Void or Vital: The Return of Robinson-Patman

Priyal Mohanty

With the continued survival of monopolies comes many consequences for consumers, but also the small businesses of the nation. Too little to fight against the powers of big corporations, “20% of small businesses fail in their first year...and 50% of small businesses fail after five years in business” [1]. An issue in particular, price discrimination, has been a heavily ignored topic of discussion for two decades. Fueled by the notion to benefit the consumer, the Federal Trade Commission has allowed leeway towards trusts. In turn, small businesses have suffered. Only recently has a sudden refocus on the enforcement of the Robinson-Patman Act resulted in a greater priority for smaller competitors. Many go as far as to question if Robinson-Patman still has relevance in the era of Big Tech. Others propose the elimination of the law in its entirety [2]. The reemergence of the RPA poses new concerns for the Federal Trade Commission, requiring the reassessment of the law and its place in modern-day antitrust legislation to ensure a balance in protections for both American consumers and small enterprises alike.

To combat trusts, in 1914, the Federal Trade Commission Act created the Federal Trade Commission (FTC), a bipartisan government agency that still exists today. Before this landmark piece of legislation, the Sherman Antitrust Act was the primary form of trust-busting legislation; however, it was put into place to promote competition, highlighting the federal government’s emphasis on promoting small businesses. A precedent was set that competition must exist, though the underlying goal was to protect consumers and provide them with options for their purchases. The flaws within the Sherman Antitrust Act were repaired in the 1914 Clayton Antitrust Act, later amended by the Robinson-Patman Act (RPA). Under the RPA, price

discrimination of “like grade and quality” goods was prohibited [3]. Suppliers could not offer different buyers of essentially the same goods with different prices, which usually stemmed from the buying power of larger companies. The aforementioned buying power was used to receive lower prices from suppliers compared to small businesses, contributing to small business failure due to unfair price competition. Price discrimination was perceived to harm competition, in turn driving up prices and offering fewer choices for the consumer.

Since its genesis in 1936, the RPA has been utilized as the justification for numerous lawsuits against trusts, but some have set unforeseen precedents that have led to its lack of use in present-day trust-busting. The RPA began with a success in *FTC v. Morton Salt Co.* (1948), in which the Supreme Court ruled that Morton had participated in price discrimination. Specific large companies capable of making extensive purchases received benefits, while smaller companies that were unable to purchase to such a degree were not offered the special pricing. Consequently, these smaller businesses had to sell the product at a higher cost than those that were sold at a lower price. Discounts as much as 10% were provided to large businesses. The RPA performed its function in this case. It ruled to promote competition between larger businesses and smaller businesses. The consumer was also relevant in this case, as discounts and favored customers were exclusively provided to the bigger businesses [4]. The mandate of the FTC is “to protect consumers and promote competition,” but in this case, consumers were denied lower pricing [5]. A precedent was set that protecting smaller businesses was necessary to promote competition and supposedly maintain fair prices for the consumer. However, this was not continuous throughout the history of the legislation.

By the 1990s, the RPA had somewhat lost its fire. It persevered with Booksellers Association v. Houghton Mifflin Co. (1994) but faced substantial defeats with cases such as Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993). The plaintiff argued that Brown & Williamson Tobacco Corp. engaged in price discrimination to harm its competitors and monopolize. However, the courts did not rule in favor of the Brook Group. From this case, the court set a high standard for proving predatory pricing involving two components: a price set below cost and the likelihood that the scheme would result in success. This success equates to a recoupment of the losses from the time of predatory pricing through post-predation gains [6]. These requirements are difficult to complete. They confirm the agenda of the FTC to promote competition for the specific purpose of lowering the prices of goods, while still maintaining the quality. When these larger companies cut prices, the consumer benefits. Thus, the only way to prove the situation is if the plaintiff can claim that the company raised prices afterward to recover previously lost profits. Unfortunately, for small businesses, this was a major loss. However, it highlights the courts' exclusive dedication to protecting the consumer. Thus, what place can Robinson-Patman take on if the priorities have shifted since its inception? Antitrust began historically to specifically focus on consumer welfare, not on protecting competition and maintaining the survival of small businesses. A clear precedent was made: the priority was the consumer, not small businesses. Though the law was not made null, this case resulted in increased difficulty for future plaintiffs to make a successful case under a Robinson-Patman claim. If a case cannot be used, it cannot be enforced. Since then, the usage of the law in the war against trust-busting has slowly dissipated. This has been the case until 2024, with the case of FTC v. Southern Glazer's Wine and Spirits.

The accusations against Southern Glazer's Wine and Spirits are directly underneath the domain of the Robinson-Patman Act. Similarly, action was taken against PepsiCo in 2025. Southern has been accused of selling alcohol to smaller retailers at higher prices, thus negatively affecting their opportunity to offer competitive pricing. PepsiCo has allegedly provided special treatment, somewhat of a prioritization, towards their larger buyers. The exclusive perks they provide similarly offer a disadvantage to the smaller businesses attempting to compete in the free market system. The FTC lawsuits against Southern Glazer's (2024) and PepsiCo (2025) display a reemergence in the RPA after two decades of no enforcement. The government, specifically the FTC, has suddenly developed an interest in supporting small businesses as opposed to their typical single-issue stance of prioritizing consumer welfare. These cases and their validity depend heavily on the state of the economy, making it hard to dictate a clear answer as to whether or not the RPA is necessary. The outcomes of these two cases are not conclusive quite yet, but when a decision is made, it could set a precedent for the future on whether or not the RPA is still relevant and the balance between the free market and the conscious promotion of small businesses.

It must also be considered that price discrimination may post undeniable benefits to the consumer. Some claim that it "makes markets more competitive, benefiting consumers through lower prices" [7]. Companies split the consumer base between bigger firms and smaller firms and continue to compete for each other's consumers. The competition is strengthened with price discrimination, thus rendering the RPA useless. If competition is strengthened, prices will be lower. All prices end up being higher as lower prices cannot be offered, and a profit sacrifice must be maintained without price discrimination. With a profit sacrifice, prices must be

increased. Any scenario where the cost for small business protection is consumer welfare is not supported by the FTC, as per its mandate. It simply cannot prioritize small businesses over consumers without completely abandoning its mission. However, a deeper financial understanding of the possibilities of benefits under price discrimination must be considered. Wholesale businesses, by shortening the supply chain, take on fewer expenses and end up lowering their prices. When comparing warehouse business and standard retail grocery stores going through the supply chain, a "24-pack of Kirkland signature USDA grade AA cage-free large eggs at Costco comes out to under $3 per dozen," which is "50 cents less [...] at Trader Joe's" and "65 cents cheaper [...] at Aldi" [8]. A warehouse, though not through price discrimination, ends up having fewer expenses; however, prices have remained ideal for consumers. Price discrimination similarly reduces a percentage of the expenses for some companies, ensuring that the company can effectively compete, as per the FTC's mandate, as well as promoting the welfare of the consumer by allowing for the opportunity for prices to be reduced through the lower cost of the goods.

In light of the recent election of President Donald Trump, Commissioner Lina Khan is no longer the Chair of the Federal Trade Commission. Her successor, Andrew Ferguson, who belongs to the opposing Republican Party, has voiced his dissent on both the recent PepsiCo case as well as the 2024 Southern Glazer's lawsuit. He voices his belief that the act should be enforced as it was enacted by the government and has not been repealed, but that he has personal misgivings with it [9]. His recurring dissenting statements for the revival in enforcement of the Robinson-Patman Act lead to the speculation that this new trend in support will not persist throughout the remainder of the Trump-Vance Administration. The Republican Party has historically been

against the regulation of business and has typically opposed extensive trust-busting. Ferguson's emphasis that "many of its cases [...] were imprudent and protected large businesses from smaller competitors" brings up the question if the law stands by the mandate of the FTC. He claims that the government pronounced the law outdated. With his new position of leadership, it is fair to infer that the RPA will no longer be enforced, at least until the culmination of the Trump-Vance administration.

It is worth considering that the cases currently in action against the Robinson-Patman Act may be faced with a court that has been reluctant to effectively the law to the fullest extent. In the past, enforcement has been minimal, and it is highly likely this trend will continue through this administration as well.

It is evident that the Robinson-Patman Act, in its current form, has not proved to be necessary. Its lack of usage in the modern fight against monopolies makes apparent its invalidity in modern trust-busting legislation. It has historically had some successes, such as American Booksellers Association v. Houghton Mifflin Co. (1994), which displayed the Act's potential to fight against favoritism toward companies that purchase in larger quantities. But its tendency to benefit big business over small businesses, as described by Ferguson and the U.S. Department of Justice, as well as its blatant prioritization of businesses over the consumer, cannot be ignored. Its temporary revival could return it to the spotlight to be terminated or replaced by a beneficial alternative to protect consumers and small businesses alike. Until then, however, the law will remain in a permanent state of limbo.

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