AMERICAN ECONOMIC LIBERTIES PROJECT

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

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MEMO

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ABSTRACT

Amazon and Walmart are giants in the American economy, and both argue that their size and power offer a significant benefit, lower prices for 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: Power buyers like Amazon and Walmart 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 charged higher prices by the same manufacturers for identical products. This type of price discrimination was the principal target of the Robinson-Patman Act. The Supreme Court established early in the RPA's existence that this injury to smaller retailers, such as a local grocer paying higher prices for orange juice than a national chain, is sufficient to state a claim. However, this does not mean price discrimination lawsuits are easy. Strong affirmative defenses, a hostile judiciary, and an absence of support from government enforcers have resulted in the proliferation of blatant price discrimination. This paper examines the abandonment of the RPA, which was based on improper readings of the statute, government policies, and economies theories that have no empirical support. It argues that government enforcers should revive the RPA, and that Congress should broaden its reach, to rescue small businesses and consumers from the stranglehold power buyers have on the American economy.

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I. INTRODUCTION

Over the last 40 years, much of the American retail marketplace has consolidated into the hands of a few firms. In supermarkets, for instance, 60% of sales occur at just five chains, and hundreds of smaller chains have gone out of business, with Walmart alone controlling 30% of the market. A supermarket can, with a single decision, "grant or deny a food supplier's access to 30 percent of American households."[1] In the world of books, "Amazon accounts for over half of all print book sales and over 80% of e-book sales."[2] These retailers' dominance gives them extraordinary buying power, which they use to extract discriminatory pricing arrangements from suppliers, distorting competition and hamstringing smaller businesses' ability to compete.

Much of the American economy is beset with these middlemen who are both "power buyers" and "power sellers" that control entire industries up and down the supply chain. The traditional narrative as to why these giant firms exist is technology and globalization, induced by technical economies of scale. In truth, a major underpinning of dominant middlemen and retailers is policy, namely government enforcers' and federal courts' embrace of a consumer welfare standard that wholly undermined a law Congress passed with the goal of protecting small businesses against the threat of power buyers.

The Robinson-Patman Act (the "RPA") was passed in 1936.[3] Originally called the Wholesale Grocer's Protection Act, it bars sellers from "discriminat[ing] in price between different purchasers of commodities of like grade and quality" and buyers from knowingly inducing or receiving discriminatory prices.[4] The RPA was, per the Supreme Court in 1960, designed to "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."[5] Thus, "[s]ellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either the sellers' or the buyers' market unless such discriminations are justified as permitted by the [RPA]."[6] To understand why this law matters, it helps to start with the testimony of small-business owners who bear the brunt of these retailers' buying power vis-à-vis common suppliers.

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1 Prepared Testimony of Michael Needler, *Power Buyers, Economic Discrimination, and the Grocery Supply Chain*, at 5 (Jan. 19, 2022), *available at* https://docs.house.gov/meetings/JU/JU05/20220119/114345/HHRG-117-JU05-Wstate-NeedlerM-20220119.pdf (last visited June 21, 2022).

2 House Judiciary Committee, *Investigation of Competition in Digital Markets*, at 255 (Oct. 5, 2020), *available at* https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 (last visited June 21, 2022).

3 15 U.S.C. § 13; D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 Antitrust L.J. 1003, 1012 (2014).

4 15 U.S.C. § 13(a), (f).

5 *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960).

6 *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 702 (1967).

Independent grocery chain owner Anthony Pena spoke before antitrust enforcers in late March of 2022. Pena owns nine grocery stores across the State of New York.[7] He employs hundreds of people, and his strategy is to cater to different groups with differentiated products.[8] For instance, Portuguese customers at his store in Indian Orchard can find bacalao, a salted fish unavailable elsewhere, while his store that serves college students stocks foods for those on a budget.[9] Pena, however, faces a significant problem competing with Walmart and other dominant firms. The reason is not technology or scale, but buying power. Here's what he said.

> In some cases, these stores are selling identical products for lower prices than I can buy them for at wholesale. Let me give you an example; orange juice, for example. It's a must-have commodity in grocery stores. Just months ago, I was buying a 59-ounce orange juice just north of $4 a unit, where we couldn't get the supplier to sell it to us simply because there are none or their limited quantities are available to us. Meanwhile, I go to the bigger box like a Walmart or a club store. Not only do they have it fully stocked, but they have it about half the price that I would buy it for at cost.[10]

Pena noted that during the pandemic, Walmart demanded that its suppliers stock their stores first, leading to shortages of basic goods among independent retailers.[11] What supplier could say no to Walmart, given that firm's bargaining advantage? It is extremely difficult for independent merchants to compete with colossal big-box stores when the latter get input prices for the same products at a better rate.

Gayle Shanks, the owner of two award-winning bookstores in Arizona, spoke at another FTC listening forum about the importance of bookstores to democracy, and the damage Amazon has done to her business. These local institutions are learning spaces for children and adults that "introduce readers to writers and are repositories of the art of literature."[12] Her experience with Amazon mirrors that of Mr. Pena's with Walmart. Amazon sells books to consumers for less than the wholesale prices she pays.[13] She told enforcers:

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7 FTC-DOJ Merger Guidelines Listening Forum, Tr. at 9 (Mar. 28, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ%20Merger%20Guidelines%20Listening%20Forum_FTC_March%2028%202022.pdf (last visited June 21, 2022).

8 *Id.*

9 *Id.* at 9–10.

10 *Id.* at 10.

11 *Id.*

12 FTC-DOJ Listening Forum on Firsthand Effects of Mergers and Acquisitions- Technology, Tr. at 10 (May 12, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20and%20Justice%20Department%20Listening%20Forum%20on%20Firsthand%20Effects%20of%20Mergers%20and%20Acquisitions-%20Technology%20-%20May%2012%2C%202022_0.pdf (last visited July 7, 2022).

13 *Id.*

> For decades, we have been trying to level the playing field, not asking publishers for anything more than allowing us to compete fairly and competitively with the same terms that other businesses selling books receive. Amazon's size gives it terrifying leverage over the publishing industry. It has bullied publishers in the past for better discounts, early releases of titles before brick and mortar stores get them, lower prices on e-books and audiobooks. And if the publisher stood up to them or pushed back, they removed the buy buttons, telling the consumer the books were out of stock or unavailable.[14]

Businesses like Ms. Shanks's create jobs, support local classrooms and charities, and seek out new voices. Businesses like Amazon and the publishing cartel only care about the bottom line.

Walmart and Amazon abuse their market power by extracting discriminatory prices from their suppliers. This price discrimination is one of the key tools that dominant firms use to undermine rivals and extract excess profits. It is an old technique, and a powerful one. One hundred years ago, Standard Oil, railroad barons, and chain stores like A&P all used their buying power to secure favorable input prices, keep suppliers in line, and control markets,[15] just as pharmacy benefits managers and online and retail goliaths do today.[16]

Pining for the bygone days of independent stores in America can often seem like nostalgia for a technologically backward era, before the cool efficiency of a Walmart or Amazon. But as Mr. Pena and Ms. Shanks noted, the emergence and dominance of chain stores is not a result of technology but of law. The Department of Justice (DOJ) and Federal Trade Commission (FTC) have, as a matter of policy, failed to enforce the RPA and allowed behemoths like Walmart and Amazon to buy and resell consumers goods at a cost below what independent retailers pay, even before wholesaler fees.[17] That is, because of price discrimination in wholesale markets, your independent retailer has to pay more for a product than you might if you went to Walmart. These bargains come at a cost that includes inferior goods, less variety, and the erosion of community support systems.[18] Consumers are biased away from superior small businesses they may otherwise want to frequent because price discrimination favors the power buyer. And in the end, if Ms. Shanks' and Mr. Pena's stores go under because they are forced to pay more for orange juice or a book than Walmart and Amazon, the communities served by their stores will suffer.

The historical roots of the debate over concentrated power buyers run deep. Americans always understood the importance of local institutions and structured a legal apparatus to protect them.

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14 *Id.*

15 *Standard Oil Co. v. United State*s, 221 U.S. 1, 30 (1911).

16 *See infra* Section VI.

17 Merger Guidelines Listening Forum Tr., *supra* note 7, at 12.

18 For example, Mr. Pena described "lower prices, better package deals, and exclusive products" that suppliers only offered to a Walmart that was "literally" four feet from his store. *Id.* at 11. At the same time, his store employs expert butchers and refuses to sell ground meat that is more than a day old, while Walmart "has no skilled butchers" and sells three-week-old ground meat. *Id.* at 12.

The RPA banned a system of price discrimination that the A&P supermarket chain enforced on its suppliers.[19] A&P, like Amazon and Walmart today, used a variety of tactics, including selectively underpricing rivals and inducing discounts from packaged goods producers, to ensure dominance in local markets. The RPA put a stop to this behavior by A&P and dominant firms in general. From the 1930s to the 1960s, the FTC and private litigants used the RPA to constrain discounters, chain stores, and large manufacturers. The goal of the law was to protect independent stores and manufacturers by preventing dominant distributors and producers from using their market power to extract discriminatory prices from suppliers.[20] Small businesses relied on the RPA to ensure that Main Streets across America were populated with local stores, and those local stores helped enabled manufacturers and producers to regularly introduce new products without having to go through a centralized chain store procurement department. Despite the antitrust bar's consistent hostility toward the RPA from the 1950s onward, the "preponderance" of all antitrust cases brought by the FTC from the 1930s until the 1970s were directed at Robinson-Patman violations.[21] When the RPA went away, large and centralized power buyers once again took control of American society.

Oddly though, the RPA did not disappear through repeal by Congress. Elite antitrust scholars essentially jeered it out of existence. Conservative antitrust scholar Robert Bork dubbed it the "Typhoid Mary of Antitrust," and Herbert Hovenkamp called the law "irritating to almost anyone who is serious about antitrust."[22] Then, enforcers simply chose to stop enforcing it. In 1977, the DOJ's Antitrust Division issued a report that reads like a defense bar manifesto and essentially promised to abandon RPA enforcement entirely.[23] That was based largely on the unsupported premise that the economy faced "higher price levels brought about by the Act's inhibitions on the competitive price-setting process and its encouragement of price fixing activity," while simultaneously observing that the economic effects of the RPA had not and could not be quantitatively studied.[24]

The RPA's fall from grace flowed from the effective rewrite of antitrust law in the 1970s, shortly after Bork invented the "consumer welfare standard" that dominates antitrust policy in the United States today. By elevating the welfare of consumers over that of independent merchants it

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19 The RPA also prohibits "concealing price discrimination as a promotional service provided to the purchaser" and "reimbursement for the same." ***Woodman's Food Mkt., Inc. v. Clorox Co.***, 833 F.3d 743, 747 (7th Cir. 2016); 15 U.S.C. § 13(d), (e). These sections apply to "promotional services and facilities" and do not apply to "any attribute of the product that makes it desirable to consumers." ***Clorox***, 833 F.3d at 748. They are briefly explored, along with the RPA's prohibition of corporate bribery, in Section VI *infra*.

20 *See* ***F.T.C. v. Anheuser-Busch, Inc.***, 363 U.S. 536, 543–44 (1960) (The RPA's passage was "motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores .").

21 From 1965 to 1968, the FTC conducted 97 formal investigations and filed 27 complaints per year. Antitrust Modernization Comm'n, ***Report and Recommendations***, at 316 (2007), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (last visited Aug. 3, 2021).

22 Robert Bork, ***The Place of Antitrust Among National Goals***, Address Before the National Conference Board, at 9 (Mar. 3, 1966); Herbert Hovenkamp, ***The Robinson-Patman Act and Competition: Unfinished Business***, 68 Antitrust L.J. 125, 125–144 (2000).

23 *See generally* DOJ Report on the Robinson-Patman Act ("1977 DOJ Report") (1977), *available at* https://hdl.handle.net/2027/pur1.32754060681834 (last visited June 21, 2022).

24 *Id.* at 37–39. The DOJ goes on to argue, without any supporting data, that the "*probable effect* of [RPA] enforcement is to raise retail prices by one-half to one percent" and that losses would be in the billions "*[i]f such a price increase were evidenced.*" *Id.* at 39–40 (emphasis added).

was designed to protect, the consumer welfare standard effectively subverted the RPA's purpose, emphasizing allocative efficiency as a goal over rivalry. This standard held sway among enforcers and courts until recently. The Supreme Court used it to depart from the RPA's original intent and find that an RPA plaintiff must show injury to competition (e.g. the buyer), not injury to the competitor (e.g. the retailer), to succeed.[25] And the FTC issued a consumer-welfare heavy "Statement of Enforcement Principles" in 2015, constraining the FTC's ability to use its authority to police unfair methods of competition.[26]

Over the last 10 years, advocates have challenged the consumer welfare standard, casting doubt on the appropriateness of cabining antitrust into such cramped quarters. Recent scholarship has shown the prevalence of concentrated market power across American industries.[27] In 2021, President Biden criticized the consumer welfare standard in his speech announcing an executive order on competition, and the Assistant Attorney General for the Antitrust Division Jonathan Kanter downplayed the very coherence of the concept in 2022.[28] Not coincidentally, President Biden's executive order called for a revival of the RPA, noting that the law might "enhance access to retail markets by local and regional food enterprises."[29] However, even though the law remains in place and the consumer welfare standard is under attack, government enforcers and private litigants face steep challenges under the RPA, erected through decades of hostility toward the law.[30] And after more than 40 years of dormancy, the RPA is unrecognizable to the lawmakers who adopted it and nearly forgotten by those tasked with enforcing it.

This memorandum first explores how the Supreme Court's view of U.S. antitrust laws, shaped by the consumer welfare standard, has left a treacherous road for plaintiffs pursuing RPA claims. It then explores the policy decisions of the DOJ and the FTC surrounding price discrimination and why those choices were misguided. Finally, it examines how the executive and legislative branches can repair the RPA and restore competition amongst small businesses.[31] Recent actions by the FTC give hope that these proposals will be well received and that the law will in fact be revived. Enforcing the RPA in the way Congress intended would produce far better outcomes for consumers, workers, and small businesses and restore a healthier balance of power in the U.S. economy.

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25 *See infra* Section II.

26 *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act*, (withdrawn), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (last visited June 21, 2022).

27 Jan De Loecker, Jan Eeckhout, and Gabriel Unger, *The rise of market power and the macroeconomic implications*, 135 Q.J. Econ. 561, 561-644 (2020); Gustavo Grullon, Yelena Larkin, and Roni Michaely, *Are US industries becoming more concentrated?*, 23 Rev. Fin. 697, 697-743 (2019); Thomas Philippon, *The Great Reversal: How America Gave Up on Free Markets* (1st ed. 2019).

28 Jonathan Kanter, *Antitrust Enforcement: The Road to Recovery* (Apr. 21, 2022), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler (last visited June 21, 2022).

29 Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

30 Section 5, which empowers the FTC to prevent unfair competition, is unavailable to private plaintiffs. *President Biden's Executive Order on Promoting Competition: an Antitrust Analysis*, 64 Ariz. L. Rev. (forthcoming 2022), July 18, 2021, at 2, *available at* https://ssrn.com/abstract=3887776 (last visited June 21, 2022). Yet the DOJ recognized in 1977 that private enforcement might "have the greatest impact on the economy." 1977 DOJ Report, *supra* note 23, at 4.

31 *See infra* Section II.

II. THE SUPREME COURT'S VIEW OF COMPETITION NARROWS THE PATH TO RPA VICTORIES

A. PRIMARY-LINE DISCRIMINATION

1. The Utah Pie Era Opens the Door

Primary-line discrimination involves "pricing pattern[s] which ha[ve] adverse effects only upon sellers' competition."[32] Such price discrimination violates the RPA "when the seller charges predatory, below-cost prices in one geographical market to eliminate competitors there, but charges higher prices in another market."[33] The Supreme Court's 1967 *Utah Pie* decision is the most well known of these cases.[34] Three large frozen pie manufacturers conspired to sell their pies below cost in the Salt Lake City market with the goal of diverting business away from their chief competitor in that geographic market, plaintiff Utah Pie Company.[35] In ruling for Utah Pie Company, the Supreme Court found that, while not all price discrimination is prohibited,[36] the plaintiff's evidence of predatory intent and injury to competition was sufficient to support the underlying jury verdict in its favor.[37]

> There was ample evidence to show that each of the respondents contributed to what proved to be a deteriorating price structure over the period covered by this suit, and each of the respondents in the course of the ongoing price competition sold frozen pies in the Salt Lake market at prices lower than it sold pies of like grade and quality in other markets considerably closer to its plants.[38]

The Supreme Court flatly rejected the Tenth Circuit's "apparent view that there is no reasonably possible injury to competition as long as the volume of sales in a particular market is expanding and at least some of the competitors in the market continue to operate at a profit."[39]

32 *Anheuser*, 363 U.S. at 538.

33 *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1092 (9th Cir. 1998).

34 386 U.S. 685.

35 *Id.* at 690.

36 *Id.* at 702.

37 *Id.* at 702–03.

38 *Id.* at 690.

39 *Id.*

The *Utah Pie* decision was met with and continues to face derision because the short-term effect of the conspirators' price discrimination was to drive down prices for consumers in the Salt Lake City market and reduce the monopolistic plaintiff's market power.[40] Thus, Justice Stewart argued in his dissent:

> [A] contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition.
>
> I cannot hold that Utah Pie's monopolistic position was protected by the federal antitrust laws from effective price competition.[41]

A Yale economist described it as "the most anticompetitive antitrust decision of the decade."[42] But as the majority opinion in *Utah Pie* properly stated, "the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact."[43] Moreover, "[s]ince . . . an independent and important goal of [the RPA] is to extend protection to competitors of the discriminating seller, the limitation of that protection by the alien factor of competition among purchasers [e.g. how the discriminatory practice affects consumer prices] would constitute a debilitating graft upon the statute."[44]

2. Brooke Group Shuts The Door

When the Supreme Court returned to the issue of primary-line discrimination almost 30 years later in 1993, it acknowledged that the *Utah Pie* decision was "criticized on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition."[45] At the same time, the Supreme Court discounted *Utah Pie*'s significance: "As the law has been explored . . . , it has become evident that primary-line competitive injury under the [RPA] is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act."[46]

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40 *Id.* at 704 (Stewart, J. dissenting).

41 *Id.* at 706.

42 Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L.J. 70, 84 (1967).

43 386 U.S. at 703.

44 *Anheuser*, 363 U.S. at 546.

45 *Brooke Grp.*, 509 U.S. at 221.

46 *Id.*

By reading the RPA in parallel with the Sherman Act, the *Brooke Group* court found that recovery for primary-line discrimination required proof of two elements: (1) "that the prices complained of are below an appropriate measure of its rival's costs"[47] and (2) "that the competitor had a reasonable prospect . . . of recouping its investment in below-cost prices."[48] "For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within a disciplined oligopoly."[49] But "[e]vidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition."[50] It also "requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market."[51]

Brooke Group reflected a shift away from *Utah Pie* and *Anheuser*. The Supreme Court, echoing Bork's consumer welfare standard, stated:

> [T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . .[,] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[52]

Thus, following the logic of *Brooke Group*, there is no injury to competition unless "the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it."[53]

Inherent in the recoupment test, as defined in *Brooke Group*, is a market power requirement. A plaintiff must show that the predator (1) "possessed sufficient market power to set supracompetitive prices" and (2) "could sustain supracompetitive prices long enough to recoup its losses."[54] "Measurement of a predator's market share is necessary to assess whether the predator possesses sufficient leverage to influence marketwide output."[55] Absent a showing that the predator "ha[d] market power, or that he ha[d] some reasonable prospect of obtaining it . . . , the below-cost

47 *Id.* at 223.

48 *Id.* at 224.

49 *Id.* at 225.

50 *Id.* at 226.

51 *Id.*

52 *Id.* at 226 (citation omitted) (alterations in original).

53 *Id.* at 225.

54 *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1245 (11th Cir. 2002).

55 *Id.* at 1249.

pricing poses no threat to competition."[56] And the predation must be sustained—isolated incidents of price discrimination will not support an RPA claim.[57] "If [a predator]'s pricing cannot drive [its competitors] out of the market, then it will never have a chance to charge supracompetitive prices, let alone sustain those levels."[58]

The *Brooke Group* court independently acknowledged that "[t]hese prerequisites to recovery are not easy to establish."[59] It "requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will."[60] "In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate."[61] Indeed, the Court was right; the evidentiary standards it created for a plaintiff to succeed on a primary line RPA claim are expensive and nearly impossible to satisfy.

The cumulative effect of *Brooke Group* and its progeny was to override the intent of Congress when it passed the RPA. The Supreme Court superimposed on the Act a complex web of economic analyses required for plaintiffs to succeed in a primary-line case. One must first establish pricing "below an *appropriate measure* of its rival's costs."[62] This, in theory, involves true marginal costs but is, in practice, determined using average variable costs, including labor, rent, depreciation, capital expenses, costs of materials, transports, and electrical consumption.[63] Obtaining this information through discovery and performing the necessary economic analysis is a lengthy and expensive process. Then, as discussed above, the recoupment test requires a multi-layered economic analysis of the alleged predator's market power, including analyses of the relevant geographic market, the relevant product market, barriers to entry, production capacity, and numerous other factors. Again, such economic analyses present significant costs and risk in the form of challenges under the Federal Rules of Evidence and *Daubert v. Merrell DOW Pharmaceuticals, Inc.*[64] As *Brooke Group* stated, it is a narrow path to victory: "*[E]ven in the presence of predatory intent as documented by direct evidence*, summary judgment in favor of the defendant-predator may be warranted if he can demonstrate a lack of a rational economic motive

56 *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1445 (9th Cir. 1995); *see also Bailey*, 284 F.3d at 1246–50, 1255–56 (affirming summary judgment where the plaintiff failed to properly define or prove the relevant product market or geographic market or the predator's market share or show that the predator could maintain inflated prices).

57 *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 529 (5th Cir. 1999).

58 *Id.*

59 *Brooke Grp.*, 509 U.S. at 226.

60 *Id.*

61 *Id.*

62 *Stearns Airport*, 170 F.3d at 532.

63 *Id.*

64 509 U.S. 579 (1993).

to engage in a predatory pricing scheme."[65] Thus, in practice, the "recoupment test" all but eliminated primary-line price discrimination cases under the RPA.[66] As the Supreme Court originally found in 1960, nothing in the text of the RPA justifies or supports this outcome.[67]

B. SECONDARY-LINE DISCRIMINATION

1. Morton Salt Protects Small Businesses

Secondary-line price discrimination "injures competition among the discriminating seller's customers."[68] Plaintiffs bringing secondary-line price discrimination cases must show:

> (1) that [the] seller's sales were made in interstate commerce; (2) that the seller discriminated in price as between the two purchasers; (3) that the product or commodity sold to the competing purchasers was of the same grade and quality; and (4) that the price discrimination had a prohibited effect on competition.[69]

In its seminal 1948 *F.T.C. v. Morton Salt* decision, the Supreme Court found that "'the [RPA] does not require that the discriminations must in fact have harmed competition, but only that there is *a reasonable possibility* that they '*may*' have such an effect.'"[70] Thus, the Supreme Court established early in the RPA's existence that "'injury *to the competitor* victimized by the discrimination,'" rather than competition itself, is (1) sufficient to make a secondary-line claim and (2) in line with the goals of the RPA.[71] In doing so, it recognized the RPA's legislative history: "Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability."[72]

The *Morton Salt* decision, like *Utah Pie*, has many detractors. Professor Hovenkamp described *Morton Salt*'s reasoning as "nonsense" and wrote that the "Court's statement failed to distinguish

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65 *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1549 (N.D. Ill. 1991) (emphasis added). In *Brooke Group*, "[n]o inference of recoupment [wa]s sustainable . . . because no evidence suggest[ed] that [the defendant]—*whatever its intent* in introducing [generic cigarettes] may have been—was likely to obtain the power to raise the prices for generic cigarettes above a competitive level." 509 U.S. at 232 (emphasis added).

66 *See* Sokol, *supra* note 3, at 1015 (noting zero success in primary-line cases between 2006 and 2010).

67 *Anheuser*, 363 U.S. at 546. *See also* Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1123 (1983) (quoting S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)) ("An attempt to include in the Act the traditional Clayton Act 'injury to competition' standard was opposed because it was 'too restrictive, in requiring a showing of general injury to competitive conditions.'"); Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 Antitrust L.J. 921, 924 (1985) ("It is quite clear that the underlying predicate of the Robinson-Patman Act was *not* consumer welfare.").

68 *Volvo Trucks*, 546 U.S. at 166. For example, General Mills could not, in certain circumstances, sell Cheerios to a national chain grocery store at $0.50/box and another local grocery store for $1.75/box without a cost justification.

69 *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202, 209–10 (2d Cir. 2015).

70 334 U.S. 37, 46 (1948) (citation omitted) (emphasis added).

71 *Id.* at 49 (emphasis added).

72 *Id.* at 43.

the quantity purchaser who pressures its buyer to make non-cost-justified discounts it would prefer not to make, from those given to larger purchases generally."[73] But the Supreme Court reiterated in its 1983 *Falls City* decision:

> To establish a prima facie violation of § 2(a), one of the elements a plaintiff must show is a *reasonable possibility* that a price difference may harm competition. In keeping with the Robinson-Patman Act's prophylactic purpose, § 2(a) "does not 'require that the discriminations must in fact have harmed competition.'"[74]

Such "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time."[75] The *Falls City* seller met this standard with direct evidence of diverted sales, which "more than established the competitive injury required."[76] And perhaps even more strikingly, the Supreme Court rejected the defendant's argument that the RPA only applies to large buyers.[77] "Although concerns about the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act, the Act 'is of general applicability and prohibits discriminations generally.'"[78]

Defendants have attempted to overcome inferences of competitive injury by "showing that competition in the relevant market remains healthy."[79] The Ninth Circuit in *Chroma Lighting*; the Third Circuit in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*; and the First Circuit in *Monahan's Marine, Inc. v. Boston Whaler, Inc.* rejected these arguments.[80] Because the RPA exists "to protect 'those who compete with a favored seller, not just the overall competitive practice,'" these Courts found "evidence of injury to a competitor" sufficient to prove competitive injury.[81] However, their holdings were called into question with the Supreme Court's 2006 decision in *Volvo Trucks*.[82]

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73 Hovenkamp, *supra* note 22, at 129, 140.

74 *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983) (citing *Corn Products Refining Co. v. F.T.C.*, 324 U.S. 726, 742 (1945) *and* quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981)) (emphasis added).

75 *Id.* Note that, while evidence of competitive injury will give rise to injunctive relief, monetary relief is not automatic. *J. Truett Payne*, 451 U.S. at 562. "To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *Id.* A jury may infer injury "as a matter of just and reasonable inference . . . from the proof of defendants' wrongful acts . . . and the evidence of the decline in prices, profits, and values, not shown to be attributable to other causes." *Id.* at 565 (citations omitted).

76 *Falls City*, 460 U.S. at 437–38. However, as discussed in Section II *infra*, the Supreme Court ultimately vacated the lower courts' rulings for plaintiff based on their misapplication of the meeting-competition defense, discussed in Section III *infra*. *Id.* at 451–52.

77 *Id.* at 436.

78 *Id.* (citation omitted).

79 *Chroma Lighting v. GTE Prod. Corp.*, 111 F.3d 653, 654 (9th Cir. 1997).

80 *Id.* at 656; 909 F.2d 1524, 1535 (3rd Cir. 1990); 866 F.2d 525, 529 (1st Cir.1989).

81 *Feeser*, 909 F.2d at 1545 (quoting *Monahan's Marine*, 866 F.2d at 529); *Chroma Lighting*, 111 F.3d at 657.

82 546 U.S. 164.

2. Volvo Trucks Limits Morton Salt

Volvo Trucks was originally filed in 2000 by a heavy-duty truck dealer that sold Volvo's trucks through a competitive bidding process.[83] Customers requested bids from dealers, who in turn sought discounts from Volvo to meet the customer's specifications.[84] "The dealer then use[d] the discount offered by Volvo in preparing its bid; it purchase[d] trucks from Volvo only if and when the retail customer accept[ed] its bid."[85] Though Reeder, the plaintiff dealer, rarely bid against other Volvo dealers, it presented evidence that Volvo repeatedly offered concessions to other Volvo dealers bidding against non-Volvo dealers that it did not provide to Reeder.[86] Volvo also had a program in place designed to eliminate dealers like Reeder.[87] A jury found "a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder," and it awarded Reeder treble damages.[88] When the Eighth Circuit upheld the verdict, the Supreme Court granted certiorari to decide one question: "May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer?"[89]

The Supreme Court began by admonishing that the RPA "does not 'ban all price differences charged to different purchasers of commodities of like grade and quality.'"[90] "A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser."[91] Thus, the Court reasoned, "Absent actual competition with a favored Volvo dealer, . . . Reeder [could not] establish the competitive injury required under the [RPA]."[92]

The crux of the Supreme Court's decision was the shortage of evidence that Reeder received less favorable treatment when bidding against another Volvo dealer for the same customer:

> [I]n none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination for the same customer. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-à-vis

83 *Id.* at 170.

84 *Id.*

85 *Id.* at 170–71.

86 *Id.* at 172.

87 *Id.* at 171.

88 *Id.* at 173–74.

89 *Id.* at 175.

90 *Id.* at 176 (quoting *Brooke Group*, 509 U.S. at 220).

91 *Id.* at 177.

92 *Id.*

> Reeder. Reeder simply paired occasions on which it competed with non-Volvo dealers for a sale to Customer A with instances in which other Volvo dealers competed with non-Volvo dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months.
>
> We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality.[93]

In sum, the Court restricted the relevant market "to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale."[94] And though it did not expressly overrule *Morton Salt* or *Falls City*, the Court said it

> would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. There is no evidence here that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson–Patman's governance to such cases, the Court continues to construe the Act consistently with antitrust law's broader policies.[95]

The decision met a strong dissent from Justices Stevens and Thomas.

The dissent argued that the Court's "transaction-specific concept of competition" all but eliminated the statutory protections of the RPA for dealers.[96] Until the majority opinion, the Supreme Court "treated as competitors those who sell 'in a single, interstate retail market.'"[97] The local grocer did not have to prove that it lost any specific customer to the chain store. And importantly, Volvo did not challenge the jury instructions, the relevant finding of actual price discrimination, or the relevant geographic market implicit in that finding, nor did the Eighth Circuit find the instructions erroneous or the evidence insufficient.[98] But in the view of Volvo and the majority, "each transaction was a separate market."[99]

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93 *Id.* at 178.

94 *Id.* at 179.

95 *Id.* at 181 (internal citations omitted).

96 *Id.* at 182 (Stevens, J. dissenting).

97 *Id.* at 185 (collecting cases).

98 *Id.* at 183. The procedural status of *Volvo Trucks* on appeal is significant because jury verdicts, in both civil and criminal cases, are afforded extraordinary deference. Evidence is viewed in the light most favorable to the prevailing party, and verdicts are sustained "unless no reasonable jury could have reached the same verdict based on the evidence submitted." *Craig Outdoor Advert., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1009 (8th Cir. 2008); *United States v. Medina*, 969 F.3d 819, 821 (7th Cir. 2020); *United States v. Davis*, 985 F.3d 298, 302 (3d Cir. 2021); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001).

99 *Volvo Trucks*, 546 U.S. at 186 (Stevens, J. dissenting).

Justice Stevens wrote in his dissent that "such an approach makes little sense."[100] The majority's approach

> requires us to ignore the fact that competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events. Each time Reeder managed to resell trucks it had purchased at discriminatorily high prices, it was forced either to accept lower profit margins than were available to favored Volvo dealers or to pass on the higher costs to its customers (who then might well go to a different dealer the next time). And we have long indicated that lost profits relative to a competitor are a proper basis for permitting the *Morton Salt* inference.[101]

In straying from *Morton Salt*, the majority "refus[ed] to adhere to the text of the [RPA] in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market."[102] Thus, while Justice Stevens agreed with Bork's characterization of the RPA as a "wholly mistaken economic theory," he found that the facts of *Volvo Trucks* "provide[d] strong reason to enforce [its] prohibition against discrimination."[103]

Volvo Trucks was welcomed by the Bush Administration's DOJ and FTC. The agencies filed an amicus brief in support of Volvo advocating for the very position the Court adopted—that the bidding process Reeder challenged "foreclose[d] the type of competition between different purchasers for resale of the purchased product that the [RPA]'s prohibition on secondary-line price discrimination was designed to address" and that "there [wa]s no evidence of price discrimination in the rare instances in which Reeder competed with another Volvo dealer to make a sale."[104] It was also hailed by the defense bar "as an important step in harmonizing the Robinson-Patman Act with the goals of the antitrust laws."[105] A sampling of decisions since 2006 demonstrates the impact of the decision.

A district court relied on the decision in 2012 to hold that the RPA "requires a showing of substantial competitive injury and that the de minimis sales identified by [plaintiff were] insufficient to establish such an injury."[106] The Third Circuit similarly relied on *Volvo Trucks* in 2008 when it affirmed summary judgment against a different truck dealer, reaffirming that "a plaintiff must allege facts to demonstrate that . . . the defendant made at least two contemporary sales of the

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100 *Id.*

101 *Id.*

102 *Id.* at 187–88.

103 *Id.*

104 Br. for the United States as Amicus Curiae Supp. Pet'r, 2005 WL 1248280, at *9 (U.S. 2005).

105 Margaret M. Zwisler, *Volvo Trucks v. Reeder-Simco: Judicial Activism at the Supreme Court?*, Antitrust, Summer 2006, at 40.

106 *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, No. 93-cv-5148, 2012 WL 3544771, at *13 (E.D.N.Y. Aug. 16, 2012), *aff'd sub nom. Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015).

same commodity at different prices to two different purchasers."[107] "[M]erely offering lower prices to a customer does not give rise to a price discrimination claim."[108] In another secondary-line case, the Northern District of California, though ruling in the plaintiff's favor, read *Volvo Trucks* to mean that "two purchasers can occupy the same place in a supply chain, in a common geographical market, and still not compete with each other for the same customers."[109]

Courts have recognized *Volvo Trucks*' limits. In 2016, the Northern District of California rejected the argument that *Volvo Trucks* overturned *Morton Salt*.[110] And in *C & M Oil Co. v. CITGO Petroleum Corp.*, the Southern District of Florida declined to extend *Volvo Trucks* to competitive pricing, which it distinguished from the competitive bidding process at issue in *Volvo Trucks*.[111] Nonetheless, empirical studies have shown that *Volvo Trucks* was a gift to predatory sellers. Prior to the *Brooke Group* decision in 1993, private plaintiffs bringing RPA actions succeeded 35% of the time, but between 2006 and 2021, that number dropped to less than 5%.[112]

III. THE DEFENSES TO RPA ACTIONS ARE VARIED AND ROBUST

The Third Circuit has noted that "the Supreme Court, in seeking to construe the [RPA] consistently with the broader policies of the antitrust laws, has repeatedly limited its reach."[113] The RPA "contain[s] two affirmative defenses that provide protection for two categories of discounts—those that are justified by savings in the seller's cost of manufacture, delivery, or sale, and those that represent a good-faith response to the equally low prices of a competitor."[114] The seller bears the burden of proof for each of these.

The cost justification defense is considered "difficult, expensive, and often unsuccessful."[115] It "focuses on narrowly defined savings to the seller derived from the different method or quantities in which goods are sold or delivered to different buyers" and requires a showing "that the

107 *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 228-29 (3d Cir. 2008).

108 *Id.* at 227–28.

109 *ABC Distrib., Inc. v. Living Essentials LLC*, No. 15-cv-02064, 2017 WL 3838443, at *8 (N.D. Cal. Sept. 1, 2017).

110 *Mathew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-cv-04236, 2016 WL 4269998, at *7 (N.D. Cal. Aug. 15, 2016).

111 No. 04-cv-22901, 2006 WL 8445994, at *3 n.5 (S.D. Fla. Sept. 29, 2006).

112 Sokol, *supra* note 3, at 1015 (citing Ryan Luchs, et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 Mgmt. Sci. 2123, 2124 (2010)); *see, e.g.*, *Dynegy Mktg. & Trade v. Multiut Corp.*, 648 F.3d 506, 522 (7th Cir. 2011) ("mere demonstration of a 'competitive injury' and the other elements of a violation 'does not mean that a disfavored purchaser has been actually "injured"'"); *United Mag. Co. v. Curtis Circulation Co.*, 279 F. App'x 14, 17 (2d Cir. 2008) (claims failed because *Volvo Trucks* requires "head-to-head competition" for bids).

113 *Feesers*, 591 F.3d at 198.

114 *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 555-56 (1990); 15 U.S.C. § 13(a).

115 *Texaco*, 496 U.S. at 561 n.18 (quotations omitted).

price reductions given did not exceed the actual cost savings."[116] The meeting-competition defense, on the other hand, "'requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.'"[117] The seller must have had a reasonable belief "that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors."[118] Moreover, the lower price must have been "'*made* in good faith to *meet*' the competitor's low price."[119] This "is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity."[120] The Supreme Court's lengthy discussion of the meeting-competition defense in its 1983 *Falls City* decision noted that it "also permits a seller to retain a customer by realistically meeting in good faith the price offered to that customer, *without necessarily freezing his price to his other customers*."[121] And the seller may do so "throughout a particular region" rather than customer by customer, so long as it is "reasonably tailored to the competitive situation."[122]

Functional discounts, similar to the cost-justification defense, can rebut the *Morton Salt* inference of competitive injury.[123] These discounts are "given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier."[124] The doctrine is not subject to the same "rigorous requirements of the cost justification defense."[125] However, it is not a blanket exemption from RPA liability: "[N]ot every functional discount is entitled to a judgment of legitimacy, and that it will sometimes be possible to produce evidence showing that a particular functional discount caused a price discrimination of the sort the [RPA] prohibits."[126]

The functional availability doctrine provides defendants another escape hatch. Described by some courts as "'a judicial graft on § 2(a) . . . not explicitly embodied in the text of the statute,'"[127] it dictates that a seller is not liable under the RPA if the lower prices charged to competitors "were available to the plaintiff from a practical standpoint and on equal terms."[128] It is well

116 *Id.*

117 *Falls City*, 460 U.S. at 438 (citations omitted).

118 *Id.* (citation omitted).

119 *Id.* at 440 (quoting 15 U.S.C. § 13(b)).

120 *Id.* at 441 (citation omitted).

121 *Id.* at 445.

122 *Id.* at 449–50.

123 *Texaco*, 496 U.S. at 571.

124 *Id.* at 554 n.11.

125 *Id.* at 561.

126 *Id.* at 571.

127 *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 866 (6th Cir. 2007) (quoting *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998)).

128 *Id.* (citation omitted).

illustrated in the 1980 *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.* decision.[129] There, the challenged price discrimination involved a pricing formula for fuel that was "uniform in structure and application" but "produce[d] differentials in the effective price of gasoline sold to Texaco distributors."[130] The Third Circuit said, quite plainly, that "a uniform pricing formula applicable to all customers is not a price discrimination under the [RPA]."[131]

The RPA's limited application to commodities has also been used to curtail defendants' liability.[132] The Supreme Court defined the term "commodities" to mean "goods, wares, merchandise, machinery or supplies."[133] Thus, the RPA does not apply to services. This is sometimes easy to determine.[134] It is also sometimes esoteric.[135] But more often, the overlap in provision of goods and services makes the applicability of the RPA unclear:

> Many transactions are of a hybrid nature, contemplating both goods and services; even the transfer of an intangible or service can rarely be accomplished without the incidental involvement of documents or other tangibles. To distinguish between goods and services the *dominant nature of the transaction* governs whether the activity is subject to the Act.[136]

The Sixth Circuit first used this "dominant nature of the transaction" test in 1942.[137] There, the defendant entered into a contract "to secure the construction of extensive housing facilities."[138] The plaintiff disputed the price charged for brick, but that brick "was only one of the factors in the cost of constructing a project in its entirety."[139] "Because there was no sale of a commodity by the [contractor], it could not be guilty of discrimination in the price of a commodity to the Commission."[140]

The Seventh Circuit's 1989 decision in *First Comics* illustrates the confusion that the "dominant nature of the transaction" test creates.[141] The plaintiff's claim was dismissed because, though the

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129 637 F.2d 105 (3rd Circ. 1980).

130 *Id.* at 120.

131 *Id.*

132 *See* 15 U.S.C. § 13(a) (prohibiting "discriminat[ion] in price between different purchasers of *commodities of like grade and quality*") (emphasis added).

133 *Columbia Broad. Sys., Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961).

134 *See May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1215 (9th Cir. 1980) (collecting cases finding RPA inapplicable to title insurance, news wire services, and lending); *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033, 1035 (7th Cir. 1989) (collecting cases finding RPA inapplicable to mutual fund shares, television advertising, news information, theater tickets, and glass glazing).

135 *See, e.g., Metro Commc'ns Co. v. Ameritech Mobile Commc'ns, Inc.*, 984 F.2d 739, 745 (6th Cir. 1993) (finding that cellular telephone services are, unlike electricity, not commodities because they "cannot be produced, felt, or stored, even in small quantities").

136 *First Comics*, 884 F.2d at 1035 (emphasis added).

137 *Gen. Shale Prods. v. Struck Constr.*, 132 F.2d 425, 428 (6th Cir. 1942).

138 *Id.*

139 *Id.*

140 *Id.*

141 884 F.2d at 1035–38.

end product was comic books, "the transaction was for printing, a service which made possible the production of commodities for future sales."[142] In *Aviation Specialties, Inc. v. United Technologies Corp.*, the Fifth Circuit likewise affirmed summary judgment for the defendant because (1) Pratt-Whitney did not sell parts directly to the plaintiff and (2) "although parts costs generally exceeded labor costs on repair contracts, labor costs were a significant portion of the contracts."[143] The discounted sale of parts was "woven into a general repair agreement" for labor.[144] These results show that the exclusion of services from the RPA has led to unpredictable outcomes in the courts.

Courts have also found the RPA inapplicable to intrafirm transfers. In short, "transfers between parent and wholly-owned subsidiary are not the type of transactions the Robinson-Patman Act meant to regulate."[145] That is, they are not sales within the meaning of the RPA because the two entities are a single economic actor.[146] The doctrine is a *per se* rule, and when it was adopted by the Sixth Circuit, the court rejected the argument that factors such as corporate control should be considered.[147] In a world of heavy vertical integration, this allows a manufacturer to acquire a retailer, sell that retailer inputs at discounted prices, and push disfavored competitor retailers out of the market.

In 1985, then-FTC Commissioner Calvani emphasized that "enforcement of Robinson-Patman *has* become more difficult," in large part due to the courts' "increasingly restrictive view of Robinson-Patman liability."[148] As shown above, that trend has only continued, aided by defendant-friendly court decisions expanding affirmative defense and the ill-advised decision of our enforcement agencies to jettison the RPA from its arsenal. Private victims of price discrimination are, as a result, left with little recourse.[149]

IV. THE FTC AND DOJ ABANDONED THE RPA

The DOJ and FTC are both empowered to enforce Robinson-Patman.[150] Congress also specifically tasked the FTC with preventing unfair methods of competition, a broad delegation of

142 *Id.* at 1038.

143 568 F.2d 1186, 1191 (5th Cir. 1978).

144 *Id.*

145 *Sec. Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir. 1979).

146 *Id.* at 966; *Utah Foam Prod. Co. v. Upjohn Co.*, 154 F.3d 1212, 1218 (10th Cir. 1998); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 221 (6th Cir. 1985).

147 *Russ' Kwik*, 772 F.2d at 220–21.

148 Calvani, *supra* note 67, at 925.

149 This is only compounded by the difficulty of bringing primary- and secondary-line cases as class actions, which are rarely certified. 6 Newberg on Class Actions § 20:30 (5th ed.).

150 Antitrust Modernization Comm'n, *supra* note 21, at 316; 15 U.S.C. §§ 4, 13a.

power that "encompass[es] not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."[151] However, both agencies abandoned these directives from Congress in the name of "consumer welfare." Between 1956 and 1968, the FTC, on average, pursued 97 RPA investigations and filed 27 complaints per year.[152] Between 1979 and 1983, the FTC opened 70 investigations total.[153] Then, between 1992 and 2014, the FTC brought one RPA enforcement action.[154] Former FTC Commissioner Calvani seemed to justify this reduced enforcement in 1985 with the claim that, "[a]s with most protectionist legislation, [the RPA] comes at a cost to the American consumer."[155] Calvani further argued that "historically the brunt of the Commission's enforcement efforts has fallen on small businesses," particularly buying cooperatives[156] In 2007, the DOJ Antitrust Modernization Commission plainly stated that the DOJ "has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s."[157] The Commission, led primarily by corporate defense lawyers,[158] even advocated for the RPA's repeal.[159]

Surprisingly, this dereliction of duties was based not on empirical studies but instead on the dogma of Robert Bork and the Chicago school of economics. The enforcers that abandoned the RPA do not dispute this. When the DOJ argued for the RPA's repeal, it admitted that "estimates of the effects of the Act have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited."[160] Even in the decades since the agencies ceased enforcement, economists and legal scholars have argued that price discrimination equals lower prices. According to Hovenkamp, "Were it not for the Robinson-Patman Act, a manufacturer's pricing practices respecting sales to its various dealers would undoubtedly be treated in the same way as vertical nonprice restraints generally. *Harm to competition would be highly exceptional*."[161]

Despite 40 years of relentless criticism of the RPA for supposedly increasing consumer prices, empirical studies supporting this widely accepted claim that price discrimination is beneficial to

151 15 U.S.C. § 45(a)(2); ***F.T.C. v. Indiana Fed'n of Dentists***, 476 U.S. 447, 454–55 (1986).

152 Antitrust Modernization Comm'n, *supra* note 21, at 316.

153 Calvani, *supra* note 67, at 927.

154 Antitrust Modernization Comm'n, *supra* note 21, at 316.

155 *Id.* at 924.

156 *See id.* (reporting that, "[i]n the main, these respondents were small companies that banded together to benefit from scale economies and other efficiencies associated with larger purchases"); Hansen, *supra* note 67, at 1157 n.231.

157 Antitrust Modernization Comm'n, *supra* note 21, at 316.

158 Antitrust Modernization Comm'n, *Commissioner Biographies*, *available at* https://govinfo.library.unt.edu/amc/bios.htm (archived) (last visited June 11, 2022).

159 Antitrust Modernization Comm'n, *supra* note 21, at 317–26.

160 1977 DOJ Report, *supra* note 23, at 322.

161 Hovenkamp, *supra* note 22, at 126 (emphasis added); *see also* Antitrust Modernization Comm'n, *supra* note 21, at 311 (2007) ("the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would").

consumers simply do not exist.[162] Only one systematic study of the RPA's economic effects has been carried out – in 1984 – and even that study focused on its effects on profits, not prices.[163] In opening the study, the author stated that "[t]he [RPA]'s poor reputation owes more to theory than to evidence, however. There has been very little empirical work on the effects of the act, and what there is has been largely concerned with the effects of individual prosecutions." Furthermore, the study found that the RPA's effects on profits were largely what was intended: it redistributed profits away from power buyers and towards suppliers. There was no investigation into its effects on price.

Even notwithstanding the lack of empirical evidence, existing theoretical economic models do not come to consistent conclusions that price discrimination should be permitted. In fact, a growing body of economic models indicate that price discrimination harms consumers. In 1987, one study showed that markets for intermediate goods (for which the RPA was designed) are fundamentally different, and that price discrimination would lead to higher prices and lower output, assuming the power buyer in question is not in a position to vertically integrate back into production.[164] Updates to this research–still entirely theoretical–reach indeterminate conclusions about the effects of price discrimination on consumer prices.[165]

What research does exist on price discrimination in general, beyond the RPA specifically, tends to indicate that price discrimination does not benefit consumers, particularly when it results from monopsonists (power buyers). As one review notes, "The monopsony literature is much less conflicted than that of monopolies, oligopolies, or monopolistic competition. Gould shows that monopsonists who price discriminate extract more surplus from consumers, sometimes even from parties with whom they do not contract. Furthermore, Inderst and Valletti show that uniform pricing unambiguously results in an increase in consumer surplus."[166] Others have also argued that the price discounts offered to power buyers may directly lead to *increased* prices for other buyers, and by extension their consumers.[167] Using evidence from Germany, another study found that uniform wholesale prices tend to benefit consumers with lower prices.[168]

In sum, the RPA was abandoned by the FTC and DOJ based on untested theory, and the body of evidence produced in the time since has not provided any support for the notion that it would increase consumer prices. The Chicago school successfully advanced a myopic view of antitrust

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162 *See* Daniel P. O'Brien, *The welfare effects of third- degree price discrimination in intermediate good markets: the case of bargaining*. 45 RAND J. Econ. 92, 108 (2014). ("A formal study of the effects of the Robinson-Patman Act on prices has not been conducted, to my knowledge."); Christina DePasquale, *The Robinson-Patman Act and the Consumer Effects of Price Discrimination*, 60 Antitrust Bull. 402, 412 (2015) ("no empirical studies find unambiguous positive effects of price discrimination on consumer surplus").

163 Thomas W. Ross, *Winners and losers under the Robinson-Patman Act*, 27 J. Law & Econ. 243, 243 (1984).

164 Michael L. Katz, *The welfare effects of third-degree price discrimination in intermediate good markets*, 77 Am. Econ. R. 154 (1987).

165 O'Brien, supra note 162.

166 *See* DePasquale, *supra* note 1623, at 412 (discussing J.R. Gould, *Price Discrimination and Vertical Control: A Note*, 85 J. Pol. Econ. 1063 (1977); Roman Inderst and Tommaso M. Valletti, *Third-Degree Price Discrimination with Buyer Power*, 9 B.E.J. of Econ. Analysis & Pol'y 1 (2009)).

167 Roman Inderst and Tommaso M. Valletti, *Buyer power and the 'waterbed effect'*, 59 J. Indus. Econ. 1 (2011).

168 Sofia Berto Villas- Boas, *An empirical investigation of the welfare effects of banning wholesale price discrimination*, 40 RAND J. Econ. 20 (2009).

law, focused on efficiencies above all else, and it persuaded the courts to ignore the plainly stated purpose of the RPA found in Congressional records, without any research supporting its claims. In effect, a natural experiment was conducted, and we can see the effects of permitting price discrimination in our economy now.

V. PRICE DISCRIMINATION TODAY

So if anything has truly tested the wisdom of the consumer welfare standard, it is the abandonment of the Robinson-Patman Act. Unfortunately, the experiment failed. As President Biden remarked when he signed his executive order on competition policy:

> We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And where—what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents.[169]

The approach of courts and enforcement agencies has so gutted Robinson-Patman as to make it impotent even in settings where Congress clearly intended it to operate.

Today's giant middlemen, such as Amazon and Walmart, dwarf A&P in their size and power. They control such enormous swaths of their markets that similarly consolidated manufacturing sectors (and even the U.S. Postal Service)[170] are happy to oblige their extortionist terms at the expense of everyone else.[171] A class action pending against Amazon and a cartel of book publishers illustrates the point well.

Book publishing is a highly concentrated industry at the wholesale and retail level. Five publishing companies control 80% of the market for trade books sold in the U.S.[172] Amazon, meanwhile, controls about half of the market for all retail trade book sales and 90% of the market for online book sales (and has its hand in publishing as well).[173] The "Big Five" publishers and Amazon stand accused of (1) colluding to jointly raise the wholesale prices of trade books in violation of

169 Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy (July 9, 2021), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/ (last visited July 13, 2022).

170 *See* Hal Singer and Ted Tatos, *Protecting the U.S. Postal Service from Amazon's Anticompetitive Assault*, *available at* https://www.econone.com/wp-content/uploads/2022/02/Protecting-the-USPS-from-Amazons-Assault-Singer-and-Tatos.pdf (last visited July 5, 2022) (discussing the special rebates Amazon extorts from the Postal Service and their impact on standard rates paid by smaller shippers and individuals).

171 *Compare* Antitrust Modernization Comm'n, *supra* note 21, at 140 (arguing that, in the year 2000, price discrimination was not a threat because "today large chain stores have become a fact of life, and in most markets competition among them is robust.")

172 *Bookends & Beginnings LLC v. Amazon.com, Inc., et al.*, No. 21-cv-2584, Amended Class Action Complaint, Dkt. 66, ¶1 (S.D.N.Y. July 19, 2021). The term "trade books" refers to "general interest fiction and non-fiction books" as opposed to "academic textbooks, reference materials, and other texts." *Id.*

173 *Id.* ¶2.

Section 1 of the Sherman Act,[174] (2) selling books to Amazon (and knowingly purchasing books from the publishers) at higher discounts and with more favorable terms in violation of Section 2(a) of the RPA,[175] and (3) illegally monopolizing (and conspiracy to monopolize) the online retail market for books in violation of Section 2 of the Sherman Act.[176]

The harm wrought by the publishers' and Amazon's illegal conduct is clear:

> [D]iscriminatory pricing lessens competition in the retail market for print trade books because it allows Amazon to draw significant sales or profits away from its rivals. By minimizing competition from Amazon's rivals, it also tends to create or maintain Amazon's monopoly share of the print trade book market and the print trade book ecommerce submarket. But the [publishers] have set aside these concerns because reaching this same deal with Amazon enables them to raise their list prices (and therefore their wholesale price to [independent book sellers]) without suffering any competitive disadvantages within the print trade book publishing market.[177]

Anticompetitive effects in the trade book market run the gamut: "higher wholesale prices, higher consumer prices, depressed book sales, and stagnant deductions that make it difficult for smaller retailers to compete with Amazon."[178] And the benefits to Amazon highlight the importance of the RPA: the publishers' "discriminatory pricing scheme locks in Amazon's dominance as a retailer of print trade books and prevents fair competition from other booksellers."[179]

Similar power structures exist in the food supply chain. In September 2021, the National Grocers Association submitted comments to the FTC about the harm dominant retailers like Walmart and, again, Amazon have caused in the grocery space.[180] These large buyers command "more favorable pricing and price terms, more favorable packaging, and access to exclusive products."[181] The expense of price discrimination is felt from the producer level, where farmers are forced to accept unfavorable terms, to the retail level, where smaller grocers cannot sustain their businesses, to the consumer level, where consumers are left with higher prices and less choice.[182]

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174 *Id.* ¶¶3, 6, 105–123; *see* 15 U.S.C. § 13(f) (making it "unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section").

175 *Id.* ¶¶3, 92–104.

176 *Id.* ¶¶18, 124–130, 131–138.

177 *Id.* ¶17.

178 *Id.* ¶53.

179 *Id.*¶57.

180 Nat'l Grocers Ass'n, *Comments in response to Solicitation from Public Comment on Contract Terms that May Harm Competition*, FTC-2021-0036-0022 (Sept. 30, 2021), *available at* https://www.nationalgrocers.org/wp-content/uploads/2021/09/9.30.21_NGA_Unfair-Contract-Terms_FTC-Submission_Final.pdf (last visited June 21, 2022).

181 *Id.* at 1.

182 *Id. See also* Nat'l Grocers Ass'n, *Buyer Power and Econ. Discrimination in the Grocery Aisle: Kitchen Table Issues for Am. Consumers*, (Mar. 2021), *available at* https://www.nationalgrocers.org/wp-content/uploads/2021/03/NGA-Antitrust-White-Paper25618.pdf (last visited June 21, 2022) (discussing harms wrought by buying power of national and international grocery chains).

The price hikes permeating U.S. markets have proven the RPA's critics wrong. Consumers are not reaping benefits from price discrimination imposed on sellers by dominant buyers. As 43 members of Congress rightly point out in a bipartisan letter to the FTC, "[t]he 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 "bedrock of communities from rural America to the inner city."[183] RPA violations run rampant because the government has allowed them. The resulting inflation demands action.

First, the FTC and DOJ should abandon prior policy positions criticizing the RPA and revisit how price discrimination affects competition. The thinking that "discriminatory prices are likely to exist only where *sellers* have enough market power to charge some purchasers higher prices" was wrong and ignored the initial goal of the RPA: to combat the outsized buying power of A&P.[184] Today, it is the buying power of conglomerates like Walmart and Amazon that creates the problem. They extract discriminatory prices and other more favorable terms from all the sellers, so "there is no seller willing to reduce profit margins to capture the new business of the disfavored customer."[185]

Second, investigations to uncover the scope of the problem are key. The FTC is already using its 6(b) authority to investigate how large buyers use their market power to extract discriminatory prices from manufacturers and increase market power, and also how manufacturers pass on the costs of those contracts to small businesses.[186] Congressional committees can also uncover information on price discrimination, as can other executive branch agencies, such as the Department of Agriculture. The FTC, DOJ, and agencies with similar powers should also look at recent private RPA actions to determine how to bring civil or criminal cases, as well as consider filing amicus briefs to shape the law in a pro-enforcement direction. The agencies should test the bounds of the law with cases in politically salient areas where price discrimination is causing obvious harm.

Third, legislative remedies are likely necessary. The RPA should be broadened to cover services and eliminate confusion around the term "commodities" and the "dominant nature of the transaction" test. Doing this would enable price discrimination claims in the markets for digital services, such as online advertising. It would also prevent the abuses Amazon is currently inflicting on the U.S Postal Service, which gives Amazon rebates that result in below-cost pricing—at the expense of smaller businesses and consumers—but escapes RPA scrutiny because the Postal Service is providing services rather than commodities.[187] A provision should also be added in

183 Letter Regarding the Robinson-Patman Act, 117 Cong. at 1 (Mar. 30, 2022).

184 1977 DOJ Report, *supra* note 23, at 47, 116 (emphasis added).

185 *Id.* at 47–48.

186 Press Release, Fed. Trade Comm'n, *FTC Launches Inquiry into Supply Chain Disruptions* (Nov. 29, 2021), *available at* https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions (last visited June 21, 2022).

187 Singer and Tatos, *supra* note 170, at 14–16, 18–21.

response to the *Volvo Truck* ruling, making clear that a plaintiff must only show injury to the competitor, not consumers, and need not compete with buyers for identical customers to succeed on their claim. And power buyers sued under Section 2(f) should be barred from invoking the meeting competition and cost justification defenses, which have little relationship to how a middleman with outsized market power extracts discriminatory prices. Of course, state legislatures can enact similar legislation.

Fourth, Congress should, more broadly, restore access to the courts by passing the Forced Arbitration Injustice Repeal (FAIR) Act. The FAIR Act bars corporations from forcing their customers, employees, and competitors into arbitration agreements and class action and collective action waivers for employment, consumer, antitrust, and civil rights disputes.[188] Its passage would allow affected buyers to more readily seek remedies in court and, more generally, restore citizens' access to justice. Otherwise, government investigations are the only realistic way of combating the threat of price discrimination to Americans. RPA plaintiffs also need protection from retaliation from suppliers to prevent defendants from cancelling contracts and further strangling competition.

Fifth, enforcers should look to other provisions of the RPA. Section 2(d) makes it "unlawful for a merchandiser to pay anything of value to a customer for any services or facilities furnished by the customer in connection with the resale of the product; unless such payment is available on proportionally equal terms to all competing customers."[189] For example, if a manufacturer offers a rebate or some other compensation in exchange for prime advertising space in a retailer's mailer, it must make proportionally equal offers to its other buyers.[190] Section 2(e) conversely makes it "unlawful for a merchandiser to furnish any services or facilities connected with the resale of a commodity sold by him, upon terms not accorded all purchasers on proportionally equal terms."[191] In *F.T.C. v. Simplicity Pattern Company*, this meant the manufacturer had to offer the same displays, cabinets, catalogues, and transportation costs to fabric stores that it provided to variety stores.[192] Importantly, these "proscriptions . . . are absolute."[193] They do not require "a showing that the illicit practice has had an injurious or destructive effect on competition."[194] Cost justification is also not a defense.[195] With these shields unavailable to defendants, kickbacks designed to squeeze out small businesses can be more effectively challenged in court.

188 Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. § 502 (2022).

189 *Exquisite Form Brassiere, Inc. v. F.T.C.*, 301 F.2d 499, 500 (D.C. Cir. 1961).

190 *See Colonial Stores, Inc. v. F.T.C.*, 450 F.2d 733, 738 (5th Cir. 1971) (upholding FTC findings where large retail grocer knowingly received payments from suppliers for promotional services that were not proportionally equal to offers made to its competitors).

191 *Exquisite Form*, 301 F.2d at 500.

192 360 U.S. 55, 60–61 (1959). Simplicity also sold its dress patterns to variety stores on a consignment basis while requiring fabric stores to pay cash. *Id.* at 60.

193 *Id.* at 65.

194 *Id.*

195 *Id.* at 65–66.

Section 2(c) is another valuable tool. This provision of the RPA makes it "unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered."[196] Effectively an anti-corporate bribery statute, the FTC voted on June 16, 2022 to investigate its application to pharmacy benefit managers (PBMs).[197] These intermediaries routinely "favor high-cost drugs that generate large rebates and fees that are not always shared with patients."[198] The results for patients have been catastrophic. Insulin costs have soared to $6,000 for a year's supply, with "out-of-pocket costs for insulin alone averaging $1,288 for uninsured patients and $613 for insured patients as of 2017."[199] These out-of-control costs are exacerbated, even driven by, illegal kickbacks paid to PBMs to discourage listing lower cost drugs on insurance formularies.[200] These arrangements violate the Robinson-Patman Act, and the FTC's recent policy decision is an important step in the right direction to improve competition in the pharmaceuticals industry.

Nonetheless, the FTC should not forget the mistakes of the past. Enforcement efforts in the 1960s and 1970s often targeted the small businesses that the RPA was meant to protect.[201] This was a failure that served as a scapegoat to abandon the RPA altogether, rather than to rethink how it could be used to help small businesses consistent with legislative intent. Enforcement actions that prevent local grocers from forming cooperatives or local gas station operators from competing with the national chain across the street were not the goal of the RPA. Enforcers should use their rule-making authority and agency discretion to ensure that the RPA is enforced in a way that bolsters rather than hinders the ability of small businesses to compete with large dominant firms.

VI. CONCLUSION

The power buyers of today—like Walmart, Amazon, national grocers, and PBMs—pose the same threats as Standard Oil and A&P 100 years ago. The Internet expands their reach and makes them even more powerful. The RPA can and should be used against them, but it can also be improved. Taking these actions will allow ordinary Americans to procure goods and services on equal terms. They will revitalize the Main Streets of America, their brick-and-mortar stores, small suppliers, and the local communities that they employ and serve.

196 15 U.S.C. § 13(c).

197 Fed. Trade Comm'n, *Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products*, (June 17, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf (last visited June 21, 2022).

198 *Id.* at 1.

199 *Id.* at 2.

200 *Id.* at 3–4.

201 1977 DOJ Report, *supra* note 23, at 97–99. One FTC Bureau of Economics director speculated that this was because small businesses, with less specialized attorneys and fewer resources, were easier to prosecute than large corporations with "stables of highly skilled attorneys." *Id.* at 98.