

# Price Discrimination and Power Buyers: Why Giant Retailers Dominate the Economy and How to Stop It

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Amazon and Walmart are giants in the American economy, and both argue that their size and power offer a significant benefit: low prices to consumers. The traditional explanation for how they do this is technological sophistication and the efficiency that large size brings. But the reality is more straightforward: They are so big that they can use their buying power to bludgeon suppliers. Walmart and Amazon, as well as other large firms, control such a large percentage of the market for books, groceries, and e-commerce in general that they can extract steep discounts for wholesale goods from manufacturers. But those discounts are not shared equally with smaller retailers, who are typically charged higher prices by the same manufacturers for identical products. If small retailers could get the same prices as large ones, most of the advantages of an Amazon or Walmart would disappear.

Price discrimination, as this tactic is known, underpins the business model of many important firms and can take many forms, such as the use of rebates by powerful buyers or sellers to disadvantage rivals or harm suppliers or consumers. And it's not just retail. Price discrimination is

pervasive in health care, advertising, and a host of other markets. For instance, rebates in the pharmaceutical supply chain by powerful middlemen known as pharmacy benefit managers drive up the price of insulin dramatically.

What's astonishing about price discrimination is that it is technically illegal. So why does it happen? The reason is that the law prohibiting this conduct hasn't been enforced for 40 years. So we have a deeply unfair economy, where raw power—not skill or efficiency—is what matters.

## WHAT IS PRICE DISCRIMINATION?

Price discrimination is the charging of different prices to different customers for the same good or service. For instance, book publisher Simon & Schuster might sell its books to Amazon for one price and to your local independent bookstore for a much higher price. This discrimination was outlawed nationally in 1936 by the Robinson-Patman Act (RPA). Congressman Wright Patman sought to protect local grocers from national retailer A&P, which was the Walmart of its day. The RPA ensured that small businesses were able to buy at the same prices as their giant competitors. The RPA protected Main Street stores across America until the 1980s.

Charging lower prices to power buyers and higher prices to smaller retailers was the principal target of the RPA. The Supreme Court established early in the RPA's existence that this injury to smaller retailers, such as a local grocer injured by paying higher prices for orange juice than a national chain, is sufficient to state a claim. And the local grocer is not limited to a lawsuit against the manufacturer. The national chain could also be sued for knowingly accepting the discriminatory lower price. And importantly, a plaintiff must only show a reasonable probability of injury to competition, as opposed to an actual injury to competition, to succeed. However, this does not mean price discrimination cases are easy.

## SO WHAT HAPPENED TO THE ROBINSON-PATMAN ACT?

The RPA's ban on price discrimination is still the law, and it was strictly enforced for decades. However, it fell out of favor in the 1970s, when economists decided that the RPA's very purpose, allowing small retailers to fairly compete with large ones, was anti-competitive because it hampered the "efficiencies" of giant retailers. With little evidence, they alleged that the RPA created higher prices for consumers, and the Department of Justice (DOJ) and Federal Trade Commission (FTC) followed suit by abandoning any attempts to enforce the RPA in the 1970s and 1980s. In 1977, the DOJ began advocating for the law to be repealed, and between 1992 and 2014, the FTC only tried to enforce the RPA once. In 2006, the FTC and DOJ *supported* price discrimination by a car manufacturer in a case before the Supreme Court.

## WHY CAN'T SMALL BUSINESSES GO TO COURT THEMSELVES?

While the government refuses to enforce the law, retailers harmed by price discrimination face an uphill battle to bring their own lawsuits. Bringing a private RPA case is nearly impossible today because of the strict legal standards in the law itself, procedural changes in the courts, and Supreme Court decisions limiting the RPA.

First, the RPA does not outlaw all forms of price discrimination. It does not apply to price discrimination when the favored buyer is a wholly owned subsidiary of the manufacturer. Discounts to buyers who play a role in the manufacturer's distribution chain are also allowed. Finally, the RPA does not apply to contracts for services like printing and advertising.

Second, loopholes written into the RPA and procedural rules make enforcement of the RPA harder. The RPA allows manufacturers to give discounts that are justified by the cost savings achieved by, for example, selling products in bulk. Manufacturers can also offer lower prices to match those offered by other companies. Class action lawsuits—where one person brings a case on behalf of other people—rarely succeed because the companies affected by price discrimination are usually competitors. At the extreme, the Supreme Court has required that small businesses show that they lost the business of a specific customer due to price discrimination. That they were offered discriminatory prices—the fundamentally illegal practice—was not enough, despite decades of court decisions to the contrary.

These exceptions to the RPA, the uphill battle in court, and the absence of enforcement by federal agencies have left private retailers and consumers highly vulnerable to the outsized buying power of a few giant companies. Manufacturers are happy to acquiesce to the extortionist demands of power buyers at the expense of small businesses that care about and help their communities.

## WHAT CAN WE DO NOW?

The price hikes currently permeating U.S. markets have proven the RPA's critics wrong. Consumers are not reaping benefits from price discrimination. Small businesses have been disappearing for decades, and inflation is at a 40-year high. Last year, President Biden entered an executive order calling for a renewed look at the benefits of the RPA, and a bipartisan congressional group asked the FTC to explore its utility, pointing out that “the anticompetitive effects of discriminatory pricing . . . ripple through the entire supply chain—harming consumers as well as independent producers” and threaten the small- and medium-sized business that are the “bed-rock of communities from rural America to the inner city.”

The FTC and DOJ should heed these calls and use their powers to investigate and prosecute price discrimination through the RPA. Congress can also pass legislation to reverse court decisions that have weakened the RPA and broaden the law to cover price discrimination for services, which are currently exempt. That way, other areas beset by price discrimination, such as Big Tech's digital services in the messy world of advertising and data collection, cannot take advantage of loopholes. Congress can also pass the Forced Arbitration Injustice Repeal Act to outlaw class action waivers and arbitration agreements, which deny small businesses access to justice through federal courts.

The Robinson-Patman Act was designed to protect competitors and, by extension, the communities they serve. Abandoning that goal has created the very world Wright Patman sought to avoid—one dominated by monolithic chains and online retailers with less innovation and lower quality services. Taking away the enormous buying power of Amazon and Walmart is one step that would have an immediate impact on small businesses, allowing them to play with equal footing.