THE ROBINSON-PATMAN ACT: ANTITRUST LEX HORRIBILIS WHICH MUST BE ENFORCED AND INTERPRETED AS WRITTEN (AND SHOULD BE REPEALED)

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At the twilight of the Biden Administration, the Federal Trade Commission (FTC or Commission) filed suit against Southern Glazer's[1] and Pepsi[2] under the Robinson-Patman Act, a 1936 law on price discrimination.[3] These are the first actions under the Act by either the FTC or the Antitrust Division of the Department of Justice (DOJ or Antitrust Division) since the FTC's consent decree with McCormick in 2000[4] and the first cases litigated under the Act in federal court since the late 1980s.[5] They both were brought under Section 2, the Robinson-Patman Act's main section.[6] The case against Pepsi was voluntarily dismissed by the Trump Administration.[7] The case against Southern Glazer's is, at the time of writing, in discovery, the motion to dismiss having been denied.[8]

This Article examines the Robinson-Patman Act in the light of the return of government enforcement after nearly a quarter century. It starts with context: the world in which the Act was enacted and what it sought to do, all foreign to the world of today. It outlines the many reasons the Act is at war with the rest of antitrust: facilitating collusion, distorting competition, harming the consumer. It also shows that the Act is at war with itself: harming its intended beneficiary, small business, and encouraging concentration. All these issues considered, this Article squarely rejects the pro-Act stance of the FTC majority that brought *Southern Glazer's* and *Pepsi*.[9] At the same time, the many issues with the

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1. Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, 8:24-cv-02684-FWS-ADS, ECF 1 (C.D. Cal. Dec. 12, 2024).
2. Complaint, FTC v. PepsiCo Inc., 1:25-cv-00664-JMF, ECF 1 (S.D.N.Y. Jan. 23, 2025).
3. 15 U.S.C. §§ 13, 13a, 13b, 13c, 21a.
4. Decision and Order, McCormick & Co., F.T.C. No. C-3939 (Apr. 27, 2000).
5. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988).
6. 15 U.S.C. § 13.
7. Notice of Voluntary Dismissal, FTC v. PepsiCo Inc., 1:25-cv-00664-JMF, ECF 42 (S.D.N.Y. May 22, 2025); Order Dismissing Case, ECF 43 (S.D.N.Y. May 22, 2025).
8. FTC v. Southern Glazer's Wine and Spirits, LLC, 2025 WL 1392166 (C.D. Cal. Apr. 17, 2025).
9. Alvaro M. Bedoya, Comm'r, Fed. Trade Comm'n, Returning to Fairness, Prepared Remarks at Midwest Forum on Fair Markets: What the New Antimonopoly Vision Means for Main Street 8 (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf [https://perma.cc/A63Q-PAFW] [hereinafter Bedoya Speech]; Southern Glazer's Wine & Spirits, FTC No. 2110155 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-joined-by-khan-slaughter-southern-glazers.pdf [https://perma.cc/S4DT-FE6S] (statement of Comm'r Alvaro Bedoya) [hereinafter Bedoya, *Southern Glazer's* Statement]; Non-Alcoholic Beverages Price Discrimination Investigation, FTC No. 2210158 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-khan-bedoya-non-alcoholic-beverages-price-discrimination-investigation.pdf [https://perma.cc/QG59-2WCK] (statement of Chair Lina Khan) [hereinafter Khan, *Pepsi* Statement]; Alvaro Bedoya, *I*

Act notwithstanding, the Robinson-Patman Act is still a valid act of Congress. This Article thus suggests ways that the Justice Department and the FTC can in good faith engage with the Act, including by providing data on private actions, a relevant factor in how the government is to approach enforcement, and examining the Act's forgotten Section 3,[10] which is just as valid law as the rest of the Act but does not come with a private right of action.[11] Further, considering that the vast majority of Supreme Court cases interpreting the Act are "relic[s] from a bygone era of statutory construction,"[12] this Article provides a modern, proper statutory interpretation perspective on the major issues. This Article finally concludes that repeal is optimal in view of the deleterious impact of the Act and that truly harmful price discrimination can be pursued under the Sherman Act and, as examined at length for the first time here, Section 5 of the FTC Act.[13]

This Article is organized as follows. Part I deals with the Congress: what it did with the Robinson-Patman Act, why it did it, and what else it did and didn't do alongside the Robinson-Patman Act. Parts II and III concern respectively the problematic ebbs and flows of executive enforcement and judicial interpretation. Part IV goes back to the legislature and argues for repeal. Part V is parting thoughts.

I. "LOOK! IT'S MOVING. IT'S ALIVE. IT'S ALIVE . . . IT'S ALIVE, IT'S MOVING, IT'S ALIVE, IT'S ALIVE, IT'S ALIVE, IT'S ALIVE, IT'S ALIVE!"[14]

Section 2 of the Clayton Act, enacted in 1914, made it illegal "to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[15] Congress amended Section 2 in 1936.[16] That amendment is known as the Robinson-Patman Act. Like Section 2 of the Clayton Act, the Robinson-Patman Act "uses the language of [price] discrimination," but "it actually refers only to price

Work at the F.T.C. I Know What Is Killing Groceries., N.Y. TIMES (Jan. 13, 2025), https://www.nytimes.com/2025/01/13/opinion/ftc-robinson-patman-grocery-food-desert.html [https://perma.cc/C62Q-8QRH] [hereinafter Bedoya Op-ed].

10. 15 U.S.C. § 13a.

11. Nashville Milk Co. v. Carnation Co., 355 U.S 373, 376 (1958).

12. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 437 (2019) (internal quotation marks omitted).

13. 15 U.S.C. § 45.

14. FRANKENSTEIN (Universal Pictures 1931).

15. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730, 730 (1914).

16. Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13, 13a, 13b, 13c, 21a).

differences, and thus (1) does not reach many instances of actual price discrimination, and (2) condemns as 'discrimination' transactions that are in fact not economically discriminatory."[17] Economic price discrimination occurs when the price ratios differ from the marginal cost ratios for two similar products sold by a business.[18]

Section 2 of the Robinson-Patman Act, the Act's main section, has six subsections. Section 2(a) makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality" where the "effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[19]

There are "three categories of competitive injury that may give rise" to a claim.[20] First, "[p]rimary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors."[21] Second, "[s]econdary-line cases . . . involve price discrimination that injures competition among the discriminating seller's customers."[22] Such cases "typically refer to 'favored' and 'disfavored' purchasers."[23] Finally, "[t]ertiary-line cases involve injury to competition at the level of the purchaser's customers."[24]

A claim for any of these three kinds of injury requires meeting several jurisdictional requirements:

> (1) two or more consummated sales, (2) reasonably close in point of time, (3) of commodities, (4) of like grade and quality, (5) with a difference in price, (6) by the same seller, (7) to two or more different purchasers, (8) or use, consumption, or resale within the United States or any territory thereof, (9) which may result in

17. Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 125 n.1 (2000) [hereinafter Hovenkamp, *Unfinished Business*].
18. GEORGE J. STIGLER, THE THEORY OF PRICE 210 (4th ed. 1987).
19. 15 U.S.C. § 13(a).
20. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

competitor injury. Furthermore, (10) the "commerce" requirement must be satisfied.[25]

Section 2(a) applies to sellers. Section 2(f) prohibits buyers from "knowingly . . . induc[ing] or receiv[ing] a discrimination in price."[26] Sections 2(c), 2(d), and 2(e) prohibit sellers and buyers alike from engaging in brokerage, promotion, and services that discriminate amongst buyers.[27] Section 2(b) provides a defense to liability for price discrimination "made in good faith to meet an equally low price of a competitor."[28] This is known as the "meeting competition" defense. A private party injured by a Section 2 violation may sue to recover treble damages and costs.[29] Private plaintiffs may also seek injunctive relief.[30]

There is another substantive section, Section 3.[31] Section 3 stems from the Borah-Van Nuys bill, which was introduced in the Senate as an alternative to the bills sponsored by Senator Robinson.[32] Section 3 is a criminal statute: it provides for imprisonment of up to one year, a fine of up to $5,000, or both for three types of conduct.[33] One is "sell[ing], or contract[ing] to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[34] The other two, which the Supreme Court has described as "general" and "geographical" price discrimination,[35] are as follows:

> It shall be unlawful . . . to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to [one's] knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the

25. EARL KINTNER, A ROBINSON-PATMAN PRIMER 35 (2d ed. 1979).
26. 15 U.S.C. § 13(f).
27. *Id.* § 13(c)–(e).
28. *Id.* § 13(b).
29. *Id.* § 15.
30. *Id.* § 26.
31. 15 U.S.C. § 13a.
32. Nashville Milk Co. v. Carnation Co., 355 U.S 373, 381, 381 n.11 (1958).
33. 15 U.S.C. § 13a.
34. *Id.*
35. *Nashville Milk Co.*, 355 U.S. at 377.

> purpose of destroying competition, or eliminating a competitor in such part of the United States . . . .[36]

The Supreme Court has held that private parties cannot bring claims under Section 3.[37] The private right of action, outlined in Sections 4 and 16 of the Clayton Act, is limited to conduct forbidden in the "antitrust laws,"[38] and "antitrust laws" is defined in Section 1 of the Clayton Act[39] as inclusive of "(1) the Sherman Act (Act of July 2, 1890); (2) parts of the Wilson Tariff Act (Act of August 27, 1894); (3) the Act amending the Wilson Tariff Act (Act of February 12, 1913); and (4) the Clayton Act."[40] The Supreme Court concluded that, considering that Section 2 of the Robinson-Patman Act "expressly amend[s]" Section 2 of the Clayton Act and Section 3 "does not amend the Clayton Act but rather "stands on its own footing and carries its own sanctions," Section 3 is not part of "antitrust laws" and thus does not come with a private right of action.[41] Private claims under Section 3 have since been summarily dismissed.[42] Further, the Justice Department has not enforced Section 3 since the 1960s. Section 3 is thus generally forgotten.

There is "little real dispute" that the Robinson-Patman Act was special interest legislation.[43] Originally titled the "Wholesale Grocer's Protection Act," the Robinson-Patman Act was enacted to bolster small retailers by stifling chain stores, particularly the Great Atlantic & Pacific Tea Company (A&P).[44] Indeed, it was "[f]rom its very beginning [that] the Act was described as 'camouflaged anti-chain store' legislation, pretending to be what it is not."[45]

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36. 15 U.S.C. § 13a.
37. *Nashville Milk Co.*, 355 U.S. at 376.
38. 15 U.S.C. §§ 15(a), 26.
39. *Id.* § 12(a).
40. *Nashville Milk Co.*, 355 U.S. at 375.
41. *Id.* at 376.
42. *See, e.g.*, Native Am. Dist. v. Seneca-Cayuga Tob., 546 F.3d 1288, 1298 (10th Cir. 2008); Big River Indus., Inc. v. Headwaters Res., Inc., 971 F. Supp. 2d 609, 623 (M.D. La. 2013); Walker v. Hallmark Cards Inc., 992 F. Supp. 1335, 1342 (M.D. Fla. 1997); Rio Vista Oil v. Southland Corp., 667 F. Supp. 757, 761, 766 (D. Utah 1987).
43. PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2340b (updated 2024 LexisNexis).
44. *See, e.g.*, Terry Calvani & Gilde Breidenbach, *Introduction to Robinson-Patman Act and its Enforcement by the Government*, 59 ANTITRUST L.J. 765, 769–70 (1990); HERBERT HOVENKAMP, CPI ANTIRUST CHRON., ANTITRUST POLICY AND INEQUALITY OF WEALTH 1 (2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/10/CPI-Hovenkamp.pdf [https://perma.cc/2RDA-KXCG].
45. Edward H. Levi, *The Robinson-Patman Act: Is It in the Public Interest?*, *in* 1 A.B.A. SECTION OF ANTITRUST LAW: PROCEEDINGS AT THE ANNUAL MEETING, SAN FRANCISCO, CALIFORNIA, SEPTEMBER 17–18, 60 (1952).

The Robinson-Patman Act was part of a broader campaign against chain stores. In the 1930's, "many states passed a variety of chain store taxation measures, with rates ranging in severity from mildly annoying to frankly confiscatory."[46] Congressman Patman proposed a law that would levy a national tax on chain stores.[47] Under the proposed bill, "the taxation on each outlet increased by the number of stores in the chain."[48] Further, "a chain would have been required to multiply the tax payable by the total number of states in which it operated," and this "would have resulted in imposing upon A&P, for example, a tax of <u>$523 million</u> on an annual net income of <u>$9 million</u>."[49]

The criticism of chain grocery stores at the time can only be described as vitriolic. Huey Long, speaking his usual demagogic hogwash, said that he "would rather have thieves and gangsters than chain stores" in his home state of Louisiana.[50] In the congressional debates preceding the passage of the Robinson-Patman Act, Pennsylvania Congressman Theodore L. Moritz argued that chain stores "should be eliminated" because the significant harm they cause "far outweighs the little good they do."[51] Congressman Patman had a few argumenta ad hominem to contribute to the discourse on the law that has come to bear his name:

> The bill has the opposition of all cheaters, chiselers, bribe takers, bribe givers, and the greedy who seek monopolistic powers which would destroy opportunity for all young people and which would eventually cause Government ownership, as the people of this country will not tolerate private monopoly. The bill has the support of those who believe that competition is the life of trade; that the policy of live and let live is a good one; that it is one of the first duties of Government to protect the weak against the strong and prevent men from injuring one another; that greed should be restrained and the Golden Rule practiced.[52]

46. U.S. DEP'T OF JUST., REPORT ON THE ROBINSON-PATMAN ACT 112 (1977) [hereinafter 1977 DOJ REPORT].
47. *Id.*
48. *Id.*
49. *Id.* (emphasis added).
50. Carl H. Fulda, *Food Distribution in the United States, the Struggle Between Independents and Chains*, 99 U. PA. L. REV. 1051, 1051 (1951) (citing THEODORE N. BECKMAN & HERMAN CHRISTIAN NOLEN, THE CHAIN STORE PROBLEM 228–29 (1938)).
51. 80 CONG. REC. 8136 (1936) (statement of Rep. Theodore L. Moritz).
52. *Id.* at 3447 (statement of Rep. Wright Patman).

Congressman Patman went on a "nationwide lecture tour in 1936 and 1937 'to consolidate the sentiment of retailers, manufacturers and businessmen generally behind the Robinson-Patman Law.'"[53] The tour was sponsored by drug manufacturer McKesson & Robbins, as contemporaneously noted by Drug Topics, an industry publication, and news reports.[54] At the time, McKesson & Robbins "was secretly assembling a retail drug chain of its own."[55]And it was run by F. Donald Coster, whom Patman introduced in 1937 to the head of the Reconstruction Finance Corporation, a federal agency that served as a lender of last resort to banks and businesses, and whom Patman attempted to introduce to President Roosevelt in March 1938.[56] In December, it was revealed that F. Donald Coster was an alias used by Philip Musica, a fraudster and bootlegger.[57]

Apart from drug wholesalers, who were themselves defined by the kind of monopoly of which retail was accused, in support of the Robinson-Patman Act was the National Association of Retail Grocers[58] and the U.S. Wholesale Grocers Association—whose counsel, H.B. Teegarden, drafted the bill that became the Robinson-Patman Act.[59] These special interests won. On the losing side were "all voluntary groups of independent retailers," including "the Independent Grocers Alliance, [which] alone represent[ed] 20,000 independent retail grocers,"; of "consumer cooperatives," which were "in [their] infancy" but still "number[ed] 6,500, [with] a membership of over 2,000,000 individuals, 500 retail stores, 50 wholesale establishments, 1,500 farm supply houses, and 1,500 oil-supply stations"; and of "farm organizations, like the National Farm Bureau Federation."[60]

53. *National Affairs: Sponsored Patman*, TIME, Dec. 26, 1938, https://time.com/archive/6769742/national-affairs-sponsored-patman/ [https://perma.cc/8BQ6-H6ZW].
54. *Id.*; *Patman Is Silent on Drug Speeches*, N.Y. TIMES, Dec. 18, 1936, https://www.nytimes.com/1938/12/18/archives/patman-is-silent-on-drug-speeches-old-advertisement-says-he-spoke.html [https://perma.cc/77AY-574D].
55. MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA 172 (2d ed. 2019).
56. *Id.* at 171.
57. *Fingerprints Show Coster to be 'Vanished' Swindler; Indicted with 2 Drug Aides*, N.Y. TIMES, Dec. 16, 1938, at 1; *Trade: My God, Daddy!*, TIME, Dec. 26, 1938, https://time.com/archive/6769801/trade-my-god-daddy [https://perma.cc/C6EQ-HX8P].
58. 80 CONG. REC. 5977 (1936) (statement of Rep. Emanuel Celler); *Patman Is Silent on Drug Speeches*, *supra* note 54.
59. Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1067 (1957).
60. 80 CONG. REC. 5978 (1936) (statement of Rep. Emanuel Celler).

So was the public at large. The defining characteristic of the Act—protecting a select group of businesses at the expense of society—is best illustrated by the following statement submitted by the director of the National Association of Retail Grocers to the Judiciary Committee of the House of Representatives, which was then debating what later became the Robinson-Patman Act:

> The present condition of affairs in the food industry has put thousands of salesmen out of work. It has driven many brokers out of business. It has closed the doors of many wholesale grocers and has shut up thousands of retail grocers all over the country. All of these men were engaged in useful and gainful occupations. Many of them now are on the relief roll. And this was done, not to bring goods to the consumer cheaper, but in order to fatten the income of a few chosen people who invested their money in chain stores.[61]

This statement ignores the fact that vertically integrated chain stores offer a wider range of products at lower prices and "better control [the] flow and specification of merchandise in accord with the special needs of their customers."[62] Indeed, that was what led to the rise of A&P and the spread of the chain store model in general.[63] And "[t]hese advantages . . . enable a larger purchaser to manage its own production of merchandise and thereby to ensure its ready availability when needed, or in the case of individual specifications, to tailor-make the merchandise to meet a perceived selling point with the customer."[64] A small purchaser by contrast "must sell whatever it is that the manufacturer decides to produce and must await the manufacturer's decision to change his line."[65]

Also dubious was an FTC report on which Congress relied. In 1928, Congress tasked the FTC with investigating the chain store system.[66] The FTC produced a report in 1934 which recommended an amendment to the Clayton Act to outlaw price discrimination not backed up by a cost savings justification.[67] According to the report, "lower selling prices [we]re a very substantial, if not the chief, factor in the growth of chain-store

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61. Fulda, *supra* note 50, at 1051–52 (quoting Hearing on H.R. 4995 and H.R. 5062 Before the H. Comm. on the Judiciary, 74th Cong., 1st Sess. 58 (1935) (statement of John M. Pohlhaus)).
62. 1977 DOJ REPORT, *supra* note 46, at 194.
63. Fulda, *supra* note 50, at 1057.
64. 1977 DOJ REPORT, *supra* note 46, at 194.
65. *Id.*
66. S. Res. 224, 70th Cong., 1st Sess. (1928).
67. FED. TRADE COMM'N, FINAL REPORT ON THE CHAIN STORE INVESTIGATION 97 (1934) [hereinafter 1934 FTC STUDY].

merchandising," and "lower buying prices than are available to independents [we]re a most substantial, if not the chief, factor in these lower selling prices."[68] Alas, "[t]he actual statistics gathered by the FTC" made "it clear that the chains' lower cost of goods sold was but a minor factor in the chains' ability to sell at a lower price."[69] Indeed, the FTC's "exhaustive study of chain-store practices, the study that was ostensibly behind the Robinson-Patman Act, largely exonerated the chains from the charges of wrongdoing that had been leveled against them," and "[t]here is grave doubt that the charges of anticompetitive conduct leveled against the chains were true."[70] The FTC report also "focused mainly on the growth of chains in terms of numbers, rather than market share by sales," but "its figures on sales showed that in 1929 chains, taken as a whole, accounted for less than 20 percent of all sales made in retail distribution."[71]

Congress was on notice. Congressman Emanuel Celler—who was no fan of chain stores, finding them "guilty of many sins," and supported "any provision that would stop certain predatory practices"[72]—explained on the House floor that the FTC itself contradicted the purported market conditions that, to the Act's supporters, necessitated its enactment.[73]

Congress did not care. Congressman Patman stated before the House Judiciary Committee that "only 18 percent of the cash business in groceries was done by independents."[74] Nor did Congress care about "testimony tending to show that between the years of 1929 and 1933 the number of small businesses had in fact increased and that the number of chain stores had decreased."[75] Rather, the "members of the Committee . . . preferred to rely upon their own impressions and anecdotes from constituents."[76]

Congress was animated by something else: the Great Depression. "Real GDP fell 29% from 1929 to 1933," and the "unemployment rate reached a peak of 25% in 1933."[77] "Consumer prices fell 25%," and

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68. *Id.* at 53.
69. 1977 DOJ REPORT, *supra* note 46, at 131.
70. RICHARD POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES 26 (1976).
71. 1977 DOJ REPORT, *supra* note 46, at 103 (citing 1934 FTC STUDY, *supra* note 67, at 4).
72. 80 CONG. REC. 5977 (1936) (statement of Rep. Emanuel Celler).
73. *Id.*
74. 1977 DOJ REPORT, *supra* note 46, at 103 (citing 80 CONG. REC. 8116 (1936) (remarks of Rep. Patman)).
75. 1977 DOJ REPORT, *supra* note 46, at 103 (citing Hearings on H.R. 8442, H.R. 4995, H.R. 5062 Before the H. Comm. on the Judiciary, 74th Cong, 1st Sess. 132 (1935)).
76. 1977 DOJ REPORT, *supra* note 46, at 104.
77. *How Bad Was the Great Depression? Gauging the Economic Impact*, FED. RESERVE BANK OF ST. LOUIS, https://www.stlouisfed.org/the-great-

"wholesale prices plummeted 32%."[78] Naturally, the Depression "generated desperation and fear, a desire to do anything, something, anything"[79] to ultimately "return[] the country to full employment."[80]

The Depression "was a period of profound disenchantment with competition, which was widely thought to have contributed to the deflation of the day."[81] That led to "protectionism and government supervised cartels"[82] under the National Recovery Administration (NRA) codes, in effect from 1933 to 1935.[83] The National Industrial Recovery Act, which created the NRA, was found unconstitutional the year before the passage of the Robinson-Patman Act.[84] In its short existence between its becoming law in June 1933 and the unconstitutionality finding in May 1935, the National Industrial Recovery Act made the Great Depression longer and more severe than it would have been otherwise.[85]

Section 2(c) of the Robinson-Patman Act "first appeared in the NRA Code of Fair Competition for the wholesale fresh fruit and vegetable distribution industry."[86] Section 2(c), which was the basis of the bulk of the FTC's enforcement effort for decades, amounting to more than forty percent of final orders between 1936 and 1969,[87] conferred "virtual legal monopoly . . . on one type of middleman," the "'independent' broker," thus "clog[ging] competition in the channels of distribution[] and exact[ing] tribute from the consumer for the benefit of a special business class."[88]

Besides setting up the NRA and enacting the Robinson-Patman Act, Congress passed the Miller-Tydings Act.[89] The Supreme Court found vertical price maintenance to be per se illegal under the Sherman Act in

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depression/curriculum/economic-episodes-in-american-history-part-3 [https://perma.cc/2ZLP-5EVG] (last visited Mar. 22, 2026).

78. *Id.*

79. 1977 DOJ REPORT, *supra* note 46, at 101 (quoting throughout testimony from Donald I. Baker, at the time head of the Antitrust Division).

80. *Id.* at 6.

81. *Id.* at 101.

82. *Id.*

83. *Id.* at 108–11.

84. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

85. Jason E. Taylor, *The Output Effects of Government Sponsored Cartels During the New Deal*, 50 J. IND. ECON. 1 (2002); Christina Romer, *Why Did Prices Rise During the 1930s?*, 59 J. ECON. HIST. 167 (1999).

86. 1977 DOJ REPORT, *supra* note 46, at 80.

87. *Id.* at 82.

88. *Id.* at 83 (quoting throughout REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 190–91 (1955) [hereinafter 1955 REPORT]).

89. Amendment to the Antitrust Laws, Pub. L. No. 314, 50 Stat. 693 (1937).

1911,[90] and the Miller-Tydings Act amended the Sherman Act to make such contracts enforceable in interstate commerce when made between states with so-called fair-trade laws. Those laws "allowed agreements between suppliers and distributors which, under certain circumstances, prescribed minimum prices for the resale of trade-marked or branded commodities."[91] The fair-trade "movement originated in California in 1931," and "[b]y 1936 nine states had enacted similar legislation."[92] On December 7 of that year, the Supreme Court upheld the constitutionality of the laws of two states, California and Illinois.[93] By mid-1938, such "laws had been enacted in every State except Texas, Missouri, Vermont, Delaware, and Alabama."[94]

The purpose of the state laws and the Miller-Tydings Act was "ostensibly to protect manufacturers of branded articles from having the good will of their products injured and the even flow of their distribution disrupted by price-cutting dealers."[95] But "there is strong evidence that the real movement started with organizations of retailers, the bitterest opponents of chain stores, who desired to have high resale prices maintained in order to obtain, for themselves, larger profits."[96]

President Roosevelt opposed the law.[97] "When Congress was holding hearings on the bills that later became the Miller-Tydings Act, [he] requested Congress to forego consideration of the bills and to authorize the Federal Trade Commission to make further studies of the subject."[98] The Act eventually "was passed as a rider to the District of Columbia appropriations bill," and "the reluctance of the President's approval was evident."[99] Indeed, upon "signing the bill on August 17, 1937, [he] . . . expressed fear that the law would lead to increased prices to

90. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), *overruled by*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

91. 1977 DOJ REPORT, *supra* note 46, at 112.

92. J. Edward Collins, *Anti-Chain Store Legislation*, 24 CORNELL L. REV. 198, 215 (1939).

93. Old Dearborn Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936) (Illinois); Pep Boys v. Pyroil Sales Co., Inc., 299 U.S. 198 (1936) (California).

94. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1938, at 46 (1938).

95. Collins, *supra* note 92, at 215.

96. *Id. See also* 1977 DOJ REPORT, *supra* note 46, at 111 (stating that heavily involved was the National Association of Retail Druggists, "the nation's most powerful trade association").

97. *President's Stand on Tydings Bill Builds Barriers*, N.Y. TIMES, Apr. 29, 1937, https://www.nytimes.com/1937/04/29/archives/fair-trade-laws-held-limited-here-presidents-stand-on-tydings-bill.html [https://perma.cc/HY8B-27B9].

98. Stanley D. Rose, *Resale Price Maintenance*, 3 VAND. L. REV. 24, 25 n.10 (1949) (citing 81 CONG. REC. 3838 (1937)).

99. *Id.* (citing N.Y. TIMES, Aug. 19, 1937, at 26).

consumers."[100] "[W]hen a Senate committee was considering a Fair Trade Act for the District of Columbia" two years later, Roosevelt "wrote to Vice-President Garner asking that the Senate delay action on this bill until after the [Temporary National Economic Committee, set up to study the concentration of economic power and to report to Congress with its findings,] and the FTC had completed their studies of the problem."[101]

President Truman was no fan either. In 1951, the Supreme Court held that fair trade agreements could not be enforced against nonsigners in interstate commerce.[102] Congress a year later passed the McGuire Act[103] "to reverse the [Supreme Court's] decision and 'to provide that if the State statutory scheme permitted price maintenance against nonsigners, such contracts would be immunized from antitrust violations.'"[104] President Truman explained in a statement upon signing the McGuire Act that "there is no doubt that the fair-trade laws also have the effect of removing some competitive forces which otherwise would operate to help keep prices down" and "urge[d] the Congress to make a thorough investigation of this field, including not only the fair-trade laws, but the related problems of price discrimination and antitrust policy."[105]

"The term 'fair trade' is a misnomer" as "[n]o thinking individual is in favor of 'unfair trade,' and any consumer who understands that a 'fair trade' bill will mean higher prices for the commodities he purchases would not favor 'fair trade' either."[106] By the late 1950s, a time of great expansion of the economy, the fair-trade laws seemed like a relic from the Great Depression: "The era of continued economic expansion, and the corresponding increase in the manufacturing of all types of consumer goods, has wiped out any possible justifications for Fair Trade based upon depression-wartime arguments, i.e., creation of monopoly due to either shortage of buying power or scarcity of commodities."[107] The laws accordingly had "[v]igorous opposition . . . by labor, farmer and consumer

100. Kirby Sullivan, Note, *Restraint of Trade—Fair Trade Acts—Constitutionality*, 28 N.C. L. REV. 336, 338 n.11 (1950).

101. Rose, *supra* note 98, at 25 n.10 (citing 84 CONG. REC. 6114 (1939)).

102. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).

103. Federal Trade Commission Act, Amendment, Pub. L. No. 542, 66 Stat. 332 (1952).

104. Lenox, Inc. v. FTC, 417 F.2d 126, 127 (2d Cir. 1969) (quoting Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 402 (2d Cir. 1968)).

105. Harry S. Truman, President of the United States, Statement by the President Upon Signing the "Fair-Trade Laws" Bill (July 14, 1952), https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-the-fair-trade-laws-bill [https://perma.cc/PW62-9FRL].

106. Robert M. Ague Jr., *Resale Price Maintenance-A Threat to Free Competition*, 63 DICKINSON L. REV. 107, 107 (1959).

107. Richard K. Bates, *Constitutionality of State Fair Trade Acts*, 32 IND. L.J. 127, 129 (1957).

organizations, the Department of Justice and the Federal Trade Commission, many department stores and mail order houses, independent retailers and supermarket operators[,] . . . and manufacturers."[108] The laws of at least twenty-four states were found unconstitutional under their state constitutions, generally on due process and police power grounds.[109] Congress finally repealed both the Miller-Tydings Act and the McGuire Act in the stagflation 1970s.[110]

In short, the Robinson-Patman Act's contemporaries have been discarded. The Robinson-Patman Act is still here, even though it is "demonstrably false" that high prices will bring high employment.[111]

Congress was on notice of consumer harm and inefficiency. The Congressional Record of the seventy-fourth Congress is rife with statements raising concerns.[112] Amongst those sounding the alarm was Congressman Celler. Citing various authorities, a few amongst the "scores of . . . economists throughout the land . . . unalterably opposed to th[e] bill,"[113] Celler warned that what became the Robinson-Patman Act would, first, "strike at all those who have heretofore been effective in reducing prices, to that extent w[ould] raise prices"[114]; second, "force a realinement of manufacturing, with disastrous consequences to the small independent"[115]; third, "discriminat[e] against all the present efficient retail distributors of the country"[116]; fourth, "arbitrarily . . . classify distributors"[117]; fifth, "run counter to reductions of cost of production and distribution"[118]; sixth "place a premium on inefficiency"[119]; seventh, "exploit the consumers"; and, eighth, "discourage lower prices through

108. Carl H. Fulda, *Resale Price Maintenance*, 21 U. CHI. L. REV. 175, 186 (1954) (citations omitted).

109. *See* Zale-Las Vegas, Inc. v. Bulova Watch Co., 396 P.2d 683, 693 (Nev. 1964) (finding Nevada fair trade law unconstitutional as exceeding the police power); *id.* at 684 (noting, prior to its own finding of unconstitutionality, that "23 jurisdictions ha[d] held such acts unconstitutional as against 17 upholding the acts"); *id.* at 685–93 (collecting cases and explaining the ratia decidendi).

110. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

111. 1977 DOJ REPORT, *supra* note 46, at 153.

112. 80 CONG. REC. 6296–97 (1936) (statement of Rep. Theodore A. Peyser); *id.* at 6331 (statement of Sen. Warren Austin); *id.* at 6335 (statement of Sen. Warren Austin).

113. *Id.* at 5977 (statement of Rep. Emanuel Celler).

114. *Id.* at 5976 (quoting Dr. Harold G. Moulton of the Brookings Institution).

115. *Id.* (citing Prof. Malcolm P. McNair of Harvard University).

116. 80 CONG. REC. 5976 (1936) (citing Prof. Shore Livermore of the University of Buffalo).

117. *Id.* (citing Prof. William A. Carter of Dartmouth College).

118. *Id.* (citing Prof. H.L. Caverly of the University of Michigan and Dr. George Filipetti of the University of Minnesota).

119. *Id.* (same).

quantity discounts."[120] Because, in short, the bill would "result [in] increases in manufacturing and distributing costs and a cutting off from customers of the full benefits of mass production and distribution," "[t]he consumer again w[ould] 'pay the piper.'"[121]

The Act's supporters opposed the notion that it would raise consumer prices.[122] Indeed, supporters claimed it would do the opposite.[123] The May 27, 1936, House debate on what became the Robinson-Patman Act revolved around the impact on consumers, proponents arguing that the Act was pro-consumer and opponents that it was anti-consumer.[124] Congressman Patman himself expressed his belief that it would benefit consumers "by preserving independent business which forces competition and lower prices to the consumers."[125] To supporters, even efficiency was

120. *Id.* (citing Prof. C.C. Huntington of Ohio State University).
121. *Id.* at 5978.
122. *See* 80 CONG. REC. 6151 (1936) (statement of Sen. Josiah Bailey) ("Congressman Celler . . . assumes that if the bill should be enacted it will throttle efficiency and increase production and distribution cost, and if that should result it would raise prices to the consumer. There is nothing in the Robinson bill that would have any such effect. There is nothing in it that affects production or distribution methods."); *id.* at 6335 (statement of Sen. Joseph T. Robinson) ("[T]he bill under consideration takes account of and permits quantity differentials justified by differences in cost whether of transportation or of distribution . . . . [T]he passage of this bill would [not] mean an added burden to the consumer. The object of the bill is to prevent large buyers from taking unfair advantage of independents by securing terms that are out of proportion to the differences in cost, thus enabling them to destroy their competitors and to monopolize the market.").
123. *See id.* at 6152 (statement of Sen. Josiah Bailey) ("Roughly speaking, the buyers, known as the chains, sell about 20 percent of the commodities consumed in the entire Nation. There is no reason at all why their prices should be increased if the Robinson bill should be enacted, but if the independents are treated on proportionately equal terms with the large buyers it may well be argued that the price to 80 percent of the consumers would be reduced. Even the most hypercritical view of the Robinson bill cannot lead to the conclusion that there is any justification for the contention that the price to the consumer will be increased."). *See also id.* at 6284 (statement of Sen. M.M. Logan) ("The cost to the consumers, it is said, will be increased. In some instances, perhaps it may, to be perfectly fair about it, but not much. Let us consider it in this way for a moment. Let us turn it over and look at it. Probably the largest percentage of the total goods under the measure we are discussing sold to the consumer by the large chain stores, we will say, is 20 percent. Some say 18, some say 13, some say less, but no estimate exceeds 20 percent. If that be true, 80 percent of this type of goods is sold to the consumer by the independents. If we can enact a law that will give to the independent, the retail merchant, equal treatment with the large purchasers he will be enabled to reduce his price to the consumer. It appears to me that the reasoning is that perhaps 80 percent of the consuming public would be benefited and 20 percent probably hurt a little, but I do not know that to be true.").
124. 80 CONG. REC. 8102–40 (1936).
125. *Id.* at 8116 (statement of Rep. Wright Patman).

not at odds with it.[126] Senator Barkley, who later served as Vice President under President Truman, stated that the Act would allow a business to "outdistance [its] competitor" and "extinguish him, if [it] can, by superior efficiency," but that it may "not do so by force of [its] greater size and the mere power which that size affords."[127]

In all, that the Congress had an intended beneficiary is clear. Also clear, though, is that the Congress that passed the Act was on notice about consumer harm and inefficiency. The Act's supporters insisted that that was not the case and even that the Act was pro-consumer and pro-efficiency. It is possible that they believed that. It is also possible that these politicians, well, lied—an admittedly "difficult concept to get across to a politician."[128] What is undoubtable is that simultaneously taking issue with efficiency and stating unequivocally that "Congress' intent" in the Robinson-Patman Act is "clear," as Commissioner Bedoya did in a 2022 speech,[129] is something that finds no substantiation in the Congressional Record.

The majority in *Southern Glazer's*, in a statement written by Commissioner Bedoya, complained that "[t]here are no empirical studies demonstrating that Robinson-Patman enforcement raises prices for consumers."[130] For one, even if the empirical evidence as to harm to consumer welfare is not good, that there is <u>no evidence</u> of harm doesn't mean that there is evidence <u>of no harm or of benefit</u>. And in any event, there is empirical evidence of harm.[131] Indeed, the Justice Department

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126. *See id.* at 7325 (statement of Rep. George G. Sadowski) ("The bill does not in any way attempt to change the business methods or practices within the chain-store systems whether those practices be good or bad. It does not put any penalty on efficiency either in manufacturing or distribution. It does not prevent the distributor or retailer, whether he be chain store or independent, from passing along to the consumer every saving that efficiency can devise. This bill will prohibit practices that destroy competition and bring about monopoly. It will not injure any legitimate business or legitimate practice."); *id.* at 8129 (statement of Rep. John M. Robsion) ("A single chain has as many as 14,000 units scattered throughout the length and breadth of the land. It is not the purpose of this bill to destroy or unreasonably or unfairly hamper any legitimate business institution, however large it may be.").

127. *Id.* at 6256–57 (statement of Sen. Alben Barkley).

128. YES, PRIME MINISTER (British Broadcasting Corp. 1988).

129. Bedoya Speech, *supra* note 9, at 8.

130. Bedoya, *Southern Glazer's* Statement, *supra* note 9, at 10, 11 n.63.

131. *See* AREEDA & HOVENKAMP, *supra* note 43, ¶ 2340b1 ("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. However, the incentives for discounting become stronger and much broader when discounting can be sequential. That is, the seller first gives the discount selectively to the larger buyer, and this puts pressure on both smaller buyers and eventually the seller

estimated in 1977 that the Robinson-Patman Act costs the economy $3 to $6 billion annually.[132] That is $16 to $32 billion in today's dollar. And the 1977 estimate "was almost certainly too low" since it "included higher prices, but not compliance costs or job losses."[133]

Regardless of whether, as the *Southern Glazer's* majority said, "the loudest critique of Robinson-Patman is that it will raise prices for consumers,"[134] the Act's war with the antitrust enterprise and itself has many bloody fronts. First, the Act facilitates collusion by prohibiting the kind of single-customer price cuts that can effectively undermine cartels.[135] In other words, the Act enables the "supreme evil of antitrust."[136] Indeed, the kind of price restrictions that the Act promotes are for all practical purposes identical to those the Supreme Court found an illegal restraint of trade under Section 1 of the Sherman Act in *Sugar Inst. v. United States*[137]—ironically the same year the Act was enacted.[138]

Further, it is "cutting prices in order to increase business [that] often is the very essence of competition,"[139] but the Robinson-Patman Act discourages price-cutting. Between "penaliz[ing] firms for beating rather than meeting the bids of other firms," and "forbidding firms from bidding lower than the price it has charged in reasonably contemporaneous sales to others," the Act "serves to blunt the hard competitive bidding that antitrust policy generally wishes to encourage."[140]

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to extend the discounts to them too. As a result, a rule forbidding discriminatory pricing is likely to prevent any business, large or small, from obtaining a lower price. Of course, sequential discounting injures small buyers to the extent that larger buyers obtain the discount earlier. But the important point is that if a rule forbidding selective price cuts were repealed, all parties except the seller would be better off. The greatest improvement would accrue to consumers.") (citing Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 J.L. ECON. & ORG. 296 (1994)).

132. 1977 DOJ REPORT, *supra* note 46, at 40.

133. Herbert Hovenkamp, *Can The Robinson-Patman Act Be Salvaged?*, PROMARKET (Oct. 13, 2022), https://www.promarket.org/2022/10/13/can-the-robinson-patman-act-be-salvaged/ [https://perma.cc/ZJ2S-J7M4].

134. Bedoya, *Southern Glazer's* Statement, *supra* note 9, at 10 (emphasis added).

135. Written Testimony of Herbert Hovenkamp, Antitrust Modernization Comm'n Hearing on the Robinson-Patman Act, at 7–8 (July 2, 2005), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hovenkamp.pdf [https://perma.cc/P77D-RT2J] [hereinafter Hovenkamp, Written Testimony].

136. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

137. Sugar Inst. v. United States, 297 U.S. 553 (1936).

138. Rowe, *supra* note 59, at 1074.

139. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

140. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2340b1 (citing 1977 DOJ REPORT, *supra* note 46, at 37–74).

All this deters entry. New firms enter markets by convincing the consumer to switch from the incumbent, usually by way of lower prices. "Price differentials may be found violative of the Act even when they represent the opening wedge of competition in a market that is largely cartelized or in which for some other reason competition is sluggish."[141] The Act thus "discourages firms from undertaking a promotional pricing campaign in connection with an attempt to enter a new market, unless that campaign is conducted on a nationwide basis or reflects some special cost saving of serving that market."[142] "Such foreclosure of potential competition is directly contrary to antitrust purposes embodied in Section 7 of the Clayton Act,"[143] which prohibits acquisitions whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly."[144] And it is particularly harmful to smaller markets and their consumers, purportedly in the name of who the Biden Administration FTC resurrected the Act.[145] "[I]n local or regional markets where the number of competitors is relatively small, the most effective deterrent to the establishment of collusive or oligopolistically high prices and profits margins is the likelihood that these conditions will attract new business into the area."[146]

As to efficiency, "[t]he ways in which the mere presence of the Robinson-Patman Act has encouraged firms to undertake evasive but costly distribution strategies are legion."[147] To take one example related to the parts of the Act on which the FTC's suit against Pepsi relies, the Act "has introduced unnecessary and anticompetitive restraints on the system of independent brokers, even to the point of prohibiting a broker from reducing a commission in order to effect a large sale."[148] This was determined as far back as the 1950s.[149]

Then there's the war the Robinson-Patman Act wages with itself. For one, the Act facilitates the conduct it seeks to deter. It was vertically integrated chain stores that the Act targeted, but "[b]ecause the oligopolistic seller will almost never lower its price to all of its customers,

141. Boise Cascade Corp. v. FTC, 837 F. 2d 1127, 1149 (D.C. Cir. 1988) (Williams, J., concurring).
142. 1977 DOJ REPORT, *supra* note 46, at 65.
143. *Id.* (citing United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964)).
144. 15 U.S.C. § 18.
145. Bedoya, *Southern Glazer's* Statement, *supra* note 9, at 1; Bedoya Op-ed, *supra* note 9.
146. 1977 DOJ REPORT, *supra* note 46, at 65.
147. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2340b3.
148. *Id.*
149. *Id.* at n.24.

the large buyer may be forced to integrate."[150] And it hurts even its supposed beneficiary, small business. Manufacturers who face the high costs that compliance with the Act requires have an incentive to abandon independent-dealer networks and switch to manufacturer-owned outlets.[151] There is also an incentive simply not to sell to smaller resellers. And the high cost of compliance is imposed on small businesses directly: Section 2(f) makes it illegal "knowingly to induce or receive a discrimination in price which is prohibited by [Section 2]."[152] In other words, small businesses are exposed to risk of litigation by the government and private parties. Whereas "[t]he corporate giants can and do maintain stables of highly skilled attorneys," small businesses "are less able to afford such counsel, and the law firms they retain typically lack the specialized knowledge needed to cope with the body of statutory, case, and regulatory law as complex as [the] Robinson-Patman [Act]."[153] The Act, in other words, "imposes a hardship on smaller businesses who do not have their own antitrust counsel, and so must increase their expenditures on legal advice."[154] And it "has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power."[155]

Harm to small business is yet another warning Congress had before it passed the Robinson-Patman Act.[156] Harm to small business is yet another warning Congress ignored when it passed the Robinson-Patman Act. In the end, the only thing in which Congress "succeeded wildly" was to "destroy the A&P."[157]

150. 1977 DOJ REPORT, *supra* note 46, at 55.

151. Hovenkamp, Written Testimony, *supra* note 135, at 7.

152. 15 U.S.C. § 13(f).

153. 1977 DOJ REPORT, *supra* note 46, at 98 (quoting Statement of F.M. Scherer, then the Director of the FTC Bureau of Economics).

154. *Id.* at 97 (quoting speech by Jonathan C. Rose, then the Deputy Assistant Attorney General for the Antitrust Division).

155. *Id.* at 63.

156. *See* 80 CONG. REC. 5976 (1936) (statement of Rep. Emanuel Celler) (warning that "[i]n the long run" the Robinson-Patman Act "w[ould] react disastrously to the small, independent dealer who is supposed to be helped by it"); *id.* at 5977 (warning about the adverse effects of the Act on "manufacturers, large and small, and particularly the consumer," as well as "independent dealer[s]").

157. Daniel Crane, *Reviving the Robinson-Patman Act*, NETWORK L. REV. (Feb. 28. 2023), https://www.networklawreview.org/cranes-cartel-three/ [https://perma.cc/L3K9-5M3A] [hereinafter Crane, *Reviving the Robinson-Patman Act*].

II. "HE'S JUST RESTING. WAITING FOR A NEW LIFE TO COME."[158]

The enactment of the Robinson-Patman Act left the executive with a Herculean task: enforcing a "'legislative monstrosity'" of "'bad economics and impossible accounting.'"[159] The executive swung hard in two different directions and missed the mark entirely.

Former FTC Chairman William Kovacic provides the following useful breakdown[160] of FTC enforcement actions from 1961 until 2000, when the FTC brought the last enforcement action prior to *Southern Glazer's* in *McCormick*.[161] Note that the Justice Department has not brought any Robinson-Patman Act cases since the early 1960s.[162]

President	*Number of Complaints Issued*	*Matters Per Year*
Clinton (1993–2000)	1	0.125
Bush (1989–1992)	0	0
Reagan (1981–1988)	5	0.625
Carter (1977–1980)	8	2.0
Nixon/Ford (1969–1976)	41	5.125
Kennedy/Johnson (1961–1968)	518 (134)	64.75 (16.75)

Former FTC Chair Khan has attributed the decline and eventual end of Robinson-Patman Act enforcement by the agencies to "Chicago School hostility."[163] The comment is part of a larger narrative that the Chicago School and its most prominent proponent, Robert Bork, form the foundation of modern antitrust law and ought to be blamed for perceived failures. This narrative has been embraced by many in academia and

158. FRANKENSTEIN (Universal Pictures 1931).

159. Levi, *supra* note 45, at 60..

160. William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 411 (2003) [hereinafter Kovacic, *The Modern Evolution*]. Kovacic made the following judgment calls as to how to count Robinson-Patman Act cases:

> Perhaps the most important is whether to treat selected, industry-wide enforcement projects as one case, or to treat all consent decrees or other enforcement actions taken pursuant to the industry-wide project as separate enforcement events. During the Kennedy and Johnson administrations, the FTC undertook major industry-wide initiatives involving the citrus and apparel industries. One citrus initiative yielded 45 consent decrees, and the Commission conducted apparel industry sweeps that yielded batches consisting of 163 matters, 27 matters, 33 matters, and 56 matters. If one treats each large grouping of consents as one matter, one generates the total of 134 [Robinson-Patman Act] cases for the period. If one treats each consent as a separate event, the number of matters is 518.

Id.

161. Decision and Order, McCormick & Co., F.T.C. No. C-3939 (Apr. 27, 2000).

162. Kovacic, *The Modern Evolution*, *supra* note 160, at 410–11 n.108.

163. Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 775 n.331 (2017).

government.[164] Even then-President Biden, upon signing the now-revoked 2021 competition executive order,[165] stated that modern antitrust law, "following the misguided philosophy of people like Robert Bork," got off on the wrong foot in the 1970s.[166]

This narrative is as false as it is widespread. As a general matter, modern antitrust law reflects the views of non-Chicagoans such as Herbert Hovenkamp and of the Harvard School and its leading figures, Phillip Areeda, Donald Turner, and Stephen Breyer, probably more, and certainly at least as much, than those of the Chicago School.[167]

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164. *See, e.g.*, Jonathan Kanter, Assistant Attorney General, Farewell Address (Dec. 17, 2024), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-farewell-address [https://perma.cc/GWR2-TM4Q] ("[I]n recent years, we lost sight of the 'why' due to a deliberate and decades-long effort to dismantle the intellectual, legal, and operational infrastructure of antitrust enforcement. From the Powell Memorandum written in 1971 to the Chicago School ideologues who substituted their judgment for that of Congress, to the network of academics who radicalized institutions under the guise of 'administrability' and error costs, a systematic effort to defang antitrust took hold. And it stuck.") (citation omitted); Brian Fung, *Sen. Amy Klobuchar: 'We Have a Major Monopoly Problem,'* WASH. POST (Mar. 5, 2019), https://www.washingtonpost.com/technology/2019/03/05/sen-amy-klobuchar-we-have-major-monopoly-problem/ [https://perma.cc/E9T7-NPT5] (interviewing Senator Amy Klobuchar) ("It is [a] choice to follow this Robert Bork, University of Chicago school—where I went to law school, by the way—approach. But it's not like a given that that's where the court is going to stay forever, in terms of their narrow view . . . ."); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 17 (2018) ("[Antitrust] law is suffering from an overindulgence in the ideas first popularized by Robert Bork and others at the University of Chicago over the 1970s."); Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 14 (2015) ("In a nutshell, [modern antitrust law is the way it is] because the Chicago School—and especially Robert H. Bork—persuaded the antitrust fraternity that its field should be exclusively concerned with consumer welfare."); Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L.J. 337, 337 (1987) ("We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration's antitrust policies are chief among them.").

165. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021), *revoked by*, Exec. Order No. 14,337, 90 Fed. Reg. 40227 (Aug. 19, 2025).

166. Joseph R. Biden, Jr., President of the United States, Remarks on Signing an Executive Order on Promoting Competition in the American Economy and an Exchange with Reporters (July 9, 2021), https://www.presidency.ucsb.edu/documents/remarks-signing-executive-order-promoting-competition-the-american-economy-and-exchange [https://perma.cc/T576-WMPH].

167. *See* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 464–65 (2020) ("The greatest omission in Chicago School–centric interpretations of U.S. antitrust policy is the failure to recognize the significant influence of the modern Harvard School and its formative scholars: Professors Phillip Areeda, Donald Turner, and now-Justice Stephen Breyer. Harvard School

The prevalence of the Harvard School is "especially" the case as to, amongst other things, "price cutting": "[t]he Harvard School greatly influenced the development of substantive legal rules that have scaled back intervention."[168] To take one example from the case law, the Supreme Court in *Matsushita Indus. Co., Ltd. v. Zenith Radio Corp.*, a predatory pricing conspiracy case, relied on *Barry Wright Corp. v. ITT Grinnell Corp.*, where the First Circuit, in an opinion written by then-Judge Breyer, held that "we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."[169] And the first edition of the Turner/Areeda/Hovenkamp treatise, published in 1978 by Turner and Areeda, refused to address the Robinson-Patman Act for being out of line with the general goals of antitrust law.[170] More recent editions address the Act but only because "dislike for a particular statute or doctrine is not a good reason for excluding it from what purports to be a 'full coverage' treatise on federal antitrust law."[171] Hovenkamp, the only surviving author, recommends congressional repeal.[172] Many others, some of Chicago School persuasion, many not, have been critical to different extents of the

perspectives today guide key elements of US antitrust doctrine and enforcement policy, so much so that American case law more strongly reflects the Harvard School's ideas than the Chicago School's.") (citations omitted); Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 109, 112 (Robert Pitofsky ed., 2008) ("In sum, antitrust law as produced by the courts today comes much closer to representing the ideas of a somewhat chastised Harvard School than of any traditional version of the Chicago School."); Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra*, at 40, 42 ("To the most vocal critics of 'Conservative Economic Analysis,' the Chicago School is akin to the 'Grinch Who Stole Christmas' . . . . The 'Grinch' view assumes that it is the villains of the Chicago School alone who have done us in, taking us away from happier times in the antitrust valley . . . . If there is a Grinch at all, . . . it is a collective Grinch, a Chicago-Harvard Grinch and perhaps a good Grinch besides."); Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI L. REV. 1911, 1919–20 (2009) ("If one is to criticize the recent pro-defendant turn in Supreme Court jurisprudence, one might as well write a book entitled, *How the Neo-Harvard School Overshot the Mark*.").

168. Leon B. Greenfield, *Afterword:* Lorain Journal *and the Antitrust Legacy of Robert Bork*, 79 ANTITRUST L.J. 1047, 1057 (2014).

169. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (quoting throughout Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983)).

170. I PHILLIP AREEDA & DONALD F. TURNER, ANTIRUST LAW ¶ 100 (1978).

171. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2300 n.1.

172. Hovenkamp, Written Testimony, *supra* note 135, at 2.

Robinson-Patman Act.[173] And Bork did not "disparage[] the [Robinson-Patman Act] as 'the Typhoid Mary of antitrust,'" something for which he repeatedly has been chastised.[174] Bork in the relevant speech[175] spoke more broadly of what is known as the incipiency concept, that the Clayton Act covers "certain trade practices which, as a rule, singly and in themselves, are not covered by the [Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, . . . arrest[s] the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[176]

Criticism of the Robinson-Patman Act became prevalent in the executive branch long before the 1970s. The Report of the Attorney General's National Committee to Study the Antitrust Laws, published under the Eisenhower administration, was generally positive about the state of antitrust law at the time[177] and proposed no legislative changes except with regard to one statute, for which it proposed several: the Robinson-Patman Act.[178] The report argued that courts should reconcile

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173. *See, e.g.*, Albert A. Foer, *The Antitrust Modernization Commission: A Retrospective From the Perspective of the American Antitrust Institute*, 54 ANTITRUST BULL. 305, 318 (2009); Calvani & Breidenbach, *supra* note 44, at 765; Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 ANTITRUST BULL. 733 (1986); Thomas Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & ECON. 243 (1984); A.B.A., ANTITRUST SECTION MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW (1980); Phil Neal, *Let's Reform It*, 45 ANTITRUST L.J. 52 (1976); Wesley J. Liebeler, *Let's Repeal It*, 45 ANTITRUST L.J. 18 (1976); William F. Baxter, *A Parable*, 23 STAN. L. REV. 973 (1971); James M. Nicholson, *Antitrust: Sound and Fury?*, 37 ANTITRUST L.J. 807, 811 (1968); Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH L. REV. 1, 1 (1966); FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT xiii (1962); JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 141–44 (1956).

174. Brian Callaci et al., *The Robinson-Patman Act as a Fair Competition Measure*, 97 TEMPLE L. REV. 185, 210 (2025) (quoting Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1114 (1983), in turn citing Robert Bork, The Place of Antitrust Among National Goals, Address Before the National Conference Board, at 9 (Mar. 3, 1966)); *see* Callaci et al., *supra*, at 185 (same quote); *id.* at 187–88 ("Robert Bork called it 'the Typhoid Mary of antitrust.'"); Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 HOFSTRA L. REV. 313, 344 (2024) ("Among the most influential of the new conservative critics of the [Robinson-Patman Act] was Robert Bork, who described the law . . . as the 'Typhoid Mary of Antitrust.'").

175. Robert H. Bork, *The Place of Antitrust Among National Goals*, *in* BASIC ANTITRUST QUESTIONS IN THE MIDDLE SIXTIES 12, 18 (NICB Fifth Conference on Antitrust in an Expanding Economy, March 3, 1966).

176. S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914).

177. *See* 1955 REPORT, *supra* note 88, at 3 ("[A] backward look across the 64 years since the Sherman Act reveals on the whole a healthy process of growth through which antitrust fundamentals have gained in strength and effectiveness.").

178. *Id.* at 155–221.

the interpretation of the Robinson-Patman Act with "broader antitrust policies" and "[a]ccommodate all legal restrictions on the distribution process to dominant Sherman Act policies."[179] It also recommended the repeal of Section 3.[180] Four years later, Corwin D. Edwards, who had served as Director of the FTC Bureau of Economics in the Truman Administration, published a book sharply criticizing the Act.[181] In 1969, the White House Task Force Report recommended "a thorough revision of the Robinson-Patman Act to remove features that unduly restrict the free play of competitive forces."[182] Eight years later, in a report on the Robinson-Patman Act, the Justice Department, which at that point had not brought a case under the Robinson-Patman Act for more than a decade, described the Robinson-Patman Act as having a "deleterious impact on competition."[183] The Justice Department provided two draft statutes, each of which could replace the Robinson-Patman Act.[184] The Report reached the following conclusion:

> [The] Robinson-Patman [Act] is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole . . . . The evidence reviewed in this Report makes clear that careful reconsideration of the Robinson-Patman Act is timely. This evidence seriously undermines historic claims that the Robinson-Patman Act offers any sustaining economic protection to small business; and it raises serious questions whether the Act advances the competitive goals of other antitrust laws. Rather, the evidence is that the Act promotes high prices, restricted entry, and inefficiency in the distribution of goods; and it has encouraged the creation of illegal pricing exchanges by competing manufacturers. The fact that the Act does not apply at all to the offering of services—a growing sector in which small business is especially significant—reinforces the conclusion that the Robinson-Patman Act is not a key factor in preserving efficient small businesses.[185]

At the FTC in the same time period, the 1960s and 1970s, the Bureaus of Economics and Competition engaged in "warfare" on whether the

179. *Id.* at 132.
180. *Id.* at 201.
181. CORWIN D. EDWARDS, THE PRICE DISCRIMINATION LAW: A REVIEW OF EXPERIENCE (1959).
182. 91 CONG. REC. 13890 (1969).
183. 1977 DOJ REPORT, *supra* note 46, at 250.
184. *Id.* at 276.
185. *Id.* at 260.

Robinson-Patman Act should be enforced.[186] FTC leadership continued to bring cases, including a case against A&P all the way to the Supreme Court.[187] Still, as the table above illustrates, the number of complaints dropped starting in the late 1960s. For example, the FTC under Michael Pertschuk, Chairman in the Carter Administration, brought only eight enforcement actions. Under Pitofsky, Chairman in the Clinton Administration, the FTC brought only one suit. Note that neither Chairman was by any means a Chicagoan or Borkian. Pertschuk was "the symbol of the FTC's efforts to stretch the boundaries of antitrust policy—to pursue a conception of," as Pertschuk himself put it, "'competition policy in its broadest sense.'"[188] Pitofsky after his tenure compiled a series of essays on *How the Chicago School Overshot the Mark*, where he argued that "[b]ecause extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts) have come to dominate antitrust, there is reason to believe that the United States is headed in a profoundly wrong direction."[189] And in the 1970s he famously argued in favor of taking political considerations into account in antitrust by citing another amendment to the Clayton Act, the Celler-Kefauver Act of 1950,[190] and statements by its co-sponsor Congressman Celler—who had been the chief opponent of the Robinson-Patman Act in Congress.[191]

Having shown the follies of the popular narrative on the Robinson-Patman Act and clarified the timeline of the decline and end of government enforcement of the Act, this Article turns to the actual reasons enforcement declined and eventually ended.

Kovacic in 2003—just three years after *McCormick*, when it was hardly clear that enforcement would simply cease—listed four possible explanations for the decline of FTC enforcement in the 1970s, 1980s, and 1990s: that there was a consensus amongst commentators as to the issues with the "statute and enforcement patterns through the 1960s"; that there was a consensus amongst key FTC appointees, starting with Miles Kirkpatrick's selection as FTC Chairman in 1970; that the "[c]ourts

186. D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2074 (2015).

187. Great Atl. & Pac. Tea Co., Inc. v. FTC., 440 U.S. 69 (1979).

188. William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977–1981*, 60 WM. & MARY L. REV. 1269, 1269 (2019).

189. Robert Pitofsky, *Introduction: Setting the Stage*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 167, at 3, 6.

190. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

191. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1062–65 (1979).

toughened standards that plaintiffs must satisfy to prevail," something the FTC saw for itself while defending its administrative decisions in court in the 1980s; and that "[p]rivate enforcement . . . continued at substantial levels, providing some assurance that the Act's commands would be implemented, albeit by private rather than public prosecutors."[192]

Another factor may have played a part. "[I]n 1963 the Department and the FTC formed a liaison for coordinating various aspects of antitrust enforcement, including an agreement allocating Robinson-Patman investigations and complaints to the FTC."[193] This understanding remains to this day.[194] In other words, the FTC in the last few decades of the twentieth century and in the beginning of the twenty-first was aware that, unless it enforced, there would be no government enforcement. An unwillingness, then, to leave the Act completely unenforced by the government may have factored into leadership considerations. The first decade of the twenty-first century was the first decade with no enforcement actions. That decade saw the establishment[195] and final report of the bipartisan Antitrust Modernization Commission, which recommended that Congress "finally" repeal the Robinson-Patman Act in its entirety.[196] Even the American Antitrust Institute, a think-tank set up to "provide a counterpoint to conservative influence in antitrust enforcement and competition policy,"[197] though opposed to repeal, recommended reform, arguing that the Robinson-Patman Act, "for all its faults . . . can be reformed to conform its function more closely to what is generally viewed as economically sensible."[198] The non-enforcement approach carried on across different administrations until recently.

The sordid history of government enforcement of the Act probably also made the FTC highly cautious. And for good reason.

The government historically not only did not enforce the Robinson-Patman Act in line with promoting competition, it enforced it in ways that

192. Kovacic, *The Modern Evolution*, *supra* note 160, at 413–14 (citations omitted).

193. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2370 (citing H.R. REP. NO. 1738, 94th Cong., 2d Sess. 91 (1976)).

194. *See* U.S. DEP'T JUST., ANTITRUST DIVISION MANUAL VII-3 (5th ed. 2015) ("[P]ursuant to a liaison agreement, the Department has referred all civil Robinson-Patman Act matters to the FTC for action.").

195. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856.

196. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS iii (2007) [hereinafter ANTITRUST MODERNIZATION COMM'N REPORT].

197. *Mission and History*, AM. ANTITRUST INST., https://www.antitrustinstitute.org/about-us/mission-and-history/ [https://perma.cc/NX5F-D6ZP] (last visited Mar. 31, 2026).

198. Foer, *supra* note 173, at 318 (citing AM. ANTITRUST INST., THE NEXT AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 128–37 (Albert A. Foer ed., 2008)).

reinforced the Act's paradoxes. It appears that problems emerged from the get-go: writing just one year after the Act became law, one scholar complained that "[i]nstead of endeavoring to find flagrant discriminators and to bring a few cases that might appeal to the courts, [the FTC] ha[d] gone ahead without any signs of intelligent discrimination itself."[199] At the forty-year mark, another scholar noted that "[t]he overwhelming number of absurdities resulting from the application of the Robinson-Patman Act by the [FTC] and the courts ma[de] it difficult to pick any one to illustrate undesirable features of the act."[200] A few examples are offered here nonetheless, starting with enforcement in ways that exacerbate the Robinson-Patman Act's war with the rest of antitrust.

First, as to the Act incentivizing cartel activity, in its case under the Act against Standard Oil in the 1940s, the FTC's remedy was essentially minimum resale price maintenance, which, as noted above, was at the time per se illegal under the Sherman Act.[201] As explained in the 1977 Report, the Act eventually became "cover for hard core price-fixing agreements" as "on several occasions attorneys representing companies under investigation for price fixing argued that any discussion of prices was motivated by the need to comply with the meeting competition defense" under Section 2(b) of the Act.[202] A year later, the Supreme Court held that the Act cannot be used as a pretext for anticompetitive conduct; for example, a firm can verify the prices offered by competitors, but it cannot consistently check prices directly with competing firms as this may lead to collusion and price stabilization.[203] Second, as to prices, the FTC, in its case against Anheuser-Busch in the 1960s, argued that price discrimination means a price differential of any amount, and the Supreme Court agreed.[204] The "charging of prices sufficiently different in amount to affect resale prices create[d] a virtual presumption of illegality and rebuttal of that presumption [wa]s difficult if not impossible."[205] Third, as to efficiency, the FTC in a 1967 advisory opinion took the "completely unjustified position" that a backhaul allowance—"a rebate that a seller

199. James Angell McLaughlin, *The Courts and the Robinson-Patman Act: Possibilities of Strict Construction*, 4 L. & CONTEMP. PROBS. 410, 418 (1937).
200. Yale Brozen, *Foreword* to POSNER, *supra* note 70.
201. *See* Frederick M. Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929, 942–45 (1951) (discussing Standard Oil Co., 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946), *modified and aff'd*, Standard Oil v. FTC, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951)).
202. 1977 DOJ REPORT, *supra* note 46, at 59 (citing testimony by former Assistant Attorney General Thomas Kauper).
203. United States v. U.S. Gypsum Co., 438 U.S. 422, 456–59 (1978).
204. 1977 DOJ REPORT, *supra* note 46, at 10 (discussing FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960)).
205. *Id.* at 35.

gives to buyers who pick up their own goods, typically on a 'back haul,' rather than having the goods delivered by the seller"—which was "calculated to do no more than compensate for actual but avoided freight costs" fell under the Act.[206] The Justice Department in 1977 estimated that this wasted about 100 million gallons of fuel and $300 million per year.[207] That is $1.6 billion in today's dollar.

Turning to government enforcement that reinforced the Act's war with itself, many government cases under Section 2(c), which deals with brokerage, were brought against "buying cooperatives composed of small food stores, which [had] sought to obtain a discount for having adopted methods of centralized purchasing that dispensed with a need for a food broker and so [had] made them more competitive with the chain stores."[208] By virtue of Section 2(c) enforcement, "joint buying organizations of independent distributors . . . were placed on an equal footing with the A&P."[209] Harm to small business was also done indirectly by enforcement against larger businesses. One stems from the aftermath of *FTC v. Morton Salt Co.*,[210] on which the FTC relies in the *Southern Glazer's* complaint.[211] As a consequence of the FTC case, Morton Salt "eliminated all small quantity sales of salt, harming the small purchasers who relied on these smaller quantity purchases, along with the consumers who ultimately purchased from the small purchasers."[212]

These issues did not go unnoticed at the time. Edwards, the Truman Administration head of the FTC Bureau of Economics, noted in the mid-1950s that FTC enforcement disproportionately targeted small wholesalers and manufacturers.[213] To Edwards, the FTC's enforcement program bore "some resemblance to an effort to stamp out mugging by making it an offense to permit oneself to be mugged."[214] Two decades

206. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2321e (citing Advisory Opinion No. 147, 72 F.T.C. 1050 (1967)).
207. 1977 DOJ REPORT, *supra* note 46, at 91 (citations omitted).
208. POSNER, *supra* note 70, at 46.
209. Rowe, *supra* note 59, at 1076.
210. FTC v. Morton Salt Co., 334 U.S. 37 (1948).
211. Complaint ¶ 7, FTC v. Southern Glazer's Wine and Spirits, LLC, 8:24-cv-02684-FWS-ADS, ECF 1 (C.D. Cal. Dec. 22, 2024).
212. Southern Glazer's Wine & Spirits, FTC No. 2110155, at 45 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement_southern-glazers.pdf [https://perma.cc/LPZ2-HEFS] (dissenting statement of Comm'r Melissa Holyoak) [hereinafter Holyoak, *Southern Glazer's* Dissent] (citing JOHN L. PETERMAN, FED. TRADE COMM'N, BUREAU OF ECON., THE SALT PRODUCERS' DISCOUNT PRACTICES BEFORE AND AFTER THE ROBINSON-PATMAN ACT AND THE FTC'S CHALLENGE TO THEM: THE MORTON SALT AND INTERNATIONAL SALT CASES 149 (1995)).
213. Corwin D. Edwards, *Twenty Years of the Robinson-Patman Act*, 29 J. BUS. 149, 151, 153 (1956).
214. EDWARDS, *supra* note 181, at 63.

later, F.M. Scherer, the Ford Administration head of the FTC Bureau of Economics, admitted that "[m]any [FTC] attorneys measure[d] their own success in terms of the number of complaints brought and settlements won," and "[i]n the absence of broader policy guidance . . . the typical attorney shie[d] away from a complex, long, uncertain legal contest with well-represented giant corporations and trie[d] to build up a portfolio emphasizing small, easy-to-win cases."[215] In the mid-1970s, the Bureau of Competition, facing opposition from the Bureau of Economics to enforcement of the Act given its adverse economic consequences, resorted to complaining to Congressman Patman.[216] Congress in turn held hearings where many of these issues were revealed.[217] All this was on par with the course for the FTC: it is well documented that FTC decision-making generally was not guided by the public interest through the 1980s.[218]

That government enforcement of the Robinson-Patman Act has many sorry chapters does not mean, however, that the Act ought to be treated as persona non grata on Pennsylvania Avenue. The Constitution mandates that the President "take care that the laws be faithfully executed"[219] and take an "Oath or Affirmation" to "faithfully execute the Office."[220] The former is known as the Take Care Clause, the latter as the Presidential Oath or Affirmation Clause. As Washington wrote Hamilton in 1792, it is the "duty [of the President] to see the Laws executed: to permit them to be trampled upon with impunity would be repugnant to [that duty]."[221] That there is an obligation on the executive to execute the law the Supreme Court recognized in 1838.[222]

First principles matter. Getting to a decision to not enforce by, in essence, treating the Robinson-Patman Act as nonexistent because of—well founded—concerns about it as a matter of policy is wrong. The Take Care and Oath Clauses come with a duty of "diligent, careful, good faith,

215. 1977 DOJ REPORT, *supra* note 46, at 98 (quoting Statement of F.M. Scherer).
216. Sokol, *supra* note 186, at 2074–75.
217. *Id.* at 2075.
218. *Id.* at 2071 (citing PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 1–12 (Robert J. Mackay et al. eds., 1987); Malcolm B. Coate et al., *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & ECON. 463, 464 (1990); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 329–31 (1982)); William F. Shughart II & Robert D. Tollison, *The Positive Economics of Antitrust Policy: A Survey Article*, 5 INT'L REV. L. & ECON. 39, 48–51 (1985)).
219. U.S. CONST. art. II, § 3.
220. U.S. CONST. art. II, § 1.
221. Letter from George Washington to Alexander Hamilton (Sept. 7, 1792), *in* 32 WRITINGS OF GEORGE WASHINGTON 144 (John C. Fitzpatrick ed., 1939).
222. Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838).

honest, and impartial execution of law or office."[223] As now-Chairman Ferguson put it in his *Southern Glazer's* dissent, "even if the research unequivocally proved that enforcing the Act would injure consumer welfare, the Executive Branch still could not simply suspend the law."[224] This sentiment is shared by Commissioner Meador[225] and former Commissioner Holyoak,[226] who was at the FTC at the time of both the Southern Glazer's and Pepsi suits and the latter's dismissal.

In short, the right approach of the executive to the Robinson-Patman Act requires acknowledging the Act's many flaws, that it is the Congress's prerogative to enact terrible laws if it so desires, that the executive does not get to undo Acts of Congress, and that it has a duty to in good faith engage with the laws enacted by the Congress.

With these first principles in mind, how is the government to approach enforcement of the Robinson-Patman Act? To make that determination, an important datapoint is how the Act is otherwise being enforced, in other words, private enforcement. "[P]rivate suits provide a significant supplement to the limited resources available to the [federal government] for enforcing the antitrust laws and deterring violations."[227]

A Westlaw search shows that at least fourteen Robinson-Patman Act cases were litigated in 2023, including two before the circuit courts,[228] and

223. Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2111 (2019). *See also* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1858 (2016) (finding that "both clauses, read in light of each other, point toward a general obligation of good faith, as measured by the norms and expectations that governed the proper exercise of executive power at the time").

224. Southern Glazer's Wine & Spirits, FTC No. 2110155, at 23 (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southernglazers-statement.pdf [https://perma.cc/K95M-PZP6] (dissenting statement of Comm'r Andrew Ferguson) [hereinafter Ferguson, *Southern Glazer's* Dissent].

225. Mark Meador, *Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers*, FED. SOC'Y BLOG (July 9, 2024), https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers [https://perma.cc/2WGR-H6GF].

226. Holyoak *Southern Glazer's* Dissent, *supra* note 212, at ii.

227. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

228. U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC, 74 F.4th 960 (9th Cir. 2023), *amended and superseded on denial of reh'g en banc*, 89 F.4th 1126 (9th Cir. 2023), *cert. denied*, 2024 WL 4426552 (Oct. 7, 2024); *In re* AMR Corp., 2023 WL 2563897 (2d Cir. Mar. 20, 2023), *cert. denied sub nom.* Fjord v. Am. Airlines Grp., Inc., 144 S. Ct. 102 (2023); L.A. Int'l Corp. v. Prestige Brands Holdings, Inc., 2023 WL 8896249 (C.D. Cal. Nov. 14, 2023); Elite Sub-Zero Repair v. Great Plains Appliance Parts, Inc., 2023 WL 11916709 (W.D. Tex. Oct. 31, 2023); Turner v. Luxotitica Retail N. Am., Inc., 2023 WL 7167853 (S.D. Cal. Oct. 30, 2023); Turner v. Advantage GPS, 2023 WL 7354778 (S.D. Cal. Oct. 30, 2023); Power Buying Dealers USA, Inc. v. Juul Labs, Inc., 2023 WL 6049936 (N.D. Ill. Sept. 15, 2023); Coyle Nissan, LLC v. Nissan N. Am., Inc.,

at least nineteen in 2010, including four at the circuit level.[229] This is decades after *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[230] limited the more permissive standard in primary-line cases under *Utah Pie Co. v. Continental Baking Co.*[231] It is also after *Ashcroft v. Iqbal*[232] and *Bell Atlantic Corp. v. Twombly*,[233] which have meant, as the Sixth Circuit once made clear, that Robinson-Patman Act cases are being dismissed that, before those two decisions, "courts would probably have allowed . . . to proceed" to discovery.[234] Westlaw shows at least twenty-two cases, including five at the circuit level, litigated in 2000, before *Iqbal* and *Twombly* but after *Brooke Group*, and the same year as *McCormick*.[235] The

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2023 WL 4866334 (S.D. Ind. July 31, 2023); Anderson v. Akridge, 2023 WL 4722530 (S.D. Ala. June 30, 2023), *report and recommendation adopted*, 2023 WL 4708006 (S.D. Ala. July 24, 2023); *In re* Direct Purchaser Insulin Pricing Litig., 2023 WL 3431213 (D.N. J. May 12, 2023); Johnson v. Cap. One Bank, N.A., 2023 WL 2733486 (D.C. Cir. Mar. 31, 2023); Nasreen v. Capitol Petrol. Grp., 2023 WL 2734210 (D.D.C. Mar. 31, 2023); Roma Mikha, Inc. v. Southern Glazer's Wine & Spirits, LLC, 2023 WL 3150076 (C.D. Cal. Mar. 30, 2023); Arconic Corp. v. Novelis Inc., 2023 WL 2403916 (W.D. Pa. Mar. 8, 2023).

229. McCullough v. Zimmer, Inc., 382 F. App'x 225 (3d Cir. 2010); Shell Co. v. Los Frailes Serv, 605 F.3d 10 (1st Cir. 2010); Alaska Airlines Inc. v. Carey, 395 Fed. App'x 476 (9th Cir. 2010); Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191 (3d Cir. 2010); Sales Res., Inc. v. All. Foods, Inc., 2010 WL 5184943 (E.D. Mo. Dec. 15, 2010); Morning Star Packing Co. v. SK Foods, L.P., 754 F. Supp. 2d 1230 (E.D. Cal. 2010); Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys., Inc., 2010 WL 4365807 (W.D. Wash. Oct. 27, 2010), *aff'd*, 723 F.3d 1019 (9th Cir. 2013); Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F. Supp. 2d 568 (W.D.N. C. 2010); Church & Dwight v. Mayer Lab'ys, Inc., 2010 WL 3907038 (D.N. J. Sept. 28, 2010); Dayton Superior Corp. v. Spa Steel Prod., Inc., 2010 WL 3825619 (N. D.N. Y. Sept. 24, 2010); Coal. For A Level Playing Field, L.L.C. v. AutoZone, Inc., 737 F. Supp. 2d 194 (S.D.N.Y. 2010); Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co., 2010 WL 3488244 (E.D. La. Aug. 26, 2010); Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n, 2010 WL 3168032 (S.D. Miss. Aug. 10, 2010), *rev'd and remanded*, 658 F.3d 500 (5th Cir. 2011); Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp., 2010 WL 11478992 (N.D.Cal. July 21, 2010), *aff'd*, 525 F. App'x 612 (9th Cir. 2013); Barnett Chrysler Plymouth Co. v. Kia Motors Am., Inc., 2010 WL 11534351 (D. Minn. Apr. 16, 2010); Staton Holdings, Inc. v. Russell Athletic, Inc., 2010 WL 1062566 (N.D.Tex. Mar. 19, 2010); Zachariah v. BP Prod. N. Am., 2010 WL 11712309 (N.D. Ill. Jan. 22, 2010); Trigeant Ltd. v. Petroleos de Venezuela S.A., 2010 WL 11505968 (S.D. Fla. Jan. 5, 2010).

230. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

231. Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

232. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

233. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

234. New Albany Tractor v. Louisville Tractor, 650 F.3d 1046, 1051 (6th Cir. 2011).

235. Bridges v. MacLean-Stevens Studios, Inc., 201 F.3d 6 (1st Cir. 2000); Handicomp, Inc. v. U.S. Golf Ass'n, 2000 WL 426245 (3d Cir. Mar. 22, 2000); Patterson v. Ford Motor Credit Co., 203 F.3d 821 (4th Cir. 2000); Acoustic Systems Inc. v. Wenger Corp., 207 F.3d 287 (5th Cir. 2000); Huntsman Chem. Corp. v. Holland Plastics Co., 208 F.3d 226

Westlaw number for 1970, when government enforcement was at its height, is eighteen, including nine at the circuit level.[236]

The numbers, in short, show some consistency and, even more so, that private enforcement today is robust. Note that private actions often "follow on" from a successful government action. In one famous example, following the government's success in the seminal case against Microsoft,[237] IBM, AOL, and Sun sued Microsoft, which settled and paid, in total, north of $9 billion.[238] Recent plaintiffs under the Robinson-

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(10th Cir. 2000); Johnson Controls, Inc. v. Exide Corp., 2000 WL 1849293 (N.D. Ill. Dec. 15, 2000); Augusta News Co. v. Hudson News Co., 2000 WL 1772466 (D. Me. Nov. 29, 2000), *recommendation aff'd*, 2001 WL 1334362 (D. Me. Jan. 11, 2001), *aff'd*, 269 F.3d 41 (1st Cir. 2001); Moecker v. Honeywell Int'l, Inc., 2000 WL 34361504 (M.D. Fla. Oct. 23, 2000); O'Dell v. Gen. Motors Corp., 122 F. Supp. 2d 721 (E.D. Tex. 2000); Bailey v. Allgas, Inc., 148 F. Supp. 2d 1222 (N.D. Ala. 2000), *aff'd*, 284 F.3d 1237 (11th Cir. 2002); Town & Country Equip., Inc. v. Deere & Co., Inc., 133 F. Supp. 2d 665 (W.D. Tenn. 2000); Bayshore Ford Truck Sales Inc. v. Ford Motor Co., 2000 WL 35948714 (N.D. Ga. Sept. 5, 2000); LCA, Inc. v. Sharp Elecs. Corp., 2000 WL 1222044 (N.D. Ill. Aug. 22, 2000); Hix Corp. v. Nat'l Screen Printing Equip. Inc., 108 F. Supp. 2d 1204 (D. Kan. 2000); Sheet Metal Duct, Inc. v. Lindab, Inc., 2000 WL 987865 (E.D. Pa. July 18, 2000); Via Fone, Inc. v. W. Wireless Corp., 106 F. Supp. 2d 1147 (D. Kan. 2000); Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465 (5th Cir. 2000); Amsterdam Tobacco Inc. v. Philip Morris Inc., 107 F. Supp. 2d 210 (S.D.N.Y. 2000); Peerless Heater Co. v. Mestek, Inc., 2000 WL 637082 (E.D. Pa. May 11, 2000); Allied Sales & Serv. Co. v. Glob. Indus. Techs., Inc., 2000 WL 726216 (S.D. Ala. May 1, 2000); Cancall PCS v. Omnipoint Corp., 2000 WL 272309 (S.D.N.Y. Mar. 10, 2000); Intimate Bookshop, Inc. v. Barnes & Noble, Inc., 88 F. Supp. 2d 133 (S.D.N.Y. 2000).

236. Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970); Indus. Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970); Data Processing Fin. & Gen. Corp. v. Int'l Bus. Mach. Corp., 430 F.2d 1277 (8th Cir. 1970); Exp. Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251 (6th Cir. 1970); Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970); A & M Stores, Inc. v. Hiram Walker, Inc., 427 F.2d 167 (5th Cir. 1970); Int'l Film Ctr., Inc. v. Graflex, Inc., 427 F.2d 334 (3d Cir. 1970); Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir. 1970); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970); Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co., 313 F. Supp. 1184 (N.D. Tex. 1970); Flotken's W., Inc. v. Nat'l Food Stores, Inc., 312 F. Supp. 136 (E.D. Mo. 1970); Rec. Club of Am., Inc. v. Columbia Broad. Sys., Inc., 310 F. Supp. 1241 (E.D. Pa. 1970); Karlinsky v. N.Y. Racing Ass'n, Inc., 310 F. Supp. 937 (S.D.N.Y. 1970); Rosen v. Kahlenberg, 337 F.Supp. 1075 (M.D. Fla. 1970), *rev'd*, 474 F.2d 858 (5th Cir. 1973); Gossner v. Cache Valley Dairy Ass'n, 307 F. Supp. 1090 (D. Utah 1970); Harlem River Consumers Co-op., Inc. v. Assoc. Grocers, 1970 WL 545 (S.D.N.Y. Nov. 12, 1970), *aff'd*, Harlem River Consumers Co-op., Inc. v. Associated Grocers, 450 F.2d 271 (2d Cir. 1971); Centex-Winston Corp. v. Edward Hines Lumber Co., 1970 WL 557 (N.D. Ill. Oct. 15, 1970), *rev'd*, 447 F.2d 585 (7th Cir. 1971); Bowen v. The News, 1970 WL 529 (S.D.N.Y. July 16, 1970).

237. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc).

238. U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 162 n.150 (2008) (citing remarks by Charles F. Rule and William H. Page).

Patman Act have not had the benefit of following on after a government case, but the number of private cases is still considerable.

Proponents of the Robinson-Patman Act point out that the success rate of private plaintiffs dropped from thirty-five percent in 1982–93 to less than five percent in 2006–10.[239] This shift concerns substantive law, the impact of *Brooke Group* in primary-line cases and *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*[240] in secondary-line cases—which saw the only plaintiff success in 2006–10.[241] But these numbers hurt, not help, the proponents' case. Antitrust cases are notoriously tough, fact-heavy, and resource-devouring. Courts and litigants were heavily burdened, and in the heyday of liability for both primary-line and secondary-line cases pre-*Brooke Group* and pre-*Volvo*, just thirty-five percent of private plaintiffs succeeded.

Brooke Group and *Volvo* did not stop the numerous cases noted above, and there is thus no reason to believe the deterrent effect will not remain strong. That can be pernicious for competition: the threat of treble damages under the Robinson-Patman Act often instills in buyers and sellers alike extreme pricing caution,[242] thus "create[ing] in the business community an atmosphere where caution, not competition, is the rule in setting non-uniform prices."[243] And the antitrust laws are consistently used by market participants as a sword to be wielded against their competitors in the service of their own interests.[244] The Robinson-Patman Act is no exception.[245]

In view of these facts, what should the government's enforcement approach to the Robinson-Patman Act be? The executive gets "to decide 'how to prioritize and how aggressively to pursue legal actions against

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239. Erik Peinert & Katherine Van Dyck, *The Needless Desertion of Robinson-Patman*, PROMARKET (Oct. 10, 2022), https://www.promarket.org/2022/10/10/the-needless-desertion-of-robinson-patman/ [https://perma.cc/RP5M-JRZX] (citing Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123 (2010)).

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

241. Luchs et al., *supra* note 239, at 2124.

242. 1977 DOJ REPORT, *supra* note 46, at 33–35.

243. *Id.* at 36.

244. R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. STRATEGIC MGMT. EDUC. 1, 2 (2004); Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 2 (1995); William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 J.L. & ECON. 405, 405 (1985); James C. Miller, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 267, 267 (1985); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 247 (1985).

245. Ward S. Bowman, *Restraint of Trade by the Supreme Court: The* Utah Pie *Case*, 77 YALE L.J. 70, 70 (1968).

defendants who violate the law.'"[246] Amongst the relevant factors in prosecutorial discretion are "the Government's enforcement priorities" and "the case's relationship to the Government's overall enforcement plan."[247] And the government must be guided by the interests of the public.[248] The public interest is the lodestar of the federal prosecutor because, in the words of Robert Jackson, who was the head of the Antitrust Division before his service as Attorney General and on the Supreme Court, the federal prosecutor has "tremendous" discretion and "more control over life, liberty, and reputation than any other person in America."[249] In the antitrust laws too, the principle that the public interest ought to guide government prosecution is embedded.[250] To protect the public interest and guard resources, the government's overall enforcement plan ought to be based on the protection of competition, not competitors. That is true of antitrust in general: "putting aside questions of wealth distribution as the province of other laws, such as tax and welfare," "our best hope for a competitive economy and a wealthier society . . . lies in our single-mindedly directing our antitrust efforts toward preserving competition, pure and simple, as best we can understand how to do that."[251] Enforcement of the Robinson-Patman Act should be no different.

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246. United States v. Texas, 599 U.S. 670, 671 (2023) (quoting TransUnion LLC v. Ramirez, 594 U.S. 413, 429 (2021)).
247. Wayte v. United States, 470 U.S. 598, 607 (1985).
248. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").
249. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).
250. *See* 15 U.S.C. § 53(b) (giving the FTC power, if it has "reason to believe" that an individual or entity "is violating, or is about to violate" a law enforced by the FTC, to bring suit in federal court for a temporary restraining order or a preliminary injunction, which "may be granted" "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant"); United States v. Borden Co., 347 U.S. 514, 518 (1954) ("[I]t is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under the[] [antitrust] laws.").
251. Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1278 (1988).

But where does harm to competition lie in the context of the Robinson-Patman Act? It's in "a powerful buyer/retailer with many outlets [which] protect[s] itself from retail competition by forcing suppliers to charge rivals higher prices or give them less advantageous terms."[252] Such "powerful dealers . . . would prefer to limit the competition between themselves and other dealers in the manufacturer's brand."[253] They can do so by, for example, "forc[ing] the manufacturer to impose resale price maintenance on competing dealers, thus sheltering the powerful dealer from other dealers' price competition," imposing "locational or territorial restrictions that might serve to limit the dominant dealer's competition with rival dealers," and strongarming the "manufacturer [in]to giv[ing] [them] a lower price than other dealers receive," something which in turn "provides an umbrella under which the dominant dealer can increase its own margins."[254] To manufacturers, yielding to the demands of the powerful dealer—"or perhaps a group of dealers acting as a cartel"[255]—is "often . . . cheaper than looking for alternatives."[256] And if they did look for alternatives, odds are they would set up their own outlets: the Robinson-Patman Act "applies only to a supplier's sales to independent dealers," so manufacturers "for whom the costs of Robinson-Patman Act enforcement is high," say, Pepsi, "are motivated to switch away from networks of independent dealers and toward manufacturer-owned outlets."[257] This, of course, is part of the paradox of the Robinson-Patman Act: harming independents in the name of independents.

Sound government enforcement of the Robinson-Patman Act requires focusing on harm to competition. This enforcers across ideological lines

252. Hovenkamp, Written Testimony, *supra* note 135, at 4.
253. *Id.* at 9.
254. *Id.* at 9–10.
255. *Id.* at 9.
256. *Id.* at 10.
257. *Id.* at 7–8.

have recognized: FTC Chairman Ferguson,[258] former Chairman Pitofsky,[259] and former head of the Antitrust Division William Baxter.[260]

And sometimes not enforcing is the better course of action. An example from Pitofsky's tenure as Chairman—though Pitofsky himself was recused—is illustrative. In 1996, the FTC decided to dismiss complaints against book publishers even after consent decrees had been proposed that would "prohibit most of the practices that led to the complaints."[261] The FTC identified two reasons it was in the "public interest to . . . dismiss the complaints."[262] First, the industry had "changed appreciably."[263] "[T]he dynamics and structure of the book distribution

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258. *See* Ferguson, *Southern Glazer's* Dissent, *supra* note 224, at 27, 30 ("The Commission has limited resources. Every enforcement action we bring consumes a large chunk of those resources and may do so for many years as the case wends its way through the courts. We must be choosy about how we commit the taxpayers' resources and ensure that we get the biggest bang for their buck. Applying that principle to the Robinson-Patman Act, I conclude that we should bring secondary-line cases only when there is strong evidence that the favored purchasers possess market power . . . . Treating the Robinson-Patman Act as a nullity for decades offended the separation of powers. That offense is vitiated today. But the Commission ought not to revive enforcement of the Act merely for the sake of reviving enforcement. We must exercise sound judgment in deciding when to enforce the Act. We fail to do so here. We ought to enforce the Act where it will serve the broad public interest, and bring only those cases we are likely to win. This case checks neither box. I therefore respectfully dissent from the filing of this Complaint."); Non-Alcoholic Beverages Price Discrimination Investigation, FTC No. 2210158, at 2–3 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf [https://perma.cc/B2QP-3G63] (dissenting statement of Comm'r Andrew Ferguson) [hereinafter Ferguson, *Pepsi* dissent] ("I [am] willing to enforce the Act where (1) we ha[ve] solid evidence that a firm ha[s] violated the Act, and (2) the retailer benefitting from the discrimination ha[s] market power sufficient to pose a danger to competition.").

259. *See* Boise Cascade Corp., 107 F.T.C. 76, 79 (1986) (Pitofsky, Comm'r, dissenting) ("[The Robinson-Patman Act] should be enforced by this agency, and I am convinced that sensible cases can be initiated—addressing real issues of injury to competition."); Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817, 829–30 (1987) ("I do not believe that price or term discrimination can never yield anticompetitive effects, but cases should be selected carefully, with a liverly [sic] regard for the kind of competition called for by the Sherman Act. An increased emphasis on efficiency should temper the declining commitment to the 'small is beautiful' notion, ensuring that Robinson-Patman enforcement will be selective and comparatively restrained.") (citation omitted).

260. *See Interview with William F. Baxter*, 50 ANTITRUST L.J. 151, 155 (1981) ("The Robinson-Patman Act is at present the law of the land. The executive branch has a constitutional obligation to enforce the law of the land . . . . As cases come along they will be examined, but resources are limited. One has to determine which cases will do the most to avoid artificial restrictions on output and the resultant enhancement of consumer prices. I will bring any Robinson-Patman case which in my judgment answers that description.").

261. Harper & Row Publishers, Inc., 122 F.T.C. 113, 113 (1996).

262. *Id.*

263. *Id.*

market ha[d] evolved in significant ways, reflecting the growth of 'superstores' and warehouse or 'club' stores," and the major book publishers had both modified their pricing and promotional strategies and "replaced the principal forms of alleged price discrimination that prompted the complaints—unjustified quantity discounts on trade books and secret discounts on mass market books—with other pricing strategies."[264] Second, further investigation would not be "a necessary or prudent use of scarce public resources"[265] for the following reasons: directing FTC staff to investigate further and, if appropriate, to negotiate revised consent agreements "would be time-consuming and resource-intensive" and "even more resources would be needed in the event that litigation became necessary"; any consent agreements "might not effectively [had] prevent[ed] the respondents from adopting, pursuant to the 'meeting competition' defense, practices used by other publishers" not subject to a consent agreement; and several private actions challenging alleged discrimination in the industry had been filed and consent decrees against four publishers had already been obtained.[266]

By contrast, the FTC's approach in *Southern Glazer's* and *Pepsi* is textbook what-not-to-do. Starting with *Southern Glazer's*, the majority statement, written by former Commissioner Bedoya, asserts that "the absence of empirical support for claims of price increases [because of the Act] is disqualifying" when the Act has been on "the books for 89 years" and "actively enforced for 60 of them."[267] It then admits that "the theoretical literature on this topic is mixed, at best"[268] and then cites one working paper for the statement that "recent scholarship points to a clear consumer benefit to Robinson-Patman enforcement."[269]

The majority got it backwards. In enforcing or not enforcing, with millions of taxpayer dollars on the line, the onus is on the enforcer/spender to show that what is being done is to the benefit of the public at large. It's been nine decades since the Act became law, the FTC enforced it for more than half a century (in ways that harmed the consumer and small business), the criticism that has been directed at the Act has been "long-lived and unrelenting,"[270] and yet all the FTC has to cite, in committing a

264. *Id.*
265. *Id.*
266. *Id.* at 114.
267. Bedoya, *Southern Glazer's* Statement, *supra* note 9, at 11.
268. *Id.* at 11 n.63.
269. *Id.* (citing ASLIHAN ASIL, CAN ROBINSON-PATMAN ENFORCEMENT BE PRO-CONSUMER? (2024)).
270. Hovenkamp, *Unfinished Business*, *supra* note 17, at 130. *See also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) ("[N[o other antitrust

considerable amount of taxpayer money and taking it away from other enforcement efforts, is one working paper.

Pepsi was the first case under Sections 2(d) and 2(e) since the complaints against the book publishers discussed above. Possibly as a result of the misguided effort to rush the complaint out the door the week before the change of administration, there is no majority statement: former Chair Khan's statement was joined by former Commissioner Bedoya, while former Commissioner Slaughter voted to file the complaint but did not explain why.

Former Chair Khan's statement cites as authoritative the "Commission's own guidance" as outlined in the Fred Meyer Guides.[271] The Supreme Court in *FTC v. Fred Meyer*, a Section 2(d) case, "h[eld] only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales."[272] This may well mean, as the Sixth Circuit seems to have concluded, that *Fred Meyer* is limited to its factual situation—the seller offered allowances or facilities to a directly purchasing large retailer but did not offer to a wholesale intermediary or the intermediary's retailer customers.[273] In any event, the "result [of *Fred Meyer*] [wa]s an administrative nightmare for the seller,"[274] and the FTC issued regulations, known as the Fred Meyer Guides,[275] to "detail the conditions which must be obeyed in order to avoid an FTC enforcement action."[276] But "[e]ven attorneys favorable to [the] Robinson-Patman [Act] . . . concluded" over forty years ago that the Guides "are so complex as to be totally unworkable."[277]

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statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act.").

271. Khan, *Pepsi* Statement, *supra* note 9, at 3 (citing 16 C.F.R. § 240.7 (1969)).

272. FTC v. Fred Meyer, Inc., 390 U.S. 341, 358 (1968).

273. *See* Lewis v. Philip Morris, Inc., 355 F.3d 515, 526 (6th Cir. 2004) ("In light of the Commission's argument that it would create a huge burden on manufacturers to have to bypass wholesalers and provide allowances to all of their retailers, the Court seemed to narrow its holding: 'We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales.'") (quoting *Fred Meyer*, 390 U.S. at 358).

274. POSNER, *supra* note 70, at 48.

275. 16 C.F.R. §§ 240.1–240.15 (1969).

276. 1977 DOJ REPORT, *supra* note 46, at 92.

277. *Id.* (citing testimony from Jerrold C. Van Cise).

The Guides were last updated in 2014 and before that were updated once, in 1990. 79 Fed. Reg. 58245-01 (Sept. 29, 2014); 55 Fed. Reg. 33651 (Aug. 17, 1990). The changes have been minor.

Further, and more importantly, the FTC brought this case not because it believes there was harm to competition. And even under the Fred Meyer Guides, "requiring proof of likely injury to competition is sound enforcement policy."[278]

The complaint and former Chair Khan's statement call violations of Sections 2(d) and 2(e) per se illegal.[279] That violations of Sections 2(d) and 2(e) are per se illegal has been repeated by courts,[280] but it is not true: the meeting competition defense under Section 2(b) is by its terms applicable to Section 2(e),[281] and some courts—using the purposivist analysis popular in the mid-twentieth century—found the defense applicable to Section 2(d) as well.[282] That exception notwithstanding, it is true that courts and the FTC itself, as outlined in the Fred Meyer Guides, have found that no showing of harm to competition is required.[283] This is in contrast to private actions: courts have held that private plaintiffs must show competitive harm.[284]

278. 79 Fed. Reg. 58245-01, 58247.
279. Khan, *Pepsi* Statement, *supra* note 9, at 4 (citing FTC v. Simplicity Pattern Co., 360 U.S. 55, 67–68, 68 n.13 (1959); ROWE, *supra* note 173, at 372).
280. *See, e.g.*, Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 747 (7th Cir. 2016) ("[T]he Robinson-Patman Act introduced a per se ban on one method that manufacturers had used to circumvent subsection 13(a): concealing price discrimination as a promotional service provided to the purchaser. Congress found that manufacturers had been providing valuable services, such as paying for the purchaser's advertisements, to preferred purchasers (usually large chain stores) as a way to provide a discount without running afoul of subsection 13(a)."); Grand Union Co. v. FTC, 300 F.2d 92, 99–100 (2d Cir. 1962) ("Section 2(d) defines an offense which is illegal per se.").
281. *See* Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 501–02 (D.C. Cir. 1961) ("All parties seem to agree that the defense . . . is available in response to charges under Subsections (a) and (e) . . . . While 'services or facilities' are the subject of both [Sections 2(d) and 2(e)], in the one case ((e)) the vendor furnishes them to the customer; in the other they are furnished by the customer and the vendor reimburses him. So that, if careful note is taken of the difference between Subsections (d) and (e), and if Subsection (b) is read quite literally, the language of the statute appears to support the view . . . that a person can meet competition by directly supplying some but not all customers with services and facilities with which to promote sales, but he cannot meet competition by reimbursing some but not all of his customers for services or facilities they procure in the first place.").
282. *See Exquisite Form Brassiere*, 301 F.2d at 502–05; Shulton, Inc. v. FTC, 305 F.2d 36, 37–38 (7th Cir. 1962) (quoting from *Exquisite Form Brassire*, stating "agree[ment] with th[e] reasoning," and deciding that the "defense [i]s available" in Section 2(d) cases without further explanation).
283. 79 Fed. Reg. 58245-01, 58247; FTC v. Simplicity Pattern Co., 360 U.S. 55, 65, 71 n.18 (1959); Kirby v. P.R. Mallory & Co., 489 F.2d 904 (7th Cir. 1973).
284. *See, e.g.*, Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 25 (1st Cir. 1981) (Breyer, J.) ("[Section] 2(e), like the rest of the Robinson-Patman Act, is aimed at significant harm to competition; and therefore the injury suffered from its violation must be something more than failure to obtain a sporadic advantage once made available to a single competitor.").

Though no showing of competitive harm is required, and that makes the government's job easier, former Chair Khan speaks in her statement of harm to competition. She states first that Sections 2(d) and 2(e) were violated and then, as an afterthought, that Pepsi's conduct is "also . . . harming competition."[285]

The complaint—which was filed by the FTC "heavily redacted" and ordered largely unsealed[286] after the intervention of a third party following the voluntary dismissal of the case by the FTC under the Trump administration[287]—does similarly. It states that Sections 2(d) and 2(e) are illegal per se[288] and then, in one short paragraph with no specifics, that "[a]s a result of Pepsi's favoritism toward Walmart, the Disfavored Retailers," meaning brick-and-mortar stores, "have sold lower volumes of Pepsi soft drinks than they would have sold in the absence of the discriminatory conduct and have made lower profits on the products they did sell," conduct that "caused the Disfavored Retailers and the American consumers who are their customers to pay higher prices for Pepsi soft drinks over the course of years."[289]

But if there was harm to competition, the case could have been brought under Section 2(a) to go after the price discrimination that features heavily under the complaint.[290] The majority instead brought this action under Sections 2(d) and 2(e), which were enacted to go after indirect means of

285. Khan, *Pepsi* Statement, *supra* note 9, at 1 (emphasis added).

286. FTC v. PepsiCo Inc., 2025 WL 3484835, at *1 (S.D.N.Y. Dec. 4, 2025).

287. Notice of Voluntary Dismissal, FTC v. PepsiCo Inc., 1:25-cv-00664-JMF, ECF 42 (S.D.N.Y. May 22, 2025); Order Dismissing Case, ECF 43 (S.D.N.Y. May 22, 2025).

288. Complaint ¶ 73, FTC v. PepsiCo Inc., 1:25-cv-00664-JMF, ECF 68 (S.D.N.Y. Dec. 11, 2025).

289. *Id.* ¶ 74; *see id.* ¶ 64 (defining "Disfavored Retailers" as "brick-and-mortar retailers").

290. *See, e.g.*, *id.* ¶ 5 ("Pepsi works with Walmart to create a retail 'price gap' or 'price hedge' between Walmart and its competitors, or in other words, to give Walmart lower average retail prices than its competitors. The purpose of the price gap is to provide Walmart with an advantage over its brick-and-mortar competitors in the resale of Pepsi soft drinks to the consumer. Pepsi's ordinary course documents reflect a 'foundational commitment' to provide Walmart with this price gap: 'Delivering on Walmart hedge commitments is an aligned commercial strategy' across Pepsi. As one internal Pepsi email explains, 'stay[ing] focused on our price gap . . . is how we win with Walmart—[w]e stay focused on our deliverables and commitments.'"), ¶ 14 ("When Pepsi learns that other retailers are threatening Walmart's retail price gap, Pepsi sometimes reduces or eliminates promotional support for those retailers to buttress Walmart's retail price advantage in the resale of Pepsi soft drinks. Pepsi similarly will increase wholesale prices for such non-Walmart retailers with the expectation that to meet margin goals, those retailers will pass on the wholesale price increase to consumers by raising retail prices on Pepsi soft drinks. In other words, to enforce Walmart's price gap, Pepsi at times seeks to drive up retail prices for Pepsi soft drinks sold by Walmart's rivals.").

price discrimination.[291] Put another way, the majority, its own story goes, chose to go after indirect price discrimination when direct price discrimination is present under the facts it alleges and the core element of that, harm to competition, was also, as the majority insists, present. "Pure applesauce"[292]—the other, not undesirable form of which can conveniently be found not far from cost-effective beverages at many a local chain store.

In short, what the FTC did here is highly inappropriate for a government agency. The majority rushed to get out the door an eleventh-hour action. One commissioner offered no explanation, and the two who did simultaneously told businesses to look at the Fred Meyer Guides for what is and what is not legal and enforced the law in direct violation of those same guides—that the FTC issued itself. And in a sordid exercise of prosecutorial discretion, the FTC majority rushed out a complaint divorced from competitive concerns on which antitrust complaints ought to be grounded and committed—or, rather, attempted to commit, an effort thankfully thwarted after the change of administration—millions of taxpayer dollars that it could have chosen to invest in enforcement against businesses that engaged in conduct that did harm the consumer. That is exactly the kind of enforcement in which the FTC engaged decades ago.[293]

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291. *See* AREEDA & HOVENKAMP, *supra* note 43, ¶ 2363a ("[Sections 2(d) and 2(e)] represent Congress's attempt to address certain 'alternative' forms of price discrimination believed to injure smaller buyers. A seller might charge different buyers the same nominal price but then offer favored buyers various promotional literature, services, consultants or other personnel, or in some cases processing facilities. Of course, to the extent that these services are costly to the seller and have value to the buyer, the impact is the same as a 'direct' price discrimination. And indeed, many instances of discriminatory service provision are probably reachable under §2(a)'s coverage, which extends to indirect as well as direct price discriminations. But the statutes do have somewhat different coverage and applications."). *See also* FTC v. Fred Meyer, Inc., 390 U.S. 341, 351–52 (1968) ("The draftsman of the provision which eventually emerged as § 2(d) explained that, even when such payments were made for actual sales promotional services, they were a form of indirect price discrimination because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not. That Congress adopted this view of the practice it sought to eliminate by § 2(d) is demonstrated by the words used by the Senate Judiciary Committee in recommending enactment of the section [.] . . . Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers.") (citations omitted).

292. King v. Burwell, 576 U.S. 473, 507 (2015) (Scalia, J., dissenting).

293. *See, e.g.*, Borman Food Stores, 81 F.T.C. 201, 208 (1972) (Elman, Comm'r, dissenting) ("[Two members of the FTC majority] agreed that if their economic analysis was sound, lettuce prices would be increased but they argued that 'such factors should [not] determine whether the Commission enforces' Section 2(c) because, they said, the Commission should not be concerned about the interim allocation of resources among

That enforcement playbook was long ago abandoned. It should have stayed that way. Harm-to-competitors cases ought to be left to the harmed competitors.[294] As explained by Judge Douglas Ginsburg, a former head of the Antitrust Division, there are two cardinal principles of antitrust enforcement: "do no harm" and "promote competition as the best economic policy a government can have, suitable in almost all markets, in all seasons."[295] The *Pepsi* suit violated both.

A final matter: the generally forgotten Section 3. Section 3 provides for imprisonment of up to one year, a fine of up to $5,000, or both for three types of conduct: "sell[ing], or contract[ing] to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor"[296] and "general" and "geographical" price discrimination.[297] Private parties cannot enforce Section 3,[298] taking private enforcement out of the equation. And it is only the Justice Department that can enforce Section 3, it being a criminal statute.

The "unreasonably low prices" provision is of questionable constitutionality. Under the vagueness doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" is unconstitutional.[299] When Section 3 was heavily litigated in the 1950s, one court stated that it was "beset with doubts as to the constitutionality" of Section 3 even as it affirmed.[300] The 1955 Report expressed concerns about the constitutionality of "this harsh criminal law" on vagueness grounds.[301] Three years later, in *Nashville Milk Co. v.*

growers, distributors, and consumers. That there was no competitive injury from these practices they also deemed irrelevant, since Section 2(c) 'makes no reference to competitive injury.' In their view, 'the statutory scheme is plain' and it would 'frustrate the legislative intent' for the Commission not to issue this complaint. Although it was recognized that 'of course, an increase in cost of .4¢ on every head of lettuce sold in the country would be a significant amount, and that if these proceedings had any economic impact it would be an inflationary one, the majority members believed that the Commission had no discretion in the matter and was compelled to proceed with these complaints, even though their issuance might be antithetical to fundamental national policies declared by Congress and the President.").

294. *See infra* notes 392–405 and accompanying text (explaining that current case law prohibits private harm-to-competitor cases but that the text of the Robinson-Patman Act and the Clayton Act provisions affording private plaintiffs rights to damages and injunctive relief allow such suits).

295. Ginsburg, *supra* note 251, at 1282.

296. 15 U.S.C. § 13a.

297. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 377 (1958).

298. *Id.*

299. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

300. United States v. Bowman Dairy Co., 89 F. Supp. 112, 114 (N.D. Ill. 1949).

301. 1955 REPORT, *supra* note 88, at 201.

Carnation Co., the Supreme Court called Section 3 "vague" but appeared satisfied to limiting its enforcement to "public authorities."[302] In a footnote, addressing the district court's concerns that "the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties," the Court thought it sufficient to note that the Justice Department had at that point not "so far as it [was] able to determine, brought proceedings" under the "unreasonably low prices" provision.[303] That changed soon, and the Court had to address the question in *United States v. Nat'l Dairy Prods. Corp.*[304] There, the Court—with no reference to *Nashville Milk*—overturned the district court's decision that the provision was unconstitutionally vague and held that, at least as applied to the defendants, the provision was not vague as the defendants could reasonably understand their conduct was a violation of Section 3 because they sold their goods below cost.[305] "By today's standard for below-cost pricing, the conduct would not only not be criminal, it would also not be a violation of the Act."[306] The Court also held[307] that its finding was bolstered by the inclusion of an intent requirement within the terms of Section 3, that the goods must be sold "for the purpose of destroying competition." The Court further noted the "specificity of the violations charged in the indictment."[308] The dissent compared Section 3 to the language of the statute at issue in *United States v. L. Cohen Grocery Co.*, where the Court found unconstitutionally vague a criminal statute outlawing "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."[309] The dissent concluded that *L. Cohen Grocery Co.* "should control."[310]

The vagueness doctrine stems from due process, "guarantee[ing] that ordinary people have 'fair notice' of the conduct a statute proscribes," and from the separation of powers, "requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not."[311] For one, that means that the fact that it is "public authorities"

302. Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 378–79 (1958).
303. *Id.* at 378 n.7.
304. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 29 (1963).
305. *Id.* at 34–35.
306. D. Daniel Sokol, *Reinvigorating Criminal Antitrust?*, 60 WM. & MARY L. REV. 1545, 1595 (2019).
307. *Id.* at 35.
308. *Id.* at 36.
309. United States v. L. Cohen Grocery Co., 255 U.S. 81, 86 (1921).
310. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 37 (1963) (Black, J., dissenting).
311. Sessions v. Dimaya, 584 U.S. 148, 155–56 (2018) (quoting Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)).

only that get to enforce Section 3[312] does not help. Indeed, if anything, it is of little comfort to know that it is the federal prosecutor that will be on the other side, ready to exercise discretion wisely or unwisely[313] over how to prosecute a list of crimes so long that it is practically impossible to account them all,[314] a list created by criminal statutes that "overlap

312. Nashville Milk Co. v. Carnation Co., 355 U.S 373, 378–79 (1958).

313. *See, e.g.*, NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW 9–14, 23, 29–32 (2024) (stating that in Yates v. United States, 574 U.S. 528 (2015)—a case involving a Maine fisherman charged with a violation of the Sarbanes-Oxley Act, which was enacted in the wake of the Enron accounting scandal, as part of which Arthur Andersen allegedly destroyed key evidence, and which prohibits "knowingly alter[ing], destroy[ing], mutilate[ing], conceal[ing], cover[ing] up, falsif[ying], or mak[ing] a false entry in any record, document, or tangible object," 18 U.S.C. § 1519—the prosecution tried "to extend financial fraud legislation to red grouper," in the process "robb[ing] [Yates] and his family of the life they cherished," all on a theory that, after an inspection at sea in which a federal agent, part of an agency that the department inspector general later revealed had engaged in evidence destruction, allegedly found <u>seventy-two</u> smaller than legally allowed red grouper in a <u>three-thousand-pound pile</u>, Yates before going back to shore destroyed that fish and replaced with fish that <u>also fell under the threshold</u>, which by the time of Yates' arrest <u>three years later</u> the government had lowered enough to make the fish lawful, even under the agent's disputed measurements); United States v. Moore, 115 F.4th 1370, 1377–78 (11th Cir. 2024) (Lagoa, J., concurring) (stating the following, in case of felony convictions for two members of a boat crew for a company that facilitated shark encounters under 18 U.S.C. § 661, which prohibits theft of property within special maritime jurisdiction: "[The two crew members] are felons because they tried to save sharks from what they believed to be an illegal poaching operation. They are the only felons I have ever encountered, in eighteen years on the bench and three years as a federal prosecutor, who called law enforcement to report what they were seeing and what actions they were taking in real time. They are felons who derived no benefit, and in fact never *sought* to derive any benefit, from the conduct that now stands between them and exercising the fundamental rights from which they are disenfranchised. What's more, they are felons for having violated a statute that no reasonable person would understand to prohibit the conduct they engaged in . . . . For reasons that defy understanding, Assistant United States Attorney Tom Watts Fitzgerald learned of these facts and—taking a page out of Inspector Javert's playbook—brought the matter to a grand jury to secure an indictment for a charge that carried up to five years in prison . . . . Against the weight of [the evidence]—which, in my view, plainly suggests a good-faith mistake on [the crew's] part—Watts Fitzgerald determined that this case was worth the public expense of a criminal prosecution, and the lifelong yokes of felony convictions, rather than imposition of a civil fine.").

314. *See* GORSUCH & NITZE, *supra* note 313, at 21 ("How many federal crimes do you think we have these days? It turns out no one knows. Yes, every few years some enterprising academic or government official sets out to count them. They devote considerable resources and time (often years) to the task. But in the end, they come up short. Every time. In 1982, the Department of Justice undertook what stands as the most comprehensive count to date. A lawyer spent more than two years reading the U.S. Code—at the time, some 23,000 pages. At the end of it all, the best the lawyer could say was that there were <u>about</u> 3,000 federal crimes. A little more than forty years later, the U.S. Code is roughly <u>twice</u>

entirely, are duplicative in part, or when juxtaposed raise perplexing questions about what they mean."[315]

Crucially, the "unreasonably low prices" provision is in essence the same as the law found to be unconstitutional in *L. Cohen Grocery Co.*, and the Supreme Court recently discussed and reaffirmed that decision in *Johnson v. United States*.[316] And the intent requirement with which Section 3 comes, the only real difference between Section 3 and the *L. Cohen Grocery* provision, does not fix the vagueness issue. As to due process, "[i]f a statute does not satisfy the due process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment[,] then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable."[317] And as to the separation of powers, "even if it is required that the defendant know what he is doing, it is nonetheless possible that the police, prosecutor, court, and jury will be arbitrary in determining whether his conduct is within the statute."[318] Finally, as to the specificity of the indictment, for a law to pass muster, Congress "must do more than invoke an aspirational phrase and leave it to prosecutors and judges to make things up as they go along."[319] Rather, what is prohibited "must be knowable in advance—not a lesson to be learned by individuals only when the prosecutor comes calling or the judge debuts a novel charging instruction."[320]

The executive has a duty not to enforce unconstitutional statutes.[321] The "unreasonably low prices" provision must not be enforced, then. But

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the length it was in 1982, and contemporary guesses put the number of federal crimes north of 5,000.") (citations omitted).

315. *Id.* at 22.

316. *See* Johnson v. United States, 576 U.S. 591, 602–03 (2015) ("[O]ur holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an 'unjust or unreasonable rate' void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable.") (quoting United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921)).

317. Screws v. United States, 325 U.S. 91, 154 (1945) (Roberts, J., dissenting). *See also* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting) ("[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.").

318. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 11, at 87 n.37 (1972).

319. Percoco v. United States, 598 U.S. 319, 337–38 (2023) (Gorsuch, J., concurring in the judgment).

320. *Id.*

321. Saikrishna Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

the Justice Department can criminally enforce the other two provisions. That too is a questionable course of conduct. The Robinson-Patman Act prohibits the sort of conduct for which only civil remedies are appropriate.[322]

There is a better way. Section 3 "largely duplicates and overlaps Section 2."[323] The overlap lies in the geographic price discrimination and "unreasonably low prices" provisions.[324] The latter should not be touched. But because there can be conduct that violates Section 2 and the geographic price discrimination provision of Section 3, as in, for example, *Moore v. Mead's Fine Bread Co.*,[325] there can be a case under Section 2 alone that still prosecutes the conduct prohibited by Section 3. Even without a separate count under Section 3, the FTC can go after an end that conduct under Section 2, leaving undisturbed the understanding between the FTC and the Justice Department that it is the former only that prosecutes Robinson-Patman Act violations.

III. "NO, IT'S PRONOUNCED *FRONKENSTEEN*."[326]

When it left Capitol Hill, the Robinson-Patman Act was "a roughly hewn, unfinished block of legislative phraseology"[327] "with a 'lawsuit in literally every word of it.'"[328] Many a lawsuit reached the courts indeed,

322. *Cf.* Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 409, 409 n.24 (1978) ("[T]he generality of the 'civil' Sherman Act today raises serious questions concerning its constitutionality as a criminal statute. Second, the Department of Justice has in recent years enforced the 'criminal' Sherman Act so as to give defendants due notice of what it regards as within the Act's criminal prohibitions. And third, a criminal case against a clear civil violation (such as a noncoercive tie-in) would, in my opinion, be subject to criticism as an abuse of prosecutorial discretion . . . . Public confidence is vital to the law enforcement process. Where prosecutorial decisions appear random and erratic, the public is more likely to regard prosecution as a game rather than a serious undertaking. Even if an Assistant Attorney General could obtain a felony indictment against a noncoercive tie-in, and this exercise of discretion could not be overturned as a matter [sic] of law, such a decision would surely deserve public criticism as a flagrant abuse of the responsibility entrusted to the Department of Justice.") (cleaned up); AREEDA & HOVENKAMP, *supra* note 43, ¶ 303b4 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), for the proposition that "Section 2 [of the Sherman Act] has been applied to monopolists against whom criminal penalties were inconceivable").

323. 1955 REPORT, *supra* note 88, at 198.

324. JULIAN O. VON KALINOWSKI ET AL., ANTITRUST AND TRADE REGULATION, § 44.01 (updated 2024 LexisNexis).

325. Moore v. Mead's Fine Bread Co., 348 U.S. 115, 117–18 (1954).

326. YOUNG FRANKENSTEIN (20th Century Fox 1974).

327. JERROLD G. VAN CISE ET AL., UNDERSTANDING THE ANTITRUST LAWS 56 (9th ed. 1986).

328. Levi, *supra* note 45, at 60.

and the courts were tasked, like the executive, with dealing with a backbreaker. Again like the executive, they have gone through problematic ebbs and flows in interpretive outcomes, caused by the reliance across the ebbs and the flows on an interpretive methodology that glorifies legislative history and intent. That is in part an accident of history: the Supreme Court has construed the Robinson-Patman Act in forty cases, and with the exception of three cases, *Volvo*, decided in 2006, *Brooke Group*, decided in 1993, and *Texaco Inc. v. Hasbrouck*, decided in 1990,[329] every case is from the early 1980s or prior.[330] The bottom line is that the vast majority of Supreme Court decisions construing a law that has "required much interpretive refinement . . . to reveal the contours of its meaning and application"[331] are "relic[s] from a bygone era of statutory construction."[332] Take one Robinson-Patman Act case from the 1980s, where the Supreme Court stated a rule which even those who see a role for legislative history today would reject (and at which would perhaps even flinch): "The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act."[333] This Article will go to "statutory text, context, and structure"[334] to address the major issues.

329. Texaco Inc. v. Hasbrouck, 496 U.S. 543 (1990).
330. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983); Jefferson Cnty. Pharm. Ass'n v. Abbott Lab'ys, 460 U.S. 150 (1983); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Great Atl. & Pac. Tea Co., Inc. v. FTC, 440 U.S. 69 (1979); United States v. U.S. Gypsum Co., 438 U.S. 422 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); Abbott Lab'ys v. Pol. Retail Druggists Ass'n, 425 U.S. 1 (1976); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Perkins v. Standard Oil Co. of Cal., 395 U.S. 642 (1969); FTC. v. Fred Meyer, Inc., 390 U.S. 341 (1968); Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967); FTC v. Borden Co., 383 U.S. 637 (1966); United States v. Nat'l Dairy Prod. Corp., 372 U.S. 29 (1963); FTC v. Sun Oil Co., 371 U.S. 505 (1963); United States v. Borden Co., 370 U.S. 460 (1962); FTC v. Henry Broch & Co., 368 U.S. 360 (1962); FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); FTC v. Henry Broch & Co., 363 U.S. 166 (1960); FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959); FTC v. Standard Oil Co., 355 U.S. 396 (1958); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958); FTC v. Nat'l Lead Co., 352 U.S. 419 (1957); FTC v. Am. Crayon Co., 352 U.S. 806 (1956); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); United States v. Borden Co., 347 U.S. 514 (1954); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61 (1953); FTC v. Ruberoid Co., 343 U.S. 470 (1952); Standard Oil Co. v. FTC, 340 U.S. 231 (1951); FTC v. Morton Salt Co., 334 U.S. 37 (1948); FTC v. Cement Inst., 333 U.S. 683 (1948); Bruce's Juices v. Am. Can Co., 330 U.S. 743 (1947); Corn Prod. Ref. Co. v. FTC, 324 U.S. 726 (1945); FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945); FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257 (1938).
331. VAN CISE ET AL., *supra* note 327, at 56.
332. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 437 (2019) (internal quotation marks omitted).
333. *Jefferson Cnty. Pharm. Ass'n*, 460 U.S. at 157.
334. Esteras v. United States, 606 U.S. 185, 199 (2025).

First up is *Morton Salt*, which introduced in secondary-line cases an inference of competitive injury, a requirement for a Section 2(a) claim, from evidence that a competitor engaged in "a substantial price discrimination between competing purchasers over time."[335] The inference was left undisturbed by both *Brooke Group*,[336] which dealt with primary-line differentials, and *Volvo*,[337] which, like *Morton Salt* itself, involved secondary-line differentials.

The *Morton Salt* inference is divorced from the text of the Robinson-Patman Act. Section 2(a) makes it unlawful to:

> [D]iscriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.[338]

Under *Morton Salt*, plaintiffs can show competitive injury by showing price discrimination. That price discrimination must be "significant" and "over a substantial period of time."[339] Still, the *Morton Salt* inference collapses the two requirements, price discrimination and injury. But a court's "duty [is] to give effect, if possible, to every clause and word of a statute."[340] Courts are thus "reluctant to treat statutory terms as surplusage in any setting."[341] To be sure, "[t]he canon against surplusage is not an absolute rule."[342] But courts should be "especially unwilling to [find surplusage] when the term occupies so pivotal a place in the statutory scheme" as does competition and injury to it in antitrust.[343]

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335. *Falls City Indus.*, 460 U.S. at 435. *See Morton Salt*, 334 U.S. at 49–51.
336. George Haug Co. v. Rolls Royce Motor Cars, Inc., 148 F.3d 136 (2d Cir. 1998); Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653 (9th Cir. 1997); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Co., 79 F.3d 182 (1st Cir. 1996); Stelwagon Mfg. Co. v. Tarmac Roofing, 63 F.3d 1267, 1272 (3d Cir. 1995).
337. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2333b; Sokol, *supra* note 186, at 2099; John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has* Volvo *Reconciled Them?*, 30 SEATTLE U. L. REV. 349, 372 (2006) [hereinafter Kirkwood, *Consumer Welfare*]; Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 210–13 (2d Cir. 2015); Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 213 (3d Cir. 2007).
338. 15 U.S.C. § 13(a).
339. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006).
340. Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting throughout United States v. Menasche, 348 U.S. 528, 538–39 (1955)).
341. *Id.* (cleaned up).
342. Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013).
343. *Duncan*, 533 U.S. at 174.

Then there's the most recent government case under the Robinson-Patman Act to reach the Supreme Court: the FTC's action in the 1970s against A&P.[344] There, the Court held that the legislative history of Section 2(f) "fully confirms the conclusion that buyer liability under [that subsection] is dependent on seller liability" under Section 2(a).[345] For that proposition, that the legislative history "fully confirms" the Court's conclusion, the Court cited a single short statement from one representative.[346] But Congress enacts into law the text of the statute, "not the preferences expressed by certain legislators."[347] Even assuming legislative history is relevant, "excerpts from committee hearings and scattered floor statements by individual lawmakers" are "the sort of stuff [the Supreme Court has] called 'among the least illuminating forms of legislative history.'"[348] Such materials "too often reflect an effort by a subgroup in Congress—or, worse, outside of it—to affect how the statute will subsequently be interpreted and implemented, in ways that Congress and the President may not have intended."[349] With the Robinson-Patman Act, the influence of groups both inside and outside Congress is well known. And the legislative history of Section 2(f), as the dissent pointed out, is "sparse."[350] Indeed, Section 2(f) was "almost an afterthought," and the "reports issued by the two Houses of Congress do not even discuss buyers' liability."[351]

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344. Great Atl. & Pac. Tea Co., Inc. v. FTC, 440 U.S. 69 (1979).
345. *Id.* at 77.
346. *Id.* at 77 n.10 (citing 80 CONG. REC. 9419 (1936) (statement of Rep. Utterback)).
347. NLRB v. SW Gen., Inc., 580 U.S. 288, 306 (2017) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).
348. Advoc. Health Care Network v. Stapleton, 581 U.S. 468, 481 (2017) (quoting *SW Gen.*, 580 U.S. at 307).
349. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2149 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 369 (2012) (pointing out the "false notion that committee reports and floor speeches are worthwhile aids in statutory construction"); Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to [certain district court] cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.").
350. *Great Atl. & Pac. Tea Co.*, 440 U.S. at 86 (Marshall, J., dissenting).
351. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2361a, ¶ 2361a n.4 (citing ROWE, *supra* note 173, at 423; *Great Atl. & Pac. Tea Co.*, 440 U.S. at 75–76; 80 CONG. REC. 9419 (1936) (statement of Rep. Utterback); H.R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935)).

Even more recent decisions are problematic from a modern, proper statutory interpretation perspective. Starting in 1953, in the midst a period of considerable expansion of antitrust liability, the Supreme Court cautioned against constructions of the Robinson-Patman Act that "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."[352] The two most recent Supreme Court cases interpreting the Act, *Brooke Group* and *Volvo*, both affirmed the principle that the Robinson-Patman Act is to be read "consistently with broader policies of the antitrust laws,"[353] meaning that courts should "resist interpretation geared more to the protection of existing competitors than to the stimulation of competition."[354]

Brooke Group is a good example of the purposivism that undergirds the Supreme Court's interpretation of the Robinson-Patman Act even in modern times. The Court distinguished and practically overruled *Utah Pie*, which condemned aggressive price competition because it harmed competitors,[355] and held that the Act should not be read as permitting liability in primary-line cases where there is harm to a competitor, as opposed to competition, because of "the antitrust laws' traditional concern for consumer welfare and price competition."[356] "[T]he essence of the claim under" Section 2(a) is "the same" as under the Sherman Act: "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[357]

But all this ignores the text of Section 2(a). The first two effect tests appear, with a minor difference that does not alter meaning,[358] in Section

352. Automatic Canteen Co. v. FTC, 346 U.S. 61, 63 (1953).
353. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 181 (2006) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993), itself quoting *Great Atl. & Pac. Tea Co.*, 440 U.S. at 80 n.13).
354. *Volvo*, 546 U.S. at 168.
355. Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 703 (1967).
356. *Brooke Group*, 509 U.S. at 221.
357. *Id.* at 222.
358. *See* Samuel Evan Milner, *The Clayton Act Cipher: Text as an Antitrust Strategy*, 77 FLA. L. REV. 279, 313–14 (2025) [hereinafter Milner, *The Clayton Act Cipher*] ("The Robinson-Patman Act's only modification to the original test of the Clayton Act was to change the split infinitive of 'to substantially lessen' to 'substantially to lessen.' That change could have signified that the tendency to create a monopoly must also be substantial, as with the lessening of competition. Because tendency already signified a heightened degree, substantially tending would prove redundant, so the better explanation is that congressional grammarians took this opportunity to correct an unprofessional split infinitive. Contemporaries already used 'to substantially lessen' and 'substantially to lessen' interchangeably when discussing or paraphrasing the Clayton Act, so they would not have perceived any noteworthy change from this shift.") (citations omitted).

2 of the Clayton Act,[359] which Section 2 of the Robinson-Patman Act amended, and in Sections 3[360] and 7[361] of the Clayton Act. Section 2(a) of the Robinson-Patman Act introduced something new: "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[362]

"[T]hat single word 'with' makes a considerable practical difference."[363] Because of that word, Section 2(a) "protects those who compete . . ., not just the overall competitive process."[364] The Supreme

359. 38 Stat. 730, 730 (1914).

360. *Id.* at 731 (codified at 15 U.S.C. § 14).

361. *Id.* at 731–32 (codified as amended at 15 U.S.C. § 18).

362. 49 Stat. 1526, 1526 (1936) (codified at 15 U.S.C. § 13(a)).

363. Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.).

364. *Id. See also* JF Feeser, Inc. v. Serv-A-Portion, Inc., 909 F. 2d 1524, 1532–33 (3d Cir. 1990) (reaching the same conclusion, though with unnecessary recourse to legislative history); Herbert Hovenkamp, *The Antitrust Text*, 99 INDIANA L.J. 1063, 1065 (2024) ("[The Robinson-Patman Act] added a special provision to the original statute that prohibited harm to a specific competitor rather than to competition generally."); Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 83 ("[T]he Robinson-Patman Act explicitly embraced a more private theory of injury, which was price discrimination that may 'injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' For example, if a favored dealer received a price of $10, all the statute required was that a disfavored dealer was required to pay more and that it was thus injured in its ability to compete with the favored dealer. Nothing in the statute required an injury to competition in the economic sense, which would be lower output or higher prices. Indeed, the statute was routinely applied in highly competitive markets where no such injury was likely. Because it contained no market-power requirement, it could be applied against small and large sellers alike.") (quoting 15 U.S.C. § 13(a)); Daniel Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1205, 1238 (2021) [hereinafter Crane, *Antitrust Antitextualism*] ("[T]he [Robinson-Patman] Act added to the 'substantially lessen competition or tend to create a monopoly' criteria an additional category of cognizable competitive harms for price discrimination that tends to 'injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' The evident purpose of this addition was to create liability in circumstances where the discriminatory price might not have a general market effect but might nonetheless impair the ability of some rival to compete with the firm giving the discriminatory price or a firm receiving it. Textually, 'lessen competition or tend to create a monopoly' have reference to general market effects, whereas the focus on injury to competition with a particular person made the new Robinson-Patman criterion personal to individual market actors."); John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 ANTITRUST BULL. 358, 375–76 (2015) [hereinafter Kirkwood, *Reforming the Robinson-Patman Act*] ("The third test was added by the Robinson-Patman Act, and it is this test that allows section 2 to be enforced in a protectionist manner. Unlike the first two tests, which require an impact on market wide competition, the third is satisfied simply by showing that the challenged discrimination

Court has "often noted that when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—[courts] presume that Congress intended a difference in meaning."[365] And reading "competition with any person" to mean the same as the language to which the Robinson-Patman Act added "runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'"[366] Somehow, *Brooke Group* refused to recognize harm to competitors even though it acknowledged that "all the words of the Act [ought] to carry adequate meaning" and applied this principle elsewhere.[367]

That the Robinson-Patman Act is an amendment to the Clayton Act and part of the antitrust laws more broadly does not change the conclusion that it protects competitors—contrary to arguments that have been made.[368] To be sure, "statutes in pari materia should be interpreted harmoniously."[369] But where the canon's application "makes the most sense [is] when the statutes were enacted by the same legislative body at the same time."[370] That is not the case with the Robinson-Patman Act, on the one hand, and the rest of the Clayton Act and antitrust more broadly, on the other hand. And it is the use of "the same language in two statutes having similar purposes" that creates a "presum[ption] that Congress

made it harder for the disfavored customer to compete with the favored customer."). *Cf.* Written Testimony of Daniel Francis, Deregulation & Competition: Reducing Regulatory Burdens to Unlock Innovation and Spur New Entry: Hearing Before the Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts. of the S. Comm. on the Judiciary, 119th Cong., at 64 (June 24, 2025), https://www.judiciary.senate.gov/imo/media/doc/efe2785b-b329-e9da-0b5e-0292d6c294e3/2025-06-24%20PM%20-%20Testimony%20-%20Francis1.pdf [https://perma.cc/5YUZ-3FV3] (recommending, as a measure less preferable to full repeal, amendment to delete the third test to harmonize with the rest of antitrust).

365. Loughrin v. United States, 573 U.S. 351, 358 (2014) (cleaned up).

366. *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)).

367. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 229 (1993) ("The Robinson-Patman Act, which amended § 2 of the original Clayton Act, suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting . . . . [T]he Robinson-Patman Act is phrased in broader, disjunctive terms [than the Sherman Act], prohibiting price discrimination 'where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.' For all the words of the Act to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting.") (quoting 15 U. S. C. § 13(a)).

368. *See* Herbert Hovenkamp, *Judicial Reconstruction of the Robinson-Patman Act: Predatory Differential Pricing*, 17 U.C. DAVIS L. REV. 309, 339 (1983) [hereinafter Hovenkamp, *Judicial Reconstruction*] (endorsing a standard that "runs counter to" the text because "it is absolutely essential if the antitrust laws are to work as a functional unit and seek the single goal of maximizing consumer welfare").

369. Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990).

370. Erlenbaugh v. United States, 409 U.S. 239, 244 (1972).

intended that text to have the same meaning in both statutes."[371] It would have made perfect sense, then, to interpret Section 2(a) harmoniously with the rest of the Clayton Act, and the rest of antitrust, had Section 2(a) read only "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." But it does not. Rather, with Section 2(a) Congress introduced something new. And it only "within the permissible meanings of the text" that courts have a "responsibility . . . to make" the "body of the law . . . make sense."[372]

One textualist analysis concludes that Section 2(a) concerns harm to competition only.[373] The scholar mentions first that the text "does not refer to competitors" and then that Congress "could have," if it wanted to "protect[] bilateral competition with specific competitors[,] . . . borrowed from the phrasing of the original section 7 to ban acts that may substantially lessen competition 'between' the favored and unfavored parties."[374] "[W]hen contemporaries wanted to indicate concern about competition's impact on specific rivals, including bilateral competition with chain stores, they would," says the scholar, "generally discuss one company '<u>in</u> competition with' another."[375] The scholar also points to two instances where "Congress expressed that narrower meaning of competition between two or more discrete rivals."[376] The scholar finally adds that "[t]he Robinson-Patman Act elsewhere uses a similar preposition–noun structure when criminalizing knowing discrimination 'against competitors of the purchaser.'"[377] From these the scholar concludes that "[t]he Act's failure to use similar phrasing in section 2(a) shows that the provision aligns with the same competitive concerns as the original section 2."[378]

Contemporaries also used "in competition with" and variations thereof to speak of bilateral competition in the Miller-Tydings Act[379] and the

371. Smith v. City of Jackson, 544 U.S. 228, 233 (2005).
372. SCALIA & GARNER, *supra* note 349, at 252.
373. Milner, *The Clayton Act Cipher*, *supra* note 358, at 317.
374. *Id.* at 316–17.
375. *Id.* at 317 (citing Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412, 426–27 (1937); Nat'l Biscuit Co. v. FTC, 299 F. 733, 736 (2d Cir. 1924); Great Atl. & Pac. Tea Co. v. Harvey, 177 A. 423, 424 (Vt. 1935)) (emphasis added).
376. *Id.* (citing Act of May 27, 1930, Pub. L. No. 71-271, § 3, 46 Stat. 391, 391; Agricultural Adjustment Act, Pub. L 73-10, § 15(d), 48 Stat. 31, 39 (1933)).
377. *Id.* (quoting 15 U.S.C. § 13(a)).
378. *Id.*
379. *See* 50 Stat. 693, 693 (1937) (speaking of "contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such

various state so-called fair-trade laws.[380] But two phrases can mean the same thing or something different depending on the context.[381] And contemporaries used "competition with" and variations thereof sans "in" to also describe bilateral competition, including as to chain stores.[382]

Crucially, Section 2 of the Clayton Act started with "it shall be unlawful" language.[383] What was unlawful? It was "for any person engaged in commerce, in the course of such commerce, either directly or

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commodity and which is in free and open competition with commodities of the same general class produced or distributed by others" and of "any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other").

380. *See, e.g.,* Lentheric, Inc. v. F. W. Woolworth Co., 338 Pa. 523, 527–28 (1940) ("Section 1 [of the 1935 Pennsylvania Fair Trade Act] permits the producer or owner of 'a commodity which bears, or the label or content of which bears, the trade-mark, brand or the name of the producer or owner . . . which is in fair and open competition with commodities of the same general class produced by others', to enter into a contract: '(a) That the buyer will not resell such commodity, except at the price stipulated by the vendor. (b) That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not in turn resell except at the price stipulated by such vendor or such vendee.'"); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 185 (1936) (quoting 1935 Illinois Fair Trade Act, which included "in fair and open competition with" language).

381. *See, e.g.,* Campbell v. Preferred Accident Ins. Co. of New York, 98 F.2d 53, 53 (2d Cir. 1938) (L. Hand, J.) ("For the purposes of this case the two phrases may be taken as the same.") (emphasis added).

382. *See, e.g.,* Columbus Gas & Fuel Co. v. Public Util. Comm'n, 292 U.S. 398, 413 (1934) ("The burden of building up patronage may be negligible where there is little competition with any other producer or with other kinds of fuel."); Vogue Co. v. Thompson-Hudson Co., 300 F. 509, 512 (6th Cir. 1924) ("If B. represents that his goods are made by A., and if damage therefrom to A. is to be seen, we are aware of no consideration which makes it controlling whether this damage to A. will come from market competition with some article which A. is then manufacturing or will come in some other way."); Great Atl. & Pac. Tea Co. v. A. & P. Radio Stores, 20 F. Supp. 703, 707 (E.D. Pa. 1937) ("Defendant's use of the letters 'A & P' in its corporate name and otherwise in connection with its business constitutes unfair competition with the plaintiff in violation of the law."); Wm. A. Rogers, Ltd., v. Majestic Prods. Corp., 23 F.2d 219, 219 (D. Del. 1927) ("It further contends that in the sale of its silver polish under the trade-mark 'Heirlooms' there can be no competition with plaintiff in its sale of silver plated or other metal ware, and, consequently, there can be no unfair competition or interference with plaintiff's business."); Criscuolo v. Dep't of Pub. Utilities, 302 Mass. 438, 441 (1939) ("[T]he commissioners 'assumed' that they might restrain competition with reputable operators."); Par. v. Schwartz, 344 Ill. 563, 571 (1931) ("The court [in Union Strawboard Co. v. Bonfield, 193 Ill. 420 (1901)] said that the restrictions imposed were probably no greater than were necessary to prevent competition with the company, but that this was not the only test of validity, and, upon the theory that the contract was divisible, proceeded to lay down the decisive principles above expressed.").

383. 38 Stat. 730, 730–31 (1914).

indirectly to discriminate in price between different purchasers of commodities" in interstate commerce, "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[384] Section 3 similarly declared "[t]hat it shall be unlawful for any person engaged in commerce, in the course of such commerce," to engage in tying under that same effect tests. Section 7, by contrast, started with "no corporation engaged in commerce shall"—acquire, that is, another's stock under three effect tests, the two in Sections 2 and 3 and the following: "restrain such commerce in any section or community."[385] Starting with the same introductory language as its immediate predecessor, Section 8 introduced a ban of interlocking directorates.[386] It mandated "[t]hat," starting two years from the Clayton Act's signing into law, "no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000."[387]

The Robinson-Patman Act took Section 2 and added to the two effect tests the third test: "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[388] Using in that test "in" before "competition with" would require rewording the entire section. If this was Section 8, for instance, using "in competition with" to mean bilateral competition may have been a realistic prospect: "no person shall at the same time be a director or other officer or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States" in competition with one another and if "either of which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000." But this straightforward amendment to Section 2 is impossible.

"Language takes meaning from its linguistic context, but historical and governmental contexts also matter."[389] That the "draftsmanship" of the Robinson-Patman Act was "a 'grotesque manifestation of the scissors and paste-pot method'"[390] makes the total-redraft scenario even more improbable. All this taken together with the fact that the Act added this

384. *Id.* at 730.
385. *Id.* at 731.
386. *Id.* at 732.
387. *Id.*
388. 49 Stat. 1526, 1526 (1936) (codified at 15 U.S.C. § 13).
389. Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).
390. Levi, *supra* note 45, at 60.

new provision to the harm-to-competition standard under the original Section 2 and the surplusage that would result if the Robinson-Patman addition also meant harm to competition, the third test is best read to prohibit harm to competitors.

Section 2(a) prohibits harm to competitors, in short. "The most basic form" of the harm under the Robinson-Patman-Act addition is "the disfavored buyer [being] less able to compete with its rivals as a result of its having to purchase goods at a higher price."[391] In spite of this, and even though Brooke Group does not extend to secondary-line cases, all private plaintiffs are prohibited from suing without harm to competition. Sections 4[392] and 16[393] of the Clayton Act provide private rights to damages and injunctive relief respectively. In 1981 in *J. Truett Payne Co. v. Chrysler Motors Corp.*, the Supreme Court acknowledged that "[its] cases ha[d] recognized [that] the statute does not 'require that the discriminations must, in fact, have harmed competition'" but held that "proof of a violation does not mean that a disfavored purchaser" could sue for damages under Section 4.[394] To the Court, "[its] decision [was] virtually governed by [the] reasoning"[395] of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[396] There, the Supreme Court held that damages are not available under Section 4 for Section 7 violations where there is harm to the competitor, as opposed to competition on account, again, of purpose: "[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors'" and it would accordingly be "inimical to the purposes of these laws to award damages for [competitor] injury"[397] under Section 4, "in essence a remedial provision."[398] The Supreme Court in *Cargill, Inc. v. Monfort of Colorado, Inc.*, a Section 7 case decided five years after *J. Truett*, held that Section 16 comes with the same requirement of "injury of the type the antitrust laws were designed to prevent,"[399] meaning, again, harm to "competition, not competitors."[400] "It would be anomalous," the *Cargill* Court reasoned, "to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled

391. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2331a.
392. 15 U.S.C. § 15.
393. *Id.* § 26.
394. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (quoting Corn Prods. Refin. Co. v. FTC, 324 U.S. 726, 742 (1945)).
395. *Id.*
396. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).
397. *Id.* at 488 (quoting Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320 (1962)).
398. *Id.* at 485.
399. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 111 (1986).
400. *Id.* at 110 (quoting *Brunswick*, 429 U.S. at 488).

to compensation if the injury actually occurred."[401] *Cargill*, in short, "extend[ed] [the] antitrust injury requirement to suits for injunctive relief" generally,[402] and courts accordingly demand such a showing in Robinson-Patman cases.[403]

But the text of Sections 4 and 16 does not. On the contrary, Section 4 gives a damages right to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"[404] and Section 16 an injunctive relief right to "[a]ny person, firm, corporation, or association . . . threatened loss or damage by a violation of the antitrust laws, including section[] [2 of the Robinson-Patman Act]."[405] Section 2(a) prohibits harm to competitors as well as competition, and the private right of action ought to be available for conduct that harms competitors only since, as to damages, that is "what is forbidden in th[at] antitrust law[]" and, as to injunctive relief, that is in "violation of th[at] antitrust law[]."

IV. "YOU KNOW, I'M A RATHER BRILLIANT SURGEON. PERHAPS I CAN HELP YOU WITH THAT HUMP."[406]

This Article went from the legislature to the executive and then to the courts. It now comes full circle back to the legislature to address one final question: what is to be done about the Robinson-Patman Act? Sure, the present leadership of the FTC has made it clear that enforcement should be against conduct that harms competition. But there is nothing to stop a future administration from again enforcing against conduct that does not. That would itself be harmful—to the consumer and the taxpayer, whose

401. *Id.* at 112.

402. Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 902 (9th Cir. 2008). *See also* Waggoner v. Denbury Onshore, L.L.C., 612 F. App'x 734, 737 (5th Cir. 2015) ("[*Cargill*] extend[ed] the antitrust injury requirements of Clayton Act § 4 claims for damages to § 16 claims for injunctive relief."); Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994) ("[*Cargill*] extend[ed] [the] antitrust injury requirement to equitable actions under section 16 of the Clayton Act."); AREEDA & HOVENKAMP, *supra* note 43, ¶ 337 ("[T]he Supreme Court held in *Cargill* that antitrust injury was also a prerequisite for private equitable relief.").

403. *See, e.g.*, Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 214 (2d Cir. 2015); B-S Steel of Kansas, Inc. v. Texas Indus., Inc., 439 F.3d 653, 666 (10th Cir. 2006); Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1420–21 (11th Cir. 1990). *See also* AREEDA & HOVENKAMP, *supra* note 43, ¶ 2371b ("[T]he private plaintiff seeking damages must show injury-in-fact, 'antitrust injury' as defined for the Robinson-Patman Act by the Supreme Court's *Truett Payne* decision, causation, and the amount of its damages. If the action is merely to seek an injunction, the private plaintiff must show threatened injury-in-fact, and that this injury will be antitrust injury.").

404. 15 U.S.C. § 15.

405. *Id.* § 26.

406. YOUNG FRANKENSTEIN (20th Century Fox 1974).

dollars ought to be spent guarding from conduct harmful to competition, not market participants. And private actions not only continue to exist, they abound,[407] and they should, under the terms of the Act, be available for harm to competitors, not only competition.[408] Indeed, the Act properly construed is antithetical to the protection of competition, which ought to be the one goal of the antitrust enterprise, and courts cannot, contrary to various suggestions,[409] do Congress's dirty work and mitigate the Act's harms. That means liability in cases such as *Utah Pie*: in that case, prices in the relevant market went down and the defendants "were convicted not of injuring competition but, quite simply, of competing."[410] For these reasons, "[t]here could be no clearer demonstration than the *Utah Pie* decision that the [Robinson-Patman Act] is essentially anti-competitive and anti-consumer."[411] But antithetical as this outcome is to the purpose of the antitrust laws generally, a "government of laws, not of men,"[412] requires that the Robinson-Patman Act be given its full—and terrible—effect.

The majority, it appears, of those who embrace consumer welfare as antitrust's lodestar and recognize the Robinson-Patman Act's many faults recommend repeal.[413] That was the view of the bipartisan Antitrust Modernization Commission, a recommendation backed in full by ten of the twelve commissioners and by another "with the . . . qualification" that Congress should consider whether any generic—as opposed to industry-specific—price discrimination statute is appropriate.[414] The twelfth

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407. *See supra* notes 228–45 and accompanying text.
408. *See supra* notes 392–405 and accompanying text.
409. *See, e.g.,* Hovenkamp, *Judicial Reconstruction, supra* note 368, at 339; Paul H. LaRue, *Recent Judicial Efforts to Reconcile the Robinson-Patman Act with the Sherman Act,* 36 WASH. & LEE L. REV. 325, 345 (1979).
410. BORK, *supra* note 270, at 387.
411. *Id.*
412. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
413. *See, e.g.*, Hovenkamp, Written Testimony, *supra* note 135, at 2; Crane, *Reviving the Robinson-Patman Act, supra* note 157; Liebeler, *supra* note 173; Sokol, *supra* note 186, at 2081 n.154; Francis, *supra* note 364, at 7; BORK, *supra* note 270, at 382, 394; Daniel J. Gilman, *Antitrust at the Agencies Roundup: Rounding up the Roundups,* TRUTH ON THE MKT. (Dec. 20, 2024), https://truthonthemarket.com/2024/12/20/antitrust-at-the-agencies-roundup-rounding-up-the-roundups/ [https://perma.cc/6S64-8WZM]; ALDEN ABBOTT & SATYA MARAR, THE ROBINSON-PATMAN ACT: A STATUTE AT ODDS WITH COMPETITION AND ECONOMIC WELFARE, MERCATUS CENTER POLICY BRIEF, at 15 (June 2023), https://www.mercatus.org/research/policy-briefs/robinson-patman-act-statute-odds-competition-and-economic-welfare [https://perma.cc/USX3-6ECG]; Roger D. Blair & Christina DePasquale, *"Antitrust's Least Glorious Hour": The Robinson-Patman Act,* 57 J.L. & ECON. 201, 214 (2014).
414. ANTITRUST MODERNIZATION COMM'N REPORT, *supra* note 196, at 317.

commissioner, former Antitrust Division head John Shenefield, agreed to repeal of Sections 2(c) and 3 and recommended amendment to the rest of Section 2 to introduce a requirement of competitive injury, focused on market or buyer power, and relax the cost justification defense,[415] which at present is quite difficult to show.[416]

There is the third and final alternative view, that which is pro-Act—in one iteration positing that "competition is not a categorical good"[417] and even seeking amendment to make the Act far stricter.[418] Needless to say, it is rejected as inconsistent with "the national policy in favor of competition"[419] and for the myriad of other reasons that make the Robinson-Patman Act a terrible, horrible, no good, very bad law.

As noted by John Kirkwood, who provides the most comprehensive argument along the pro-competition-amendment lines,[420] price discrimination from powerful buyers can be anticompetitive in various ways, including, for instance, when a powerful buyer "depress[es] suppliers' profits [and thus] cause[s] suppliers to curtail the variety of products they offer, reducing consumer choice"; "induce[s] its suppliers to raise its rivals' costs, enabling it to increase prices or otherwise exploit consumers in downstream markets"; and "obtain[s] discriminatory concessions that are so large and long-lasting that they enable it to drive out or greatly diminish the market share of smaller rivals, increasing downstream concentration and making tacit or explicit collusion more likely."[421]

These are types of consumer harm, to be sure. But scholars generally agree that the Sherman Act, as it has been interpreted, extends to the limited instances where consumer harm results from price discrimination.[422] Indeed, as summed up by the Antitrust Modernization Commission, "Section 1 of the Sherman Act protects against unlawful price discrimination agreements based on monopsony power," and "Section 2 outlaws the unlawful acquisition or maintenance of monopsony

415. *Id.* at 442–43 (separate statement of Commissioner Shenefield).
416. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18 (1990).
417. Callaci et al., *supra* note 174, at 220.
418. Hanley, *supra* note 174, at 357.
419. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).
420. *See* Kirkwood, *Reforming the Robinson-Patman Act*, *supra* note 364; AM. ANTITRUST INST. WORKING GRP. ON THE ROBINSON-PATMAN ACT, THE ROBINSON-PATMAN ACT SHOULD BE REFORMED, NOT REPEALED 3 (July 1, 2005), https://www.antitrustinstitute.org/wp-content/uploads/2018/08/425.pdf [https://perma.cc/TNE2-U29R] (identifying Prof. Kirkwood as the "principal author").
421. Kirkwood, *Reforming the Robinson-Patman Act*, *supra* note 364, at 364, 368.
422. Hovenkamp, Written Testimony, *supra* note 135, at 14; Francis, *supra* note 364, at 54.

power" and "true price-predation schemes involving below-cost pricing."[423]

Assuming gaps remain, there is excellent filler: the FTC Act.[424] As enacted in 1914 and to this day, Section 5 of the Act prohibits, and gives the FTC power to go after where it "would be to the interest of the public," "[u]nfair methods of competition in commerce"[425] In 1931 in *FTC v. Raladam Co.*, the Supreme Court held that the public interest condition required harm to a competitor.[426] Seven years later, "Congress passed the Wheeler-Lea Act of 1938," which "broadened the FTC's regulatory mandate beyond antitrust, as it was under the original FTC Act, to 'unfair or deceptive acts or practices,' in other words, consumer protection."[427] The Supreme Court in 1972 held that decisions subsequent to *Raladam* "brought [it] into question" and that its "displacing . . . was legislatively confirmed" with the Wheeler-Lea Act.[428] That amendment to the FTC Act, the Supreme Court concluded, "made it clear that Congress, through s 5, charged the FTC with protecting consumers as well as competitors."[429] Of course, as a matter of prosecutorial discretion, the FTC "should address solely harm to competition and thus consumers—not harm to competitors."[430]

The Supreme Court has long held that "individual conduct or concerted conduct which falls short of being a Sherman Act violation may, as a matter of law, constitute an 'unfair method of competition' prohibited by the [FTC] Act."[431] And it has held that Section 5 "minimally . . . registers violations of the Clayton and Sherman Acts,"[432] and Section 2 of the Robinson-Patman Act is, of course, an amendment to the Clayton Act. Indeed, the Supreme Court has upheld a cease-a-desist order based on the FTC Act alone because the conduct was also a violation of Section 3 of the Clayton Act.[433] And it has also upheld an FTC cease-and-desist order

423. ANTITRUST MODERNIZATION COMM'N REPORT, *supra* note 196, at 324.

424. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914).

425. 15 U.S.C. § 45.

426. FTC v. Raladam Co., 283 U.S. 643, 649 (1931).

427. George Sakkopoulos, *A Rendezvous with Destiny: The President's FTC Removals and the Rule of Law*, 74 CLEV. ST. L. REV. 217, 245 (2025) (citing Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938); 15 U.S.C. § 45).

428. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 241–45 (1972).

429. *Id.* at 244.

430. Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENF'T 1, 6 (2014).

431. FTC v. Cement Inst., 333 U.S. 683, 708 (1948).

432. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 609 (1953).

433. Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 464 (1941).

that alleged an FTC Act violation stemming from a combination and a Robinson-Patman Act violation that resulted from that combination.[434]

In view of this long line of precedent, scholars are in general agreement that "unfair methods of competition" under Section 5 of the FTC Act covers violations of the Robinson-Patman Act,[435] and, as with the Sherman Act, the FTC Act has before been identified as gap filler in a world without the Robinson-Patman Act.[436] Indeed, both price discrimination statutes proposed by the 1977 DOJ Report as options each of which could replace the Robinson-Patman Act would remove coverage of price discrimination from the FTC Act.[437]

"Unfair methods of competition" sounds like a rather broad phrase, arguably "even more general than the Sherman Act's rather vague condemnation of contracts, combinations, and conspiracies in restraint of trade in § 1 or of every person who shall 'monopolize' in § 2."[438] One commentator argued shortly after the passage of the FTC Act that "[l]awyers, who delight in certainty in the expression of legal rules, and the administration of the law, will find no settled meanings in this statute," that "unfair methods of competition" was a "novel and fresh" phrase with "no historic or common law meaning," and that "almost limitless range of information [would] be needed to define and enforce fair methods of competition in all lines of trade in this country."[439] Another commentator, writing a decade after the passage of the FTC Act, stated that "'Unfair Competition,' like 'Fraud,' or 'Police Powers,' is an indefinable abstract idea that is easier to point out in a specific case than to generalize and thereby include all of its multitudinous and partly unknown variations."[440]

But "unfair methods of competition" in Section 5 in fact did have "a clear, yet long since overlooked, legal meaning rooted in the law of intentional torts as it had developed in the late nineteenth and early

434. *Cement Inst.*, 333 U.S. at 721–26.

435. Samuel Evan Milner, *From Rancid to Reasonable: Unfair Methods of Competition Under State Little FTC Acts*, 73 AM. U. L. REV. 857, 885 (2024); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 238–42 (1980). *See also* AM. ANTITRUST INST. WORKING GRP. ON THE ROBINSON-PATMAN ACT, *supra* note 420, at 15 (stating that "Section 5 of the Federal Trade Commission Act . . . covers secondary line discrimination").

436. Francis, *supra* note 364, at 60–61.

437. 1977 DOJ REPORT, *supra* note 46, at 279, 283.

438. Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 872 (2010).

439. Michael F. Gallagher, *The Federal Trade Commission*, 10 ILL. L. REV. 31, 34 (1915).

440. Warren F. Drescher, Jr., Note, *Unfair Competition Under Federal Law*, 9 ST. LOUIS L. REV. 294, 294–95 (1924).

twentieth century."[441] "Even before the creation of statutory antitrust law," American law "[r]eject[ed] the English view that only an independently wrongful act directed against a rival could produce liability" and "scrutinized actions that appeared to inflict losses on rivals or impede their entry into a market without any offsetting justification."[442] The analysis then was "different . . . than [that in] antitrust law," but the "approach largely tracked the outcomes of the rule of reason, just as the modern law of tortious interference continues to avoid condemning good faith efforts at enhancing consumer welfare."[443]

As to price discrimination in particular, the historical evidence is quite clear that it falls under "unfair methods of competition." The phrase "unfair methods of competition" made its maiden appearance three years prior to the passage of the FTC Act in a government brief before the Supreme Court in *Standard Oil Co. of New Jersey v. United States*, and the Supreme Court subsequently used the phrase in its seminal decision.[444] The Supreme Court, in listing the Sherman Act violations Standard Oil was alleged to have committed, stated that amongst them were "unfair methods of competition, such as local price cutting at the points where necessary to suppress competition,"[445] in other words, predatory pricing. In its debut, then, "unfair methods of competition" was tied to something that falls under Section 2 of the Clayton Act, as originally enacted and as amended by the Robinson-Patman Act.

Contemporaries construing the FTC Act's prohibition of "unfair methods of competition" understood price discrimination to be included. In two parallel cases from the mid-1920s, the FTC accused the National Biscuit Company and the Loose-Wiles Biscuit Company of:

> Unfair methods of competition in that [they], engaged in the manufacture and sale of biscuits, crackers, and other bakery products, in allowing discounts based on aggregate monthly orders, refuse[d] to grant as high a rate of discount on the pooled

441. Samuel Evan Milner, *Defining Unfair Methods of Competition in the Federal Trade Commission Act*, 2023 WIS. L. REV. 109, 113 [hereinafter Milner, *Defining Unfair Methods*] (citing Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 450–87 (1990); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 423–41 (1975)).
442. *Id.* at 113–14. *See also* Drescher, *supra* note 440, at 295–98 (discussing the same history).
443. *Id.* at 114.
444. *Id.* at 136 (citing Reply Brief for the United States, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (No. 398), 1911 WL 19167, at *39, *45, *54; Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 42–43 (1911)).
445. *Standard Oil*, 221 U.S. at 43.

> orders of two or more retail store owners as on the orders of owners of so-called chain stores, thereby giving the owners of chains of retail stores an undue advantage in competing with owners operating but one retail store.[446]

"[T]he said discrimination in price," it was alleged, "tend[ed] to lessen competition and create a monopoly, in alleged violation of section 5 of the Federal Trade Commission act and section 2 of the Clayton Act."[447] After the FTC entered cease-and-desist orders and the companies sought judicial review, the reviewing circuit court summarily described "[t]he gravamen of the offense or the unfair method [as] the granting of discounts to purchasers of quantities."[448] This is just one example of a case that depended on the same facts to make out violations of both the FTC Act and the original Clayton Act Section 2.[449]

This understanding remained unchanged at the time the Robinson-Patman Act amended Section 2. For instance, in prosecuting A&P in the 1930s under the Act, the FTC described Section 2(c) as "deal[ing] specifically with a particular trade practice which was regarded by Congress as an unfair method of competition, per se injurious to commerce, and therefore to be prohibited."[450] A court dealing with the same provision around the same time stated that it "was clearly intended to restore equality of opportunity in business by strengthening the anti-trust laws through protecting trade and commerce against unfair practices and unlawful price discrimination."[451] Sections 2(d) and 2(e) were

446. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, 1922, at 131–32 (1922) [hereinafter 1922 FTC ANNUAL REPORT].
447. *Id.*
448. Nat'l Biscuit Co. v. FTC, 299 F. 733, 736 (2d Cir. 1924), *overruled on other grounds by*, George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 254 (1929).
449. *See* Mennen Co. v. FTC, 288 F. 774, 775 (2d Cir. 1923), *overruled on other grounds by*, *Van Camp*, 278 U.S. at 254; 1922 FTC ANNUAL REPORT, *supra* note 446, at 128 (reporting on case against Tide Water Oil Co. and Tide Water Oil Sales Corporation "[c]harg[ing] [t]hat the respondents, by maintaining a system of rebates and discounts based and graduated on the separate purchases of their petroleum products by dealers during a definite period and on purchases of carload lotsthereof, thereby causing the purchasers to confine their purchases to the respondents, ha[d] indulged in the practice which tends to substantially lessen competition and create a monopoly, in alleged violation of section 5 of the Federal Trade Commission act and section 2 of the Clayton Act."). *See also* FTC v. Eastman Kodak Co., 274 U.S. 619, 627 (1927) (Stone, J., dissenting) (stating that the FTC had entered orders forbidding as an unfair method of competition "local price discrimination").
450. Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 675 (3d Cir. 1939) (quoting FTC brief).
451. Biddle Purchasing Co. v. FTC, 96 F.2d 687, 692 (2d Cir. 1938).

similarly described, alongside Section 2(c), as "forbidd[ing] . . . unfair trade practices" by yet another contemporary court.[452]

State analogues also demonstrate the link. At the time of the enactment of the FTC Act, "twenty-seven states . . . banned 'restraint of competition as distinguished from restraint of trade' through legislation or a constitutional enactment," "[t]wenty-three states . . . banned local price discrimination,"[453] and "[m]any, although not all, of the states that had passed laws banning local price discrimination limited liability to instances in which this action was 'done for the purpose of destroying competition.'"[454] For example, in 1913 California enacted a price discrimination law, "An Act relating to unfair competition and discrimination, making," amongst other things, "certain unfair and discriminatory practices unlawful."[455]

Consider also the landmark *Nebbia v. New York*,[456] where the Supreme Court started the shift away from the protection of an unenumerated constitutional right to contract from cases such as *Lochner v. New York*[457] and more generally from more searching judicial review of economic regulation.[458] *Nebbia*, like "most of the famous economic liberty cases[,] involve[d] legislation siding with some firms in competition with others": New York enacted "regulation raising the retail price of milk," thus "protect[ing] big milk distributors from competition from small mom-and-pop retailers in poor neighborhoods."[459] To justify its upholding the New York law, the *Nebbia* Court made the following, useful for present purposes, comparison to "[l]egislation concerning sales of goods, and incidentally affecting prices, [that had] been held valid."[460] "In this class," the Court stated, "fall laws <u>forbidding unfair competition</u> by the charging of lower prices in one locality than those exacted in another, by giving trade inducements to purchasers, and by other forms of price discrimination."[461] The Court for the first and third propositions cited respectively to its decisions upholding from a constitutional challenge a

452. Oliver Bros. v. FTC, 102 F.2d 763, 767 (4th Cir. 1939).
453. Milner, *Defining Unfair Methods*, *supra* note 441, at 137 (citing JOSEPH E. DAVIES, DEP'T OF COMMERCE, TRUST LAWS AND UNFAIR COMPETITION 159–60, 163, 187 (1915)).
454. *Id.* at 170 (quoting DAVIES, *supra* note 453, at 187).
455. 1913 Cal. Stat. 508.
456. Nebbia v. New York, 291 U.S. 502 (1934).
457. Lochner v. New York, 198 U.S. 45 (1905).
458. Randy E. Barnett, *Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes*, 14 GEO. J.L. & PUB. POL'Y 355, 356–57 (2016).
459. *Id.* at 356.
460. *Nebbia*, 291 U.S. at 529.
461. *Id.* (citations omitted) (emphasis added).

South Dakota statute outlawing price discrimination[462] and construing Section 2 of the Clayton Act.[463] In the former case, the U.S. Supreme Court in 1912 affirmed the judgment of the South Dakota Supreme Court, which had held that the 1907 South Dakota price discrimination law and other similar state laws were "aimed at monopolies obtained through unfair competition."[464] This link between "unfair competition" and the like and price discrimination remained unbroken decades later at the time of *Nebbia* and when the Robinson-Patman Act became law.[465] Indeed, contemporaries also saw a link directly between state price discrimination law and the federal "unfair methods of competition."[466]

Not only does the FTC Act cover price discrimination, it "[i]n some cases . . . has been held to permit the FTC to pursue discriminatory sales practices under circumstances where the Robinson-Patman Act would not reach them."[467] "The most prominent such practice is the buyer's liability for inducing the discriminatory provision of facilities or services or payment therefor."[468] Sections 2(d) and 2(e) of the Robinson-Patman Act

462. Cent. Lumber Co. v. South Dakota, 226 U.S. 157 (1912).
463. George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245 (1929).
464. State v. Cent. Lumber Co., 123 N.W. 504, 509 (S.D. 1909).
465. *See* Great Atlantic & Pac. Tea Co. v. Ervin, 23 F.Supp. 70, 76 (D. Minn. 1938) ("The second paragraph of section 2 of part 2 of the [Minnesota Unfair Trade Practices Act of 1937] provides: 'Any person, firm, partnership or corporation which sells goods in any part of the State of Minnesota at prices lower than those exacted by said person elsewhere in the State of Minnesota for like quantities and grades and where the effect of such lower prices may be substantially to lessen competition or tend to create a monopoly in any line of business, or to injure, destroy or prevent competition with the person selling at such lower prices, shall be guilty of unfair competition and subject to the penalties of this act; provided that nothing shall prevent differentials in prices in different localities which make only due allowances for differences in costs of delivery for such goods to different localities; nor differences in price made in good faith to meet local competition of any other person in such locality.'").
466. *See* State v. Langley, 84 P.2d 767, 772 (Wyo. 1938) ("[A]ll combinations or agreements which unreasonably suppress competition or restrain trade were illegal at common law as against public policy. The Sherman Anti-Trust Act was passed pursuant to that policy. Here was an interference with business in the field of competition—different, it is true, than that evidenced by the [state price discrimination] statute before us, but an interference nevertheless, and the aim was partially at least the same as under our statute, namely, the maintenance of fair competition. The Clayton Act was passed in 1914 to supplement the Sherman Anti-Trust Law. Section 2 of the Act prohibits price discrimination between different purchasers . . . . It, too, directly interferes with business in the field of competition, and declares discriminatory sales to be an evil. The Federal Trade Act . . . was passed in 1914. That Act declared unfair methods of competition in commerce unlawful. That in its ultimate analysis is true under the statute before us. Its aim is to maintain fair competition, but to prevent unfair and ruinous competition.") (citations omitted).
467. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2370 (emphasis added).
468. *Id.*

prohibit such conduct by sellers but not buyers.[469] And Section 2(f), the buyer liability provision, has been held to be "dependent on seller liability under § 2(a)"[470] and does not "extend[] . . . to violations of §2(d) or §2(e)."[471] Section 5 of the FTC Act is filler here: lower "courts have fairly consistently held that the FTC suing under §5 of the FTC Act may condemn a buyer for inducing a seller to engage in conduct violating either §2(d) or §2(e)."[472] And the Supreme Court's *Fred Meyer* "opinion substantially accorded with that conclusion."[473]

As to private actions, assuming the goal is a proper price discrimination regime focused on harm to competition and not competitors, and it is common ground that that should be the goal, there is more than sufficient redress for private parties. Private parties in antitrust can sue for injunctive relief to stop "threatened loss or damage"[474] and for damages once an injury has occurred.[475] Damages under a proper price discrimination regime would—and do under the current improper price discrimination statute because of the off-the-bench legislating condemned above[476]—require "actual injury attributable to something [such a regime is] designed to prevent,"[477] i.e., harm to competition.

In primary-line price discrimination, that should be hard to show. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition" and "cannot give rise to antitrust injury."[478] After all, "[a] price 'too low' for an inefficient rival may be just right from consumers' perspective, showing only that the defendant's costs of production are lower than those of the plaintiff—for which it should receive a reward in the market rather than a penalty in the courthouse."[479] Indeed, "[t]he real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and

469. *Id.*
470. Great Atl. & Pac. Tea Co., Inc. v. FTC, 440 U.S. 69, 77 (1979).
471. AREEDA & HOVENKAMP, *supra* note 43, ¶ 2370.
472. *Id.*; *see id.* ¶ 2361e (citing Fred Meyer, Inc. v. FTC, 359 F.2d 351, 364–65 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968); Alterman Foods, Inc. v. FTC, 497 F.2d 993, 996–97 (5th Cir. 1974); Colonial Stores, Inc. v. FTC, 450 F.2d 733 (5th Cir. 1971); R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962)).
473. *Id.* ¶ 2361e.
474. 15 U.S.C. § 26.
475. *Id.* § 15.
476. *See supra* notes 392–405 and accompanying text.
477. J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).
478. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990).
479. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989) (Easterbrook, J.).

suppressed,"[480] especially in view of evidence that "[m]uch of the litigation about exclusionary practices," such as "predatory pricing, introduction of new products, bundling, and related conduct," comes from "rivals for the purpose, or with the effect, of reducing competition and increasing price."[481] If there is something improper—if there is "competitive injury resulting from a rival's low prices" that "are below an appropriate measure of [the] rival's costs" and a "demonstration that the competitor had . . . a dangerous probability[] of recouping its investment in below-cost prices"[482]—then the Sherman Act suffices.

As to secondary-line price discrimination, where the powerful buyer issues lie, there must be "diversion of sales or profits from a disfavored purchaser to a favored purchaser,"[483] demonstrable by "evidence" that, for instance, "showed patronage shifted from disfavored dealers to favored dealers."[484] In a Sherman Act action, also required is consumer harm. That is one avenue for the private plaintiff.

And there is an even better option. If there is such conduct from a powerful buyer against a small seller, that seller is better off "bring[ing] the matter to the Commission's attention and request[ing] it to file a complaint."[485] The FTC then can move to end that practice if it finds it to be in the public interest.[486] Indeed, providing small market participants with this option was amongst the purposes of Section 5. The drafters of Section 5 recognized that "[t]he problem with reliance on private litigation was that not every competitor driven to ruin by these tactics would be able to afford litigation to recover damages after the harms had occurred."[487] Senator Newlands "described [this] as a battle of pygmies against the giant corporations with the best lawyers and deepest pockets."[488] "The role of the FTC, Senator Newlands emphasized, would thus be 'economically giving to each individual, at the lowest cost of effort and money, the power of asserting his right which exists in law or in equity.'"[489] All this makes Section 5 not merely an alternative to the Robinson-Patman Act in the powerful buyer case, but a much better alternative.

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480. BORK, *supra* note 270, at 157.
481. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 34–35, 34–35 n.71 (1984); *see supra* notes 244–45 and accompanying text.
482. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993).
483. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006).
484. *Id.* (citing FTC v. Sun Oil Co., 371 U.S. 505, 518–19 (1963)).
485. FTC v. Klesner, 280 U.S. 19, 25 (1929).
486. 15 U.S.C. § 45(b).
487. Milner, *Defining Unfair Methods*, *supra* note 441, at 144.
488. *Id.* (citing 51 CONG. REC. 12939, 13116 (1914)).
489. *Id.* (citing 51 CONG. REC. 11109 (1914)).

There is also practical advantage as to the administration of government. The FTC Act is enforced, needless to say, by the FTC only, and enforcement against any harmful price discrimination under that Act in a world without the Robinson-Patman Act leaves undisturbed the existing understanding between the FTC and the Justice Department as to Robinson-Patman Act enforcement.[490]

V. "THE MIRACLE IS NOT THAT I CAN SPEAK. THE MIRACLE IS THAT YOU WOULD EVER LISTEN."[491]

Commentators on the Robinson-Patman Act were once said to be engaged in a "contest of witticisms" to alleviate the "otherwise dreary picture."[492] That was in 1952—long before, that is, the emergence of the Chicago School, which many conveniently insist on blaming for reduced enforcement of the Robinson-Patman Act. Submissions to the contest in the decades since include "'Wrong Way Corrigan' of antitrust" from Herbert Hovenkamp,[493] "black sheep of antitrust" from John Kirkwood,[494] "antitrust's least glorious hour" from Robert Bork,[495] and, long prior to the publication of Bork's seminal book *The Antitrust Paradox: A Policy at War with Itself*, "paradox of antitrust at war with itself" from Frederick Rowe.[496]

The Robinson-Patman Act is a relic of the Great Depression and its high deflation, massive unemployment, real GDP decline, and popular sentiment against chain stores. Concerns about the Act's adverse impact to the consumer were voiced in Congress and went unheeded. The Act's anti-competition and anti-consumer contemporaries, the National Recovery Act, the Miller-Tydings Act, and the misnamed fair-trade laws, have been left on the ash heap of history.

But the antitrust agencies are not a "junior varsity Congress"[497] and cannot do away with the Robinson-Patman Act themselves. Rather, while the Robinson-Patman Act is still on the books, enforcement decisions must be made. There are certain important considerations. First, taxpayer

490. *See supra* notes 193–94 and accompanying text.
491. FRANKENSTEIN (Netflix 2025).
492. Levi, *supra* note 45, at 60.
493. HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 192 (2005).
494. Kirkwood, *Consumer Welfare*, *supra* note 337, at 349.
495. BORK, *supra* note 270, at 382.
496. ROWE, *supra* note 173, at xi.
497. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

money, even if as certain as death,[498] is not infinite, and the agencies hold it in trust for the people. Second, to bring an enforcement action under the Robinson-Patman Act, the agencies must take away resources from enforcing the other antitrust laws. Third, the Act's main section, Section 2, is being privately enforced today as much as it was when government enforcement was at its height. Fourth, it is the public interest that the agencies have a duty to uphold. All these considerations taken into account, the FTC's recent suits against Southern Glazer's and Pepsi fail on multiple fronts. Where the focus should be is on cases under Section 2 where there is harm to competition from powerful buyers, with attention to conduct also in violation of the geographic price discrimination provision of Section 3 that the Section 2 suit can end as well.

While the executive can, and should, focus on harm to competition, courts cannot. Courts must faithfully enforce the terms of the Robinson-Patman Act—at least where it is not in conflict with the Constitution. In many important cases, they have not done so. *Morton Salt*, the basis of the Southern Glazer's suit, impermissibly collapsed two statutory requirements into one by allowing plaintiffs to show injury by way of showing price discrimination. *Brooke Group* set aside the "more textually faithful"[499] *Utah Pie* and mandated injury to competition, as opposed to competitors, in primary-line cases, even though the Robinson-Patman Act properly construed protects competitors. Decisions have similarly limited private plaintiffs by requiring a showing of harm to competition even though the terms of Sections 4 and 16 of the Clayton Act, which provide private rights to damages and injunctive relief respectively, encompass the harm prohibited by the Robinson-Patman Act.

If there is a silver lining to all the recent attention to the Robinson-Patman Act, it is that there is a bill pending before Congress to repeal it,[500] something Congress has had opportunities to do before but did not.[501] And that is a reflection of the general rule that it is easier to enact special-interest laws than to repeal them.[502] Repeal of the Robinson-Patman Act not only would do away through the appropriate process with this

498. *See* Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 10 WRITINGS OF BENJAMIN FRANKLIN 69 (A. Smyth ed. 1907) ("[I]n this world nothing can be said to be certain, except death and taxes.").

499. Crane, *Antitrust Antitextualism*, *supra* note 364, at 1241.

500. Restore Prescription Drugs Discount Act, S. 2099, 119th Cong. (2025).

501. *See* FINDINGS AND RECOMMENDATIONS OF THE ANTITRUST MODERNIZATION COMMISSION: HEARING BEFORE THE ANTITRUST TASK FORCE OF THE H. COMM. ON THE JUDICIARY, 110th Cong., 1st Sess. (May 8, 2007); Hovenkamp, *Judicial Reconstruction*, *supra* note 368, at 309–10.

502. *See, e.g.*, Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J. L. & PUB. POL'Y 87, 98 (2010).

dismally-drafted, special-interest, Depression-era relic that, properly construed, bastardizes both the antitrust laws and the public interest, but it also would end private actions. And it would leave the limited situations where price discrimination harms competition covered by the Sherman Act and the FTC Act.

Congress, then, should repeal the Robinson-Patman Act, antitrust's lex horribilis.