[84] FTC v. Borden Co., 383 U.S. 637, 638-40 (1966).
[85] *Id.* at 643 (quoting H.R. REP. No. 74-2287, pt. 1, at 4 (1936)).
[86] *Id.* at 641.

the Supreme Court held that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test."[87]

Through these decisions, the Court established a 10-part test for establishing a presumptive violation of section 2(a). Former FTC Chair and antitrust scholar Earl Kintner wrote that sales may violate section 2(a) when there are "(1) two or more consummated sales, (2) reasonably close in point of time, (3) of commodities, (4) of like grade and quality, (5) with a difference in price, (6) by the same seller, (7) to two or more different purchasers, (8) for use, consumption, or resale within the United States or any territory thereof, (9) which may result in competitor injury . . . [and] (10) the 'commerce' requirement must be satisfied."[88]

Given Congress's concern with selective price reductions induced using buyer power as opposed to all selective price reductions, the RPA features a cost-justification defense. Section 2(a) reads that "nothing 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."[89] In other words, discriminatory pricing was permitted when selling goods to the favored purchaser entailed legitimate cost savings in manufacturing or distribution.

In construing this justification, the Court was clear that the burden was on the defendants to establish the cost justification and the burden was substantial. In its words, the

[87] *Id.* at 645-46.
[88] KINTNER RPA PRIMER, *supra* note 35, at 35.
[89] 15 U.S.C. § 13(a).

burden on firms, as articulated by the FTC, was "heavy."[90] Defendants could not merely offer theoretical cost justifications, such as speculating about potential economies of scale in the production or distribution of large volume orders. The Court stated that defendants must show "*actual* cost differences resulting from the differing methods of or quantities in which the commodities in question are sold or delivered."[91]

Yet, the Court did not make the defense impossible to establish. Defendants could engage in reasonable classification among customers in establishing that certain customers could be served at a lower cost, due to savings in distribution or manufacturing associated with their purchases. Sellers did not have to establish cost justifications on a customer-by-customer basis. But their classification of customers could not be arbitrary. Instead, "a balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member."[92] Within each group, the defendant must show "a close resemblance of the individual members of each group on the essential point or points which determine the costs considered."[93]

The Court adopted a per se rule for one provision of the law. Section 2(c) of the RPA prohibits the payment of brokerage commissions by sellers except for services rendered. Unlike other provisions of the law, it does not require two contemporaneous sales to competitors.[94] A single transaction

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[90] Automatic Canteen Co. v. FTC, 346 U.S. 61, 69 (1953).
[91] United States v. Borden Co., 370 U.S. 460, 467 (1962).
[92] *Id.* at 469.
[93] *Id.*
[94] 15 U.S.C. § 13(c).

involving the payment of brokerage could violate the law. The Court noted that when Congress debated and passed the RPA, "One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer."[95]

In *FTC v. Henry Broch & Co.*, the Court read the provision in a functional manner. It noted, "There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price."[96] While interpreting the text broadly in one aspect, the Court indicated an openness to limiting the plain text in another. The Court stressed the discriminatory aspect of the brokerage arrangement at issue and added the case would be very different if there was evidence of services rendered by the buyer to the seller.[97]

In applying section 2(d)'s prohibition on discriminatory payment for service or facilities, the Court adopted another strong presumption. The Court held that the discriminatory granting of payments was illegal absent the seller establishing the meeting-competition defense. In *FTC v. Fred Meyer, Inc.*, the Court ruled that the prohibition on discriminatory advertising allowances applied even when manufacturers directly sold their goods to some retailer and supplied them indirectly to their rivals through jobbers and wholesalers.[98] Accordingly, the Court ruled that "when a supplier gives allowances to a direct-buying retailer, he must

[95] FTC v. Henry Broch & Co., 363 U.S. 166, 169 (1960).
[96] *Id.* at 174-75.
[97] *Id.* at 173.
[98] 390 U.S. 341 (1968).

also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales."[99]

The Court followed a similar approach for Section 2(e)'s ban on discriminatory provision of facilities and services by sellers. A maker of dress patterns offered patterns to one class of customers on a consignment basis while requiring the second class to pay in cash.[100] Further, it provided cabinets and catalogs for free to the former while charging the latter.[101] The company justified its conduct because the two classes marketed dress patterns differently: the favored class treated them as a source of profits while the disfavored class offered them as a courtesy to customers. Further, it argued that the two classes did not compete in the sale of dress patterns. The Court rejected these justifications as inconsistent with its decision in *Morton Salt* and the plain text of Section 2(e), which makes no reference to competition or competitive injury.[102]

But the Supreme Court was not always faithful to the text and legislative history of the law. It read a few important provisions of the RPA narrowly.

In interpreting the RPA's provision on meeting competition, the Court in the 1940s and 50s took a strict approach to the "good faith" requirement but also established meeting competition as an absolute defense. For example, a seller could not successfully invoke the defense to meet the discriminatory and unlawful pricing practices of a competitor.[103] And further, the meaning of "competitor" was

[99] *Id.* at 358.
[100] FTC v. Simplicity Pattern Co., 360 U.S. 55, 60 (1959).
[101] *Id.*
[102] *Id.* at 67-68.
[103] FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 753-54 (1945).

limited to a competitor of the seller, as opposed to a competitor of a downstream customer.[104] The Court explained this as follows:

> Having consciously chosen not to effect direct distribution through wholly owned and operated stations, Sun cannot now claim for itself the benefits of such a system and seek to inject itself as a supplier into what on this record appears as a struggle wholly between retailers, when such interference favors one of Sun's customers at the expense of others.[105]

The high court examined the text of the law and identified the difference between the language in the Robinson-Patman Act and the original Clayton Act. The Court noted that Congress, in enacting the RPA and amending Section 2 of the Clayton Act, tightened up the requirements of this defense. In the original price discrimination provision in the Clayton Act, Congress liberally permitted price discrimination made to meet a competitor's prices, while in the RPA, meeting competition was made a defense that sellers could invoke to rebut a finding of illegal price discrimination.[106]

The Court, however, made the meeting-competition defense absolute. If a party satisfied the defense, it established a conclusive presumption against legal liability. Sellers could broadly offer targeted price cuts provided they were meeting the prices of a competitor in good faith. The plaintiff could not show adverse effects on downstream competition to overcome the defense.[107] Justice Stanley Reed dissented from this interpretation and contended that the majority

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[104] FTC v. Sun Oil Co., 371 U.S. 505, 529 (1963).
[105] *Id.*
[106] *Staley*, 324 U.S. at 752-53.
[107] Standard Oil Co. v. FTC, 340 U.S. 231, 251 (1951).

undercut Congress's attempt to fix the deficiencies in Section 2 of the Clayton Act through the RPA.[108]

In another defendant-friendly decision, the Court read the buyer liability section narrowly. Buyers could be liable for inducing discriminations in their favor under Section 2(f) of the law.[109] Indeed, the law had been passed principally to rein in the buying clout of chain stores such as the A&P and Kroger.[110] Yet, the bulk of the law focused on the sellers that granted discriminatory concessions to these power buyers. Section 2(f) was an exception. The Court, however, limited the reach of 2(f) in a 1953 decision. The Court in *Automatic Canteen Co. v. FTC* ruled that a seller would avoid liability under 2(f) "if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses."[111] This meant power buyers had broad latitude to escape liability under 2(f).

In *Automatic Canteen*, Justice William O. Douglas dissented on legal and policy grounds. He cited Congress's concerns about the abuse of buyer power and the distinction "between those who incidentally receive discriminatory prices and those who actively solicit and negotiate them."[112] He stated that the buyer should have the burden of establishing the cost justification when "the buyer undertakes to bludgeon sellers into prices that give him a competitive advantage, there is no unfairness in making him show that the privileges he demanded had cost justifications."[113]

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[108] *Id.* at 256-59 (Reed, J., dissenting).
[109] 15 U.S.C. § 13(a).
[110] *See* Part I *supra*.
[111] 346 U.S. at 74.
[112] *Id.* at 85 (Douglas, J., dissenting).
[113] *Id.*

B. Vigorous Enforcement by the Federal Trade Commission Protects Small Retailers and Manufacturers from Buyer Power

The federal government energetically enforced the law in the postwar period and created more room for small and medium-sized retailers to grow and thrive. The FTC played the lead role in developing case law and guidance and ensuring the law had practical force. In doing so, the FTC deprived large corporations of an important competitive weapon—their buyer power—and permitted all firms, regardless of size, to grow through investment and provision of high-quality services. The FTC's enforcement was supplemented by private suits filed by businesses that believed they were victims of a Robinson-Patman violation by a supplier.[114] The RPA was part of a postwar antitrust regime that restricted unfair competition that restricted the economic weapons firms, especially large firms, could use in business rivalry.

The FTC aggressively enforced the law in the postwar era. It helped make and apply the precedents that the Supreme Court announced. It was the plaintiff in several cases that reached the Supreme Court, including in *Morton Salt* and *Simplicity Patterns*. The FTC carried out particularly aggressive enforcement of the RPA in the 1960s. It brought 518 cases during the Kennedy and Johnson administrations, for an average of 65 actions per year between 1961 and 1968.

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[114] Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 409 (1970) (detailing 105 private enforcement actions against "price discrimination between 1935 and 1969); Richard J. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 197 (1961) (detailing 111 private RPA cases between 1936 and 1961, but also stating "Perhaps an additional 220 cases or so have been filed but are unreported.").

In one year during this period, the FTC filed 215 Robinson-Patman Act complaints.[115]

Even as it took the law seriously, the FTC's enforcement practices were not fully faithful to the animating purpose of the RPA. Although Congress passed the RPA as an anti-buyer power measure, it designed the law to principally focus on sellers that granted discriminatory discounts and other special favors and in so doing, the law focused on the victims of buyer power. This choice had a certain logic: Sellers possessed information on whether discriminatory discounts and concessions were being granted and could invoke the RPA to reject demands and requests for special favors. Buyers did not necessarily know whether they were the beneficiaries of price discrimination and other special favors. But as economist Corwin Edwards quipped, the RPA "bears some resemblance to an effort to stamp out mugging by making it an offense to permit oneself to be mugged."[116] Further, as discussed in Section II.A, the Supreme Court narrowed the RPA's buyer liability section and made the meeting-competition defense absolute, which likely allowed power buyers to play suppliers off against each other and still avoid legal liability. Given the structure and judicial interpretations of the law, the FTC principally targeted sellers in its enforcement activities.[117]

The FTC's prosecutions also had an ad hoc quality. It disproportionately targeted smaller manufacturers and wholesalers rather than large manufacturers.[118] The FTC did not select industries and practices based on economic

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[115] D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2072 (2015).
[116] EDWARDS, *supra* note 15, at 63.
[117] Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1, 6 (1966).
[118] Corwin D. Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. BUS. 149, 151, 153 (1959).

significance but appears to have focused on cases it could easily win.[119]

In addition to enforcing and shaping the law in front of the courts, the FTC made policy through guidance documents. To clarify ambiguities in the case law and statutory text and aid business compliance, the FTC issued guides and advisory opinions. To identify what sellers can and cannot do under the Supreme Court's *Fred Meyer* decision, the FTC issued the Guides for Advertising Allowances and Other Merchandising Payments and Services.[120] The guides, which have been called the *Fred Meyer* Guides, articulate how sellers can offer promotional allowances without violating Sections 2(d) and (e). In addition, the FTC issued a series of advisory opinions in response to inquiries from businesses and their counsel concerning the Robinson-Patman Act. These advisory opinions covered topics such as cooperative advertising allowances and functional discounts.[121]

Did RPA effectively combat buyer power when it was robustly enforced? The most thorough empirical study of RPA used data from capital markets. If the RPA were effective, chain stores should have lost profitability derived from securing discriminatory discounts. If chain stores had previously profited from the kind of non-cost-justified discounting prohibited by RPA and were unable to use a workaround like backward integration or exclusive contracting with suppliers, this should be reflected in lower equity prices following passage of the RPA. That is indeed

[119] EDWARDS, *supra* note 15, at 68-70, 75-78.
[120] 16 C.F.R. § 240.
[121] 68 FED. TRADE COMM'N., FEDERAL TRADE COMMISSION DECISIONS: FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1965, TO DECEMBER 31, 1965, at 1271-72 (1970) (detailing cooperative advertising); 71 FED. TRADE COMM'N., FEDERAL TRADE COMMISSION DECISIONS: FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1967, TO JUNE 30, 1967, at 1724-25 (1970) (detailing functional discounts).

what the study found: from the month RPA was introduced until 30 months afterward, grocery chains experienced statistically and economically significant negative abnormal returns. The total fall in equity value was as high as 58 percent. In addition, the study also examined capital market returns after RPA enforcement actions. It found that prosecuted firms were indeed harmed.[122] This evidence suggests the RPA succeeded in its stated goals.

Vigorous Robinson-Patman enforcement created more space for small and medium-sized retailers to grow and thrive. Under Robinson-Patman, large retailers such as the A&P and Kroger could not use their buyer power to extract price discounts and other special concessions from suppliers. The law reduced spreads in wholesale prices, and successful enforcement forced the termination of discriminatory discounts in favor of big chains.[123] That meant large buyers no longer had an important competitive weapon to employ against small and medium-sized rivals. They could still compete through the attainment of genuine operational efficiencies in distribution and reasonable discounting. While the cost-justification defense was not easy to establish, the Robinson-Patman Act spurred firms to pay closer attention to cost accounting and document bona fide efficiencies in production and distribution.[124]

The Robinson-Patman Act was embedded within a broader legal regime of fair competition. The law restricted the use of market and financial power as competitive weapons and encouraged firms to compete through internal expansion,

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[122] Thomas W. Ross, *Winners and Losers under the Robinson-Patman Act*, 27 J.L. & ECON. 243 (1984).
[123] EDWARDS, *supra* note 15, at 622-24.
[124] *Id.* at 628. Improving businesses' cost accounting was a major focus of public interest lawyer and later Supreme Court Justice Louis Brandeis. *See generally* GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900-1932 (2009).

attainment of productive efficiencies, and development of new products and processes. Limits on predatory pricing, including under the Robinson-Patman Act, prevented deep-pocketed firms from driving competitors out through below-cost pricing.[125] Superior access to finance could not be freely deployed as a competitive weapon.

The federal government and Supreme Court also construed anti-merger law expansively. In articulating the meaning of Section 7 of the Clayton Act, the Supreme Court interpreted the law as a strong anti-consolidation measure that sought to preserve relatively unconcentrated market structures and to promote growth through internal expansion in lieu of growth through mergers and acquisitions. In *United States v. Von's Grocery Co.*, the Court held that a merger between two Los Angeles-area supermarket chains, with a combined market share of 7.5% violated the Clayton Act.[126] The Court also stressed that internal expansion was an available method of growth for all firms[127] and that it was socially superior to mergers. The Court in the seminal 1962 decision *Brown Shoe Co. v. United States* wrote:

> A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons,

[125] Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).
[126] United States v. Von's Grocery Co., 384 U.S. 270, 272, 279 (1966).
[127] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 370 (1963).

> among others, Congress expressed its disapproval of successive acquisitions.[128]

The postwar antitrust regime promoted a more decentralized economy. In retailing and other sectors, small and medium-sized firms had more freedom to grow. Larger rivals could not use their buyer power to obtain lower wholesale prices and other dispensations from suppliers. As described in Section I, before the enactment of the Robinson-Patman Act, the FTC had found that chain stores were obtaining goods at wholesale prices substantially lower than what their smaller rivals were charged.[129] In some cases, small and medium-sized food retailers paid *wholesale* prices that were higher than what their larger rivals charged *retail* customers.[130] The enforcement of Robinson-Patman restricted such pricing advantages for large chains unless they could be justified on the basis of manufacturing or distributional cost savings. Further, Supreme Court decisions such as *Von's* and *Brown Shoe* encouraged firms to grow through investment in new and larger stores instead of acquiring existing firms. In this legal environment, "[r]egional, sectional, and local chains led the postwar supermarket boom" and initiated the adoption of new store formats.[131]

III. The Decline and Fall of the Robinson-Patman Act

Since the 1970s, the Robinson-Patman Act has been marginalized and subject to vigorous criticism. The federal antitrust agencies stopped aggressively enforcing the law

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[128] Brown Shoe Co. v. United States, 370 U.S. 294, 345 n.72 (1962).
[129] FTC CHAIN STORE REPORT, *supra* note 11, at 24-29.
[130] *Id.*
[131] Paul B. Ellickson, *The Evolution of the Supermarket Industry: From A&P to Walmart* 374-75, *in* HANDBOOK ON THE ECONOMICS OF RETAIL AND DISTRIBUTION (Emek Basker, ed., 2016).

beginning in the Nixon administration. The law has also been subject to withering criticism from inside and outside the government, most famously in a 1977 report published by the DOJ.[132] This criticism has been informed heavily by a consumer welfare ideology that favors low prices and high output above all else.

While the Supreme Court has created procedural obstacles to private enforcement of the law, it has notably *not* revisited nor overturned key postwar precedents such as *Morton Salt*. The Robinson-Patman Act's fall from grace was instigated and led by the federal antitrust agencies through a policy of effective non-enforcement and less so by decisions of the Supreme Court.

Enforcement of the Robinson-Patman Act by the federal government has declined to nil in recent times. This began with the Nixon administration, which brought far fewer RPA cases than the preceding Kennedy and Johnson administrations had. In its first term, the Nixon administration filed, on average, one Robinson-Patman lawsuit per year, compared to an average of 65 per year under the two preceding administrations.[133] This de facto non-enforcement continued under subsequent Democratic and Republican presidents. The FTC last filed, and settled, a Robinson-Patman case in 2000.[134] Since then, the federal

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[132] U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977) [hereinafter DOJ-RPA REPORT].
[133] Sokol, *supra* note 115, at 2072.
[134] McCormick & Co., FTC Docket No. C-3939 (Mar. 8, 2000), 2000 WL 264190 (consent order); *see also* Press Release, Fed. Trade Comm'n., World's Largest Manufacturer of Spice and Seasoning Products Agrees to Settle Price Discrimination Charges, Fed. Trade Commn. (Mar. 8, 2000), https://www.ftc.gov/news-events/news/press-releases/2000/03/worlds-largest-manufacturer-spice-seasoning-products-agrees-settle-price-discrimination-charges.

government, under Presidents Bush, Obama, Trump, and Biden, have not filed a single RPA case.[135]

What catalyzed this change? Beginning in the 1970s, the courts initiated an ideological shift in antitrust and competition policy. The Supreme Court in 1972 declared, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[136] The Court described the antitrust laws as a broad political economic measure.

Just seven years later, following the appointment of two new justices, the Court announced a much narrower vision of antitrust law. In *Reiter v. Sonotone Corp.*, the Court, quoting Robert Bork, said that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[137] Expressing a maximalist consumerist ideology, the Supreme Court in 1990 asserted, "Low prices benefit consumers *regardless of how they are set*. So long as they are above predatory levels, they do not threaten competition and, hence, cannot give rise to antitrust injury."[138] This statement applied literally would mean that low prices derived from the exercise of buyer

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[135] Sokol, *supra* note 115, at 2072. The Biden FTC has signaled an interest in reviving Robinson-Patman enforcement, but as of today, has not filed or settled a complaint. *See, e.g.*, Josh Sisco, *Feds Target Alcohol Pricing in New Antitrust Probe*, POLITICO (Mar. 30, 2023), https://www.politico.com/news/2023/03/30/feds-target-alcohol-pricing-in-new-antitrust-probe-00089676.
[136] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
[137] 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).
[138] Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) (emphasis added).

power over suppliers or the mistreatment of workers are not only permissible, but desirable.

Although none of these cases directly implicated the RPA, an important ideological change was afoot inside and outside the federal judiciary—consumerism was now the watchword. This ideology was captured in the 1977 report the DOJ published on the RPA. The DOJ heavily criticized the law and its assumptions and estimated that its enforcement was costing consumers in the United States three to six billion dollars every year.[139] It contended that the law discourages targeted price-cutting and could thereby preserve collusive arrangements among manufacturers.[140] Further, the DOJ alleged that the law promotes wasteful product differentiation as a means of evading the prohibition on price discrimination.[141] This criticism was also echoed by scholars more sympathetic to the RPA.[142] Based on its assessment of the law's effects, the DOJ called for Congress to consider repealing the RPA.[143]

This critical theme rooted in consumerism has been repeated by others. In a speech given to a group of industrialists in 1966, Robert Bork disparaged the law as "the Typhoid Mary of antitrust."[144] Herbert Hovenkamp, dubbed "a dean of the

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139 DOJ-RPA REPORT, *supra* note 131, at 40.
140 *Id.* at 40, 75-77. Arguably, this criticism missed the mark because it ignored a conscious tradeoff by Congress: "It could be said that the act was intended to limit competition among sellers, in the short run, in the hope of strengthening competition among buyers, in the long run." Elman, *supra* note 117, at 5.
141 DOJ-RPA REPORT, *supra* note 131, at 75-78.
142 EDWARDS, *supra* note 15, at 629.
143 DOJ-RPA REPORT, *supra* note 131, at 261.
144 Hansen, *supra* note 3, at 1114 (citing Robert Bork, *The Place of Antitrust Among National Goals*, Address Before the National Conference Board, at 9 (Mar. 3, 1966)).

antitrust bar" by the *New York Times*,[145] asserted that the RPA's prohibition on discrimination in favor of power buyers "is irritating to almost anyone who is serious about antitrust."[146] The bipartisan Antitrust Modernization Commission, which Congress created in 2002,[147] repeated many of the familiar criticisms. In its 2007 report, it urged Congress to repeal the RPA in its entirety.[148]

Even as it initiated an ideological reorientation in antitrust law, the Supreme Court has joined the anti-Robinson-Patman effort in only a limited way. Although it sought to reconcile perceived inconsistences between the Robinson-Patman Act and the other antitrust laws,[149] it did not overrule decisions such as *Morton Salt*. In a 2004 case, the Court limited the application of *Morton Salt* and held it did not cover an unusual set of facts in a case about the marketing of heavy-duty trucks.[150] It, however, affirmed *Morton Salt*.[151]

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[145] James B. Stewart, *For Airlines, It May Be One Merger Too Many*, N.Y. TIMES (Aug. 17, 2013), https://www.nytimes.com/2013/08/17/business/for-airlines-it-may-be-one-merger-too-many.html.
[146] Hovenkamp, *supra* note 4, at 125.
[147] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).
[148] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 20 (2007).
[149] *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180-81 (2004) ("Interbrand competition, our opinions affirm, is the 'primary concern of antitrust law.' Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–52, n. 19 (1977). 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 Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*.") (emphasis in original).
[150] *Id.* at 178-80.
[151] *Id.* at 177.

The Court also addressed the scope of defenses. It expanded the breadth of the meeting-competition defense, though not dramatically. In 1978, the Court held that sellers did not need to verify the offers of competitors to satisfy the meeting-competition defense because such communications could facilitate collusive pricing and violations of the Sherman Act.[152]

Further, the Court considered the legality of "functional discounts" in which sellers could charge purchasers at different levels of the distribution chain different prices.[153] For instance, a manufacturer could sell a good at a lower price to a wholesaler than to a retailer because the wholesaler performs certain distributional services that the retailer does not.[154] The Supreme Court ruled that these discounts are legal when they are "reasonable" but held that they could constitute illegal discrimination.[155] Two justices, closely hewing to the text of the law, wrote that the Court should prohibit functional discounts *unless* the sellers could meet the requirements of the cost-justification defense.[156]

Some courts of appeals have gone beyond what the Supreme Court and limited the force of the *Morton Salt* inference. Notwithstanding the statute's plain language[157] and the

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[152] United States v. U.S. Gypsum Co., 438 U.S. 422, 458-59 (1978).
[153] *See* In re Doubleday & Co., 52 F.T.C. 169, 207 (1955) ("Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions.").
[154] KINTNER RPA PRIMER, *supra* note 35, at 140.
[155] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 571 (1990).
[156] *Id.* at 579-80 (Scalia, J., concurring).
[157] *See* 15 U.S.C. § 13(a) (prohibiting price discrimination in sale of commodities "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or *to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them*") (emphasis added)

Morton Salt decision, three courts of appeals held that market-wide harm is necessary to establish a violation of Section 2(a) of the RPA.[158] The D.C. Circuit ruled that the *Morton Salt* inference could be rebutted by showing that competition in the market in which the disfavored purchaser competed remained "healthy."[159] While narrowing the scope of liability and effectively rewriting the text of the law, these decisions are not the law of the land, only particular circuits.

Most damagingly, the Supreme Court erected obstacles to effective private enforcement of the RPA. In a 1977 decision, the Court had held that private plaintiffs in antitrust cases must show "antitrust injury."[160] It defined "antitrust injury" (in a circular fashion) as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[161]

The Court subsequently applied the antitrust injury requirement to private RPA claims. Accordingly, plaintiffs injured by a Robinson-Patman violation had to compute damages from the injury already suffered and would no longer be automatically entitled to damages based on the price differential between themselves and favored purchasers.[162] Instead, plaintiffs would have to estimate the damages they sustained, such as lost profits, from the discrimination.[163] This creates a major bar to private

[158] Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983); Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380, 395 (10th Cir. 1985).
[159] Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1143-44 (1988).
[160] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).
[161] *Id.*
[162] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562-63 (1981).
[163] *Id.* at 567-68.

enforcement as it effectively nullifies the prophylactic intent Congress designed the RPA to have.[164] This challenge is especially acute when the commodity subject to illegal price discrimination is one of hundreds or thousands of items carried by the victim of the discrimination, making lawsuits much more difficult to win.

Judicially created barriers to private litigation appear to have had a significant effect on private enforcement of the RPA.[165] One study found that between 1996 and 2006, only three out of 200 private Robinson-Patman lawsuits resulted in a jury verdict for plaintiffs and only two of those survived appeal.[166] This does not appear to be an aberration. In more recent times, private Robinson-Patman suits continued to fare very poorly in court.[167] This fact underscores one practical reality. Private enforcement of the RPA is toothless at present. In the absence of enforcement by the federal government, the *effective* enforcement of the RPA may be nil.

Notwithstanding its unfavorable decisions for private enforcers, the Court's overall interpretation of the RPA stands in contrast to its broad reinterpretation of the Sherman Act. Whereas the Court overturned or narrowed many key Sherman Act precedents, it took a more restrained approach to the RPA. For instance, it reversed decades-old decisions outlawing vertical price restraints as per se illegal

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[164] Keith Leffler & Ted Tatos, *Competitive Injury and Damages under the Robinson-Patman Act:* Morton Salt *and Statistical Analysis*, 60 ANTITRUST BULL. 318, 323 (2015).

[165] The federal judiciary has erected many general obstacles to the effective private enforcement of law. *See generally* Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303 (2015).

[166] Glick, Mangum, & Swensen, *supra* note 4, at 294.

[167] Ryan Luchs, et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123, 2124 (2010).

under the Sherman Act.[168] In addition to replacing particular per se rules with the rule of reason, the Court expressed general discomfort with maintaining or adopting per se rules under the Sherman Act.[169] With the RPA however, the Court largely upheld older precedents, such as *Morton Salt*. It fiddled around the edges, in ways no doubt adverse to private plaintiffs, but did not rethink its longstanding approach to the law.

IV. Making Sense of It All: Robinson-Patman Act as Fair Competition Law

A. Restrictions on Buyer Power as a Competitive Weapon

Far from being outdated or irrational, the Robinson-Patman Act is highly relevant to today's economy, in which buyer power is pervasive. As discussed at greater length in Section VI, while there is widespread evidence that horizontal concentration across economic sectors has increased in recent decades,[170] vertical integration has declined steadily over the same period.[171] This confluence of horizontal

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[168] Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. at 907; State Oil Co. v. Khan, 522 U.S. 3, 22 (1997).
[169] *See State Oil*, 522 U.S. at 10 ("[W]e have expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.") (internal quotation omitted).
[170] David Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020); Matias Covarrubias, Germán Gutiérrez & Thomas Philippon, *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NAT'L BUREAU OF ECON. RES. MACROECON. ANNU. 1 (2020); THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (1st ed. 2019).
[171] Gerald Davis & J. Adam Cobb, *Resource Dependence Theory: Past and Future*, 28 RES. SOC. ORGS. 21 (2010); Florian Kaiser & Robert

concentration with vertical dis-integration signals the growing role of buyer power in the economy.

Buyer power harms upstream suppliers. Studies find that large buyers do force reductions in profits among suppliers.[172] Moreover, the effects of buyer power go beyond the profits of suppliers, and harm the employees of suppliers as well. A growing body of evidence indicates that, in addition to effects on supplier profits, buyer power in supply chains also reduces wages at upstream suppliers. Using a panel of publicly traded firms, sociologist Nathan Wilmers finds that supplier dependence on large buyers lowers the wages paid by suppliers.[173]

Buyer power also affects other aspects of jobs besides wages, including worker health and safety. The garment industry supply chain, first in the U.S. and then globally as production migrated overseas, has long been plagued by unsafe workplaces, due in part to the demands for low prices from large buyers such as retail chains.[174] Meanwhile a case study

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Obermaier, *Vertical (Dis-)Integration and Firm Performance: A Management Paradigm Revisited*, 72 SCHMALENBACH BUS. REV. 1 (2020); Herman M Schwartz, *Intellectual Property, Technorents and the Labour Share of Production*, COMPETITION & CHANGE (2020); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

[172] Martin L. Gosman & Mark J. Kohlbeck, *Effects of the Existence and Identity of Major Customers on Supplier Profitability: Is Wal-Mart Different?*, 21 J. MGMT. ACCT. RES. 179 (2009); Yoon Hee Kim, *The Effects of Major Customer Networks on Supplier Profitability*, 53 J. SUPPLY CHAIN MGMT. 26 (2017).

[173] Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers' Wages, 1978 to 2014*, 83 AM. SOC. REV. 213 (2018).

[174] Mark Anner, *Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective,* 27 REV. INT'L. POL. ECON. 320 (2019); ROBERT J. S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS (2004).

of three meat processing plants in the United Kingdom finds that price and delivery demands from supermarkets raise the repetitive motion workloads of processing plant workers.[175]

Since enforcement of RPA was abandoned, antitrust enforcers have struggled to target buyer power. Proponents of consumer welfare antitrust generally insist that harm to downstream purchasers or final consumers is a necessary component of any antitrust claim, or alternatively that a reduction in output must be shown.[176] As C. Scott Hemphill and Nancy L. Rose point out in the context of merger review, nothing in antitrust law says that harm to sellers in an input market is not a sufficient basis for an antitrust claim.[177] The Supreme Court held that antitrust law has several protected classes, including sellers.[178] Hemphill and Rose, however, incorrectly state that "antitrust does not prohibit the exercise of lawfully obtained monopsony power," thereby ruling out antitrust action to combat buyer power outside the merger context.[179] On the contrary, guarding against the exercise of monopsony power, even lawfully obtained monopsony power, is a principal purpose of the RPA.

B. Economic Models of Price Discrimination and the RPA

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[175] Caroline Lloyd & Susan James, *Too Much Pressure? Retailer Power and Occupational Health and Safety in the Food Processing Industry*, 22 WORK EMP. SOC. 713 (2008).

[176] Even "wins" for workers in antitrust suits have been qualified by judicial consideration for consumer interests. NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021).

[177] C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078 (2018).

[178] Mandeville Island Farms. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948). The protection of sellers has been affirmed in recent times. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) ("[A] horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.").

[179] Hemphill & Rose, *supra* note 177 at 2084.

Economists have developed several models to understand the effects of price discrimination in different contexts. However, the usefulness of these models to understanding and applying RPA are limited by two factors. First, likely for reasons of tractability, the models deal with simple cases of price discrimination versus no price discrimination. The RPA, however, is not the blanket ban on price discrimination assumed in economic models. Rather it is targeted to price discrimination derived from raw market power, yet allows for cost-justification and meeting-competition defenses. Second, in evaluating the benefits and drawbacks of price discrimination, economists substitute their own normative framework—simple versions of welfare economics focused on the price and output effects of policy changes—for the normative framework of Congress when it created the law, which was to ensure fair competition and protect suppliers and retailers from unfair exercises of market power. While law and economics scholars may wish it were otherwise, economists cannot veto laws enacted by Congress when they do not conform to their understanding of welfare.

The economic literature on price discrimination can still be an aid in thinking through the likely effects of the RPA, and whether it is well suited to its statutory goals under plausible economic conditions. Economists in recent decades have typically opposed bans on price discrimination. One major reason is that total surplus and output can often rise when a seller with market power is allowed to discriminate, even if price-discriminating firms with market power capture the surplus and wealth is redistributed as a result. A discriminating monopolist can be expected to use price discrimination to serve new markets and expand output, since price discrimination allows it to sell marginal units at a lower price to marginal customers with a higher price elasticity of demand.[180] Another reason is that economists believe price discrimination can destabilize cartels by encouraging selective and targeted price-cutting by cartel members.[181]

However, the traditional models showing positive output and total surplus effects of price discrimination pertain to final goods markets. It turns out that the effects of secondary-line price discrimination in intermediate goods markets, where the RPA applies,[182] are considerably more complex. For example, in intermediate goods markets, unlike final goods markets, the downstream firm's demands are interdependent (they depend not just on its own input prices and profits, but those of its rivals as well). Moreover, in

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[180] *See* Hal R. Varian, *Price Discrimination and Social Welfare*, 75 AM. ECON. REV. 870 (1985); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 189-91 (1933). Robinson's approach to evaluating the effects of price discrimination was significantly more nuanced than contemporary maximum output fetishists, however. She incorporate equity (or what could be called fairness) as well as efficiency into her moral framework, since the lower price-elasticity consumers might be in some cases be poorer than the high-elasticity customers: "From one point of view, therefore, price discrimination must be held to be superior to simple monopoly in all those cases where it leads to an increase in output…But against this advantage must be set the fact that price discrimination leads to a maldistribution of resources." *id.* at 206. Robinson also pointed out that uniform price regulations, if targeted well, could also achieve the maximum output effect, without the need for price discrimination. *id.* at 207.

[181] On the other hand, price discrimination could actually facilitate cartel stability, by allowing cartel members to compete vigorously in markets where collusion is bound to fail, while colluding in those markets where cartel discipline is viable. Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 AM. ECON. REV. 154 (1987).

[182] The law only prohibits secondary-line price discrimination in the sale of commodities in which the purchasers are competitors. 15 U.S.C. § 13(a). As such, it does not bar discrimination in sales to end-use consumers. A grocery store, for instance, can offer discounts on pickles to senior citizens without violating the RPA.

intermediate goods markets, the larger downstream firms may be able to integrate backward and supply the good themselves.[183]

One major strand of the secondary-line price discrimination literature argues that we should actually observe price-discriminating monopoly suppliers charging higher prices to the *stronger* buyers, because the largest or most efficient buyers are better able to support higher input costs with their own higher prices, or their own efficiencies. In these models, the RPA's effect is the opposite of Congress's intention, since it protects the strongest buyers, not the weaker, from supplier attempts to extract a larger share of the surplus.[184]

While this class of models does show the potential for perverse effects from RPA enforcement in cases in which market power is strongest in upstream rather than downstream markets, the real world prevalence of such market structures (upstream monopolist, downstream rivalry) is likely quite limited. In practice, as discussed in Section VI, we commonly observe that large retailers have bargaining power against even large suppliers, derived from the ability to source from alternative suppliers, from the ability to integrate backwards (or credibly threaten to do so), and from other sources of bargaining power (such as lower disagreement costs).

Indeed, when economists relax the assumption of upstream monopoly and allow downstream buyers to search for alternative suppliers, the finding that stronger buyers pay

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[183] Katz, *supra* note 181.

[184] Patrick DeGraba, *Input Market Price Discrimination and the Choice of Technology*, 80 AM. ECON. REV. 1246 (1990); Yoshihiro Yoshida, *Third-Degree Price Discrimination in Input Markets: Output and Welfare*, 90 AM. ECON. REV. 240 (2000).

higher prices from the earlier literature reverses, and stronger buyers are now the ones that receive a discount. This finding supports the RPA as an effective law in achieving its stated goals of protecting suppliers and small retailers from buyer power.

This literature does show that protection of suppliers and retailers may come at a cost. In perhaps the strongest argument against the RPA, these models imply that a ban on price discrimination may reduce the incentives for upstream firms to invest in innovation and growth, because a price discrimination ban would prevent them from leveraging the advantages of size into further profits and competitive advantage through increased bargaining power against suppliers.[185]

Nonetheless, the ability to leverage size into squeezing suppliers is socially undesirable.[186] Under robust RPA enforcement, upstream firms would still be free to seek competitive advantage and grow large through investments in innovation, new product development, more efficient production and distribution methods, and the like. RPA does not bar these more socially beneficial methods of business growth. The only competitive channel that RPA closes is the one where firms squeeze their supply chains for discounts not justified by cost differences that are unavailable to their competitors. Protecting suppliers from this squeeze from large buyers and protecting small retailers from unfair

[185] Roman Inderst & Greg Shaffer, *Market Power, Price Discrimination, and Allocative Efficiency in Intermediate-Goods Markets*, 40 RAND J. ECON. 658 (2009); Roman Inderst & Tommaso Valletti, *Price Discrimination in Input Markets*, 40 RAND J. ECON. 1 (2009).
[186] One might also point out here that while RPA does prevent suppliers from giving in to a powerful buyers' demands for discounts at the expense of weaker buyers unable to exercise similar bargaining power, the supplier is also banned from keeping inefficient buyers afloat by charging a lower price than that charged to more efficient buyers.

competition resulting from such a squeeze, is the policy goal of the RPA. Congress did not consider a modicum of redistribution of rents from downstream power buyers to suppliers, or even a modest reduction in output, as outweighing the fairness goals of the RPA.

In a final strand of the literature, the mechanisms by which the buyers extract the discounts prove crucial. Here, the welfare and output effects depend on how the contracts between buyers and suppliers are structured, and the results vary widely depending on the modeling assumptions. Non-linear contracting such as two-part tariffs prove to be important in these models. A key finding is that if the buyer extracts an increased share of surplus through a lump sum (like a slotting fee) rather than in the unit price, it actually generates no downstream competitive advantage, because all buyers are charged the same marginal wholesale price, and profit-maximizing large buyers would have few incentives to pass the gains on to consumers in lower prices. However, in the more realistic scenario of downstream rivalry, each buyer has an incentive to negotiate a lower marginal payment (not just a lower lump sum), in order to gain a cost advantage over rivals and win market share. Once they all do this, consumers gain from lower prices, and so a ban on price-discrimination would harm consumers in this case.[187]

Finally, adding still more complexity, when downstream buyers are not uniform, but have differing bargaining powers, the larger firms' ability to bargain lower input prices can reinforce their competitive advantages in the final goods market, leading in some cases to higher overall retail prices through the so-called "waterbed effect," raising wholesale prices for all rival downstream firms and ultimately

[187] Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J. L. ECON. & ORG. 296 (1994).

consumers.[188] At this point, it should be clear that the effects of price discrimination bans on prices and output are highly sensitive to modeling assumptions, and economic models alone cannot support bright-line competition rules.

C. Promotion of Operational Efficiencies

While lower intermediate goods prices extracted by a large buyer may be passed on to consumers in the form of final goods output, potentially even resulting in higher output, this is not necessarily evidence of increased productive efficiency. As Hemphill and Rose demonstrate, in many cases "efficiencies" premised on an increase in buyer power are not efficiencies at all. Rather, lower wholesale prices may simply result from bargaining leverage that redistributes surplus from suppliers to powerful buyers, harming suppliers.[189] The lower input prices, even if passed on to final consumers, are a function of exploitation, not superior efficiency.

What is more, likely for reasons of tractability, the economic and legal literature on RPA treats RPA as a blanket prohibition on secondary-line price discrimination.[190] But the RPA is not a blanket ban. Some critics mistakenly assume that the chains thrived solely on account of superior efficiency and that Congress was targeting efficiency-based

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[188] Roman Inderst & Tommaso M. Valletti, *Buyer Power and the 'Waterbed Effect'*, 59 J. INDUS. ECON. 1 (2011).
[189] Hemphill & Rose, *supra* note 177.
[190] For an example of critics failing to distinguish between discounts due to buyer power and discounts due to bona fide cost savings and the RPA's protection of the latter, see Muris & Nuechterlein, *supra* note 4, at 503 (asserting that the law "was explicitly enacted to protect entrenched economic interests—wholesalers and small retailers—by keeping large chain stores such as the supermarket giant A&P from underselling their smaller rivals by acquiring goods at a discount, bypassing middlemen, and passing along the savings to consumers").

cost savings.[191] The FTC concluded that some of the wholesale advantages enjoyed by the A&P and other major chains were a product of buyer power.[192]
Congress permitted discounting under both the meeting-competition and the cost-justification defenses. The cost-justification defense fully allows suppliers to charge buyers lower prices if the costs of serving that seller are lower. For example, if agreeing to serve a larger seller at a lower price allows the supplier to reach economies of scale otherwise unavailable, RPA does not prohibit charging the large buyer a lower price. There are many other scenarios where price discrimination can be similarly justified on cost and efficiency grounds. Susan Helper and Rebecca Henderson contrast the extractive relationship between General Motors and its suppliers with Toyota's more cooperative, "relational" contracting approach.[193]

In cooperative models of supply chain relations, suppliers would be able to justify discounts to preferred buyers by pointing to relationship-specific investments and efficiencies that generate cost savings from serving a particular buyer. Indeed, large corporate buyers can in some cases bring gains to suppliers through mechanisms that include supplier learning.[194] Discounts to buyers would be one way of sharing

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[191] *See, e.g.*, Blair & DePasquale , *supra* note 4, at S202 ("In 1936, the Robinson-Patman Act (15 U.S.C. sec. 13) amended section 2 of the Clayton Act in an effort to protect mom-and-pop stores from the large retail chains. Such protectionism was ill-advised since consumers obviously preferred the lower prices of the more efficient chains to the higher prices offered by smaller, owner-operated stores.").
[192] FTC CHAIN STORE REPORT, *supra* note 11, at 24-25, 53.
[193] Susan Helper & Rebecca Henderson, *Management Practices, Relational Contracts, and the Decline of General Motors.*, 28 J. ECON. PERSP. 49 (2014).
[194] Panos N. Patatoukas, *Customer-Base Concentration: Implications for Firm Performance and Capital Markets*, 87 ACCT. REV. 363 (2011); Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 ADMIN. SCI. Q. 35 (1997).

those savings and encouraging mutual commitment. While suppliers would still have the burden of establishing the cost-justification defense, they can use reasonable classifications to show that selling to certain customers entails lower costs of distribution or manufacturing than sellers to other customers.[195]

V. Narrow Welfare Economics is the Wrong Framework for Evaluating the RPA

The normative conclusions of most of the economic models discussed above are ultimately of limited relevance to the RPA. When economists evaluate the RPA, they tend to focus their attention on the output, price, or total surplus effects of different types of price discrimination in various scenarios. Their competitive market is one that has maximal output and little or no deadweight loss.[196] One problem with this approach is that in doing so, economists substitute their own policy goals for the fair competition goals Congress set out when it enacted the RPA.[197]

The standard welfare economics normative framework used by antitrust scholars is orthogonal to RPA's goals. These

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[195] *Borden*, 370 U.S. at 469.

[196] The Supreme Court has stressed output maximization as the goal of antitrust in certain restraint of trade cases. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289 (2018). In monopolization cases though, the Court has held that output reduction—one consequence of monopoly power—is not enough to establish a violation of the law. Indeed, in one case, the Court praised monopoly power, notwithstanding any output reductions: "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Verizon Commc'ns Inc. v. L. Off. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

[197] For more on the misapplication of maximum output and maximum surplus measures of welfare in light of modern welfare economics, *see* Mark Glick, Gabriel A. Lozada, & Darren Bush, *Why Economists Should Support Populist Antitrust Goals*, 2023 UTAH L. REV. 769.

goals are, once again, to protect suppliers and small buyers from unfair competition resulting from raw bargaining power. When garment manufacturers persuaded the FTC to prevent rivals from granting advertising concessions to large buyers in the *Abby Kent* case, the protection of suppliers from unfair competition in an industry prone to buyer squeezes and resulting sweatshop working conditions was a success, not a flaw, of RPA enforcement.[198] While the rise of fast fashion and cheap clothes alongside the re-emergence of garment sweatshops as apparel manufacturing has moved overseas and out of the reach of RPA might be seen as a triumph of consumer welfare, the aims of Congress in 1936 were different. In other words, blaming RPA for failing to maximize consumer welfare is a category mistake.

Standard economic models used in antitrust too often fail to grapple with the fact business rivalry is a process structured by law.[199] This is the fundamental defect in the criticisms of the RPA. The critics, explicitly or implicitly, posit that competition is a free for-all in which firms can win by hook or crook and something that is categorically good.[200] The dominant antitrust language of "anticompetitive" conduct versus "procompetitive" conduct rests on the assumption

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[198] Abby Kent Co., 68 F.T.C. 393 (1965).
[199] *See* STEVEN K. VOGEL, MARKETCRAFT: HOW GOVERNMENTS MAKE MARKETS WORK (2018); Brian Callaci, *Labor Unions and the Problem of Monopoly: Collective Bargaining and Market Governance, 1890 to the Present*, 51 POL. & SOC'Y 387, _ (2023) ("All markets are in fact governed. Markets do not arise spontaneously from nature, but rather sit atop legal rules, regulatory infrastructures, and informal norms and power relationships that structure them. Different market governance regimes determine how firms compete.").
[200] For instance, one critical assessment of the Robinson-Patman Act states that secondary-line price discrimination cases are concerned with "protecting the firm's disfavored customers rather than protecting competition in the market." Blair & DePasquale , *supra* note 4, at S209.

that competition is a categorical or general good.[201] Indeed, one leading critic has labeled the RPA itself as "anticompetitive."[202]

Notwithstanding the antitrust platitudes about the "protection of competition, not competitors,"[203] competition is not a categorical good. Just as the rules of Major League Baseball proscribe certain types of rivalry between teams, some forms of business competition are restricted by law.[204] If economic competition were literally a free for all, firms would be able to assault or murder executives of competitors with impunity. A narrow focus on price or output disregards the fact that competition is not a static outcome, but instead a dynamic process structured by public policy.

A few examples are illustrative. Consider prohibitions on false advertising and industrial sabotage. Similarly, the antitrust laws restrict the use of predatory pricing,[205] exclusive dealing,[206] property destruction,[207] and regulatory fraud[208] as competitive methods. Congress recognized the

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[201] *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001). The Supreme Court posited competition as always good in particularly strong terms in one 1993 decision. It wrote that the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).
[202] Hovenkamp, *supra* note 4, at 132.
[203] *Atl. Richfield*, 495 U.S. at 338.
[204] Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 WILLIAM & MARY L. REV. ONLINE 119 (2022); Nicolas Cornell, *Competition Wrongs*, 129 YALE L.J. 2030 (2020).
[205] Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005).
[206] McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015); United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005).
[207] Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).
[208] Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

legal construction of economic competition when it outlawed "*unfair* methods of competition" in section 5 of the FTC Act.[209] Recognizing that unfair competition laws are not restricted to antitrust, Congress, in enacting the Fair Labor Standards Act, declared employers' paying of unfairly low wages and demanding too much work to be an "unfair method of competition."[210] And under the antitrust laws, firms excluded from a market by proscribed competitive practices can obtain monetary and equitable remedies.[211] In other words, the law protects competitors from certain forms of competition. Critics who disparage the RPA as "protectionism"[212] ignore the fact that the law, in general, protects firms from *certain* forms of competition.

The similarities between Section 2 of the Sherman Act and the RPA show how they limit the use of certain competitive methods. Under longstanding Sherman Act precedent, monopolists cannot use their power as a competitive weapon. While monopolies are not per se illegal under the Sherman Act, they are illegal if they were obtained or maintained through improper means.[213] For instance, the Sherman Act prohibits "the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'"[214] In a similar spirit, the Robinson-Patman Act restricts the use of buyer power as a competitive weapon. Congress designed it "to curb and prohibit all devices by which large buyers gained discriminatory

[209] 15 U.S.C. § 45 (emphasis added).
[210] 29 U.S.C. § 202(a)(3).
[211] 15 U.S.C. §§ 15(a), 26. *E.g.*, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012).
[212] Blair & DePasquale, *supra* note 4, at S202.
[213] United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).
[214] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482-83 (1992) (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)).

preferences over smaller ones by virtue of their greater purchasing power."[215]

The different legal burdens should not erase the conceptual resemblance between the two laws. In a Sherman Act case, the burden of proof is on the plaintiff to show an unfair exercise of power, while judicial interpretations of the RPA, specifically the *Morton Salt* decision, place the burden on the defendant to show the discrimination is cost-justified. To put the distinction in different terms, courts, in interpreting the Sherman Act, treat corporate size as generally the result of genuine economies of scale, or at least benign, while Congress in the RPA, more skeptical that all advantages of size reflected true operational efficiencies, implicitly presumed the exercise of power by large buyers to be the norm in buyer-seller relationships. Power is the exception under the former, and the rule under the latter. This reflects a conscious choice by Congress to correct a perceived deficiency in judicial interpretations of the Sherman Act and prohibit unfair trade practices in their *incipiency* under the Clayton Act.[216] Even the DOJ in its critical 1977 report acknowledged that a rule like the *Morton Salt* inference was necessary for an anti-buyer power law to be effective in nipping such abuses in the bud.[217]

Both laws restrict the use of market power as a competitive weapon and are broadly harmonious.[218] As noted in II.B, a

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[215] FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960).
[216] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922).
[217] *See* DOJ-RPA REPORT, *supra* note 131, at 228 ("[F]ailure to utilize the *Morton Salt* presumptions in an incipiency statute based on price discrimination would result either in non - enforcement of the law or in extreme business uncertainty and caution in pricing.").
[218] While this presumption of power is foreign to many antitrust lawyers and economists, Congress and state legislatures routinely adopted it in other fields. Labor, employment, and consumer protection laws generally

principal defect with the design of the law and historical enforcement of the RPA by the FTC was the targeting of sellers victimized by buyer power, instead of the power buyers themselves.

Congress designed RPA in ways that struck a balance between the goals of protecting small business from predatory competition and of preserving efficiency-based competitive advantages, especially those resulting from economies of scale.[219] Whether these goals are "uneconomic" or not, they are what Congress prescribed.

Further, only the narrowest and most myopic versions of welfare economics would exclude these goals as somehow uneconomic. For example, consumer welfare antitrust assumes that consumers always prefer lower prices to higher. But "consumer" is just one of the identities that individuals carry with them. While individuals may express (or "reveal") consumer preferences for low prices through their market behavior, they express their preferences under their other identities in other contexts, such as voting for Congress to pass laws.[220] For example, chain stores have been shown to hurt local economies by reducing access to variety and services provided by small retailers and by lowering wages.[221] They also pay low wages and squeeze supply chains

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do not have power tests. Congress presumed that employers and creditor generally have power with respect to employees and debtors. Workers have the right to organize family-run retailers and Walmart alike, and consumers in many states are protected from usurious interest rates whether they seek a loan from a local credit union or a national payday lender.

[219] Glick, Mangum, & Swensen, *supra* note 4, at 879.

[220] Amartya Sen, *Goals, Commitment, and Identity*, 1 J.L. ECON. & ORG. 341 (1985).

[221] Barry C. Lynn, *Breaking the Chain*, HARPER'S MAGAZINE (July 2006), https://harpers.org/archive/2006/07/breaking-the-chain/; STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES xiii (2006).

employing workers throughout the country and beyond.[222] Individuals may prefer to live in a community that preserves small, locally owned retailers, or whose robust local manufacturing or agricultural economies are not squeezed by big box retailers or e-commerce giants.

These preferences for a resilient local economy, well-treated workers, local ownership, and public control over business enterprises are genuine, fully rational preferences, but they are not *consumer* preferences. Individuals may recognize that preferences for the lowest possible prices that they may have as consumers are in conflict with other preferences they hold as community members, citizens, or workers. While consumer preferences are expressed most strongly in the marketplace, their other identities are better expressed through voting or other civic actions.[223] Thus, the same individual who shops at Walmart as a consumer because they prefer lower prices (whether or not they have knowledge that one source of the lower prices is squeezing unfair discounts from suppliers), might still have higher-level preferences to live in a community without Walmart's unfair competition, or with Walmart's power constrained. Unable to express these higher-level preferences over the shape of the political economy through the marketplace (due to collective action and other obstacles), they express them through voting, and lobbying their legislators to support laws like the RPA. The marketplace is not the only domain in

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[222] LICHTENSTEIN, *supra* note 170; Charles Fishman, *The Wal-Mart You Don't Know*, FAST COMPANY (Dec. 1, 2003), http://www.fastcompany.com/47593/wal-mart-you-dont-know; Justin C. Wiltshire, *Walmart Supercenters and Monopsony Power: How a Large, Low-Wage Employer Impacts Local Labor Markets* (Wash. Ctr. for Equitable Growth, Working Paper, Nov. 2022), https://equitablegrowth.org/working-papers/walmart-supercenters-and-monopsony-power-how-a-large-low-wage-employer-impacts-local-labor-markets/.
[223] Sen, *supra* note 224.

which preferences count, and individuals "reveal" different kinds of preferences, including those of how markets should be structured, in domains outside the market.

Indeed, an analogous method of unfair competition to that of squeezing suppliers for discriminatory discounts is underpaying workers. Individuals may prefer to shop and work in an economy in which companies compete with each other through more salutary means than cutting labor costs. Congress passed the Fair Labor Standards Act precisely to outlaw such underpayment of workers as an "unfair method of competition."[224] To take the example of Walmart again, it has been shown to reduce community-wide wages when it enters a labor market through its monopsony power over wages.[225] Individuals who *as consumers* might always shop for the lowest price, might *as citizens* or *as workers* express their preference for fair wages by supporting minimum wage legislation through the political process. There is nothing irrational about having such non-consumer preferences. Indeed, pure consumerism is an example of what economist Amartya Sen called the rationality of "fools."[226] Output- or consumer welfare-based economic frameworks rule out any consideration of these preferences as illegitimate, but if individuals cannot express their preferences over alternative political economic outcomes through the legislative process, where can they express them? Restrictions on popular input on the structure of economic life conflict with constitutional and common understandings of democratic governance.

VI. The Continued Relevance of the Robinson-Patman Act

[224] 29 U.S.C. § 202(a).
[225] Wiltshire, *supra* note 220.
[226] Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

Since the DOJ and FTC generally abandoned enforcement of the Robinson-Patman Act, the economic conditions to which it applies have, ironically, only increased in significance. While the mid-twentieth century, when the law was vigorously enforced, was the heyday of the large, vertically integrated corporation, vertical integration has been in decline ever since.[227] Buyer-seller relationships have replaced internal transfer pricing in supply chains across the economy.

Evidence is mounting that large retailers exercise buyer power over their supply chains, and the large retailers have increasingly been a position to dictate prices to suppliers.[228] In the retail sector, Walmart and Amazon have risen to dominance using means that are likely illegal under the RPA, squeezing suppliers for discounts unavailable to other retailers. Walmart sought, and received, deep discounts from a wide range of suppliers, who were so wary of offending the massive buyer that many of them established headquarters in Bentonville, creating a "Vendorville" in Walmart's hometown.[229]

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[227] Gerald F. Davis & J. Adam Cobb, *Corporations and Economic Inequality around the World: The Paradox of Hierarchy*, 30 RES. ORGAN. BEHAV. 35 (2010); Naomi Lamoreaux, Daniel Raff & Peter Temin, *Beyond Markets and Hierarchies: Toward a New Synthesis of American Business History*, 108 AM. HIST. REV. 404 (2003); Richard N. Langlois, *The Vanishing Hand: The Changing Dynamics of Industrial Capitalism*, 12 IND. CORP. CHANGE 351 (2003); Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 329 (Naomi Lamoreaux & William Novak eds., 2017); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).
[228] Trish Kelly & Martin L. Gosman, *Increased Buyer Concentration and Its Effects on Profitability in the Manufacturing Sector*, 17 REV. IND. ORGAN. 41 (2000).
[229] LICHTENSTEIN, *supra* note 170, at 2.

Amazon, which started its online retail empire in the books trade, trained similar tactics on publishers to fuel its early growth. According to Jeff Bezos biographer Brad Stone, "The bigger the company got, Bezos explained, the lower the prices it could exact from…the book wholesalers." Which meant it could capture more market share downstream.[230] In what Bezos called the "Gazelle project" (after the way a Cheetah approaches a sickly Gazelle) Amazon targeted the smallest and weakest publishers with tactics like hiding titles from customers, which led to sales falls of as much as 40%. According to Stone, "Bezos kept pushing for more. He asked [an Amazon executive] to exact better terms from the smallest publishers, who would go out of business" if they lost the Amazon retail channel. Amazon systematically ranked publishers according to their dependence on Amazon and then pushed for discounts from the weakest first. [231]

Buyer power is a factor across the retail sector. One study found that as sales to major customers increase, supplier gross margins and return on assets both decrease.[232] In food supply chains, analysts have reported that a key reason for the consolidation of suppliers has been to level the playing field with retailers, who have been themselves merging aggressively.[233] During Congressional hearings pertaining to "slotting fees," a type of discount to retailers, small manufacturers testified wearing hoods or behind screens for

[230] BRAD STONE, THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON 48 (Reprint edition ed. 2014).
[231] *Id.* at 243.
[232] Martin L. Gosman & Mark J. Kohlbeck, *Effects of the Existence and Identity of Major Customers on Supplier Profitability: Is Wal-Mart Different?*, 21 J. MANAG. ACCOUNT. RES. 179 (2009).
[233] Kenneth N. Gilpin, *For Sellers of Food, Fewer Chairs at the Table*, N.Y. TIMES (Sept. 29, 2002), https://www.nytimes.com/2002/09/29/business/market-insight-for-sellers-of-food-fewer-chairs-at-the-table.html.

fear of retaliation.[234] And wholesalers report giving discounts to the largest retailers—discounts unavailable to independent grocers.[235]

Such practices are not confined to retailer-wholesaler relations. A similar story reins in manufacturing, where "five percent letters" from upstream manufactures demanding discounts from suppliers are common.[236] In automotive manufacturing, the business press is full of stories of companies like Ford,[237] Chrysler,[238] and Toyota[239] demanding price cuts from suppliers.

Studies document the effect of buyer power across the entire economy, not just retailing. One study finds that upstream concentration negatively affects return on sales and return assets to suppliers.[240] Meanwhile, while some economic theories suggest the effects of buyer power are likely to be confined to oligopolistic sellers, which downstream firms appropriate (and perhaps even share with final consumers),

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[234] Julie Forster, *The Hidden Cost of Shelf Space*, BLOOMBERG (Apr. 14, 2002), https://www.bloomberg.com/news/articles/2002-04-14/commentary-the-hidden-cost-of-shelf-space.
[235] Ann Zimmerman, *Fleming Takes Hefty Deductions From Grocery Suppliers' Bills*, WALL ST. J. (Sept. 5, 2002), https://www.wsj.com/articles/SB103118315124932075.
[236] JOSH WHITFORD, THE NEW OLD ECONOMY: NETWORKING, INSTITUTIONS AND THE ORGANIZATIONAL TRANSFORMATION OF AMERICAN MANUFACTURING. (2005).
[237] Joann Muller, *Visteon: Thrown into the Deep End*, BLOOMBERG (May 6, 2001), https://www.bloomberg.com/news/articles/2001-05-06/visteon-thrown-into-the-deep-end.
[238] Roger Dickinson, The Robinson-Patman Act: An Important Conundrum, 23 J. MACROMARKETING 31, 32 (2003) (citing Jeff Green, *Can Chrysler Get Blood From a Supplier?*, BUS. WEEK (Dec. 24, 2000))
[239] *Id.* at 32 (citing Chester Dawson, *Machete Time: IN a Cost-Cutting War with Nissa, Toyota Leans on Suppliers*, Bus. Week (Apr. 9, 2001)).
[240] Yoon Hee Kim, *The Effects of Major Customer Networks on Supplier Profitability*, 53 J. SUPPLY CHAIN MANAG. 26 (2017).

recent research finds that the effects of buyer power are felt the greatest in more atomistic upstream markets.[241]

VII. Conclusion

The Robinson-Patman Act has been the target of withering criticism for years—criticism that failed to grasp its basic function. Business competition is structured by myriad laws, including property, copyright, consumer protection, and antitrust laws. To be sure, if low prices are and should be the only purpose of antitrust law and overall public policy, the RPA appears suspect. But Congress expressly rejected the ideology of low prices at any cost, including through labor and employment law. To restructure the employment relationship and limit the arbitrary power of management, Congress enacted the National Labor Relations Act and Fair Labor Standards Act to give workers the right to unionize and receive fair wages, notwithstanding any adverse effects these rights may have on consumers. In a similar spirit, Congress enacted the RPA primarily to protect suppliers and independent retailers from powerful chains that could use their buying clout to extract special discounts and other concessions and consequently obtain a critical competitive advantage. The law recognizes that not all special pricing concessions are the result of buyer power and allows firms to show that discriminatory discounts are rooted in distributional or manufacturing cost savings. When faithfully interpreted and applied, in large measure, in the postwar period, the RPA encouraged fair competition in retail markets and spurred firms to compete by expanding their product lines, improving their store layouts, and engaging in cost-based price discounting. The law is not irrational, let

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[241] Trish Kelly & Martin L. Gosman, *Increased Buyer Concentration and Its Effects on Profitability in the Manufacturing Sector*, 17 REV. IND. ORGAN. 41 (2000).

alone “the Typhoid Mary of antitrust.” It is a sensible and targeted measure against buyer power and in favor of productive efficiency.