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POLICY BRIEF

The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare

Alden Abbott and Satya Marar

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The Robinson-Patman Act of 1936 (RPA), a 1937 amendment to the Clayton Antitrust Act, is an anti–price discrimination statute, administered primarily by the Federal Trade Commission (FTC), which may provide injunctive relief through administrative proceedings.[1] The RPA bans certain discriminatory discounts on price as well as the provision of or reimbursement for certain promotional services. Its original intended targets were large retail chains that leveraged their large size and dominant market position to secure favorable exchange terms from suppliers relative to their smaller competitors. Although courts have recently shown greater reluctance to enforce the RPA based on injury to competitors rather than competition,[2] even its modern proponents in the antitrust enforcement establishment affirm its purpose as keeping "open the door of opportunity for the small-business man."[3] After initial decades of heavy enforcement by the FTC, the statute largely became inactive in the 1980s. Since 1992, the FTC has issued just one RPA complaint.[4] Recently, however, the Biden administration FTC, under new chair Lina Khan, has signaled renewed enthusiasm about enforcing the RPA's mandates.[5] Khan's FTC has the support of the Biden administration, which produced an executive order in July 2021 citing the RPA as a solution for improving "farmers' and smaller food processors' access to retail markets."[6]

The historic decline in RPA enforcement has largely been driven by changes in economic learning and antitrust precedent since the statute's enactment. From the 1970s onward, American courts adjudicating Clayton Act disputes have applied the "consumer welfare standard" as the antitrust benchmark for assessing business practices.[7] More specifically, courts have struck down conduct as anticompetitive based on its harmful effect on consumers, as attested through higher prices, reduced innovation, and lower quality in products and services. This situation has led to jurists,[8] scholars,[9] and antitrust enforcement agencies—for example, the Department of Justice[10]—alike criticizing the RPA for its focus on shielding competitors from their potentially more efficient and effective rivals rather than on promoting competition to protect consumers. Put simply, larger buyers typically undercut smaller rivals by increasing services, lowering prices, or making their products more attractive—thus benefiting consumers.[11]

Critics of RPA enforcement note that it risks harming consumers by deterring potentially procompetitive conduct. For instance, a retail chain that is prevented from securing a lower price (relative to its rivals) from a willing supplier by negotiating discounts likely will need to raise prices for its retail products. Calls to repeal the RPA have thus been made as recently as 2007 in a bipartisan report from the Antitrust Modernization Commission.[12] RPA enforcement is also fraught with difficulty owing to its language, which is convoluted and difficult to interpret, with Justice Frankfurter famously writing that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act."[13] A further complication is that public and private plaintiffs attempting to make a successful RPA claim must clear several complex statutory hurdles, as well as rebut multiple potential defenses that defendants may assert. FTC enforcers attempting to mount any renewal in RPA enforcement will need to overcome these difficulties, as well as recent unfavorable judicial precedents, if they are to bring successful claims.

This brief charts the legislative, judicial, and enforcement history of the RPA. It critically appraises the potential consequences for consumers and competition of stricter and more zealous RPA enforcement by today's FTC. The brief also assesses the justifications provided by proponents of renewed RPA enforcement and evaluates suggestions for alternative, pragmatic reforms to address the ability of small businesses and entrepreneurs to compete effectively.

THE ROBINSON-PATMAN ACT: A BRIEF SUMMARY

This section briefly discusses the conduct covered by the RPA, types of injuries, defenses, and the act's judicial history.

What Conduct Is Covered by the RPA?

According to the FTC:

> A seller charging competing buyers different prices for the same "commodity" or discriminating in the provision of "allowances"—compensation for advertising and other services—may be violating the [RPA] … RPA claims must meet several specific legal tests:
>
> 1. The Act applies to commodities but not to services, and to purchases, but not to leases.

2. The goods must be of "like grade and quality."
3. There must be likely injury to competition (that is, [in a private lawsuit,] a private plaintiff must also show actual harm to his or her business).
4. Normally, the sales must be "in" interstate commerce (that is, the sale must be across a state line).[14]

Types of Injury

The RPA punishes firms responsible for primary-line and secondary-line injuries. Primary-line injuries occur when a firm's competitor sells its goods at a lower price in the firm's specific geographic market relative to other markets. For instance, a big-box retailer selling its goods below cost in a single locality over a sustained time period inflicts a primary-line injury on its competitors in that market. The 1993 *Brooke Group* Supreme Court decision limited the scope of liability for primary-line injuries. Secondary-line injuries are those inflicted on an aggrieved firm when its supplier gives price advantages to its competitor or competitors. Thus, primary-line injuries occur at the seller level and are caused by competing sellers, and secondary-line injuries occur at the buyer level.

Defenses

The *meeting competition defense* allows sellers to provide different prices or promotional services to specific buyers if it believes in good faith that it must do so to meet a comparable offer from competing sellers.[15] This defense acknowledges that competing sellers do not usually know prices their rivals are offering, thereby letting them confidently make the most competitive offers without fear of legal liability. These cost savings are usually passed on to end consumers through lower prices. In 1983, the Supreme Court ruled that sellers need only meet the generally lower price structure offered by a competing seller in another geographic market rather than having to show it was "meeting competition" on a customer-by-customer basis.[16] Thus, firms can charge different prices in two different geographical markets based on differing levels of competition in each one.

The *cost justification defense* allows sellers to offer different prices to buyers based on differences in costs inherent in manufacturing, selling, or delivering the goods to them.[17] For instance, a supplier's wholesaler customers may receive a "functional discount" relative to its retail customers for the same good to compensate the wholesalers for promotional services they provide, which retailers do not normally provide.[18] This defense was later expanded to include arrangements between suppliers and vertically integrated businesses engaged in multiple supply-chain levels.[19] Cost justification is, however, generally difficult and costly to establish because defendant sellers must demonstrate actual cost savings equal to or exceeding the differences in price faced by different customers.[20]

An *affirmative defense* is available in cases where price differences between customers are a “response to changing conditions affecting the market for or the marketability of the goods concerned.”[21] This defense can be raised if the demand for the product has decreased significantly because of the perishable nature of the goods or obsolescence of seasonal goods or if the product is discontinued.[22] Courts have also recognized an affirmative defense if the advantageous price was functionally or practically available to the disfavored buyer.[23] Buyers from the same supplier may also be offered different prices where they are not “close competitors” or do not compete “head-to-head” for the same customer or customers.[24] For instance, a wholesaler plaintiff may be offered a higher price than a large, vertically integrated chain because they are not close competitors.[25] Liability also will not hold if sales were not diverted to the competitor that was allegedly offered the discount[26] or if the loss incurred by the aggrieved purchaser was de minimis—that is, only a minuscule proportion of its customers were diverted.[27] Although courts have recognized more defenses over time while broadening the scope of existing ones, the RPA still deters potentially pro-competitive behavior through the threat of litigation itself. This situation reflects the risk that successful plaintiffs may obtain treble damages and their attorney fees and recover their own costs.[28]

A Judicial History of the RPA

Early RPA jurisprudence interpreted it as protecting competitors from purported price discrimination even if competition intensified and consumers benefited from the differences, such as through lower final prices in the relevant markets. *Morton Salt* (1948) dealt with secondary-line injuries and created a rebuttable presumption that competition is injured if it can merely be shown that an aggrieved buyer had faced sustained higher prices from suppliers after a price discrimination or discount agreement between the defendant competitor and the same suppliers.[29] Proof of diverted sales to the beneficiary competitor after such an agreement also supports this presumption.[30]

However, the Supreme Court later ruled in *Automatic Canteen* (1953) that a defendant competitor receiving a favored price would be liable for RPA injury only if it both *knew* that it was receiving a better price than its rivals *and also knew* that the supplier seller in question had little likelihood of a successful defense, such as cost justification or meeting competition.[31] This interpretation established and upheld the rule that the RPA must be reconciled with the broader purpose of the Clayton Act of promoting competition and that an agency’s interpretations of its own statutes cannot be accepted at face value unless Congress has instructed otherwise.[32] The majority held that competition would be reduced if the “sturdy bargaining between buyer and seller” was inhibited as a result of buyers bearing the burden of determining whether their supplier’s price is lawful every time they negotiate for a lower price.[33] Information about whether RPA defenses apply is usually proprietary to the seller and may thus be unavailable to its customers.[34] Information is often difficult to obtain even for sellers without investigating their own business in detail.[35]

With regard to primary-line injury cases, the 1967 *Utah Pie* Supreme Court decision held that a defendant competitor seller that had sold its products in the plaintiff's geographic market at a lower price than in other markets was liable for injuring the plaintiff, even though economic data showed the pro-competitive result of prices faced by consumers being driven down in the long term.[36] However, *Utah Pie* has since been essentially overruled, and primary-line injury liability now requires a showing that the price-discriminating defendant seller not only underbid its competitors but also sold at below its own cost.[37] This development brings the standard of proof for RPA primary-line injury claims into line with that of Sherman Act price discrimination claims, and it requires a stronger indication that competition (rather than merely competitors) has been injured.

Subsequent RPA case law has been characterized by the influence of the modern consumer welfare standard as the benchmark for ascertaining substantial harm to competition under the Clayton Act and by courts increasingly expanding the number and scope of available defenses for RPA injury claims. These developments have made RPA claims increasingly expensive and difficult for competition authorities and aggrieved competitors to bring and substantially lowers their prospects of success.[38] Accordingly, there is an increased focus on empirical evidence and market analysis demonstrating more than injury to aggrieved competitors through their having sustained levels of higher prices (something that is no longer considered as sufficient evidence of "injury to competition" in isolation). Despite these developments, however, the RPA's treatment of secondary-line injury claims, as upheld by courts,[39] leaves open the possibility of liability even where consumer welfare and competition across the relevant market are enhanced.

ARGUMENTS AGAINST THE RPA AND STRICTER RPA ENFORCEMENT

The RPA harms rather than protects small business. Instead of protecting small businesses from the "predatory" tactics of larger firms, targets of RPA enforcement have mainly been the very same small and medium-sized businesses. A 1990 study found that between 1961 and 1974, only 36 (6.4 percent) of the 564 companies mentioned in FTC complaints concerning RPA injury had annual sales exceeding $100 million or above when the complaint was made. More than 60 percent of these firms had sales below $5 million.[40] Thus, renewed calls for more zealous and strict RPA enforcement likely will disproportionately harm the same small and medium-sized businesses. These firms bear disproportionately greater costs from litigation than larger ones—costs that will make it harder for them to expand and compete with even larger rivals while deterring them from engaging in potentially pro-competitive conduct that benefits consumers. Small businesses also suffer when their suppliers refuse outright to sell to small clients to avoid incurring liability under the RPA for charging them prices that differ from the prices charged to their larger competitors.

The RPA polices price difference rather than price discrimination, punishing efficient business practices as a result. Price discrimination happens when there are differences in the price–

to–marginal cost ratios faced by different buyers.[41] By contrast, the RPA is concerned with mere differences in prices faced by different buyers—something that is not necessarily discriminatory. Extensive economic literature finds that price differences faced by buyers of the same product are ubiquitous, occurring even in industries with many competitors and low barriers to entry to markets considered to be competitive, and that these differences give buyers incentives to compete with each other by adopting efficient practices, providing promotion or other services, or buying larger quantities to obtain discounts from sellers and suppliers that can be passed on to consumers.[42] Though many differences would be captured by defenses such as cost justification and meeting competition, a zealous enforcement agency is likely to err on the side of bringing complaints that increase litigation costs for firms. That approach could lead to firms raising prices in different markets to achieve an "even" price across them all, exiting some markets, or refusing to sell to some buyers entirely to avoid the possibility of an RPA complaint. The Antitrust Modernization Commission notes that many businesses find ways to comply with the RPA by differentiating products just so they can sell slightly different products to different buyers at different prices.[43] Such methods are likely to increase costs for these sellers—and hence to raise them for consumers—without any countervailing benefit. In markets where listed prices do not exist or differ from negotiated final prices, the RPA deters such negotiations between buyers and sellers that place downward pressure on final prices faced by consumers when passed on, as typically occurs in competitive markets.[44] Conversely, resources dedicated to create practices to avoid RPA liability risk leave fewer resources that could be used to lower production costs or increase product quality.[45] Thus, consumers are likely to be worse off under more zealous RPA enforcement.

Price discrimination can benefit consumers, helping calibrate and clear markets. The welfare effects of price discrimination are ambiguous because they can benefit or harm consumers depending on the circumstance.[46] This scenario has prompted economists to note the difficulty in distinguishing between "[beneficial] discrimination and systematic discrimination practiced by an entrenched monopolist that may be harmful."[47] There are many instances where price discrimination can help calibrate and clear markets while benefiting end consumers.[48] For instance, price discrimination deters collusion because it encourages parties to break collusive agreements by attempting to secure prices lower than the agreed price—thus breaking the collusive market structure and producing lower prices and welfare enhancement for consumers.[49] Even in oligopolistic markets where outright collusion is not taking place, the benefits for competition and consumers are especially significant because oligopolies can be broken through forced shifting to a new and more competitive equilibrium created by the entry of a seller willing to lower its prices in that market.[50] Deterring such price discrimination would defeat a key goal of current neo-Brandeisian advocates for stricter antitrust enforcement, who view the undermining of oligopolies as an inherent objective of antitrust law.[51]

The RPA is based on flawed, discredited economic theory. The theory of predatory pricing connoting a primary-line injury to competition under the RPA is premised on the notion that firms engaged in multiple markets may lower costs in a specific market in the short term and incur losses in the process just so they can raise prices above their previous market levels once rivals in that specific market have been eliminated because of their inability to match said prices.[52] Hence, the elevated price levels of post–price discrimination left unchecked by rivals that have been forced out of the market injure consumers. Under this theory, the firm operating across multiple markets can offset its temporary losses in one market through profits accrued in less competitive markets where it levies a higher price. Alternatively, the firm can offset temporary losses by charging above pre–price discrimination levels once rivals have exited the market. By contrast, the firm's local competitors cannot weather such tactics because they operate in only one or a few markets and are thus less able to offset temporary losses in one market through higher prices in others. However, economists find that it is rarely a profitable tactic for price-discriminating firms to deliberately run at a loss with the goal of eliminating rivals from a market in order to offset the losses.[53] It is only when the predatory firm is able to maintain a sustained increase in its own prices relative to the pre–price discrimination levels that benefits to consumer welfare from the discriminatory prices would be offset.[54] The result when this does not happen is improved consumer welfare at the expense of the loss-running firm and more competitive pressure on the firm's rivals to better serve consumers.

The RPA is redundant for policing predatory pricing. Even if the theory of predatory pricing is accepted, it is already policed under another antitrust statute: section 2 of the Sherman Act. Unlike the RPA, however, this provision requires proof of actual harm to competition and proof that the discriminating firm is selling at below cost rather than merely underbidding its rivals. Hence, the Sherman Act is a better and more finely calibrated instrument for addressing predatory pricing when it could potentially adversely affect competition and consumer welfare.[55] Notably, the *Brooke Group* Supreme Court decision nullified *Utah Pie* and led to the harmonization of standards for a predatory pricing conviction between the RPA and Sherman Act. Plaintiffs are now required to establish that the defendant sells products at below cost in the relevant market and that they have a reasonable prospect of recouping their losses.[56] However, even this precedent merely ensures that two statutes with similar standards serve the same ends, thereby indicating a duplication in function.

The limits on the RPA's meeting competition defense reduce rather than promote competition and consumer welfare, thus defeating the purpose of the antitrust laws. The RPA's meeting competition defense theoretically allows sellers to make competitive offers to buyers in order to secure or retain their business without fear of legal sanction. However, it allows sellers only to *meet* rather than *beat* what they reasonably believe to be the most competitive counteroffer faced by the buyer.[57] Thus, the RPA serves to limit competition between sellers by preventing them from undercutting each other and thus competing more rigorously on price. This scenario harms consumers by denying them the lowest-priced offers possible for the same quantity of goods.

The RPA's treatment of secondary-line injury punishes injury to competitors even when competition and consumer welfare are enhanced. Unlike primary-line injury liability, secondary-line injury liability under the RPA can still arise merely from showing that some purchasers of a good had to pay substantially more to the same seller than did their competitors.[58] Private damages are calculated on the basis of evidence of sales and profits diverted from one competitor to the other.[59] This approach precludes the need for meaningful exploration and analysis of the effect of discriminatory prices on the relevant market, and thus it fails to adequately appraise the effect of allegedly injurious practices on competition or consumer welfare. Courts have found secondary-line injury liability while simultaneously conceding that the relevant markets have remained highly competitive.[60] This finding is because the RPA makes it an offense to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of [price] discrimination, or with customers of either of them."[61] This section limits the scope of the relevant market for the purpose of competition analysis in secondary-line injury cases to head-to-head competitors reliant on the same price-discriminating supplier[62] rather than to the market of firms that compete head-to-head to attract consumers of the same good or a close substitute regardless of their supplier.[63]

For instance, in *Texaco Inc.*, the relevant market for assessing secondary-line injury to competition was defined as the defendant Texaco (which supplied Texaco-brand gasoline) and its customers, including direct gasoline retailers and gasoline distributors (who served retailers). Thus, a secondary-line injury caused by Texaco was inferred on the basis of Texaco selling at a higher price to its direct retail customers than to its customers who distributed to other retailers. Both categories of customer were deemed to compete directly because they marketed Texaco's brand to final customers. However, in defining the relevant market as narrowly as competitors sharing the same individual supplier, the court disregarded that the relevant product market in the context of the competing firms' customers would include other gasoline brands that compete with Texaco and are close substitutes. The anticompetitive result of the court's own decision was recognized in the opinion's text, with the majority remarking that the "retail gasoline market in Spokane was highly competitive throughout the damages period, which ran from 1972 to 1981," and noting that "[s]tations marketing the nationally advertised Texaco gasoline competed with other major brands as well as with stations featuring independent brands."[64] It is also notable that including gasoline of different brands would be commensurate with the RPA's reference to "commodities of like grade and quality."

The RPA is not necessary or desirable for leveling the playing field for small business. From its inception, the RPA was intended to level the field for small businesses by curtailing the ability of larger competitors to leverage their size and resources to negotiate relatively favorable, exclusive terms resulting from economies of scale (lower costs per unit of selling to them because of their size).[65] This objective has been emphasized even in recent court cases with regard to secondary-line injury claims.[66] Current FTC chair and RPA enforcement proponent Lina Khan has also cited the RPA as promoting "fair" competition by curbing the negotiating power of big business in order to assist small business.[67] These claims are underpinned by assertions from proponents of wider antitrust enforcement against large businesses, such as Senator Elizabeth Warren, that concentration across American industries is increasing in "sector after sector."[68]

Although corporate concentration has increased in recent decades in several industries, it has fallen in many others and increased only slightly in many.[69] When it comes to American manufacturing, for instance, from 1952 through 2007, the proportion of industries in which the top four firms comprised at least 50 percent of the shipments went up just slightly, from 35 percent to 39 percent. Concentration rates fell in banking, electronic product manufacturing, and other industries. And industries where concentration rose significantly have stayed competitive.[70] Even a business such as Amazon, which was singled out by FTC chair Khan for its consolidation and growth as a corporate retail giant, retains only the seventh place in market concentration in retail[71] despite cross-subsidizing that arm through operations in other lines of business (by bundling Amazon Prime media subscriptions with retail offerings, for example). As of 2016, the top four companies in retail in the United States were Walmart, Kroger, Costco, and Home Depot. Not only do these large big-box chains remain in fierce competition with each other, they also collectively account for just 13 percent of the sector. These figures contradict the narrative that several major industries, including retail, have attained concentration levels that threaten competition and consumers.

Modifying or more strictly enforcing laws like the RPA against big firms for the advantages they possess as a result of scale also is not to the benefit of consumers, innovation, or workers. The Antitrust Modernization Committee found that the presence of large chains in the grocery and drugstore markets is associated with lower prices for consumers because of the superior bargaining power of larger businesses when it comes to negotiating with suppliers and manufacturers.[72] Economists similarly find that the transition toward larger, more-efficient businesses across many sectors likely strengthened the economy and benefited consumers.[73] This contradicts the notion underpinning the RPA that a market of many small firms and dispersed concentration is good for consumers, living standards, or economic well-being. Big businesses are four times less likely to lay off workers than small ones; pay their workers 54 percent more on average; provide 2.5 times more paid leave and insurance benefits and 3.9 times more retirement benefits; are more likely to have unionized workers; and invest significantly more in research, development, and worker training.[74] They also obtain more in innovation output for every dollar invested[75] and are far more likely to pay above minimum wage.[76] Laws targeting larger businesses could also harm small businesses in the long run by devaluing them because larger firms are less likely to invest in them or buy them out because of the antitrust risks associated with such acquisitions. New businesses are often started with the incentive of being bought out by larger firms capable of applying their economies of scale to new business models and innovations,[77] and the idea of eventually being profitably bought out is also a significant incentive for early-stage investors in start-ups.[78] Encouraging smaller firms, especially less-efficient ones, to grow and consolidate, such as by removing existing regulatory barriers, would hence be a better alternative for fostering their competitiveness without sacrificing consumer and worker welfare, innovation, and vigorous competition.

PROSPECTS FOR STRICTER ENFORCEMENT

This section discusses the possible stricter enforcement of retail and e-commerce, the soft drink sector, and pharmacy benefit managers.

Retail and E-Commerce

The Biden administration flagged its intention to use the RPA to "improve … access to retail markets" for farmers and small food processors.[79] Thus, primary targets of enforcement likely will include retail and e-commerce giants and chains such as Walmart and Amazon. Regulatory agencies such as the FTC and private plaintiffs alike will need to show "prolonged," "substantially better" prices offered by the same supplier or suppliers to allegedly favored giants relative to one or more "head-to-head" competitors, such as smaller chains or smaller independent stores. Courts have ruled that head-to-head competition for the same customers exists merely with evidence of some consumer overlap.[80] Courts have interpreted "substantially better pricing" based on the magnitude of the effect of the differential on business rivalry in the particular market.[81] For instance, while courts have said that a price differential above 5 percent in the purchasing price will probably be accepted as "substantially better,"[82] even differentials as little as 2.3 percent have been accepted when the market is price sensitive, intensely competitive, and typified by low profit margins.[83] Differentials that persist for as little as 11 months have been accepted as "prolonged."[84]

Once a substantial and prolonged price difference is established, the giants or chains are not guaranteed to succeed in defending against a secondary-line injury claim by deferring to evidence that the lower prices they face from suppliers or wholesalers ultimately benefit consumers through lower final prices, greater access to products, and shipping convenience. This outcome is because the Supreme Court ruled in *Volvo* that the RPA's statutory effect in secondary-line injury claims is to penalize harm to direct competitors relying on the same supplier or wholesaler even if such harm benefits consumers in the wider market through enhanced welfare or lower prices. Thus, pro-competitive behavior that benefits consumers is likely to be penalized if the FTC takes on more zealous RPA enforcement of secondary-line injury claims. And even companies that may successfully defend against such claims in court are likely to be deterred from undertaking pro-competitive conduct in order to avert the risk of resource- and time-consuming prosecution and litigation. Retail and e-commerce giants are likely to rely on the defenses of meeting competition and cost justification. For e-commerce giant Amazon, which acts as both an e-retail platform and seller on its own platform, the meeting competition defense may be especially useful because it could be established using retail pricing data differences on Amazon's own platform between Amazon and other sellers.

To avoid or escape liability or possibility of litigation, retail giants may resort to paying more to their suppliers and wholesalers—and passing on such cost increases to their customers. Similarly, the suppliers, manufacturers, and wholesalers who service these giants may simply refuse to deal with independent grocers and smaller-sized clients outright in order to avoid risk of RPA liability stemming from offering a lower price to larger chains that give more consistent, repeat orders. This outcome would be worse than the status quo for the small businesses that compete with the large chains. The vast majority of poor Americans live in urban, suburban, and rural areas that are serviced by big-box retail chains and supermarkets. In a 2015 study,[85] 9 in 10 US households were found to shop for groceries at "a supermarket or supercenter." An almost identical figure was observed for households participating in the federal government's Supplemental Nutrition Assistance Program,[86] eligibility for which is often used as a statistical indicator of poverty status in areas such as state government finance for public schools.[87] The same statistic was observed for households that were determined to be food insecure.[88] Thus, the RPA's deterrence effect on the negotiation of the lowest possible prices by large supermarket and retail chains dealing with suppliers is likely to harm the vast majority of poor Americans who rely on these stores, even if it does help the minority of poor Americans who have no access to them. This cost is immense relative to a small benefit that may not even materialize. Conversely, a welfare policy response for assisting communities that have no access to big-box retailers, such as isolated ones on Native American reservations, would address the disadvantages better than would RPA enforcement. For instance, refundable tax credits, a negative income tax, additional food stamps, and other public benefits targeted to areas supposedly affected by independent grocers' inability to negotiate the prices commanded by big-box retailers would do better to improve consumer access to foodstuffs than would the distortion of competitive markets.

Soft Drink Sector

The FTC is currently undertaking a preliminary investigation into whether soft drink producers Coca-Cola and PepsiCo engaged in price discrimination by allegedly offering lower prices to larger retailers of their products relative to smaller ones.[89] As part of this investigation, the FTC is seeking data from Walmart and other retail giants on how they purchase soft drinks and at what cost. If an RPA claim against the manufacturers of these beverages is successful, then it could result in a reduction or elimination of bulk-buy savings for retail sellers of soft drinks. Such a scenario will likely raise prices for beverage consumers. This increase is because it is far more likely that Coca-Cola and PepsiCo will respond to a prohibition on price discrimination between large and small retailers by increasing the prices they charge large retailers rather than by reducing the prices they charge small ones—because the costs of production and shipping are likely to be higher for the manufacturers when servicing smaller retailers owing to fewer economies of scale. In this regard, Coca-Cola and PepsiCo likely will rely on the cost justification defense, which will require them to produce evidence that it costs them less to service the large retailer than the small one, and this fact is therefore reflected in the prices offered to each. They may also defer to the meeting competition defense, such as by arguing that they were simply trying to meet the prices of competitor beverage brands as they are sold at large retailers in comparison to small ones. If the FTC's RPA claim is successful, then another possibility is that the beverage manufacturers may cease servicing retailers that are below a certain size.

Pharmacy Benefit Managers

The FTC is investigating pharmacy benefit managers (PBMs) for potential RPA violations with regard to the fees and rebates they levy.[90] PBMs are intermediary entities enlisted by health insurance providers to manage their prescription benefits programs, to negotiate prices between insurers and drug makers, and to reimburse pharmacies for patient prescriptions. PBMs help draft the insurer's formularies (lists of prescription drugs they are willing to cover). The FTC is concerned by the allegedly opaque contractual relationships among PBMs, insurers, and drugmakers. It is especially concerned by *rebate walls*—whereby drugmakers pay PBMs to secure listing of their drugs on an insurer's formularies—used to block competing drugs' listings or to secure "second-class" listing for competing drugs. The FTC alleges that this practice harms consumers because rebates are not guaranteed to be passed on to them as savings because rebates from makers of more expensive drugs incentivize PBMs to avoid listing cheaper "biosimilar" drugs for insurers to cover and because rebates function to "exclude competition" from competing drugmakers. It intends to rely on section 2(c) of the RPA, which bans sellers from providing fees or discounts to specific buyers (insurers) or an intermediary agent of said buyers (PBM) unless those benefits compensate buyers or intermediaries for services they provide.[91]

Conversely, drugmaker rebates to PBMs are likely to be pro-competitive and to the benefit of consumers. Insurers are not legally required to work with PBMs, but they do so instead of negotiating directly with drugmakers because this practice ostensibly cuts drug and plan costs. These savings may be passed on to consumers through lower insurance premiums, cheaper drugs, or subsidized innovation.[92] There is no concrete data and empirical literature establishing real harm to consumers from PBMs. Conversely, research finds that forcing insurers to undertake PBM services in-house would increase management costs that are likely to be passed on to consumers through higher drug prices or premiums, forgoing 40 percent of the net value of PBM services.[93] The annual benefit to the wider economy of these services is approximately $50 billion.[94] The Congressional Budget Office separately concluded that forcing drugmaker rebates to PBMs to be passed on through drug-price subsidies to end consumers at the point of sale would increase premiums and deliver smaller discounts on drugs, thereby increasing costs to the Medicare public health system by $170 billion over 10 years[95] and to Medicaid by $7 billion.[96]

Notably, the success or failure of the FTC's claims against PBMs under RPA section 2(c) is not contingent on an analysis of whether consumer welfare or drug prices are enhanced or reduced by a specific rebate provided to a specific PBM.[97] As a result, successful FTC claims against the

PBMs, or pressure to curtail PBM services owing to threat of litigation, could end rebates that are passed on to these consumers through lower prices, thus harming consumer welfare. Although the FTC may unearth evidence of consumer harm by investigating anticompetitive or anticonsumer behavior in the PBM sector, it is better off serving consumers and competition by resorting to investigations pursuant to sections 1 and 2 of the Sherman Act or FTC Act section 5 rather than RPA section 2(c), which is a poor consumer welfare safeguard.

REGULATORY BARRIERS TO SMALL BUSINESS COMPETITIVENESS

A far more significant barrier than the RPA to new or small business creation, growth, and competitiveness is the range of regulations and barriers imposed by state and federal governments. Regulations are rules that prohibit, require, or deter certain actions. For small and large firms alike, regulatory compliance entails outlays for procedures and equipment, payment of additional wages and benefits to workers, and often the recruitment of experts to navigate the many complex rules faced by different industries and companies.[98] Although many regulations do create benefits, some create no meaningful benefit. Even many beneficial regulations raise costs and barriers to procompetitive conduct, innovation, and business growth that must be weighed against these benefits. Notably, larger firms find these barriers easier to navigate because they have entire departments dedicated to legal and regulatory compliance, corporate social governance, and human resources and industrial relations. Larger firms are also more likely to have established favorable relationships with regulators and have greater incentive and capacity "to lobby for legislative exemptions, administrative waivers, and favorable regulatory treatment."[99] Dedicating FTC resources to analyzing and highlighting the harms of these regulatory barriers imposed by state, federal, and local governments would assist small businesses far more than dedicating resources toward RPA enforcement.

Direct federal regulations collectively impose an annual cost of approximately $2 trillion on the US economy,[100] a figure that does not include state-based regulations.[101] Governments also impose regulations governing land use and zoning, business permits, and other activities. In some areas, such as building codes, all three levels of government impose their own regulations.[102] Consistent surveys of small business owners conducted by the National Federation of Independent Business from the 1980s to the present find that "unreasonable government regulations" rank close to the top as one of the "most important problems" they face.[103] Examples of unproductive regulatory barriers worthy of investigation, analysis, and potential repeal or reform include the following:

- **Occupational licensing:** Licensing requirements for legally practicing certain professions and lines of business have grown dramatically since the 1950s.[104] Depending on the state, affected occupations include everything from practitioners of medicine and law to barbers, cosmetologists, tour guides, and manicurists.[105] Often, occupational licenses are not recognized outside the issuing state, despite the existence of comparable standards.

This lack of mutual recognition creates artificial scarcity in many licensed professions and serves to protect incumbent professionals at the expense of not only their would-be competitors but also consumers, who are forced to endure less access to critical services such as medicine and dentistry and higher prices relative to quality. Economists and academics,[106] the US government,[107] and international bodies such as the Organisation for Economic Co-operation and Development[108] find scant evidence that these rules have any positive effect on quality of service or consumer safety. Economists find that states imposing higher rates of licensure of low-income occupations suffer lower rates of low-income entrepreneurship.[109] The FTC already recognizes that occupational licensing laws increase prices, restrain competition, and restrict employment opportunities and labor supply.[110]

- **Lines-of-business bans:** Across federal and state governments, only specific types of entities are permitted to undertake certain lines of business, despite a lack of reasonable policy justification for such limitations. Where these restrictions do not entirely prevent the formation of a legal industry, they tend to benefit large, well-resourced enterprises (especially those operating across multiple lines of business) over small entrepreneurs. For instance, industrial hemp is a cannabis-derived product that contains minimal amounts of THC (tetrahydrocannabinol) and is used to make building and insulation material, clothing, shoes, animal feed, and fuel. Despite serving no narcotic or recreational purpose, it remains overregulated in most US states since its federal legalization in 2018,[111] and it is still banned in Idaho and Mississippi. Similarly, in the craft beer industry, only 35 states allow independent brewers to self-distribute to retailers,[112] and the regulatory constraints within even these states tend to vary significantly. Economists link more relaxed regulatory environments around the practice to a greater proliferation of craft breweries.[113]
- **Local zoning and permit restrictions:** Regulatory hurdles to startups include those pertaining to zoning, building renovations and additions, alcohol licenses, parking, signage, and general permits. Often, these regulations apply unexpectedly for self-employed entrepreneurs and those whose commercial actions do not cause any negative externalities for the surrounding community—and even when their activity generates positive externalities that do benefit the community. Such restrictions impose costs that disproportionately harm smaller businesses relative to large retail and other chains and conglomerates, such as those that were the original targets of Congress at the time of the RPA's drafting and are the potential targets of more zealous RPA enforcement today.

CONCLUSION

The decline in RPA enforcement in the preceding decades has been driven by a combination of economic learning and understanding about the statute's adverse implications for competition and consumer welfare, thereby affirming its status as a protectionist measure that serves to shield competitors rather than foster vigorous economic competition. This scenario explains why bipartisan public commissions, jurists and judges, regulators, and economists alike have favored the repeal of the RPA, criticized it for its convoluted wording and adverse consequences, or advocated for its benign nonenforcement. Small businesses, including many that ironically became targets of RPA enforcement during the statute's heyday, struggle to compete against larger players in their respective fields for a variety of reasons, including the cost and difficulty of complying with patchworks of regulations and required permits and licenses at the local, state, and federal government levels, many of which do not improve customer or community safety, amenities, or welfare. There are also long-standing structural issues in the governance of labor markets that increasingly challenge small businesses to attract, train, and retain suitable staff. Addressing these issues would do more to level the playing field for vigorous economic competition than to arbitrarily shield businesses from competition owing to their rivals' negotiating power, especially because consumers (including impoverished Americans) frequently benefit from the exercise of such negotiating power.

Specific situations in which isolated communities not serviced by larger enterprises with negotiating power are worse off owing to agreements that may prevent the stores serving them from getting a better price from suppliers than they otherwise do can be dealt with through targeted welfare policy reform.[114] Such an approach is significantly superior to a revival in RPA enforcement, which would threaten substantial welfare reductions for the vast majority of Americans.

In the case of the pharmaceutical and health insurance industry, the RPA, specifically under its section 2(c) provision, may promote pro-consumer outcomes when targeted against specific rebates to PBMs that reduce net consumer welfare. However, the statute does not require any empirical analysis of whether these rebates harm consumers. Furthermore, the consolidation of large, vertically integrated healthcare entities that has driven the modern PBM system is likely, in large part, a result of the major growth in burdensome regulation and compliance requirements in the healthcare space. Rather than launching RPA investigations into PBMs, the FTC would be better advised to undertake a comprehensive economic analysis of the role of harmful regulatory distortions in incentivizing the use of PBMs. The FTC should also analyze the factors that are key to determining whether PBMs reduce—or instead enhance—competition and consumer welfare in the healthcare, health insurance, and pharmaceutical sectors.

Net welfare is likely to be maximized by an outright repeal of the RPA, which will prevent ideologically motivated officials from expending public resources in RPA lawsuits that are likely to diminish consumer welfare and make the American economy less competitive. Failing to give due weighting to efficient business practices that benefit consumers is antithetical to the pro-competition purpose of the antitrust laws. It is also unfair to consumers—and, in particular, to the vast majority of Americans in poverty, who benefit from the negotiating power of large, vertically integrated entities—and to the majority of entrepreneurs who serve them. Regulatory reform that reduces unnecessary government-imposed costs, not the RPA, is an appropriate means to promote the interests of small businesses in an economically efficient, welfare-promoting manner.

ABOUT THE AUTHORS

Alden Abbott is a senior research fellow focusing on antitrust issues. Before joining Mercatus, he served as the Federal Trade Commission's general counsel from 2018 to early 2021, where he represented the FTC in court and provided legal advice to its representatives. Prior to working at the FTC, he worked at the Heritage Foundation and BlackBerry Ltd. He also served as an adjunct professor at George Mason's Antonin Scalia Law School from 1991 to 2018. He has a JD from Harvard Law School and an MA in economics from Georgetown University.

Satya Marar is a visiting postgraduate fellow at the Mercatus Center at George Mason University, where he was formerly an MA fellow. He holds an MA in economics from George Mason University and a BA in writing and an LLB with honors in law from Macquarie University in Sydney, Australia. He is currently pursuing an LLM in US law at George Mason University. He has previously worked at Reason Foundation and the Australian Taxpayers' Alliance. His research interests include antitrust and competition policy, intellectual property, trade, and technology policy.

NOTES

1. Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526, 15 U.S.C. §13. The act also has a criminal enforcement provision administered by the Department of Justice. However, that agency has rarely sought criminal penalties under the RPA and has not done so since the 1960s. Private rights of action are available through the Clayton Act, and successful plaintiffs may obtain litigation costs, attorney fees, and treble damages from defendants. However, this right has been limited by successive Supreme Court decisions discussed later in this brief. See Tyson Herrold, Danyll Foix, and Carl Hittinger, "The FTC Considers Reviving Robinson-Patman Enforcement," *Westlaw Today*, February 27, 2023.
2. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).
3. Alvaro N. Bedoya, "Returning to Fairness" (prepared remarks of Commissioner Alvaro M. Bedoya, Midwest Forum on Fair Markets, Minneapolis, MN, September 22, 2022), 7, https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf
4. Antitrust Modernization Commission, *Report and Recommendations* (Stratford, CT: Imperial Graphics, 2007), 316.
5. Herrold, Foix, and Hittinger, "The FTC Considers."
6. Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).
7. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979), wherein Chief Justice Burger refers to the Sherman Act as a "'consumer welfare prescription'" (quoting Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978), 66).
8. See Bork, *The Antitrust Paradox,* 382. Bork refers to the RPA as the "misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory."
9. See Thomas W. Ross, "Winners and Losers under the Robinson-Patman Act," *Journal of Law and Economy* 27, no. 2 (1984): 243 ("The Robinson-Patman Act has the distinction of being almost universally unpopular among antitrust scholars. This is probably because it looks less like an antitrust measure than like legislated relief for small business. That the law wears an antitrust cloak is probably a measure of the cunning of its original proponents.").
10. US Department of Justice, *Report on the Robinson-Patman Act* (Washington, DC: US Government Printing Office, 1977). The department has declined to enforce the RPA or bring claims under it since this report was issued and described the RPA in the report as being based on "questionable economic assumptions prevalent in the 1930s."

11. John B. Kirkwood, "Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*," Antitrust Bulletin* 60, no. 4 (2015): 358–83.

12. Antitrust Modernization Commission, *Report,* 316.

13. Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

14. See Federal Trade Commission, "Price Discrimination: Robinson-Patman Violations," https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations (accessed March 16, 2023).

15. Paul B. Larue, "Meeting Competition and Other Defenses under the Robinson-Patman Act," *Business Lawyer* 25, no. 3 (1969): 1037.

16. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

17. See Federal Trade Commission, "Price Discrimination."

18. Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990).

19. Am. Booksellers Ass'n v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031 (N.D. Cal. 2001).

20. American Bar Association, *ABA Section of Antitrust Law, Antitrust Law Developments,* 6th ed. (Chicago: American Bar Association, 2007), 524–30; FTC v. Morton Salt Co., 334 U.S. 37 (1948); *Texaco, Inc.*, 496 U.S. at 561.

21. Robinson-Patman Act § 2(a) codified at 15 U.S.C. Section 13(a).

22. Antitrust Modernization Commission, *Report,* 315.

23. Antitrust Modernization Commission, *Report,* 316; Comcoa, Inc. v. NEC Tels., Inc., 931 F.2d 655, 664–65 (10th Cir. 1991).

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

25. ABC Distrib., Inc. v. Living Essentials LLC, Case No. 15-cv-02064-NC (N.D. Cal. Sept. 1, 2017).

26. *Volvo Trucks N. Am., Inc.,* 546 U.S. at 164.

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

28. Herrold, Foix, and Hittinger, "The FTC Considers."

29. FTC v. Morton Salt Co., 334 U.S. 37 (1948).

30. *Cash & Henderson Drugs, Inc.,* 799 F.3d at 202.

31. Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

32. *Automatic Canteen*, 346 U.S. at 74. These principles were affirmed by the Supreme Court again in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

33. *Automatic Canteen*, 346 U.S. at 69, 74.

34. *Automatic Canteen*, 346 U.S. at 68–69.

35. *Automatic Canteen*, 346 U.S. at 68–69.

36. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). A dissenting opinion by Justice Stewart in Utah Pie noted that the pie producer market in the plaintiff's locality continued to remain vigorously competitive and contested by multiple local, nonlocal, independent, and chain producers, even after the alleged price discrimination. Utah Pie Co., 386 U.S. at 704.

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

38. John B. Kirkwood, "The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?," *Seattle University Law Review* 30: 349–75.

39. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 548 (1990); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).

40. Frederic M. Scherer and David Ross, *Industrial Market Structure and Economic Performance,* 3d ed. (Boston: Houghton Mifflin, 1990); Roger D. Blair and Christina DePasquale, "'Antitrust's Least Glorious Hour': The Robinson-Patman Act," *Journal of Law and Economics* 57, no. S3 (2014): S202.

41. Blair and DePasquale, "'Antitrust's Least Glorious Hour,'" S203; George J. Stigler, *The Theory of Price,* 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1987); US Attorney General's National Committee to Study the Antitrust Laws, *Report of the Attorney General's National Commission* (Washington, DC: US Government Printing Office, 1955), 210.

42. Antitrust Modernization Commission, *Report,* 318. See also Symposium on Competitive Price Discrimination, *Antitrust Law Journal* 70, no. 3 (2003): 593; James D. Dana, Jr., "Advance-Purchase Discounts and Price Discrimination in Competitive Markets," *Journal of Political Economy* 106, no. 2 (1998): 395–422; Mark Armstrong and John Vickers, "Competitive Price Discrimination," *RAND Journal of Economics* 32, no. 4 (2001): 579–605; Severin Borenstein and Nancy L. Rose, "Competition and Price Dispersion in the U.S. Airline Industry," *Journal of Political Economy* 102, no. 4 (1994): 653–83; Severin Borenstein, "Price Discrimination in Free-Entry Markets," *RAND Journal of Economics* 16, no. 3 (1985): 380–97; James C. Cooper et al., "Does Price Discrimination Intensify Competition? Implications for Antitrust," *Antitrust Law Journal* 72, no. 2 (2005): 327–73.

43. Antitrust Modernization Commission, *Report,* 311.

44. For instance, empirical evidence shows that the discounts obtained by buyers from sellers through negotiated exclusive dealing arrangements benefit consumers through lower final prices when pressure from competing rival buyers servicing consumers exists. See Joshua D. Wright, "An Evidence-Based Approach to Exclusive Dealing and Loyalty Discounts" (George Mason Law and Economics Research Paper No. 09-32, George Mason University, Fairfax, VA, July 2009).

45. Thomas W. Ross, "The Costs of Regulating Price Differences," *Journal of Business* 59, no. 1 (1986): 143–56.

46. Richard Schmalensee, "Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination," *American Economic Review* 71, no. 1 (1981): 242–47; Marius Schwartz, "Third-Degree Price Discrimination and Output: Generalizing a Welfare Result," *American Economic Review* 80, no. 5 (1990): 1259–62; Michael L. Katz, "The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets," *American Economic Review* 77, no. 1 (1987): 154–67.

47. W. Kip Viscusi, Joseph E. Harrington Jr., and David E. Sappington, *Economics of Regulation and Antitrust,* 5th ed. (Cambridge, MA: MIT Press, 2018), 290.

48. Bork, *The Antitrust Paradox,* 394.

49. Carl Kaysen and Donald Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, MA: Harvard University Press, 1959); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice,* 4th ed. (St. Paul, MN: West Publishing, 2011); Blair and DePasquale, "'Antitrust's Least Glorious Hour,'" S204.

50. Antitrust Modernization Commission, *Report,* 311; Blair and DePasquale, "'Antitrust's Least Glorious Hour,'" S205; Kaysen and Turner, *Antitrust Policy*.

51. The New Brandeis or neo-Brandeis movement is an antitrust academic and political movement based on the notion that centralized private power is dangerous for economic, political, and social reasons, and it should be limited by the implementation and strict enforcement of bright-line rules. See Lina Khan, "The New Brandeis Movement: America's Antimonopoly Debate," *Journal of European Competition Law and Practice* 9, no. 3 (2018): 131–32. See also Luke Herrine, "At the Nexus of Antitrust and Consumer Protection," *Utah Law Review* (forthcoming).

52. Hovenkamp, *Federal Antitrust Policy*.

53. John S. McGee, "Predatory Pricing: The Standard Oil (N.J.) Case," *Journal of Law and Economics* 1 (1958): 137–69; Kenneth G. Elzinga and Thomas F. Hogarty, "*Utah Pie* and the Consequences of Robinson-Patman," *Journal of Law and Economics* 21, no. 2 (1978): 427–34.

54. Blair and DePasquale, "'Antitrust's Least Glorious Hour,'" S205.

55. For instance, the Supreme Court stated in *Reiter v. Sonotone Corp*., 442 U.S. 330, 343 (1979), that "Congress designed the Sherman Act as a 'consumer welfare prescription.'" It later noted in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993), that "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."

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

57. Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 82–83 (1979); FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945); Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

58. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 559 (1990).

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

60. *Texaco, Inc.,* 496 U.S. at 548.

61. Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526, 15 U.S.C. §13.

62. See, e.g., Lewis v. Philip Morris, Inc., 355 F.3d 515, 531 (6th Cir. 2004), citing 16 C.F.R. § 240.5.

63. This reading is based on 16 C.F.R. § 240.5, which defines "competing customers" as "all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary."

64. *Texaco, Inc.,* 496 U.S. at 548.

65. Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 675–76 (2d Cir. 1959).

66. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 175 (2006).

67. Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126 (2017): 710–805.

68. Senator Elizabeth Warren, "Reigniting Competition in the American Economy" (keynote speech, North America's Open Markets Program, Washington, DC, June 29, 2016), https://awpc.cattcenter.iastate.edu/2017/03/09/reigniting-competition-in-the-american-economy-june-29-2016/.

69. Robert D. Atkinson and Michael Lind, *Big Is Beautiful: Debunking the Myth of Small Business* (Cambridge, MA: MIT Press, 2018).

70. Atkinson and Lind, *Big Is Beautiful.*

71. Lina M. Khan, "Amazon—An Infrastructure Service and Its Challenge to Current Antitrust Law," in *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple,* ed. Martin Moore and Damian Tambini (New York: Oxford University Press, 2018), 98–129.

72. Emek Basker, "Selling a Cheaper Mousetrap: Wal-Mart's Effect on Retail Prices," *Journal of Urban Economics* 58, no. 2 (2005): 203–29; Jerry Hausman and Ephraim Leibtag, "Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart" (NBER Working Paper No. 11809, National Bureau of Economic Research, Cambridge, MA, December 2005).

73. Chris Edwards, "Entrepreneurs and Regulations: Removing State and Local Barriers to New Businesses" (Cato Policy Analysis No. 916, Cato Institute, Washington, DC, May 5, 2021).

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77. Dale Heywood, "Venture Dynamics: Buying, Building, Selling Enterprises. Moving Entrepreneurship Education Beyond Start-ups," in *European Conference on Innovation and Entrepreneurship* (Reading, UK: Academic Conferences International Limited, 2015), 246–51.

78. Sonja Markova and Tatjana Petkovska-Mircevska, "Financing Options for Entrepreneurial Ventures," *Amfiteatru Economic Journal* 11, no. 26 (2009): 597–604.

79. Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).

80. See, for instance, Lewis v. Philip Morris, Inc., 355 F.3d 515, 531 (6th Cir. 2004).

81. Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1428 n. 20 (11th Cir. 1990).

82. Julian O. Von Kalinowski, *Antitrust Laws and Trade Regulation,* 2d ed. (Newark, NJ: Matthew Bender, 1996), § 39.02[3][d][i]; Allied Sales & Serv. Co. v. Glob. Indus. Techs., Inc., No. 97-0017-CB-M, 2000 U.S. Dist. LEXIS 7774 .

83. Mathew Enter., Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2016 U.S. Dist. LEXIS 108693.

84. *Mathew Enter., Inc.,* No. 13-cv-04236-BLF.

85. Michele Ver Ploeg et al., "Where Do Americans Usually Shop for Food and How Do They Travel to Get There? Initial Findings from the National Household Food Acquisition and Purchase Survey," Economic Information Bulletin No. EIB-138, Economic Research Service, US Department of Agriculture, March 2015; Rosanna Mentzer Morrison and Lisa Mancino, "Most U.S. Households Do Their Main Grocery Shopping at Supermarkets and Supercenters Regardless of Income," Economic Research Service, US Department of Agriculture, August 3, 2015.

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87. Satya Marar, "Examining How States and School Districts Allocate Funding for Poverty Concentration," Reason Foundation, May 28, 2020.

88. Elizabeth Nolan Brown, "Five Years and $500 Million Later, USDA Admits That 'Food Deserts' Don't Matter," Reason Foundation, June 13, 2016.

89. Jonathan Rubin, "Kahn's FTC Reportedly Reviving Price Discrimination Law to Investigate What Big Retailers Pay for Cola," *National Law Review* 13, no. 142 (March 17, 2023).

90. Herrold, Foix, and Hittinger, "The FTC Considers."

91. Robinson-Patman Act section 2(c), 15 U.S.C. §13(c).

92. Joe Grogan and Casey Mulligan argue that because most patients use off-patent drugs that provide marginal revenue returns, rebates to PBMs to secure listing of newer patented drugs provide an essential incentive for drugmakers to invest in researching and developing these drugs. See Joe Grogan and Casey B. Mulligan, "In Defense of Pharmacy Benefit Managers," *Wall Street Journal*, July 11, 2022. A recent working paper finds that new drugs made available by PBM arrangements create an estimated $6 billion a year in annual revenue for drugmakers and patients. See Casey B. Mulligan, "The Value of Pharmacy Benefit Management" (NBER Working Paper No. 30231, National Bureau of Economic Research, Cambridge, MA, July 2022).

93. Mulligan, "The Value."

94. Mulligan, "The Value."

95. CBO (Congressional Budget Office), "Incorporating the Effects of the Proposed Rule on Safe Harbors for Pharmaceutical Rebates in the CBO's Budget Projections—Supplemental Material for *Updated Budget Projections: 2019 to 2029*," May 2019.

96. CBO, "Incorporating the Effects."

97. For instance, the Second Circuit Court of Appeals in 2005 ruled that "for purposes of § 2(c), it is irrelevant whether an improper payment that is given to a purchaser's agent is kept by the agent for personal gain rather than transferred to

the purchaser" and hence possibly to the end consumer. Blue Tree Hotels Invest. (Canada) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 224 (2d Cir. 2005).

98. Edwards, "Entrepreneurs and Regulations."

99. Steven J. Davis, "Regulatory Complexity and Policy Uncertainty: Headwinds of Our Own Making" (Becker Friedman Institute for Research in Economics Working Paper No. 2723980, Becker Friedman Institute for Research in Economics, University of Chicago, Chicago, April 29, 2017).

100. W. Mark Crain and Nicole V. Crain, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* (Washington, DC: National Association of Manufacturers, 2014), table 10; Diane Katz, "No End in Sight for Regulatory Tsunami," Heritage Foundation, July 15, 2022.

101. The Mercatus Center's QuantGov website estimates the magnitude of costs associated with state-based regulation. See "State RegData" (dataset), QuantGov, Mercatus Center at George Mason University, Arlington, VA, www.quantgov.org/state-regdata.

102. Edwards, "Entrepreneurs and Regulations."

103. Michael J. Chow and William C. Dunkelberg, "Deregulation, Tax Policy, and Certainty: Foundations of the US Recovery," *Business Economics* 54, no. 4 (2019): 211–25.

104. From 1950 to 2018, the share of US occupations requiring a license rose from 5 percent to more than 18 percent. See Morris M. Kleiner and Evgeny S. Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing* (Arlington, VA: Institute for Justice, 2018).

105. Edwards, "Entrepreneurs and Regulations."

106. Morris M. Kleiner, "Reforming Occupational Licensing Policies" (Hamilton Project Discussion Paper No. 2015-01, The Hamilton Project, Brookings Institution, Washington, DC, March 2015).

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108. Christina von Rueden and Indre Bambalaite, "Measuring Occupational Entry Regulations: A New OECD Approach" (OECD Economics Department Working Paper No. 1606, Organisation for Economic Co-operation and Development, Paris, March 2020), 13.

109. Stephen Slivinski, "Bootstraps Tangled in Red Tape," Goldwater Institute (blog), February 10, 2015.

110. Karen A. Goldman, "Options to Enhance Occupational Licensing Portability," Policy Perspectives, Federal Trade Commission, September 2018.

111. "State Industrial Hemp Statutes," National Conference of State Legislatures, April 16, 2020, cited in Edwards, "Entrepreneurs and Regulations." In New York state, for instance, obtaining a license to process hemp means paying a license fee of $4,500 and a nonrefundable application fee of $1,000. License fees for retailers are $300, and manufacturers must pay $4,500. These costs are significantly higher than the costs imposed by other states. See Benjamin Joe, "Small NY Hemp Growers Feel the Pinch of Regulations, Fees," auburnpub.com, February 12, 2021.

112. "Beer Self Distribution Guide: Part 1," *Craft Brewery Financial Training* (blog), July 7, 2017, https://craftbreweryfinance.com/deconstructing-beer-self-distribution-part-uno/.

113. Trey Malone and Jayson L. Lusk, "Brewing up Entrepreneurship: Government Intervention in Beer," *Journal of Entrepreneurship and Public Policy* 5, no. 3 (2016): 325–42.

114. The second welfare theorem of economics holds that "[i]f society prefers a different division of the gains from trade than the one brought about by competitive market forces, it is sufficient to transfer wealth among the agents in order to correct it." Borys Grochulski, "Distortionary Taxation for Efficient Redistribution," *FRB Richmond Economic Quarterly* 95, no. 3 (2009): 236. However, redistribution introduces market distortions that undermine optimally efficient resource allocation. Thus, targeted lump sums are a preferable wealth redistribution mechanism to constraining market participants' abilities to negotiate through RPA enforcement because the latter distorts the market process to a greater degree.