

**ANTITRUST MODERNIZATION COMMISSION:
WRITTEN TESTIMONY ON THE ROBINSON-PATMAN ACT**

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SUMMARY AND OPENING STATEMENT

My name is Herbert Hovenkamp, and I am the Ben V. & Dorothy Willie Professor of Law and History at the University of Iowa. I am also the surviving author of the *Antitrust Law* treatise begun in the 1970s by the late Phillip E. Areeda and the late Donald F. Turner.¹ Volume 14 of *Antitrust Law* is concerned mainly with Secondary Line coverage of the Robinson-Patman Act. I am also the author of numerous other books and articles in the general field of antitrust, several of which are concerned solely or in part with the Robinson-Patman Act. My writings on the Robinson-Patman Act have been cited in approximately 70 federal court decisions and more than 100 law review articles. I have no clients involved in Robinson-Patman Act litigation, nor am I being paid by or asked to be a spokesperson for any group with an interest in this statute. My interests are motivated purely by my desire that the corpus of the federal antitrust laws be dedicated to encouraging efficient and competitive markets.

The balance of my opening statement offers brief answers to the questions you have posted concerning the repeal of the Robinson-Patman Act or significant changes in the way it is administered.

1. What are the benefits and costs of the Robinson-Patman Act? Does the Act promote or reduce competition and consumer welfare?

As currently enforced the Robinson-Patman Act is a socially costly statute that produces no benefits to competition that could not be secured by means of litigation under the Sherman Act. At the same time, the statute imposes significant costs on manufacturers who depend on networks of independent dealers. While judicial interpretation of the statute is not as anticompetitive as it once was, the statute continues to make it costly for a firm to reward its more aggressive dealers or invest more resources in them, in the process discriminating against less effective dealers.

Both the amount and the cost of Robinson-Patman Act litigation has diminished considerably over the last two decades, thanks in part to Supreme Court decisions that have attempted to bring interpretation of the statute more in line with that of the antitrust laws generally. Nevertheless, in 2004 10 Circuit decisions and 22 district court

1. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 20 vols. (New York: Aspen Publ. 1978-2005). Other authors have included Donald F. Turner, John Solow, Einer Elhauge & Roger D. Blair.

decisions included discussion of Robinson-Patman Act claims. For 2003, 9 Circuit decisions and 22 district court decisions included such discussions. I do not know how many complaints containing Robinson-Patman Act issues were filed in those years.

2. What purposes should the Robinson-Patman Act serve?

The only situation in which the Robinson-Patman Act can reliably serve to promote competition is the one that was most immediately of concern to its framers; namely, the powerful *buyer/reseller* which forces a supplier to discriminate against rival buyer/resellers contrary to the supplier's independent judgment. Unfortunately, the statute has completely lost its historically intended focus with buyer pressure, and the Supreme Court has made buyers' liability under §2(f) of the statute almost impossible to prove. Moreover, any anticompetitive assertions of buyer pressure could be remedied under the Sherman Act.

Your supplemental questions ask whether the current approach to interpreting the Robinson-Patman Act reflects the increasing role of economic analysis in antitrust. My answer is, somewhat, but not nearly enough to rehabilitate an economically harmful provision. In cases such as *A&P*² and *Automatic Canteen*³ the court was concerned about how the Robinson-Patman Act can facilitate collusion, and in *Vanco Beverage* it was concerned about maintaining the ability of sellers to respond to market conditions. But all of these decisions fall into the classification of minimizing damage rather than doing affirmative good.

3. Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered?

As a matter of competition policy the Robinson-Patman Act is completely unnecessary and should be repealed. That may not be a politically practicable solution, however.

4. Please identify specific changes and explain why they should be adopted. For example:

a. Should private plaintiffs asserting Robinson-Patman claims be required to prove "antitrust injury," i.e., proof of injury reflecting the anticompetitive effect of the challenged conduct?

This is sensible only if "antitrust injury" is properly defined. In the *Truett Payne*

2. *Great A. & P. Tea Co. v. FTC*, 440 U.S. 69 (1979).

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

case⁴ the Supreme Court assessed an "antitrust injury" requirement, but it referred only to the way that damages are measured, and has been interpreted to require a showing that the disfavored purchaser was injured in its ability to compete with the favored purchaser. The Supreme Court will very likely return to this issue next term in the *Reeder-Simco/Volvo* case.⁵ The proper antitrust injury showing that should be required in all antitrust cases, including Robinson-Patman Act cases, is *competitive* injury, or a showing that the conduct tends to lessen competition by reducing market output and increasing marketwide prices.

b. Should the inference of harm to competition recognized in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), be modified, e.g., by requiring plaintiffs to make a showing of harm to competition similar to that required to establish a Sherman Act violation?

This question is very close to the first one. The *Morton Salt* inference was never properly one of injury to *competition* at all. To the extent any inference is created from evidence of a substantial price discrimination over time, it is an inference of injury-in-fact to the disfavored purchaser. As a result, the *Morton Salt* doctrine should be abandoned.

c. Does limiting the substantive provisions of the Robinson-Patman Act to the sale of commodities, not services, make sense in today's economy?

First, given that price discrimination in the delivery of services is more ubiquitous than in the sale of goods, the Act's limitation to commodities makes little sense except in this historical context of the Robinson-Patman Act, which was a concern with the buying practices of large chain stores such as A & P. Second, however, expanding the scope of the Robinson-Patman Act so as to make it reach business services would only increase the social cost of an already costly statute. Third, collateral issues raised under such an expansion would produce a litigation nightmare. For example, how would the "like grade and quality" requirement apply to legal services, accounting services, medical services, and the like? Finally, such an amendment would carry the statute very far from its historically intended target, modern chain store distribution, and into areas such as the regulation of pricing of law firms, medical practices, accountants, and the like where it is even more difficult to identify a cognizable social harm. In sum, this would be a foolish amendment.

4. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

5. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), cert. granted, ___ S.Ct. ___ (2005).

d. What role should buyer market power play in applying the Robinson-Patman Act?

The historical concern of the Robinson-Patman Act was the power of large buyers, and the exercise of buyer power, while perhaps uncommon, is the one situation in which a price discrimination can injure competition. For example, a powerful buyer/retailer with many outlets may protect itself from retail competition by forcing suppliers to charge rivals higher prices or give them less advantageous terms. The result will be higher margins at the retail level. Such practices are presumably contrary to the independent wishes of the manufacturer, who profits when its distribution chain is operating as efficiently as possible.

A Robinson-Patman Act concerned with true injuries to competition would be focused predominantly, if not exclusively, on buyer power. At the same time, however, an exercise of buyer power that genuinely caused competitive harm could be remedied by either §1 or §2 of the Sherman Act, depending on the circumstances.

4. To what extent do state antitrust laws prohibit price discrimination that is also prohibited by the Robinson-Patman Act? Would repeal or reform of the Robinson-Patman Act affect the likelihood that states would adopt their own prohibitions on price discrimination? How, if at all, would repeal or reform of the Robinson-Patman Act affect the amount of litigation under such state laws?

Several states have price discrimination provisions that are similar, although not necessarily identical, to those in the Robinson-Patman Act.⁶ To date, these provisions

6. E.g., *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 175 F.3d 18 (1st Cir. 1999), cert. denied, 528 U.S. 931 (1999) (Robinson-Patman Act claim had already been dismissed for lack of "in commerce" jurisdiction; but analyzing damages under a Puerto Rican provision interpreted as similar to Robinson-Patman). See also *Redmond Ready-Mix, Inc. v. Coats*, 283 Or. 101, 582 P.2d 1340 (Or. 1978) (Oregon price discrimination provision modeled after Robinson-Patman Act requires injury to competition, thus placing it in conflict with current federal law in some circuits, including the Ninth).

In *ABC Intern. Traders, Inc. v. Matsushita Elec. Corp. of America*, 14 Cal.4th 1247, 931 P.2d 290, 61 Cal.Rptr.2d 112 (Cal. 1997), the California Supreme Court construed this state statute:

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers

have not generated conflicts of the magnitude that have resulted from, say, state law indirect purchaser provisions. In large part this is true because there are very few class actions under the Robinson-Patman Act. My own view is that the value of federalism outweighs the relatively minor conflicts that arise in this area.

You also ask whether the approach of *Brooke Group* should be extended to secondary line cases. My answer is that it depends on what level of generality this question must be answered. If the question asks only whether the Sherman Act concern for true injury to competition that the Supreme Court applied to primary line cases in *Brooke Group*⁷ should be required in secondary-line cases as well, my answer is yes, for the reasons stated previously.

purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

Cal. Bus. & Prof. Code §17045. The court concluded that the injury to a competitor and injury to competition language in the last part of the quoted passage referred to injury to the disfavored purchaser, and required no injury to competition generally. The court made a detailed exploration of the legislative history, and concluded that the provision was motivated by the same concerns that had inspired the federal Robinson-Patman Act amendments. As Justice Brown's well written dissent points out, under the provision the supplier who gives one of its distributors or other wholesale purchasers a discount that is not communicated to or given to others, does so at its peril. More significantly:

Whatever its business motivation, the alleged price differential at issue in this case reflects an implicit preference for two distributors of the same brand of telephone over a third. I find it difficult to comprehend how a discount offered to some but fewer than all distributors of the same product can even affect, much less "tend to destroy" the only kind of competition that matters to the consumer—competition among brands.

Other provisions include *Watercraft Management, L.L.C. v. Mercury Marine*, 191 F. Supp. 2d 709 (M.D. La. 2001) (Louisiana price discrimination provision does not permit private actions); *Jauquet Lumber Co., Inc. v. Kolbe & Kolbe Millwork Co., Inc.*, 164 Wis.2d 689, 476 N.W.2d 305 (Wis.App. 1991), which concluded that the Wisconsin price discrimination statute, unlike the federal Robinson-Patman Act, permits calculation of "automatic" damages based on the amount of price discrimination multiplied by the number of units the plaintiff purchased. This method, which had been applied in some circuits, was rejected under federal law in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

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

However, it would make no sense for a court to assess *Brooke Group's* specific technical requirements in a secondary-line case. The economic concerns of the two applications are absolutely different. Primary-line cases are concerned with predatory pricing against rivals; secondary-line cases are concerned with supplier price discriminations that injure retailers, dealers or intermediaries who must pay a higher price than a rival purchaser receives. The *Brooke Group* requirement (in dicta) of prices below cost and "recoupment" are completely senseless in the secondary-line context.

FULL STATEMENT

These written comments develop the following general themes:

1. The special interest origins and competitively harmful effects of the Robinson-Patman Act are well known and beyond reasonable dispute.
2. No manufacturer can profit by making its distribution scheme less efficient; as a result, true manufacturer-initiated price discriminations must be deemed procompetitive whenever anyone considers overall impact on output.
3. The one competitive danger comes from powerful buyers who are able to force suppliers to make choices contrary to their own independent self-interest; in fact, this concern, which the Robinson-Patman Act shares in common with the law of vertical restraints generally, dominated the legislative history of the Robinson-Patman Act but has been denigrated in subsequent case law interpreting the statute.
4. The legislative history of the Robinson-Patman Act was in fact not as anticompetitive as subsequent judicial interpretation of the Act became; further, and perversely, the legislative history of the Robinson-Patman Act is accorded a degree of judicial deference that is not given to the other antitrust statutes, even though the special interest origins of the Robinson-Patman Act are relatively clear.
5. The proper repair for this socially harmful statute is to repeal it, permitting §1 of the Sherman Act (or occasionally §2) to pick up any instances of discriminatory arrangements that cause competitive harm; a distinctly "second best" but perhaps more politically acceptable solution is to amend the statute so as to require true injury to competition, as do the remaining antitrust laws.

Finally, I offer a few comments on the Robinson-Patman Act's criminal provision, as well as state price discrimination provisions.

DISCUSSION

1. The special interest origins and competitively harmful effects of the Robinson-Patman Act are well known and beyond reasonable dispute.

Few federal statutes have received criticism as relentless and withering as that which has been levied at the Robinson-Patman Act.⁸ Further, the sources of that criticism are not limited to hard core neoclassical or public choice ideologues, but comes from many moderates, even including the Justice Department during the Ford and Carter era. Donald Baker, head of the Antitrust Division, was responsible for the Division's *Report*, which severely criticized the Act.⁹ Since that Report was published the Justice Department has not enforced the statute.

Very briefly, the criticisms of the Robinson-Patman Act are that it prevents manufacturers from achieving economies in distribution by requiring them to protect smaller, less efficient dealers. While the statute contains a "cost justification" defense that should enable suppliers to price to different dealers differently where costs differ, the defense is extraordinarily difficult to prove and reaches only a small proportion of the cases. The Act imposes wholesale price uniformity that makes it very difficult for dealers to respond to different market situations differently. Quite aside from this overreaching, compliance with the Robinson-Patman Act is extremely costly, and many firms have run afoul of it simply by inadvertence. The Act often serves to encourage oligopoly or facilitate collusion by prohibiting the type of single-customer price cuts that can be very effective in undermining cartels or entrenched oligopolies. Finally, and perversely, because the Act applies only to a supplier's sales to independent dealers,¹⁰ manufacturer's for whom the costs of Robinson-Patman Act enforcement is high are motivated to switch away from networks of independent dealers and toward

8. See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 155-221 (1955); United States Dept of Justice, Report on the Robinson-Patman Act (1977); H. Hansen, Robinson-Patman Law: A Review and Analysis, 51 Fordham L. Rev. 1113 (1983); R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences (1976); W. Baxter, A Parable, 23 Stan.L.Rev. 973 (1971). See also M. Schwartz, The Perverse Effects of the Robinson-Patman Act, 31 Antitrust Bull. 733 (1986); T. Ross, Winners and Losers Under the Robinson-Patman Act, 27 J. L. & Econ. 243 (1984); H. Hovenkamp, Market Power and Secondary-Line Differential Pricing, 71 Georgetown L.J. 1157 (1983); P. Neal, Let's Reform It, 45 Antitrust L.J. 52 (1976); ABA Antitrust Section, The Robinson-Patman Act: Policy and Law. (1980).

9. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).

10. See 14 Antitrust Law ¶12312 (2d ed. 2006).

manufacturer-owned outlets. As a result, the Act may end up injuring the very class of persons -- small dealers -- that it was intended to protect.

2. No manufacturer can profit by making its distribution scheme less efficient; as a result, true manufacturer- or supplier-initiated price discriminations must be deemed procompetitive whenever anyone considers overall impact on output.

In antitrust parlance, the secondary-line provisions of the Robinson-Patman Act are both "vertical" and "intra-brand," in that they deal with the way a manufacturer or supplier controls the distribution of its own brand, in this case through wholesale pricing¹¹ or the provision of collateral services or facilities.¹² The economic logic of Robinson-Patman Act enforcement is precisely the same as the economic logic of other vertical intra-brand restraints, including resale price maintenance and vertical nonprice restraints. Essentially, every manufacturer or supplier is best off when its distribution system is operating as efficiently as possible. The manufacturer is injured by high dealer margins as well as dealer inefficiency. No manufacturer is in a position to profit by making its distribution system operate less efficiently, or by limiting the amount of competition that occurs among its various dealers.

Second, a manufacturer just as any other principal must be able to give its dealers the correct set of incentives. The principles that apply to manufacturers are no different than those that apply to employers: employees must be encouraged by means of a reward system, and the most effective rewards typically take the form of higher wages. Manufacturers tend to reward dealers by giving them price concessions, by offering more flexible terms or conditions to more trustworthy and successful dealers, or by investing their own resources more heavily in dealers that have better prospects for growth. While such behavior is perfectly sensible, any incentive scheme that results in lower prices for more effective dealers or more investment in their dealerships can become the basis of a Robinson-Patman Act claim. When that happens a court is being asked to interfere in a manufacturer's decision about how best to run its distribution system in order to protect one of the weaker dealers in the system.

These economic constraints on manufacturer incentives apply to monopolists as well as competitive suppliers. Even a monopolist is best off when its distribution system is running as efficiently as possible. Although higher margins may be available in a monopolist's distribution system, the monopolist itself makes no money by simply giving

11. Wholesale pricing is the principal concern of §2(a) of the statute as well as §2(f), which pertains to buyer's liability.

12. Discriminatory provision of services or facilities are the subjects of §§2(d) and 2(e) of the statute. See 14 Antitrust Law ¶12363 (2d ed. 2006).

these away to its dealers. The profit-maximizing situation for a monopoly manufacturer, just as for a competitive manufacture, is to have a distribution network that runs as efficiently as possible, thus maximizing the profits that it can keep for itself.

Even if this were not the case, the Robinson-Patman Act does not distinguish between monopoly and competitive distribution systems because it has no market power requirement. Manufacturers in competitively structured industries can run afoul of its prohibitions just as much as market dominating firms can.¹³ Or to state this proposition in a different way: even if there were a "monopoly problem" in distribution networks, the Robinson-Patman Act is not the vehicle for addressing it, because enforcement of that Act is completely indifferent to the amount of power that a manufacturer or supplier has.

3. The one true competitive danger comes from powerful buyers who are able to force suppliers to make choices contrary to their own independent self-interest; in fact, this concern, which the Robinson-Patman Act shares in common with the law of vertical restraints generally, dominated the legislative history of the Robinson-Patman Act but has been denigrated in subsequent case law interpreting the statute.

To be sure, there are situations in which a manufacturer's differential treatment of its dealers can raise competitive issues. Such situations arise when the anticompetitive impetus comes not from the manufacturer, but rather from a powerful dealer or perhaps a group of dealers acting as a cartel. Once again, the story here is very much the same as it is for understanding intrabrand restraints such as resale price maintenance or territorial restrictions. While manufacturers have no incentive to make their distribution systems less competitive, powerful dealers do.

Such dealers would prefer to limit the competition between themselves and other dealers in the manufacturer's brand, and they can accomplish this by diverse means. One is to force the manufacturer to impose resale price maintenance on competing dealers, thus sheltering the powerful dealer from other dealers' price competition.¹⁴ A second way is by means of locational or territorial restrictions that might serve to limit the dominant dealer's competition with rival dealers.¹⁵ The third mechanism is through the wholesale pricing system itself -- i.e., the powerful dealer might force the

13. See, e.g., *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 548 (1990) (applying Act to Texas even though the retail gasoline market in the area was "highly competitive").

14. On this rationale for resale price maintenance, see 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1604 (2d ed. 2004).

15. See *id.* at ¶1648d (2d ed. 2004).

manufacturer to give it a lower price than other dealers receive. The higher price that the other dealers pay then provides an umbrella under which the dominant dealer can increase its own margins. Whether the manufacturer yields to the power of such dealers depends on the circumstances, but often yielding is cheaper than looking for alternatives.

This theory is not only economically plausible, it was also the dominant theory that drove the framers of the Robinson-Patman Act in 1936 to pass the legislation that they did. To be sure, they did not get all the economics right, and they seemed to be concerned as much with the efficiency of large chains as they were with their market power, but by and large the political impetus for the Robinson-Patman Act came from the buying practices of large grocery store chains such as A&P.¹⁶

4. The legislative history of the Robinson-Patman Act was in fact not as anticompetitive as subsequent judicial interpretation of the Act became; indeed, and perversely, the legislative history of the Robinson-Patman Act is accorded a degree of judicial deference that is not given to the other antitrust statutes, even though the special interest origins of the Robinson-Patman Act are relatively clear.

There is little dispute about the fact that the Robinson-Patman Act was special interest legislation, with the special interest being small dealers who were being severely injured by the buying practices of chain stores and other large purchasers. This fact is often presented as a contrast to the other antitrust provisions so as to justify a less consumer friendly approach to the Robinson-Patman Act because that was, after all, Congress' wish. For example, some courts have suggested that:

In contrast to the Sherman Act and the Clayton Act, which were intended to proscribe only conduct that threatens consumer welfare, the Robinson-Patman Act's framers "intended to punish perceived economic evils not necessarily threatening to consumer welfare per se."¹⁷

16. On this aspect of the legislative history, see 14 Antitrust Law ¶12302 (2d ed. 2006); Rowe, Price Discrimination Under the Robinson-Patman Act 3-8 (1962); Corwin D. Edwards, The Price Discrimination Law 8-10 (1959); Hearings Before the Antitrust Subcommittee of the House Judiciary Committee on Bills to Amend Sections 2 and 3 of the Clayton Act, 74th Cong., 1st Sess. (1935); FTC, Chain Stores: Final Report on the Chain-Store Investigation (1934), S.Doc. No. 4, 74th Cong., 1st Sess. (1935).

17. *George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 143 (2d Cir. 1998), quoting *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Co.*, 79 F.3d 182 (1st Cir.), cert. denied, 519 U.S. 927 (1996).

In fact, however, a great deal of historical writing in the last twenty years establishes fairly clearly that the Congresses that passed the Sherman Act in 1890,¹⁸ the Clayton Act in 1914, and the merger statute amendments in the Celler-Kefauver Act of 1950 were all controlled to one degree or another by special interests.¹⁹ In general, the Congressional concern was not with guaranteeing fierce competition and low consumer prices. Rather, it was protecting some set of small business interests from the competitive aggressiveness of other firms.

A great deal of revisionism has gone into our interpretations of the Sherman Act and §7 of the Clayton Act. Predatory pricing is analyzed today under standards that are significantly more restrictive on plaintiffs than the framers of either the Sherman Act or original §2 of the Clayton Act supported.²⁰ Mergers are tolerated today that would never have been accepted by the framers of the 1950 Celler-Kefauver amendments to §7. But the courts often seem reluctant to treat the Robinson-Patman Act the same way, as if its legislative history deserves a degree of deference and durability not given to the legislative history of these other antitrust statutes. One is hard put to find a justification for that attitude, especially in light of the internally contradictory and often unilluminating legislative history of the Robinson-Patman Act, the fact that it was so obviously special rather than general interest legislation, and the extraordinarily high social costs of its enforcement.

5. The optimal repair for this socially harmful statute is to repeal it, permitting §1

18. See Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practice* §2.1a (3d ed. 200); *The Causes and Consequences of Antitrust: the Public Choice Perspective* (F. McChesney & W. Shughart, eds. 1994); T. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 *Econ. Inquiry* 263, 267 (1992); W. Shughart, *Antitrust Policy and Interest Group Politics* 11–12 (1990); Hovenkamp, *Antitrust's Protected Classes*, 88 *Mich.L.Rev.* 1, 28 (1989); L. Telser, *A Theory of Efficient Cooperation and Competition* 27 (1987); G. Stigler, *The Origin of the Sherman Act*, 14 *J. Legal Stud.* 1 (1985); T.J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 *Int'l. Rev. L. & Econ.* 73 (1985).

19. On the merger provision and its 1950 amendments, see 4 P. Areeda, H. Hovenkamp, & J. Solow, *Antitrust Law* ¶¶1903-904 (2d ed. 2006); Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *Harv. L. Rev.* 226 (1960); Herbert Hovenkamp, Derek Bok and the Merger of Law and Economics, 21 *J. L. Reform* 515 (1988).

20. For example, predatory pricing under original §2 of the Clayton Act was intended to be analyzed under a "subsidy" theory -- that firms would raise the price in one region in order to offset the costs of predation in another region -- that is largely discredited today. See 14 *Antitrust Law* ¶2302 (2d ed. 2006).

of the Sherman Act (or occasionally §2) to pick up any instances of discriminatory arrangements that really do harm competition; a "second best," and perhaps more politically acceptable solution, is to amend the statute so as to give it a requirement of competitive injury analogous to that employed under the other antitrust laws.

Perhaps the political climate has shifted sufficiently that Congress would be more willing to pass a bill that simply repealed the Robinson-Patman Act.²¹

There are legislative fixes, however, that would go some distance in the right direction without full repeal. The current statute provides:

It shall be unlawful ... to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination 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....²²

The statute could be amended to read:

It shall be unlawful ... to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce....

This amendment would approximately restore this portion of the statute to its original 1914 language.²³ Its language would be roughly the same that is applied to

21. Recent Efforts to Amend or Repeal the Robinson-Patman Act: Hearings on Antitrust, the Robinson-Patman Act and Related Matters Before the Ad-Hoc Sub comm. of the House Comm. on Small Business (Pt. 1), 94th Cong., 1st Sess. (1975).

22. 15 U.S.C. §2(a).

23. Original §2 of the Clayton Act provided:

It shall be unlawful for any person ... to discriminate in price between different purchasers of commodities... where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly.

38 Stat. 730 (1914). On the meaning of the original provision, see 14 Antitrust Law ¶¶2302, 2332 (2d. ed. 2006).

mergers in §7 of the Clayton Act, and to tying and exclusive dealing in §3 of the Clayton Act. The Supreme Court has made clear that these provisions require a showing not merely of injury to a competitor, but also of injury to competition.²⁴ Similar fixes could be applied to §§d & e of the statute.²⁵

24. See, e.g., *Brown Shoe Co. v United States*, 370 U.S. 294, 315-323 (1962) (amended §7 concerned with injury to competition, not injury to competitors); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (§7 case; developing "antitrust injury" doctrine). On tying arrangements under §3 of the Clayton Act, see *CTUnify, Inc. v. Nortel Networks, Inc.*, 115 Fed.Appx. 831, 2004 WL 2633395 (6th Cir. Nov. 18, 2004); *Valley Products Co., Inc. v. Landmark*, 128 F.3d 398 (6th Cir. 1997).

25. The fixes would look like this: for 15 U.S.C. §2(d):

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, *where the effect of such payments or provisions may be substantially to lessen competition or tend to create a monopoly*, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(proposed amending language in italics). Ad for 15 U.S.C. §2(e):

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms, *where the effect of such discrimination in the furnishing of services or facilities may be substantially to lessen competition or tend to create a monopoly*.

(proposed amending language in italics).

Section (f) on buyers liability would not require an amendment because it applies

Under the amending language the volume of Robinson-Patman Act litigation would drop substantially, for there are relatively few situations in which intrabrand price discrimination of the type that the Robinson-Patman Act reaches would injure competition. Indeed, amending the statute rather than simply repealing it is probably not justified on any grounds other than the political one. A price discrimination practice that really did cause competitive injury would almost certainly fall within the restraint of trade language of §1 of the Sherman Act or, in a few cases, the monopolization language of §2.

Criminal Provision

While the Robinson-Patman Act contains a criminal provision, it is completely defunct and to the best of my knowledge has not been enforced since the 1960s.²⁶ The statute is not one of the "antitrust laws," and since it is strictly criminal it cannot be enforced by anyone other than the Justice Department.²⁷ Repeal of this provision would be in the

only to a buyer's inducement of a price discrimination "which is prohibited by this section." As a result, the competitive injury language of §2(a) would cover §2(f) as well.

26. 15 U.S.C. §13a:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

The statute was upheld against claims of unconstitutional vagueness in *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

27. See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958) (this section not an "antitrust law," and thus cannot be enforced through Clayton Act §§4 & 16). Accord

public interest, perhaps only because uninformed lawyers occasionally base actions on it, thus wasting the court's resources and those of their clients.

State Price Discrimination Statutes

Several, but not all, states have a differential pricing provision modelled more-or-less closely on the federal Robinson-Patman Act.²⁸ By and large their coverage mimics that of the federal statute, with some exceptions.²⁹ While these provisions would certainly

Energex Lighting Indus., Inc. v. North Am. Philips Lighting Corp., 656 F.Supp. 914, 920 (S.D.N.Y. 1989); *Hayden v. Bardes Corp.*, 1989-1 Trade Cas. ¶168477 (W.D.Ky. 1988); *Rio Vista Oil, Ltd. v. Southland Corp.*, 667 F.Supp. 757 (D.Utah 1987); *O'Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 120 (E.D.N.Y. 1983).

28. See 14 Antitrust Law ¶12419; and see *Castrol, Inc. v. Parm Trading Co. of N.Y.C., Inc.*, 228 A.D.2d 633, 645 N.Y.S.2d 825 (App. Div. 1996) (price discrimination does not violate any state antitrust law of New York); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 207 N.J.Super. 607, 504 A.2d 828 (N.J. Super. 1985) (same; New Jersey); *Regal Motors, Inc. v. Fiat Motors of North America, Inc.*, 133 Ill.App.3d 370, 479 N.E.2d 1, 88 Ill.Dec. 666 (Ill. App. 1985) (same; Illinois); *Essex v. Getty Oil Co.*, 661 S.W.2d 544 (Mo. App. 1983) (same; Missouri).

29. See, e.g., *Syfo Water Co. v. Chakoff*, 182 So.2d 17 (Fla.App. 1966) (noting that Florida equivalent of Robinson-Patman Act contains no private action provision; suggesting possibility of injunctive relief). And see *Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp.*, 175 F.3d 18 (1st Cir. 1999), cert. denied, 528 U.S. 931 (1999) (Robinson-Patman Act claim had already been dismissed for lack of "in commerce" jurisdiction; but analyzing damages under a Puerto Rican provision interpreted as similar to Robinson-Patman); *Jauquet Lumber Co., Inc. v. Kolbe & Kolbe Millwork Co., Inc.*, 164 Wis.2d 689, 476 N.W.2d 305 (Wis.App. 1991), which concluded that the Wisconsin price discrimination statute, unlike the federal Robinson-Patman Act, permits calculation of "automatic" damages based on the amount of price discrimination multiplied by the number of units the plaintiff purchased. This method, which had been applied in some circuits, was rejected under federal law in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); see ¶12371c2.

And see *Redmond Ready-Mix, Inc. v. Coats*, 283 Or. 101, 582 P.2d 1340 (Or. 1978) (Oregon price discrimination provision modeled after Robinson-Patman Act requires injury to competition, thus placing it in conflict with current federal law in some circuits, including the Ninth; see ¶12342).

In *ABC Intern. Traders, Inc. v. Matsushita Elec. Corp. of America*, 14 Cal.4th 1247, 931 P.2d 290, 61 Cal.Rptr.2d 112 (Cal. 1997), the California Supreme Court construed this

reach beyond federal law once the Robinson-Patman Act was repealed, such actions would appear to be nearly as numerous nor as disruptive as state law indirect purchaser actions. My own belief is that in the interests of federalism these be left to the prerogatives of the states.

state statute:

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

Cal. Bus. & Prof. Code §17045. The court concluded that the injury to a competitor and injury to competition language in the last part of the quoted passage referred to injury to the disfavored purchaser, and required no injury to competition generally. The court made a detailed exploration of the legislative history, and concluded that the provision was motivated by the same concerns that had inspired the federal Robinson-Patman Act amendments in 1936. See ¶12302. As Justice Brown's well written dissent points out, under the provision the supplier who gives one of its distributors or other wholesale purchasers a discount that is not communicated to or given to others, does so at its peril. More significantly:

Whatever its business motivation, the alleged price differential at issue in this case reflects an implicit preference for two distributors of the same brand of telephone over a third. I find it difficult to comprehend how a discount offered to some but fewer than all distributors of the same product can even affect, much less "tend to destroy" the only kind of competition that matters to the consumer—competition among brands.

Cf. *Watercraft Management, L.L.C. v. Mercury Marine*, 191 F. Supp. 2d 709 (M.D. La. 2001) (Louisiana price discrimination provision does not permit private actions).