

RESTOCKING THE ANTITRUST ENFORCEMENT AISLE FOR A FAIRER GROCERY MARKET

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I. INTRODUCTION

The increasing concentration of grocery stores and the decline of independent small grocers underscores the need for antitrust law to revive the Robinson-Patman Act and to reevaluate the consumer welfare standard. The consumer welfare standard emphasizes allocative efficiency and evaluates anticompetitive injury to consumer welfare through the creation of deadweight loss.¹ This narrow framework for antitrust law, the body of law regulating monopolies and anti-competitive conduct, neglects other forms of anticompetitive injury and has neutered antitrust enforcement since its adoption in the 1980s. The reconceptualization of antitrust law can help foster a more competitive grocery market, which will benefit both consumers and independent small grocers.

This paper argues that the revival of dormant antitrust enforcement tools will create a grocery market that is both competitive and fair for consumers and small businesses alike. The first section of this paper discusses the merger history of concentration in the grocery market. The second section discusses the economic effects of oligopsony and bargaining power. The third and final section discusses the history of the Robinson-Patman Act and how it can simultaneously quell anticompetitive effects outlined in the second section and help address overlooked noneconomic effects on public welfare.

II. HISTORY OF GROCERY CONCENTRATION

In October 2022, Kroger entered into an agreement to acquire Albertsons for \$24.6 billion.² The proposed merger would have been the largest supermarket merger in history.³ Had the merger gone through, about 69% of the retail grocery market would have been controlled by Walmart, Kroger-Albertsons, and Costco.⁴

The Kroger-Albertsons merger was consistent with the grocery market's historical trends toward concentration. The grocery store industry experienced significant concentration, peaking in the 1990s with over 380 mergers.⁵ The 20th century trend of grocery concentration was not without legal challenges. In 1966, Vons'

1. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1444 n.15 (9th Cir. 1995).

2. Melissa Repko, *Kroger Agrees to Buy Rival Grocery Company Albertsons for \$24.6 Billion*, CNBC (Oct. 14, 2022, 7:11 AM), <https://www.cnbc.com/2022/10/14/kroger-agrees-to-buy-albertsons-for-24point6-billion.html>.

3. Marcia Brown, *Judge Pauses Kroger-Albertsons Merger in Victory for Biden*, POLITICO (Dec. 10, 2024), <https://www.politico.com/news/2024/12/10/kroger-albertsons-merger-biden-00193574>.

4. FOOD & WATER WATCH, *The Economic Cost of Food Monopolies: The Grocery Cartels*, at 2 (Nov. 2021), https://www.foodandwaterwatch.org/wp-content/uploads/2021/11/IB_2111_FoodMonoSeries1-SUPERMARKETS.pdf.

5. Timothy J. Richards & Paul M. Patterson, *Competition in Fresh Produce Markets: An Empirical Analysis of Marketing Channel Performance*, USDA ECON. RSCH. SERV., Sept. 2003, at 1, 45.

attempted acquisition of Fazio's Shopping Bag was held unlawful due to this exact trend of concentration.⁶ Although the trend of grocery concentration continued into the 21st century, grocery store merger challenges did not. The last challenged merger was American Stores' acquisition of Lucky Stores in 1988,⁷ until the 2024 challenge of the Kroger-Albertsons merger.

The colossal scope of the agreement prompted the Federal Trade Commission (FTC) to sue to block the agreement.⁸ The FTC alleged that the merger was unlawful due to increased market concentration and the elimination of competition for price, product quality, store condition and customer service, and pharmacy services.⁹ After a fifteen-day preliminary injunction hearing, the U.S. District Court for the District of Oregon agreed with the FTC and blocked the Kroger-Albertsons merger.¹⁰

III. MONOPSONY, BUYER POWER, AND "WATERBED" EFFECTS

Congress's chief concern in enacting antitrust laws, such as merger enforcement under Section 7 of the Clayton Act, was the evils of monopoly.¹¹ However, antitrust law is just as concerned with abuse of monopsony power, oligopsony, and buyer power as it is with the mirror image of monopoly power, oligopoly, and seller power.¹²

Like in the mirror case of monopoly, monopsony results in allocative inefficiency.¹³ Though there may be a reduction in the firm's average costs, these cost savings are not passed on to consumers; profit-maximizing output decreases, thereby increasing prices on consumers in the output market.¹⁴ Courts have recognized the impact of buyer power against upstream sellers on input markets and their consequential adverse downstream effects on consumers in the output market.¹⁵

6. U.S. v. Von's Grocery Co., 384 U.S. 270, 278 (1966).

7. Cal. v. Am. Stores Co., 495 U.S. 271, 276 (1990) (the most recent challenge to a non-supermarket food retailer merger was the acquisition of Wild Oat Markets by Whole Foods Markets); see also F.T.C. v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1039 (D.C. Cir. 2008) (defining the relevant submarket of premium natural and organic supermarkets).

8. Complaint ¶ 1, Kroger Co., FTC Docket No. D-9428 (Feb. 26, 2024).

9. *Id.* ¶¶ 41, 46, 49, 52.

10. Fed. Trade Comm'n v. Kroger Co., No. 3:24-CV-00347-AN, 2024 WL 5053016, at *1 (D. Or. Dec. 10, 2024).

11. Clayton Act § 7, 15 U.S.C. § 18 (prohibiting acquisition of stock or assets when the "effect of such acquisition may be substantially to lessen competition, or to tend to create a *monopoly*." (emphasis added)).

12. Mueller v. Wellmark, Inc., 818 N.W.2d 244, 265 (Iowa 2012).

13. ROGER D. BLAIR & JEFFREY L. HARRISON, *MONOPSONY: ANTITRUST LAW AND ECONOMICS* 42 (1993).

14. *Id.* at 41-42.

15. See Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 518 U.S. 231 (1996).

While the vertical harm of buyer power to suppliers through restrictions on output is well-understood both economically and legally, less is known about the horizontal effects of buyer power on competitors with less buyer power.¹⁶ Framing buyer power within bargaining theory may suggest that a firm can gain an advantage over competitors by securing more favorable terms of trade, at the expense of weaker competitors' terms, which is a concept of differential buyer power known as the "waterbed effect."¹⁷

The waterbed effect does not involve restrictions on quantity, but instead manifests through negotiated discounts.¹⁸ The buyer's size impacts the negotiation process in a variety of ways, such as through credible threats to search for alternative suppliers, prospective profitability which attracts experienced negotiators, and increased investment in competitive procurement methods.¹⁹ A buyer may gain a position that constitutes a significant amount of a supplier's business, creating economic dependency where the supplier risks a disproportionate loss from the withdrawal of the buyer's business.²⁰

This dynamic could presumably be advantageous to consumers if the discounts are passed down to consumers because the discounts are not obtained by restrictions on output.²¹ However, depending on the structure of the markets, the pass-through effects of these discounts can often be negated by the deterioration of the terms of trade of small competitors.²² Like a heavy object on a waterbed causing the surface to dip significantly beneath them while simultaneously elevating lighter objects to the side, the waterbed effect finds smaller buyers facing rising prices due to worsened terms of trade as the dominant buyer's leverage pushes their prices down and fewer per unit sales.²³

The waterbed effect and the interaction between horizontal and vertical dimensions are especially relevant given the increased concentration of retail markets.²⁴ The antitrust relevance is not obvious given the emphasis on consumers and competition rather than competitors, but increased input prices on competitors can result in long-run price increases in retail markets.²⁵

16. See Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WIS. L. REV. 331, 334-35 (2008).

17. Roman Inderst & Tommaso M. Valletti, *Buyer Power and the 'Waterbed Effect'*, 59 J. INDUS. ECON. 1, 1 (2011).

18. Dobson & Inderst, *supra* note 16, at 338.

19. *Id.* at 339.

20. *Id.* at 339-340.

21. *Id.* at 338.

22. Inderst & Valletti, *supra* note 17, at 2.

23. See David E. Mills, *Buyer Power and Industry Structure*, 36 REV. INDUS. ORG. 213, 219 (2010).

24. See Paul W. Dobson et al., *Buyer Power and its Impact on Competition in the Food Retail Distribution Sector of the European Union*, 1 J. INDUS. COMPETITION & TRADE 247, 248 (2001).

25. Dobson & Inderst, *supra* note 16, at 351.

IV. THE ROBINSON-PATMAN ACT AND PROTECTING SMALL RETAILERS

A. *History of the Robinson-Patman Act*

While the Clayton Act is primarily utilized as a merger enforcement statute under Section 7, Section 2 also prohibits price discrimination.²⁶ Section 2's prohibition on price discrimination was enacted in response to concerns that the rule of reason unduly narrowed the Sherman Act's regulation of predatory pricing.²⁷ While Section 2 addressed the issue of predatory pricing by large companies and trusts to bankrupt smaller competitors, it was ineffectual in curbing price discrimination from special-price concessions secured by chain stores due to the exemption on quantity discounts.²⁸ Large chain stores, such as the chain grocer Great Atlantic & Pacific Tea Company, used their bargaining power to obtain large price concessions, discounts, and free-goods allowances from suppliers threatened by the possibility of losing business.²⁹

Although the rising dominance of chain stores in the early twentieth century brought about lower consumer prices, concerns grew as small independent retailers and wholesalers began to feel pressure from chain stores underselling.³⁰ Anti-chain store sentiment intensified as Americans began to feel the distress of the Great Depression, prompting Congress to amend the Clayton Act with the Robinson-Patman Act in 1936.³¹ The Robinson-Patman Act's amendments supplemented existing prohibitions against price discrimination by prohibiting differential pricing that "injure[s], destroy[s], or prevent[s] competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them."³²

The Robinson-Patman Act protects against different types of price discrimination: primary-line, secondary-line, and tertiary-line.³³ Primary-line prohibits injury to competitors of the discriminating seller; secondary-line prohibits injury to competitors of the customer benefiting from the discrimination; and tertiary-line prohibits injury to competition of the purchaser's customers.³⁴

26. Clayton Act § 2, 15 U.S.C. § 13.

27. Roger D. Blair & Christina DePasquale, "Antitrust's Least Glorious Hour": *The Robinson-Patman Act*, 57 J.L. & ECON. S201, S202 (2014).

28. Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1063-64 (1957).

29. FED. TRADE COMM'N, FINAL REP. ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 74-4, at 24-26 (1934).

30. *Id.* at 86-87.

31. Rowe, *supra* note 28, at 1064-65, 1073-74.

32. Clayton Act § 2(a), 15 U.S.C. § 13(a).

33. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

34. *Id.*

Secondary-line price discrimination, the most common injury pursued under the Robinson-Patman Act, requires a demonstration of substantial price discrimination sufficient to influence resale prices.³⁵ The requisite injury to demonstrate a secondary-line violation was first formulated by the Supreme Court in 1948 with the *Morton Salt* rule.³⁶

In the seminal *Morton Salt* case, the FTC brought an administrative proceeding against the Morton Salt Company for selling table salt using volume and quantity discounts.³⁷ The pricing schedule ensured that only five national chain stores purchased the large quantities needed for the discounts.³⁸ In holding that the quantity and volume discounts violated the Robinson-Patman Act, the Court recognized that Congress designed the Act to “protect[] small businesses which were unable to buy in [large] quantities.”³⁹ Importantly, because no independent retail store had purchased enough table salt to use the volume and quantity discounts, it was “self-evident . . . that there [was] a ‘reasonable possibility’ that competition may be adversely affected.”⁴⁰ The “self-evident” nature of competitive injury from price differentiation alone created the *Morton Salt* inference in price discrimination cases. This presumption allowed for a finding of a violation of the Robinson-Patman Act by simply showing that any price differential resulted in a substantially lower resale price among competing purchasers over time.⁴¹

The *Morton Salt* rule was considered by some to be a departure from other antitrust laws because the inference created liability without actual competitive injury.⁴² The broad, conclusory inference created by *Morton Salt* has been narrowed by subsequent cases addressing the criticisms of the Robinson-Patman Act.⁴³ In *J. Truett Payne*, the Court declined to apply the *Morton Salt* rule to an automobile dealer because the lower court bypassed the issue of whether the violation harmed competition.⁴⁴ Likewise, in *Volvo Trucks of North America*, the Court further narrowed *Morton Salt* when it held that the Robinson-Patman Act did not extend to a dealer of heavy-duty trucks because none of the favored purchasers possessed market power.⁴⁵

35. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1134–35 (1983).

36. Simon A. Rodell, *Antitrust Law: The Fall of the Morton Salt Rule in Secondary-Line Price Discrimination Cases*, 58 FLA. L. REV. 967, 970 (2006).

37. Fed. Trade Comm’n v. Morton Salt Co., 334 U.S. 37, 40–42 (1948).

38. *Id.*

39. *Id.* at 49.

40. *Id.* at 50 (quoting Corn Prods. Refin. Co. v. Fed. Trade Comm’n, 324 U.S. 726, 739 (1945)).

41. See Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule be Retired*, 48 SMU L. REV. 1917, 1921 (1995).

42. Hansen, *supra* note 35, at 1135–36.

43. See Blair & DePasquale, *supra* note 27, at S213.

44. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 568 (1981).

45. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 182 (2006).

B. *Decline of the Robinson-Patman Act Enforcement*

Relative to all the other antitrust laws, the Robinson-Patman Act is the most criticized.⁴⁶ The controversial nature of the Robinson-Patman Act is best summarized by Judge Robert Bork when he called it “antitrust’s least glorious hour.”⁴⁷ The Act has been criticized by many, including Judge Bork, as penalizing active and vigorous price competition.⁴⁸

Often neglected in analyses of the Robinson-Patman Act are the social costs, namely the disincentivization of risk-taking behavior.⁴⁹ The decline in risk-taking behavior also comes with increased commercial costs from inefficient business practices and increased price rigidity.⁵⁰ The Robinson-Patman Act can also have the tendency to force businesses toward inefficient modes of distribution.⁵¹ The Robinson-Patman Act’s protection of inefficient small independent businesses may conflict with the goal of maximizing allocative efficiency.⁵² Some scholars argue that price discrimination that is attributable to differences in marginal cost should be encouraged to optimize allocative efficiency, because the price charged should be a function of the marginal cost of a particular customer.⁵³

With the influence of neoclassical and laissez-faire economics on antitrust jurisprudence and scholarship, the 1970s saw a substantial drop in the number of price discrimination cases.⁵⁴

C. *Revival of the Robinson-Patman Act and its Importance to Competition and Welfare*

In 2024 the FTC brought their first case against Southern Glazer’s Wine and Spirits after half a century of non-enforcement of the Robinson-Patman Act.⁵⁵ The FTC alleged that Southern Glazer’s engaged in price discrimination, claiming that they utilized high-volume quantity discounts and scan rebates that favored large independent chains.⁵⁶ Just a month later, the FTC brought another case against Pepsi, alleging that

46. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 385 (2d ed. 1993) (“[N]o other antitrust statute has been subjected to so steady a barrage of hostile commentary as the Robinson-Patman Act.”).

47. *Id.* at 382.

48. *See, e.g., id.* at 393-94.

49. Hansen, *supra* note 35, at 1188-89.

50. *Id.*

51. *See* BORK, *supra* note 46, at 387.

52. *See id.* at 396-97.

53. *See* Herbert J. Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 *GEO. L.J.* 1157, 1161 (1983).

54. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 726 (2017).

55. *See* Complaint ¶¶ 6-10, *FTC v. Southern Glazer’s Wine & Spirits, LLC*, FTC Docket No. 8:24-cv-02684 (Dec. 12, 2024).

56. *Id.* ¶¶ 32, 35.

they discriminated by favoring big box retailers with promotional payments and allowances.⁵⁷

The resurgence of government enforcement of the Robinson-Patman Act may indicate a shift away from the influence of neoclassical economics that dominated antitrust since the 1970s.⁵⁸ For many decades, courts had accepted the proposition that antitrust laws were designed as a “consumer welfare prescription” where economic efficiency is prioritized over protecting small businesses.⁵⁹ However, increased concentration in various industries has led to concerns over the fragility of markets and the possibility of collusion, monopoly, and monopsony in the modern economy.⁶⁰ These concerns inspired Neo-Brandeisians who reject the consumer welfare standard, instead emphasizing the exacerbation of social ills that come from such economic concentration.⁶¹ Their skepticism of large corporations is reminiscent of the populism behind the original passage of the antitrust laws, and some believe the redistributive aims behind Neo-Brandeisianism to be in line with the economic and political grievances Congress sought to address.⁶²

Just as Neo-Brandeisians challenge the consumer welfare standard to reinvigorate enforcement of the Sherman Act and Clayton Act, they should advocate for the full revival of the Robinson-Patman Act as an essential component of antitrust enforcement. The revival of the Robinson-Patman Act must involve a recognition of the economic consequences of waterbed effects, as well as impacts on upstream competition.⁶³ Likewise, there should be an acknowledgment of the broader social and political aims behind antitrust laws. Enforcing the Robinson-Patman Act would enhance social welfare through improvements to productive capacity, promoting competition based on the quality of goods and services, and by encouraging a form of industrial organization that enhances public welfare.⁶⁴ Enhancements to public welfare was a goal that the drafters of the Robinson-Patman Act had in mind when it sought to quell anti-chain store sentiments that

57. Press Release, FTC, *FTC Sues PepsiCo for Rigging Soft Drink Competition*, (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition>.

58. See Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who Is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 939–41 (2023).

59. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

60. Herbert J. Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 67 (2019).

61. Amelia Miazad, *Prosocial Antitrust*, 73 HASTINGS L.J. 1637, 1663 (2022).

62. See *id.* at 1658; Khan, *supra* note 54, at 741.

63. John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U.L. REV. 1485, 1544–46, 1554–57 (2012).

64. Daniel A. Hanley, *Controlling Buyer and Seller Power: Reviving Enforcement of the Robinson-Patman Act*, 52 HOFSTRA L. REV. 313, 323 (2024).

saw small businesses as an essential backbone of social welfare and democracy.⁶⁵

By going beyond the narrow constraints of the consumer welfare standard, the retail grocery market would be relieved from the negative impact of waterbed effects on small independent retailers. For example, preventing secondary-line price discrimination will relieve pressure on upstream suppliers and small retail competitors, which can allow these entities to pay their workers higher wages.⁶⁶ In the retail grocery market, reducing retail concentration and eliminating waterbed effects can result in lower grocery prices for consumers and positive redistributive wealth transfers to retailers and farmers.⁶⁷

V. CONCLUSION

The breakup of the Kroger-Albertsons merger marks a victory for those who advocate for increased competition in the retail grocery store market. However, small independent grocery stores still face the difficult challenge of having to compete with large grocery retailers. Because the preservation of small independent grocery stores presents social and economic benefits for American consumers, laborers, and small business owners, the revival of the Robinson-Patman Act should be explored by antitrust enforcers. Additionally, the protections against secondary-line price discrimination can help ensure fair competition, free from waterbed effects and anticompetitive countervailing power. Revival of the Robinson-Patman Act presents an opportunity to reframe antitrust law beyond the narrow constraints of the current consumer welfare standard, and to account for public welfare like Congress intended.

65. Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1068-69 (2005).

66. Hanley, *supra* note 64, at 338.

67. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 255 (2017).