



MEMORANDUM

From: AMC Staff[†]
To: All Commissioners
Date: May 19, 2006
Re: Robinson-Patman Act Discussion Memorandum

The Commission adopted the following issues for study: (1) “Should the Robinson-Patman Act be repealed in whole or in part, or otherwise be modified?” and (2) “Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?”¹ In particular, the Commission sought to study longstanding concerns that the Robinson-Patman Act may impose costs exceeding the benefits it provides, and whether it should be reformed or repealed. The Commission received numerous calls to study several issues that arise under current law, the benefits conferred by the Act, the burdens it imposes, and its possible conflict with the other antitrust laws. This issue was recommended for study by, among others, the American Bar Association and then-Assistant Attorney General R. Hewitt Pate.² The Senate Judiciary

[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

¹ See Single-Firm Conduct Issues Recommended for Commission Study Memorandum, at 4-7 (Dec. 21, 2004); Criminal Procedures and Remedies Issues Recommended for Commission Study Memorandum, at 3 (Dec. 21, 2004); Meeting Trans. (Jan. 13, 2005), at 36, 39-40, 50, 125-26, 154; Robinson-Patman Study Plan (May 4, 2005).

² Report of the Section of Antitrust Law of the American Bar Association (“ABA”) to the Antitrust Modernization Commission, at 2, 8, 17-18 (Sept. 30, 2004); Letter from Hon. R. Hewitt

Subcommittee on Antitrust, Competition Policy, and Consumer Rights recommended that the Commission study the Robinson-Patman Act and buyer power issues generally.³

The Commission requested comment on May 19, 2005, on the following questions:

1. What are the benefits and costs of the Robinson-Patman Act as currently enforced? Does the Robinson-Patman Act promote or reduce competition and consumer welfare? If so, how? What other benefits does it afford or costs does it impose, if any?
2. What purposes should the Robinson-Patman Act serve?
3. Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered? 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?
 - 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?
 - C. Does limiting the substantive provisions of the Robinson-Patman Act to the sale of commodities, not services, make sense in today’s economy?
 - D. What role should buyer market power play in applying the Robinson-Patman Act?
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

Pate, Assistant Attorney General For Antitrust, Re: Suggested Topics for the Antitrust Modernization Commission Study, at 2 (Jan. 5, 2005); Comments of the Business Roundtable, at 5 (September 29, 2004); Letter from Constantine & Partners re: Issues to be Studied by the Antitrust Modernization Commission, at 4-5 (Sept. 30, 2004); Letter from Professor Edward D. Cavanagh re: Proposed Agenda Items for AMC, at 2 (Oct. 1, 2004); A Comment By The Competitive Enterprise Institute Submitted to the Antitrust Modernization Commission: Proposed Issues for Reform, at 6 (Sept. 30, 2004); Computing Technology Industry Association, Comments Regarding Commission Issues for Study, at 2, 11 (Oct. 28, 2004); Chamber of Commerce of the United States of America, at 3 (Sept. 30, 2004) (endorsing case law that recognizes defenses).

³ Letter from the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, at 2 (Oct. 1, 2004).

prohibitions discrimination? How, if at all, would repeal or reform of the the amount of litigation under such state laws?

The Commission held a hearing consisting of one panel on July 28, 2005.⁴ Panelists were J.H. Campbell, President and CEO of Associated Grocers, Inc., on behalf of the National Grocers Association; Prof. Herbert Hovenkamp, University of Iowa College of Law; Harvey Saferstein, of counsel, Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo; and Bruce Spiva, partner, Tycko, Zavareei, and Spiva, on behalf of the American Booksellers Association. The Commission received several comments from members of the public, including from the American Antitrust Institute, ABA Antitrust Section, Business Roundtable, and the U.S. Chamber of Commerce. In addition, FTC Chairman Deborah Platt Majoras addressed the issue of repeal or reform of the Robinson-Patman Act when she testified before the AMC on March 21, 2006.⁵

I. Background

The Robinson-Patman Act, enacted in 1936, amended Section 2 of the Clayton Act to address concerns regarding the ability of large buyers to obtain unfairly discriminatory pricing from suppliers, which was believed to threaten competition generally and small independent wholesalers and retailers in particular.⁶ The Supreme Court has long recognized this basic statutory purpose.⁷

⁴ Unless otherwise noted, all citations to “Trans.” are to the transcript of the July 28, 2005, Robinson-Patman Act hearing.

⁵ Statement of Deborah Platt Majoras, Chairman, Federal Trade Commission, before the Antitrust Modernization Commission, at 5-6 (March 21, 2006) (“Majoras Statement”).

⁶ ABA Antitrust Section, *Monograph No. 4, The Robinson-Patman Act: Policy and Law Volume I*, at 7-9 (1980) (“*ABA Monograph No. 4, Vol. I*”).

⁷ *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 43 (1948) (“The legislative history of the Robinson-Patman Act makes it abundantly clear that the Congress considered it to

As amended, Section 2(a) of the Robinson Patman Act makes it unlawful, in certain circumstances, “to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to lessen competition.”⁸ A plaintiff bringing a claim under Section 2(a) must establish that a single seller charged two different prices in separate, substantially contemporaneous sales to two different buyers for commodities that are of like grade and quality, and thereby caused competitive injury.⁹ In secondary-line cases—in which a challenged discrimination is alleged to injure competition between the favored and disfavored buyers (typically resellers)—competitive injury can be presumed based on a showing of the size and duration of the discrimination, among other circumstances (the “*Morton Salt*” inference).¹⁰ This can be a considerably lesser showing than is generally required to establish a violation under the other antitrust laws.

be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages . . .”). The Supreme Court recently reaffirmed the Act’s focus on protecting small firms from “power buyers”: “Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.” *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 869 (2006) (“*Volvo*”).

⁸ 15 U.S.C. § 13(a). For an overview of the Robinson-Patman Act, see generally Section of Antitrust Law, American Bar Association, *A Primer on the Federal Price Discrimination Laws: A General Review of the Robinson-Patman Act for Business Managers* (3rd ed. 2005) (“Robinson-Patman Primer”).

⁹ Robinson-Patman Primer, at 2-7. In addition, plaintiffs must meet a number of technical requirements; for example, both sales must be completed transactions and at least one sale must be in interstate commerce. *Id.*

¹⁰ *Id.* at 6-7. The Act has been used to protect a firm from predatory pricing by a competitor. See *ABA Monograph No. 4, Vol. I*, at 24-25. However, since the Supreme Court’s decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the courts apply the same standards to predatory pricing claims whether brought under the Robinson-Patman Act or Section 2 of the Sherman Act.

By comparison, the Supreme Court recently ruled that primary-line claims (alleging injury at the seller’s level) are generally subject to injury to competition standards similar to those under the Sherman Act.¹¹

Section 3 imposes criminal sanctions for territorial price discrimination “for the purpose of destroying competition or eliminating a competitor,” charging unreasonably low prices for the same purpose, and related offenses.¹²

Various affirmative defenses are available to Robinson-Patman defendants, including where the preferential price is offered “in good faith to meet an equally low price of a competitor” (the “meeting competition defense”), where the differential in price is cost-justified, and where the advantageous price was practically available to the disfavored buyer.¹³

To prevent disguised price discrimination, Section 2(c) prohibits parties to a transaction from receiving brokerage fees or commissions, except for services rendered, and Sections 2(d) and 2(e) require that promotional allowances and services be available on proportionately equal terms to all competing customers.¹⁴ These prohibitions do not require a showing of competitive injury.¹⁵

¹¹ *Brooke Group, Ltd. v. Brown and Williamson*, 509 U.S. 209, 221 (1993) (claim of “primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes under section 2 of the Sherman Act”); Robinson-Patman Primer, at 6 (“requirements for proving competitive injury in a primary line situation are similar to the requirements for proving predatory pricing under Section 2 of the Sherman Act”).

¹² 15 U.S.C. § 13a; ABA Section of Antitrust Law, *Antitrust Law Developments V*, 522-23 (5th ed. 2002) (“*Antitrust Law Developments V*”).

¹³ Robinson-Patman Primer, at 7-12.

¹⁴ See 15 U.S.C. § 13(c)-(e); *Antitrust Law Developments V*, at 499-509; Robinson-Patman Primer, at 14-18.

¹⁵ *Antitrust Law Developments V*, at 499, 505.

The Supreme Court most recently addressed the Robinson-Patman Act earlier this year in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*¹⁶ While the case addressed “customer-specific competitive bidding,” the Court’s opinion provides broader consideration of the Act as well.¹⁷ Reeder, a Volvo dealer, bid in competition with other (typically non-Volvo) dealers to sell to truck-fleet owners.¹⁸ Reeder claimed that Volvo violated the Act by granting larger concessions to other Volvo dealers in connection with these bids; however, these higher concessions generally were granted when Reeder was not a bidder for the contract.¹⁹ The Court, reversing the Eighth Circuit, held that Reeder had not established a Robinson-Patman violation, finding insufficient evidence of competitive injury.²⁰ Specifically, Reeder was not bidding in competition with favored Volvo dealers, and thus had not lost sales due to the alleged discriminations.²¹ The Court noted that Reeder alleged some instances in which it bid against other Volvo dealers, but held that Reeder had not shown price discrimination “of such magnitude as to affect substantially competition between Reeder and the ‘favored’ Volvo dealer.”²²

In explaining its decision, the Court noted that the favored purchasers were not alleged to have market power and bore no resemblance to the chain operations that gave rise to the Act.²³ In addition, the Court’s opinion acknowledged that the original purpose of the Act was to protect

¹⁶ 126 S. Ct. 860 (2006).

¹⁷ *Id.* at 866.

¹⁸ *Id.* at 860, 866-67.

¹⁹ *Id.* at 867-68, 871-72.

²⁰ *Id.* at 869-72.

²¹ *Id.* at 870-72.

²² *Id.* at 872.

²³ *Id.* at 873.

small retailers from powerful buyers, but that the courts should “resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*.”²⁴

Private parties, the Federal Trade Commission, and the Department of Justice may enforce the Robinson-Patman Act. The Act is enforced mainly through private treble-damage actions.²⁵ As a practical matter, the FTC is the only government enforcer of the Act; the Department of Justice has left civil enforcement of the Act to the FTC and has not enforced the criminal provisions since the 1960s.²⁶

During the first three decades after the Act’s passage, the FTC devoted “an overwhelming preponderance” of its antitrust resources to Robinson-Patman enforcement.²⁷ Beginning in 1969, however, the FTC sharply contracted its Robinson-Patman Act enforcement efforts.²⁸ While the FTC undertook an average of 97 formal investigations and issued an average of 27 complaints annually during 1965-68; the FTC averaged only 4.3 formal investigations and 3 complaints annually from 1975 to 1978.²⁹ Enforcement has continued to decline—the FTC issued only one complaint from 1992 to 2000.³⁰

²⁴ *Id.* at 872; *see also infra* note 56.

²⁵ Robinson-Patman Primer, at 19; *Antitrust Law Developments V*, at 456.

²⁶ *Antitrust Law Developments V*, at 456, 522-23; *see, e.g.*, William Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *Antitrust L.J.* 377, 410 n.108 (2003) (Kovacic, *Evolution*).

²⁷ *ABA Monograph No. 4, Vol. I*, at 2-3.

²⁸ Business Roundtable Comments, at 17-18; Antitrust Section, American Bar Association, *Comments Regarding the Robinson-Patman Act*, at 12 (April 10, 2006) (“ABA Comments re: Robinson-Patman”); Robinson-Patman Primer, at 19 (enforcement by the Federal Trade Commission has declined substantially in recent years).

²⁹ *ABA Monograph No. 4, Vol. I*, at 41 n.158; *Recent Efforts to Amend or Repeal the Robinson-Patman Act: A Report of the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the House Comm. on Small Business*, 94th Cong., 2d Sess., H.R. Rep. No. 94-1738, at 127 (1976) (“*Small Business Committee Report*”).

³⁰ Kovacic, *Evolution*, at 410, Table 1 (citing CCH Trade Regulation Reporter looseleaf service and transfer binders on FTC Complaints, Orders, Stipulations for 1961 through 2000).

The Commission's last Robinson-Patman case was brought in 2000 against McCormick & Co.³¹ In that case, McCormick was alleged to have granted discounts to large supermarkets, partly in the form of up-front shelf allocation payments (or "slotting allowances"), without making comparable payments available to other chains and independents.³² By a three-to-two vote, the Commission accepted a consent decree enjoining this conduct.³³ The majority argued that, while the *Morton Salt* presumption is "appropriate and dispositive" in some circumstances, "it makes sense for the . . . Commission and Courts, in the process of considering whether there has been a violation, to look past the *Morton Salt* factors to a broader range of market conditions to determine whether there has been real injury to competition."³⁴ Based on such an inquiry, it found "that there was injury not just to disfavored buyers, but to secondary-line competition generally."³⁵ The dissent complained that the majority's analysis still left Robinson-Patman violations too easy to prove.³⁶

Private litigation under the Act has also fallen. In 2004, there were ten circuit decisions and 22 district decisions that included discussions of Robinson-Patman Act claims; the corresponding numbers for 2003 were nine circuit court decisions and 22 district court

³¹ *McCormick & Co.*, FTC File No. 961-0050, Trade Reg. Rep. (CCH) ¶ 24,711 (Mar. 8, 2000) (Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson) at 1 ("*McCormick* Statement"); see also Denise L. Diaz & Robert A. Skitol, *Vertical Law Reform: Fertile Ground for a New Antitrust Modernization Commission*, 18 FALL-Antitrust 60, 63 n.40 (2003) (*McCormick* was "the first enforcement action brought by the Commission in ten years").

³² *McCormick* Statement, at 1.

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *McCormick & Co.*, FTC File No. 961-0050, Trade Reg. Rep. (CCH) ¶ 24,711 (Mar. 8, 2000) (Dissenting Statement Of Commissioners Orson Swindle and Thomas B. Leary).

decisions.³⁷ Several panelists opined that the amount of Robinson-Patman litigation has decreased significantly over time, in part as a result of more restrictive judicial decisions, such as those requiring plaintiffs to prove actual damages.³⁸

Criticism of the Act has been widespread, coming from government and bar association task forces, legal scholars, economists, and businessmen, many of whom have viewed the Act as “inconsistent with basic competition policy, distributive efficiencies, and marketplace realities.”³⁹ Indeed, as one critic has observed, “[v]ery few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act.”⁴⁰ Particularly since the *Brooke Group* decision, reform efforts have focused on secondary line liability issues.

The leading critiques proposing reform include:

- *1955 Attorney General’s Report*⁴¹ The 1955 Attorney General’s Report expressed concern over “the collisions between the Robinson-Patman Act and the philosophy underlying the Sherman and Clayton Acts,” and advocated

³⁷ Trans. at 12 (Hovenkamp); Herbert Hovenkamp, Antitrust Modernization Commission: Testimony on the Robinson-Patman Act, at 1-2 (“Hovenkamp Statement”). (Professor Hovenkamp developed these data through Westlaw searches.)

³⁸ Trans. at 11 (Hovenkamp); Trans. at 54-55 (Spiva); Trans. at 38 (Saferstein) (Supreme Court’s decision in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), has had a major impact on private litigation, because it held that a plaintiff “must prove actual lost sales, actual damages”); see also *J. Truett Payne Co.*, 451 U.S. at 562 (a Robinson-Patman plaintiff is not entitled to “automatic damages” equal to the amount of the discrimination, but rather “ordinarily must show that it lost customers or profits because the favored customer used the discount either to lower its resale price or otherwise to solicit business”); *Antitrust Law Developments V*, at 520.

³⁹ *ABA Monograph No. 4, Vol. I*, at 1; see generally Department of Justice, Antitrust Division, *Report on the Robinson-Patman Act* (1977) (“1977 Department of Justice Report”); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 130 n.15 (2000) (citing reports and academics critical of the Act) (“Hovenkamp, *Unfinished Business*”).

⁴⁰ Hovenkamp, *Unfinished Business*, at 130.

⁴¹ *Report of the Attorney General’s National Committee to Study the Antitrust Laws* (1955) (“1955 Attorney General’s Report”).

“accommodating all legal restrictions on the distribution process to dominant Sherman Act policies.”⁴² It made extensive suggestions for legislative changes or revised interpretations of the Act.⁴³

- *The Neal Report*⁴⁴ The Neal Report found that the Act impeded price reductions and efficient distribution, emphasizing that “[m]ost price discrimination is affirmatively beneficial to competition” and that the instances in which price discrimination harms competition “are exceptions.”⁴⁵ It advocated a “major overhaul” of the Act through legislative changes throughout the Act.⁴⁶
- *1977 Justice Department Report*⁴⁷ Based on extensive study and hearings, in 1977 the Justice Department issued a lengthy and thoroughly negative assessment of the Robinson-Patman Act, concluding that the Act is ineffective in achieving its claimed benefits and that any benefits are far outweighed by its high cost to society.⁴⁸ In particular, the Report found that the Act did little to protect small business, but reduced price flexibility and inhibited efficient distribution.⁴⁹ The Report concluded that “serious consideration” should be given to repealing the Robinson-Patman Act and Section 2 of the Clayton Act,⁵⁰ and presented draft legislative options.⁵¹

II. Discussion of Issues

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

Many proponents of the Robinson-Patman Act maintain that the Act “levels the playing field” for smaller businesses by prohibiting unfair or unjustifiable discrimination in pricing.⁵²

The Supreme Court’s decisions concerning the Act have generally acknowledged this purpose:

⁴² *Id.* at 131.

⁴³ *Id.* at 155-221.

⁴⁴ *Report of the White House Task Force on Antitrust Policy*, reprinted in 2 *Antitrust L. & Econ. Rev.* 1 (1968-69) (“*Neal Report*”).

⁴⁵ *Neal Report*, at 13, 17, 40-44.

⁴⁶ *Id.*, at 41.

⁴⁷ *1977 Department of Justice Report*.

⁴⁸ *Id.* at 251-69.

⁴⁹ *Id.* at 37-100.

⁵⁰ *Id.* at 260-62.

⁵¹ *Id.* at 261-62, 272-93.

⁵² *See House Committee on Small Business, H.R. Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, Recent Efforts to Amend or Repeal the Robinson-Patman Act*, at 4 (1975-76) (Chairman Hon. Joe L. Evins) (the

The legislative history of the Robinson-Patman Act makes it abundantly clear that the Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages⁵³

In the view of many of the Act's detractors, however, this objective conflicts with the consumer welfare or social welfare focus that has come to be regarded as the dominant paradigm for interpreting all the other antitrust laws, and that calls for protecting competition rather than particular competitors.⁵⁴ The Supreme Court has also expressed concern regarding this conflict, repeatedly admonishing that the Act should be construed "consistently with broader policies of the antitrust laws."⁵⁵ Both the Court's endorsement of the underlying purpose of the Act claimed by proponents, and its desire to avoid the conflict with the policies of the other antitrust laws criticized by opponents, was evident in its recent *Volvo* decision.⁵⁶

"purpose of this subcommittee is to look and see that it is enforced in the interests of small business of this Nation."); Statement of J.H. Campbell, Jr., on Behalf of the National Grocers Association, Before the Antitrust Modernization Commission on the Robinson-Patman Act, at 12 (July 28, 2005) ("Campbell Statement") ("Robinson-Patman is the only significant restraint in our antitrust laws on the ability of power buyers to obtain preferential treatment. . .").

⁵³ *Morton Salt*, at 43. The Court declared that "the more immediately important concern is in injury to the competitor victimized by the discrimination," although it also indicated that this would protect competition by "catch[ing] the weed in the seed." *Id.* at 49 n.18 (citing S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936)).

⁵⁴ See, e.g., Hovenkamp, *Unfinished Business*, at 143-44 (arguing that the other antitrust laws have been judicially revised and that judicial recognition of a "true injury to competition" requirement would "show some fidelity to the statute's language and its legislative history"); *1955 Attorney General's Report*, at 131-32. As noted above, after *Brooke Group*, the standards applicable to primary line Robinson-Patman claims are similar to those applying to Sherman Act claims.

⁵⁵ *Volvo*, 126 S. Ct. at 873 (quoting *Brooke Group*, 509 U.S. 209, 220 (1993)).

⁵⁶ Compare *Volvo*, 126 S. Ct. at 872 (The Court "would resist interpretation [of the Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*") with *id.* at 869 ("Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.").

B. What are the benefits and costs of the Robinson-Patman Act as currently enforced? Does the Robinson-Patman Act promote or reduce competition and consumer welfare? If so, how? What other benefits does it afford or costs does it impose, if any?

As described below, commentators differ sharply in their assessments of the costs and benefits of the Robinson-Patman Act. In general, assessment of the effects of the Act's enforcement have been based largely on anecdotal evidence and informed judgments about the way in which markets operate, rather than on systematically collected empirical evidence, which appears to be extremely limited.⁵⁷ For example, it is difficult to estimate the costs and benefits arising out of conduct that has been deterred.⁵⁸ The Commission did not receive any empirical data in response to its request for public comment on the costs and benefits of RPA enforcement.

Benefits

- The main benefits claimed for the Robinson-Patman Act flow from its purpose of protecting small business.⁵⁹ The Act ensures equality of competitive opportunity and preserves small business by preventing power buyers from obtaining unjustified preferences. By protecting small business, the Act benefits

⁵⁷ Trans. at 17-18 (Saferstein) (explaining that he “tends to believe anecdotally” that the Act has negative effects, but wondered “how . . . it really works in practice” and expressing concern that we may not “know enough to take major action”); Trans. at 54 (Spiva) (“we really have no idea what types of costs [the Act] imposes, if any, on sellers”); *Federal Antitrust Policy: Implications for Small Business, Hearing Before the Committee on Small Business United States Senate* at 68-71 (1981) (assessments of the Act “do[] not come from a clear body of empirical evidence—in fact, the true net effects of Robinson-Patman have not, as far as I am aware, been the subject of much solid empirical work”) (In response to Hon. Lowell Weicker Jr.’s Questions of James C. Miller III); *see also 1977 Department of Justice Report*, at 37-38 (describing the lack of empirical studies and difficulty of obtaining data to assess the Act’s impact). *See* pp. 18-20 below for a brief discussion of the economics literature.

⁵⁸ F.M. Scherer, *Industrial Market Structure and Economic Performance* 580-81 (2d ed. 1980) (difficulty of determining what behavior would be in the absence of the Act) (“Scherer, *Industrial Market Structure*”); *1977 Department of Justice Report*, at 37-39 (describing difficulties of measuring Act’s impact).

⁵⁹ *See Hearings Before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business, Recent Efforts to Amend or Repeal the Robinson-Patman Act*, 94th Cong. 4 (1975-76) (Chairman, Hon. Joe L. Evins) (the “purpose of this subcommittee is to look and see that it is enforced in the interests of small business of this Nation”).

consumers, decreases concentration, increases consumer choice, and promotes efficiency.⁶⁰

- The Act protects equal competitive opportunity for all firms by ensuring a level competitive playing field.⁶¹ The “Act basically provides for equality of opportunity among competing customers A simple moral code.”⁶²
- By preventing unfair preferences, the Act can promote efficiency. For example, the provision of discounts based solely on market power of the recipient is not likely to serve the consumer interest or efficiency.⁶³ Thus discrimination that is unjustified by considerations of cost differences or efficiency should not be permitted.⁶⁴ As a result, despite critics’ claims to the contrary, the Act does not promote inefficient distribution.⁶⁵
- By protecting competitive equality, the Act protects and promotes small firms.⁶⁶

⁶⁰ Critics of the Act maintain that it does not benefit small firms in practice, as asserted by proponents. The Act imposes greater burdens on small firms than on large ones, since it costs small firms more to adjust to the requirements. Moreover, Robinson-Patman enforcement, particularly FTC complaints, appears to be mainly aimed at small business. Professor Scherer concluded that “the brunt of the Commission’s enforcement effort fell upon the small businesses Congress sought to protect,” after analyzing respondents in FTC Robinson-Patman proceedings. Scherer, *Industrial Market Structure*, at 580-82; *1977 Department of Justice Report*, at 97-99; *see also 1977 Department of Justice Report*, at 169-209.

⁶¹ The American Antitrust Institute, *Robinson-Patman Should be Reformed, Not Repealed*, Comments of the American Antitrust Institute Working Group on the Robinson-Patman Act, at 12 (July 1, 2005) (“AAI Comments”); ABA Comments re: Robinson-Patman, at 10; *ABA Monograph No. 4, Vol I*, at 22-24.

⁶² *Hearings before the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business*, 94th Cong., at 260, 262 (1976) (testimony of Earl W. Kinter). Some emphasize that this equality be ensured not simply with respect to the price that is paid, but also with regard to other important terms, including packaging, promotional allowances, payment terms, and product availability. *See Campbell Statement*, at 8; *Trans.* at 52, 74-75, 87-88 (Campbell).

⁶³ *Small Business Committee Report*, at 119.

⁶⁴ *ABA Monograph No. 4, Vol. I*, at 23.

⁶⁵ *Campbell Statement*, at 12.

⁶⁶ *Small Business Committee Report*, at 10 (quoting Small Business Act, Sec. 2(a), 15 U.S.C. § 631(a)). One witness testified in detail how the Act protected small retailers in one industry. *Trans.* at 39-43 (Spiva); Bruce V. Spiva, Comments of the American Booksellers Association to the Antitrust Modernization Commission, Robinson-Patman Act Panel (July 28, 2005) at 2, 3-11 (“Spiva Statement”) (“Flaws in the Robinson-Patman Act contribute to the inability of independent bookstores to obtain a completely level playing field, but despite its flaws, the existing Act has at least limited the unfair price advantages enjoyed by large retailers.”).

- By leveling the field for small business, the Act can also “improve consumer welfare in many situations.”⁶⁷
- Several specific ways in which consumers benefit are:
 - ▶ By protecting small firms, the Act prevents large firms from using unequal concessions to eliminate small rivals and thereby increase concentration or monopoly in distribution.⁶⁸ As AAI observed, unjustified discriminations “may lead to *higher* consumer prices” if used to “acquire[] market power as a seller.”⁶⁹
 - ▶ Preserving small firms can also offer advantages to consumers by expanding available choices, including “convenient locations, distinctive services, [and] superior selection.”⁷⁰
 - ▶ Protecting small firms can provide important social benefits, such as “desirable countervailing” political influence.⁷¹
- The Act does not result in higher prices for consumers. Far from increasing prices and decreasing entry, the Act reduces prices by ensuring there are sufficient competing options.⁷²
- The defenses afforded by the Act, particularly the cost justification and meeting competition defenses, protect most procompetitive price differentials.⁷³

⁶⁷ AAI Comments, at 7; *ABA Monograph No. 4, Vol. I*, at 23-24; *Small Business Committee Report*, at 120 (“strict enforcement of the Robinson-Patman Act” not only protects small business “but is also in the interests of consumers”); *see also Regulations of Various Federal Regulatory Agencies and Their Effect on Small Business, pt. 1, Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Committee on Small Business House of Representatives*, 94th Cong. 138 (1975) (quoting Joe Sims, Special Assistant to the Attorney General (recognizing “a significant parallel between the goal of fostering opportunities for small business and our responsibility to preserve competition and free markets”)).

⁶⁸ *ABA Monograph No. 4, Vol. I*, at 26; *1977 Department of Justice Report*, at 146, 148.

⁶⁹ AAI Comments, at 13-14; *see also* Campbell Statement, at 4.

⁷⁰ Campbell Statement, at 10, 12; AAI Comments, at 13-14.

⁷¹ *ABA Monograph No. 4, Vol. I*, at 24. Mr. Spiva declared that, in the case of booksellers, a significant narrowing of the Act would have a “disastrous effect on the dissemination of culture and ideas in America.” Trans. at 22 (Spiva).

⁷² Mr. Spiva reported that, in the case of book selling, the margins are higher for large chains, and Mr. Campbell reported that his experience is that prices rise where there are “fewer” but “larger” retail competitors. Trans. at 44 (Spiva); Trans. at 46 (Campbell).

⁷³ *ABA Monograph No. 4, Vol. I*, at 26; *see also* Trans. at 38-40 (Spiva) (emphasizing effectiveness of cost justification and meeting competition defenses; AAI Comments, at 10-11 (meeting competition defense limits the Act’s anticompetitive consequences)).

- The total litigation costs imposed by government enforcement and private actions in recent years appear to have been relatively small, according to available data.⁷⁴

Costs

- The Act imposes substantial legal costs (particularly compliance costs), inhibits pricing flexibility (thereby leading to higher prices), and prevents parties from adopting efficient distribution practices.⁷⁵
- The legal costs imposed by the Act include the costs of litigating Robinson-Patman cases, compliance efforts, and counseling. The costs of compliance with the Act, including developing and operating compliance systems, training personnel, and obtaining legal advice, are believed to be substantial.⁷⁶ For example, there is typically strong interest shown in Robinson-Patman CLE programs and instructional publications.⁷⁷ (However, systematic information about Robinson-Patman compliance costs is generally lacking, and defenders of the Act further point out that the compliance burdens may be exaggerated.⁷⁸)
- Pricing flexibility, and particularly selective price discounting, plays a key role in defeating anticompetitive oligopolistic pricing and benefiting consumers.⁷⁹ The Act inhibits pricing flexibility, and thereby deters procompetitive pricing and promotes oligopolistic conduct.⁸⁰ Moreover, it “creates an overwhelming legal

⁷⁴ See pp. 7-9, above.

⁷⁵ 1977 *Department of Justice Report*, at 169, 250, 260; see also *id.* at 99-100 (listing a wide variety of costs of the Act).

⁷⁶ Chamber of Commerce of the United States of America, Comments on Commission Issues Accepted for Study, at 24 (Nov. 8, 2005) (“U.S. Chamber of Commerce Comments”) (noting “reports that entire departments have been established simply to track and process the information necessary to document compliance with the [meeting competition] defense”); Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, at 17 (Nov. 4, 2005) (“Business Roundtable Comments”) (the Act results in “substantial costs on businesses as they educate employees in R-P Act compliance”).

⁷⁷ The Robinson-Patman portion of the Practising Law Institute’s major antitrust programs is “typically attended by at high number of in-house counsel.” Harvey I. Saferstein, *Now That It Is Almost 70 Years Old, What Do We Do With The Robinson-Patman Act?*, at 4 (July 28, 2005) (“Saferstein Statement”). The Robinson-Patman Primer is typically one of the Antitrust Section’s most popular publications. Trans. at 31 (Saferstein).

⁷⁸ ABA Comments re: Robinson-Patman, at 11-12 (observing that some argue that paperwork costs might be incurred in any event, and might be reduced due to the introduction of computers and the Internet).

⁷⁹ *Neal Report*, at 40; see also 1977 *Department of Justice Report*, at 44-58.

⁸⁰ Mr. Saferstein argued that the Act imposes “serious costs in terms of encouraging price rigidity.” Saferstein Statement, at 4; ABA Comments re: Robinson-Patman, at 7-8; see also 1977 *Department of Justice Report*, at 35-74; *ABA Monograph No. 4, Vol. I*, at 27-31; *Neal Report*, at 40-41.

barrier” to selective price adjustments.⁸¹ The buyer liability provision inhibits buyers from seeking lower prices.⁸²

- ▶ The cost justification and meeting competition defenses do little to mitigate the Act’s harms, in part because they are limited in scope, and especially because hostile judicial and agency interpretations have made them “impractical and thus unavailable.”⁸³
- ▶ Proponents of reform argue that the Act was intended to protect inefficient small operators from more efficient competitors—“low prices, not discriminatory prices, are the chief ‘evil’ condemned by the Act.”⁸⁴
- Reduced price flexibility may inhibit firm entry or expansion, since an entrant may need to undercut prices charged by existing firms.⁸⁵ New entrants may find it important to reduce prices selectively to overcome existing commercial relationships, especially where entry requires winning one or more large accounts.⁸⁶
- By restricting selective discounts, brokerage payments to customers, and promotional allowances, the Act also inhibits firms from adopting more efficient distribution arrangements, especially where distribution systems are complex and functions are overlapping.⁸⁷

⁸¹ 1977 *Department of Justice Report*, at 35-36. Even selective price discounts that would not violate the Act are discouraged due to the “extreme pricing caution” instilled by the Act. *See id.* at 40; *see also* 1955 *Attorney General’s Report*, at 131. Compliance with the Act has been cited by parties as an excuse for anticompetitive information exchanges. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

⁸² 1977 *Department of Justice Report*, at 32-33 (“The buyer liability provision . . . strikes at a process which is fundamental to a competitive market: the process by which each buyer negotiates for itself the best possible price.”). However, Professor Hovenkamp argued that the Supreme Court’s interpretation of Section 2(f) has made buyer liability “almost impossible to prove.” *Trans.* at 12 (Hovenkamp); *see also* ABA Comments re: Robinson-Patman, at 11 (defenders of the Act also contend that buyer liability is “virtually impossible to prove”).

⁸³ They claim that the cost justification defense, as interpreted, imposes “almost insurmountable” burdens, while the complex issues associated with the meeting competition defense almost requires “a salesman . . . to become a lawyer.” 1977 *Department of Justice Report*, at 27; *see also* ABA *Monograph No. 4, Vol. I*, at 3; 1977 *Department of Justice Report*, at 18-27.

⁸⁴ ABA Comments re: Robinson-Patman, at 4.

⁸⁵ 1977 *Department of Justice Report*, at 70-74; ABA Comments re: Robinson-Patman, at 8.

⁸⁶ *See, e.g., Neal Report*, at 40; ABA *Monograph No. 4, Vol. I*, at 30-31.

⁸⁷ *See, e.g.,* ABA Comments re: Robinson-Patman, at 8-9; ABA *Monograph No. 4, Vol. I*, at 31-32; *Neal Report*, at 40-41 (restrictions on experimentation discourages more efficient arrangements and protects independent brokers).

- ▶ The Act can thwart efficient distribution arrangements, *e.g.*, by interfering with compensation for brokers services, complicating dual distribution arrangements, burdening buyer cooperatives, impeding arrangements to limit empty backhauls, and increasing uncertainty.⁸⁸
 - ▶ The Act can be used to challenge vertical intrabrand activity that is normally lawful under the Sherman Act.⁸⁹
 - ▶ The Act “imposes significant costs on manufacturers who depend on networks of independent dealers,” and it makes it “costly for a firm to reward its more aggressive dealers or invest more resources in them.”⁹⁰
 - ▶ Firms incur higher costs to avoid application of the Act, for example through inefficient product differentiation, or may cut off small distributors to avoid potential liability.⁹¹
- While in limited circumstances the Act can inhibit anticompetitive conduct by powerful buyers, the other antitrust laws provide sufficient protection against such anticompetitive conduct.⁹²

Economic Assessments of the Impact of the Act

A number of leading industrial organizational texts describe most economists as viewing the Act as having anticompetitive consequences:

⁸⁸ 1977 *Department of Justice Report*, at 75-99; *see also ABA Monograph No. 4, Vol. I*, at 31-32.

⁸⁹ ABA Comments re: Robinson-Patman, at 6.

⁹⁰ Hovenkamp Statement, at 1.

⁹¹ *See ABA Monograph No. 4, Vol. I*, at 32-33; 1977 *Department of Justice Report*, at 75-79; ABA Comments re: Robinson-Patman, at 10. Mr. Saferstein argued that firms change the manner in which they market in order to comply with the Act, for example, using bulk packaging. Trans. at 31-32 (Saferstein).

⁹² Hovenkamp Statement, at 2; Trans. at 23-24 (Hovenkamp); ABA Comments re: Robinson-Patman, at 7; 1977 *Department of Justice Report*, at 250; *ABA Monograph No. 4, Vol. I*, at 33-35.

Defenders of the Act respond by emphasizing importance of preventing large retailers from using their size to obtain unjustified price concessions, and argue that the Act is uniquely suited to serve this goal, even in the absence of proof that the conduct has anticompetitive effects. In Mr. Campbell’s view, “The Robinson-Patman Act is the only federal antitrust law that focuses on pricing fairness among competing resellers, and determining Robinson-Patman violations under other federal laws would be extremely difficult, if not impossible.” Campbell Statement, at 12; *see also* Trans. at 25-26 (Spiva) (Robinson-Patman protects against real harms that may result even where injury to competition cannot be shown).

- The Robinson-Patman Act “is generally viewed as an economically harmful law,”⁹³ and “is generally an anticompetitive law.”⁹⁴
- “The [Robinson-Patman] Act has been universally condemned by economists for focusing on the protection of competitors rather than on competition, and for condemning *price differences* rather than making any attempt to identify true price discrimination.”⁹⁵
- “If [the Robinson-Patman Act] has not reduced the vigor of competition in American industry, credit must go more to the resilience of the forces of competition than to the [A]ct itself or its enforcement.”⁹⁶

Economists recognize that price discrimination directed at ultimate consumers can have beneficial or harmful impacts, depending on the circumstances,⁹⁷ but many find the Act unlikely to be useful in protecting welfare, and a few particular analyses find the Act harmful on balance.⁹⁸

⁹³ W. Kip Viscusi, John M. Vernon & Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* 65 (3d ed., 2000) (“Viscusi, *Economics*”).

⁹⁴ Viscusi, *Economics*, at 292.

⁹⁵ Jeffrey Church & Roger Ware, *Industrial Organization: A Strategic Approach* 177 (2000).

⁹⁶ F. M. Scherer & David Ross, *Industrial Market Structure and Economic Performance*, 515 (3d ed. 1990) (footnote omitted).

⁹⁷ Viscusi, *Economics*, at 284-90; Marius Schwartz, *Third-Degree Price Discrimination and Output: Generalizing a Welfare Result*, 80 *Amer. Econ. Rev.* 1259-62 (1990); Hal R. Varian, *Price Discrimination*, in 1 *Handbook of Industrial Organization* 617-23 (Richard Schmalensee & Robert D. Willig eds., 1989). However, this analysis may be of limited relevance in assessing the impact of price discrimination practices when the discriminations at issue are directed towards intermediate suppliers, like the wholesalers and retailers protected by the Robinson-Patman Act. See Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 *Amer. Econ. Rev.* 154 (1987).

⁹⁸ Daniel P. O’Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 *J.L. Econ. & Org.* 296 (1994) (finding that “forbidding discriminatory discounts renders retailer bargaining power useless in mitigating manufacturer market power” so that “all retail prices rise” and welfare losses are “substantial”); see also Thomas W. Ross, *The Costs of Regulating Price Differences*, 59 *J. Bus.* 143 (1986) (prohibitions on discrimination may cause firm to adopt policies that do not minimize costs); John L. Peterman, *The Morton and International Salt Cases: Discounts on Sales of Table Salt*, 21 *Res. L. & Econ.* 127 (2004) (studying two leading Robinson-Patman cases and questioning the utility of those enforcement actions).

- “The difficulty is to distinguish in practice between [beneficial] discrimination and systematic discrimination practiced by an entrenched monopolist that may be harmful. Hence, laws against price discrimination are difficult to write and enforce if they are to promote competition.”⁹⁹
 - Although the ability to persistently charge discriminatory prices has been taken as a possible sign of market power,¹⁰⁰ a substantial economics literature has recently developed showing that price discrimination often arises in industries characterized by competitive conditions.¹⁰¹
 - Some witnesses at the AMC hearing testified that the margins of “power” buyers exceed those of smaller retailers, and that their entry leads to higher prices.¹⁰² There is no systematic evidence comparing the gross margins of power buyers with those of other retailers selling the same good. Available research, which focuses on Wal-Mart, concludes that for a range of drugstore and grocery products, the entry and the presence of large chains lowers prices.¹⁰³
- C. Should the Robinson-Patman Act be repealed or modified, or its interpretation by the courts altered?

AMC witnesses and commenters, as well as numerous previous reports and articles, have proposed repeal of the Robinson-Patman Act or other changes to limit or improve the Act in certain areas. In addition, the Commission received several proposals to enhance the Act and its enforcement. The following proposals for reform are described in this section.

⁹⁹ Viscusi, *Economics*, at 290.

¹⁰⁰ Richard A. Posner, *Antitrust Law* 80 (2d ed. 2001) (declaring that “[p]ersistent price discrimination can be evidence of monopoly because it is inconsistent with a competitive market,” but noting that economic price discrimination is not to be confused with the legal meaning of the price discrimination under the Robinson-Patman Act).

¹⁰¹ See *Symposium on Competitive Price Discrimination*, 70 *Antitrust L.J.* 593 (2003); James D. Dana, Jr., *Advance-Purchase Discounts and Price Discrimination in Competitive Markets*, 106 *J. Pol. Econ.* 395 (1998); Mark Armstrong & John Vickers, *Competitive Price Discrimination*, 32 *Rand J. Econ.* 579 (2001); Severin Borenstein & Nancy L. Rose, *Competition and Price Dispersion in the U.S. Airline Industry*, 102 *J. Pol. Econ.* 653 (1994); Severin Borenstein, *Price Discrimination in Free-Entry Markets*, 16 *Rand J. Econ.* 380 (1985).

¹⁰² Trans. at 43-46 (Spiva and Campbell).

¹⁰³ Emek Basker, *Selling a Cheaper Mousetrap: Wal-Mart’s Effect on Retail Prices*, 58 *J. Urban Econ.* 203 (2005); Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart* (Nat’l Bureau of Econ. Research Working Paper No. 11809, 2005).

1. Repeal the Robinson-Patman Act.
2. Repeal the criminal provisions of the Act.
3. Increase government enforcement of the Act.
4. Extend the Act to cover sales of services as well as of commodities.
5. Require that plaintiffs in Robinson-Patman cases make a showing of injury to competition similar to that required under the other antitrust laws.
6. Require that plaintiffs in Robinson-Patman cases establish “buyer power” on the part of the favored buyer.
7. Add a competitive injury requirement to Sections 2(d) and 2(e).
8. Repeal Section 2(c).
9. Permit defendants to establish a cost justification defense by showing that the preferential price was “reasonably related” to cost savings realized when dealing with the favored buyer.
10. FTC reconsideration of previous decisions and policies.

1. *Repeal of the Robinson-Patman Act*

Leading commentators and scholars have advocated complete repeal of the Act, citing its high costs and limited benefits, as described above. Others arguing for retention of the Act tout its benefits, and argue its claimed costs are overstated.

Pros

- The Act imposes substantial costs, by
 - ▶ Reducing pricing flexibility, leading to higher prices.
 - ▶ Inhibiting efficient distribution.
 - ▶ Inhibiting entry.
 - ▶ Requiring firms to incur compliance and litigation costs.
- The Act fails to provide significant benefits:
 - ▶ It is ineffective in protecting and benefiting small business.
 - ▶ The few competitive benefits that could be achieved through the Act could be achieved through the other antitrust laws.

Cons

- The Act promotes equality, protects small business, and benefits consumers.
- The Act provides important benefits, including
 - ▶ Ensuring equal competitive opportunity and the elimination of unfair preferences
 - ▶ Promoting efficient distributing by ensuring that discounts reflect efficiency.
 - ▶ Protecting small business, and thereby reducing concentration, and increasing consumer choice and diversity.
- The Act is the only protection small business has from buyer power; the other antitrust laws would not provide adequate protection.
- The alleged costs are exaggerated, unproven, and mitigated by the meeting competition and cost justification defenses.
- In light of Congress' longstanding refusal to amend the Act, advocating repeal or reforms approximating repeal would not be "fruitful or constructive."¹⁰⁴
- Congressional action might produce undesirable reforms, or even a "backlash of specific regulatory legislation" in Congress.¹⁰⁵
- Many states have laws similar to the Robinson-Patman Act, and also sector-specific restrictions.¹⁰⁶ If the Robinson-Patman Act were repealed, there is serious potential for plaintiffs to respond by bringing claims under currently underutilized state price discrimination laws.¹⁰⁷ In addition, there could be expansion of state law.¹⁰⁸ If the federal law is no longer available as a option for plaintiffs and guidepost for state law, price discrimination will be governed by divergent state laws, increasing compliance costs and potentially creating a "mess."¹⁰⁹

¹⁰⁴ AAI Comments, at 7.

¹⁰⁵ ABA Comments re: Robinson-Patman, at 13; Trans. at 49-50 (Saferstein).

¹⁰⁶ *Antitrust Law Developments V*, at 810 (a number of states have counterparts to the Robinson-Patman Act).

¹⁰⁷ At the Robinson-Patman Committee breakfast during the 2005 Antitrust Section Spring Meetings, this concern was raised by several panelists, including Professor Stephen Ross. The 2006 Spring Meeting Robinson-Patman Committee Breakfast featured a panel on state laws, described as "Sleeping Giants." See also ABA Comments re: Robinson-Patman, at 13 (noting concerns and suggesting that Congress would be unlikely to enact preemptive legislation).

¹⁰⁸ AAI Comments, at 16-17.

¹⁰⁹ See Saferstein Statement, at 2; Trans. at 49-50 (Saferstein) (observing that state court might be "unleashed" by repeal, resulting in "a bigger mess than you counted on"); AAI Comments, at 16-17 (repeal could "spur a populist backlash").

2. *Repeal the criminal provisions of the Act.*

Section 3 of the Robinson-Patman Act, which criminalizes certain violations of the Act, has long been viewed as an anachronism. It has seldom been prosecuted, and never in the past 40 years.¹¹⁰ Repeal of the criminal provisions of the Act has been advocated by numerous commentators.¹¹¹

Pros

- Repeal has the “near unanimous support in the antitrust community.”¹¹²
- Section 3 is “dangerous surplusage,” and its “enforcement ha[s] neither furthered the national interest nor realized the Congressional purpose.”¹¹³
- Elimination of the criminal provision would not likely have an adverse impact and could “eliminate the confusing inconsistencies between overlapping and redundant provisions.”¹¹⁴
- Section 3 of the Act “is completely defunct.”¹¹⁵

Cons

- No witness or commenter argued against repeal of the criminal provision.¹¹⁶

¹¹⁰ There have been a total of seven indictments for Section 3 violations, four resulting in acquittal, and no reported prosecutions since 1963. *See ABA Report to the House of Delegates #105*, at 8 (1987) (“*ABA Report 105*”). There have also been no prosecutions since the ABA Section Report. *See Hovenkamp Statement*, at 14.

¹¹¹ The *Neal Report* and *1955 Attorney General’s Report* both recommended that Section 3 be eliminated, and the draft reform statutes in the *1977 Department of Justice Report* excluded criminal liability. *Neal Report*, at 43-44; *1955 Attorney General’s Report*, at 201; *1977 Department of Justice Report*, at 272-85.

¹¹² ABA Comments re: Robinson-Patman, at 2.

¹¹³ *1955 Attorney General’s Report*, at 200-01.

¹¹⁴ *ABA Report 105*, at 9; ABA Comments re: Robinson-Patman, at 2.

¹¹⁵ Hovenkamp Statement, at 14-15 (advocating repeal of Section 3); *see also* Saferstein Statement, at 11 (same); AAI Comments, at 6; Chamber of Commerce Comments, at 25 (“the complex character of the RP Act does not lend itself to criminal sanctions”); Business Roundtable Comments, at 19 (pulling for repeal of the criminal provision).

¹¹⁶ Mr. Spiva and Mr. Campbell did not take a position. Trans. at 69 (Spiva and Campbell).

3. *Increase government enforcement of the Act.*

FTC enforcement of the Act had fallen dramatically in recent decades, as discussed above. Proponents of the Act argue that the FTC should “resume” or “fully and effectively enforce” the Act.¹¹⁷

Pros

- An agency should not fail to enforce the law just because it disagrees with it.¹¹⁸ Yet “[d]ecades have passed without any significant R-P enforcement activity by the FTC.”¹¹⁹

Cons

- Reallocation of FTC enforcement resources towards Robinson-Patman cases could result in reduction of other enforcement efforts that are more likely to benefit consumers.¹²⁰

4. *Extend the Act to cover sales of services as well as of commodities.*

Under current law, the Act’s coverage is restricted to “commodities,” which has been interpreted to mean “tangible” products, and to exclude services. This has resulted in distinctions regarding the Act’s coverage that are not entirely coherent. For example, certain products, such as towing and rail transportation have held to be services.¹²¹ Courts have reached

¹¹⁷ See, e.g., Campbell Statement, at 16; *Small Business Committee Report*, at 123; Trans. at 8 (Campbell); ABA Comments re: Robinson-Patman, at 12.

¹¹⁸ See, e.g., *Impact of Federal Antitrust Enforcement Policies on Small Business, Hearings Before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the Committee on Small Business House of Representatives, 97th Cong. 2-3 (1982)* (Opening Statement of Hon. Berkley Bedell) (“It certainly is not proper for [government enforcers], simply because they disagree with what Congress may have done, to decide that they are going to not enforce the laws that have been passed by the Congress.”).

¹¹⁹ Campbell Statement, at 16; *Small Business Committee Report*, at 23. Mr. Spiva described one FTC enforcement action against booksellers, which the FTC ultimately dropped. Trans. at 39-42 (Spiva); see also.

¹²⁰ See, e.g., Robert Pitofsky, *The Past, Present, and Future of Antitrust Enforcement at the FTC*, 72 U. Chi. L. Rev. 209, 212-13 (2005); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. Chi. L. Rev. 165, 167-68 (2005).

¹²¹ See *Antitrust Developments V*, at 469; *ABA Monograph No. 4, Vol. I*, at 52.

different conclusions on whether electricity is a commodity or a service.¹²² Furthermore, in mixed transactions, courts generally apply a “dominant nature of the transaction” test, under which tangible goods that are incidental to the provision of a service are not subject to the Act.¹²³ In light of the increasing importance of the service sector, some have argued that the Act should be extended to services.¹²⁴

Pros

- The restriction to commodities is “an irrational limitation.”¹²⁵
- Price discrimination in services can impose as much, or greater, harm than discrimination in the prices of goods.¹²⁶

Cons

- Insurmountable practical difficulties would arise in applying the requirement of like grade and quality to services provided by different suppliers.¹²⁷ Extending the Act’s coverage to services would raise a “litigation nightmare” over “collateral issues” such as like grade and quality.¹²⁸

¹²² *Antitrust Developments V*, at 469.

¹²³ *Antitrust Developments V*, at 470; *ABA Monograph No. 4, Vol. I*, at 52.

¹²⁴ *ABA Monograph No. 4, Vol. I*, at 53 (describing proposed 1957 amendment that would have provided that “‘commodities’ . . . shall include services, other than professional services, rendered by independent contractors” (quoting H.R. 8277, 85th Cong., 1st Sess., 103 Cong. Rec. 9898 (1957))). *See generally* Trans. at 44, 91-93 (discussion of whether services were sufficiently like commodities to warrant coverage under the Act).

¹²⁵ *ABA Monograph No. 4, Vol. I*, at 53 (quoting *Report of the White House Task Force on Antitrust Policy*, 411 *Antitrust & Trade Reg. Rep. (BNA) Pt. 2* (May 27, 1969) reprinted in 1 *J. Reprints Antitrust L. & Econ.* 633, 753-54 (1969) (“*Neal Report*”). The *Neal Report* called for the Act to include services in its coverage. *Id.*

¹²⁶ Campbell Statement, at 13-16 (services should be covered by the Act, for example, to address discrimination in the fees charged by VISA to retailers for credit card services, which can represent a large portion of the profit margin for retailers).

¹²⁷ *See, e.g., ABA Monograph No. 4, Vol. I*, at 53.

¹²⁸ Hovenkamp Statement, at 3. Similarly, Mr. Saferstein affirmed the utility of limiting the Act to commodities, citing “the difficulties of applying the act to services.” Saferstein Statement, at 11; Trans. at 36-37 (Saferstein). Mr. Spiva took no position. Trans. at 36 (Spiva).

- It makes little sense to extend an already inefficient provision to new areas.¹²⁹
5. *Require that plaintiffs in Robinson-Patman cases make a showing of injury to competition similar to that required under the other antitrust laws.*

Many commentators and leading reports have advocated that the Act be interpreted to focus on injury to competition, not competitors.¹³⁰ There are several ways in which the Robinson-Patman Act could be reformed to require a showing that the alleged discrimination imposes an injury to competition similar to that required in Sherman Act cases. The AMC's *Federal Register* notice sought comment on two of those:

- i. Interpreting the statute as prohibiting only those discriminations that injured competition in a market (and not permit them to meet this requirement, *e.g.*, through the *Morton Salt* inference).
- ii. Requiring plaintiffs to establish such injury to competition as part of meeting the antitrust injury requirement.¹³¹

Several witnesses and commenters argued that these either of these options would likely have essentially equivalent results, and would greatly reduce or eliminate the ability of plaintiffs to bring Robinson-Patman actions.

Pros

- These approaches would “go some distance” and shrink the scope of the Robinson-Patman Act to be similar to that of the Sherman Act.¹³²

¹²⁹ Hovenkamp Statement, at 3.

¹³⁰ *1955 Attorney General's Report*, at 165 (advocating “that analysis of the statutory ‘injury’ center on the vigor of competition in the market rather than hardship to individual businessmen,” though one member dissented); *Neal Report*, at 42 (“The proper focus is on the effect of competition in the market as a whole.”).

¹³¹ 70 Fed. Reg. 28,902, 28,904 (May 19, 2005).

¹³² Trans. at 11-12, 53 (Hovenkamp). Prof. Hovenkamp presented a proposed amendment to the Act designed to “approximately restore . . . the statute to its original 1914 language” and impose a standard of proof of injury to competition similar to that required under Section 7 of the Clayton Act. Hovenkamp Statement, at 12-13. Overall, he maintained that this was a “distinctly ‘second best’” solution compared to repeal. Hovenkamp Statement, at 6.

- The other pros cited in support of eliminating the Robinson-Patman Act also apply to these proposals.

Cons

- “[R]equiring that the plaintiff in a Robinson-Patman case prove a full-blown competitive injury case would be a *de facto* repeal of the Act.”¹³³
- The other cons cited in opposition to a full repeal of the Robinson-Patman Act also apply to these proposals.
- Adoption of an injury to competition requirement would directly conflict with the clear language and legislative history of the Act, as well as its consistent interpretation by the Supreme Court.¹³⁴

One method of implementing this change is a legislative modification of the Robinson-Patman Act that would explicitly impose a requirement of showing competitive injury, as described above.¹³⁵

Some witnesses and commenters proposed, instead, to encourage courts to revisit and possibly revise the *Morton Salt* ruling. They make the following arguments supporting the approach of allowing the courts to develop the law.

- The language and legislative history of the Robinson-Patman Act should not be an impediment to judicial reinterpretation of the Act. The interpretation of the Sherman and Clayton Acts have undergone “a great deal of revisionism,” making

¹³³ Trans. at 16 (Saferstein); *see also* AAI Comments, at 7 (opposing adding an injury to competition requirement).

¹³⁴ *Morton Salt*, 334 U.S. at 43. The Court declared that “the more immediately important concern is in injury to the competitor victimized by the discrimination,” although it also indicated that this would protect competition by “catch[ing] the weed in the seed.” *Id.* at 49 n.18 (citing S. Rep. No. 74-1502, at 4 (1936)). The Supreme Court recently reaffirmed the Act’s focus on protecting small firms from power buyers: “Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.” *Volvo*, 126 S. Ct. at 869.

¹³⁵ Professor Hovenkamp included draft legislative language to implement this reform in his statement. *See* Hovenkamp Statement, at 12-14.

them more consistent with the overall goal of promoting competition; the courts should not be reluctant to treat the Robinson-Patman Act likewise.¹³⁶

- The Supreme Court has frequently stressed the importance of construing the Act “consistently with the broad policies of the antitrust laws,” most recently in the *Volvo* case where it also Supreme Court specifically emphasized the importance of “resisting interpretations geared more to the protection of existing competitors than to the stimulation of competition.”¹³⁷
- The Court’s 1993 decision in *Brooke Group*, holding that Sherman Act standards should be applied in a primary line predatory pricing case brought under the Robinson-Patman Act, should be extended to secondary-line cases.¹³⁸
- Courts can and should be less ready to infer that a competitor has been injured by discriminatory pricing, limiting such inferences to proper cases.¹³⁹

Others argue that the courts should not revise the *Morton Salt* presumption, since it is a longstanding Supreme Court precedent that correctly implements the language and purpose of the Act to protect small retailers:

- The Supreme Court has consistently articulated this view of the Act’s purpose.¹⁴⁰

¹³⁶ Hovenkamp, *Unfinished Business*, at 132.

¹³⁷ *Volvo*, 126 S. Ct. at 872-73.

¹³⁸ *Brooke Group*, 509 U.S. at 221 (claim of “primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes under § 2 of the Sherman Act”); Hovenkamp Statement, at 3; Trans. at 23-24 (Hovenkamp); Hovenkamp, *Unfinished Business*, at 143-44. *But cf.* Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save it, Let It Go*, 48 Emory L.J. 1057, 1081-93 (1999) (“Gavil, *Secondary Line Price Discrimination*”) (arguing that *Brooke Group* has rightly not been extended to secondary line cases). *See generally ABA Monograph No. 4, Vol. I*, at 97-102.

¹³⁹ Professor Gavil has proposed an alternate judicial revision, based on his view that the *Morton Salt* inference has two components—inferring injury to a competitor from a discrimination in price, and inferring injury to competition from injury to a competitor. Gavil, *Secondary Line Price Discrimination*, at 1123. He argues that the latter component is not subject to judicial revision, but that courts can and should be less ready to infer that a competitor has been injured by discriminatory pricing.

¹⁴⁰ *See, e.g., Volvo*, 126 S. Ct. at 869 (“Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.”); *see also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983) (refusing to limit the *Morton Salt* inference to preferences involving

- Lower courts since *Brooke Group* have continued to follow *Morton Salt*.¹⁴¹
6. *Require that plaintiffs in Robinson-Patman cases establish “buyer power” on the part of the favored buyer.*

Although the Robinson-Patman Act was intended to protect small retailers from the exercise of power by large retailers, some have questioned whether the Act has lost this focus. For example, they suggest that the Act may not protect small businesses, and may instead harm them.¹⁴² In particular, there have been few cases against large buyers or their suppliers.¹⁴³

The term “buyer power” has been defined in various ways to reflect different levels of power on the part of large purchasers. Some define “buyer power” as the ability of a large retailer to use buyer power to produce anticompetitive consequences in a market.¹⁴⁴ Others define the term to mean the ability of a large purchaser to obtain discriminatory price concessions from suppliers that are not justified by cost differences.¹⁴⁵

large buyers and noting that “[t]he determination whether to alter the scope of the Act must be made by Congress”).

¹⁴¹ See *Antitrust Law Developments V*, at 478-81 (reviewing cases interpreting the competitive injury requirement generally and discussing the impact of *Brooke Group* specifically); see, e.g., *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 657 (9th Cir. 1997) (stating that the Act’s language “expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination” and holding that the *Morton Salt* inference cannot be overcome by evidence that there was no harm to competition).

¹⁴² See *supra* note 60.

¹⁴³ AAI Comments, at 11.

¹⁴⁴ See, e.g., Hovenkamp Statement, at 4, 9; Trans. at 60-63 (Hovenkamp) (buyer power can harm consumers in two circumstances: (1) discrimination by monopolist sellers (which might or might not injure consumers) and (2) discriminatory prices or restraints solicited by buyers to impose higher costs on competitor); Roger G. Noll, “*Buyer Power*” and *Economic Policy*, 72 *Antitrust L.J.* 589 (2005) (focusing on the exercise of monopsony power—the ability of a buyer to control enough purchases in a market to affect market price).

¹⁴⁵ See, e.g., Albert Foer, *Introduction to Symposium on Buyer Power and Antitrust*, 72 *Antitrust L.J.* 505, 506 (2005) (buyer power can be found at market levels generally much lower than those at which seller market power arises); Paul Dobson, *Exploiting Buyer Power, Lessons from the British Grocery Trade*, 72 *Antitrust L.J.* 529, 554-56 (reporting price differentials and

One commenter proposed that plaintiffs be required to establish that the favored buyer had buyer power, defined as “the power to induce a discriminatory price that is not cost justified.”¹⁴⁶

Pros

- Approach will protect cost-justified discriminations from liability, while enabling plaintiffs to attack other instances of price discrimination.¹⁴⁷

Cons

- This standard may filter out relatively few claims, and many of the claims that remain may be directed at conduct that does not raise substantial consumer welfare concerns.¹⁴⁸
- The cost justification defense provides a screen to protect efficient price discrimination.¹⁴⁹

No other witnesses or commenters advanced specific proposals that would use some type of buyer power as an element in a Robinson-Patman claim. However, Professor Hovenkamp observed that “[a] Robinson-Patman Act concerned with true injury to competition would focus predominantly, if not exclusively, on buyer power.”¹⁵⁰ Asked to describe a statute addressing buyer power, he suggested making it unlawful for “a buyer to induce price discrimination . . . that would cause a restraint of trade . . . [*i.e.*] that would create an inference of higher prices or

advantageous terms achieved by five leading multiple retailers in Britain, with shares ranging from approximately 10 to 25 percent); Trans. at 57 (Spiva) (“buyers who control 10 percent of the market can get significant price concessions not justified by efficiencies”).

¹⁴⁶ AAI Comments, at 8. AAI proposed that in the alternative the plaintiff could establish a Robinson-Patman claim by showing that the discriminating seller had market power, defined as “the power to price above marginal cost and buyer power means the power to induce a discriminatory price that is not cost justified.” AAI Comments, at 8, 17-18.

¹⁴⁷ AAI Comments, at 17-18.

¹⁴⁸ See, e.g., Trans. at 60-63 (Hovenkamp) (arguing that circumstances in which buyer power can be used to injure consumer welfare are limited and that plaintiffs should be required to show antitrust injury to prevail).

¹⁴⁹ Trans. at 60 (Spiva).

¹⁵⁰ Hovenkamp Statement, at 4.

poorer product quality.”¹⁵¹ His definition of buyer power was limited to the power to affect competition adversely.¹⁵²

7. *Add a competitive injury requirement to Sections 2(d) and 2(e).*

Under current law, “[i]f a seller either offers to pay a customer for promotional services or provides the customer promotional services or materials . . . the offer [must] be made available on proportionally equal terms to all competing customers.”¹⁵³ A plaintiff claiming a violation of these sections need not make any showing of competitive injury.¹⁵⁴ The purpose of this provision was to prevent “under the table” discriminations in favor of large customers.¹⁵⁵ Various commentators and leading reports have advocated repeal or modification of Sections 2(d) and 2(e), arguing that these activities should be evaluated under the same standards as price discrimination under Section 2(a).¹⁵⁶

Pros

- Such an amendment will undo “a confusing tangle of regulations.”

¹⁵¹ Trans. at 73 (Hovenkamp).

¹⁵² Hovenkamp Statement, at 2, 4, 9-10; Trans. at 60-63 (Hovenkamp). One witness described requiring such a showing of buyer power as amounting to “back-door” repeal. Trans. at 63 (Saferstein).

¹⁵³ Robinson-Patman Primer, at 14.

¹⁵⁴ *Antitrust Law Developments V*, at 505; Robinson-Patman Primer, at 14.

¹⁵⁵ *ABA Report 105*, at 2.

¹⁵⁶ ABA Comments re: Robinson-Patman, at 1-3 (renewing recommendations of *ABA Report 105*); AAI Comments, at 19-20; *1977 Department of Justice Report*, at 267-68 (advocating including a requirement of competitive harm for violations of Sections 2(c), 2(d) and 2(e), either by folding them into Section 2(a) or amending them); *Neal Report*, at 42-43 (questioning the absence of a competitive injury requirement under 2(d) and 2(e), and proposed that they be repealed and the underlying conduct addressed as price discrimination); *1955 Attorney General’s Report*, at 187-93 (advocating harmonizing these sections with Section 2(a) by, e.g., imputing a competitive injury requirement and making the defenses to a 2(a) violation applicable to alleged violation of these sections).

- The special treatment of promotional allowances and services is not necessary in light of the prevalence of open promotional expenditures.¹⁵⁷
- An amendment would harmonize the various sections of the Act and ensure that only conduct meeting the harm to competition standard will be actionable.¹⁵⁸
- An amendment would be a modest change that would not result in unfairness to small retailers.¹⁵⁹
- An amendment would help smaller buyers and sellers compete effectively with large incumbents.¹⁶⁰

Cons

- The existing *per se* prohibition is needed in light of the difficulty of ferreting out and countering hidden discrimination.¹⁶¹
- Adding a competitive injury requirement to Sections 2(d) and 2(e) would impede the ability of plaintiffs to obtain equal treatment.¹⁶²
- Sections 2(d) and 2(e) are needed to prevent discrimination and do not prevent appropriate cooperative promotional programs.¹⁶³

8. *Repeal Section 2(c).*

Section 2(c) “prohibits a party to a sales transaction from granting to or receiving from the other party a ‘commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered.’”¹⁶⁴ It was included in the Act to address concerns that large buyers could obtain preferences by using “dummy brokers” or by demanding allowances in

¹⁵⁷ *ABA Report 105*, at 2.

¹⁵⁸ *Id.* at 5. The proposed amendment would merely impose the showing of competitive injury currently required under Section 2(a); it would not require a showing of injury to competition equivalent to that required under the Sherman Act. *Id.* at 3.

¹⁵⁹ *Id.* at 5.

¹⁶⁰ AAI Comments, at 19-20.

¹⁶¹ ABA Antitrust Section, *Monograph No. 4, The Robinson-Patman Act: Policy and Law Volume II*, at 49-50, 59-62 (1983) (“*ABA Monograph No. 4, Vol. II*”); *Small Business Committee Report*, at 114-20.

¹⁶² Campbell Statement, at 12.

¹⁶³ *Small Business Committee Report*, at 117-20.

¹⁶⁴ *Antitrust Developments V*, at 499 (quoting 15 U.S.C. § 13(c)).

lieu of brokerage.¹⁶⁵

The ABA recommended repeal of Section 2(c) in its comments to the AMC,¹⁶⁶ as have previous reports.¹⁶⁷

Pros

- Repeal of Section 2(c) will better enable firms to realize cost reductions in distribution.¹⁶⁸
- Section 2(c)'s "basic and fundamental defect [is] its per se restriction on the ability of one party to a transaction to recognize the business contributions of the other which assist in the distribution function."¹⁶⁹
- Discriminatory brokerage payments threatening adverse effects on competition can be handled effectively under Section 2(a).¹⁷⁰

Cons

- Section 2(c) is necessary to prevent discrimination through subterfuge and does not prevent proper brokerage payments.¹⁷¹
 9. *Permit defendants to establish a cost justification defense by showing that the preferential price was "reasonably related" to cost savings realized when dealing with the favored buyer.*

The cost justification defense provides that a price discrimination does not violate the Act where it makes "only due allowance for differences in the costs of manufacture, sale, or delivery

¹⁶⁵ *ABA Report 105*, at 5.

¹⁶⁶ ABA Comments re: Robinson-Patman, at 1-3 (renewing recommendations in *Report 105*, adopted by the ABA House of Delegates).

¹⁶⁷ *See Neal Report*, at 42-43; *1977 Department of Justice Report*, at 267-68. The *1955 Attorney General's Report* recommended that the "for services rendered" exception be reinvigorated. *1955 Attorney General's Report*, at 192-93.

¹⁶⁸ *ABA Report 105*, at 2, 7-8.

¹⁶⁹ *Id.* at 6.

¹⁷⁰ *Id.* at 8.

¹⁷¹ *Small Business Committee Report*, at 114-20.

resulting from the differing methods or quantities” in which the goods are “sold or delivered.”¹⁷² The defendant has the burden of establishing that there are actual costs savings that are equal to or exceed the price difference.¹⁷³ The Federal Trade Commission has tended to require defendants to establish the defense through rigorous cost studies, so that the defense can be “difficult and costly” to establish in practice.¹⁷⁴ However, some courts recognized at the time that the Federal Trade Commission might not be using a “practicable standard.”¹⁷⁵

AMC witnesses and commenters proposed a reduction in a defendant’s burden in making a cost-justification defense, reflecting similar previous proposals.¹⁷⁶ AAI’s proposed change would require a defendant to show only that a preferential prices was “reasonably related” to cost savings realized when dealing with the favored buyer.¹⁷⁷ This would replace the existing focus on technical aspects of cost studies with a more practical inquiry focusing on “whether the cost

¹⁷² 15 U.S.C. § 13(a).

¹⁷³ Robinson-Patman Primer, at 9-10.

¹⁷⁴ *Antitrust Law Developments V*, at 486, 490-91; Robinson-Patman Primer, at 9-10 (the “defense is the most technical and usually the most difficult to establish”); ABA Comments re: Robinson-Patman, at 23 (“companies hesitate to institute costly and complex cost studies, since there is no confidence that the study would be acceptable in litigation”).

¹⁷⁵ *Antitrust Law Developments V*, at 489 (citing *FTC v. Standard Motor Products*, 371 F.2d 613 (2d Cir. 1967)); Trans. at 75-76 (Spiva).

¹⁷⁶ See, e.g., Trans. at 73-74 (Saferstein) (favoring allowing defense to be made by establishing that the discriminatory price is reasonably related to cost savings); see also U.S. Chamber of Commerce Comments, at 25 (“the defense would be more viable if the cost accounting needed to sustain the defense could be greatly simplified”); AAI Comments, at 18-19; *ABA Monograph No. 4, Vol. I*, at 99-120; *Neal Report*, at 42 (proposing to “permit[] price differentials approximating actual cost differences or based on reasonable estimates of costs differences or based on a reasonable system of classification”); *1955 Attorney General’s Report*, at 172, 174 (recommending that the FTC “adopt realistic standards” reflecting accounting difficulties); cf. ABA Comments re: Robinson-Patman, at 23 (suggesting that the FTC could study the cost justification defense and provide guidance).

¹⁷⁷ AAI Comments, at 18-19 (proposing to require that the “cost savings were reasonably documented and reasonably approximated the price differential”).

savings were reasonably documented and reasonably approximated the price differential and whether the lower price was made available to all buyers that could provide the savings.”¹⁷⁸

Pros

- The cost justification defense is “illusory in practice,” since it imposes almost insurmountable burdens.¹⁷⁹
- Cost differences under the defense “be shown with extreme exactitude.”¹⁸⁰
- The current cost justification defense is “overly restrictive”¹⁸¹
- The cost justification requirements and expense of collecting data “make the barriers to practical utilization of the defense almost insurmountable.”¹⁸²
- The defense has been “too narrowly construed.”¹⁸³

Cons

- Despite its limitations, the cost justification defense is actively and successfully used by defendants.¹⁸⁴
- “[C]onverting the cost justification standard to a reasonable relationship standard” will make it “too amorphous” and will require developing a large body of case law that interprets “reasonable relationship.”¹⁸⁵

¹⁷⁸ *Id.* at 18-19.

¹⁷⁹ *1955 Attorney General’s Report*, at 171; *see* U.S. Chamber of Commerce Comments, at 24-25 (“many firms have virtually abandoned the defense . . .”).

¹⁸⁰ *Neal Report*, at 42; *1977 Department of Justice Report*, at 264-65 (“businessmen must be permitted to make reasonable, good-faith estimates of the costs” to determine compliance with the Act).

¹⁸¹ AAI Comments, at 18-19.

¹⁸² *1977 Department of Justice Report*, at 22.

¹⁸³ Trans. at 33-34, 73-74 (Saferstein).

¹⁸⁴ Trans. at 32-34 (Spiva and Saferstein).

¹⁸⁵ Trans. at 75-76 (Spiva). Mr. Campbell did not express any objection to the proposal. Trans. at 74 (Campbell).

10. *FTC reconsideration of previous decisions and policies.*

The Commission received from the ABA comments proposing that the FTC be called on to revisit previous FTC policies and decisions regarding the Robinson-Patman Act. No responsive commentary on these proposals was received.

- *Functional allowances:* The FTC could overrule some of its early restrictive decisions on functional allowances, that preceded *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).¹⁸⁶
- *Functional availability:* The FTC could overrule some of its early restrictive decisions on functional availability that may be inconsistent with *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).¹⁸⁷
- *Section 2(c):* The FTC could revise its position on the “services rendered” defense.¹⁸⁸
- *Sections 2(d) and 2(e):* The FTC could clarify the scope of these prohibitions and their effect by revising its Guides for Advertising Allowances and Other Merchandise Payments and Services, 16 C.F.R. pt. 240.¹⁸⁹
- *Meeting Competition:* The FTC could clarify the law regarding several issues that arise in applying the doctrine.¹⁹⁰
- *Cost Justification:* The FTC could issue guidelines on the cost justification defense.¹⁹¹

¹⁸⁶ ABA Comments re: Robinson-Patman, at 18.

¹⁸⁷ *Id.* at 19.

¹⁸⁸ *Id.* at 19-20.

¹⁸⁹ *Id.* at 20-22. The U.S. Chamber of Commerce also recommends that the Commission consider recommendations relating to these guidelines. U.S. Chamber of Commerce Comments, at 25.

¹⁹⁰ ABA Comments re: Robinson-Patman, at 22-23. The U.S. Chamber of Commerce also recommends that the Commission consider alternatives to satisfying the meeting competition defense that would reduce the burdens it imposes. U.S. Chamber of Commerce Comments, at 24.

¹⁹¹ *Id.* at 23.