

CONTROLLING BUYER AND SELLER POWER: REVIVING ENFORCEMENT OF THE ROBINSON-PATMAN ACT

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I. INTRODUCTION

President Franklin D. Roosevelt signed the Robinson-Patman Act (“RPA”) into law on June 19, 1936.¹ Congress’s goal in drafting this historic legislation was to protect and promote democracy and individual liberty in the United States by supporting the creation and vitality of small and independent businesses, thereby distributing power and opportunity within the United States political economy. Congress’s objective was not to protect any particular retailer or producer, or to reduce real competition between businesses in the economy.² Instead, Congress designed the RPA to ensure that markets remain open to all comers, are democratically structured, and are not governed by any one or few corporations.

Congress believed the best way to accomplish these goals was to ensure that powerful retailers and producers of goods such as groceries or other commodities treat every business that depends on them equitably, regardless of size. In addition to a more robust, fair, open, and equal democracy, the authors of the RPA also believed the Act would result in better service, higher quality, and fairer real prices for consumers and manufacturers, as well as incentivize businesses to use socially beneficial methods of competition to succeed in the marketplace.³

The RPA targeted the abuse of both retailer and producer power. In markets where many producers compete for the business of just a few big retailers, experience has shown that the big retailers can often coerce producers into giving them discounts and other concessions that none of their smaller competitors can get. Similarly, powerful producers can coerce retailers into providing them with special services that smaller producers cannot get. This kind of discrimination makes it increasingly difficult for small and independent businesses to compete, and thus breeds monopoly. Just as fundamentally, when price discriminations and coercion derived from sheer corporate size are allowed to pervade markets, competition tends to center not on which firms can make the best product or provide the best service with the most efficiency but to focus instead on who can gain the most power and control over their buyers or sellers through mergers, acquisitions, and other strategies supported by large-scale financial actors.

To prevent large retailers and producers from abusing their power, the RPA required that all buyers and sellers of commodities, such as

1. Robinson-Patman Antidiscrimination Act, ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13, 21).

2. See 80 CONG. REC. 8111 (1936) (statement of Rep. Patman).

3. See *infra* Part III.

groceries, offered and received proportionally the same prices and terms of service. As explained by one of the bill's proponents on the Senate floor, its purpose was to "compel the treatment of all customers exactly alike when the same situation applies to all of them."⁴ Under the RPA, businesses were allowed to treat wholesale sellers or buyers differently only if they provide clear, consistent, and logical reasons for doing so.⁵ For example, offering a volume discount is permissible, but only if the unit cost of distribution or manufacturing is demonstrated to be lower and the discounts are equitably designed.⁶

Working in conjunction with the other antitrust laws, like the Sherman and Clayton Acts,⁷ the RPA became an essential pillar of America's political economy during the middle decades of the twentieth century.⁸ When enforced alongside the other antitrust laws, the RPA helped sustain the broad prosperity and vibrant, balanced, and competitive retail sector that marked that era, including the spread of modern supermarkets and department stores alongside smaller, independent retailers.⁹

Like most laws that regulate business conduct, the RPA attracted criticism.¹⁰ At first, most critics focused on problems of implementation, arguing that enforcement was difficult because the language of the law is unnecessarily complex.¹¹ However, prominent policy intellectuals

4. 80 CONG. REC. 6333 (1936) (statement of Sen. Logan).

5. S. REP. NO. 74-1502, at 3014 (1936) ("The bill proposes to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them."); H.R. REP. NO. 74-2287, at 3187 (1936) ("The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them."); Mark A. Glick et al., *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 ANTITRUST BULL. 279, 280 (2015) ("In enacting the RPA, Congress attempted to balance the goals of protecting small business and local economies while preserving the *legitimate efficiency-based competitive advantages resulting from economies of scale and scope.*") (emphasis added).

6. 15 U.S.C. § 13(a) ("[D]ifferentials which make only due allowance for differences in the cost of manufacture, sale, or delivery . . ."); *FTC v. Morton Salt Co.*, 334 U.S. 37, 47-48 (1948). Other defenses can apply as well. 15 U.S.C. §§ 13(a)-(b).

7. 15 U.S.C. §§ 1-2 (2018) (prohibiting restraints of trade and monopolization tactics); 15 U.S.C. § 14 (2018) (restricting the use of exclusive deals and tyings involving commodities); 15 U.S.C. § 18 (2018) (restricting the use of mergers).

8. *See infra* Part VI.

9. *See infra* Part IV-VI.

10. *See infra* Part VII.

11. EARL W. KINTNER, *A ROBINSON-PATMAN PRIMER: A BUSINESSMAN'S GUIDE TO THE LAW AGAINST PRICE DISCRIMINATION* 35 (1st ed. 1970) [hereinafter KINTNER, RPA PRIMER] (detailing a ten-part test for a violation of section 2(a) of the RPA). Many of the words in the RPA are undefined, including "price," "discriminate in price," "commodities," and "like grade and quality."

associated with both political parties later began to argue that the RPA's ban on price discrimination and restrictions on powerful buyers were fundamentally flawed in concept.¹²

These voices included the prominent liberal economist John Kenneth Galbraith, who attacked the RPA in the early 1950s, claiming it was leading to higher consumer prices by protecting inefficient retailers and producers.¹³ Among conservatives, the torch was later taken up by a coterie of law professors associated with the libertarian "Chicago school of economics," notably Richard Posner and Robert Bork, who presented the RPA as a perversion of the "free market" and a threat to optimal "efficiency" and "consumer welfare."¹⁴ After President Ronald Reagan took office in 1981, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") used Chicago School criticisms to formally codify an almost complete suspension of RPA enforcement, even as they reconceptualized broader antitrust law in ways that resulted in a dramatic reduction of antitrust enforcement.¹⁵

With the benefit of hindsight, we can now see that these were grave policy mistakes. The de facto legalization of price discrimination and the usage of coercion to obtain preferential treatment that came with the failure to enforce the RPA, in combination with the broader retreat from antitrust enforcement, unleashed a dramatic increase in corporate concentration. Taking a broader view, these policy decisions have also contributed to the significant drop-off in rates of new business formation,¹⁶ a

See 15 U.S.C. § 13; see also Frederick M. Rowe, *Expectation Versus Accomplishment Under the Robinson-Patman Act, 1936-1960: A Statement of the Issues*, 17 A.B.A. SECTION ANTITRUST L. 298, 301 (1960) [hereinafter Rowe, *Expectation*] (calling the RPA a "masterpiece of obscurity").

12. See *infra* Part VII.

13. See JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 58, 141-45 (Sentry ed. 1956); see also Phillip Longman, *Everyday High Prices*, WASH. MONTHLY (Jan. 8, 2023), <https://washingtonmonthly.com/2023/01/08/everyday-high-prices> [<https://perma.cc/XPS6-D7TM>].

14. See RICHARD A. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* 49-53 (1976); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 393-401 (1978).

15. The suspension of RPA enforcement from the DOJ and the FTC is slightly more complicated. See MARC ALLEN EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE* 210-13, 215, 221-22 (1991); U.S. DEP'T JUST., *REPORT ON THE ROBINSON-PATMAN ACT* 260-61 (1977) [hereinafter DOJ RPA REPORT]; *Antitrust Division Workload Statistics FY 1970-1979*, U.S. DEP'T JUST. ANTITRUST DIV., <https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1970-1979> [<https://perma.cc/T7DA-WK4C>] (last visited Feb. 21, 2024) [hereinafter *DOJ 1970-1979 Enforcement*]; *infra* Part VII.

16. See Ian Hathaway & Robert E. Litan, *What's Driving the Decline in the Firm Formation Rate?: A Partial Explanation*, BROOKINGS INST. 1, 3-6 (Nov. 2014), https://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf

jolting decline in the commercial vibrancy of most American cities and towns,¹⁷ and a sharp rise in economic inequality between different regions of the nation.¹⁸ They have also worsened racial and generational disparities in business ownership,¹⁹ contributed to the disempowerment of workers,²⁰ dramatically reduced real consumer choice,²¹ increased inflation and supply chain fragility,²² and helped to drive political polarization.²³

This Article provides a robust defense of Congress's goals and intentions in enacting the RPA as well as a detailed history of how the Act benefited American society when it was vigorously enforced. It concludes with thoughts on how the RPA can be used to revitalize today's economy, thus paving the way for broader economic prosperity, greater social justice, and a stronger democracy.

[<https://perma.cc/74AH-C95D>]; Ufuk Akcigit & Sina T. Ates, *Ten Facts on Declining Business Dynamism and Lessons from Endogenous Growth Theory* 9-10 (Becker Friedman Inst., Working Paper No. 2019-55, 2019), https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_201955.pdf [<https://perma.cc/8N92-BYRY>]; CONG. BUDGET OFF., FEDERAL POLICIES IN RESPONSE TO DECLINING ENTREPRENEURSHIP 1-3, 12, 14, 17-18 (2020), <https://www.cbo.gov/publication/56945> [<https://perma.cc/2UA7-KRSV>].

17. See Ross Baird & Ben Wrobel, *Monopolies Are Killing America*, BRIGHT MAG. (June 28, 2017), <https://brightthemag.com/monopolies-are-killing-america-41bdeff929e> [<https://perma.cc/CAL5-WMVQ>].

18. Estelle Sommeiller & Mark Price, *The New Gilded Age: Income Inequality in the U.S. by State, Metropolitan Area, and County*, ECON. POL'Y INST. 1, 7-14, 16 (July 19, 2018) <https://files.epi.org/pdf/147963.pdf> [<https://perma.cc/A43W-JHMM>]; see also Phillip Longman, *Bloom and Bust*, WASH. MONTHLY (Nov. 8, 2015), <https://washingtonmonthly.com/2015/11/08/bloom-and-bust> [<https://perma.cc/EHB4-FRPW>].

19. Cara Brumfield et al., *Concentrated Power, Concentrated Harm: Market Power's Role in Creating & Amplifying Racial & Economic Inequality*, GEO. L. CTR. ON POVERTY & INEQ. 6-10, 32-34 (Mar. 2022), <https://www.georgetownpoverty.org/wp-content/uploads/2022/03/ConcentratedPowerConcentratedHarm-March2022.pdf> [<https://perma.cc/5JD3-YNB3>]; Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, APPEAL (Sept. 16, 2020), <https://theappeal.org/how-antitrust-perpetuates-structural-racism> [<https://perma.cc/DME3-V3SH>].

20. See generally Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27 (2023) (discussing the adverse effects government policy and Supreme Court decisions had on workers).

21. See JOHN KWOKA, CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA 25, 36-37 (2020).

22. Barry C. Lynn, *Manufacturing and Liberty*, WASH. MONTHLY (Jan. 8, 2023), <https://washingtonmonthly.com/2023/01/08/manufacturing-and-liberty> [<https://perma.cc/AA8R-WHS9>].

23. See Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 236, 266 & n.207, 274-75, 278 (2017) (noting the other problems with concentrated markets); KWOKA, *supra* note 21, at 36-37; Phillip Longman & Barry C. Lynn, *A New Boogeyman? How Corporate Consolidation Undermines Small Businesses, Family Wealth and the American Dream*, in THE FUTURE OF BUILDING WEALTH: BRIEF ESSAYS ON THE BEST IDEAS TO BUILD WEALTH—FOR EVERYONE 421, 424-27 (Ray Boshara & Ida Rademacher eds., 2021).

II. THE RELATIONSHIP BETWEEN U.S. LAW AND CORPORATE POWER

To understand the origins and the promise of the RPA, it is useful to view it in historical context.

Since the nation's founding, Americans have used government to check concentrations of corporate power.²⁴ For the nation's first century, not only did citizens write antimonopoly provisions into many state constitutions,²⁵ but state legislatures also imposed highly detailed charters on almost all corporations specifying their obligations to the public.²⁶ The failure of a corporation to serve the public interest could result in the state legislature revoking its charter and dissolving the corporation.²⁷ In one famous example, New York dissolved the North River Sugar Refining Company in 1890 for "participat[ing] in [a] consolidation" and therefore violating the terms of its charter.²⁸

After the end of Reconstruction in 1877, a series of Supreme Court rulings, combined with changes in corporate regulation in states including New Jersey and Delaware, set the stage for the rise of a new form of private corporation that was able to centralize control, crush independent businesses, and dominate entire sectors of the economy.²⁹ During these

24. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1-2 (1996) (ebook). See generally BARRY C. LYNN, *LIBERTY FROM ALL MASTERS: THE NEW AMERICAN AUTOCRACY VS. THE WILL OF THE PEOPLE* 75-77 (1st ed. 2020) (detailing the history of competition policy in the United States).

25. See, e.g., WYO. CONST. art. X, § 2 (1889) ("All powers and franchises of corporations are derived from the people and are granted by their agent, the government, for the public good and general welfare, and the right and duty of the state to control and regulate them for these purposes is hereby declared. The power, rights and privileges of any and all corporations may be forfeited by willful neglect or abuse thereof. The police power of the state is supreme over all corporations as well as individuals.").

26. Eric Hilt, *Early American Corporations and the State*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 37, 37-38 (Naomi R. Lamoreaux & William J. Novak eds., 2017); WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 48 (1997) (ebook) (quoting Ronald E. Seavoy); *id.* at 71, 76 (noting the "erosion of the public corporation" and that "[t]he corporation was after all a delegation of sovereign powers to serve the public interest"); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 112 (Stanley N. Katz ed., 1977) ("The archetypal American corporation of the eighteenth century [was] the municipality, a public body charged with carrying out public functions . . ."); Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 *SMU L. REV.* 23, 28 (2002) ("Charters were also granted as a means of furthering sovereign goals of increasing trade, but without the government being responsible for the risks thereof or for the outlay of large amounts of capital. At this time, charters were seen to be granted in exchange for the public benefits associated with the possibility of large combinations of capital in areas of government interest.") (footnotes omitted).

27. See Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 *VAND. L. REV.* 639, 648 (2016).

28. *People v. N. River Sugar Refin. Co.*, 121 N.Y. 582, 583, 607, 626 (1890).

29. See ROY, *supra* note 26, at 70-71, 76, 153, 179-81, 272.

same years, new technologies such as the railroad and telegraph also made it easier to operate corporations over great distances.³⁰

Congress responded to these threats to democracy and entrepreneurial liberty with a variety of new laws. For example, in 1887, Congress enacted the Interstate Commerce Act (“ICA”) in response to widespread public demand to regulate the railroads and to end their intentionally discriminatory shipping rates.³¹ The ICA imposed strict non-discrimination rules, requiring railroads to provide similar pricing and terms of service to all customers.³² The ICA also created the first independent federal agency, the Interstate Commerce Commission (“ICC”), which Congress tasked with ensuring that railroad rates were “reasonable and just.”³³

Three years later, in 1890, Congress enacted the Sherman Antitrust Act. The plain language of the bill outlawed restraints of trade and other monopolistic tactics—a prohibition that was later interpreted by the courts to include offering rebates and other price concessions to some customers and not others.³⁴ In 1910, Congress passed the Mann-Elkins Act, which strengthened the ICC’s regulatory power over railroads and also gave the agency jurisdiction over other key network industries, specifically the telephone and telegraph, and newly emerging wireless communications systems.³⁵ Then in 1914, Congress enacted the Clayton Antitrust Act, both to strengthen the antitrust provisions of the Sherman Act and to extend and more explicitly integrate non-discrimination principles into U.S. antitrust law.³⁶

Over the half century that followed the passage of the Clayton Act, Congress enacted numerous additional antimonopoly laws, including the

30. See RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 5, 10, 68, 85, 101 (2010).

31. ARI HOOGENBOOM & OLIVE HOOGENBOOM, A HISTORY OF THE ICC: FROM PANACEA TO PALLIATIVE 13-15, 17 (1st ed. 1976); JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 130 (1954) (“Discriminatory rates secured by powerful shippers were the most important single evil that Congress sought to curb when it passed the Interstate Commerce Act in 1887.”).

32. Interstate Commerce Act, ch. 104, §§ 1, 3, 24 Stat. 379, 379-80 (1887). The Hepburn Act significantly strengthened the ICA. See Hepburn Act, Pub. L. No. 59-337, § 1, 34 Stat. 584, 584 (1906) (granting the ICC the explicit power to impose a just and reasonable rate on railroads).

33. James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131, 1131 (2012). Note that while the ICC could not initially set or fix rates, it could review rates and block those that were unreasonable. *Id.* at 1133.

34. 15 U.S.C. §§ 1-2 (2018).

35. Mann-Elkins Act, Pub. L. No. 61-218, § 7, 36 Stat. 539, 544-45 (1910).

36. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 2, 43 (2003). Specifically, section 2 of the Clayton Act, which was amended by the RPA, sought to restrict price discrimination. See Clayton Act, ch. 323, § 2, 38 Stat. 730, 730-31 (1914) (codified at 15 U.S.C. § 13).

RPA, that applied these principles to other sectors, from agriculture to finance to retail and manufacturing. These policies were shaped by and reflected at least four fundamental political assumptions about the role of laws and legal institutions in shaping the U.S. political economy, and they provide essential insight into understanding the origins and goals of the RPA.

*A. Markets, Corporations, and Competition Are Structured
Through Law*

Markets are institutions structured by the people acting through government to achieve specific political, social, and economic ends.³⁷ For instance, whether the market for groceries in a midsize American city is controlled by two giant corporations or divided among 100 family-controlled businesses is a political question. From the first, Americans understood that how we answer that question will significantly affect the social and political structure of the community, the well-being of workers and consumers, and the well-being of independent suppliers and farmers.

Similarly, corporations are institutions created and structured by people to achieve specific political, social, and economic ends. As explained above, in return for state-granted benefits such as perpetual life, limited liability, and the ability to issue stock or raise other forms of capital, a corporation is granted a charter of incorporation by the state.³⁸ This charter imposes a variety of obligations on the corporation that govern both its internal structure and how it interacts with other institutions and society as a whole.³⁹

In the United States system, elected representatives also enact laws that prescribe what firms may and may not do to compete with one another. For example, child labor laws prevent firms from competing on price by using children as workers.⁴⁰ Various other laws prohibit firms from competing through malicious behavior, such as burning down a rival's property or defaming a rival's reputation with knowingly false statements or deceptive advertising.⁴¹

37. ROBERT HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 380-82 (1952).

38. ROY, *supra* note 26, at 48.

39. Theodore H. Davis, Jr., Note, *Corporate Privileges for the Public Benefit: The Progressive Federal Incorporation Movement and the Modern Regulatory State*, 77 VA. L. REV. 603, 615 (1991).

40. 29 U.S.C. § 203(l) (2018).

41. See, e.g., Lanham Act, Pub. L. No. 79-489, § 32, 60 Stat. 427, 437 (1946) (prohibiting trademark infringement and dilution, and false advertising).

As a result, all corporate behavior ultimately derives from and is confined by what the law explicitly or implicitly authorizes or prohibits, and by the competitive environment created by the structure of the particular marketplace in which the corporation must operate.

B. Concentrated Market Power Undermines Democracy While Harming the Economy

Most Americans have long recognized that dominant corporations and wealthy individuals routinely transform their market power into disproportionate political power.⁴² The process includes using direct and indirect lobbying and campaign donations as well as capturing regulatory agencies by promising government officials lucrative future employment.⁴³

Americans have also recognized that concentrated market power creates barriers to upward mobility and equal opportunity, especially among groups such as small-scale farmers, shopkeepers, immigrants, racial minorities, and others who lack power and privilege.⁴⁴ As a corollary, mainstream American political tradition has historically held that concentrated market power also threatens the independence of both the entrepreneur and worker, and the civic capital of local communities, thereby threatening self-governance and democracy.⁴⁵

Finally, mainstream American political tradition has historically held that concentrated power reduces innovation and the development of

42. See generally HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 54-163 (1955) (detailing the economic and social background that led to the enactment of the Sherman Act).

43. See Hal Singer, *As the Revolving Door Swings*, AM. PROSPECT (July 17, 2020), <https://prospect.org/power/as-the-revolving-door-swings-big-tech-regulation> [<https://perma.cc/DU35-SFQV>] (noting the numbers of staffers from the DOJ Antitrust Division, FTC, the United States Senate Judiciary Committee, and the House of Representatives Judiciary Committee that now work for Google, Amazon, and Facebook); see also Leah Nylén, *How Washington Fumbled the Future*, POLITICO (Mar. 16, 2021, 5:46 PM), <https://www.politico.com/news/2021/03/16/google-files-ftc-antitrust-investigation-475573> [<https://perma.cc/3BYN-FFA6>] (describing that the FTC had significant evidence to bring an antitrust lawsuit against Google in 2013 for its exclusionary conduct but ultimately chose not to). The newly released report details how the FTC based its decision off of significantly flawed assumptions, contradictory conclusions, and narrow beliefs about antitrust enforcement. Nylén, *supra*.

44. Vaheesan, *supra* note 19; Jeremie Greer & Solana Rice, *Anti-Monopoly Activism: Reclaiming Power Through Racial Justice*, LIBERATION GENERATION 5-6, 10-11 (Mar. 2021), https://www.liberationinageneration.org/wp-content/uploads/2021/03/Anti-Monopoly-Activism_032021.pdf [<https://perma.cc/8RGB-KPUZ>]; Brumfield et al., *supra* note 19, at 28-29.

45. Longman, *supra* note 18.

both existing and new forms of material and social wealth and well-being.⁴⁶

C. Fair Competition Creates a Fair Society

The legislative history of the antitrust laws clearly shows that Congress enacted them to achieve broad moral and political purposes.⁴⁷ For example, during the Sherman Act legislative debates, Senator James Z. George stated that Congress should “put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell.”⁴⁸ Similarly, in 1890 Senator John Sherman denoted his namesake act as “a bill of rights, a charter of liberty[,]”⁴⁹ and forcefully defended his proposed statute as a means of protecting individual liberty from corporate domination. He stated:

If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.⁵⁰

46. Khan & Vaheesan, *supra* note 23, at 238; see Cory Lewis Sparks, *Locally Owned and Operated: Opposition to Chain Stores, 1925-1940*, at 75 (Dec. 2000) (Ph.D. dissertation, Louisiana State University) (LSU Scholarly Repository) (“Chain stores stripped wealth from communities, [opponents of chain stores] argued, and even if they offered better prices, a disputed point, they still undermined the local economy. Instead of profits remaining in town, where they could be invested, chains sent their money to a central headquarters. Instead of concentrating on better streets and a thriving downtown, chains worried about their own profits.”); Sparks, *supra*, at 76-81; see also Hathaway & Litan, *supra* note 16, at 5-6; Akcigit & Ates, *supra* note 16, at 10; CONG. BUDGET OFF., *supra* note 16, at 3-4.

47. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 *YALE L.J.* 175, 198, 202-04, 220-22 (2021). One of those purposes was to protect workers and weaken the power of dominant corporations. EDWARD BERMAN, *LABOR AND THE SHERMAN ACT* 52 (1930) (stating “[t]here is no evidence available in the records of the [Sherman Act] debates to show that the [Congress] . . . believed that the [law] would apply to labor”); Clayton Act, ch. 323, sec. 6, § 17, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17) (stating “the labor of a human being is not a commodity or article of commerce”); JONATHAN J. BEAN, *BEYOND THE BROKER STATE: FEDERAL POLICIES TOWARD SMALL BUSINESS, 1936-1961*, at 5 (1996) (quoting Rep. Wright Patman, one of the namesakes and leading proponents of the RPA as saying in 1951, “The wide distribution of economic power among many independent proprietors is the foundation of the Nation’s economy. Both [Benjamin] Franklin and [Thomas] Jefferson feared that industrialization would lead to a labor proletariat without property and without hope. Small-business enterprise is a symbol of a society in which the hired man can become his own boss. . . . History shows that the elimination of the independent businessman has been the first step in the development of totalitarianism.”).

48. 20 CONG. REC. 1458 (1889) (statement of Sen. George).

49. 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman).

50. *Id.* at 2457 (statement of Sen. Sherman).

Congress achieved these moral and political ends by structuring the antitrust laws to prohibit the use of unfair methods of competition.⁵¹ The antitrust laws specifically targeted practices such as using dominant market power to coerce suppliers into providing concessionary prices that were not available to other buyers, selling at a loss to drive out competitors, or refusing to do business with customers unless they stopped buying any products from rival firms.⁵² Behind all these measures was an ambition to protect the vitality of American democracy through measures to foster equality of opportunity and broad economic prosperity.⁵³

Citizens believed that banning unfair methods of competition such as price discrimination and buyer coercion would all but force a firm to structure its operations and behaviors in ways that enhance overall social welfare. Such actions can include better terms to suppliers, other investments that enhance productive capacity or innovation, and greater benefits and wages to workers.⁵⁴ Firms can also compete by selling higher quality goods and services, strategically allocating investments to improve and expand their production processes and offer superior terms to customers and suppliers, and by lowering prices. The goal here was not simply to encourage good behavior. In decreeing such fair methods of competition, citizens aimed to, in essence, *design* the American corporation to act in ways that enhance the public welfare. The goal was to ensure that the competition that is inherent in all human society is constructive rather than destructive in nature.⁵⁵

51. See, e.g., 15 U.S.C. §§ 1–2, 14, 18 (2018).

52. See, e.g., *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 368–69 (1927); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 690, 703 n.15 (1967); *Standard Oil Co. of Cal. v. United States (Standard Stations)*, 337 U.S. 293, 295–96 (1949). Other examples of prohibition on business practices include: Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201); Lanham Act, Pub. L. No. 79-489, § 32, 60 Stat. 427, 437 (1946) (protecting trademarks and prohibiting deceptive marketing); National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

53. James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 296 (1989); *id.* at 295 (“For most of the nineteenth century, however, small proprietors were considered to be the vibrant heart of economic life, indeed, archetypical examples of the ‘free laborers’ who were thought to be central to the natural economic order of classical economic theory.”) (footnote omitted); see also Paul, *supra* note 47, at 204, 206–07; THORELLI, *supra* note 42, at 565.

54. See, e.g., 15 U.S.C. §§ 1–2, 14, 18.

55. Other examples include: Fair Labor Standards Act; Lanham Act § 32 (protecting trademarks and prohibiting deceptive marketing); and the National Labor Relations Act of 1935.

D. Equality of Treatment (Non-Discrimination) Is the Foundation of Antimonopoly Law

Since the founding, Americans have understood that some institutions must be large and powerful and could not be broken into smaller pieces. Within bounds, this applied to the government itself and to networked systems such as communications and transportation.⁵⁶ Americans believed that individual liberties, as well as the fairness and efficiency of markets, depended on such powerful institutions not favoring some citizens over others. As one-time DOJ Assistant Attorney General Lee Loevinger put it in 1949: “Part of the Anglo-American tradition, as ancient and fundamental as the ideal of freedom itself, is the idea of equality: that under the same conditions all men shall be treated the same.”⁵⁷

The Declaration of Independence implicitly enshrines this principle as it affects the relationship between citizens and the states.⁵⁸ The Constitution more formally extended the principle to the nation’s legal system by granting all “due process of law” in the Fifth Amendment and “equal protection of the laws” in the Fourteenth Amendment.⁵⁹

The Constitution also expressly empowers Congress to establish the United States postal system as the nation’s first main communications platform.⁶⁰ When Congress established the United States postal system through the enactment of the Postal Act in 1792, it included a non-discrimination provision that mandated that all newspapers sent via mail would be charged at the same rate, irrespective of their origin or destination.⁶¹ This policy of non-discrimination protected smaller newspapers from more rural towns from being supplanted by bigger and better capitalized newspapers from big cities.⁶²

The foundational importance of non-discrimination is also made clear by the fact that Congress passed the ICA three years before the Sherman Act specifically to address the price discriminations in the railroad industry that were widely believed to have aided Standard Oil, Carnegie Steel, and other dominant corporations of the era in their drive to

56. *See supra* Part II.

57. LEE LOEVINGER, *THE LAW OF FREE ENTERPRISE* 137 (1949).

58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed . . . with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).

59. U.S. CONST. amends. V, XIV, § 1.

60. U.S. CONST. art. I, § 8, cl. 7.

61. Act of Feb. 20, 1792, ch. 7, §§ 9–10, 1 Stat. 232, 235; RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 25 (1995).

62. RICHARD KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700-1860s*, at 3, 34, 147 (1989); JOHN, *supra* note 61, at 25, 57, 59-60.

amass monopoly power.⁶³ Further, Senator Sherman, in defending the bill that bears his name, reemphasized precisely this point when he made clear that the Sherman Antitrust Act was founded on the belief that “[i]t is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on *equal terms and conditions and under like circumstances*. This is industrial liberty and lies at the foundation of the equality of all rights and privileges.”⁶⁴

Congress then reinforced these prohibitions by clearly extending them to specific sectors of the economy, including telecommunications, banking, broadcasting, and truck and airline transportation.⁶⁵ Congress also used the Clayton and Robinson-Patman Acts to, as Lee Loevinger put it, extend “th[e] principle [of non-discrimination] to commercial transactions generally . . . [thereby] specify[ing] as a general rule for business a standard of fair dealing that is ancient in our culture and our law.”⁶⁶

With these principles in mind, the intent, effect, and justifications for Congress enacting the RPA are put into their proper context.

III. WHY CONGRESS ENACTED THE ROBINSON-PATMAN ACT

When Congress passed the RPA in 1936, the immediate concern driving its action was the rapid spread of chain stores such as the Great Atlantic & Pacific Tea Company (“A&P”).⁶⁷ These large corporations were able to use their sheer size and deeply integrated operations to obtain highly preferential prices from suppliers and term concessions from producers.⁶⁸ Lawmakers believed this coercive influence gave the chains

63. HOOGENBOOM & HOOGENBOOM, *supra* note 31, at 8-11. Consider also how powerful buyers coercively extracted preferential terms. For example, a 1906 government report cogently described the power of Standard Oil, the monopolistic oil company owned by the infamous robber baron John D. Rockefeller, and its ability to coercively extract unfair price discriminations from railroad companies. The report stated, “[B]y reason of [receiving] discriminating [railroad] freight rates . . . [Standard Oil was able to] . . . destroy[] competition in large sections of the country Railway discriminations, in connection with price cutting, have thus enabled the Standard to obtain monopoly profits of enormous amount.” DEP’T COM. & LAB., REPORT OF THE COMMISSIONER OF CORPORATIONS ON THE TRANSPORTATION OF PETROLEUM 3 (1906).

64. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (emphasis added).

65. See Motor Carrier Act of 1935, Pub. L. No. 74-255, §§ 201–202, 49 Stat. 543, 543; Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064; Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973.

66. LOEVINGER, *supra* note 57, at 138.

67. Sparks, *supra* note 46, at 206-08, 221, 235-36.

68. GODFREY M. LEBHAR, CHAIN STORES IN AMERICA 1859-1950, at 25-26, 40 (1952); 80 CONG. REC. 9417 (1936) (statement of Rep. Utterback) (“It is through this clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution in return for depriving him of the right to crush his efficient

an unfair advantage in day-to-day competition.⁶⁹ Smaller producers also feared these powerful buyers. If a producer refused to grant preferential pricing and terms that had been demanded, a chain store could threaten to take their business elsewhere or even manufacture the goods themselves.⁷⁰ The loss of the chain store as a buyer would deprive the seller of significant revenues and threaten its profitability and even its solvency.⁷¹ Relatedly, Congress believed the discriminatory practices of powerful buyers and sellers were unfairly undermining the vitality of small businesses, thus placing a politically dangerous concentration of control over other people and other companies in the hands of the executives of a few large corporations.⁷² The first chain stores emerged in the

smaller competitors with the power and resources of mere size.”); Sparks, *supra* note 46, at 11-12, 22-24, 232-33.

69. FED. TRADE COMM’N, 74TH CONG., FINAL REPORT OF THE CHAIN-STORE INVESTIGATION 24-25, 53 (1934) [hereinafter FTC CHAIN STORE REPORT] (describing the ability of chain stores to obtain preferential pricing and services as an “outstanding feature” of the growth of chain stores and describing chain stores as using “threats and coercion” to obtain “preferential treatment”); 80 CONG. REC. 6282 (1936) (statement of Sen. Logan) (“But there may come such a condition after a while that the purchaser becomes so enormously large, his purchasing power is so tremendous, the quantity he buys may become so very great that the discount which he receives will enable him to drive all others out of business.”); *id.* at 8122, 8124 (statement of Rep. Boileau); *id.* at 8128 (statement of Rep. Shannon) (“The very bigness of these chain organizations makes them a menace to our civilization.”).

70. FTC CHAIN STORE REPORT, *supra* note 69, at 24; Sparks, *supra* note 46, at 236-37 (“Standard Brands, the maker of Fleischmann’s Yeast, had its products yanked from A&P’s shelves because it refused to grant a ten percent rebate to the firm. The company went to private label goods, produced exclusively for it by smaller manufacturers.”).

71. *See, e.g.*, Sparks, *supra* note 46, at 231-32.

72. 80 CONG. REC. 7761 (1936) (statement of Rep. Patman) (“The people of America must very quickly decide whether they want absentee ownership of business through corporate chains or whether they want local independent merchants. . . . If we have absentee ownership of business the public will pay and pay dearly, the profits going to the privileged few. Local communities will be destroyed, since the local reservoirs of credit will be dried up and the opportunities for young people will be very much restricted.”); *id.* at 8130 (statement of Rep. Robsion) (“The money of the community is absorbed just like a great sponge absorbs water. It can be seen at once that this system takes the money and credit from the various counties and communities of the Nation and centers it in the great metropolises like New York and Chicago. About all the service they render to a community is to exchange their goods for the people’s money and send the money out of the community.”); *id.* at 8131 (statement of Rep. Robsion); *id.* at 9416 (statement of Rep. Utterback) (“The more far-flung his operations, the larger his business, and the greater his list of customers, the more reserve has he at his disposal on which to absorb those losses, and the deeper the price cut he can afford rather than lose a large customer’s business to a competitor. Likewise the deeper the price cut he can afford to offer the larger customers of his various competitors, to induce them to switch their business to him.”); *id.* at 5715 (statement of Rep. Martin) (“[U]nless [the RPA] passes at this session of Congress monopoly will have a much firmer grip upon the throats of the people and within a short time the independents will be threatened with extinction.”); *id.* at 8104 (statement of Rep. Cochran); *id.* at 8109 (statement of Rep. Summers); *id.* at 8125 (statement of Rep. Ford); *id.* at 8130-32 (statement of Rep. Robsion); *id.* at 8136 (statement of Rep. Moritz).

mid-to-late nineteenth century and began spreading rapidly.⁷³ By 1911, for instance, F.W. Woolworth operated 596 stores across the United States and had accumulated sufficient profits to build the world's tallest office tower in lower Manhattan near Wall Street.⁷⁴ In the 1920s and early 1930s, the chain store model proliferated across the country.⁷⁵ By the 1930s, grocery stores controlled by A&P were in over 15,000 locations, making it the largest retailer in the world.⁷⁶ Other chains, such as Sears and JCPenney, grew rapidly as well.⁷⁷ In ten years, JCPenney grew its number of locations by fourfold, increasing from 312 to 1,452 stores between 1920 and 1930.⁷⁸ Between 1925 and 1936, Sears grew from eight stores to 440.⁷⁹ At the end of the 1920s, there were almost 150,000 chain stores, and they constituted between twenty and thirty percent of all retail sales in the United States, up from merely four percent earlier in the decade.⁸⁰ Chain stores controlled forty percent of all United States grocery sales by 1929 and nearly sixty percent in 1933.⁸¹

By obtaining preferential pricing and terms, chain stores like A&P were able to charge significantly lower retail prices than their smaller independent competitors could.⁸² One estimate calculated that chain stores extracted prices three to eleven percent lower from their suppliers than their smaller rivals—which became the principal reason consumers made their purchases from chain stores.⁸³

Public animosity toward the chain stores ran high throughout the 1920s and 1930s.⁸⁴ A 1936 poll found that sixty-nine percent of the public viewed the chain stores negatively.⁸⁵ One author described the

73. Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1019-20 (2005).

74. LEBHAR, *supra* note 68, at 34.

75. FTC CHAIN STORE REPORT, *supra* note 69, at 5, 8.

76. *Id.* at 7-9; Paul B. Ellickson, *The Evolution of the Supermarket Industry: From A&P to Walmart*, in HANDBOOK ON THE ECONOMICS OF RETAILING AND DISTRIBUTION 368, 371 (Emek Basker ed., 2016).

77. Schragger, *supra* note 73, at 1019-20; LEBHAR, *supra* note 68, at 41.

78. Schragger, *supra* note 73, at 1020.

79. LEBHAR, *supra* note 68, at 41.

80. *Id.* at 58; Schragger, *supra* note 73, at 1013.

81. LEBHAR, *supra* note 68, at 59; Schragger, *supra* note 73, at 1013; MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 227 (1996).

82. FTC CHAIN STORE REPORT, *supra* note 69, at 28-33. There was also a worry about perception. Since independents could not access the lower prices offered to chain stores, consumers could think of independents as unfairly inferior. *See* Sparks, *supra* note 46, at 232-33.

83. RICHARD S. TEDLOW, *NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA 197-98* (1990).

84. Bethany E. Moreton, *It Came from Bentonville: The Agrarian Origins of Wal-Mart Culture*, in *WAL-MART: THE FACE OF TWENTY-FIRST-CENTURY CAPITALISM* 57, 68 (Nelson Lichtenstein ed., 2006).

85. *Id.*

public's antipathy: "Rooted in the antimonopoly ideology of the Progressive Era, the anti-chain store movement articulated an account of local economic self-sufficiency in the service of political liberty, economic independence, and local community."⁸⁶

Responding to this public pressure, a Republican-controlled Congress in 1928 instructed the FTC to open an investigation into the business operations of chain stores.⁸⁷ The investigation lasted six years and concluded with a landmark report in 1934.⁸⁸ The report found that "the ability of the chain store to obtain its goods at [a] lower cost than independents and of large chains to obtain goods at [a] lower cost than small chains is an outstanding feature of the growth and development of chain store merchandising."⁸⁹ The FTC also concluded that the chain stores obtained their preferential pricing and terms through, among other tactics, "threats and coercion."⁹⁰ The FTC's report prompted Congress to design the RPA to prohibit this kind of conduct.

Based on the FTC report and national media campaigns,⁹¹ Congressman Wright Patman in 1935 introduced legislation to prevent large firms from extracting preferential terms from suppliers simply based on their size. In a House floor debate, Patman stated that:

[P]owerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstances and for the same quantities of goods. Is that right or wrong? It is wrong.⁹²

Representative Patman also stated that the bill had the broad intention of protecting smaller businesses from the unfair and coercive tactics of dominant corporations:

This bill has the opposition of all cheaters, chiselers, bribe takers, bribe givers, and the greedy who seek monopolistic powers which would destroy opportunity for all young people and which would eventually cause Government ownership, as the people of this country will not tolerate private monopoly. This bill has the support of those who believe that competition is the life of trade; that the policy of live and let live is a good one; that it is one of the first duties of Government to

86. Schragger, *supra* note 73, at 1014.

87. *Id.* at 1060-61.

88. *Id.* at 1061. See generally FTC CHAIN STORE REPORT, *supra* note 69 (discussing the landmark 1934 report).

89. FTC CHAIN STORE REPORT, *supra* note 69, at 24.

90. *Id.* (internal quotations omitted).

91. Sparks, *supra* note 46, at 46, 75-82.

92. 80 CONG. REC. 8111 (1936) (statement of Rep. Patman).

protect the weak against the strong and prevent men from injuring one another; that greed should be restrained and the Golden Rule practiced.⁹³

Other lawmakers vigorously echoed Patman's statements that the RPA was predominantly aimed at restraining powerful buyers,⁹⁴ asserting the legislation was rooted in the concepts of equality and fairness.⁹⁵ For example, Congressman Hubert Utterback stated forcefully:

Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influence within the State.⁹⁶

During the legislative debates, Representative George Sadowski said that Congress had specifically designed the RPA to prevent unfair practices that would hinder fair competition. He said:

The opponents of this bill continually raise the objection that this legislation will stifle competition. Competition in business is a good thing when it is fair competition. Unfair competition, the kind that has destroyed small business in this Nation, must not be tolerated further.

93. *Id.* at 3447 (statement of Rep. Patman).

94. *See, e.g., id.* at 6282 (statement of Sen. Logan) (“But there may come such a condition after a while that the purchaser becomes so enormously large, his purchasing power is so tremendous, the quantity he buys may become so very great that the discount which he receives will enable him to drive all others out of business.”); *id.* at 8122, 8124 (statement of Rep. Boileau); *id.* at 8128 (statement of Rep. Shannon).

95. *Id.* at 9416 (statement of Rep. Utterback) (“[This bill provides] equal opportunity and fair play which . . . guarantees the integrity and wholesomeness of local community life against corruption and impoverishment by these sinister influences.”); *id.* at 8102 (statement of Rep. Sabath) (“The chain-store octopuses, mainly controlled by Wall Street financiers, must be restricted from unfair and discriminatory practices. Since the ethics of fair dealing seem to be unknown to them, these overlords must be prevented by legislation from obtaining special inducements, at the expense of independent dealers, through threats and coercion.”); *id.* at 8131 (statement of Rep. Robsion) (“What are we trying to get away from these chains? We are not trying to take away from them any rights given to them by the Constitution of this country. What we are trying to take away from them is secret discounts, secret rebates, and secret advertising allowances. We are trying to take away from them those practices that are unfair. We are trying to take away from them the power to destroy the independent merchants and the independent and smaller wholesale concerns. We are trying to keep these large aggregations of capital and brains from forming monopolies. We are trying to keep open the door of opportunity for the small-business man as well as the large.”); *id.* at 6621 (statement of Rep. Miller) (“The [RPA] is based upon the simple American ideals of equal opportunity and fair play.”).

96. *Id.* at 9417 (statement of Rep. Utterback).

The monopolies insist on concessions, allowances, and rebates to enable them to compete with independent merchants. This, I say, is unfair competition. Why are they afraid or unable to compete with the independent merchant on equal terms? Why are they afraid to start with goods at equal costs? The monopolies claim to have superior efficiency. Let us have an honest test. This bill does not demand any special privileges for the independent or small merchant. It merely demands that unfair, unequal, and unethical business practices, including unfair price discrimination, be prohibited by law.⁹⁷

Similarly, other members of Congress advocated for the RPA because it ensured fair competition through equalized standing of firms so that their success was determined not by privileged access, but rather by their own business acumen. Representative John Cochran stated:

It is a desire to extend equal rights to all and special privileges to none, and nothing more. I want the small druggist, grocer, butcher, hardware man, and other merchants in my district to be able to buy their supplies at the same price and receive the same benefits as is accorded the large chains and mail-order houses. I seek no advantages for them and they desire none.⁹⁸

In addition to promoting fair competition, equal treatment, and protecting small businesses, supporters of the RPA also sought to remedy the deficiencies of section 2 of the Clayton Act, which was Congress's original attempt to explicitly restrict price discrimination of commodities throughout the entire economy.⁹⁹ As originally enacted, section 2 of the Clayton Act was aimed at outlawing discriminatory pricing, stating that it should be allowed only "on account of differences in the . . . quantity

97. *Id.* at 7324 (statement of Rep. Sadowski).

98. *Id.* at 8104 (statement of Rep. Cochran); *id.* at 8135-36 (statement of Rep. Nichols) ("[I]s there anything undemocratic about our wanting to give the same opportunity to the man who helped build this Nation and helped build the homes and communities of the Nation? Are we wrong in wanting to give him the same opportunity that is given the man who merely comes into our community for the purpose of accumulating huge fortunes in profits and who sends it back to some other land, takes it out of our community so that it cannot build further? I think surely you gentlemen who are on the floor this afternoon will stand toe to toe and fight with both hands for the passage of this legislation, and I say to you that in my humble opinion you will have rendered a great service to a great Nation when you do it.")

99. S. REP. NO. 74-1502, at 3015 (1936) (stating that the RPA "accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower"); see also Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 136 (2000).

of the commodity sold”¹⁰⁰ Federal courts interpreted this provision as classifying quantity and other volume discounts as per se legal, regardless of their competitive effects.¹⁰¹ As described in a House Committee report, this “quantity loophole” “so materially weakened section 2 of [the Clayton] [A]ct . . . as to render it inadequate, if not almost a nullity.”¹⁰² When Congress enacted the RPA to amend section 2 of the Clayton Act, the law was strengthened not just to target price discrimination and coercive buyer tactics that could lessen competition or tend to lead to a monopoly, but also those which “injure, destroy, or prevent competition”¹⁰³

The RPA’s language makes it clear that Congress was concerned with protecting a range of interests, including the health of the market, consumers, and businesses.¹⁰⁴ In summarizing Congress’s intentions in passing the RPA, a House Report cogently stated:

The purpose of this proposed legislation is to restore so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.¹⁰⁵

Congress also stated that the express purpose of the bill was to “suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them.”¹⁰⁶ With its emphasis on equality, fairness, and the regulation of dominant corporations, members of Congress presented the RPA as an extension of the tradition of fair play and non-discrimination that informed railroad regulation under the ICA.¹⁰⁷

100. Clayton Act, ch. 323, § 2, 38 Stat. 730, 730 (1914) (codified at 15 U.S.C. § 13).

101. CORWIN D. EDWARDS, *THE PRICE DISCRIMINATION LAW: A REVIEW OF EXPERIENCE* 7-8 (1959).

102. H.R. REP. NO. 74-2287, at 3187 (1936).

103. 15 U.S.C. § 13(a).

104. Angela Nwaneri, Note, *The “Good Faith” Meeting Competition Defense to a Section 2(a) Violation of the Robinson-Patman Act: Area-Wide Pricing as a Valid Response to Competition*, 14 WM. MITCHELL L. REV. 859, 870-71 (1988) (“[T]he drafters were motivated by the interests of consumers, wage earners, farmers, and the general welfare of the people by preserving competition. Proponents of the Act concede that the immediate concern of the drafters was the prevention of injury to competitors victimized by discrimination.”) (footnotes omitted).

105. H.R. REP. NO. 74-2287, pt. 1, at 3183 (1936).

106. *Id.* at 3187.

107. *See, e.g.*, 80 CONG. REC. 6621 (1936) (statement of Rep. Miller); *id.* at 7324 (statement of Rep. Sadowski); *id.* at 8112 (statement of Rep. Patman); *id.* at 8128 (statement of Rep. McLaughlin); *id.* at 8129 (statement of Rep. Robsion).

President Roosevelt, in invoking the themes of the RPA, would say in his 1944 State of the Union address that “every businessman, large and small, [has the right] to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad”¹⁰⁸ Upon becoming law, supporters of the RPA would hail it as the “Magna Carta of Small Business[.]”¹⁰⁹

IV. OVERVIEW OF THE ROBINSON-PATMAN ACT

The RPA has six main sections, each of which is briefly described below.¹¹⁰

Section 2(a) prohibits certain price discriminations in the purchase or sale of commodities that “may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them[.]”¹¹¹ Section 2(a) also contains the cost justification

108. Franklin D. Roosevelt, President of the U.S., State of the Union Message to Congress (Jan. 11, 1944), <https://www.presidency.ucsb.edu/documents/state-the-union-message-congress> [<https://perma.cc/6ZWS-W48F>]. After he signed the RPA, Franklin Roosevelt came to see the law as a central means to promote economic liberty and prevent the monopolization of markets. Roosevelt implicitly referenced the RPA and its themes of antimonopoly and equal opportunity in at least two campaign speeches in 1936. See Franklin D. Roosevelt, President of the U.S., Address at Little Rock, Arkansas (June 10, 1936), <https://www.presidency.ucsb.edu/documents/address-little-rock-arkansas> [<https://perma.cc/T9XF-JBEG>] (“These problems, with growing intensity, now flow past all sectional limitations. They extend over the vast breadth of our whole domain. Prices, wages, hours of labor, fair competition, conditions of employment, social security, in short the enjoyment by all men and women of their constitutional guaranties of life, liberty and the pursuit of happiness We know that equality of individual ability has never existed and never will, but we do insist that equality of opportunity still must be sought.”); Franklin D. Roosevelt, President of the U.S., Address at the Texas Centennial Exposition, Dallas, Texas (June 12, 1936), <https://www.presidency.ucsb.edu/documents/address-the-texas-centennial-exposition-dallas-texas> [<https://perma.cc/5XRH-2GN8>] (“[The people of Texas] found that certain forms of monopoly—the combinations of public utilities and other businesses which sought their own ends—were undemocratic because they were bearing down heavily on their smaller competitors, and on the people they served. Because of this they were taking away opportunity. Today we have restored democracy in government.”).

109. H.R. COMM. ON SMALL BUS., 94TH CONG., RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT 1 (1976) (quoting Rep. Gonzalez); Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> [<https://perma.cc/A7M5-KBCQ>]; BEAN, *supra* note 47, at 17; see also MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA 91-93 (1991) (detailing a number of bills Congress considered to regulate the economy).

110. For a good paper providing more detail on each of the sections of the RPA, see Clinton C. Carter & Kesa M. Johnston, *The Robinson-Patman Act: The Law of Price Discrimination*, 64 ALA. LAW. 246 (2003).

111. 15 U.S.C. § 13(a).

defense, which allows litigants to escape liability as long as their price discriminations are based on differences in manufacturing, sale, or delivery.¹¹²

Section 2(b) establishes the burden of proof under a section 2(a) claim.¹¹³ Section 2(b) also contains the “meeting competition” defense, which allows litigants to escape liability if their price discriminations are based on granting a lower price that was made in good faith to meet the price of a competitor.¹¹⁴

Section 2(c) prohibits brokerage fees, discounts, and kickbacks.¹¹⁵ Sections 2(d) and 2(e) prohibit discrimination in promotional allowances paid or services and facilities provided by the seller to its customers.¹¹⁶ Effectively, sections 2(d) and 2(e) are anti-circumvention provisions against any 2(a) claim. Last, section 2(f) prohibits buyers from knowingly receiving price discriminations.¹¹⁷ Section 2(f), therefore, applies the prohibition of sellers to discriminate in price, as stated in section 2(a), to buyers.

When viewed collectively, the substantive prohibitions of the RPA reveal some uniquely important features. First, rather than take a generalized approach like the Sherman Act, the RPA targets specific conduct regarding price discrimination analogous to the Clayton Act’s approach to tyings, exclusive dealings, and mergers.¹¹⁸ Also, unlike the Sherman Act, the RPA does not rely on a “rule of reason” standard, making it much more friendly to prosecutors and private plaintiffs.¹¹⁹

Second, like the Clayton Act, the RPA is a prophylactic statute, meaning that plaintiffs can seek redress even before the deleterious effects from the statute’s targeted behaviors have completely manifested

112. *Id.* Section 13(a) also contains the changing conditions defense, which states: [N]othing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Id.

113. *Id.* § 13(b).

114. *Id.*

115. *Id.* § 13(c).

116. *Id.* § 13(d)–(e).

117. *Id.* § 13(f).

118. *Id.* §§ 1–2, 14, 18.

119. NELSON B. GASKILL, WHAT YOU MAY AND MAY NOT DO UNDER THE NEW PRICE DISCRIMINATION LAW 16 (1936). For a description of the rule of reason, see Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50 (2019). Conduct evaluated under the rule of reason is effectively a demarcation of per se legality. See Michael A. Carrier & Christopher L. Sagers, *The Alston Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed Under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461, 1476 & n.114 (2021).

themselves.¹²⁰ The RPA explicitly states that price discriminations are prohibited where the effects “*may be* substantially to lessen competition or *tend* to create a monopoly[.]”¹²¹ Beyond the text of the statute, the prophylactic nature of the RPA is perhaps best expressed in the Supreme Court’s landmark 1948 ruling in *FTC v. Morton Salt Co.*,¹²² which led to what is commonly known as the “*Morton Salt*” inference. Rather than requiring a plaintiff to show injury to competition, a *prima facie* case for secondary line discrimination could be inferred merely from presenting evidence of “a substantial price discrimination between competing purchasers over time.”¹²³ A 1936 Senate report stated that the purpose of the RPA’s incipiency standard was to “catch the weed in the seed [to] keep it from coming to flower.”¹²⁴

Third, like the other antitrust laws, the RPA is designed to be widely enforced by public law enforcement and by civil lawsuits brought by private businesses and others harmed by predatory marketplace behavior. This practice has long been accepted by the Supreme Court. Along with the *Morton Salt* inference, the Supreme Court favorably interpreted other aspects of the RPA in support of a robust enforcement regime that would meet Congress’s intent.¹²⁵

Congress further bolstered RPA enforcement in 1959 with the passage of the Finality Act.¹²⁶ Before 1959, the FTC cease and desist orders were not final.¹²⁷ Instead, if a corporation violated the agency’s order, the FTC had to submit a petition to a reviewing federal circuit court of appeals to enforce its order.¹²⁸ In other words, the federal courts had to approve the FTC’s RPA enforcement actions, and without the blessing of the federal courts, there were effectively no penalties for violating the Commission’s orders to stop the unlawful conduct. This weak enforcement mechanism removed much of the deterrent effect of the FTC’s orders to prevent unlawful conduct in the first place and also greatly

120. *Corn Prods. Refin. Co. v. FTC*, 324 U.S. 726, 738 (1945).

121. 15 U.S.C. § 13(a) (emphasis added); *Corn Prods. Refin. Co.*, 324 U.S. at 738, 742 (describing the RPA to reach incipient violations of price discrimination); *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 701-02 (1967).

122. 334 U.S. 37 (1948).

123. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983).

124. S. REP. NO. 74-1502, at 3015 (1936).

125. *See, e.g.*, *FTC v. Henry Broch & Co.*, 363 U.S. 166, 173-74 (1960) (establishing a *per se* rule for section 2(c) of the RPA); *Utah Pie Co.*, 386 U.S. at 703-04 n.15 (establishing a plaintiff-friendly standard for predatory pricing). As detailed in Part VII, the Supreme Court did not interpret every aspect of the RPA favorably between the 1940s and 1970s. *See infra* Part VII.

126. Finality Act, Pub. L. No. 86-107, 73 Stat. 243 (1959).

127. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719-20 (1914).

128. *Id.* at 720.

increased enforcement costs for the agency.¹²⁹ After Congress enacted the Finality Act,¹³⁰ the FTC could immediately impose civil penalties of \$5,000 for each separate offense—significantly strengthening the FTC’s enforcement capabilities.¹³¹

V. THE BENEFICIAL EFFECTS OF THE ROBINSON-PATMAN ACT

During the height of its enforcement between the 1940s and 1970s, the RPA led to several under-discussed and underappreciated benefits to the American economy. First, the RPA increased economically beneficial competition at the retail level and between brands by eliminating unfair and unjustified price competition that does not reflect actual differences in manufacturing, transporting, or delivering costs.¹³² Firms were required to make real claims of superior economies of scale or provide actual justifications for offered or received differences in price.¹³³ In other words, the RPA did not suppress competition; it modified it to create a fairer form of competition governed by different factors other than low prices.¹³⁴

As the historical evidence shows, price discrimination can lead to increased market power by firms by mere dint of obtaining preferential pricing and terms.¹³⁵ By establishing a level and fair starting point for all

129. See Martin B. Louis, *The Scope and Enforcement of Robinson-Patman Act Cease and Desist Orders*, 10 VILL. L. REV. 457, 463 (1965).

130. 73 Stat. 243.

131. See, e.g., 105 CONG. REC. 12731 (1959) (statement of Rep. Huddleston); *id.* at 12734 (statement of Rep. Meader).

132. H.R. REP. NO. 74-2287, pt. 1, at 3187 (1936) (stating “[t]he object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them”); Earl W. Kitner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 ANTITRUST BULL. 571, 590 (1986) (stating that the RPA “helped make competition more vigorous in some markets and has served to assure that vigorous competition . . . continue[s] in others”).

133. *United States v. Borden Co.*, 370 U.S. 460, 467 (1962) (stating that firms must show “actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered” to avoid violating the RPA); 15 U.S.C. § 13(a).

134. RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* 153 (rev. ed. 2000) (ebook) (“The Robinson-Patman Act’s strategy for equalizing competition embodies a compromise between equality and efficiency, between strict government control of wholesale prices, on the one hand, and unrestrained economic power on the other. It seeks to forge a fair start by stratifying competition along levels of distribution.”).

135. Peter R. Maier, Comment, *Effective Marketing and the Robinson-Patman Act: Volume Incentives, Functional Discounts, and Promotional Allowances*, 55 TEX. L. REV. 473, 478 (1977) (“[P]rice discrimination may result in retailers selling to consumers at different retail prices. Because those prices do not always reflect the cost of production but instead mirror the strategic power of the retailer or his wholesaler, price discrimination arguably results in lower prices and, therefore,

purchasers and sellers, and by requiring retailers to pay proportionally similar prices, the RPA shifts the playing field of competition from one of purchasing power to allowing for additional factors such as the best selection, appealing store layouts, good customer service, or efficient operations. In other words, firms were effectively freed to focus more of their resources and attention on more socially beneficial methods of competition to obtain market success.¹³⁶

This shifting of the competitive landscape, in turn, assisted with providing consumers having a greater number of choices among more competing brands.¹³⁷ This increased competition also meant that retailers had to compete on running their operations more efficiently or with lower profit margins, rather than on the ability to amass enough market power to coerce concessionary prices from their suppliers.¹³⁸ Moreover, the environment resulting from such fair competition had critical feedback effects. An increase in the number of retailers creates more outlets where producers can sell their products, which fosters the creation of more producers, and therefore increased competition for goods.

Second, evidence shows that the RPA's prophylactic design significantly reduced unfair price and term concessions.¹³⁹ Historical reviews of the RPA's effects show that discounts offered to buyers became much more equitably available.¹⁴⁰ This leveling of the playing field undoubtedly helped small businesses by restricting practices that allowed their significantly larger rivals to obtain unfair advantages. As one study concluded, the evidence shows that when large firms had their unfair pricing practices restricted, "[r]egional, sectional, and local chains led the post[-World War II] supermarket boom" as opposed to national ones,

more sales by the 'wrong' retailers. While retailer A may be more efficient, retailer B can undersell A because of the subsidy B receives in the form of a hidden price reduction from his supplier.").

136. See, e.g., NELSON LICHTENSTEIN, *THE RETAIL REVOLUTION: HOW WAL-MART CREATED A BRAVE NEW WORLD OF BUSINESS* 27 (2009); see also Akiva A. Miller, *What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing*, 19 J. TECH. L. & POL'Y 41, 66 (2014) ("Instead of competing over better quality, more variety, or cost reduction, firms compete over adoption of marketing tools that do not enhance consumer welfare in any meaningful way, and may even be socially detrimental."); Daniel A. Farber & Brett H. McDonnell, *Why (and How) Fairness Matters at the IP/Antitrust Interface*, 87 MINN. L. REV. 1817, 1868 (2003) ("[I]n the context of intellectual property, price discrimination does increase the incentive to innovate, but there can be too much of a good thing. Just how much of its resources should society invest in innovation as opposed to providing existing goods and services is not clear, but it is at least arguable that we have pushed beyond the break-even point in some areas.").

137. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-91 (2007).

138. Ellickson, *supra* note 76, at 369, 372-76.

139. EDWARDS, *supra* note 101, at 622; Rowe, *Expectation*, *supra* note 11, at 307.

140. EDWARDS, *supra* note 101, at 623.

allowing the smaller chains to improve their services.¹⁴¹ Other evidence shows that in the initial years following the enactment of the RPA, independent grocers comprised an increasing percentage of total national sales.¹⁴² After Congress passed the RPA, evidence shows that the chain stores had to raise their prices because they could no longer obtain unfairly low prices for their purchases.¹⁴³ Complementing this evidence are repeated surveys showing resounding and consistent support for the RPA from small and independent businesses since its inception as well as a desire for increased enforcement from federal agencies.¹⁴⁴

By inhibiting monopoly and maximizing fair competition, the RPA also encouraged real efficiency and, in the long run, held down consumer prices.¹⁴⁵ Despite critics who claimed that the RPA contributed to inflation, not a single empirical study has shown this to be true.¹⁴⁶ Instead,

141. Ellickson, *supra* note 76, at 374-75.

142. Thomas W. Ross, *Winners and Losers Under the Robinson-Patman Act*, 27 J.L. & ECON. 243, 258 (1984).

143. MARC LEVINSON, *THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA* 165 (2011) (“[After the enactment of the Robinson-Patman Act,] [c]hain supermarkets were forced to raise prices, as they were no longer able to use advertising and brokerage allowances to lower the cost of groceries. As they could no longer obtain merchandise far more cheaply than independent stores, their price advantage declined, and their share of food sales plummeted.”).

144. Howard K. Calish, *The Effects of the Robinson-Patman Act on the Food Distribution System* 61 (May 17, 1949) (M.B.A. thesis, Boston University), <https://open.bu.edu/handle/2144/21415> [<https://perma.cc/CPJ4-PTHB>] (“Approximately two-thirds (66.1%) of the responding firms felt that the Robinson-Patman Act was a good law and had benefited the food industry.”); Ross, *supra* note 142, at 244 (“[The RPA] retains a great deal of support among small businessmen, arguably more support than it had in the 1930s.”); *Bigger Than Big Tech: Business Groups Form Main Street Competition Coalition, Urge Federal Trade Commission to Enforce Antitrust Laws*, NAT’L GROCERS ASS’N (Oct. 28, 2021), <https://www.nationalgrocers.org/news/bigger-than-big-tech-business-groups-form-main-street-competition-coalition-urge-federal-trade-commission-to-enforce-antitrust-laws> [<https://perma.cc/7BGH-R5GZ>].

145. John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 649-50 (2005) [hereinafter Kirkwood, *Buyer Power*] (“[B]uyer-induced discrimination may harm consumers by allowing the favored buyer to become less efficient. Because an unjustified concession confers a competitive advantage on the favored buyer, it can use that concession in a variety of ways—to reap higher profits, to gain market share, or to allow its own costs to rise. . . . [I]t reduces economic efficiency because it is wasting resources. The inflated costs also hurt consumers if they impede the firm’s ability to compete in the future, making it less innovative or less responsive to changing consumer tastes.”).

146. Alvaro M. Bedoya, Fed. Trade Comm’n, Prepared Remarks at the Midwest Forum on Fair Markets 7 n.35 (Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf [<https://perma.cc/528K-F5QY>] (citing studies); Erik Peinert & Katherine Van Dyck, *The Needless Desertion of Robinson-Patman*, PROMARKET (Oct. 10, 2022), <https://www.promarket.org/2022/10/10/the-needless-desertion-of-robinson-patman> [<https://perma.cc/BP6C-KR8T>] (stating “there is *no* systematic empirical evidence that RPA enforcement will lead, or ever has led, to higher prices for consumers” and citing other studies that confirm this statement) (emphasis in original).

economic research shows that powerful buyers procuring preferential treatment can increase prices for consumers and smaller firms.¹⁴⁷ A 1976 article co-authored by former FTC Chair Earl Kintner succinctly encapsulated the lack of evidence against the RPA: “No good case has yet been made that its evisceration or repeal is appropriate. We doubt that such a case can be made when the Act is properly understood.”¹⁴⁸

Third, by proscribing destructive cost-cutting among suppliers and smaller retailers and prohibiting demands for lower prices by powerful buyers, as well as working in conjunction with the other antitrust laws to inhibit market concentration, the RPA led to fair returns for small and locally owned enterprises¹⁴⁹ and thus fair wages for workers.¹⁵⁰ By restricting the use of buyer power as a competitive weapon, pressure on both suppliers and rival retailers was relieved, and these businesses could then afford to pay higher wages to their workers. At the same time, the prohibitions on coercive conduct provided established firms more resources to engage in research and development, long-term planning, and investment.¹⁵¹

A significant consequence of buyer power is that workers often incur its costs through reductions in wages, benefits, and employment to

147. See Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 333 (2008). This is known as the “waterbed effect” and is when “better supply terms for powerful buyers [results in] a worsening of the terms of supply for smaller or otherwise-less-powerful buyers” *Id.*; see also Roman Inderst & Tommaso M. Valletti, *Buyer Power and the ‘Waterbed Effect,’* 59 J. INDUS. ECON. 1, 1 (2011) (detailing an economic model that shows the harms derived from the waterbed effect and when it can lead “to a reduction in consumer surplus or welfare”); Ross, *supra* note 142, at 254-58. “While a large and powerful firm improves its own terms of supply by exercising its bargaining power, the terms of its competitors can deteriorate sufficiently so as ultimately to increase average retail prices and, thereby, reduce total consumer surplus.” Inderst & Valletti, *supra*, at 2.

148. Earl W. Kintner et al., *Reform of the Robinson-Patman Act: A Second Look*, 21 ANTITRUST BULL. 203, 236 (1976).

149. Martin L. Gosman & Mark J. Kohlbeck, *Effects of the Existence and Identity of Major Customers on Supplier Profitability: Is Wal-Mart Different?*, 21 J. MGMT. ACCT. RSCH. 179, 181 (2009); Nathan Wilmers, *Wage Stagnation and Buyer Power: How Buyer-Supplier Relations Affect U.S. Workers’ Wages, 1978 to 2014*, 83 AM. SOCIO. REV. 213, 230-32 (2018); Hsihui Chang et al., *Customer Concentration, Cost Structure, and Performance* 1, 4, 20-21 (Apr. 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482777 [<https://perma.cc/HH7P-ZW4X>]; C. Edward Fee & Shawn Thomas, *Sources of Gains in Horizontal Mergers: Evidence from Customer, Supplier, and Rival Firms*, 74 J. FIN. ECON. 423, 431-32 (2004); Trish Kelly & Martin L. Gosman, *Increased Buyer Concentration and Its Effects on Profitability in the Manufacturing Sector*, 17 REV. INDUS. ORG. 41, 42-43 (2000); Yoon Hee Kim, *The Effects of Major Customer Networks on Supplier Profitability*, 53 J. SUPPLY CHAIN MGMT. 26, 37 (2017); Yoon Hee Kim & Urban Wemmerlöv, *Does a Supplier’s Operational Competence Translate into Financial Performance? An Empirical Analysis of Supplier-Customer Relationships*, 46 DECISION SCIS. 101, 103, 105 (2015).

150. See Wilmers, *supra* note 149, at 214-17, 229-30.

151. Kirkwood, *Buyer Power*, *supra* note 145, at 649-51.

meet the pricing and terms demanded.¹⁵² The RPA thus served as a bulwark to protect worker benefits and their economic standing.

The benefits of the RPA flowed through American society as a whole. During the height of its enforcement between the 1940s and 1970s, America saw the spread of modern, well-stocked supermarkets and department stores.¹⁵³ Thanks in part to the RPA, most were operated by local or regional owners rather than controlled by a handful of distant Wall Street banks. Overall, in the post-World War II decades, the United States enjoyed a vibrant and diverse retail sector where locally owned stores and locally owned suppliers thrived alongside national chains.¹⁵⁴

VI. THE RPA AS PART OF A SYSTEM OF INTERLOCKING COMPETITION LAW AND POLICY

Starting in the 1930s through to the mid-1970s, favorable interpretations of the antitrust laws and additional legislation from Congress buttressed the RPA's goal of restraining the power of dominant corporations.

During this time, the Supreme Court found, for example, that:

- The forced purchase of one product with another (known as tyings) were per se illegal.¹⁵⁵
- Exclusive deals were illegal if they “foreclosed [competition] in a substantial share of the line of commerce affected.”¹⁵⁶
- Mergers were significantly restricted in the name of preserving local ownership and promoting internal expansion.¹⁵⁷
- Vertical territorial restrictions were per se illegal.¹⁵⁸

152. Wilmers, *supra* note 149, at 213 (concluding that “[p]anel data on publicly traded companies shows that dependence on large buyers lowers suppliers’ wages and accounts for [ten] percent of wage stagnation in nonfinancial firms since the 1970s”).

153. See Stacy Mitchell & Ron Knox, *Boxed Out*, INST. FOR LOC. SELF-RELIANCE 6-7 (Sept. 2022), <https://ilsr.org/boxed-out> [<https://perma.cc/ETZ8-ZLCJ>].

154. *Id.* at 7.

155. *Int’l Salt Co., Inc. v. United States*, 332 U.S. 392, 394-96, 398 (1947); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-7 (1958); *Fortner Enters., Inc. v. U.S. Steel Corp. (Fortner I)*, 394 U.S. 495, 509 (1969); *United States v. Loew’s Inc.*, 371 U.S. 38, 44-45 (1962), *abrogated by* *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42, 45-46 (2006).

156. *Standard Oil Co. of Cal. v. United States (Standard Stations)*, 337 U.S. 293, 314 (1949). *But see Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 334-35 (1961) (weakening the Supreme Court’s *Standard Stations* holding).

157. See, e.g., *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 333 (1962) (“Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure.”); see also *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 362-63 (1963); *United States v. Aluminum Co. of Am. (Rome Cable)*, 377 U.S. 271, 277, 279-81 (1964); *United States v. Von’s Grocery Co.*, 384 U.S. 270, 274-78 (1966).

Congress also complemented the passage of the RPA with the enactment of the Miller-Tydings Act in 1937 and the McGuire Act in 1952.¹⁵⁹ These laws allowed states to pass their own “fair trade” laws governing commerce within their own borders.¹⁶⁰ Specifically, both acts authorized states to permit corporations to engage in resale price maintenance (“RPM”) agreements, which allowed firms to contractually prevent downstream retailers from selling a product at less than a predetermined price.¹⁶¹ RPM has been widely condemned as allowing powerful suppliers to forcibly control smaller retailing firms through contract.¹⁶² But particularly when used by smaller producers, the practice has shown to be able to prevent unfair price-cutting and help smaller firms establish a foothold in a market by ensuring fair prices for their products.¹⁶³ In other words, fair trade laws, as authorized by the Miller-Tydings Act, supported small businesses through equalized prices on the sale of goods.¹⁶⁴

158. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375-76 (1967), *overruled by* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977).

159. Miller-Tydings Fair Trade Act, Pub. L. No. 75-314, 50 Stat. 693 (1937); McGuire Act, Pub. L. No. 82-542, 66 Stat. 631 (1952) (codified as amended at 15 U.S.C. § 45).

160. See David W. Boyd, *From “Mom and Pop” to Wal-Mart: The Impact of the Consumer Goods Pricing Act of 1975 on the Retail Sector in the United States*, 31 J. ECON. ISSUES 223, 223-24, 229-30 (1997); 50 Stat. at 693-94. However, note that resale price maintenance is not without its adverse effects such as limiting competition between rivals. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 21 (1964). Some of the justifications for resale price maintenance appear to be on shaky grounds. See Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS OF U.S. ANTITRUST* 196, 196-97 (Robert Pitofsky ed., 2008).

161. 50 Stat. at 693-94; 66 Stat. at 631-32.

162. WALTON H. HAMILTON, *THE PATTERN OF COMPETITION* 33 (1940) (“[Resale Price Maintenance] presents an industrial order in which overlords, through contract, collect their feudal dues.”); see also *Simpson*, 377 U.S. at 21 (describing the use of resale price maintenance contracts as depriving smaller firms of “the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise”). Miller-Tydings may have also led to the rise of large membership retailers like Costco and Sam’s Club and the rise of private label brands. See VICKI HOWARD, *FROM MAIN STREET TO MALL: THE RISE AND FALL OF THE AMERICAN DEPARTMENT STORE* 168, 182-83 (2015); see also SANDRA S. VANCE & ROY V. SCOTT, *WAL-MART: A HISTORY OF SAM WALTON’S RETAIL PHENOMENON* 26-27 (1994). For the claim that Miller-Tydings led to membership stores, see also Mark D. Bauer, *Whither Dr. Miles?*, 20 LOY. CONSUMER L. REV. 1, 9-10 (2007); Mark D. Bauer, *Department Stores on Sale: An Antitrust Quandary*, 26 GA. ST. U.L. REV. 255, 269-70 (2010). This claim appears to be based on the text of the Miller-Tydings Act since it requires that products be in “free and open competition.” 50 Stat. at 693.

163. See John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*, 55 ANTITRUST BULL. 423, 443-54 (2010); see also Boyd, *supra* note 160, at 223-24 (asserting that the authorizing of resale price maintenance from Miller-Tydings and the McGuire Act, in part, “act[ed] as a device by which manufacturers create[d] property rights in the information services provided by the dealers who carry their products” which helped protect small businesses).

164. 81 CONG. REC. 7495 (1937) (statement of Sen. Tydings) (detailing the purpose of the Miller-Tydings Act).

In tandem with the RPA and other antitrust laws, the Miller-Tydings and McGuire Acts supported local and independent businesses. For example, in 1958, United States census data showed that more than half of grocery stores were independent.¹⁶⁵ Small business advocates Stacy Mitchell and Susan Holmberg note that during the 1950s, independent retailers accounted for seventy percent of retail sales, while more than twenty percent of retail workers, totaling more than two million people, owned their place of business—either as a sole proprietorship or as a partnership.¹⁶⁶

Collectively, this antimonopoly legal regime aimed at protecting and promoting independently owned businesses by encouraging corporations to use lawful and more socially beneficial methods of competition served as a primary foundation for the local and regional economic communities that flourished in mid- and late-twentieth-century America. Historian Richard Hofstadter aptly described the deterrent effect of the antimonopoly regime created by the RPA and other mid-century competition policies when he stated in 1964 that “anybody who knows anything about the conduct of American business knows that the managers of the large corporations do their business with one eye constantly cast over their shoulders at the Antitrust Division”¹⁶⁷

165. Stacy Mitchell, *The Real Reason Your Groceries Are Getting So Expensive*, N.Y. TIMES (May 29, 2023), <https://www.nytimes.com/2023/05/29/opinion/inflation-groceries-pricing-walmart.html> [<https://perma.cc/Y9Q7-WCQT>].

166. Stacy Mitchell & Susan R. Holmberg, *Why the Left Should Ally with Small Business*, NATION (Nov. 18, 2020), <https://www.thenation.com/article/society/democrats-labor-business-monopoly> [<https://perma.cc/8MXQ-ZQ3R>].

167. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 192-93 (Vintage Books ed., 2008) (1965). Numerous other scholars have detailed the deterrent effect the antitrust laws have on unlawful conduct. Louis, *supra* note 129, at 464 (“The threat of such large penalties [from the Finality Act] undoubtedly has a substantial *in terrorum* effect upon respondents[.]”) (emphasis in original); Donald I. Baker, *Donald Turner’s Merger Guidelines as an Antitrust Watershed*, 53 REV. INDUS. ORG. 435, 436 (2018) (“We knew that, if a client were sued by the Antitrust Division [in the 1960s] on a merger or restrictive practice, it was probably in for an expensive trip, and could well lose in the end.”). After the FTC issued its premerger guidelines for vertical mergers in the cement industry in 1966, vertical mergers in the industry went from seventy-nine between 1963 and 1967 to twenty-nine between 1968 to 1972. WILLARD F. MUELLER, *FIGHTING FOR ANTITRUST POLICY: THE CRUCIAL 1960S*, at 197-98 (2009); *id.* at 198 (“The number of mergers by the ten largest food retailers decreased from [sixty] during 1961-1966 to [nineteen] during 1967-1972.”); *id.* at 198 (“After 1965 the largest dairy corporations virtually ceased making dairy acquisitions[.]”); William G. Shepard, *Causes of Increased Competition in the U.S. Economy, 1939-1980*, 64 REV. ECON. & STAT. 613, 623 (1982) (“[A]ntitrust [enforcement] had a substantial influence on the degree of competition in the economy.”). For additional information relating to the deterrent effect of the antitrust laws, see Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U.L. REV. 1269, 1280 (2013); see also Edward William Gass, *Private Enforcement of the Robinson-Patman Act: The Damage Controversy*, 15 ANTITRUST BULL. 153, 160 (1970).

After reviewing its history, background, and benefits, it becomes clear that the RPA is not just a minor law designed to refine certain technical aspects of the Sherman and Clayton Antitrust Acts.¹⁶⁸ Rather, the RPA represents a capstone to America's long tradition of using the law to structure markets and to initiate prohibitions on the use of economic power to obtain price discriminations. By formally inserting and extending the principles of equality and non-discrimination, Congress facilitated other public policy goals such as promoting economic opportunity and fairness, shifting the focus of business operations to serve the public, and restricting the power of monopolies and other dominant corporations. This resulted in widespread economic opportunity, small-business formation, local control of businesses, and the building of an independent citizenry fitted for self-governance and democracy.

VII. THE BACKLASH AGAINST THE ROBINSON-PATMAN ACT

The success of the RPA in constraining corporate power and its economy-wide application led to attacks on the law from many different quarters. During the 1950s, the liberal economist John Kenneth Galbraith condemned the RPA, arguing that it harmed consumers by preventing large retailers from exercising "countervailing power" against large manufacturers.¹⁶⁹ He also saw the law as preventing "vigorous bargaining" between firms—in other words, the RPA suppressed supposedly beneficial competition.¹⁷⁰ Galbraith's opposition to the RPA and to antitrust enforcement more generally allowed him to gain the support of big businesses and allied institutions, including research grants from the

168. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 192 (2005) ("Most antitrust books treat the Robinson-Patman Act separately from everything else, as if it were a kind of bastard child of the antitrust laws.").

169. See GALBRAITH, *supra* note 13, at 141-45; see also Allan R. Rule, Comment, *The Robinson-Patman Act and Vertical Conflicts in Distribution*, 26 OHIO ST. L.J. 109, 125 (1965) (describing Galbraith's thesis as: "Thus, the public interest is theoretically protected by big seller against big buyer, big employer against big government, big employer against big union, and so on. Although the buying power of chain stores was a major factor behind the adoption of the Robinson-Patman Amendment, Galbraith specially condemns the application of the Robinson-Patman Act to the grocery chains on the ground that they developed in response to the original power of food processors and producers, and the concessions obtained by the vigorous bargaining of the chains operated effectively in the interest of consumers. Thus, under this thesis administration of the Robinson-Patman Amendment ought not to proscribe price discrimination coerced from a seller by the excessive market power of the buyer") (footnote omitted).

170. See GALBRAITH, *supra* note 13, at 58-59, 141-45.

Twentieth Century Fund and a tenured professorship at Harvard University's economics department.¹⁷¹

Some government enforcers also began to show their hostility to the RPA. For example, a 1955 report from the attorney general's office characterized the law as diverging from other antitrust statutes and in need of reform.¹⁷² During the late 1960s, commissioners of the FTC also asserted that the agency should reevaluate its approach to RPA enforcement.¹⁷³

It was only at the end of the 1970s, however, that attacks on the RPA significantly intensified across the political spectrum. One reason was growing concern about the extremely high rates of inflation during the decade. There were many sources contributing to sky-high inflation, including the massive debt accumulated during the Vietnam War and the first great oil shock, in 1973 and 1974.¹⁷⁴ Liberals were particularly anxious to show that it was possible to bring down inflation without deep cuts in government spending or hiking interest rates, and many came to support the idea that we should suppress antitrust enforcement to bring down prices.¹⁷⁵ The first critical outcome to emerge from this new strain of thought was the Consumer Goods Pricing Act of 1975,¹⁷⁶ which repealed the Miller-Tydings Act, thus prohibiting states from allowing firms to set minimum prices on their goods.¹⁷⁷ The repeal of Miller-Tydings, in part, allowed national chains to use their size to price discriminate on a national scale and thus selectively undercut retailers in localities on a state-by-state basis.¹⁷⁸

171. MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* 215 (2019) (ebook); see also JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE 195-96* (4th ed. 1985).

172. U.S. ATT'Y GEN.'S NAT'L COMM., *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 163 (1955).

173. See, e.g., Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1, 2 (1966); James M. Nicholson, *Antitrust: Sound and Fury?*, 37 ANTITRUST L.J. 807, 807-08 (1968).

174. See Michael Bryan, *The Great Inflation 1965-1982*, FED. RESRV. HIST., <https://www.federalreservehistory.org/essays/great-inflation> [https://perma.cc/QR56-48ZZ] (last visited Feb. 21, 2024).

175. See Meg Jacobs, *The Politics of Environmental Regulation: Business-Government Relations in the 1970s and Beyond*, in *WHAT'S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II* 212, 224 (Kim Phillips-Fein & Julian E. Zelizer eds., 2012) ("Seeing inflation as the biggest threat to the country, [President] Carter pushed hard for fiscal austerity, even as millions of Americans were losing their jobs. Although not as conservative as his Republican opponents, Carter shared a belief that government regulation had become too burdensome to the economy."); EISNER, *supra* note 15, at 145.

176. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified as amended at 15 U.S.C. §§ 1, 45).

177. Miller-Tydings Fair Trade Act, Pub. L. No. 75-314, § 1, 50 Stat. 693, 693-94 (1937).

178. See Longman, *supra* note 18.

A similar logic led many to conclude that the time had come to allow or even encourage large retailers to use their buyer power over their suppliers to get better prices for consumers. One practical result was that many liberal policymakers became more and more reluctant to support and enforce the antitrust laws like the RPA. Another was a growing interest in promoting “buyers club” retailers such as Price Club and other “discounters.” We also see such thinking behind liberal efforts, around this same time, to promote group purchasing organizations designed to help hospitals pool their purchasing power in hopes of getting discounts from medical device makers and hospital supply manufacturers.¹⁷⁹

Meanwhile, by the late 1970s, a coterie of conservative thinkers associated with the rising law and economic movement increasingly attacked the RPA as part of a larger brief against any government regulation of the economy. As more liberals accepted the Galbraithian analysis that regulations like the RPA led to higher consumer prices, conservatives joined the assault on antitrust enforcement and the RPA, objecting that “free markets” would automatically establish optimal prices and allocations of resources if the government would just get out of the way.¹⁸⁰ Among the most influential of the new conservative critics of the RPA was Robert Bork, who described the law variously as the “Typhoid Mary of Antitrust,”¹⁸¹ and as “the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory.”¹⁸² Generally, Bork and his fellow adherents maintained that any harmful effects arising from the concentration of power and control would all but automatically “self-correct” and that government intervention would simply interfere with these natural processes.¹⁸³

To directly confront increasing criticism of the RPA, in 1975, the DOJ published an internal research paper debating whether the RPA should be repealed or reformed.¹⁸⁴ In response to the internal research

179. See H.R. COMM. ON ENERGY & COM., 99TH CONG., HEALTH BUDGET RECONCILIATION AMENDMENTS 9 (Comm. Print 1986) (stating that group purchasing organizations could “help reduce health care costs for the government and the private sector alike by enabling a group of purchasers to obtain substantial volume discounts on the prices they are charged”).

180. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 717-44 (2017).

181. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1114 (1983) (citing Robert Bork, *The Place of Antitrust Among National Goals*, Address Before the National Conference Board 9 (Mar. 3, 1966)).

182. BORK, *supra* note 14, at 382.

183. Hansen, *supra* note 181, at 1114; Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 368 (1965) (“[Increasing concentration] indicates that there are emerging efficiencies or economies of scale . . . [Such efficiencies] means that fewer of our available resources are being used to accomplish the same amount of production and distribution.”); see BORK, *supra* note 14, at 399-401.

184. DOJ RPA REPORT, *supra* note 15, at 260-61.

paper, the DOJ held hearings and commissioned a full-scale report investigating the effects of the RPA, effectively suspending the agency's already limited RPA enforcement.¹⁸⁵ The final DOJ report published in 1977 was exceptionally hostile to the RPA and recommended that "serious consideration should be given to repealing the Robinson-Patman Act"¹⁸⁶

After taking power in 1981, the Reagan Administration capitalized on the hostility to the RPA¹⁸⁷ and all but ceased to enforce the law. In the 1960s, the federal government had brought 518 cases under the RPA, whereas between 1981 and 1989, it brought only a few.¹⁸⁸ Much of the same story was true of private antitrust litigation.¹⁸⁹

The Supreme Court also played a part in the decline of the RPA. As explained above, the Supreme Court originally interpreted the RPA favorably, seeking to understand and effectuate Congress's intent and goal by repeatedly referring to the Act's legislative history and acknowledging the economic circumstances that led to its enactment.¹⁹⁰ However, starting in the 1950s, the Supreme Court started to restrict the application of the RPA by narrowing the law's substantive prohibitions, heightening procedural burdens on plaintiffs, and overtly expressing its discontent with the law.¹⁹¹ Two cases, in particular, limited the reach of the RPA and highlight the Supreme Court's hostility toward it.

185. DOJ 1970-1979 Enforcement, *supra* note 15 (showing few RPA enforcement actions).

186. DOJ RPA REPORT, *supra* note 15, at 261.

187. See KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE BUSINESSMEN'S CRUSADE AGAINST THE NEW DEAL 260-62 (2009); see also *The Powell Memo (AKA the Powell Manifesto)*, RECLAIM DEMOCRACY!, http://reclaimdemocracy.org/powell_memo_lewis [<https://perma.cc/AM9T-5HXH>] (last visited Feb. 21, 2024).

188. D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1014 (2014). Enforcement data can also be acquired from D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2072-73 (2015) [hereinafter Sokol, *RPA*]; see also Frederick M. Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law: A Paradox of Antitrust Policy*, 64 COLUM. L. REV. 415, 426 (1964) [hereinafter Rowe, *FTC Admin*].

189. DOJ 1970-1979 Enforcement, *supra* note 15; Sokol, *RPA*, *supra* note 188, at 2074.

190. See *supra* Part IV; *FTC v. Morton Salt Co.*, 334 U.S. 37, 43-44 (1948) (reviewing the legislative history of the RPA); *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-75 (1960); *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-21 (1963); *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 752-55 (1945); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) (stating that the Court cannot interpret the RPA "in a manner which runs counter to the broad goals which Congress intended it to effectuate").

191. *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953) (holding that strict enforcement of the Robinson-Patman Act might foster a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"); *Fred Meyer, Inc.*, 390 U.S. at 349 (stating the RPA "by no means represent[s] an exemplar of legislative clarity"); see *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 187 (2006) (Stevens, J., dissenting) (expressing agreement with Judge Bork's characterization, in BORK, *supra* note 14, at 382, of the Act as "wholly mistaken economic theory").

In 1951, in *Standard Oil Co. v. FTC*,¹⁹² the Supreme Court interpreted the “meeting competition” defense, which allows potential violators to escape RPA liability if a firm provided a discriminatory price in “good faith” to meet the price of a competitor, to be an absolute defense to RPA claims.¹⁹³ While what precisely constitutes “good faith” is subjective and ultimately determined by the judiciary, the Supreme Court appeared to have gone out of its way to interpret the clause in a manner that provided an exceptionally wide legal avenue to thwart RPA claims. The effect of the *Standard Oil* decision meant that by properly invoking the meeting competition defense, a defendant could defeat any RPA claim, regardless of the degree of price discrimination or buyer coercion. The Supreme Court more clearly articulated this effect in a subsequent 1979 opinion. The Court stated that “if a[n] [alleged violator] has a valid meeting-competition defense, there is simply no prohibited price discrimination.”¹⁹⁴ The meeting competition defense is now the primary defense used by litigants in response to RPA claims and one of the key impediments to RPA enforcement.¹⁹⁵

Then in 1953, in *Automatic Canteen Co. of America v. FTC*,¹⁹⁶ the Supreme Court held that in order for a plaintiff to prove a violation of section 2(f), the section of the RPA specifically targeting powerful buyers, they must meet all of the elements required for a section 2(a) violation as well as establish that the buyer had knowledge that the preferential pricing and terms it received would lead the seller to violate section 2(a).¹⁹⁷ In simplified terms, *Automatic Canteen* imposed on plaintiffs a

192. 340 U.S. 231 (1951).

193. *Id.* at 250; 15 U.S.C. § 13(b).

194. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 78 (1979); *id.* at 74 n.5.

195. COMM. ON THE JUDICIARY, 85TH CONG., REP. ON STRENGTHENING THE ROBINSON-PATMAN ACT AND AMENDING THE ANTITRUST LAW PROHIBITING PRICE DISCRIMINATION, S. DOC. NO. 85-2010, at 14-15 (2d Sess. 1058) (“If these decisions [from the judiciary] stand, there are substantial grounds to believe that a seller charged with price discrimination will be able to avail himself of the good-faith defense even though he is not meeting the equally low price of a competitor but competitive conditions; even though he is not merely meeting but beating a competitor’s price; even though the discrimination is made not to retain but to obtain a customer; even though the discrimination is not made defensively to retain a customer but is made aggressively to obtain one; and even though the practice is not an occasional or sporadic concession but is of a persistent and systematic nature.”) (internal quotations omitted); *see also Great Atl. & Pac. Tea Co.*, 440 U.S. at 83 n.16; John B. Kirkwood, *Reforming the Robinson-Patman Act*, 60 ANTITRUST BULL. 358, 377 (2015) (“[I]t is essential to curtail the meeting competition defense. Otherwise, the Robinson-Patman Act will remain a largely ineffective instrument for combatting buyer-induced discrimination.”).

196. 346 U.S. 61 (1953).

197. KINTNER, RPA PRIMER, *supra* note 11, at 252; *Automatic Canteen Co. of Am.*, 346 U.S. at 80; *see also Hovenkamp, supra* note 99, at 141 (“As a result, one cannot establish a buyer’s violation of the Robinson-Patman Act without proof that the buyer *knew* that it was receiving a discriminatorily low price.”) (emphasis in original).

“double burden” as they must show “(1) that the lower price was not in fact cost-justified and (2) that the buyer *should have known* this fact.”¹⁹⁸ The Supreme Court’s decision effectively nullified section 2(f) claims against powerful buyers—the primary target of the RPA.¹⁹⁹

The Supreme Court’s antipathy to the RPA increased after the codification of the Chicago School “consumer welfare” philosophy of antitrust in the 1980s. In *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*,²⁰⁰ the Supreme Court in 1981 further enfeebled the RPA by imposing heightened requirements on plaintiffs to obtain damages by requiring them to “make some showing of actual injury”²⁰¹ The holding significantly weakened the RPA’s prophylactic design since the Court now required plaintiffs to show actual damages even though the RPA itself could reach incipient violations.

In *Texaco Inc. v. Hasbrouck*,²⁰² the Supreme Court in 1990 heavily expanded the legality of “functional discounts.”²⁰³ These occur when a seller grants a buyer a discount based on services provided by the buyer, such as providing storage space.²⁰⁴ Legalizing such arrangements created a large loophole within the RPA that undermined Congress’s original intent to provide equalized pricing and services to all buyers and circumvent discounts offered by sellers in a purposefully discriminatory manner. These include discounts to a specific buyer with whom the seller is looking to gain favor and discounts that have nothing to do with the cost of the manufacturing process or other costs associated with the seller’s actions.

Then in 1993, in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,²⁰⁵ the Supreme Court heavily increased the burdens on plaintiffs to plead a successful claim of predatory pricing. More fundamentally, *Brooke Group* explicitly reinterpreted the part of the RPA that prohibited predatory pricing to shift the focus to consumer welfare.²⁰⁶ Ever since, private party RPA litigation concerning primary-line claims,

198. Douglas E. Ray, *Buyer Liability Under Section 2(f) of the Robinson-Patman Act*, 15 U. RICH. L. REV. 547, 559 (1981) (emphasis added) (internal quotations omitted).

199. *See supra* Part III.

200. 451 U.S. 557 (1981).

201. *Id.* at 562.

202. 496 U.S. 543 (1990).

203. *Id.* at 561-71.

204. KINTNER, RPA PRIMER, *supra* note 11, at 139.

205. 509 U.S. 209 (1993).

206. *Id.* at 224. Specifically, *Brooke Grp. Ltd.* concerned predatory pricing. Further efforts to weaken the RPA and harmonize the law with consumer welfare were made by the Supreme Court in *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006); *see also* Richard M. Steuer, *Volvo Trucks v. Reeder Simco: Bidding for a Rational Robinson-Patman Act*, ANTITRUST MAG., Spring 2006, at 61.

when pursued at all, has almost always been unsuccessful. One study found that between 1993 and 2010, the win rate for plaintiffs in RPA cases fell from approximately thirty-three percent to less than five percent.²⁰⁷ Finally, in 2006, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,²⁰⁸ the Supreme Court restricted secondary-line price discrimination claims by requiring plaintiffs to prove that they are in “actual competition” with the alleged violator.²⁰⁹ The decision—while not fully overturning the *Morton Salt* inference—weakened this important precedent and encouraged lower courts to interpret the RPA in line with consumer welfare.²¹⁰

VIII. HOW FAILURE TO ENFORCE THE ROBINSON-PATMAN ACT HURT AMERICA

Particularly with the benefit of hindsight, we can clearly see the consequences of neglectful enforcement of the RPA and the other antitrust laws. In retailing, it led directly to what journalist Charles Fishman called “The Wal-Mart Effect.”²¹¹ In a 2006 book by that title, Fishman documented how, in response to demands by Walmart and other powerful buyers for evermore concessions on wholesale prices, suppliers cut quality,²¹² investment in research and development, wages,²¹³ health care benefits, and pensions, while outsourcing more and more production to foreign companies.²¹⁴

Without the antitrust laws like the RPA restricting their market practices, super-sized retailers like Walmart also began to use buying

207. Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123, 2127 (2010).

208. 546 U.S. 164 (2006).

209. *Id.* at 176-77.

210. Roger D. Blair & Christina DePasquale, “Antitrust’s Least Glorious Hour”: *The Robinson-Patman Act*, 57 J.L. & ECON. S201, S211-12 (2014) (“While *Volvo* did nothing to eliminate secondary-line complaints, the Court did urge the lower courts to interpret the Robinson-Patman Act in ways that are consistent with the procompetitive goals of antitrust policy.”); *Volvo Trucks*, 546 U.S. at 181 (“[W]e continue to construe the Act ‘consistently with broader policies of the antitrust laws.’”) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

211. CHARLES FISHMAN, *THE WAL-MART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT’S TRANSFORMING THE AMERICAN ECONOMY* 233-36 (2006).

212. Stacy Mitchell, *Is Your Stuff Falling Apart? Thank Walmart*, GRIST MAG. (Nov. 11, 2011), <https://grist.org/business-technology/2011-11-11-is-your-stuff-falling-apart-thank-walmart> [<https://perma.cc/Z43H-QGTK>].

213. Wilmers, *supra* note 149, at 215-16.

214. Abigail Goldman & Nancy Cleeland, *An Empire Built on Bargains Remakes the Working World*, L.A. TIMES (Nov. 23, 2003, 12:00 AM), <https://www.latimes.com/news/la-fi-walmart23nov23-story.html> [<https://perma.cc/HK28-85BS>].

power to coerce suppliers into offering steep wholesale price concessions. One author described Walmart as so enormous “it can (and does!) demand just about anything it wants from its vendors, from deeper-than-usual discounts to downright disadvantageous shipping policies to enforced returns on slow-moving merchandise.”²¹⁵ Another manufacturer stated in 2003 that when sellers meet with Walmart buyers, “Your price is going to be whittled down like you never thought possible”²¹⁶

Failure to enforce the antitrust laws, including the RPA, also allowed Amazon to build its first big monopoly. Amazon’s demands for concessionary wholesale prices for the books it sold online supercharged its dominance over the publishing industry and, in the process, stripped out most of the value that had previously gone to compensating authors, publishers, and independent bookstores. Starting in 1998, the American Booksellers Association repeatedly joined with other groups in petitioning the courts to uphold enforcement of the RPA but failed to win a ruling that would have prevented the spread of wholesale price discrimination, first from “Big Box” retailers like Barnes & Noble and eventually to Amazon and the rest of the retail economy.²¹⁷

In 2004, as the journalist Brad Stone has detailed, Amazon began to demand price concessions from book publishers for the assumed benefits of being listed on Amazon’s website.²¹⁸ Amazon explicitly targeted the publishers most dependent on its site for sales who might otherwise go out of business without its service.²¹⁹ Amazon brazenly called its operation focused on vulnerable publishers the “Gazelle Project” after the way a cheetah hunted a gazelle.²²⁰ At the same time, Amazon also sought significant and preferential discounts on volume purchases and shipping rates.²²¹ As with Walmart, the basic business model with which Amazon built its business relied on the brandishing of buyer power to coerce price concessions from its suppliers.²²²

215. BILL QUINN, *HOW WAL-MART IS DESTROYING AMERICA (AND THE WORLD) AND WHAT YOU CAN DO ABOUT IT* 64 (3d ed. 2005).

216. Goldman & Cleeland, *supra* note 214.

217. *See, e.g.*, *Am. Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1042-43, 1056, 1064, 1069 (N.D. Cal. 2001).

218. BRAD STONE, *THE EVERYTHING STORE: JEFF BEZOS AND THE AGE OF AMAZON* 243 (1st ed. 2013).

219. *Id.*

220. *Id.* at 243-44.

221. *Id.* at 243. Amazon has also engaged in other forms of unfair competition that violate the RPA such as predatory pricing against Diapers.com. Khan, *supra* note 180, at 769-70.

222. I am not suggesting that the lack of antitrust enforcement was the only element responsible for the rise of Amazon and Walmart, as other legal violations, such as repeated campaigns to thwart unionization, also contributed as well. *See* Simon Head, *Worse Than Wal-Mart: Amazon’s*

More generally, failure to enforce the RPA and related competition policies has eroded the promise of American life on many fronts. For consumers, it has meant paying more for less, as consolidation among both retailers and suppliers eventually resulted in monopoly pricing and profiteering in more and more sectors, including pharmaceuticals, food, and energy.²²³ For communities, it has meant the loss of local control and self-sustaining economies. Between 1982 and 2012, independent businesses have gone from supplying fifty percent of the goods purchased in the United States to less than twenty-five percent.²²⁴

The roll-up of local businesses into giant national chains and the lack of effective competition policy has also fueled regional equality, while wiping out the “creative class” in such once thriving centers of journalism, advertising, and public relations like St. Louis, Missouri.²²⁵ The growth of giant platform monopolies like Google and Facebook has fostered the spread of disinformation and a poisoned information environment.²²⁶

Another consequence has been increasing financialization of the economy, as banks and hedge funds engineered and funded waves of mergers and acquisitions, acquiring increasingly greater shares of the country’s wealth and income.²²⁷ Market competition shifted from who could create the best product at the best price to who could merge the

Sick Brutality and Secret History of Ruthlessly Intimidating Workers, SALON (Feb. 23, 2014, 11:59 AM),

https://www.salon.com/2014/02/23/worse_than_wal_mart_amazons_sick_brutality_and_secret_history_of_ruthlessly_intimidating_workers [<https://perma.cc/5FBP-AVMX>].

223. Longman, *supra* note 13.

224. Stacy Mitchell, *Monopoly Power and the Decline of Small Business: The Case for Restoring America’s Once Robust Antitrust Policies*, INST. FOR LOC. SELF-RELIANCE 9 (Aug. 2016), <https://ilsr.org/wp-content/uploads/downloads/2016/08/MonopolyPower-SmallBusiness.pdf> [<https://perma.cc/2YN6-EVMK>].

225. Brian S. Feldman, *The Real Reason Middle America Should Be Angry*, WASH. MONTHLY (Mar. 14, 2016), <https://washingtonmonthly.com/2016/03/14/the-real-reason-middle-america-should-be-angry> [<https://perma.cc/V8DS-B5QH>].

226. Sally Hubbard, *Fake News Is a Real Antitrust Problem*, COMPETITION POL’Y INT’L 1 (Dec. 2017), <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf> [<https://perma.cc/9TJR-CLQA>] (stating “Facebook and Google lack meaningful competition in their primary spheres of social media and online search, respectively. As a result, their algorithms have an outsized impact on the flow of information, and fake news purveyors can deceive hundreds of millions of users simply by gaming a single algorithm. Weak competition in social media platforms means Facebook can tailor its news feed to serve its financial interests, prioritizing engagement on the platform over veracity. Lack of competition in online search means Google does not face competitive pressure to drastically change its algorithm to stem the spread of fake news”).

227. See Longman, *supra* note 13.

quickest with their remaining competitors and once accomplished, to cut costs and raise prices.²²⁸

This rise in concentration among retailers, trading companies, and suppliers also helped to drive the offshoring of vast swaths of the United States industrial base. Initially this included mainly textiles, apparel, and general merchandise, but as manufacturers like Dell and Hewlett-Packard adopted similar models, the trend soon expanded to advanced products, such as electronics, chemicals, and materials.²²⁹

This outsourcing, offshoring, and increased market concentration, in turn, had many other knock-on effects, including supply chain fragility and associated shortages and price hikes, as well as politically dangerous dependencies on foreign sources of supply for many essential goods.²³⁰

For workers, the concentration of markets has resulted in fewer job opportunities.²³¹ For example, between 1990 and 2005, nearly half of all new jobs available were at Walmart, meaning that many workers effectively had no other choice of employer.²³² Both common sense and rigorous academic scholarship also demonstrate that when fewer employers compete for each worker's labor, this leads to worse working conditions and lower wages.²³³ Workers have also had to endure lower wages and

228. See Mitchell & Knox, *supra* note 153, at 4-5.

229. See BARRY C. LYNN, *END OF THE LINE: THE RISE AND COMING FALL OF THE GLOBAL CORPORATION* 120-22 (1st ed. 2005); see also BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* 74-78 (2010).

230. See Norman W. Hawker & Thomas N. Edmonds, *Avoiding the Efficiency Trap: Resilience, Sustainability, and Antitrust*, 60 *ANTITRUST BULL.* 208, 210 (2015) (“[O]verreliance on efficiency may be a trap if it lead[s] these complex, interdependent systems to lose their resilience and become vulnerable to sudden collapse in the wake of sudden, unexpected events.”); LYNN, *supra* note 229, at 223-24, 247-48.

231. See José Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data* 16-17 (IZA Inst. Lab. Econ., Working Paper No. 11379, 2018), <https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf> [<https://perma.cc/9A9V-RHD7>] [hereinafter Azar, *Concentration*]; Mike Konczal & Marshall Steinbaum, *Declining Entrepreneurship, Labor Mobility, and Business Dynamism: A Demand-Side Approach*, ROOSEVELT INST. 13-24 (July 21, 2016), <https://rooseveltinstitute.org/wp-content/uploads/2016/07/RI-Declining-Entrepreneurship-Labor-Mobility-Business-Dynamism-201607.pdf> [<https://perma.cc/3KPT-DFL4>].

232. Justin C. Wiltshire, *Walmart Supercenters and Monopsony Power: How a Large, Low-Wage Employer Impacts Local Labor Markets* 2-3 (Jan. 28, 2022) (unpublished manuscript) (on file with the Washington Center for Equitable Growth), <https://equitablegrowth.org/working-papers/walmart-supercenters-and-monopsony-power-how-a-large-low-wage-employer-impacts-local-labor-markets> [<https://perma.cc/XG9T-TS8D>].

233. STRATEGIC ORG. CTR., *THE WORST MILE: PRODUCTION PRESSURE AND THE INJURY CRISIS IN AMAZON'S DELIVERY SYSTEM* 1-3, 10 (May 2022) [hereinafter SOC, *WORST MILE*], <https://thesoc.org/wp-content/uploads/2022/06/The-Worst-Mile.pdf> [<http://perma.cc/D6TM-4V4R>]; STRATEGIC ORG. CTR., *THE INJURY MACHINE: HOW AMAZON'S PRODUCTION SYSTEM HURTS WORKERS* 1, 9 (Apr. 2022), https://thesoc.org/wp-content/uploads/2022/04/The-Injury-Machine_How-Amazons-ProdDon-System-Hurts-Workers.pdf [<https://perma.cc/XK8K-6VXY>];

benefits,²³⁴ worse working conditions,²³⁵ and increased subjugation to coercive contracts that restrict worker mobility and limit their ability to access a judicial forum to redress their grievances,²³⁶ among many other harms.²³⁷

Another knock-on effect of increasing corporate concentration has been declining entrepreneurship. One analysis published by the *Washington Monthly* in 2012 showed a fifty-percent decline in the number of new businesses launched in the United States since the 1970s.²³⁸ A 2021 Kauffman Foundation report found that the rate of new employer business actualization, meaning the number of business applications that lead to employment within two years, fell nearly fifty percent between 2005 and 2021.²³⁹ This restricting of entrepreneurship opportunities has resulted in the sharp narrowing of many avenues of upward mobility for young people, women, people of color, and other individuals struggling to achieve the American Dream.

Finally, the abandonment of RPA enforcement and of United States antimonopoly law more generally has shown to be a main driver of the

José Azar et al., *Labor Market Concentration* (Nat'l Bureau Econ. Rsch., Working Paper No. 24147, 2017) [hereinafter Azar, *Labor*], <http://www.nber.org/papers/w24147> [<https://perma.cc/Y3QC-AQXT>] (estimating in one model that “[g]oing from the 25th percentile [of market concentration] to the 75th percentile [of market concentration] is associated with a 17% decline in posted wages”); Wilmers, *supra* note 149, at 213.

234. Azar, *Labor*, *supra* note 233, at 2; Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?*, 57 J. HUM. RES. S200, S202-04 (2022).

235. See Daniel A. Hanley & Sally Hubbard, *Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power*, OPEN MKTS. INST. (Sept. 1, 2020), <https://www.openmarketsinstitute.org/publications/eyes-everywhere-amazons-surveillance-infrastructure-and-revitalizing-worker-power> [<https://perma.cc/EQV5-5CMF>] (describing the multiple methods Amazon uses to surveil its workers); Brian Callaci, *Amazon Warehouses Are Relentless, Dangerous Workplaces—But It's Hard to Punish Them for It, Thanks to Bill Clinton*, NEW REPUBLIC (Mar. 25, 2022), <https://newrepublic.com/article/165842/amazon-warehouse-washington-ergonomics-regulation-osha-clinton> [<https://perma.cc/Q6QT-GPT9>]. See generally SOC, WORST MILE, *supra* note 232 (discussing Amazon drivers' exposure to injuries).

236. Daniel A. Hanley, *Ending Corporate America's Coercive Contracts*, DEM. J. IDEAS (Dec. 21, 2021, 11:38 AM), <https://democracyjournal.org/arguments/ending-corporate-americas-coercive-contracts> [<https://perma.cc/8W4X-Y8AZ>].

237. See Barry C. Lynn, *Antimonopoly: A Master Narrative for Democracy?*, DEM. J. IDEAS (2022), <https://democracyjournal.org/magazine/66/antimonopoly-a-master-narrative-for-democracy> [<https://perma.cc/DJR8-REN3>].

238. Barry C. Lynn & Lina Khan, *The Slow-Motion Collapse of American Entrepreneurship*, WASH. MONTHLY (July 7, 2012), <https://washingtonmonthly.com/2012/07/07/the-slow-motion-collapse-of-american-entrepreneurship> [<https://perma.cc/9D2G-VMHK>].

239. *2021 New Employer Business Indicators in the United States: National and State Trends*, KAUFFMAN INDICATORS ENTREPRENEURSHIP 5 (May 2022), https://indicators.kauffman.org/wp-content/uploads/sites/2/2022/05/2021_New-Employer-Business-Indicators-in-the-United-States_report.pdf [<https://perma.cc/ZJR4-C8QP>].

dramatic rise in inequality in the United States.²⁴⁰ In perhaps the starkest demonstration of how the new retail power has changed the face of American society, two of the richest families in America are retail monopolists. The heirs of Walmart founder Sam Walton and Amazon founder Jeff Bezos, for instance, control as much wealth as the lower fifty percent of the entire United States population.²⁴¹

Just as some of the authors of the RPA had feared, the ultimate outcome of the overthrow of the Act and of antimonopoly law more generally is not just the subjugation of our economic and social life to domination by powerful corporations but the undermining of American democracy.²⁴²

IX. CURRENT RPA ENFORCEMENT MEASURES

Fortunately, an act of Congress is not needed to remedy many of these societal ills, that is, because the RPA is still on the books. Though far from perfectly drafted, the RPA is still a robust statute that is capable of addressing many of the most acute problems of buyer and seller power in the United States in ways that can begin to reduce much of the attendant increase in corporate concentration.

Perhaps the biggest challenge is for the current generation of competition law enforcers to relearn how to put the RPA to effective use in today's economy. The following six-point plan can serve as a guide.

First, the DOJ and FTC should create investigative groups within their respective agencies to research potential litigation opportunities. To underpin these efforts, the FTC could use its broad investigative

240. Kerwin Kofi Charles et al., *The Transformation of Manufacturing and the Decline in U.S. Employment* 1 (Nat'l Bureau Econ. Rsch., Working Paper No. 24468, 2018), https://www.nber.org/system/files/working_papers/w24468/w24468.pdf [<https://perma.cc/S5EQ-6RTC>] (detailing that the U.S. lost 7.5 million manufacturing jobs between 1980 and 2017); Juliana Menasce Horowitz et al., *Trends in Income and Wealth Inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality> [<https://perma.cc/5365-A9KD>] (“[T]he wealth gap between America’s richest and poorer families more than doubled from 1989 to 2016.”); Brian S. Feldman, *The Decline of Black Business*, WASH. MONTHLY (Mar. 19, 2017), <https://washingtonmonthly.com/2017/03/19/the-decline-of-black-business> [<https://perma.cc/BNX4-RU2P>]; see also Khan & Vaheesan, *supra* note 23, at 238-45.

241. Chuck Collins et al., *Billionaire Bonanza 2020: Wealth Windfalls, Tumbling Taxes, and Pandemic Profiteers*, INST. FOR POL’Y STUD. 5 (Apr. 23, 2020), <https://ips-dc.org/wp-content/uploads/2020/04/Billionaire-Bonanza-2020.pdf> [<https://perma.cc/A945-5TCV>].

242. The significance of the RPA as a means to ensure the vitality of American democracy has been asserted by some government enforcers. NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR 285-86 (2004) (ebook) (stating that Everette MacIntyre, a former commissioner of the FTC, told Philip Elman, another former FTC commissioner, that “the Robinson-Patman Act . . . was all that stood between us and the overthrow of the capitalist system”).

authority to obtain critical information that can form the basis of future enforcement actions initiated by federal agencies.²⁴³

Enforcement agencies should carefully examine potential cases and be highly selective as to which of them will be litigated. The DOJ and FTC should focus their enforcement efforts on dominant corporations (specifically powerful buyers) rather than small businesses, which in the past have too often been the target of RPA enforcement actions.²⁴⁴ Such actions would put the kinds of corporations Congress intended to be targeted under the RPA on notice that enforcement agencies are closely monitoring their behavior and that violations of the law will be prosecuted. Such actions would undoubtedly end the “widespread” disrespect for the RPA that has manifested after decades of non-enforcement.²⁴⁵ Critically, this deterrent effect mitigates otherwise unlawful behavior from manifesting itself in the first place.²⁴⁶

There is important precedent for federal competition agencies engaging in such highly detailed research following the strengthening of existing law. The DOJ adopted such an approach after Congress enacted the Celler-Kefauver Act in 1950, which amended and significantly strengthened section 7 of the Clayton Act to restrain corporate mergers.²⁴⁷ In 1959, the FTC opened a task force designed to investigate potential RPA enforcement opportunities after the enactment of the Finality Act, which expanded the FTC’s ability to swiftly enforce violations of the RPA²⁴⁸ and formed the basis of the several hundred lawsuits the agency initiated in the 1960s.²⁴⁹

Second, Congress, the DOJ, and the FTC should organize hearings to learn from the public and small businesses about problems deriving from the abuse of power by large buyers and large sellers. The FTC and DOJ can also partner with Congress or initiate their own separate public

243. 15 U.S.C. § 46(a)–(b) (2012).

244. Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTITRUST L.J. 921, 924 (1985) (detailing that between 1961 and 1974, the FTC targeted 564 companies with RPA violations, but only thirty-six (6.4%) had annual sales of 100 million dollars or more at the time of the complaint); see *supra* Part III.

245. Hansen, *supra* note 181, at 1188 (“Disrespect for the law is an unfortunate situation, and with Robinson-Patman law it is a widespread one.”); see also HOVENKAMP, *supra* note 168, at 192 (“Most antitrust books treat the Robinson-Patman Act separately from everything else, as if it were a kind of bastard child of the antitrust laws.”).

246. See Richard J. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 183 (1961).

247. THEODORE PHILIP KOVALEFF, BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION: A STUDY OF THE ANTITRUST POLICY OF THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT 71-73 (1980).

248. Finality Act, Pub. L. No. 86-107, 73 Stat. 243 (1959).

249. James J. Nagle, *F.T.C. Steps Up Trade Policing*, N.Y. TIMES, Nov. 10, 1959, at 67.

hearings. Such hearings can help Congress and federal agencies understand how corporations use their dominance to coerce smaller trading partners. They can also bring public awareness to the problems Congress intended the RPA to remedy. Finally, such investigations can help the agencies identify potential lawsuits. One potential model for such hearings is the David Cicilline-led House of Representatives committee formed in 2019, which generated much of the initial material used to bring antitrust lawsuits against Google and Facebook.²⁵⁰

Third, the FTC should renew its historical practice of issuing advisory opinions concerning potentially violative conduct.²⁵¹ Advisory opinions are non-binding opinions from the Commission that “help clarify FTC rules and decisions regarding either competition or consumer protection issues, often in response to requests from businesses and industry groups.”²⁵² Historically, the FTC has issued advisory opinions at the request of parties to determine if their conduct is legal or not in the opinion of the Commission.²⁵³ The practice both increased communication channels between the public and the agency and helped the public understand the contours of what conduct is permissible.

Fourth, the DOJ and FTC can jointly issue detailed policy statements and other guidance documents regarding the RPA. Policy statements can specify how the agencies will enforce the RPA and interpret some of its more ambiguous clauses. Policy statements can also provide the public guidance on the circumstances under which the DOJ and FTC will initiate a lawsuit and give much-needed information to corporate actors on how to comply with the law. The antitrust agencies already issue many policy statements, such as their merger guidelines, which detail to the public what the agencies consider when deciding to enforce section 7 of the Clayton Act.²⁵⁴ The FTC has previously issued guidelines

250. MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: REPORT AND RECOMMENDATIONS (2020); Nicolás Rivero, *A Cheat Sheet to All of the Antitrust Cases Against Big Tech in 2021*, QUARTZ (Sept. 29, 2021), <https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021> [<https://perma.cc/D362-8S3J>].

251. The FTC began issuing advisory opinions in 1962. William D. Dixon, *Federal Trade Commission Advisory Opinions*, ADMIN. L. REV., Winter-Spring 1966, at 65, 65; see, e.g., FED. TRADE COMM’N, FEDERAL TRADE COMMISSION DECISIONS: FINDINGS, OPINIONS, AND ORDERS, JULY 1, 1965, TO DECEMBER 31, 1965, at 1271-72 (1970); FED. TRADE COMM’N, FEDERAL TRADE COMMISSION DECISIONS: FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1967, TO JUNE 30, 1967, at 1724-25 (1970).

252. *Legal Library: Advisory Opinions*, FED. TRADE COMM’N, <https://www.ftc.gov/legal-library/browse/advisory-opinions> [<https://perma.cc/7M7X-QCHT>] (last visited Feb. 21, 2024).

253. Dixon, *supra* note 251, at 71-72, 76.

254. U.S. DEP’T JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 25 (2010) [hereinafter 2010 MERGER GUIDELINES].

regarding how the agency will enforce sections 2(d) and 2(e) of the RPA.²⁵⁵ While not having the “force of law,”²⁵⁶ courts often defer to policy statements to determine the strength of a lawsuit and how the courts should analyze a lawsuit initiated by a federal agency.²⁵⁷ According to former FTC Chair William Kovacic, guidance documents (along with advisory opinions) are “extremely useful contributions” to help clarify the law and streamline an agency’s enforcement agenda.²⁵⁸

Fifth, both the DOJ and FTC must initiate RPA lawsuits. Historically, the FTC has been practically the exclusive federal enforcer of the RPA.²⁵⁹ Nothing in the statutory text of the RPA requires this outcome.²⁶⁰ The DOJ has concurrent authority with the FTC to enforce the RPA, but its enforcement has been “few and episodic.”²⁶¹ A mere change in internal agency policy can change this circumstance.²⁶² One reason to do so is that lawsuits initiated by the DOJ are much more potent than those initiated by the FTC. This is because section 5 of the Clayton Act allows private parties to use final judgments of antitrust suits in federal court, which includes RPA enforcement actions, as *prima facie* evidence against a defendant in a private lawsuit.²⁶³ In other words,

255. See Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240 (1969) (known as the Fred Meyer Guidelines). The FTC was in part responding to dicta by the Supreme Court. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968).

256. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 212 (2006).

257. *Barnhart v. Walton*, 535 U.S. 212, 212 (2002). See generally Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771 (2006) (noting the importance of the merger guidelines and the historical deference they have been afforded by the judiciary).

258. William E. Kovacic, *Measuring What Matters: The Federal Trade Commission and Investments in Competition Policy Research and Development*, 72 ANTITRUST L.J. 861, 865 (2005).

259. Sokol, *supra* note 188, at 1014. Enforcement data can also be acquired from Sokol, *RPA*, *supra* note 188, at 2071-74; see also Rowe, *FTC Admin*, *supra* note 188, at 426.

260. See 15 U.S.C. § 21(a) (2012); see also 80 CONG. REC. 7760 (1936) (statement of Rep. Patman responding to a question regarding who will enforce the RPA and mentioning both actions by the FTC, the DOJ, and by private enforcers).

261. EDWARDS, *supra* note 101, at 67 (stating “few and episodic”); *id.* at 682 (“Prior to December 31, 1957, the Department of Justice had instituted eight proceedings under the Robinson-Patman Act.”); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 370 (1970) (“[The Department of Justice has a] lack of interest in enforcing [the Robinson-Patman Act]”); WRIGHT PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 101 (1963) (“The Department of Justice has proceeded in only four cases since June 19, 1936, in which it charged a violation of subsection 2(a) of the Robinson-Patman Act. None of those cases were concluded successfully. Three of them were dismissed, and one, which was instituted in 1951, was pending as of January 1, 1962.”).

262. See Hansen, *supra* note 181, at 1180 (“The underlying and basic factor [as to why the Department of Justice has rarely enforced the Robinson-Patman Act] is probably what one official called the ‘philosophic bias’ against the Act[.]” (footnote omitted)).

263. Clayton Act, ch. 323, § 5, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 16(a)).

federal litigation facilitates private litigation and increased compliance with the law and deterrence from committing violations in the first place.

Sixth, Congress should consider the use of legislation to strengthen the RPA. The close review of the history of the RPA in this Article indicates that the law would benefit from a few key legislative amendments by Congress. Such amendments could include (1) implementing bright-line rules detailing precisely when dominant firms violate the RPA;²⁶⁴ (2) repealing the “meeting competition” defense, which has been widely used as a legal loophole for price discrimination;²⁶⁵ and (3) applying the RPA to services, not just commodities.

However, such an effort should come only after the law has been carefully tested in practice, and after enforcement agencies and Congress have relearned the history and original purpose of the law. There is little to lose and much to gain from reapplying the law. Even without amendment, aggressive enforcement of the RPA as it now stands will make for a stronger, fairer American economy. Fortunately, a bipartisan coalition of lawmakers and top antitrust officials appear to understand that the fastest way forward is simply to put the law to use now.²⁶⁶ One example of such thinking is the FTC’s recent move to open an investigation into Coca-Cola and PepsiCo for possible violations of the RPA.²⁶⁷

264. I argue for the use of bright line rules in antitrust law more comprehensively in other publications. *See, e.g.*, Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to Brown Shoe* 30-31 (Nov. 16, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4404081> [<https://perma.cc/8KAR-PZBC>].

265. Among other reasons, the meeting competition defense should be repealed because it allows a discriminatory price that is not cost justified, is heavily favored by defendants, and creates perverse incentives for potential RPA violators by allowing them to avoid violating the law by purposefully seeking bids from multiple suppliers, not to actually consider the bids, but solely for the purpose of being granted preferential concessions from a seller. This approval of squeezing suppliers is contrary to the goals of the RPA. *See supra* Part III.

266. Bedoya, *supra* note 146, at 8-9; Letter from Members of Congress, to Lina Khan et al., Commissioners, Fed. Trade Comm’n (Mar. 30, 2022), https://ci.criticalimpact.com/user/31823/image/Final_Letter_to_FTC_Chair_Khan_3.30.22.pdf [<https://perma.cc/3HDA-CNYB>]; FED. TRADE COMM’N, POLICY STATEMENT OF THE FEDERAL TRADE COMMISSION ON REBATES AND FEES IN EXCHANGE FOR EXCLUDING LOWER-COST DRUG PRODUCTS (June 16, 2022), <https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products> [<https://perma.cc/JML6-WRGP>].

267. Josh Sisco, *Pepsi, Coke Soda Pricing Targeted in New Federal Probe*, POLITICO (Jan. 10, 2023, 1:45 PM), <https://www.politico.com/news/2023/01/09/pepsi-coke-soda-federal-probe-00077126> [<https://perma.cc/AWK4-AWYW>].

X. CONCLUSION: RESTORING THE RPA'S PROMISE OF FAIR COMPETITION

The RPA is an essential pillar of American antitrust law. It is a statute specifically enacted to tackle the adverse effects of price discrimination based on market power. The law seeks to help ensure a level playing field for all businesses, regardless of their size or resources. It explicitly aims to structure the economy so that fairness, equality, and socially beneficial methods of competition are the primary factors that guide how firms compete in the marketplace.

Enforcement of the RPA is a first and important step in ensuring that corporations compete over providing the best product or service at the best price, rather than leveraging mergers and acquisitions, buyer power, price discrimination, and other unfair methods of competition to concentrate dangerous degrees of power and control over other businesses and other people. That is why the time to move is now.