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Zombie Antitrust: Is Robinson-Patman a Dead Law Walking?

By Timothy J. Muris

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Introduction

Lawrence O'Brien, well-known confidant and aide to the Kennedys at the height of their 1960s power, entitled his political autobiography *No Final Victories*.[1] What is true in the grand world of politics is certainly true in the smaller realm of political economy: no victories are final, as the recent attempted revival of the Robinson-Patman Act reveals.

In May 1935, the Supreme Court ruled that Franklin Delano Roosevelt's first attempt to end the Great Depression, the National Industrial Recovery Act (NIRA), was unconstitutional. The legislation had sought to raise prices for businesses by reducing competition. Fifteen days later, Rep. Wright Patman (D-TX) introduced a bill to reenact parts of the NIRA through restricting the new chain stores whose business model was then revolutionizing American retail. The title, The Wholesaler Grocer's Protection Act, made its purpose clear. Sen. Joseph Robinson (D-AR) quickly joined Patman, but the original version of their bill faced strong opposition, including from the Roosevelt administration. To obtain passage, the sponsors had to modify the bill, including added various defenses which left a statute with some of the key language vague, ambiguous, and subject to multiple interpretations.

Once enacted, Robinson-Patman became the Federal Trade Commission's (FTC) main competition enforcement weapon, with the agency often acting as if Patman's original legislative proposal had passed unchanged. Reaction against such enforcement began in the 1940s, with recognition that the FTC was harming consumers. Criticism grew, even within the agency, especially in the early 1960s when hundreds of cases were filed. By the last decades of the 20th century, the Act was vilified throughout the antitrust community. Consensus developed that antitrust should focus on the welfare of consumers, not the protection of competitors, which was the hallmark of Robinson and Patman's original proposal and so much of the FTC's efforts. Virtually anyone who wanted to be regarded as a serious practitioner, scholar, or jurist agreed that aggressive FTC pursuit of Robinson-Patman was inconsistent with how competition laws should be enforced.

Inconsistent, that is, until the Biden administration. In 2021, the president personally condemned the antitrust legacy he inherited, with its long bipartisan consensus, as a forty-year "experiment failed."[2] His appointees, including at the Federal Trade Commission, called themselves Neo-Brandeisians, and included praise for, and filed actual cases under, Robinson-Patman as part of their program to return to what they felt were old verities wrongly abandoned. Supreme Court Justice Louis Brandeis recognized that impeding chain stores would raise prices, a cost he thought worth paying.[3] His modern-day disciples are not so forthcoming, instead hiding

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[1] O'Brien perhaps is now known today for the trophy in his name awarded annually to the National Basketball Association champion based on his service as the league's Commissioner.

[2] President Joseph Biden, "Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy," White House, July 9, 2021, https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

[3] *Louis K. Liggett Company v. Lee*, 288 U.S. 517, 542 (1933) (Brandeis, J., dissenting). Brandeis supported many activities to protect small business at the expense of both consumers and more efficient, larger firms. See Laura Phillips Sawyer, *American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890—1940* (Cambridge University Press, 2018), pp. 121-122, 136. I discuss the new movement at length in Timothy J.

behind polemics and incorrect assertions that FTC enforcement of Robinson-Patman was neither protectionist nor harmful to consumers.

Of course, the Biden administration is over, but enthusiastic support for using Robinson-Patman remains. A July 2025 guest essay in *The New York Times* argues that New York City Mayor Zohran Mamdani's proposal for government-sponsored grocery stores would be unnecessary were Robinson-Patman enforced.[4] Moreover, the Trump FTC has stated that it will not return to the status quo. All three Republican commissioners, two of whom began in 2024, professed fealty to Robinson-Patman enforcement, with the most recent appointee showing the most enthusiasm. Nevertheless, each joined in the recent dismissal of the second, final case the Democrats filed in the waning hours of the Biden administration. The Republicans employed scathing language in the dismissal about the case's inadequacies.[5] Because the case was indeed rushed, with apparently even concerns from some of the investigating staff regarding its readiness, one can probably not read too much into the closing decision. The agency continues to litigate the first case the Biden FTC filed, notwithstanding that the current Chairman opposed the case.

This report analyzes the strange resurrection of Robinson-Patman. It reviews how a handful of government appointees with no business or practical experience rejected the near-unanimous views of the antitrust community, views that had arisen based often on decades of firsthand experience. This consensus included individuals across the political spectrum who otherwise disagreed on some important antitrust issues but shared a thorough understanding of what enforcing the law meant and therefore condemned Robinson-Patman as anticompetitive and anti-consumer. It was for that reason that Herbert Hovenkamp, co-author of the leading antitrust treatise,[6] stated "[v]ery few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act."[7] In rejecting this consensus, the appointees

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Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes* (American Enterprise Institute, June 2023), https://www.aei.org/wp-content/uploads/2023/06/Neo-Brandeisian-Antitrust-Repeating-Historys-Mistakes.pdf.

[4] Zephyr Teachout, "New York City Has the Power to Bring Down Grocery Prices. All Cities Do," *The New York Times*, July 21, 2025, https://www.nytimes.com/2025/07/21/opinion/nyc-grocery-prices.html.

[5] Complaint for Permanent Injunction, *Federal Trade Commission v. PepsiCo, Inc.*, 1:25-mc-00664-JMF (S.D.N.Y January 23, 2025); Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak in the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, Matter No. 2210158, May 22, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/Pepsi-Dismissal-Ferguson-Statement-05-22-2025.pdf; Concurring Statement of Commissioner Mark R. Meador in the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, Matter No. 2210158, May 22, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/Meador-Pepsi-Statement-05-22-2025.pdf; Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (Princeton University Press, 1966), p. 284. For convenience, the statute is often called "Robinson-Patman" or simply "the Act."

[6] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Vol. VIV (2024), para. 2340a.

[7] Herbert Hovenkamp, "The Robinson-Patman Act and Competition: Unfinished Business," *Antitrust Law Journal*, Vol. 68, No. 1 (2000), p. 130, https://www.jstor.org/stable/40843460. This criticism culminated in a 1977 report in which the Department of Justice (DOJ) described the myriad problems with Robinson-Patman and its enforcement. United States Department of Justice, *Report on the Robinson-Patman Act* (U.S. Government Printing Office, 1977), https://www.justice.gov/atr/media/1378486/dl?inline. Reflecting the Biden administration's rejection of the prior consensus, the DOJ, with no defense or other explanation, recently claimed that the 1977 report is "out of date" and "no longer reflects contemporary economics or market realities, and so indicating throughout the report." In fact, the analysis of price discrimination in the 1977 report is consistent with DOJ's own description as recently as 2016,

told a fictionalized tale of the Act's origins and decline, simply ignoring why the overwhelming criticism existed and how the consensus had evolved based on long-term experience with the statute and its enforcement.

To evaluate the Robinson-Patman Act and the claims of those who would revive it, Section I of this report begins with the company whose existence was most responsible for the statute, the Great Atlantic & Pacific Tea Company (A&P), America's largest retailer for more than 40 years. A&P used a new business model that revolutionized retail, disrupting the previously-successful model that relied on third-party middlemen (i.e., wholesalers) for the key coordination between businesses that manufactured products and the myriad small retailers that ultimately sold them to consumers. The new mass marketers, of which chain stores like A&P became the most prominent, operated differently, achieved greater scale, used vertical integration to bypass wholesalers and other middlemen, made superior use of data to decrease costs and therefore prices, and better served their customers in other ways. Unsurprisingly, consumers preferred the newcomers, while the fate of the incumbent retailers and wholesalers sparked a fierce political reaction.

The first section concludes with that reaction, focusing specifically on the Roosevelt administration's attempt to restrict chain retailers through the National Recovery Administration (NRA), the operating arm of the NIRA. The NRA used codes of conduct aimed at protecting the dominant wholesaler model. After the Supreme Court found this approach unconstitutional, Wright Patman's original version of Robinson-Patman, written by the wholesalers, could not pass, leading to the final compromise—an ambiguous bill "the actual effects of which would depend on its administration and interpretation."[8]

Section II discusses enforcement of the statute, as the Commission enthusiastically, if often insensibly, made Robinson-Patman the center of its competition universe. We shall see the anti-consumer results of that misplaced ardor, along with occasional absurdities, and how practitioners, scholars, judges, and even FTC commissioners ultimately rebelled. Even before 1977, when the Department of Justice (DOJ) issued a comprehensive report on the statute, there was widespread agreement on the folly of the FTC's project, leading to a sharp reduction in, and eventual abandonment of, cases under the Act. The courts similarly moved to restrict the law, although the government's abandonment of the field offered fewer chances for judicial correction. Crucially, the wholesaler model that the NRA and Robinson-Patman's original sponsors sought to protect had declined; the chain stores had prevailed in the marketplace.

United States, "Roundtable on 'Price Discrimination,'" note submitted for the 126th OECD Competition Committee, DAF/COMP/WD(2016)69, Organisation for Economic Co-operation and Development, November 21, 2016, pp. 4, 6, https://www.justice.gov/atr/case-document/file/979211/dl?inline, meaning it only became "out of date" because the Biden administration appointees, without analysis, decided it was so. One would have thought that a report two years in the making, with input from those with firsthand experience of Robinson-Patman enforcement in action, deserved thoughtful reflection, not cursory dismissal. For a recent discussion of the 1977 report, one of whose authors led the Antitrust Division when the report issued, see Mark J. Niefer and Donald I. Baker, *The FTC's Revival of the Robinson-Patman Act: A Policy in Need of a Rationale*, March 5, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4752830.

[8] Hawley, *The New Deal and the Problem of Monopoly*, p. 254.

Unsurprisingly, the Commission's aggressive, protectionist enforcement of the Act led to criticism almost from the start, reaching a crescendo by the late 1960s. Section III discusses the most prominent critics, and how their widespread experience with the Act led to its widespread rejection. Multiple types of evidence were used to reject Robinson-Patman as central to the FTC, especially the extensive, practical experience of those many participants in the antitrust community who saw firsthand how the FTC's protectionist zeal caused significant harm directly antithetical to antitrust's basic purpose of protecting competition, not competitors. Fifty years after the Act was relegated to the sidelines, those who seek to resurrect Robinson-Patman bear the burden of justifying such dramatic change.

Section IV addresses various policy arguments from the revivalists to support change, particularly the claims that the statute's origins were not protectionist and that Robert Bork and the Reagan administration were responsible for Robinson-Patman's decline. Any analysis of the relevant history cannot ignore the origins of Robinson-Patman in the NRA's attempts to protect the incumbent wholesalers from the emerging chain store competition, an approach the wholesalers themselves drafted into the original Patman bill. Moreover, the 1969 American Bar Association report, heavily critical of the FTC in general, and the Robinson-Patman Act enforcement as one of the particulars, was crucial in deemphasizing the Act, with the head of the ABA committee and the report's chief staff draftsman assuming leadership of the FTC in the fall of 1970. By the time Bork published his *Antitrust Paradox* in 1978 and the Reagan appointees arrived at the FTC in October 1981, the deemphasis of Robinson-Patman was yesterday's news.

Section V turns from policy to economics, addressing various economics-based arguments for revival, including those based on claimed inefficiencies of non-uniform pricing. Consumers see a wide variety of price variations every day, and today's large retailers, like the A&P of old, have used a similar business model to again lower costs and, in turn, prices for consumers. The revisionists largely repeat arguments against non-uniform pricing that critics dispatched decades ago. Because the wholesaler model that gave rise to Robinson-Patman is no longer relevant, protecting such wholesalers is no longer a central issue. Modern revivalists resort to the specious argument, reflected in *The New York Times* essay and elsewhere, that the low prices of today's large chains, whatever their effects on consumers, exist because of the high prices small competitors are unfairly forced to charge. Yet, if sellers can charge high prices to small competitors, they will do so, regardless of their bargaining with larger firms. Indeed, as Professor Bruce Kobayashi, former Director of the FTC's Bureau of Economics, and I show in a companion essay to this report, if the large and small retailers compete, competitive pressures from the lower prices to the large firms will also lower the optimal prices that buyers charge to the smaller ones.[9]

Section V also discusses newer economic arguments, some theoretical. Although some of this theoretical economics, using quite restrictive assumptions, does show circumstances under which non-uniform pricing can harm consumers, consumer welfare increases when those models are modified to reflect more typical business practices. Similarly, the limited empirical evidence discussed does not support the revivalist's contentions. At bottom, modern economics does not

[9] Bruce H. Kobayashi and Timothy J. Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination* (Competitive Enterprise Institute, February 2026), https://cei.org/studies/stop-making-sense-reviving-the-robinson-patman-act-and-the-economics-of-intermediate-price-discrimination/.

justify even a targeted increase in enforcement in the specific contexts studied, let alone a broad revival of Robinson-Patman.

To the extent business practices appearing to harm consumers might fall within the Act's flexible parameters, those practices can already be scrutinized under the existing Sherman, Clayton, and FTC Acts. As the Republican dissents to the two cases the agency filed at the end of the Biden administration demonstrated, even if good Robinson-Patman cases exist, the Biden FTC, despite having nearly four years to do so, failed to find them.[10]

The final section contains concluding remarks.

I. Robinson-Patman's Sponsors Hoped to Protect Traditional Distribution from Chain Store Innovation

The early 20th century saw new low-cost retailers that reduced prices and disrupted businesses with political influence. Nevertheless, Robinson-Patman revisionists attempt to claim that the Robinson-Patman Act was not designed to thwart the new competition but instead was pro-consumer. Thus, the Biden FTC majority stated in its December 2024 enforcement action—the first under the statute in many years—that the law passed "to protect the interests of *customers* who were often ill-served by chain stores" and that "a caricature persists that the law was aimed at protecting the parochial interests of ineffective local retailers at the expense of consumers."[11]

This belief contradicts the statements of the original Robinson-Patman sponsors and the overwhelming consensus about why the law passed that has existed for decades. This consensus and the original sponsors were clear that the law passed because incumbents sought protection from the emerging threat of chain stores. As Fred Rowe, author of the leading treatise on Robinson-Patman, observed, the "Robinson-Patman Act of 1936 was the product of organized efforts to preserve traditional marketing channels against the encroachment of mass distributors and chains whose low-priced appeal to consumers was enhanced during the general business recession of the 1930s."[12] This understanding is consistent among those who have studied the history. For example, the Areeda-Hovenkamp treatise comments, "the class targeted for protection was not consumers, who benefitted from the chains' success; rather, the class comprised the various small businesses and intermediaries who lost market share, profits, or in some cases their entire businesses as a result of more efficient distribution methods."[13] And the

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[10] Dissenting Statement of Commissioner Andrew N. Ferguson in the Matter of Southern Glazer's Wine and Spirits, LLC, Matter No. 211-0155, December 12, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southernglazers-statement.pdf; Dissenting Statement of Commissioner Melissa Holyoak in the Matter of Southern Glazer's Wine & Spirits, LLC, Commission File No. 2110155, December 12, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement_southern-glazers.pdf.

[11] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 211-0155, December 12, 2024, pp. 7-8, https://www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-joined-by-khan-slaughter-southern-glazers.pdf (emphasis in original).

[12] Frederick M. Rowe, "The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective," *Columbia Law Review*, Vo. 57, No. 8 (December 1957), p. 1061, https://www.jstor.org/stable/1119439. Rowe's Treatise became the leading source on both the Act in practice and its policy. Frederick M. Rowe, *Price Discrimination under the Robinson-Patman Act* (Little, Brown and Co., 1962).

[13] Areeda and Hovenkamp, *Antitrust Law*, para. 2302.

title of the original bill, *The Wholesale Grocer's Protection Act*, removed any doubt about the sponsors' intent.

There can be no dispute that Robinson-Patman arose as a protectionist reaction to new chain store competition. Even the statute's new enthusiasts admit that the emergence of chain stores was central to its passage. To understand what happened, we need first to understand the retail world before it changed and why the chains were such a revolution, especially the leader, A&P. After subsection A provides that understanding, subsection B discusses the evolution and passage of Robinson-Patman.

A. Chain Stores Succeeded because They Generated Enormous Benefits to Consumers

Without a revolution in retailing and the political reaction that followed, there would be no Robinson-Patman. Large chains of stores were an innovative business model that lowered prices and often improved other attributes of retail quality, while disrupting the retail model that had evolved in the 19th century. Robinson-Patman's sponsors hoped to protect the incumbents from this innovation.

Especially for most of the 20th century, improvements in retailing were not recognized as important innovations. In its 1977 report, the DOJ noted how gains from innovation in retailing and distribution had been undervalued:

> [S]urprisingly little attention has been paid in the debate on Robinson-Patman to the fact that distribution is indeed an "industry" and that "innovation" and technological change in the distribution industry were significant parts of the maturation of the American economy over the last century. These changes were as significant as the replacement of the handcrafted product by the assembly line or the replacement of the multi-story urban factory by the single story suburban plant. . . . Because of this failure to perceive change in the distribution sector as innovation, and hence valuable, the Robinson-Patman debate centers exclusively on the issue of whether it is appropriate to protect small businessmen from "large corporation" organizations; no consideration is given to whether such protection would, if successful, serve to inhibit innovation in distribution, or to impede development of more efficient forms of business organization, or to forestall the establishment of new types of retail outlets. Nor is consideration given to the consumers who might benefit from and desire such changes.[14]

At the time, the most prominent leader of this retail innovation was A&P,[15] a vertically integrated grocery chain that used unprecedented scale and innovation to offer consumers many more products than its competition and at lower prices. A&P was so central to mid-20th century American life that famed novelist John Updike made it both the setting and the title of one of his

[14] Department of Justice, *Report on the Robinson-Patman Act*, pp. 171-172.

[15] On the A&P, see generally Marc Levinson, *The Great A&P and the Struggle for Small Business in America* (Hill and Wang, 2012).

best-known short stories.[16] No other company used scale, vertical integration, and innovation to transform retailing so thoroughly, becoming the largest American retailer for more than 40 years. Pioneering the large retail chain, A&P brought enormous benefits to consumers—especially the less affluent for whom A&P's products were a larger share of their household budgets—through lower prices, greater variety, and opportunities for improved nutrition. Although A&P no longer exists, indeed it is even fading in memory with the baby boom generation's passing, it was once *the* disruptive force in retailing.

By the late 1920s, A&P was the largest American retailer by far, with more than double the sales of any other retailer, vertically integrating into multiple stages of food production, distribution, and sales. It became the first retailer ever to sell $1 billion of merchandise in a single year, owning nearly 16,000 grocery stores, 70 factories, and more than 100 warehouses. In 1929, it was the country's largest coffee importer, the largest butter buyer, and the second-largest baker.[17]

As its retail innovation disrupted the old ways, A&P became the focus of political reaction to the changes. The Biden FTC majority acknowledged in its first Robinson-Patman case that the "Act is best understood as a direct response to the actions of the A&P."[18] Patman commented at the time that "one certain big concern had really caused passage of the Act, the A&P Tea Co."[19] A&P's success made it the fulcrum of the backlash against retail chains that spawned Robinson-Patman.[20]

To understand A&P and the other chain store innovators, one must juxtapose their business model with what they displaced. Before chain stores, most distribution relied on the manufacturer-wholesaler-retailer model.[21] Manufacturers made the goods, retailers sold to the

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[16] See John Updike, "A & P," *The New Yorker*, July 22, 1961, p. 22, https://www.newyorker.com/magazine/1961/07/22/a-p. When Updike died in 2009, one journalist remarked: "I remember reading his short story 'A&P' in high school. Of course, everybody remembers reading 'A&P' in high school. It is perhaps Updike's most widely anthologized work, this brief, bright jewel of a story about a young grocery clerk and his pointless act of gallantry." Julia Keller, "John Updike at the A&P," *Chicago Tribune*, February 1, 2009, https://www.chicagotribune.com/2009/02/01/john-updike-at-the-ap/.

[17] Marc Levinson, "Monopoly in Chains: Antitrust and the Great A&P," *CPI Antitrust Chronicle*, Vol. 12 (December 2011), p. 4, https://competitionpolicyinternational.com/assets/Uploads/LevinsonDEC-111.pdf.

[18] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 4.

[19] These comments were made during a 1936 Congressional hearing, as quoted in Rowe, "The Evolution of the Robinson-Patman Act," p. 1061.

[20] Richard Posner notes that at the time A&P "enjoyed much the same symbolic status as Standard Oil had enjoyed in an earlier trust-busting era." Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* (American Enterprise Institute, 1976), p. 26, https://www.aei.org/wp-content/uploads/2017/07/Robinson-Patman-Act-Text.pdf?x85095. With Jon Nuechterlein, I discuss *A&P* and its legal troubles at length in Timothy J. Muris and Jonatan E. Nuechterlein, "Antitrust in the Internet Era: The Legacy of *United States v. A&P*," *Review of Industrial Organization*, Vol. 54, No. 4 (June 2019), https://www.jstor.org/stable/48702969; see also Areeda and Hovenkamp, *Antitrust Law*, para. 2302 ("While the economics of multistore distribution methods are numerous and varied, the proponents of the Robinson-Patman Act amendments focused on one thing: the perceived ability of large chain store operations such as the Great Atlantic and Pacific Tea Co. (A&P) to obtain lower prices for the goods that it purchased than smaller buyers were able to match.").

[21] See Rowe, "The Evolution of the Robinson-Patman Act," p. 1061.

public, and wholesalers connected the two ends. Especially given the small size of many retailers, the wholesaler was crucial. The wholesaler "typically assumed the task of bulk storage, warehousing, and delivery of the goods to the retail market" and "accepted the responsibilities and credit risks in dealing with numerous scattered retail accounts."[22] The manufacturer's pricing compensated the wholesaler with a reasonable "margin" for performing its functions. Manufacturers typically did not sell to retailers while wholesalers did not sell directly to the public.[23]

New mass market retailers disrupted this model. Alfred Chandler described the revolution, which was led by the chain stores:

> Their buying and selling representatives, by using the railroads, the telegraph, the steamship, and improved postal services, coordinated the flow of agricultural crops and finished goods from a great number of individual producers to an even larger number of individual consumers. By means of such administrative coordination, the new mass marketers reduced the number of transactions involved in the flow of goods, increased the speed and regularity of that flow, and so lowered costs and improved the productivity of the American distribution system.[24]

A&P built its own distribution network that bypassed wholesalers and other profit-taking middlemen upon which smaller grocers relied. Eliminating these middlemen was highly efficient because, as the FTC reported in 1919, "[t]he cost of these individual delivery systems . . . [was] a large item to be figured into the wholesale prices."[25] For example, "[m]ost produce . . . was sold by individual farmers to small-town dealers who in turn sold to bigger dealers in nearby cities, creating a lengthy and circuitous route before perishable merchandise finally reached the retail store."[26] A&P instead dealt directly with the food producers, thereby lowering retail prices. Consumers benefited, while the bypassed middlemen and the smaller grocers that continued to use them lost business.

The mass marketers were able to exploit these advantages once they reached a size akin to the wholesalers:

> By building comparable purchasing organizations, they could buy directly from the manufacturers and develop as high a volume of sales and an even higher stock-turn than had the jobbers. Their administrative networks were more effective because they were in direct contact with the customers and

[22] Rowe, "The Evolution of the Robinson-Patman Act," p. 1061.

[23] Rowe, "The Evolution of the Robinson-Patman Act," p. 1061.

[24] Alfred D. Chandler Jr., *The Visible Hand: The Managerial Revolution in American Business* (Havard University Press, Belknap Press, 1977), p. 209.

[25] Federal Trade Commission, *Report of the Federal Trade Commission on the Wholesale Marketing of Food*, June 30, 1919, p. 160, https://play.google.com/books/reader?id=WRA-AQAAMAAJ&pg=GBS.PP8&hl=en.

[26] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 83.

> because they reduced market transactions by eliminating one major set of middlemen.[27]

These size advantages and contact with customers aided A&P in pioneering data usage to improve its products, thereby helping meet regional preferences. For example, "Philadelphians, it found, liked their butter lightly salted, with a light straw color, whereas New Englanders preferred more salt and a deeper yellow coloration."[28] And the company's "mass of sales data allowed A&P's bakeries to forecast demand with a high degree of accuracy, minimizing returns of stale bread and doughnuts" and thus reducing costs and ultimately retail prices.[29]

With these advantages, retailers such as chain stores developed a low margin, high turnover business model superior to the wholesaler-centric model: "Such velocity of stock-turn permitted mass retailers to take lower margins and to sell at lower prices and still make higher profits than small specialized urban retailers and the wholesalers that supplied them."[30] Consequently, their growth accelerated in the 1920s:

> Then, as now, the mass marketer was dedicated to a high-volume, low-margin operation, whose prime appeal to the buying public centered on price. Structurally, the mass distributor of the twenties was not content to operate in a single stage of the distribution process, either as a "wholesaler" or "retailer." Instead, he invested capital in facilities for performing bulk storage, redelivery, and financing, so as to "integrate" the retailing and wholesaling functions within his own organization and to eliminate middleman profits by dealing with the manufacturer directly.[31]

Again, the A&P is illustrative. A&P integrated vertically into both distribution and food production to reduce costs. Like vertical integration today, A&P's integration produced major efficiencies, also to the benefit of consumers. Its baked goods were "delivered to stores in the same trucks that delivered other foods rather than by commissioned salesmen, a system that saved a penny per one-pound loaf at a time when the average loaf sold for a nickel."[32] And "A&P's manufacturing plants earned money because the company learned to use the flow of orders from its [retail] stores to run the plants steadily at full capacity, reducing the waste that comes from expensive factory equipment that is not fully utilized."[33]

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[27] Chandler, *The Visible Hand*, p. 224. The wholesaler business model the mass marketers were replacing was itself a major innovation in the 19th century. See Chandler, *The Visible Hand*, pp. 215-224.

[28] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 105.

[29] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 92.

[30] Chandler, *The Visible Hand*, p. 229.

[31] Rowe, "The Evolution of the Robinson-Patman Act," pp. 1061-1062.

[32] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 92.

[33] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 265.

In summary, this new business model entailed multiple advantages:

- Perhaps most important, the firms often bought directly from manufacturers, eliminating the wholesaler profit margins and other costs built into the traditional distribution model.[34]

- By building larger scale operations with fast turnover of inventory, the large mass marketing firm spreads costs of capital and fixed labor costs across a larger volume of business, i.e., making profits on volume, not high margins, with lower per unit costs.[35]

- By integrating retail and various wholesale functions vertically, the chain stores created other efficiencies for meeting customer demand and use elsewhere, including better managing the time of production, finding the best prices across the country, more efficient advertising, coordinating marketing displays with purchasing, and customizing products to specific customer demands.[36]

- Finally, by achieving scale, the new, large retail firms could use their greater bargaining power to negotiate for lower prices from manufacturers.[37]

The FTC majority discusses only this last advantage, arguing that A&P grew through leveraged buyer power.[38] That conclusion ignores each of the other reasons that economic historians discuss. Like the political resistance to chain stores, the Biden FTC repeated the fable that prices decreased only through buyer power from larger purchasing size.[39] While no doubt relevant (and pro-competitive as it lowered prices and expanded output), such power was not the dominant reason why the new business model lowered costs and prices. Moreover, to the extent such power exists, it was largely a byproduct of the new high-volume, low-margin business model.

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[34] Rowe, "The Evolution of the Robinson-Patman Act," p. 1062; see also Department of Justice, *Report on the Robinson-Patman Act*, p. 132 ("The total gross margin for a consumer item purchased through an independent included not only the retailer's gross margin but also the gross margin of the wholesaler, broker, or other middlemen from whom the independent purchased.").

[35] Department of Justice, *Report on the Robinson-Patman Act*, pp. 131-132, 197 (stating larger organizations were better at finding the best prices). Alfred Chandler describes that the new model relied on high volume and low margins: "They were aimed at maintaining the high volume, high turnover flow of business by selling at low prices and low margins. Profits were to be made on volume, not markup." Chandler, *The Visible Hand*, p. 227. More generally, these efficiencies reflect low costs and prices through inventory turnover higher than with wholesalers. See Chandler, *The Visible Hand*, pp. 235-239.

[36] Department of Justice, *Report on the Robinson-Patman Act*, pp. 194-197; Chandler, *The Visible Hand*, pp. 227-228.

[37] Rowe, "The Evolution of the Robinson-Patman Act," p. 1062; Department of Justice, *Report on the Robinson-Patman Act*, p. 131.

[38] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 5.

[39] The economics of "power" buyers are discussed in section V B below.

Ironically, in 1934, the FTC itself completed a six year study of chain stores,[40] finding that, contrary to claims of chain store critics, the "chains' lower cost of goods sold was but a minor factor in the chains' ability to sell at a lower price."[41] The report found that the ability to use larger size to negotiate for lower manufacturing pricing accounted for 10 to 20 percent of the price difference between the large chains and the smaller, independent retailers.[42] Thus, even if the FTC could have used Robinson-Patman to eliminate buyer power completely, it would not have affected the vast majority of chain store cost advantages over their wholesaler-based competitors.[43]

Instead of seeing the virtues of a business model long ubiquitous because of the many benefits it provides consumers, the Biden FTC majority regurgitates ancient attacks on A&P as a vertically integrated firm.[44] Such attacks mirror those made in a 1940s Sherman Act case against the company and its key executives.[45] The district court convicted all defendants, and the court of appeals affirmed.[46] A&P's vertical integration into food production and distribution distressed both the government and the district court. The court was especially upset that one part of A&P—the Atlantic Commission Company (Acco)—was A&P's purchasing agent for fresh produce and also sold grocery supplies that A&P did not use itself to A&P's competitors, typically at market

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[40] Federal Trade Commission, *Chain Stores: Final Report on the Chain-Store Investigation*, 74th Congress, First Session, 1934, https://www.govinfo.gov/app/details/SERIALSET-09896_00_00-002-0004-0000.

[41] Department of Justice, *Report on the Robinson-Patman Act*, p. 131 (citing Federal Trade Commission, *Chain Stores*, pp. 53-55).

[42] Department of Justice, *Report on the Robinson-Patman Act*, pp. 192-193. The differences ranged from 3 to 35 percent in four cities across the grocery and retail drug chains analyzed, with the rough medians in the 10-20 percent range: "The figures for grocery stores, depending on whether the advantage was weighed on the basis of chain store or independent sales volume, range from 16.6 percent to 19.9 percent in Detroit, 19.16 percent to 35.8 percent in Memphis, 20.5 percent to 23.6 percent in Washington, D. C., and 3.01 percent to 4.8 percent in Cincinnati. In the retail drug trade, the figures as to the percentage of selling price difference explained by purchase price differences, again depending on the weighing factor used, were 9.7 percent to 10.8 percent in Washington, 7.7 percent to 5.4 percent in Cincinnati, 5.3 percent to 3.9 percent in Memphis, and 17.4 percent to 18.3 percent in Detroit." Department of Justice, *Report on the Robinson-Patman Act*, p. 193. The data are from the 1934 FTC report, chapter IV. "Effects of Special Concessions to Chain Stores on their Growth and Development," in Federal Trade Commission, *Chain Stores*. As the DOJ notes at p. 131 of its report, the FTC's language in the report did not always match the data, with the language less favorable to the chain stores. The difference was perhaps unsurprising, given hostility to the chains in Congress and elsewhere. See also notes 180-181 for additional discussion of the release of the 1934 report.

[43] Department of Justice, *Report on the Robinson-Patman Act*, p. 193 ("It is obvious that even with the complete elimination of lower sales prices to chains (and some of these lower prices were cost justified), the remaining 80 percent to 90 percent of the cost difference would have remained and the smaller stores would have continued at a disadvantage if competition were confined solely to price.").

[44] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 6.

[45] The 1944 case followed an earlier one in 1942, which a federal district court dismissed in Dallas. Although the court of appeals reinstated most of the 1942 indictment against the A&P, the Justice Department was disinclined to proceed before a presumptively hostile judge. It instead filed new charges against A&P in the Eastern District of Illinois, where the case was ultimately tried in 1945. Levinson, *The Great A&P and the Struggle for Small Business in America*, pp. 226-227; see Muris and Nuechterlein, "Antitrust in the Internet Era: The Legacy of *United States v. A&P*," for a detailed discussion.

[46] *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

prices. The court condemned this practice because "Acco's policy of charging A&P one price and its other customers another, all worked to create restrictions upon competition and to handicap the competitors of A&P in view of the fact that competitors paid Acco earnings which went to A&P who did the competitive retailing."[47] The court claimed that the payments were "unearned tribute" from third-party retailers to Acco for its leftover produce; such payments went to "the treasury of A&P" and "could be used as defendants wished in competing with others"; and these "odorous unjustified transactions" and "[t]he multiple roles of Acco taint[ed] the whole fabric of defendants' operations."[48]

Although the district court opinion repeated variations on this rhetorical theme at length, it never explained why Acco's "multiple roles" harmed consumers or competition. No one forced third-party grocers to pay such "tribute" to Acco. Instead, they presumably bought from A&P's affiliate because its prices were competitive with those of the many alternatives available. As Levinson observes, Acco's "sales to buyers other than A&P came to a mere 3 percent of U.S. growers' total produce sales."[49] These third-party grocery stores would have been no better off, and perhaps worse off, had Acco thrown the produce that A&P did not need in the garbage rather than selling it. At bottom, the complaint here was not of "high" prices to third-party grocers, but that vertical integration with Acco enabled A&P to buy produce inexpensively (including through the elimination of double-marginalization) and reduce consumer costs.

The DOJ prosecution of A&P has long been critiqued. Notably, two seminal attacks appeared from young economists in 1949, both of whom became well known. The first was MIT economist Morris Adelman's initial analysis of the case,[50] later converted into a full-length book.[51] Adelman explained that the government's alleged predation case made no sense, as there was no scenario in which an A&P could hope to recover short-term losses with long-term monopoly prices. Moreover, he excoriated the government lawyers for economic illiteracy in arguing that A&P received low prices from suppliers only because smaller firms "subsidized" those bargains.[52]

The second article was a student note in the *Yale Law Journal*. Although notes then were not attributed, the author was Donald Turner, a Ph.D. economist from Harvard who was teaching economics at Yale while attending its law school.[53] In 1954, he joined Harvard's Law faculty, where many years later he coauthored the leading antitrust treatise with his colleague Phil Areeda after leading the Antitrust Division in the late 1960s.

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[47] *New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. at 657.

[48] *New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. at 658.

[49] Levinson, *The Great A&P and the Struggle for Small Business in America*, pp. 230-231.

[50] Morris A. Adelman, "The A & P Case: A Study in Applied Economic Theory," *Quarterly Journal of Economics*, Vol. 63, No. 2 (May 1949), https://www.jstor.org/stable/1883100.

[51] M. A. Adelman, *The A&P: A Study in Price-Cost Behavior and Public Policy* (Harvard University Press, 1959).

[52] Adelman rejected the subsidy theory, which differs from the economic theory of waterbed pricing, both discussed in section IV C.

[53] Donald Turner, "Trouble Begins in the 'New' Sherman Act: The Perplexing Story of the A&P Case," *Yale Law Journal*, Vol. 58, No. 6 (May 1949), https://www.jstor.org/stable/792913; see also Adelman, *The A&P: A Study in Price-Cost Behavior and Public Policy*, p. 18, n. 9 (identifying Turner as author of Yale note).

Turner's student note also eviscerated the A&P case. To Turner, the government and the courts did not "draw the line between 'predatory' and 'competitive' price-cutting[,]" and thus their "general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process. . . . Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo."[54] Turner concluded that the court's attacks on Acco's role within the A&P corporate family "approach saying that vertical integration is illegal *per se*[,]" notwithstanding claims to the contrary.[55]

Turner attacked the "serious contradiction" in what he called the new Sherman Act: a misguided effort to attack the very competitive forces the statute should benefit.[56] Thus, in the name of protecting "competition," the government prosecuted A&P for aggressive competition against less efficient grocers. Yet, as Turner observed, "vigorous competition is not a friendly pastime. New methods of production and distribution not only disturb existing firms; they frequently demolish them. It then becomes much too easy to identify the demise of these beleaguered competitors with a decline in competition itself . . . ."[57]

As Adelman and Turner wrote, the attack on A&P was not about harm to consumers, but about protecting competitors at all levels of the grocery business from A&P's disruptive business model—consumers be damned. One prosecutor reflected this focus on protecting rivals, not consumers: "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."[58] The young economists noted that the court was writing Robinson-Patman into the Sherman Act, when the court announced that the latter statute "has no concern with prices, but looks solely to competition."[59] Because the prices at issue were lower than those of competitors, the court's focus appeared to be on protecting those competitors, not on protecting the benefits of competition.

This, then, is the history of the company that the Biden FTC majority condemned as it attempted to revive Robinson-Patman. To these Biden appointees, A&P was a bad company, citing the many attacks made on it long ago when Robinson-Patman became law.[60] Such attacks were hardly surprising, both legally and politically, when chain store opponents controlled the levers of political and governmental power. That chain stores still prospered is a tribute to the many benefits that their new business model provided to American consumers despite attacks from multiple levels of government. The fact that modern agency officials, their many academic supporters, and various opinion leaders would repeat such arguments decades after the wholesaler

[54] Turner, "Trouble Begins in the 'New' Sherman Act," p. 977.

[55] Turner, "Trouble Begins in the 'New' Sherman Act," p. 978.

[56] Turner, "Trouble Begins in the 'New' Sherman Act," p. 970.

[57] Turner, "Trouble Begins in the 'New' Sherman Act," p. 970.

[58] Levinson, *The Great A&P and the Struggle for Small Business in America*, p. 229.

[59] *New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. at 636. Modern courts have reversed this trend, applying Sherman Act concepts to Robinson-Patman. See, e.g., notes 102, 105, 246-48, and accompanying text.

[60] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, pp. 4-7.

model they were designed to protect was no longer dominant reveals an astonishing unwillingness to accept the benefits of modern retailing.

If this is the story, briefly retold, of the company whose success led to the passage of Robinson-Patman, what does the statute itself say? Did its passage require placing shackles on the chain stores, shackles that were later ignored? We turn next to the statute and its legislative history.

B. The Evolution of Robinson-Patman: After Rejecting NRA-type Restrictions, Congress Passed a Compromise with Ambiguous Language and New Defenses

Before the FDR years, well-organized lobbying from traditional retailers attempted to hinder the new business model, with mixed success. Various states prohibited chains from opening additional stores,[61] only to see courts void these statutes.[62] Some states then favored taxing A&P and other chains, with the rate rising with the number of stores the chain owned.[63] Although such laws subsided during the NRA era of 1933-35,[64] "[b]y the mid-1930s, 29 of the 48 states had taxes on chain stores, some of them so high as to capture half of the profits of an average chain grocery store."[65] The FTC observed in 1934 that the taxes were anti-consumer, because to "tax out of existence the advantages of chain services over competitors is to tax out of existence the advantages which the consuming public have found in patronizing them, with a consequent addition to the cost of living for that section of the public."[66] As the DOJ noted in 1977, chain store taxes were clearly protectionist attempts to "protect the independent small businesses and his way of doing business from the economic power of the larger enterprise—and its efficiencies, new ways of distributing products, and better entrepreneurial skills."[67]

In the first years of the Great Depression, declining sales increased the pressure on all businesses, especially those competing with the more efficient chains. Early in the Roosevelt administration, codes enacted through the NRA, FDR's first attempt to end the Depression, reflected this opposition to chain stores. The early 1930s was an era of deflation with policymakers focused on prices being "too low," and the NRA sought to restrict competition and thus raise prices.[68] To support higher pricing, the NRA protected the business model of

[61] Areeda and Hovenkamp, *Antitrust Law*, para. 2302; Rowe, "The Evolution of the Robinson-Patman Act," p. 1065.

[62] Areeda and Hovenkamp, *Antitrust Law*, para. 2302.

[63] Areeda and Hovenkamp, *Antitrust Law*, para. 2302.

[64] Such tax laws increased after the NRA was declared unconstitutional. Hawley, *The New Deal and the Problem of Monopoly*, p. 261.

[65] Levinson, "Monopoly in Chains," p. 4; see also Department of Justice, *Report on the Robinson-Patman Act*, p. 112 ("During the 1930's, many states passed a variety of chain store taxation measures, with rates ranging in severity from mildly annoying to frankly confiscatory.").

[66] Federal Trade Commission, *Chain Stores*, pp. 91-92.

[67] Department of Justice, *Report on the Robinson-Patman Act*, p. 252.

[68] See Hawley, *The New Deal and the Problem of Monopoly*, Chapter 3, for a discussion of early implementation under the NRA.

wholesalers and small, independent retailers through general hostility to vertical integration, in effect encouraging business cartels.[69]

The NRA codes were "particularly hostile toward vertical integration into retailing" and "attempted to preserve traditional schemes of manufacturer-intermediary-retailer sale and resale distribution as it had existed for centuries."[70] Some of the codes prohibited manufacturers from selling outside the wholesaler-retailer chain; other codes prohibited integrated operators such as chain store distributors and mail order houses from obtaining discounts that could undercut wholesalers.[71] If any manufacturer quoted prices directly to retailers to bypass wholesalers, the codes mandated manufacturer boycotts.[72] The NRA codes also sought to limit quantity discounts, discounts to buyers for performing promotional functions, and discounts to buyers to compensate for eliminating brokerage.[73] Such provisions would find parallels in the enacted Robinson-Patman Act.

The Supreme Court found the NRA program unconstitutional in 1935.[74] In any event, given public resistance to NRA enforcement, it had not achieved the "rigid regulation of distribution that wholesalers and retailers desired."[75] Although the codes "often worked badly" and were "irritating, inconsistent, and hard to enforce," the reaction among code advocates to the NRA experience was to "strengthen the code controls, not junk them."[76]

With the formal end of the NRA, chain store critics moved quickly. Fifteen days after the Supreme Court decision, Congressman Patman introduced The Wholesale Grocer's Protection Act,[77] drafted by counsel for the Wholesale Grocers Association.[78] This original draft

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[69] Department of Justice, *Report on the Robinson-Patman Act*, p. 108 ("The National Recovery Administration, in an ambitious attempt to relieve the nation's economic ills, sought to impose stringent regulation on the distribution process. The codes, in effect from 1933 to 1935, governed the wholesale function, for example, by protecting wholesalers from any attempted diversion of goods from that portion of the distribution chain.").

[70] Areeda and Hovenkamp, *Antitrust Law*, para. 2302; see also Rowe, "The Evolution of the Robinson-Patman Act," p. 1066 ("The Codes of Fair Competition authorized by the National Industrial Recovery Act of 1933 in many cases expressed the objectives of the numerically dominant independent merchants who sought to freeze the orthodox pattern of distribution into law."); Department of Justice, *Report on the Robinson-Patman Act*, p. 109 ("A significant goal of the NRA codes was the preservation of the channels of distributions which existed prior to the depression and which were threatened both by that phenomenon and competitive changes in distribution."). On NRA codes protecting wholesalers, see Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, pp. 16, 35 n. 76.

[71] Rowe, "The Evolution of the Robinson-Patman Act," p. 1066.

[72] Department of Justice, *Report on the Robinson-Patman Act*, p. 109.

[73] Areeda and Hovenkamp, *Antitrust Law*, para. 2302; Hawley, *The New Deal and the Problem of Monopoly*, p. 249.

[74] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[75] Department of Justice, *Report on the Robinson-Patman Act*, p. 111. The DOJ also notes that the Roosevelt administration had been "reluctant to lend its support to direct attempts at preventing changes in the distribution patterns." Department of Justice, *Report on the Robinson-Patman Act*, p. 111.

[76] Hawley, *The New Deal and the Problem of Monopoly*, p. 249; see also Department of Justice, *Report on the Robinson-Patman Act*, pp. 151-153 (describing the relationship between the NRA and the Robinson-Patman Act).

[77] See Hugh C. Hansen, "Robinson-Patman Law: A Review and Analysis," *Fordham Law Review*, Vol. 51, No. 6 (1983), p. 1123, https://ir.lawnet.fordham.edu/flr/vol51/iss6/1/.

[78] Rowe, "The Evolution of the Robinson-Patman Act," pp. 1067-1068 n. 44 (referencing Congressman Patman stating "Mr. Teegarden wrote this bill" and describing his role in drafting and crafting the bill through the legislative

incorporated the NRA's general approach to curbing chain stores, and after substantial weakening, became the Robinson-Patman Act of 1936.[79] The virulence against chain stores was on full display during the Congressional debate. The 1977 DOJ report describes the atmosphere of conspiracy and anti-New York and anti-Wall Street sentiment during the debate, quoting Congressman Patman: "I am convinced that there is a conspiracy existing between a few Wall Street bankers and some of the heads of the biggest business institutions in this Nation to absolutely get control of retail distribution. They expect to do that through the chain-store system."[80] Bluntly, Patman also proclaimed that "[c]hain stores are out. There is no place for chain stores in the American economic picture."[81]

Wholesalers had long opposed mass distributors like chain stores that bypassed wholesalers. Unsurprisingly, these groups objected to how chain stores lowered prices to consumers and reduced wholesaler profits. During a hearing on the legislation, a wholesaler witness testified how chain store competition hurt the wholesalers: "A gentleman of the committee asked yesterday whether or not the consumer got the benefit. "*Yes; the consumer gets the benefit, but it is generosity with the producer and the shipper's money. You are taking it right out his pocket and giving it to the consumer.*"[82]

To benefit wholesalers, the protectionist goals underlying Robinson-Patman were aimed primarily against vertical integration. The original draft would have rigidly preserved the traditional method of distribution and "[grew] out of a period in which hostility toward vertical integration in American industry was at an all-time high."[83] Reflecting its NRA antecedents, this original version "contemplated a pricing system under which discounts would be available solely on the basis of a buyer's function in the chain of distribution, that function being defined by reference to the class of customers to whom the purchaser sold goods."[84] Effectively, any mass market retailer could not bypass wholesalers to seek discounts directly from manufacturers.[85]

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process); see also Department of Justice, *Report on the Robinson-Patman Act*, p. 114; Hawley, *The New Deal and the Problem of Monopoly*, p. 251.

[79] Rowe, "The Evolution of the Robinson-Patman Act," p. 1067; Department of Justice, *Report on the Robinson-Patman Act*, pp. 112-114, 151-153; see also Yale Brozen, foreword, in Posner, *The Robinson-Patman Act* ("The Supreme Court ruled NIRA unconstitutional on May 27, 1935. Immediately following the decision, on June 11, the Robinson-Patman Act was introduced in Congress to restore many of the provisions of the defunct law, especially those designed to produce downward price rigidity.").

[80] Department of Justice, *Report on the Robinson-Patman Act*, pp. 107-108.

[81] Frederick M. Rowe, "Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman," *Yale Law Journal*, Vol. 60, No. 6 (June 1951), p. 930 n. 7, https://openyls.law.yale.edu/server/api/core/bitstreams/89b0f8d0-5751-4512-9c80-067d41f56f4a/content.

[82] Department of Justice, *Report on the Robinson-Patman Act*, pp. 122-123 (emphasis added).

[83] Areeda and Hovenkamp, *Antitrust Law*, para. 2301a. Ironically, Robinson-Patman instead probably encourages vertical integration. See Department of Justice, *Report on the Robinson-Patman Act*, p. 55 (discussing the statutes' incentives for large firms to integrate).

[84] Department of Justice, *Report on the Robinson-Patman Act*, p. 114.

[85] Rowe, "The Evolution of the Robinson-Patman Act," p. 1067 ("The Patman bill superimposed on section 2 a veritable code of pricing restrictions designed to cripple the mass distributor and protect the wholesaler's business position."); see also Department of Justice, *Report on the Robinson-Patman Act*, p. 121 n. 225 ("This version of the Act, like the NRA codes before it, would have protected the middlemen's position by codifying his right to a functional discount while denying that discount to direct purchasing mass retailers."); Department of Justice, *Report on the Robinson-Patman Act*, p. 121 ("Like the NRA, the necessary effect of the Robinson-Patman Act would be to

Hence, the original bill had a section on customer classification and prohibited payments in lieu of brokerage, both taken from the NRA codes, designed to inhibit retailer vertical integration into the wholesaling function, thereby preserving existing middlemen. The general prohibition on any price discrimination was designed to forbid larger buyers from using their advantages to reduce manufacturers' prices to them.[86]

To summarize, the legislative history could hardly be clearer: that Robinson-Patman's sponsors attempted to protect inefficient distribution from new competition. The bill was introduced immediately after the NRA's demise to replicate the NRA's attempted protection of old distribution methods and to maintain higher prices. Indeed, language from the NRA codes was imported into the legislation. It was part of a wider effort to ban, tax, and limit chain stores. As Fred Rowe observes, "[t]he Robinson-Patman Act early was recognized as an anti-chain store measure and severely criticized on that premise."[87] Small merchants and independent wholesalers created and advocated for Robinson-Patman because of the growing competition from chain stores.[88]

In the end, the enacted law did not enshrine the NRA codes or shackle the chain store model completely. Accordingly, much of the legislative history is beside the point. It reflects the aspirations of individual members of Congress, not explanations of the law that was enacted. Congressman Patman's aggressive denunciation of chain stores, for example, certainly reflected his desires, but the bill he introduced to obtain that goal did not pass. Instead, the actual statutory language left considerable enforcement discretion to the FTC. Ellis Hawley stated that the compromise produced a "vague law," the "actual effects of which would depend on its administration and interpretation."[89] As the Supreme Court noted in 1953, the statute used "infelicitous language."[90] Justice Jackson added that the Act had "indeterminate generalities" and was "complicated and vague in itself and even more so in its context."[91] He also observed that the statute was poorly drafted and its vagueness made compliance by the business community very difficult.[92] As he puzzled through the law's ambiguity, he remarked "I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it more troublesome than we do, for it does trouble me but once a term, but it must trouble them every day."[93]

The heart of the Robinson-Patman Act prohibits sales of "commodities of like grade and quality" at different prices to different buyers unless justified by "differences in the cost of

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preserve the traditional 3-tier distribution system (wholesalers, brokers, and other middlemen), from the marketing revolution.").

[86] Department of Justice, *Report on the Robinson-Patman Act*, pp. 179-180.

[87] Rowe, "Price Discrimination, Competition, and Confusion," pp. 929, 930 n. 7.

[88] Department of Justice, *Report on the Robinson-Patman Act*, pp. 178-179.

[89] Hawley, *The New Deal and the Problem of Monopoly*, p. 254.

[90] *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61, 78 (1953).

[91] *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 483, 492 (1952) (Jackson, J., dissenting).

[92] *Automatic Canteen Co.*, 346 U.S. at 78.

[93] Rowe, "The Evolution of the Robinson-Patman Act," p. 1060 n. 5 (quoting Justice Jackson oral argument); see also note 154 and accompanying text.

manufacture, sale, or delivery" or to meet competition.[94] As a result, enforcement focused on a manufacturer's price differentials that allegedly influenced competition between retail buyers receiving different prices.[95] By regulating these price differentials, the FTC could attempt, subject to the Act's defenses and other provisions, to protect smaller retailers from the emerging chain stores, such as the A&P. Given the rejection of rigid NRA codes, the Act's defenses, and the language's lack of clarity, the agency could have attempted to interpret Robinson-Patman more consistently with today's antitrust laws, that is to protect competition and consumers.

Instead, we will see that, through the 1960s, the agency usually ignored that the original draft legislation failed to pass and, for decades, the FTC tried to protect competitors, not consumers, doing so in a way that often helped neither. The resulting contradictions with the goals and application of the rest of antitrust law led to repudiation of the FTC's aggressive Robinson-Patman enforcement across virtually all parts of the antitrust community.

II. Robinson-Patman Enforcement Harmed Competition and Consumers

Before the Biden administration, few, if any, issues were less controversial within the antitrust community of practitioners, enforcers, scholars, and the relevant congressional committees and their staffs than the consensus that aggressive use of the Robinson-Patman Act was both unnecessary and inappropriate. Numerous studies had condemned the statute, the courts had increasingly construed it as consistent with pro-consumer interpretations of the antitrust laws,[96] and the FTC had abandoned enforcement. This section discusses the experience with aggressive FTC enforcement of Robinson-Patman that helped lead to this eventual rejection and retrenchment.

Robinson-Patman enforcement harmed competition and consumer welfare on multiple levels. Part A considers how compliance with the Robinson-Patman Act "may actually seem to require firms to violate one of the other antitrust laws, most notably § 1 of the Sherman Act."[97] Part B discusses how compliance with the Robinson-Patman Act, even when not a violation of another law, "may force firms to develop practices that can facilitate collusion or oligopoly" by making illegal the very low pricing behavior that would otherwise disrupt non-competitive pricing. Finally, Part C analyzes the inefficiencies from prohibiting lower cost distribution methods and various costs of Robinson-Patman compliance.

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[94] 15 U.S.C. § 13(a), (b) (1936).

[95] This is known as "secondary line" injury, distinguished from "primary line" injury in which the manufacturer lowers price to injure one or more of the manufacturer's rivals.

[96] Ryan Luchs et al., "The End of the Robinson-Patman Act? Evidence from Legal Case Data," *Management Science*, Vol. 56, No. 12 (December 2010), https://pubsonline.informs.org/doi/10.1287/mnsc.1100.1244.

[97] These categories and quotes are drawn from Areeda and Hovenkamp, *Antitrust Law*, para. 2340a, pp. 133-134. The Justice Department similarly categorized the costs of Robinson-Patman in its 1977 report: "The costs to society of Robinson-Patman are both direct and indirect. The direct costs arise from the higher price levels brought about by the Act's inhibitions on the competitive, price-setting process and its encouragement of price-fixing activity. Indirect effects occur when businesses operate less efficiently, pay high legal fees or otherwise incur greater costs because of Robinson-Patman, and when Robinson-Patman places a relatively greater burden on smaller businesses than on large companies." Department of Justice, *Report on the Robinson-Patman Act*, p. 39.

A. Encouraging Antitrust Violations

The most striking effect of aggressive FTC Robinson-Patman enforcement was its encouragement and promotion of price coordination or pricing exchanges among competitors, at least in tension with, if not in violation of, § 1 of the Sherman Act. The NRA codes, themselves government sponsored cartels, were the antecedents of the FTC's Robinson-Patman enforcement, which was designed to prevent large retailers from undercutting smaller ones.

The FTC's interpretation of the "meeting competition" defense and attempts to minimize its usage were important sources of encouraging price coordination. This defense allows a seller to show that "his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ."[98] Acting consistently with the statute thus required knowledge of competitor pricing. Because learning about such pricing both raises potential Sherman Act § 1 issues and was necessary as a defense to Robinson-Patman enforcement, what was allowed and disallowed in seeking such information spawned decades of confusion, excess costs, and even anti-competitive behavior.

Self-evidently, "good faith" turns on the evidence on which sellers can rely. Encouraged by the FTC, the Supreme Court in 1945 suggested that a seller must "investigate or verify" to satisfy the defense.[99] In fact, the Commission required that the seller must have "proof positive" of the exact competitor and price whose competition the seller sought to meet, meaning that sellers must investigate or verify the lower offers their buyers claimed they received elsewhere. Despite one court's rejection of "proof positive" in 1964,[100] until 1978, FTC precedent could be read to require such investigation, and cautious lawyers recognized that the most reliable verification of a buyer's claim of a low price offer from a competitor was to check with the competitor itself.[101] Only in 1978, when the Supreme Court recognized that the FTC's view of the law had encouraged price checking among competitors, was this misuse of the Act clearly eliminated.[102]

In 1979, the Court resolved a closely related problem that this author had seen as a young staffer talking to Robinson-Patman lawyers at the FTC in the mid-1970s. Robinson-Patman proscribes buyers from knowingly inducing or receiving illegal price discrimination. As we shall see in the next subsection, buyer-seller negotiation is important to a competitive marketplace, especially in deterring price coordination in industries with relatively few competitors. In such industries, buyers may tell sellers they have better offers, even if they are less than fully truthful. In its zeal both to limit the meeting competition defense and to prosecute sellers for inducing price discrimination, the FTC found Kroger liable for inducing a discount even though the seller

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[98] 15 U.S.C. § 13(b).

[99] *Federal Trade Commission v. A.E. Staley Manufacturing Co.*, 324 U.S. 746, 758 (1945).

[100] See *Forster Manufacturing Co. v. Federal Trade Commission*, 335 F.2d 47 (1st Cir. 1964); Department of Justice, *Report on the Robinson-Patman Act*, p. 23.

[101] Frederick M. Rowe, "Pricing and the Robinson-Patman Act," *Antitrust Law Journal*, Vol. 41, No. 1 (October 1971), pp. 98, 101-102, https://www.jstor.org/stable/40841818 (discussing *Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295 (N.D. Cal. 1971)). A similar price verification program was found illegal in *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

[102] *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978).

was not liable because it offered the discount in good faith.[103] Fred Rowe understood the irony: "for the first time, [the FTC] establishes a Robinson-Patman principle that the very same price transaction which is lawful from the standpoint of a seller, by his successful resort to the meeting competition proviso, can at the same time create illegality on the part of the buyer."[104] In 1979, the Supreme Court resolved this problem by holding that a buyer cannot violate Robinson-Patman for receiving a discount if the seller was not liable for providing it.[105]

B. Encouraging Non-Competitive Pricing

While encouraging illegal behavior was stunning, deterring price cuts that could undermine non-competitive pricing or facilitate new entry was probably more significant in practice. In its 1977 analysis, the DOJ described how the information exchanges that the Act encouraged were inconsistent with robust price competition:

> The former chief prosecutor for the Antitrust Division testified . . . how the exchange of data tends to keep prices at a stabilized level even without an express price fixing conspiracy. When a customer claims he has received a lower price, the supplier may call his competitor to learn whether that price quote was actually given. If it is believed that the claimed discount had not been given then the original seller will, of course, not lower his price. Where, on the other hand, the competitor confirms the offer of a lower price, the seller need only meet that price. Without such confirmation, the seller would be forced to rely on his buyer or to guess at the actual price offered by the competitor. Under these circumstances, the seller might, in the short run, offer lower prices than necessary to meet the competition. Thus, lack of communication would create uncertainty on the part of a seller when faced with the claim that a competitor is charging a lower price; this uncertainty would very likely lead to the outbreak of true price competition and a lower price to the consumer.[106]

Despite the obvious benefits of lower prices to consumers, a prima facie Robinson-Patman violation could be found when a manufacturer reduced price to buyers selectively in this manner.[107] As the 1977 DOJ Report concluded: "To the extent that that businessman sees extensive exposure to liability under the statute as a result of his pricing strategy, it is reasonable to conclude that his inclination to adjust prices downward on a selective basis will be reduced."[108] By causing firms to face such legal risks from selective price cuts, aggressive Robinson-Patman

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[103] *Kroger Co. v. Federal Trade Commission*, 438 F.2d 1372 (6th Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

[104] Rowe, "Pricing and the Robinson-Patman Act," pp. 98, 103.

[105] *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 440 U.S. 69, 76-81 (1979).

[106] Department of Justice, *Report on the Robinson-Patman Act*, pp. 61-62; see also George J. Stigler, "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72, No. 1 (1964), https://www.jstor.org/stable/1828791.

[107] Department of Justice, *Report on the Robinson-Patman Act*, pp. 10-15; Areeda and Hovenkamp, *Antitrust Law*, para. 2333c.

[108] Department of Justice, *Report on the Robinson-Patman Act*, pp. 9, 27 ("The practical difficulty of establishing defenses to Robinson-Patman charges thus deters a rational businessman from engaging in selective price reductions.").

enforcement created "an overwhelming legal barrier for those firms contemplating price adjustment in response to specific demands by less than all customers" because "charging of prices sufficiently different in amount to affect resale prices creates a virtual presumption of illegality and rebuttal of that presumption is difficult if not impossible."[109]

Yet, offering discounts only to some buyers, particularly large buyers that can demand lower prices, can be crucial to encourage competition. Firms in industries with few competitors may recognize that reducing all or most prices is disadvantageous. The prospect of obtaining or retaining the business of a particularly valued customer through selective discounts may nevertheless appeal to such sellers. If price concessions become known, others will demand the same concession or turn to other suppliers if prices are not cut. This process benefits consumers.[110] By contrast, the "empirical evidence suggests that when sellers are forbidden from making selective price cuts, they generally respond by making none at all, for giving an across-the-board discount to all buyers is too expensive."[111]

In its 1977 report, the Justice Department analyzed this adverse effect, noting Robinson-Patman enforcers "did not take into account . . . the fundamental importance of the selective discount as a means to bring down oligopoly prices"[112] and that "[b]oth economic theory and observations by attorneys and others indicate that it is the granting of discounts to particular customers with some bargaining power which brings down the high, 'sticky' list prices of oligopolistic industries."[113] Professor Hovenkamp similarly observes that "if a rule forbidding selective price cuts were repealed, all parties except the seller would be better off" and that the biggest gains "would accrue to consumers."[114] Today's Robinson-Patman revivalists simply ignore this crucial benefit from so-called power buyers disciplining "upstream" non-competitive pricing.

C. Other Adverse Effects on Consumers

Beyond these primary effects, the FTC's aggressive enforcement of Robinson-Patman caused numerous inefficiencies and unintended consequences. A prominent example involved the FTC's bizarre treatment of backhauls. A typical scenario involved a retailer delivering goods to its stores from its warehouses. After delivery, the retailer's empty truck might be near one of its supplier's warehouses, making it easy for this truck to deliver goods from the seller's warehouse rather than use the supplier's truck. Retailers sought an allowance or discount from the supplier

[109] Department of Justice, *Report on the Robinson-Patman Act*, p. 35; see also Areeda and Hovenkamp, *Antitrust Law*, para. 2340b1 (describing how Robinson-Patman inhibits selective price cuts that can undermine non-competitive pricing).

[110] Department of Justice, *Report on the Robinson-Patman Act*, pp. 48-53. Richard Posner similarly discusses how "cheating" or "defecting" typically works by granting "only selected discounts—probably to the larger buyers, for that way he can obtain a large profit per customer while minimizing the risk of detection by minimizing the number of customers with whom he is dealing on a cut price basis." Such "cheating has a tendency to spread" and "[m]any cartels have collapsed as a result of the progressive deterioration of the cartel price structure by discriminatory price reductions." Posner, *The Robinson-Patman Act*, pp. 14-15.

[111] Areeda and Hovenkamp, *Antitrust Law*, para. 2340b1.

[112] Department of Justice, *Report on the Robinson-Patman Act*, p. 47.

[113] Department of Justice, *Report on the Robinson-Patman Act*, p. 48.

[114] Areeda and Hovenkamp, *Antitrust Law*, para. 2340b1.

for picking up and delivering the goods. Unfortunately, the FTC interpreted such concessions as price discrimination implicating Robinson-Patman.[115] Although the agency quietly softened its harshest approach, the DOJ reported in 1977 that limiting backhauls still wasted 100 million gallons of truck fuel, costing $300 million annually.[116]

Another egregious problem of aggressive enforcement was that the FTC would not allow cost differences to justify price differences, despite the statute's plain meaning. Under the Act's cost justification defense, sellers can charge a different price to different buyers when costs vary.[117] The FTC nevertheless interpreted the defense very narrowly and court precedent made the cost justification defense impractical.[118] Consequently, buyer and seller incentives to save costs and lower prices to consumers were reduced.

Richard Posner used warehousing to illustrate the problem. Because warehousing goods is costly, if a buyer would warehouse, a seller would offer that buyer a lower price to avoid those costs. Negotiations would lead to the party that could warehouse more efficiently, a process that would likely require different prices to different buyers. In theory, the statute contemplated this scenario with the cost justification defense. Yet, the "cost-justification defense was unusable" in practice because the "cost savings to the manufacturer could not be demonstrated with the precision required by the commission," discouraging buyers from providing their own warehousing to reduce costs.[119]

Warehousing exemplified how FTC enforcement, like the NRA codes, attempted to lock distribution into the roles existing at the turn of the 20th century.[120] When a wholesaler or retailer wanted to relieve a manufacturer of the costs of the old manufacturer-wholesaler-retailer separation of roles, it could not obtain a discount for avoided costs because it was too often impractical to believe that cost savings could be proven under the statute. Incentives to innovate and achieve cost saving in distribution thus decreased. Aggressive FTC enforcement was particularly harsh on retailers that integrated into wholesale distribution—ironically, often smaller retailers that formed cooperatives to do so. The FTC considered these integrated companies to be retailers and demanded the manufacturer sell to them at prices no lower than retailers that had not integrated.[121]

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[115] Areeda and Hovenkamp, *Antitrust Law*, para. 2321 ("Initially the FTC took the completely unjustified position that even a backhaul allowance calculated to do no more than compensate for avoided freight costs constituted price 'discrimination' under the Robinson-Patman Act.").

[116] Department of Justice, *Report on the Robinson-Patman Act*, pp. 90-91; Posner, *The Robinson-Patman Act*; Muris *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, pp. 3-4.

[117] 15 U.S.C. § 13(a).

[118] Department of Justice, *Report on the Robinson-Patman Act*, pp. 18-22 ("The history of the cost justification defense before the FTC and the courts shows hostility to its use[.]").

[119] Posner, *The Robinson-Patman Act*, pp. 41-42.

[120] Department of Justice, *Report on the Robinson-Patman Act*, pp. 84-88.

[121] Department of Justice, *Report on the Robinson-Patman Act*, pp. 86-88 ("The effect is to prevent distribution systems from becoming more efficient or assuming new shapes[.]").

Problems also abound under Section 2(c), which prohibits paying brokerage to a buyer "except for services rendered."[122] Chain store critics believed that large grocery chains like A&P used "phony" brokerage to obtain discounts when no services were provided.[123] Yet, A&P dealt directly with sellers, did not need brokers, and would seek lower prices because its suppliers did not pay commissions to a broker for sales to A&P. To the statute's supporters, the ability of large buyers like A&P to avoid seller brokerage and thereby negotiate lower prices was improper competition that should be prohibited regardless of cost savings.[124] The net effect distinguished between transactions that were economically indistinguishable. For example, if a seller sold a product for $10 and paid a broker $1 (for a net of $9 to the seller) and then separately sold to an intermediary without a broker for $9 (for a net of $9 to the seller), the latter sale violated Section 2(c) if the $9 price was viewed as including a discount in lieu of brokerage. The FTC found such facts to violate 2(c) and sued A&P among many victims.[125]

More generally, in the 1940s and 1950s, the FTC disallowed brokerage payments even when brokerage services were actually rendered.[126] As then interpreted, retailers effectively could not provide their own brokerage services for a discount and the FTC protected "food brokers from the competition of alternative forms of distribution."[127] Although this approach directly contradicted the statutory language, "[u]nfortunately, the tribunals have gone to great lengths to give a statute that was socially harmful enough to begin with an even more socially harmful meaning."[128] This erroneous interpretation helped make Section 2(c) a favorite of FTC enforcement.[129] Such absolutist interpretations changed in the 1960s, but even then the FTC imposed unnecessary and anticompetitive restraints on independent brokers, such as prohibiting a broker from reducing a commission for large sales.[130]

Other inefficiencies involved Section 2(d) and 2(e), which prohibit supplier discrimination in providing different levels of services or promotional assistance to different buyers.[131] Under those sections, sellers must provide most such assistance to buyers on "proportionally equal

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[122] 15 U.S.C. § 13(c). The statute also covered discounts for brokerage.

[123] Posner, *The Robinson-Patman Act*, p. 44; Areeda and Hovenkamp, *Antitrust Law*, para. 2362a.

[124] See *Great Atlantic & Pacific Tea Co.*, 26 F.T.C. 486 (1938), *aff'd*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); Areeda and Hovenkamp, *Antitrust Law*, para. 2362c (stating such decisions yield the "unappealing policy result that parties may not agree with one another to eliminate a broker and reduce the market price accordingly"). Unlike a price discrimination under Section 2(a) of the statute, a price difference arising from saving on brokerage costs was prohibited under Section 2(c) regardless of establishing cost savings under the cost justification defense. Nevertheless, some courts have sought to permit cost differences to matter. see Areeda and Hovenkamp, *Antitrust Law*, para. 2362h.

[125] See note 121; Areeda and Hovenkamp, *Antitrust Law*, para. 2362c ("The disturbing thing about these decisions is that they condemn buyer-reseller relationships whether or not brokerage-like services were actually rendered. This seems an unjustified intrusion on firms' ability to enter efficient transactions that have no harmful economic effects whatsoever and in many cases no injury of any kind to any identifiable party.").

[126] Posner, *The Robinson-Patman Act*, p. 45.

[127] Posner, *The Robinson-Patman Act*, p. 45.

[128] Areeda and Hovenkamp, *Antitrust Law*, para. 2362d.

[129] Posner, *The Robinson-Patman Act*, pp. 32-33, 45; Department of Justice, *Report on the Robinson-Patman Act*, p. 82 (stating through 1969, 180 of 439 FTC final orders analyzed concerned section 2(c)).

[130] Posner, *The Robinson-Patman Act*, pp. 45-46.

[131] 15 U.S.C. § 13(d), (e).

terms." Interpreting these words led to protracted, costly litigation as the statute's requirements impose "extremely complex and burdensome requirements on schemes for promotional and other allowances."[132] In *Fred Meyer, Inc. v. FTC*,[133] the Supreme Court ruled that a supplier providing such services or promotions directly to some retailers must also ensure that retailers obtaining the goods indirectly through wholesalers receive the same services or promotions on proportionally equivalent terms. This result was so impractical that the FTC issued guides to try to help businesses comply, but, as DOJ's 1977 Report concluded, these "guides are so complex as to be totally unworkable."[134] Sellers were compelled to provide "useless or unwanted service" to some retailers to try to comply or simply forgo any promotional support even when it is "both useful and desired."[135] In effect, the FTC limited promotional programs only to buyers that could use them fully, severely constraining their utility.[136]

A final effect of the FTC making aggressive Robinson-Patman enforcement the center of its competition program was its effect on other FTC cases. Protecting inefficient competitors from lower price rivals—the mission of the NRA—was so predominant that Robinson-Patman cases almost certainly influenced how litigating attorneys approached cases for the other statutes they enforced, especially the merger law and the provisions involving pricing practices outside of Robinson-Patman. The FTC became aggressive in predatory pricing cases, used efficiency to count against a merger, and sought to stop mergers even when there were many competitors.[137] In each area, the focus was competitor, not consumer, protection. As I and many others have written, in mergers in particular, procompetitive benefits often counted against the transaction.[138]

III. Decades Ago, Antitrust Enforcers Appropriately Deemphasized Robinson-Patman

Despite the failure to write the NRA codes into law, as Wright Patman's first proposal sought, the FTC nevertheless aggressively enforced Robinson-Patman as if the protectionism of the initial draft had been adopted. Defenses were ignored, arcane distinctions prevailed, and even small businesses occasionally suffered. The Justice Department joined the fray, attempting to punish the A&P, the largest retail target of the NRA codes. Unsurprisingly, the obvious inconsistency between such aggressive enforcement and the goals of protecting consumers and promoting competition under the antitrust laws led to condemnation of the government and the Robinson-Patman Act.

This section discusses how the original aggressive FTC enforcement was eventually abandoned, and why those who would revive such enforcement should justify that change. Part A briefly discusses the major criticisms, reports, books, and individuals most responsible for the Act's demise, placing them in historical perspective, as well as the most comprehensive modern

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[132] Department of Justice, *Report on the Robinson-Patman Act*, p. 91.

[133] *Federal Trade Commission v. Fred Mayer, Inc.*, 390 U.S. 341 (1968).

[134] Department of Justice, *Report on the Robinson-Patman Act*, p. 92.

[135] Department of Justice, *Report on the Robinson-Patman Act*, p. 92.

[136] Department of Justice, *Report on the Robinson-Patman Act*, pp. 92-93.

[137] See Muris, "III. The Mid-Century Populist War Against Mergers," in *Neo-Brandeisian Antitrust: Repeating History's Mistakes*.

[138] Muris, "III. The Mid-Century Populist War Against Mergers," in *Neo-Brandeisian Antitrust: Repeating History's Mistakes*.

summary of the myriad problems from aggressive FTC enforcement. Part B then turns to the specific circumstances that led to the overthrow of the Robinson-Patman Act as the centerpiece of FTC competition policy, especially the cumulative, extensive experience of those who encountered Robinson-Patman. Part C explains why those who want to restore Robinson-Patman as a major competition tool, after 50 years in the wilderness, should justify such dramatic change.

A. The Act's Critics

The first major criticism from within the antitrust community was in the 1955 Report of the Attorney General's Committee to Study the Antitrust Laws.[139] Requested by President Eisenhower, 59 practitioners, law professors, and economists devoted over 50 pages of their nearly 400-page document to Robinson-Patman. Although they were clearly hostile to the then-prevailing FTC and judicial interpretations of the statute, they did not recommend wholesale reform, instead favoring detailed reinterpretation of various aspects of enforcement and the underlying case law. In the years immediately following the report, the FTC ignored this wisdom, filing more cases than ever, especially in the early 1960s with 215 cases filed in 1963 alone.[140] Although the text of the report probably helped influence some who became leaders in the sea change that would eventually arise regarding enforcement of the statute, the report itself was not a major factor in causing such reevaluation, as Thomas Kauper, himself a former head of the Antitrust Division, wrote in a 2002 retrospective.[141]

Numerous criticisms of the statute followed the 1955 report, of which six are particularly noteworthy, three in the crucial decade of the 1960s. The first was Fred Rowe's 1962 publication of a detailed treatise on the intricacies of the statute as enforced.[142] This work, and law review articles he published,[143] from a practitioner with extensive firsthand knowledge of the FTC and judicial treatment of the statute, revealed the many ways in which Robinson-Patman was anti-consumer, as well as often not even serving the interest of the small businesses it was supposed to help. As with some other critics, Rowe's and other practicing attorneys' commentary was inconsistent with their self-interest, as their expertise in the arcane law of Robinson-Patman became of little or no value when the FTC deemphasized the Act. Next, throughout the 1960s, FTC Commissioner Philip Elman wrote multiple dissents as well as other commentary critical of FTC enforcement and various judicial interpretations.[144] Because Elman's views occasionally succeeded on appeal,[145] the need for greater evidence to prosecute successfully under the statute

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[139] *Report of the Attorney General's National Committee to Study the Antitrust Laws* (U.S. Government Printing Office, March 31, 1955), https://babel.hathitrust.org/cgi/pt?id=umn.31951d02427803y&seq=1.

[140] Department of Justice, *Report on the Robinson-Patman Act*, pp. 98-99; Posner, *The Robinson-Patman Act*, pp. 32-33 (citing Rowe, *Price Discrimination under the Robinson-Patman Act*, p. 537, Table 11).

[141] Thomas E. Kauper, "The Report of the Attorney General's National Committee to Study the Antitrust Laws: A Retrospective," *Michigan Law Review*, Vol. 100, No. 7 (2002), https://repository.law.umich.edu/mlr/vol100/iss7/3/.

[142] Rowe, *Price Discrimination under the Robinson-Patman Act*.

[143] See, e.g., articles cited in notes 12, 81, and 101.

[144] See, e.g., *Sunshine Biscuits, Inc.*, 59 F.T.C. 674 (1961) (Elman, Commissioner, dissenting from finding of Robinson-Patman violation); Philip Elman, "The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal," *Washington Law Review*, Vol., No. 1 (1966), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1670&context=wlr.

[145] See, e.g., *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 306 F.2d 48 (7th Cir. 1962) (adopting Elman's position).

increasingly replaced the de facto, per se approach FTC enforcement had often followed. As Richard Posner wrote, these enhanced standards caused a "substantial increase to the commission and its staff in cost and difficulty of trying and winning Robinson-Patman suits," and therefore a "marked drop-off" in complaints.[146] To finish the 1960s, the American Bar Association in 1969 published a damning and highly influential criticism of the FTC that demanded closing the agency if it did not dramatically change course, including its enforcement of the Robinson-Patman Act.[147] The ABA report led directly to a revitalized FTC in the 1970s that in fact deemphasized Robinson-Patman, providing little lip service to the statute's alleged benefits, until the Biden administration 50 years later.[148]

The 1970s produced other critiques of the statute, with the Justice Department's 1977 report the most important because of its comprehensiveness and authorship by a government antitrust enforcement agency. While the DOJ's study was underway, the House Small Business Committee defended the statute and attacked its critics.[149] This rearguard action had no effect on FTC activity. The Republican administrations of the first seven years of the decade had deemphasized the statute, and the Carter administration in the late 1970s continued the policy shift. That the small business lobby in Washington could produce vocal congressional support for the statute, however, did serve as a reminder and a warning of the potential costs of public criticism of Robinson-Patman.

Having been an attorney advisor to Commissioner Elman and one of the members of the 1969 ABA Commission, Richard Posner was a prominent law professor at the University of Chicago in 1976 when he published a detailed study on the Act's enforcement.[150] Although highly useful as a source of the FTC's follies, its main effect was to reinforce the extensive mainstream support for the statute's deemphasis. Finally, for anyone wishing to study antitrust law today, Professor Hovenkamp's treatise is the last of the six criticisms of Robinson-Patman. Philip Areeda and Donald Turner stated in the first edition of what became the leading antitrust treatise that they would not even address the Robinson-Patman Act because it "operates in ways that are

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[146] Posner, *The Robinson-Patman Act*, p. 31.

[147] American Bar Association, *Report of the ABA Commission to Study the Federal Trade Commission*, September 15, 1969, https://babel.hathitrust.org/cgi/pt?id=coo.31924014086247&seq=1. The head of the ABA commission became FTC Chairman in the fall of 1970, and the individual most responsible for drafting the report became Director of one of the agency's two enforcement bureaus.

[148] Because the Biden Democrats assert mistakenly that the FTC's decline in enforcement was a phenomenon of the Chicago School and the Reagan administration, we defer until section IV detailed analysis of this history and the minimum role of Chicago in that effort.

[149] *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 3*, in Hearings before the Ad Hoc Subcommittee on Antitrust, The Robinson-Patman Act, and Related Matters of the Committee on Small Business, House of Representatives, 94th Congress, First Session (1976), https://babel.hathitrust.org/cgi/pt?id=umn.31951002815508a&seq=881 (presenting statements by Owen M. Johnson, Jr., Director, FTC Bureau of Competition; Daniel C. Schwartz, Assistant Director for Evaluation, FTC Bureau of Competition; Eugene A. Higgins, FTC Bureau of Competition; Frederic M. Scherer, Director, FTC Bureau of Economics; James M. Folsom, Assistant Director, FTC Bureau of Economics; Ernest G. Barnes, Assistant Chief Administrative Law Judge, FTC; Robert J. Lewis, FTC General Counsel; Bartley T. Garvey, Attorney, FTC Office of General Counsel).

[150] Posner, *The Robinson-Patman Act*.

inimical to the goals of the antitrust laws generally."[151] Subsequently, Hovenkamp disagreed with ignoring the Act, devoting all of Volume 14 of the treatise, in its 4th edition, to the subject. This version, published in 2014, although mostly a legal analysis of the numerous judicial decisions and past FTC doctrine, also makes clear its disdain for the complexity, inconsistency, and many anti-consumer aspects of Robinson-Patman enforcement.

B. Experience with Robinson-Patman Led to Its Widespread Rejection

What drove the dramatic reevaluation of Robinson-Patman enforcement? Four categories of facts appear to have been most relevant, often involving specific evidence of the harm the FTC had caused. First was the tension between the Robinson-Patman Act and the rest of competition law and policy. Virtually anyone in a position of authority in 1970 or before had personal memories of the Great Depression, even if only from adolescence. Moreover, they would have studied that cataclysmic event in school, and the protectionist nature of the NRA was well known generally. The hostility to chain stores reflected in particular NRA codes that animated Robinson-Patman's original draft was also well known in competition policy circles. Although the intricacies of the drafting process may have been less well known, the FTC's protectionist enforcement of the Act was also obvious. A growing consensus within the antitrust community had concluded that the FTC's enforcement of Robinson-Patman protected competitors, not competition, and thus was antithetical to the purpose of antitrust law.

The second reason was that public distrust of chain stores had dissipated by 1970. Intense animosity, indeed hatred, of chain stores—recall there was no place in Wright Patman's America for them[152]—had passed. It had been decades since A&P's explosive growth, and the chain's reign as America's largest retailer for over 40 years was at an end. Other chains prospered, some with large footprints. Moreover, following World War II, shopping centers became ubiquitous throughout much of America, allowing numerous chain outlets to reach more consumers with better quality, convenience, and pricing.[153] The wholesaler war against the chains, the key motivation behind the Act, was over. Chain stores and consumers had won.

A third reason for rejection of aggressive Robinson-Patman enforcement was an important form of evidence, one crucial to our daily lives. That was the extensive practical experience of those in the antitrust community, including the scholars and judges who interacted only part time with the issues. In studying the history of Robinson-Patman's rise and fall, few, if any, changes in a statute's fortunes enjoyed such widespread support as had occurred by the 1970s with the Act's decline. This was no doubt in significant part because the protectionist goals were so antithetical to the competition and consumer centric focus of antitrust. Moreover, those immersed in the Act, whatever their particular role, saw firsthand its harm. As section II details, enforcement facilitated price-fixing, deterred selective price reductions that could undermine non-competitive price structures, and imposed unnecessary costs such as the $300 million annually in the 1970s from

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[151] See Areeda and Hovenkamp, *Antitrust Law*, para. 2300, n. 1. Professor Hovenkamp includes coverage of the Robinson-Patman Act in the treatise because "dislike for a particular statute" was not a sufficient reason to exclude coverage.

[152] See note 81 and accompanying text.

[153] For an insightful analysis of important episodes in the evolution of retail sales, see Richard S. Tedlow, *New and Improved: The Story of Mass Marketing in America*, 2nd ed. (Harvard Business School Press, 1996).

limitations on backhauls. Such evidence was crucial in creating broad-based desire to correct a major mistake.

An important manifestation of the FTC's practice that encouraged those who dealt with the FTC to reject Robinson-Patman was the complex, often arcane interpretations that existed within the agency. I have personal experience with this phenomenon, both as a new policy staffer, fresh from law school, age 24, in 1974, and 10 years later as Director of the Bureau of Competition. I saw firsthand the incredible intricacy and complexity required for business compliance that decades of FTC interpretations and labor had produced. The "lore" that developed around numerous aspects of the Act, including brokerage, promotions, cost justification, and multiple other issues, was comparable to complex business, financial, and tax transactions. Many staff attorneys, some of whom remained in the agency into the 1970s, had developed extensive knowledge regarding various aspects of the statute. The bureaucratic incentives from such knowledge hardly favored simplicity. The FTC's legal positions, while perhaps sensible for staffers buried in the Act's arcana, were transparently contrary to promoting competition to knowledgeable outsiders. This complexity and anti-competitive results led to increased opposition toward the Commission's aggressive enforcement of the Act.

As knowledge and intricacy increased within the FTC regarding interpretation of a statute ambiguous from the start, businesses subject to the Act, and the outside law firms that represented them, found it necessary to match, or even exceed, the FTC's expertise. Added costs followed, not just in the direct payments to the lawyers involved, but more importantly in the time and distraction to those running a business, and the changes in the practices necessary to comply with the FTC's often arcane, sometimes foolish, dictates. Again, these costs, known to those most experienced with the effects of the statute, formed an important part of the cumulative practical experience about the voluminous costs of Robinson-Patman in action.

Moreover, those immersed in the Act, no doubt, found the statute's unclear language itself troubling from a practical, business perspective. As the conclusion to Section I details, historians, legal scholars, and even Supreme Court justices noted Robinson-Patman's fundamental ambiguity. The law's imprecision increased business uncertainty because it allowed courts to apply either the protectionist intent behind the law's original proposal or some attempt to reconcile the actual language with consumer welfare and normal antitrust principles.

Justice Jackson in the Standard Oil oral argument thus observed that "[w]e have vacillated and oscillated between the N.R.A. theory, roughly, and the Sherman Anti-Trust theory ever since I can remember, and we are still wobbling."[154] From the perspective of just 20 years after passage, Fred Rowe observed in 1957 the statute's "legal split personality":

> The statute originated in the class struggle between conventional merchants and mass marketers for supremacy in the channels of distribution. While conceived in the soft protective concepts of the NRA, the act emerged as an amendment to the antitrust laws which ordain hard competition for all commerce. Because the text of the act also is artless and imprecise, its

[154] Fred Rowe begins the introduction to his seminal book with this quote from Justice Jackson during the oral argument for *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

> interpretation and enforcement over the years have wavered between these polar antecedents of public policy.[155]

This evidence of the law's paternity and the FTC's mostly aggressive approach—with its accumulated and growing body of protectionist, anti-competitive interpretations of the Act—helps explain why a diverse and bipartisan set of individuals supported reform.

A fourth reason for the shift in Robinson-Patman enforcement was that the FTC in the 1970s made concentration the focus of its competition enforcement. Through the mid-1970s, there was widespread concern over concentration as a competition problem, sometimes characterized as the simple market concentration doctrine. This doctrine found a close correlation between competitive performance and the number of firms in an industry, even in industries that later enforcers would regard as not problematic. Belief in the doctrine was strong among academics, courts, and the enforcement agencies. When new leaders came to the FTC in 1970, they emphasized deconcentration; following the growing consensus, reflected in the prestigious ABA Report, they deemphasized Robinson-Patman. Deconcentration dominated FTC competition in the 1970s, the way that Robinson-Patman had animated previous FTC enforcement, especially in non-mergers, for the preceding three decades. Crucially, by 1970, Robinson-Patman was widely recognized as protecting competitors, not competitive performance, and thus was inconsistent with the economic goals of the antitrust laws, goals that were then felt best advanced through the concentration emphasis.[156]

This last reason reveals a marked difference between the Biden FTC and its 1970s counterparts. Both attacked concentration, but their views on Robinson-Patman could not be more diverse. There is no clear explanation for why the modern critics of bigness admire a statute their predecessors proudly relegated. Perhaps the earlier era focused on deconcentration for more straightforward economic reasons, believing that concentrated industries were less competitive, and not consistent with consumer welfare, while modern critics reject consumer welfare standards, with their central focus on economic analysis.[157] Or perhaps it was because the leading Neo-Brandeisians have a special animosity toward the leading modern retail companies. Lina Khan became famous for attacking Amazon and her mentor,[158] Barry Lynn, tried unsuccessfully to launch a public policy campaign against Walmart. If one is motivated primarily by simple animosity toward "Big" retail, then the protectionist nature of Robinson-Patman becomes attractive, with its focus on limiting those retailers, regardless of whether aggressive enforcement harms consumers.

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[155] Rowe, "The Evolution of the Robinson-Patman Act," p. 1088.

[156] Moreover, unlike price discrimination, fear of concentration could support merger, as well as non-merger policy.

[157] Timothy J. Muris and Jonathan E. Nuechterlein, "Chicago and Its Discontents," *University of Chicago Law Review*, Vol. 87, No. 2 (March 2020), https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/8/.

[158] See Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal*, Vol. 126, No. 3 (January 2017), https://yalelawjournal.org/note/amazons-antitrust-paradox; Barry C. Lynn, "Breaking the Chain: The Antitrust Case against Walmart," *Harper's Magazine*, July 2006, https://harpers.org/archive/2006/07/breaking-the-chain/.

C. Proponents of Robinson-Patman Revival Bear the Burden of Justifying Change

Today's Robinson-Patman supporters dismiss criticism of the statute, arguing critics lack overall empirical evidence of its harm.[159] (The voluminous evidence discussed in this report apparently does not count.) Of course, by the same logic, why should the FTC return to enforcement of a statute long abandoned without such empirical evidence to support a reversal? Even if there is no overall evidence of the kind that revivalists demand that shows past enforcement harmed consumers, neither is there any such evidence showing that price discrimination is routinely harmful, or that active Robinson-Patman enforcement decreased prices, improved competition, or otherwise helped consumers. Because the revivalists want to change course, why should they not produce evidence to justify change? Such arguments default, as they often do among lawyers, to which side has the burden of proof.[160] Normally, those who want to change the status quo bear that burden.

Lawyers being lawyers, they will of course debate even that issue. Those who believe, as does this author, that the overwhelming judgment of the antitrust community by the 1970s was correct that Robinson-Patman was inconsistent with the consumer protection focus of antitrust law, contend that the reformers have the burden of change. On the other hand, the statute's new supporters respond that we cannot simply abandon a statute that is in the United States Code. While the statute still exists, this point ignores that the FTC, like all agencies, has limited resources and enforces many statutes. Trade-offs are inevitable, even without Robinson-Patman. Across the economy, the US Code has more laws than can possibly be enforced adequately, if at all. One count estimates there are 1,510 federal criminal laws alone![161]

There is an even more fundamental problem for those demanding a rebirth of the Act. Modern courts already state that the statute's language is flexible enough to rationalize generally with the pro-consumer thrust of the rest of antitrust law. Were the FTC to return to aggressive Robinson-Patman enforcement, the agency and the courts would be forced to confront old precedents. Robinson-Patman fundamentally involves vertical restraints that do not directly fix prices, practices about which the courts have been much more supportive of legality since 1977 when the Supreme Court abandoned the per se rule against such vertical restrictions.[162] As is well known within the antitrust community, the courts since the mid-1970s have fundamentally

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[159] See e.g., Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 3 ("The claim that this law raises prices on consumers is stunningly untethered from any empirical research."); see also Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 10 ("There are no empirical studies demonstrating that Robinson-Patman enforcement raises prices for consumers.").

[160] More sophisticated analysis of the concept recognizes that there are both a burden of producing evidence and a burden of persuasion; "burden of proof" is used here as a convenient shorthand.

[161] Patrick A. McLaughlin and Liya Palagashvili, *Counting the Code: How Many Criminal Laws Has Congress Created* (Mercatus Center, George Mason University, January 2023), https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws.

[162] *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Since 2007, all vertical restraints have been judged under the full rule of reason, considering a practice's benefits and costs. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

reevaluated many areas of the law, none more so than vertical restraints.[163] Because this change was after the FTC began deemphasis of Robinson-Patman, courts have had few opportunities to reevaluate that statute in government cases in light of other developments in vertical antitrust law. The infrequent private cases of the last 50 years would not have had the policy and practical significance of government cases filed as part of a new crusade against price discrimination. Old chestnuts from the Supreme Court interpreting the Act in the FTC's favor would almost certainly be reevaluated were the FTC to launch a significant enforcement campaign. There is every reason to believe, given the Supreme Court's proclamation of the consistency of Robinson-Patman with antitrust laws more generally, that courts would continue to strive for such consistency and reconciliation here. Any attempt therefore to revive Robinson-Patman would spend scarce agency resources in an effort that would immediately encounter such headwinds.

Even if the issue is one of available evidence, Section V evaluates the overall empirical and theoretical economic evidence available, finding it more than amply justifies abandoning the FTC's protectionist enforcement of Robinson-Patman. Ironically, given their complaints about the alleged lack of evidence against Robinson-Patman, one might expect the revivalists to rely, at least in significant part, on proof of Robinson-Patman's "successes." Such evidence is not part of the revivalist canon, for it does not exist. Instead, one clear fact from the Act's history is that the original purpose, saving the wholesaler-centric model, failed completely. The chain stores, the original target, and the product manufacturers who sold to them, frequently sued by the FTC, thrived during the multiple decades of aggressive FTC action, despite increased costs from FTC scrutiny.

In the end, as this section shows, the Robinson-Patman Act fell from the center of the FTC's competition universe based primarily on the powerful, cumulative experience of those subject to the Act's protectionist enforcement, a policy inconsistent with the lofty goals (not always obtained) of the rest of antitrust law. That everyday, consensus rejection of the Act by those who lived through aggressive enforcement is itself powerful evidence.

Finally, estimates do exist of the Act's costs in individual applications. The Justice Department's 1977 report collected many examples. That report, as did others—again, Fred Rowe's coverage was probably the most far reaching—discussed the many enforcement anomalies and inefficiencies, from backhauls, to warehousing, to limiting smaller retailers from competing with larger firms, among the many flaws of FTC enforcement.[164] Because the Act applied nationwide, a natural experiment was unavailable of the type that proved important elsewhere in the economic analysis of various practices (e.g., when some states follow a particular strategy or regulation and others do not). But it was demonstrably false that those throughout the antitrust world who combined to dethrone Robinson-Patman lacked evidence.

The 1977 DOJ report also provided an apparent "back of the envelope" estimate of the effects of Robinson-Patman on the economy as a whole. Professor Hovenkamp, the leading

[163] See generally Areeda and Hovenkamp, *Antitrust Law*, paras. 1600-1655. I discuss the old merger precedents and their misuse in Muris, "III. The Mid-Century Populist War Against Mergers," in *Neo-Brandeisian Antitrust: Repeating History's Mistakes*. On judicial re-evaluation of Robinson-Patman, see notes 201-202 and accompanying text.

[164] See section II C.

modern antitrust scholar, who in this century has delved deeply into the Act and its history, observed over 40 years after the estimate:

> While a technical study of the cost of a particular statute is impossible, the DOJ's estimate that the [Robinson-Patman Act] cost the economy $3 to $6 billion annually was almost certainly too low. It included higher prices, but not compliance costs or job losses. Labor and consumers are both vertically related to production. They rise or fall together. Higher prices harm consumers and also lead to fewer jobs.[165]

IV. The Dubious Policy Arguments for Reviving Robinson-Patman Enforcement

For decades, through the Obama administration, those in the antitrust community, within and without the government, be they enforcers, jurists, practitioners, academics, or others, agreed on their basic approach. They would protect competition and competition's ultimate beneficiaries, consumers, primarily using the analytical tools of economics. Within that overarching framework, disagreements about specific issues were often hotly debated, for example the appropriate standards for single firm conduct and whether to challenge a particular merger. But the basic paradigm that had evolved over decades remained unchanged. By the first Trump administration, however, dissidents arose, rejecting fundamentally competition law and policy as it existed, beginning with the basic consumer-centric approach. To them, enforcement was lax, especially against large technology companies, even though they had grown mostly organically and almost exclusively in a prosperous United States. The rebels disparaged the behavior and even the very existence of these companies that had transformed so much of daily life, particularly among the well-to-do who used their technologies frequently.

These critics called themselves Neo-Brandeisians in homage to Louis Brandeis. In antitrust, Brandeis was best known for his hostility to the large banks and to the large corporate manufacturers that had grown to unprecedented size early in the 20th century.[166] As discussed above,[167] he later opposed the growth of chain stores; although acknowledging their benefits, he feared their disruption to the highly atomized economy he preferred. President Biden turned, not to the many experienced individuals from the Clinton and Obama antitrust teams, but instead to the new critics, some of them quite young, including Lina Khan, designated Chair of the Federal Trade Commission at the unprecedented age of 32, only four years after her law school graduation.

To make hostility to the old order clear, in July 2021 the President, with Chair Khan at his side less than a month after she began her new job, declared the previous 40 years of competition law and policy, including 16 years under Presidents Clinton and Obama, "an experiment

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[165] Herbert Hovenkamp, "Can the Robinson-Patman Act Be Salvaged?," ProMarket, October 13, 2022, https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/.

[166] President Biden's competition czar, Columbia Law Professor Tim Wu, titled his book *The Curse of Bigness* (Columbia Global Reports, 2018), closely following Louis D. Brandeis's famous "A Curse of Bigness," *Harper's Weekly*, January 10, 1914, p. 8.

[167] See note 3 and accompanying text.

failed."[168] He blamed the failure on the so-called Chicago school and denounced Robert Bork as the chief villain.

In justifying their enthusiasm for the Robinson-Patman Act, Khan and the Biden FTC Democrats began with two themes central to the Neo-Brandeisian canon as articulated by President Biden and others. First, the Act's origins concerned the anti-competitive power of big companies, not protection of competitors from the new chain stores.[169] Second, those responsible for Robinson-Patman's decline were Robert Bork and his followers, especially in the 1980s during the Reagan administration.[170] Part A of this section dissects both claims, showing that neither can withstand even the most casual historical scrutiny. Then Part B addresses the assertion that small businesses need the special protection that revival of Robinson-Patman would provide.

A. Robinson-Patman Was Enacted to Protect Inefficient Wholesalers; Enforcement Plummeted Because of Widespread Agreement That It Harmed Competition and Consumers.

The long-held consensus is that Robinson-Patman's sponsors sought to protect wholesalers and smaller retailers from chain stores' lower prices and other benefits. Nonetheless, the Biden FTC majority rejects this consensus and states, "these arguments are so hyperbolic that they make it hard to understand why Congress passed Robinson-Patman, and why they wrote it the way they did. That history reveals that Robinson-Patman was never aimed at protecting the inefficient."[171]

This statement is stunning, simply ignoring the history of Robinson-Patman and the long opposition to chain stores, including from Louis Brandeis, briefly retold above in Section I.[172] Attempts to stifle innovation in retail distribution have a long history, beginning by the turn of the 20th century. For decades, opponents sought to protect wholesalers and smaller "mom and pop" retailers from competition from larger, more efficient retailers that bypassed the wholesale middlemen and charged lower prices to consumers.

As section IB details, Wright Patman acted immediately after the Supreme Court ended the NRA's work in 1935. At his request, the wholesalers' trade associations, those most threatened by chains like the A&P, wrote the initial bill. As had the NRA codes, the wholesalers attempted to freeze retailing in its pre-chain store model. Indeed, and this cannot be stated too many times given today's attempts to ignore Robinson-Patman's true beginning, the original bill

[168] See note 2 and accompanying text.

[169] See section I B.

[170] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 3.

[171] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 3.

[172] As prominent studies that discuss the legislation reveal—for example, Ellis Hawley's history of New Deal economics, the writings of Fred Rowe, the leading authority on Robinson-Patman during its FTC heyday, Herbert Hovenkamp, co-author of the leading antitrust treatise, and the DOJ report in 1977—Wright Patman and his allies desired to protect wholesalers and small retailers from chain store competition at the expense of consumers.

was entitled the Wholesaler Protection Act! Of course, part IB explained that bill did not pass in its original form, although Section II makes clear that the FTC often acted as if it had.

FTC enforcement of Robinson-Patman peaked in the early 1960s, reaching 215 complaints in 1963.[173] After that, the FTC's caseload began to shrink, not because FTC leadership had lost its enthusiasm for the Act, but in significant part because the work of a minority commissioner and outside critics had led courts to tighten the standards for winning cases, greatly increasing the length of investigations.[174] When FTC leaders turned against Robinson-Patman in the 1970s, cases fell into the single digits annually (two per year by the Carter administration), decreased to about one every other year in the 1980s, and essentially zero (or barely above zero) until December 2024.[175]

In explaining the demise of the Act's enforcement, the Biden majority blames the 1980s and quotes Robert Bork, dismissing his analysis as not "sober."[176] They ignore the important critics discussed earlier, some overtly hostile to Chicago, who are most responsible for the scholarly criticism of the FTC's enforcement of Robinson-Patman.[177] Contrary to the suggestions of the Biden FTC majority, those critics repudiate conclusively the suggestion that the retreat from Robinson-Patman can be attributed to the so-called Chicago school. Of the individuals listed in Part A of this Section, only Richard Posner was a card-carrying Chicagoan. Robert Pitofsky was a long-standing Chicago critic, and Fred Rowe wrote one of the best known, albeit idiosyncratic, criticisms of antitrust's focus on economics, led in significant part by Chicago.[178] Philip Elman expressed serious reservations about the direction of the Reagan administration. Yet each of these remained proud of their fundamental role in correcting the Robinson-Patman mistake. And the publication of Bork's *Antitrust Paradox* in 1978 occurred well after the FTC had deemphasized enforcement.

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[173] Posner, *The Robinson-Patman Act*, pp. 32-33.

[174] See notes 144-146 and accompanying text.

[175] Timothy J. Muris, "How History Can Inform Practice in Modern U.S. Competition Policy," Law and Economics Working Paper 04-20 (George Mason University School of Law, 2004), p. 10, https://www.law.gmu.edu/pubs/papers/04_20; D. Daniel Sokol, "Analyzing Robinson-Patman," *George Washington Law Review*, Vol. 83, No. 6 (2015), p. 2072, https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2064.pdf. Working in the Planning Office in the mid-1970s and as Bureau Director in the mid-1980s, I saw the decline in enforcement firsthand. There was still a residue of investigations, which could take five years or more, when the new leadership arrived in 1970. Although many of the veteran Robinson-Patman attorneys had left or would soon leave, those who remained successfully managed some investigations to completion, usually consent agreements. As I have written elsewhere, time spent on investigation was often regarded, not as sunk, but as investments that should lead to enforcement if possible. Kenneth W. Clarkson and Timothy J. Muris, "Commission Performance, Incentives, and Behavior," in Kenneth W. Clarkson and Timothy J. Muris, eds., *The Federal Trade Commission since 1970: Economic Regulation and Bureaucratic Behavior* (Cambridge University Press, 1981).

[176] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 3.

[177] Another modern critique of the Act was the Antitrust Modernization Commission, which recommended repeal of Robinson-Patman in 2007. Antitrust Modernization Commission, *Report and Recommendations*, April 2007, https://www.law.nyu.edu/sites/default/files/upload_documents/AMC_Final_Report.pdf.

[178] Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics," *Georgetown Law Journal*, Vol. 72, No. 5 (June 1984), https://law.digital.georgetown.edu/handle/10822/1061254.

If there is any analysis that is not "sober" here, it is that of the Robinson-Patman revivalists. In fact, following decades of FTC leadership enthusiastic about Robinson-Patman, the 1969 ABA report had warned that the FTC must change or die. When the leaders of the ABA Commission assumed control of the FTC in 1970, Robinson-Patman no longer enjoyed support among agency leaders.

President Ford did appoint Paul Rand Dixon, FTC Chairman throughout the 1960s, acting Chairman briefly in 1976. Dixon made an inflammatory speech to the staff, which this author saw, damning the Act's critics and proclaiming that Robinson-Patman would return to preeminence. His tenure was too short to make changes, but he had recognized the obvious—his cherished Robinson-Patman Act had been cast aside. Only willful ignorance of these developments, obvious to anyone who was there or who has studied the history, could place blame on the decline in enforcement to a book published in 1978 or events of the 1980s.

Besides the erroneous claim that Robinson-Patman was not protectionist, the FTC majority argues the statute focuses on horizontal competition at retail: "Robinson-Patman is a *pro*-consumer law that seeks to prevent the oligopoly prices of a market dominated by a small number of powerful retailers."[179] There is no basis for claiming that Robinson-Patman was aimed at addressing a supposed oligopoly at retail due to chain stores. Even the diminished standards of modern political discourse cannot transform the success of the chain format, which prospered because its prices undercut traditional rivals, into a concern over oligopolistic power.

Historical anxiety over oligopoly was because of higher, not lower, prices. Moreover, large chains such as A&P could offer more variety, as well as appealing to cost-conscious consumers, especially those faced with the economic hardship of the Great Depression. Indeed, a 1934 FTC report had rejected claims that chain stores were leading to monopoly or lessening competition horizontally at the retail level.[180] *The New York Times* front page headline aptly summarized this basic conclusion: "Monopoly Denied in Chain Stores."[181] This history belies the claim that Robinson-Patman arose because of concerns about insufficient retail competition.[182]

In believing that Robinson-Patman had a consumer and oligopoly focus, perhaps the FTC Democrats are confused by how 1930s proponents often attempted to cloak Robinson-Patman as antitrust to hide its protectionist nature. Fred Rowe observed that the "technique of amending the

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[179] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 4 (emphasis in original).

[180] Federal Trade Commission, *Chain Stores*, pp. 19-22.

[181] "Monopoly Denied in Chain Stores," *New York Times*, December 15, 1934, p. 1, https://timesmachine.nytimes.com/timesmachine/1934/12/15/94587486.html?pageNumber=21. This data was available when Robinson-Patman was introduced. Contrary to the actual data, the FTC report's language concluded that lower cost of goods sold was a substantial factor in the retail price difference between chain stores and small independent retailers. Federal Trade Commission, *Chain Stores*, p. 53. The DOJ in 1977 notes that the FTC itself in 1934 "did not, in all cases, base its final report and recommendations upon the statistics which it had gathered." Department of Justice, *Report on the Robinson-Patman Act*, p. 131. To the extent that anyone relied on the FTC's gloss on the data, rather than the data itself, it just contributed to the mythology. The report's drafters probably recognized that members of Congress important to the FTC also supported the effort to restrain chain stores, and thus language in the FTC's report deemphasized the report's findings. The data in fact could not be so misinterpreted. See also note 42.

[182] See notes 34-37 and accompanying text.

original Clayton Act rather than enacting a separate law was a political masterstroke which invested an anti-chain store measure with the venerable trappings of antitrust."[183] By grafting Robinson-Patman onto antitrust laws focused on competition and consumer welfare, the Robinson-Patman Act "reincarnated the spirit of the deceased N.R.A. in the corpus of antitrust."[184]

Part of the confusion may also stem from how Robinson-Patman advocates in the 1930s used terms like monopoly and competition. Historian Ellis Hawley observes that advocates for anti-chain store legislation would confusingly use the rhetoric of antitrust to mask their protectionist goals:

> When the small merchant denounced "monopoly" in the nineteen thirties, he meant big business curbing little business, not the use of artificial controls to exploit consumers or discourage innovation. To him the monopolist was a chain store, mail order house, supermarket, or some other large-scale rival. Paradoxically, though, he used the vocabulary of the antitruster to advocate a program of market controls, a system under which government power would be used to foster cartels, freeze distribution channels, and preserve profit margins.[185]

The historical record makes it clear that Robinson-Patman's sponsors never envisioned antitrust legislation to protect consumers. Plainly, their goals of thwarting chain stores to shield the wholesale model were contrary to those of the antitrust laws.

B. Attempted Protection of Small Businesses Was Unjustified and Largely Failed

The Biden Democrats and their allies today use small business interests to justify a Robinson-Patman revival, noting how the statute had been called the "Magna Carta" for such firms.[186] As the majority discussed, some small retailers undoubtedly possess unique virtues and can sometimes outperform larger businesses in service or other attributes.[187] That smaller retailers do not have all the advantages of larger retailers does not mean they cannot succeed. But noting that obvious fact does not imply that they should be protected from competition through Robinson-Patman Act enforcement or that larger retailers should be prevented from offering lower pricing and efficient distribution that benefit customers. Handicapping large retailers does not enhance consumer welfare even if smaller retailers are helped.

Robinson-Patman revivalists seem unaware of how past Robinson-Patman enforcement harmed smaller businesses especially. While firms of all sizes are subject to the law, legal and

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[183] Rowe, "The Evolution of the Robinson-Patman Act," p. 1074.

[184] Rowe, "The Evolution of the Robinson-Patman Act," p. 1074.

[185] See Hawley, *The New Deal and the Problem of Monopoly*, p. 147.

[186] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 4, see also Teachout, "New York City Has the Power to Bring Down Grocery Prices."

[187] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 1.

other costs are much more burdensome for smaller ones. Professor Frederick Scherer testified, after serving at the FTC, that smaller firms are "more likely to get into trouble" because they are less able to afford legal counseling and that FTC staff attorneys preferred to bring cases against smaller firms because they are less likely to result in complex litigation.[188] Scherer wrote separately that the "brunt of the Commission's [enforcement] effort fell upon the small businesses Congress sought to protect."[189]

Beyond these practical problems from an ambiguous, complex, and burdensome law, the Act's substantive provisions also affected the ability of many small businesses to compete. Throughout the years of aggressive enforcement, smaller retailers formed cooperatives to lower costs and obtain better pricing, but Robinson-Patman limited their ability to do so.[190] Attempting to maintain a rigid distribution system to protect wholesalers, the agency denied smaller buyers the ability to bypass the extra costs of using these middlemen.[191] Under the FTC's view, the Robinson-Patman Act also inhibited manufacturers from helping smaller retailers that sold their brand and faced local competition from other brands.[192]

One cannot attempt to avoid these effects by claiming Robinson-Patman cases would only be brought against large firms. Such selectivity would be inconsistent with the argument that Robinson-Patman must be enforced because it exists in the US Code. And, if price discrimination has the ills these advocates claim, it is hardly obvious why those problems do not exist broadly. In any event, because of the existence of private litigation, the FTC cannot limit the effects of more aggressive enforcement only to its chosen victims. The plaintiffs' bar would use new FTC precedent against any potential defendant for whom it was advantageous, large or small, and firms would use new law in disputes with their competitors and business partners.

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[188] Department of Justice, *Report on the Robinson-Patman Act*, pp. 97-98; see Posner, *The Robinson-Patman Act*, p. 46 ("The greatest irony of section 2(c) is that it has so often been used to oppress small business. Many of the defendants in section 2(c) cases have been buying cooperatives composed of small food stores, which sought to obtain a discount for having adopted methods of centralized purchasing that dispensed with a need for a food broker and so made them more competitive with the chain stores."); see also the discussion of FTC enforcement in section II.

[189] F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3rd ed. (Houghton Mifflin, 1990), p. 516; see also Sokol, "Analyzing Robinson-Patman," p. 2075.

[190] Posner, *The Robinson-Patman Act*, p. 45; Department of Justice, *Report on the Robinson-Patman Act*, pp. 80-82. Fred Rowe notes that this reading of 2(c) meant the "joint buying organizations of independent distributors thus lost all benefits of the exception they had sponsored, and were placed on an equal footing with the A & P." Rowe, "The Evolution of the Robinson-Patman Act," p. 1076.

[191] Areeda and Hovenkamp, *Antitrust Law*, para. 2340b4, uses this example: "[S]uppose a major toothpaste manufacturer can minimize its costs and thus deliver its best price by selling toothpaste in carload lots, where it charges a uniform price of $1.00 per tube. The firm would also be willing to sell in smaller quantities but would have to charge more and fears a Robinson-Patman Act prosecution. The Wal-Marts and Walgreens of the world readily purchase toothpaste by the carload, but in the case of local pharmacists and grocers who want only a small fraction of that amount, an intermediate distribution market springs up. These distributors also pay $1.00 per carload, but they in turn resell the carload in small lots to small stores. . . . [Because the intermediary earns a markup], sales through the intermediary are likely to be at a higher price than direct sales by the manufacturer if free to charge any price it pleases."

[192] Department of Justice, *Report on the Robinson-Patman Act*, pp. 93-96.

V. The Dubious Economic Arguments for Revival: Herein of Differential Pricing and Large Buyers

Some argue that consumers would benefit from revived Robinson-Patman Act enforcement, and that such enforcement would be consistent with sound economic analysis. In this view, the Act should be seen as "normal" antitrust law, not the protector of inefficient competitors. Yet no new evidence supports such an argument, which would require abandoning the FTC's protectionist past. Of course, one can theorize how non-uniform vertical pricing harms consumers, but such theories and the models they produce are inherently ambiguous at best, describing market conditions rare in reality. Moreover, circumstances in which vertical pricing harms consumers, as with other problematic vertical business practices, are well within the reach of the Sherman and Clayton Acts, the principal vehicles of modern antitrust law. [193]

We start with the general topic of price discrimination, then analyze so-called power buyers before discussing economic arguments, theoretical and empirical, that, on balance, reinforce the case against Robinson-Patman revival.

A. Non-Uniform Pricing is Common and Often Beneficial

Uniform pricing is neither normal nor necessarily desirable. Both among retailers and within individual stores, shoppers find numerous sales, bundled discounts, specials, discounts for volume, coupons, and other deviations from uniformity. As it is for consumers, so it is upstream between manufacturers and their sales to and among merchants. Nevertheless, the Biden FTC majority joined in the praise of uniformity.[194]

Any claim that differential pricing, often called price discrimination, should be viewed as suspect or likely anti-competitive is unsupportable. As Professor Hovenkamp notes, "most price discrimination is socially beneficial in that it produces higher output and thus yields greater consumer benefits than forced nondiscriminatory pricing."[195] The price discrimination the statute seeks to prohibit could only harm smaller rivals to "the extent that it increased output" and output expansion is inherently pro-competitive and pro-consumer.[196]

This sentiment is reflected in the FTC's own pre-Biden statements. In 2016, in comments to the European Commission, the Obama DOJ and FTC observed that most price discrimination is pro-competitive and could enhance market power only in limited circumstances:

> Price discrimination is common in many markets. In many instances, price discrimination enhances market competition. In the United States, price discrimination is often viewed as efficient. In certain limited circumstances, price discrimination might feature as an aspect of an exclusionary strategy

[193] Almost all FTC cases are pursued as if they were filed under either the Sherman or Clayton Acts.

[194] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, pp. 3-4.

[195] Areeda and Hovenkamp, *Antitrust Law*, para. 2340c; see also Benjamin Klein, "Price Discrimination and Market Power," in Wayne D. Collins, Ed., *Issues in Competition Law and Policy*, Vol. 2 (American Bar Association, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1657202.

[196] Areeda and Hovenkamp, *Antitrust Law*, para. 721d.

> meant to enhance or protect market power. Intervention should be limited to preventing these exclusionary abuses.[197]

As the agency's own recent statements thus reveal, the price differences that advocates of the Act would prosecute tend to be inherently pro-competitive. To suggest otherwise ignores economic and legal developments regarding vertical pricing that have evolved over many decades. A typical Robinson-Patman case challenges how a manufacturer decides to distribute and price its own products most efficiently.[198] Modern economics and decades of Supreme Court cases recognize such vertical, intra-brand restraints as generally pro-competitive.

By contrast, the FTC's past Robinson-Patman enforcement ignored how "wholesale pricing is an efficient and natural way for a manufacturer to control its distribution system" and how a manufacturer can optimize its own distribution and sales through how it prices its products in different channels.[199] Prof. Hovenkamp explains that if the manufacturer simply vertically integrated into retail distribution and used its own independent retailers for sales it would "price discriminate" as an inherent part of its own distribution:

> If a manufacturer owned its own distribution network in which all of its sales agents were employees, it would very likely establish various incentive programs to encourage sales personnel to push the manufacturer's product aggressively. These incentives might include higher wages for good performance or other kinds of rewards ranging from stock options, annual vacation trips, or other perks, or advancement in rank. The manufacturer would also very likely invest more promotional funds in the more successful distributorships or stores while reducing its own investment in those whose growth is stagnant.
>
> The manufacturer selling its products through independent dealers is in much the same position. The best way to encourage dealers to sell more is to give them financial rewards. But since in these cases dealers buy and resell the product, financial rewards often take the form of a price reduction, whether in the form of a discount, rebate, or similar form of favorable treatment. But this is precisely the type of conduct that the Robinson-Patman Act condemns when the favored and disfavored dealers are in competition with each other.[200]

In short, for decades the antitrust world has understood that vertical intra-brand restraints are pro-competitive. This knowledge has shaped the relevant law since at least 1977. Unsurprisingly, modern courts, including the Supreme Court, have increasingly interpreted

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[197] United States, "Roundtable on 'Price Discrimination,'" pp. 4, 6.

[198] As note 95 describes, these are "secondary-line" cases under the Act. Areeda and Hovenkamp, *Antitrust Law*, para. 2301a ("'[S]econdary-line' Robinson-Patman violations are vertical in nature. . . . The great majority of cases involve disputes between manufacturers or other suppliers regarding the way that the manufacturer distributes its own product—more specifically, the way that the product is priced to various resellers. . . . Were it not for the Robinson-Patman Act, a manufacturer's pricing practices respecting sales to its various dealers would be treated in the same way as vertical nonprice restraints generally.").

[199] Areeda and Hovenkamp, *Antitrust Law*, para. 2301a.

[200] Areeda and Hovenkamp, *Antitrust Law*, para. 2301a.

Robinson-Patman as consistent with these developments across the antitrust landscape. Thus, the Supreme Court said in 2006 that "[t]he Robinson-Patman Act signals no large departure from th[e] main concern" of antitrust—protecting consumers.[201] The Court corrected problematic interpretations of the Act, and has stated that lower courts should avoid applying the Act in ways "geared more to the protection of existing competitors than to the stimulation of *competition*," and plaintiffs increasingly face greater difficulty.[202]

Robinson-Patman revivalists claim that recent economic literature, mostly theoretical, finds price differences more problematic than the above discussion indicates. We discuss that literature below,[203] finding it reinforces the arguments against revival of the Act. If problematic aspects of a company's intra-brand practices present vertical antitrust issues as part of an exclusionary strategy, the Sherman and Clayton Acts already exist. Robinson-Patman is unnecessary to police any new theories of vertical restraints.

B. Fear of Power Buyers is Rarely Justified and Does Not Support Robinson-Patman Revival.

Besides attacking price discrimination, the Biden FTC majority discuss the alleged competitive harm from "buyer power" to justify renewed Robinson-Patman enforcement.[204] Neither the design of the statute nor the economics of the businesses targeted support using the Act against anti-consumer practices of large buyers. While large chain stores like A&P animated Robinson-Patman, the actual statute emphasized alleged discriminatory pricing by manufacturers or other upstream sellers. Buyer liability is limited to inducing such manufacturer pricing; being a power buyer is not *per se* illegal nor does the statute focus on the market power of such buyers. (As discussed in section II, the courts eventually limited such buyer liability severely.[205]) Notably, the statute included defenses for "meeting competition" and "cost justification" that could protect pricing interactions with large buyers. Thus, conduct was not illegal merely because a buyer was large and might have power, however defined. If Robinson-Patman had been designed to police buyer power, very different language would have been necessary. Buyer power, called monopsony, requires proof not only of lower input prices upstream, but also that the buyer obtained lower prices by reducing upstream purchases with the effect of higher prices and reduced output downstream.[206] Robinson-Patman does not address such power or impose a

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[201] *Volvo Trucks North American v. Reeder-Simco GMC*, 546 U.S. 164, 180-181 (2006).

[202] See notes 102 and 105 for Supreme Court corrections of aggressive interpretations of the Act. In an empirical study, the authors found that, before 1993, plaintiffs had a one in three chance of winning cases under the Act. The odds dropped to less than one in 20 between 2006 and 2010. See Luchs et al., "The End of the Robinson-Patman Act?"

[203] See section V C.

[204] Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, p. 5. Ten years earlier, Lina Khan had recommended using Robinson-Patman to curtail Amazon's alleged problematic buying power. Lina Khan, "A Remedy for Amazon-Hachette Fight?," CNN, May 30, 2014, https://www.cnn.com/2014/05/30/opinion/khan-amazon-hachette-antitrust/index.html. In both sources, the A&P figured prominently as a company whose conduct led to the rise of Robinson-Patman.

[205] See section II A.

[206] On the law and economics of buying cartels, see Areeda and Hovenkamp, *Antitrust Law*, Sections 2010-2015.

statutory test consistent with requiring proof of such elements. The Sherman and Clayton Acts are the appropriate tools to address monopsony power and its seller counterpart, monopoly power.

Besides the failure of Robinson-Patman's text to address buyer power directly, the history of the rise of large chain stores like the A&P, and their modern successors, like Amazon, Walmart, and large grocery chains is the antithesis of monopsony.[207] Whatever else was said about A&P during the rise of Robinson-Patman, it was not that the company restricted downstream output and increased retail prices. Today's disruptive retailers, Amazon and Walmart, feared as prototypical "power buyers," similarly have expanded output and reduced prices. Like A&P, which used vertical integration, scale, and data superior for its time to become America's largest retailer for decades, Walmart, with its big box format, and Amazon, selling online, have followed a similar strategy, albeit much more sophisticated with modern technology. Lina Khan's mentor, Barry Lynn, waged a long, unsuccessful campaign to prosecute the former,[208] now America's largest retailer. Both in her writing and while leading the FTC, Khan made Amazon her target, and her FTC filed a non Robinson-Patman case against the country's second largest retailer.[209] Robinson-Patman cases involving large buyers both historically and today are poor fits for proving that monopsony power restricted output and raised retail prices downstream.

This focus on power buyers raises a broader mistake – it views with suspicion large retailers that seek lower input prices. Absent monopsony, however, there is nothing problematic or anti-competitive when a retailer, even a large one, seeks lower prices from upstream suppliers. It is also a mistake to view price variations as reflecting market power, as contracts normally produce "gains from trade" (i.e., value that the two sides agree to divide) that can vary from contract to contract.[210] The better a bargainer one side is or the greater its leverage, the greater is its portion of the gains from a particular contract. Yet, so long as a bargain is struck, both sides are better off with a deal than without. Thus, historically when a company like A&P used its large

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[207] See, e.g., Jerry Hausman and Ephraim Leibtag, "Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart," *Journal Applied Econometrics*, Vol. 22, No. 7 (December 2007), https://onlinelibrary.wiley.com/doi/abs/10.1002/jae.994 (finding that the entry and expansion of WalMart and other non-traditional retail outlets in geographic markets creates substantial consumer benefits). They find a large direct price effect from WalMart offering lower prices than traditional supermarkets as well as an indirect price effect by causing traditional supermarkets to lower their prices due to increased competition.

[208] Lynn, "Breaking the Chain: The Antitrust Case against Walmart"; Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (John Wiley & Sons, 2010).

[209] Khan, "Amazon's Antitrust Paradox"; see Complaint, *Federal Trade Commission v. Amazon.com*, No. 2:23-cv-01495 (W.D. Wash. September 26, 2023). Surprisingly, as others have noted, the FTC's Amazon antitrust case bears little to no relation to the theories espoused in Khan's famous student note, including her claim that Amazon prices were too low. Will Oremus, "Lina Khan's Amazon Lawsuit Is Nothing Like Her Famous Law Article," *Washington Post*, September 27, 2023, https://www.washingtonpost.com/technology/2023/09/27/lina-khan-amazon-antitrust-paradox/; Dave Michaels, "Lina Khan Once Went Big Against Amazon. As FTC Chair, She Changed Tack," *Wall Street Journal*, September 28, 2023, https://www.wsj.com/tech/in-suing-amazon-ftcs-lina-khan-turns-her-earlier-pricing-argument-on-its-head-e45b91e9. The author has advised Amazon on a variety of antitrust and consumer protection matters.

[210] A scene, perhaps apocryphal, in the 1940 movie "Edison the Man" is illustrative. After selling a stock ticker he invented, Edison, portrayed by Spencer Tracy, announced that he would have accepted less money than the agreed upon sales price, after the buyer said that he would have paid more. Thus, the sales price was between the lowest price the seller would accept and the highest price the buyer would offer. If no such intersection exists, there can be no sale, and no "gains" between the parties to divide.

size to help it win a larger share through deep discounts, such conduct was pro-competitive. The biggest winners were consumers, especially consumers for whom groceries were a significant share of their budgets, a situation common at the time, particularly for poorer households. The main losers were the smaller grocers and their wholesaler suppliers that could not offer sellers the same advantages and thus did not obtain similar discounts. And, as the FTC showed long ago, this aspect of the large chains' advantages over their smaller rivals was but a small fraction of their competitive superiority.[211]

For those who want to challenge buyer power with Robinson-Patman, disentangling this pro-competitive behavior from the statutory defenses permitting price differences based on costs would lead to numerous problems. Just as they have ignored or overruled previous anti-consumer precedents,[212] modern courts are likely to give meaning to the statutory defenses, not to the FTC's view in its Robinson-Patman heyday that rendered the "cost justification" defense unworkable.[213]

To add further complexity, actual prices are not based on differences in costs alone; they reflect multiple supply-and-demand factors.[214] Crucially, costs include opportunity costs, as measured by the costs of alternative choices. Focusing on opportunity costs is common in both economics and some sophisticated forms of business accounting, but it was not commonly used in past FTC calculations, which often led to arbitrary cost determinations. Thus, courts trying to honor the statute's language will face great, perhaps insurmountable, difficulty. For example, the meaning of a seller's "due allowance for differences in . . . cost" (the statutory phrase) when charging different amounts to different buyers historically embroiled courts in intractable disputes about how to allocate savings in joint-and-common costs across product lines—a conceptual problem without an economically meaningful solution.[215]

In the words of a Yale Law professor writing in 1937, the year after Robinson-Patman was enacted, "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork," and any "[t]rial is to proceed by the ordeal of cost accountancy."[216] The author concluded, presciently, that the Act "seems destined to raise more questions than it settles" and "presently will reveal its own defects and invite abandonment or amendment."[217] Warehousing, for example, prominent in both retailing and Robinson-Patman history, presents many joint cost issues. Mixing anti-competitive

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[211] See notes 40-43 and accompanying text.

[212] Volume XIV of Areeda and Hovenkamp, *Antitrust Law*, contains many examples of this phenomenon; see also Muris, "II. The Populist Revolt Against Chain Stores and the Rise of the Robinson-Patman Act," in *Neo-Brandeisian Antitrust: Repeating History's Mistakes*.

[213] See section II; Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter in the Matter of Southern Glazer's Wine and Spirits, LLC, pp. 24-26.

[214] Department of Justice, *Report on the Robinson-Patman Act*, pp. 159-162 (describing the "faulty assumption" that costs are the sole determinants of price differences); Antitrust Modernization Commission, *Report and Recommendations*, pp. 318-320 (stating many legitimate reasons for price differences and price discrimination).

[215] See *Federal Trade Commission v. Standard Motor Products*, 371 F.2d 613, 622 (2d Cir. 1967); Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (Massachusetts Institute of Technology Press, 1988), pp.150-153; *MCI Communications Corporation v. AT&T Company*, 708 F.2d 1081, 1116 (7th Cir. 1983).

[216] Walton Hamilton, "Cost as a Standard for Price," *Legal and Contemporary Problems*, Vol. 4, No. 3 (June 1937), pp. 321, 323, 328, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1864&context=lcp.

[217] Hamilton, "Cost as a Standard for Price," p. 333.

challenges to alleged monopsony power of large buyers with the confusion resulting from such statutory tests is a recipe for nonsensical results. Those issues show, yet again, why Robinson-Patman is ill-suited to attack any actual problems of large buyers.

C. The Modern Economics of Differential Pricing: Recent Scholarship Does Not Support Revival.

Some revivalists make more mainstream antitrust arguments, involving alleged harm to consumer welfare. Because such claims require studying the economic impact of the business practices of retailers and their suppliers, we turn to modern economic analysis of the revivalist claims. We shall see that, despite some suggestions in economic theory that uniform pricing under limited conditions can produce better results for consumers than differential pricing, modern economic analysis gives the same answers as those who condemned FTC action 50 and more years ago: the proposed use of Robinson-Patman is inconsistent with protecting competition and consumers. In a companion essay for this report, Professor Bruce Kobayashi, formerly director of the FTC's Bureau of Economics, and I discuss the modern literature and its limitations.[218] That essay, summarized here, discusses three issues: theories that discounts ("subsidies") to large firms necessarily harm smaller ones; then, more general theories in modern economics regarding the effects of differential pricing; and, finally, a deeply flawed empirical study the FTC cited in support of its first case under the Act in decades.

Subsidy Theories and Waterbed Effects

A favorite theory of today's revivalists, reflected in the *New York Times* essay discussed in the introduction to this report, is that high prices to small retailers "subsidize" big discounts to their large competitors because manufacturers must raise prices to the smaller stores to recoup lost revenues from the large discounts. The disadvantage allegedly reduces competition and even the number of the smaller competitors. This old theory, used against the A&P 80 years ago, has been long debunked.[219] It is suboptimal for the seller to raise prices more to smaller retailers regardless of what the larger buyers pay. If the retailers, big and small, compete with each other, downward pricing pressure from the discounts to large firms will reduce, not increase, what smaller firms pay.[220]

Some revivalists instead rely on theoretical economic articles about how "waterbed effect[s]" can reduce welfare compared to requiring price uniformity.[221] Under this theory, when some downstream buyers pay lower prices while others pay higher, weakening the latter, some of

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[218] Kobayashi and Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination*, https://cei.org/studies/stop-making-sense-reviving-the-robinson-patman-act-and-the-economics-of-intermediate-price-discrimination/.

[219] See Teachout, "New York City Has the Power to Bring Down Grocery Prices"; Adelman, *The A&P*.

[220] Kobayashi and Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination*, pp. 3-4.

[221] See, e.g., Mark Ross Meador, "Not Enforcing the Robinson-Patman Act Is Lawless and Likely Harms Consumers," Federalist Society (blog), July 9, 2024, https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers (citing Roman Inderst and Tommaso M. Valletti, "Buyer Power and the 'Waterbed Effect'", *Journal of Industrial Economics*, Vol. 59, No. 1 (March 2011), https://www.jstor.org/stable/41289440).

the higher payers eventually exit. Under other, typically more restrictive conditions, welfare can decrease. Under different conditions, welfare increases. Given the different results, even those who write about waterbed theories recognize the potential pro-consumer benefits of differential pricing, especially in the face of limited empirical testing.[222]

One often-cited paper shows the limitations of the models use to generate possible welfare decreases.[223] In such models, there is only a single seller upstream, ignoring interaction with other sellers. Thus, such models would analyze Coca-Cola's pricing decisions in a world without Pepsi-Cola. Downstream, the assumed nature of demand and the specialized setting used do not allow lower prices to increase the quantity sold to existing consumers or to attract new consumers to the market.[224] Obviously, neither built-in assumption is likely in actual practice. Yet, even with such restrictive assumptions, differential pricing may increase or decrease welfare.

Some Robinson-Patman supporters incorrectly claim that the 1977 DOJ report "implicitly acknowledges" that waterbed effects could harm consumers.[225] The DOJ notes only that many in the grocery industry, where margins are low, were both especially sensitive to price differences from suppliers and supported Robinson-Patman.[226] In other words, the DOJ was describing the underlying politics that led to Robinson-Patman, not "implicitly" arguing that waterbed effects were a legitimate policy concern. Indeed, the topic sentence in the cited paragraph states that Robinson-Patman was based on the "erroneous assumption" by proponents that in an "ideal world" all customers would receive the same price.[227] The subsequent language in the paragraph explains why small grocers held the intuition that all customers should receive the same price and why they accepted this erroneous assumption. Nothing in this paragraph expressly or implicitly suggests DOJ was endorsing that waterbed effects would harm consumers.

In fact, DOJ critiques the "subsidy effects" argument in the next few pages.[228] It notes that the grocers that supported Robinson-Patman believed that the "loss" to "sellers from lower prices to the large buyers would have to be 'subsidized' by higher prices to small buyers." DOJ then directly states "that this is not the case." Consistent with the economic discussion above, DOJ notes that selling firms would set prices to smaller buyers at profit-maximizing levels without needing the "excuse" of large buyers with lower prices.

Moreover, DOJ never said or implied that harmful effects from differential prices will occur in the grocery business; DOJ in fact disagreed. The DOJ report does not support selective

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[222] Inderst and Valletti, "Buyer Power and the 'Waterbed Effect,'" n. 13.

[223] Inderst and Valletti, "Buyer Power and the 'Waterbed Effect.'" Economists often make restrictive assumptions to generate workable models.

[224] In the language of economics, demand was assumed to be completely inelastic, while a spatial competition model with a fixed set of consumers was used to model downstream competition.

[225] See note 221 and accompanying text.

[226] Department of Justice, *Report on the Robinson-Patman Act*, p. 153.

[227] Department of Justice, *Report on the Robinson-Patman Act*, p. 153.

[228] Department of Justice, *Report on the Robinson-Patman Act*, pp. 155-156. As this subsection and the companion article show, the subsidy effects and waterbed theories are distinct. The former is incoherent, without support in economic analysis; the latter finds support in economic theory, albeit under restrictive assumptions.

enforcement in groceries, and notes that the law does not apply only to grocers.[229] It also notes that pricing dynamics will be more complicated in industries that are imperfectly competitive and that such realities complicate Robinson-Patman enforcement.[230] The grocery business fits the workably competitive framework that DOJ finds would greatly complicate Robinson-Patman enforcement.

Modern Analysis of Differential Input Pricing

Writing explicitly to "exhume" the Robinson-Patman Act, in 1987 Michael Katz modeled conditions under which intermediate goods price discrimination could reduce welfare.[231] Like the waterbed models just discussed, the assumptions are quite restrictive: input prices are linear, meaning there are no volume discounts or two-part pricing offers, upstream suppliers may make only take-it-or-leave-it offers, thus there is no bargaining, and only chain stores can vertically integrate into the supply business, meaning independents cannot enter supply through ownership, contract, or forming cooperatives. Under these assumptions, negative price and welfare effects of intermediate good price discrimination are possible theoretically in some, but not all, circumstances.

Subsequent articles relax these assumptions, considering practices more common among real businesses. In 2014 Daniel O'Brien replaced the assumption that sellers make take-it-or-leave-it offers with multiple sources of bargaining power, finding that differential pricing increases welfare, reversing the Katz result when the threat of vertical integration does not determine the bargaining outcome.[232]

Linear pricing is one of the most crucial assumptions of Katz-type modeling. Yet, non-linear pricing is a real world phenomenon, about which the Biden FTC and others have complained for allegedly aiding "bigness."[233] As Dennis Carlton, former Deputy Assistant Attorney General for Economics in the Antitrust Division, writing with Brian Keating, stated "[f]ailure to account for the use of nonlinear pricing can lead to a mistaken antitrust analysis…"[234]

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[229] Based on an event study analysis of cumulative abnormal returns to portfolios of chain store stocks from the mid to the late 1930s, Ross finds that the passage of the Robinson-Patman Act disproportionately and negatively affected grocery chains. See note 237 and accompanying text.

[230] Department of Justice, *Report on the Robinson-Patman Act*, p. 154.

[231] Michael L. Katz, "The Welfare Effects of Third-Degree Price Discrimination in Intermediate Goods Markets," *American Economic Review*, Vol. 77, No. 1 (March 1987), https://www.jstor.org/stable/1806735.

[232] Daniel P. O'Brien, "The Welfare Effects of Third-Degree Price Discrimination in Intermediate Goods Markets: the Case of Bargaining," *RAND Journal of Economics*, Vol. 45, No. 1 (Spring 2014), https://www.jstor.org/stable/43186448. In his model, bargaining power also depends on the profits a party would make in the absence of an agreement, relative bargaining strengths, and the expenses or negative consequences a party incurs by compromising.

[233] See, e.g., Federal Trade Commission, "FTC Sues Southern Glazer's for Illegal Price Discrimination," press release, December 12, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-sues-southern-glazers-illegal-price-discrimination (alleging favored chain stores threaten the viability of independent businesses that give consumers a choice in the market).

[234] Dennis W. Carlton and Bryan Keating, "Rethinking Antitrust in the Presence of Transaction Costs: Coasian Implication," *Review of Industrial Organization*, Vol. 46 (2015), p. 308, https://link.springer.com/article/10.1007/s11151-015-9453-4; see also Dennis W. Carlton and Bryan Keating,

With Gregg Schaffer, O'Brien had previously modeled non-linear pricing, using two part tariffs.[235] O'Brien and Schaffer also tested their model by banning differential pricing. Contrary to Katz, they find that banning differential pricing decreased welfare and prices. Once again, relaxing restrictive assumptions changes the welfare analysis.

O'Brien and Shaffer further highlight the important pro-competitive benefits that two part tariffs generate in a vertical chain. Subsequently, Kolay, Shaffer, and Ordover show that all-units volume discounts can achieve the benefits from efficient two-part tariffs.[236] The authors found that these non-linear pricing practices could induce downstream retailers to expand output and lower retail price in a manner consistent with eliminating double marginalization, similar to efficient vertical integration. As economists have long shown, double marginalization can add significant costs in vertical contract chains.

Besides the theoretical articles analyzing differential input pricing, a few empirical studies measure or simulate the effects of restricting intermediate good price discrimination. In 1984, Thomas Ross studied the effect of the passage and enforcement of Robinson-Patman on the stock price of suppliers and downstream retail firms, among others.[237] Using this well-accepted methodology, he found that the Act abnormally suppressed returns for grocery chains. This result was consistent with reality—the Act imposed significant costs, but did not stop the new chain store business model from replacing wholesaler dominance.

Twenty-five years later, S. B. Villas-Boras simulated the effects of a ban on price discrimination based on a structural estimation of the demand and supply of coffee brands sold by German retailers.[238] This simulation found that banning price discrimination increased welfare. Crucially, the simulations assumed the use of linear wholesale pricing, and relied on models in which upstream firms discriminate *against* more efficient, lower-cost downstream firms. Thus, in this paper, wholesale price discrimination favors those with higher downstream costs (e.g. smaller firms), disfavoring firms with lower costs (e.g. larger firms). This result has no relevance to the current American debate, as the larger firms with lower cost are the ones hurt, and therefore would desire Robinson-Patman enforcement. That result, of course, is the opposite of what revivalists desire and claim about the American marketplace.

Two other articles contain evidence more relevant to today's debate. In 2013, Matthew Grennan analyzed data from the medical device market for stents where negotiation determines the contract price, potentially allowing different buyers to pay different prices. He examined

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"Antitrust, Transaction Costs, and Merger Simulation with Nonlinear Pricing," *Journal of Law & Economics*, Vol. 58, No. 2 (May 2015), https://www.jstor.org/stable/10.1086/684036.

[235] Daniel P. O'Brien and Greg Shaffer, "The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman," *Journal of Law, Economics, and Organization*, Vol. 10, No. 2 (October 1994), https://academic.oup.com/jleo/article-abstract/10/2/296/842149.

[236] See, e.g., Sreya Kolay, Greg Shaffer, and Janusz A. Ordover, "All-Units Discounts in Retail Contracts," *Journal Economics & Management Strategy*, Vol. 13, No. 3 (September 2004), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1430-9134.2004.00018.x.

[237] See Thomas W. Ross, "Winners and Losers under the Robinson-Patman Act," *Journal of Law & Economics*, Vol. 27, No. 2 (October 1984), https://www.jstor.org/stable/725576.

[238] Sofia Berto Villas-Boas, "An Empirical Investigation of the Welfare Effects of Banning Wholesale Price Discrimination," *RAND Journal of Economics*, Vol. 40, No. 1 (Spring 2009), https://www.jstor.org/stable/25474418.

mechanisms that make it harder for suppliers to sell stents at different prices to different hospitals.[239] His simulations based on structural demand and supply estimates are consistent with the theoretical treatments of intermediate good price discrimination that include bargaining, and thus are more reflective of actual markets. He found that more uniform pricing reduced competition between stent manufacturers, causing upward pricing pressure, not offset by increases in hospital bargaining power. Thus, reducing differential prices decreased welfare. Later, in 2018, Garrett Hagemann simulated the effect of a ban on quantity discounts based on estimation of a structural model of the New York retail liquor market,[240] in which quantity discounts are allowed. Based on the estimates from his model, he simulated the effect of a policy that bans such discounts, finding the ban reduced total welfare by 13 percent on average. The simulation thus finds that banning differential pricing leads to consumers paying higher retail prices.

A Flawed Study of Liquor Markets

In support of its first Robinson-Patman complaint, the Biden FTC cited a different study of liquor markets, this one flawed in both conception and implementation.[241] Aslihan Asil uses reduced form, cross-section regression analysis to examine the association between state variation in regulation of wholesale price discrimination and measures of market performance, including retail liquor prices and the number or share of independent liquor stores. She finds that average retail prices are lower and the number of stores per capita is higher in states whose statutes restrict wholesale price discrimination. She also simulates the effect of allowing wholesale price discrimination, finding an annual consumer welfare loss of $4.91 per capita, or $529 million in total.

Modern empirical economics disfavors such cross-sectional regressions, which cannot determine causation. This approach does not account for pre-existing and uncontrolled-for differences among the states that could explain the correlation found. For example, states with more independent liquor stores may be more likely to enact restrictive laws, confounding conclusions that might be drawn. Instead of such a design, economists prefer causal research designs, such as difference-in-difference event studies, using panel data to measure the causal effect of changes to regulation and treated states relative to control states.[242]

Besides this general problem in research design, there are numerous specific drawbacks in implementation. Surprisingly, because it is central to the paper's thesis, the analysis does not account for the level of state enforcement, which could vary between the regulating states. A state, for example, could have a Robinson-Patman-like statute on the books and yet essentially

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[239] Matthew Grennan, "Price Discrimination and Bargaining: Empirical Evidence from Medical Devices," *American Economic Review*, Vol. 103, No. 1 (February 2013), https://faculty.wharton.upenn.edu/wp-content/uploads/2014/09/PriceDiscriminationBargaining_Grennan2013AER.pdf.

[240] Garrett Hagemann, *Upstream Quantity Discounts and Double Marginalization in the New York Liquor Market*, April 5, 2018, https://ssrn.com/abstract=3161738.

[241] Aslihan Asil, "Can Robinson-Patman Enforcement Be Pro-Consumer," *Job Talk Paper* (December 5, 2024), https://www.aslihanasil.com/sources/RPA_Asil_ext.pdf.

[242] See the sources collected and cited in Kobayashi and Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination*, p. 15, n. 56. As noted there, this is the preferred methodology of the FTC in its retrospective analysis of past events, including mergers.

have no enforcement, making that state effectively unregulated although it technically still has a statute. Moreover, possible private enforcement of the federal statute is relevant, which may differ across various federal circuit courts. The paper's analysis ignores this phenomenon.

Other problems exist. Even if one assumes that the results identify the effect of the statutes to be causal, the author uses counties as a proxy for geographic antitrust markets, while her description of consumer choice suggests that relevant markets are much narrower than urban counties. Moreover, the study lacks direct evidence that the number of stores in a county, a key variable in the study, is linked to harm to competition or prices. The absence of such a link further indicates that the study does not demonstrate that wholesale price discrimination adversely affected competition in properly delineated antitrust markets.

Another problem involved the assumption that all consumers preferred to purchase at independent stores because they are more "convenient." Consequently, some customers, who purchase at a chain store with lower prices, are nevertheless found to have decreased consumer surplus. This assumption is dubious. For example, consumers who buy their alcohol with other items at a chain store would appear to have greater convenience there. This author's paper with Professor Kobayashi discusses other problems.[243]

The State of the Economics

When asking whether current economic analysis, both theoretical and empirical, supports a revival in Robinson-Patman, the answer is decidedly in the negative. To begin, even authors of theoretical papers that show how differential pricing could reduce welfare recognize that these predictions are sensitive to the assumptions and the particular parameter of their models. Moreover, the Robinson-Patman Act is a particularly awkward vehicle to apply theoretical models that generate welfare predictions depending on hard-to-observe facts. The Act does not require uniform pricing, and the defenses it allows, the ambiguity of its language, and the extensive existing judicial and FTC precedent would be a significant distraction from applying the type of benefit-cost analysis that modern economics requires. And, of course, the Sherman and Clayton Acts already allow such benefit-cost trade offs without the irrelevant issues that the Act raises.

There are other problems with this largely theoretical literature. Nobel Laureate Ronald Coase, in his 1991 Nobel lecture, dismissed the theoretical economic literature as too often "blackboard" economics, divorced from reality.[244] As we saw, the assumptions of the early price discrimination theoretical literature fit this description. When those theories modeled practices more commonly found in actual business, welfare increased, not decreased. The waterbed literature may be in a similar, early state, where some of the restrictive assumptions used are largely divorced from actual business conduct.

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[243] For example, there are inconsistencies between the authors theories and their implementation. See Kobayashi and Muris, *Stop Making Sense: Reviving the Robinson-Patman Act and the Economics of Intermediate Price Discrimination*, pp. 14-18.

[244] Ronald H. Coase, Speech at the Nobel Banquet, December 10, 1991, The Nobel Prize, accessed November 3, 2025, https://www.nobelprize.org/prizes/economic-sciences/1991/coase/speech/.

Finally, separate from the wisdom of those with actual firsthand experience of Robinson-Patman and the numerous examples of the Act's misfires, the handful of empirical economic studies reject the logic of revival. The one study cited to support the FTC's first case is instead deeply flawed.

VI. Conclusion

In the end, the Robinson-Patman Act fell from the center of the FTC's competition universe primarily because of the powerful, cumulative experience of those subject to the Act's protectionist enforcement, a policy inconsistent with the lofty goals of the rest of antitrust law. Although in practice the law and policy sometimes failed to protect competition and its main beneficiaries, consumers, well-functioning markets, aided by rules of the road from antitrust, provide benefits to consumers and society through innovation, low prices, and higher quality. Robinson-Patman lacked such a noble heritage. The original purpose, of both the NRA codes and the initial bill from Rep. Wright Patman, was to protect the then dominant wholesaler-centric model of retail. The language actually enacted – often confusing and sometimes contradictory – did not require the protectionism that FTC enforcers tried to provide.

The perversions of that enforcement became well known. The evidence of Robinson-Patman's competitor-protection focus, exacerbated by often arbitrary, confusing, and occasionally punitive cases and interpretations led those exposed to rebel. The FTC discouraged competition directly, facilitated oligopolistic interdependence among firms, and raised costs to businesses and consumers. Moreover, the myriad policy oddities embarrassed the agency. For example, backhaul rules encouraged trucks to travel empty, costing hundreds of millions of dollars annually. The brokerage language was used to launch a campaign against small businesses, and agency action traveled roads to confusion like the attempts to enforce the requirement of proportionality in non-price competition under the Fred Meyer decision.

The Commission's reliance on such a flawed statute as its main competition weapon led the antitrust community to conclude, based on firsthand experience, that the decades-long centrality of the Act had to end. Unlike other policies, agreement on the need for change was widespread, indeed virtually unanimous outside of some FTC enforcers. The many contemporaneous lawyers, businessmen, academics, and eventually even some agency officials had no doubt that the evidence they saw with their own eyes was conclusive. Learned reports and scholarship, beginning with the 1955 Attorney General's Committee, to Fred Rowe's seminal 1962 book, the crucial ABA 1969 Report on the FTC, concluding with the DOJ's 1977 study of Robinson-Patman, detailed the fulsome evidence and many flaws summarized here. Judges grew increasingly hostile to FTC interpretations, and critics existed even within the agency, as Commissioner Elman's dissents significantly affected the law's development.[245] Beginning in 1970, rather than seek repeal – which would have devolved into a symbolic fight over the importance of small business and the need for its protection, issues with little relevance to actual Robinson-Patman enforcement – the FTC wisely instead simply deemphasized the Act. By the Carter years, only two cases were filed annually, dwindling to zero in subsequent decades.

[245] See notes 144-145 and accompanying text.

The Biden administration's praise of Robinson-Patman has unclear origins and appears completely unrelated to why the Act was passed. The well-known focus on "Big Tech," which had begun with lawsuits at the end of the first Trump administration, did not necessarily include the issues that had animated Robinson-Patman. Crucially, the battle that prompted the NRA codes and the Robinson-Patman Act's passage, i.e., protecting the incumbent wholesalers, was a battle long lost. Chain stores dominated post-World War II America, with change ever present. When the A&P and other prominent names disappeared, other chains have taken their place. Thus, innovation in retailing has continued with the big box stores, exemplified by the nation's leading retailer, Walmart, using the basic tenets of the A&P model, especially vertical integration, size, squeezing suppliers in a low margin business, and greater use of data and technology. Similarly, the second largest retailer, Amazon, has found great success online. Their rise prompted leading Neo-Brandeisian, Lina Khan, to attack Amazon, as her mentor, Barry Lynn, had previously attacked Walmart. Perhaps their influence alone was enough to return Robinson-Patman to the antitrust agenda.

"Targeted" Robinson-Patman enforcement, if possible, would be an improvement over the sorry past, but the existing body of FTC precedent would pose substantial problems for any attempt at "reform." Lawyers want to win cases, and they will want to make litigating cases easier. Yet, prioritizing litigability will require foregoing proof of consumer harm or the other pro-competition hallmarks that the Trump Republicans believe are necessary for good Robinson-Patman cases. Revivalists cannot simply start over without confronting the existing FTC precedent, much of it antithetical to the consumer orientation of modern antitrust law.

This additional complication is crucial. The Supreme Court now requires that lower courts avoid applying the Act in ways "geared more to the protection of existing competitors than to the stimulation of *competition*."[246] Thus, even if the agency or private plaintiffs sought to rely on the shortcut of the old law in such cases, substantial problems would arise given the modern trend of reading the Act as consistent with the rest of antitrust law. For example, the Supreme Court has rejected interpretations that "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[247] And the Supreme Court said in 2006 that "[t]he Robinson-Patman Act signals no large departure from the main concern"[248] of antitrust—protecting consumers.

Obviously, the Biden FTC Democrats are gone, for now, although their view has captured progressive antitrust, repudiating both previous Democrats, Clinton and Obama, who are viewed now simply as part of the alleged 40-year failed experiment.[249] Equally obvious, these are early days for the Trump FTC Republicans. They have endorsed at least some of the new progressive lore, especially the hostility to large technology companies, and the first Trump administration itself bought two of the five major tech cases in its last months. The FTC Republicans have each endorsed Robinson-Patman, albeit with significant variance. Chairman Ferguson desires to use

[246] *Volvo Trucks North American*, 546 U.S. at 180-181 (emphasis in original).

[247] *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 440 U.S. 69, 80 (1979).

[248] *Volvo Trucks North American*, 546 U.S. at 180-181.

[249] See note 2 and accompanying text.

Robinson-Patman against power buyers in cases he believes appropriate.[250] Former Commissioner Holyoak interpreted the Act consistent with the rest of competition law, a position first developed in her long dissent to the initial Biden case.[251] The newest Commissioner, Mark Meador, has expressed the most enthusiasm, especially in a short 2024 article.[252] Although he supports cases where price differences harm consumers, he may have an expansive view of the potential for that effect.[253]

None of this denies the potential of buyer power, monopsony in the economist's jargon, to harm consumers, just as seller power, monopoly to economists, can do so. But the Robinson-Patman Act does not require such power as a prerequisite for liability. Other antitrust statutes do, especially the Sherman Act. We should address problems of buyer power, as we address problems of seller power under those statutes, which are best equipped to assess the benefits and costs of business practices.

Nevertheless, this more sensible approach does not reflect today's world, with the Trump FTC endorsing the Act, both rhetorically and continuing the first Biden case, and with the private bar showing increased interest with private actions following complaints by the FTC.[254] As we approach Robinson-Patman's 90th anniversary and America's 250th, the return of a statute long abandoned shows that each generation must be prepared to refight even the most obvious of past victories.

[250] Dissenting Statement of Commissioner Andrew N. Ferguson in the Matter of Southern Glazer's Wine and Spirits, LLC.

[251] Dissenting Statement of Commissioner Melissa Holyoak in the Matter of Southern Glazer's Wine & Spirits, LLC; see also Melissa Holyoak and Christopher G. Mufarrige, "Rediscovering Adam Smith: An Inquiry in the Rule of Law, Competition, and the Future of the Federal Trade Commission," *American University Business Law Review*, Vol. 14, No. 1 (2025), https://digitalcommons.wcl.american.edu/aublr/vol14/iss1/7/.

[252] Meador, "Not Enforcing the Robinson-Patman Act Is Lawless and Likely Harms Consumers."

[253] See the discussion of "waterbed" in section V C.

[254] See, e.g., Complaint, *Alqosh Enterprises v. PepsiCo Inc.*, No. 2:25-cv-01327 (C.D. Cal. February 17, 2025).