

# Analyzing Robinson-Patman

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## ABSTRACT

*The Robinson-Patman Act protects inefficient competitors rather than consumers. The possibility of a suit brought under Robinson-Patman increases the costs of efficient competitors. Robinson-Patman shifts the benefit of antitrust law from consumers to less efficient competitors. As such, the Act is fundamentally in tension with contemporary antitrust policy. This Essay explores the history of Robinson-Patman, empirically analyzes shifts in Robinson-Patman caselaw, and discusses how the FTC may have aided (or not) the change in legal outcomes of Robinson-Patman cases.*

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INTRODUCTION

The Robinson-Patman Act<sup>1</sup> bans price discrimination,<sup>2</sup> or more precisely, differential pricing.<sup>3</sup> But the Act is based on faulty economics; as such, the very design of Robinson-Patman is flawed.<sup>4</sup> In contrast to the goals of the other antitrust statutes,<sup>5</sup> Robinson-Patman

1 Robinson-Patman Antidiscrimination Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13 (2012)).

2 15 U.S.C. § 13 (2012); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) (explaining that Robinson-Patman price discrimination is the difference in price to different purchasers of like kind and quality for commodities); 14 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2331a (3d ed. 2012).

3 See GEORGE J. STIGLER, *THE THEORY OF PRICE* 210–11 (3d ed. 1966). Price discrimination does not necessarily increase social welfare. See Hal R. Varian, *Price Discrimination and Social Welfare*, 75 AM. ECON. REV. 870, 870–71, 875 (1985).

4 See Roger D. Blair & Christina DePasquale, “*Antitrust’s Least Glorious Hour*”: *The Robinson-Patman Act*, 57 J.L. & ECON. S201, S204 (2014) (“Hovenkamp (2011) observes that a necessary result of the act’s protection of less efficient firms is higher consumer prices. Similarly, Carlton and Perloff (2005) explain that the Robinson-Patman Act has denied the benefits of scale economies to buyers and thereby leads to higher consumer prices.”); see also DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 675 (4th ed. 2005).

5 On the singular economic goal of antitrust, see generally ROBERT H. BORK, *THE ANTI-TRUST PARADOX: A POLICY AT WAR WITH ITSELF* 51 (1978) (explaining the “only legitimate goal of American antitrust law is the maximization of consumer welfare”); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTI-TRUST L.J. 471, 473 (2012) (“The goal of antitrust . . . involves a choice of either total welfare or consumer welfare.”); Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2499 (2013) (“[W]e believe that it is total welfare rather than consumer welfare that should drive antitrust analysis. This is not a new position within antitrust scholarship.”); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1992–93 (1977) (examining whether antitrust promotes goals other than efficiency and competitive markets); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POL’Y INT’L 3, 4 (2006) (examining whether consumer surplus or total surplus should be the welfare standard for antitrust); Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471–72 (2013); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 661–62 (2010) (exploring the rationale behind

protects inefficient competitors rather than consumers.<sup>6</sup> The possibility of a suit brought under Robinson-Patman increases the costs of efficient competitors.<sup>7</sup> As such, Robinson-Patman shifts the benefit of antitrust from consumers to less efficient competitors.<sup>8</sup> In 2000, the leading antitrust treatise author declared, “Robinson-Patman Act jurisprudence has all but evaded the economic revolution in antitrust.”<sup>9</sup>

The critique by academics and practitioners of Robinson-Patman has been longstanding. Beginning with the 1955 Report on Antitrust,<sup>10</sup> publications such as the Neal Report,<sup>11</sup> then-Professor Posner’s monograph of 1976,<sup>12</sup> the Department of Justice Report of 1977,<sup>13</sup> and the ABA Report of 1980<sup>14</sup> have identified Robinson-Patman as a substantive area of antitrust in need of reform. In 2007, the bipartisan congressionally appointed Antitrust Modernization Commission called for repeal of Robinson-Patman.<sup>15</sup> The vast majority of the academic community have similarly called for the repeal (or a significant abridgement) of Robinson-Patman.<sup>16</sup> Some critiques have been particularly eloquent but vituperative. Then-Professor Bork described the Act as “the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory.”<sup>17</sup> For Bork, Robinson-Patman amounted to “antitrust’s least glorious hour.”<sup>18</sup>

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condemning antitrust conduct); Barak Orbach, *How Antitrust Lost Its Goal*, 81 *FORDHAM L. REV.* 2253, 2254–56 (2013).

<sup>6</sup> See, e.g., BORK, *supra* note 5, at 68–69.

<sup>7</sup> See, e.g., Blair & DePasquale, *supra* note 4, at S204.

<sup>8</sup> See William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 *J.L. & ECON.* 247, 247–48 (1985).

<sup>9</sup> Herbert Hovenkamp, *The Robinson Patman Act and Competition: Unfinished Business*, 68 *ANTITRUST L.J.* 125, 125 (2000).

<sup>10</sup> ATT’Y GEN.’S NAT’L COMM. TO STUDY THE ANTITRUST LAWS, REPORT 155–221 (1955) [hereinafter ATT’Y GEN.’S NAT’L COMM.].

<sup>11</sup> Phil C. Neal et al., Task Force on Antitrust Policy, *Report of the White House Task Force on Antitrust Policy*, *ANTITRUST L. & ECON. REV.*, Winter 1968–69, at 11, 13.

<sup>12</sup> RICHARD A. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* 49–53 (1976).

<sup>13</sup> DEP’T OF JUSTICE, *REPORT ON THE ROBINSON-PATMAN ACT* 6–7 (1977).

<sup>14</sup> ABA ANTITRUST SECTION, *MONOGRAPH NO 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW VOLUME I* 1–4 (1980).

<sup>15</sup> ANTITRUST MODERNIZATION COMM’N, *REPORT AND RECOMMENDATIONS* i, iii (2007).

<sup>16</sup> See, e.g., BORK, *supra* note 5, at 382, 394; Blair & DePasquale, *supra* note 4, at S214; Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 *J.L. & ECON.* 427, 434 (1978); Herbert Hovenkamp, *Market Power and Secondary-Line Differential Pricing*, 71 *GEO. L.J.* 1157, 1177 (1983).

<sup>17</sup> BORK, *supra* note 5, at 382.

<sup>18</sup> *Id.*

Robinson-Patman remains law, even though federal antitrust agencies have not enforced the Act since the Clinton era.<sup>19</sup> The FTC has been given the opportunity to fix its approach to Robinson-Patman (and its implications for private enforcement) as recently as 2014 when it updated its Fred Meyer Guide, which addresses promotional allowances under Robinson-Patman.<sup>20</sup> The American Bar Association submitted comments that explicitly advocated a requirement of competitive harm.<sup>21</sup> In response, the FTC deliberately chose not to accept such a requirement, arguing that the FTC cannot do so because that standard could not “be fairly implied based on the current state of the law.”<sup>22</sup>

This Essay explores the history of Robinson-Patman, empirically identifies shifts in Robinson-Patman case law, and discusses how the FTC may have aided (or not) the change in legal outcomes of Robinson-Patman cases. The implications of a more lenient Robinson-Patman enforcement policy undertaken by both the government and private litigants extend beyond the cost of litigation.<sup>23</sup> Any Robinson-Patman litigation risk has consequences on the implementation of various business strategies,<sup>24</sup> such as discounts that may simply appear to be discriminatory, if not outright so.<sup>25</sup> In turn, Robinson-Patman cases and their outcomes have had implications for antitrust policy. Firms may become more risk-averse in their business strategies in the

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<sup>19</sup> See D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1014 (2014).

<sup>20</sup> See Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §§ 240.1–.15 (2015). The FTC released the Guide in response to *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

<sup>21</sup> Guides for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58,245, 58,246–47 (Sept. 29, 2014).

<sup>22</sup> *Id.* at 58,247. With respect to the historical significance of the Act, one need look no further than the recent *Woodman's Food Market, Inc. v. Clorox Co.*, No. 14-CV-734-slc, 2015 WL 420296 (W.D. Wis. Feb. 2, 2015). There, the judge relies entirely on FTC decisions from 1940 and 1956, which are particularly persuasive under the per se provisions of sections 2(d) and (e) of Robinson-Patman. *Id.* at \*4–6. These provisions are immune from the holding of *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006). See *infra* notes 151–55 and accompanying text.

<sup>23</sup> See generally A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 107–08 (1980).

<sup>24</sup> See ATT'Y GEN.'S NAT'L COMM., *supra* note 10, at 167–69; DEP'T OF JUSTICE, *supra* note 13, at 31–40; Hovenkamp, *supra* note 9, at 126 (“Were it not for the Robinson-Patman Act, a manufacturer’s pricing practices respecting sales to its various dealers would undoubtedly be treated in the same way as vertical nonprice restraints generally. Harm to competition would be highly exceptional.”).

<sup>25</sup> See Sokol, *supra* note 19, at 1014–15.

face of potential negative Robinson-Patman rulings.<sup>26</sup> Similarly, firms may be more emboldened in their business strategies if plaintiffs (either government or other firms) lose Robinson-Patman cases.<sup>27</sup>

Empirically, there has been limited analysis of Robinson-Patman cases and enforcement.<sup>28</sup> Such work suggests that Robinson-Patman has had a consumer welfare-reducing effect. This Essay is the first to examine Robinson-Patman cases for primary- and secondary-line claims for structural breaks in enforcement. This Essay is also the first to analyze the entire history of Robinson-Patman Act cases to determine the likelihood that a court will find a defendant liable under either a primary- or secondary-line Robinson-Patman claim.<sup>29</sup> The Essay's analysis demonstrates that there has been a structural shift in the enforcement of Robinson-Patman. This has resulted in a decline in plaintiff victories for both primary- and secondary-lines cases over time, particularly since *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>30</sup> The Essay provides some initial assessment of the empirical results and suggests its implications for Robinson-Patman.

## I. ROBINSON-PATMAN HISTORY

### A. *The Act*

What had once been a nation of small shopkeepers at the time of Tocqueville<sup>31</sup> had become increasingly the province of chain stores by the early Twentieth Century. This structural shift in the U.S. economy was due, among other things, to a decline in transportation costs, changes to supply chain management, and the ability of firms to take advantage of economies of scale and scope.<sup>32</sup> The first large retail chain was the Great Atlantic and Pacific Tea Company ("A&P"),

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<sup>26</sup> See DEP'T OF JUSTICE, *supra* note 13, at 16–17.

<sup>27</sup> See *id.*

<sup>28</sup> See, e.g., Elzinga & Hogarty, *supra* note 16, at 430–33; Ryan Luchs et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MGMT. SCI. 2123, 2127–30 (2010); Thomas W. Ross, *Store Wars: The Chain Tax Movement*, 29 J.L. & ECON. 125, 129–37 (1986); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 770–75 (1983).

<sup>29</sup> Cf. Luchs et al., *supra* note 28, at 2127–30 (examining win-loss rates for Robinson-Patman cases for the period 1982–2010).

<sup>30</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>31</sup> See generally 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 421–428 (Phillips Bradley ed., Alfred A. Knopf 1945) (1840) (describing the nature and causes of America's commercial prosperity).

<sup>32</sup> See generally ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 3–4, 8–13 (1990); ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 1–12 (1977).

which had a national presence by 1900.<sup>33</sup> The economic structure of retail had changed dramatically post World War I to the onset of the Great Depression.<sup>34</sup> From the period 1926–1933, retail sales from chain stores had increased from 9 percent to 25 percent nationally.<sup>35</sup> By 1929, retail chains “accounted for almost 40 percent of retail grocery sales.”<sup>36</sup> The growth of chain stores led to a populist backlash by small businesses and their supporters.<sup>37</sup> By the late-1930s, roughly half of the states had enacted chain tax laws (which taxed chain stores but not their smaller and less efficient competitors).<sup>38</sup> This backlash movement resulted in national protectionist legislation, as well as a general hostility to vertical integration.<sup>39</sup> In part due to a Brandeisian Progressive approach for which big was bad, antitrust was seen as a tool to correct for various political issues rather than to promote consumer welfare.<sup>40</sup>

The Robinson-Patman Act has its origins in this movement as a protectionist measure that favored small competitors against larger retailers.<sup>41</sup> This is what proponents of the Act, from its inception to the present, perceive its value to be—it serves as the “Magna Carta of Small Business.”<sup>42</sup> The protectionist nature of the Robinson-Patman Act was clear from its original title, the “Wholesale Grocer’s Protec-

33 GODFREY M. LEBHAR, CHAIN STORES IN AMERICA: 1859–1950 20–26 (1952).

34 See Terry Calvani, *Government Enforcement of the Robinson-Patman Act*, 53 ANTI-TRUST L.J. 921, 921 (1985).

35 *Id.* (citing JOSEPH CORNWALL PALAMOUNTAIN, JR., THE POLITICS OF DISTRIBUTION 7 (1955)).

36 Ross, *supra* note 28, at 125.

37 Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1022–23 (2005).

38 See LEBHAR, *supra* note 33, at 129–31.

39 See generally ARTHUR ROBERT BURNS, THE DECLINE OF COMPETITION: A STUDY OF THE EVOLUTION OF AMERICAN INDUSTRY 428–30, 460–61 (1936); FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT §§ 1.1–.7 at 3–19 (1962). On the history of A&P, see generally MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA (2011).

40 Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 439 (2012) (“The inertia of fears of size seems to be embedded in antitrust.”).

41 D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119, 128–29 (2009). However, many small businesses jumped at the opportunity to promote competitors over competition. See *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) (“[N]either the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source.”).

42 Earl W. Kintner & Joseph P. Bauer, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 ANTITRUST BULL. 571, 571 (1986).

tion Act.”<sup>43</sup> The protectionism of the Act was masked in the rhetoric of localism.<sup>44</sup>

The Act banned price differences of “commodities of like grade and quality.”<sup>45</sup> Although poorly drafted,<sup>46</sup> the Act has had particular impact in two areas—primary- and secondary-line price discrimination. In a primary-line injury, the “injury” is a result of competitor sellers harmed by the price discrimination discount of a seller.<sup>47</sup> A secondary-line “injury” occurs to customers who are disfavored by the seller relative to the seller’s favored customer.<sup>48</sup> Of note, Robinson-Patman does not require a showing of market power the way the Sherman Act does.<sup>49</sup>

## B. Government Enforcement of Robinson-Patman

### 1. Theories of Public Enforcement

There are a number of theories of how antitrust agencies operate.<sup>50</sup> Some focus on political control.<sup>51</sup> Others focus on private interest that leads to mission creep,<sup>52</sup> budget maximization,<sup>53</sup> or increasing

<sup>43</sup> Sokol, *supra* note 41, at 128.

<sup>44</sup> Shragger, *supra* note 37, at 1016 (“While those who attacked the chains were often motivated by economic self-interest, the rhetoric of local self-sufficiency that they employed resonated deeply with many Americans.”).

<sup>45</sup> 15 U.S.C. § 13(a) (2012).

<sup>46</sup> See BORK, *supra* note 5, at 382.

<sup>47</sup> “Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors.” *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

<sup>48</sup> “Secondary-line cases . . . involve price discrimination that injures competition among the discriminating seller’s customers . . . ; cases in this category typically refer to ‘favored’ and ‘disfavored’ purchasers.” *Id.*

<sup>49</sup> Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012); see 14 HOVENKAMP, *supra* note 2, ¶ 2301b.

<sup>50</sup> See generally Fred S. McChesney et al., *Competition Policy in Public Choice Perspective*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 147, 147–51 (Roger D. Blair & D. Daniel Sokol eds., 2014) (providing an overview of theories).

<sup>51</sup> See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 717–21 (2005); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 93–94 (1992); Weingast & Moran, *supra* note 28, at 765–66.

<sup>52</sup> See, e.g., Mathias Dewatripont et al., *The Economics of Career Concerns, Part II: Application to Missions and Accountability of Government Agencies*, 66 REV. ECON. STUD. 199, 199–202 (1999).

<sup>53</sup> See William A. Niskanen, *The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 300–01 (1968) (“[T]he passion of reformers to consolidate bureaus with similar output [is to] increase the inefficiency (and, not incidentally, the budget) of the bureaucracy.”). For empirical studies of this phenomenon, see generally D. Roderick Kiewiet, *Bureaucrats and Budgetary Outcomes: Quantitative Analyses*, in THE BUDGET MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 143, 151–65 (André Blais & Stéphane Dion eds., 1991).

hierarchical control over subordinates.<sup>54</sup> In other cases, antitrust agencies may justify their existence with a pressure to bring cases for the sake of bringing cases and to be seen as busy.<sup>55</sup> There is a rich empirical history of previous work that suggests the FTC's decision-making, up through the 1980s, did not maximize public interest in its enforcement decisions.<sup>56</sup>

These possible explanations regarding FTC enforcement of Robinson-Patman can be tested. An overview of the investigations, consents, and litigated cases brought by the FTC does not rule out a number of the different public-choice based theories of enforcement.<sup>57</sup> Similarly, enforcement is not the only means by which the FTC can shape caselaw. The FTC also has the ability to shape caselaw via amicus briefs through its competition advocacy program.<sup>58</sup> As described below, the FTC's lack of competition advocacy suggests the possibility of a private-interest based FTC enforcement.

## 2. *FTC Enforcement*

### a. *Enforcement Overview*

FTC enforcement of Robinson-Patman has been historically significant, although less so today due to nonenforcement of Robinson-Patman by the FTC in the last few presidential administrations. In the first thirty-four years of the Act (1937–71), the FTC issued almost 1400 Robinson-Patman complaints.<sup>59</sup> This caseload suggests that the early view by the agency is that Robinson-Patman enforcement was an important part of the overall mix of FTC enforcement.<sup>60</sup>

This view of Robinson-Patman was not one merely shaped by FTC lawyers. Corwin Edwards, the FTC's chief economist in 1948, dismissed the concern about how Robinson-Patman worked in practice as “mere ghosties and ghoulies and six legged beasties and things

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<sup>54</sup> See GORDON TULLOCK, *THE POLITICS OF BUREAUCRACY* 134–36 (1965).

<sup>55</sup> See William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25, 26–27 (2011).

<sup>56</sup> See generally, PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION 1–12 (Robert J. Mackay et al. eds., 1987); Malcolm B. Coate et al., *Bureaucracy and Politics in FTC Merger Challenges*, 33 J.L. & ECON. 463, 464–65 (1990); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 329–31 (1982); William F. Shughart II & Robert D. Tollison, *The Positive Economics of Antitrust Policy: A Survey Article*, 5 INT'L REV. L. & ECON. 39, 48–51 (1985).

<sup>57</sup> See *infra* Part I.B.2.

<sup>58</sup> James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1091–92 (2005).

<sup>59</sup> POSNER, *supra* note 12, at 30.

<sup>60</sup> See *id.* at 30–31.



that go [b]ump in the night.”<sup>61</sup> Edwards’s comments foreshadowed a more significant intervention in Robinson-Patman cases by the FTC.

Then—FTC Chairman Muris collected the average number of Robinson-Patman cases by each President per year and also determined Robinson-Patman enforcement as a total percentage of non-merger cases: Kennedy/Johnson (1961–68) 64.7; Nixon/Ford (1968–76) 5.1; Carter (1977–80) 2; Reagan (1981–88) 0.6; Bush I (1989–92) 0; and Clinton (1993–2000) 0.1.<sup>62</sup> We can extend this to Bush II (2001–08) 0 and Obama (2009–present) 0.<sup>63</sup>

The concentration of FTC Robinson-Patman complaints occurred during the Kennedy and Johnson administrations. The highest level of Robinson-Patman enforcement was under the combined Kennedy and Johnson administrations.<sup>64</sup> During that period, the FTC brought 518 Robinson-Patman cases.<sup>65</sup> By the Nixon administration the number of complaints per year had fallen significantly—from over 100 complaints per year (and in one year, 215 total complaints) to only one per year by 1972 (although the numbers rose a bit after that initial drop).<sup>66</sup>

To provide a broader sense of negative outcomes, between the passage of Robinson-Patman and 1980, there were a total of 611 FTC orders under sections (a), (d), and (e) of the Act.<sup>67</sup> An FTC report that reviewed all of these cases (along with section (f) enforcement) found that the vast majority of investigations that led to orders did so

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<sup>61</sup> Peter G. Peterson, *Quantity Discounts and the Morton Salt Case*, 25 J. BUS. U. CHI. 108, 108 (1952) (internal quotations marks omitted).

<sup>62</sup> TIMOTHY J. MURIS, HOW HISTORY CAN INFORM PRACTICE IN MODERN U.S. COMPETITION POLICY 10 (2004), [http://www.law.gmu.edu/assets/files/publications/working\\_papers/04-20.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/04-20.pdf).

<sup>63</sup> See Sokol, *supra* note 19, at 1014–15.

<sup>64</sup> See MURIS, *supra* note 62, at 10.

<sup>65</sup> William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 411 (2003). But Robinson-Patman was *not* effective at reaching its goal of helping small competitors. See F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 516 (3d ed. 1990) (“[T]he brunt of the Commission’s effort fell upon the small businesses Congress sought to protect.”).

<sup>66</sup> See POSNER, *supra* note 12 at 33; see also ALAN STONE, *ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE* 98–99 (1977) (“Until the early 1970s the Commission enforced the law heartily. . . . Of the 941 orders [between 1945 and 1965], 682 (72.48 percent) were for violation of the Robinson-Patman Act. . . . The Robinson-Patman express came to a screeching halt in the 1970s.”).

<sup>67</sup> JOHN L. PETERMAN, *FTC, THE SALT PRODUCERS’ DISCOUNT PRACTICES BEFORE AND AFTER THE ROBINSON-PATMAN ACT AND THE FTC’S CHALLENGE TO THEM: THE MORTON AND INTERNATIONAL SALT CASES* 441 (1995), <http://www.ftc.gov/reports/salt-producers-discount-practices-after-robinson-patman-act-ftcs-challenge-them-morton>.

in industries in which the industry's concentration was not significant and where "the likelihood of discrimination was remote."<sup>68</sup>

Complaints and orders are only some output measures of FTC enforcement of Robinson-Patman. Another is the total number of investigations. Not all investigations lead to complaints.<sup>69</sup> However, complaints are a proxy for the amount of agency attention in terms of resources to Robinson-Patman enforcement.<sup>70</sup> At the height of Robinson-Patman enforcement, from 1965–68, the FTC initiated an average of 97 Robinson-Patman investigations per year and issued an average of 27 complaints per year during that period.<sup>71</sup> A shift to less enforcement by the FTC followed in the mid-1970s, by which there were roughly 4 Robinson-Patman investigations and 3 complaints each year.<sup>72</sup> Certainly, it helped that the chair of the ABA report critical of Robinson-Patman, Miles Kirkpatrick, joined the FTC as Chairman in 1970.<sup>73</sup>

In total, the Carter Administration brought 8 Robinson-Patman Act cases.<sup>74</sup> FTC Robinson-Patman investigations continued through the Republican change in administrations.<sup>75</sup> This occurred even while a structural shift in antitrust enforcement of criminal, civil, and merger cases had already occurred for other areas of antitrust law.<sup>76</sup> Since the end of the George H.W. Bush presidency, there has been only one FTC Robinson-Patman decision (a divided 3-2 decision).<sup>77</sup> In practice, given the outlier nature of the Clinton era (under FTC Chairman

<sup>68</sup> *Id.* at 454.

<sup>69</sup> See ANTITRUST MODERNIZATION COMM'N, *supra* note <CITE \_Ref423784068">, at 316.

<sup>70</sup> See PETERMAN, *supra* note 67, at 441–45.

<sup>71</sup> ANTITRUST MODERNIZATION COMM'N, *supra* note 15, at 316.

<sup>72</sup> *Id.*

<sup>73</sup> TIMOTHY J. MURIS, FED. TRADE COMM'N, HOW HISTORY INFORMS PRACTICE—UNDERSTANDING THE DEVELOPMENT OF MODERN U.S. COMPETITION POLICY 10 (2003).

<sup>74</sup> Kovacic, *supra* note 65, at 411.

<sup>75</sup> See *id.*

<sup>76</sup> See Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733, 733, 740–41 (2011) (identifying the shift in merger, criminal and civil enforcement under the Clayton Act and Sherman Act).

<sup>77</sup> See Decision and Order at 1, McCormick & Co., Docket No. C-3939 (F.T.C. Apr. 27, 2000) (finding 3-2 a narrowly applied Robinson-Patman violation by suggesting that market power should be viewed as a prerequisite for the application of the Morton Salt inference). *McCormick* might be better characterized as an exclusive dealing case masquerading as a Robinson-Patman case. McCormick had a market share of about eighty percent and was foreclosing competitors from shelf space. See Complaint at 3, McCormick & Co., Docket No. C-3939 (F.T.C. Apr. 27, 2000). The dissenting votes were concerned that the decision was not well reasoned ("It is laudable that the majority has tried to limit the use of the *Morton Salt* inference. We do not believe, however, that evidence of *supplier* market power justifies bringing cases in which the *Morton Salt* inference is used as the basis to prove competitive harm among *buyers*.").

Pitofsky) Robinson-Patman case, FTC enforcement of Robinson-Patman is dead, having survived several presidential shifts.<sup>78</sup> Under neither the George W. Bush nor the Obama administrations has the FTC brought a Robinson-Patman case.<sup>79</sup> Certainly, this trend of lower enforcement started in the 1970s.<sup>80</sup> However, the difference between low-level enforcement and no enforcement may be significant. Under a no total (public and private) enforcement regime, companies may rely on the lack of enforcement for such a long period of time as part of how they plan their business risk and strategy regarding government enforcement. A situation of low total enforcement risk, in contrast, still shapes business strategies as some companies will mitigate business behavior which they find may lead to potential suits.<sup>81</sup>

*b. Causes in the Shift of FTC Robinson-Patman Enforcement*

A number of factors explain the growing shift in FTC Robinson-Patman enforcement starting in the 1970s.<sup>82</sup> One of the most important was an increased emphasis on economic analysis at the agency.<sup>83</sup> This emphasis in turn changed the internal dynamics at the FTC.<sup>84</sup> The misguided economics of Robinson-Patman and its enforcement against the very firms it was meant to protect led to a schism within the FTC by the mid-1970s.<sup>85</sup>

Warfare between the FTC Bureau of Competition and Bureau of Economics staff erupted because the Bureau of Economics opposed nearly all Robinson-Patman cases due to the negative economic effects of enforcement of the Act.<sup>86</sup> Consequently, the Bureau of Competition staff went to Congressman Patman's staff to explain that the Robinson-Patman Act was not being enforced.<sup>87</sup> The House Small Business Committee held hearings on Robinson-Patman because the

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<sup>78</sup> Sokol, *supra* note 19, at 1014.

<sup>79</sup> *Id.*

<sup>80</sup> *See id.*; POSNER, *supra* note 12, at 33.

<sup>81</sup> *See* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 695–704 (2012). Present-day private suits for secondary-line Robinson-Patman cases fall within this category.

<sup>82</sup> *See* Kovacic, *supra* note 65, at 413–14.

<sup>83</sup> *Id.* at 464.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* at 465.

<sup>86</sup> *See* ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* 42–44 (1980).

<sup>87</sup> Telephone Interview with Frederic M. Scherer, Professor, John F. Kennedy Sch. of Gov't, Harvard Univ. (Sept. 2000) (confirming this account based off his first-hand observation as member of the FTC Bureau of Economics).

Bureau of Economics rejected complaints from the Bureau of Competition staff, which had its own specialized Robinson-Patman unit (and which had the incentive to bring cases to look busy).<sup>88</sup> At the hearings, the head of the Bureau of Economics, Professor F.M. Scherer, provided an analysis of Robinson-Patman enforcement.<sup>89</sup> In his congressional testimony, Professor Scherer discussed how Robinson-Patman had become focused on small producers.<sup>90</sup> Thus, in its application, Robinson-Patman was not even effective as a protectionist measure for small competitors.<sup>91</sup> Professor Scherer's congressional testimony pointed to stunning statistics about the nature of FTC Robinson-Patman enforcement.<sup>92</sup> Indeed, "the brunt of the Commission's [enforcement] effort fell upon the small businesses Congress sought to protect."<sup>93</sup>

At this time of FTC Robinson-Patman enforcement, DOJ Antitrust took a different approach. DOJ had conducted both civil and criminal Robinson-Patman enforcement.<sup>94</sup> By the mid-1970s, DOJ unilaterally stopped its Robinson-Patman enforcement and issued a report, calling the Act "protectionist" with a "deleterious impact on competition."<sup>95</sup>

Even though the DOJ and the FTC's head of the Bureau of Economics argued that Robinson-Patman reduced consumer welfare, the FTC leadership continued enforcing the Act.<sup>96</sup> Had the FTC sought

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<sup>88</sup> *Id.*; see also WILLIAM A. NISKANEN, *POLICY ANALYSIS AND PUBLIC CHOICE: SELECTED PAPERS* BY WILLIAM A. NISKANEN 333 (1998) (describing generally the incentives of complex organizations to look busy).

<sup>89</sup> *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Bus.*, 94th Cong. 141 (1975) (statement of Frederic M. Scherer, Director, Bureau of Econ., FTC).

<sup>90</sup> *Id.* at 142.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 145–48.

<sup>93</sup> SCHERER & ROSS, *supra* note 65, at 516. The empirical evidence (presented by Professor Scherer) suggests more broadly that during this period, government antitrust lawyers were more prone than economists to push litigating cases. See WILLIAM F. SHUGHART II, *ANTITRUST POLICY AND INTEREST-GROUP POLITICS* 21–22 (1990); see also KATZMANN, *supra* note 86, at 42 (suggesting that the "economists are opposed to most conduct cases principally because there is often little benefit to the consumer gained from the prosecution of such matters").

<sup>94</sup> See *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 29–30 (1963) (holding that criminal enforcement of Robinson-Patman was constitutional). Criminal cases under Robinson-Patman were rare. See, e.g., *United States v. Md. & Va. Milk Producers Ass'n*, 151 F Supp. 438, 439–40 (D.D.C. 1957); *United States v. Bowman Dairy Co.*, 89 F. Supp. 112, 113–14 (N.D. Ill. 1949).

<sup>95</sup> DEP'T OF JUSTICE, *supra* note 13, at 250.

<sup>96</sup> Kovacic, *supra* note 65, at 410–11.

to seriously reduce or eliminate Robinson-Patman enforcement, it would not have brought the *Great Atlantic & Pacific Tea Co. v. FTC (A&P)*<sup>97</sup> case all the way to the Supreme Court. In *A&P*, the FTC issued a complaint in 1971 and continued litigation through to a negative Supreme Court opinion in 1979.<sup>98</sup> The larger point is that although there was obvious consumer harm in the application of Robinson-Patman,<sup>99</sup> the FTC did not stop all Robinson-Patman enforcement.

The FTC's 1979 loss at the Supreme Court, in *A&P*, did not deter the FTC from continuing to bring the occasional Robinson-Patman case under the Reagan Administration.<sup>100</sup> The FTC brought secondary-line cases in the 1980s instead of advocating for repeal of the Act or simply choosing not to enforce it.<sup>101</sup> In the early 1980s, then-Commissioner Calvani defended FTC investigations as having similar numbers to investigations under the Carter years.<sup>102</sup> As recently as 1993, Commissioner Azcuenaga gave a speech in favor of Robinson-Patman enforcement,<sup>103</sup> and, as noted above, in 2000 the FTC Commissioners voted in favor of a Robinson-Patman enforcement action.<sup>104</sup>

Overall, this enforcement record does not support the inference that the reduction of Robinson-Patman claims was due simply to a change of orientation at the FTC to bring economically sound cases that also comported with the law.<sup>105</sup> Large FTC cases such as the push to deconcentrate industry on oil, gas, automobiles, and breakfast cereals suggested the FTC may have substituted large bad cases for the small bad Robinson-Patman cases.<sup>106</sup>

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

98 *Id.* at 73–75, 85.

99 See DEP'T OF JUSTICE, *supra* note 13, at 250; SCHERER & ROSS, *supra* note 65, at 516.

100 Kovacic, *supra* note 65, at 411.

101 See, e.g., *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1128–29 (D.C. Cir. 1988).

102 Calvani, *supra* note 35, at 927.

103 MARY L. AZCUENAGA, FED. TRADE COMM'N, *THE ROBINSON-PATMAN ACT: A PERSPECTIVE FROM THE FTC* 1–2 (1993).

104 See *supra* note 77 and accompanying text.

105 Sokol, *supra* note 19, at 1015 n.74 (“Not all of the reasons behind FTC enforcement activity numbers can be attributed to the agency’s understanding of the economic irrationality of the Robinson-Patman Act. FTC priorities shifted during this time. The FTC looked for big cases starting in the 1970s and big cases ‘found’ the FTC as firms filed mergers under Hart-Scott-Rodino.”); see also William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L.J. 687, 688–90 (2014) (explaining political enforcement and its influence on federal antitrust enforcement activity).

106 Wesley J. Liebler, *Bureau of Competition: Antitrust Enforcement Activities, in THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 65, 65–73, 96–97 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981). But see William

### C. Judicial Enforcement of Robinson-Patman

The most important primary-line case of the pre-“Chicago” revolution was *Utah Pie Co. v. Continental Baking Co.*<sup>107</sup> The case resulted from local firm Utah Pie’s entry into the Salt Lake City frozen pie market, where three national incumbent firms had competed.<sup>108</sup> Utah Pie used a cost cutting strategy and acquired a significant market share—approximately two-thirds—of the frozen pie market.<sup>109</sup> The national firms responded with price cuts of their own, offering cheaper pies in Salt Lake City than nationally.<sup>110</sup> Utah Pie, which was still profitable (and had more than fifty percent market share), sued.<sup>111</sup> The Supreme Court found in favor of Utah Pie, even though such an outcome privileged a competitor over consumers.<sup>112</sup>

Secondary-line injury cases were equally problematic. The seminal pre-*Antitrust Paradox* case in this area is *FTC v. Morton Salt Co.*<sup>113</sup> Morton Salt sold its product, Blue Label table salt, to wholesalers and large retailers.<sup>114</sup> In turn, the wholesalers resold the salt to smaller retail grocery stores that competed directly with the large retailers.<sup>115</sup> Although volume discounts were available to all of its customers, only five firms (all large grocery chains) purchased enough salt to qualify for the volume discount.<sup>116</sup> The volume discounts allowed the large groceries to charge retail prices of Blue Label salt below the wholesalers’ prices to the smaller groceries.<sup>117</sup> The Supreme Court, without any showing of actual harm, condemned the price discrimination

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E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1136–41 (1989) (suggesting that the cases were a product of the economics of the time).

<sup>107</sup> *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685 (1967); see BORK, *supra* note 5, at 387 (“There is no economic theory worthy of the name that could find an injury to competition on the facts of the case. Defendants were convicted not of injuring competition but, quite simply, of competing.”).

<sup>108</sup> *Utah Pie*, 386 U.S. at 689–90.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 690–91.

<sup>111</sup> *Id.* at 687, 689.

<sup>112</sup> *Id.* at 703 (“We believe that the Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact.”). For an in-depth analysis, see Elzinga & Hogarty, *supra* note 16, at 427–32; Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 70–85 (1967).

<sup>113</sup> *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

<sup>114</sup> *Id.* at 40–41.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 41.

<sup>117</sup> *Id.*

based on an assumption that price discrimination led to adverse competitive effects.<sup>118</sup>

This expansive reading of both primary- and secondary-line cases by the Supreme Court had an impact (although difficult to quantify) for business planning by companies. Cases from the aggressive enforcement period that favored plaintiffs, including those brought by the FTC, gave an expansive reading to the Act. For example, in *FTC v. Sun Oil Co.*,<sup>119</sup> the Supreme Court concluded that the Robinson-Patman Act “is of general applicability and prohibits discriminations generally.”<sup>120</sup> Similarly, the language of *Morton Salt* suggests that all price discrimination is problematic, not merely anti-competitive price discrimination.<sup>121</sup> Due to pro-plaintiff decisions, efficient business decisionmaking was chilled.<sup>122</sup> More efficient legal doctrine outcomes would need to wait until there was a sea change in the thinking behind the goals of antitrust and its acceptance within the case law.

The tide of outcomes towards more defense-friendly decisions began to turn with a shift at the Supreme Court, as substantive and procedural Robinson-Patman cases reflected shifts in Sherman Act cases. By the time *A&P* was before the Supreme Court, the Court had already begun its shift toward an economics-based analysis of Sherman Act claims in cases such as *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>123</sup> *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>124</sup> *National Society of Professional Engineers v. United States*,<sup>125</sup> and *Reiter v. Sonotone Corp.*<sup>126</sup> *A&P* applied this same type of analysis to the Robinson-Patman Act.<sup>127</sup> In *A&P*, the Court warned against interpretations of the Robinson-Patman Act that “extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.”<sup>128</sup> Although the Supreme Court was unwilling to repeal Robinson-Patman, it limited application of the Act to situations in which there might be anti-competitive conduct that harmed consumers under sections 2(a)

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118 *Id.* at 46–47.

119 *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963).

120 *Id.* at 522.

121 *See Morton Salt*, 334 U.S. at 43–44.

122 *See BORK*, *supra* note 5, at 394–98; Hovenkamp, *supra* note 9, at 143–44.

123 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

124 *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

125 *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

126 *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

127 *Great Atl. & Pac. Tea Co. v. FTC (A&P)*, 440 U.S. 69, 80 (1979).

128 *Id.* (quoting *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953)).

and (b).<sup>129</sup> It also significantly reduced the number of cases in the case pipeline by more closely aligning Robinson-Patman to a requirement of antitrust injury. This shift began in *J. Truett Payne Co. v. Chrysler Motors Corp.*,<sup>130</sup> where the court explained, “[o]ur decision here is virtually governed by our reasoning in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*”<sup>131</sup>

Nevertheless, the courts took longer to adopt a competitive effect requirement for Robinson-Patman cases than it did for conduct under the Sherman Act. In *Texaco, Inc. v. Hasbrouck*,<sup>132</sup> the Supreme Court was unwilling to apply the concept of antitrust injury in a way that accurately reflected harm to competition in a secondary-line price discrimination case.<sup>133</sup> In that case, Texaco sold gasoline at different prices to two groups of customers.<sup>134</sup> Two distributors, Gull and Dompier, received discounts while Texaco-branded independent retailers did not.<sup>135</sup> The Court found that the price differential between the customer groups allowed for an inference of “injury” under Robinson-Patman.<sup>136</sup>

*Brooke Group* was a turning point in primary-line cases.<sup>137</sup> The case was interesting on the facts and argued before the Supreme

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<sup>129</sup> See *id.* at 82–85. But under those sections, at the time of the decision, the Act reached behavior that would be pro-competitive.

<sup>130</sup> *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

<sup>131</sup> *Id.* at 562. One of the most recent Robinson-Patman cases, *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136 (2d Cir. 1998), notes four elements to a successful Robinson-Patman claim. *Id.* at 141. The fourth of the elements is the competitive injury claim, based on antitrust injury. See *id.*

<sup>132</sup> *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

<sup>133</sup> See *id.* at 565–66.

<sup>134</sup> *Id.* at 546–47.

<sup>135</sup> *Id.* at 549–50. These firms primarily sold gasoline as retailers, however, and did not perform significant distribution functions. See *id.* at 549.

<sup>136</sup> *Id.* at 571.

<sup>137</sup> See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221–24 (1993). Although *Brooke Group* may explain a lot about the drop in Robinson-Patman cases, there may have been other factors at work. The repeated holdings that Robinson-Patman claims are inappropriate for class certification led most of the plaintiffs’ bar to abandon Robinson-Patman litigation entirely. See, e.g., *Boro Hall v. Metro. Tobacco Co.*, 74 F.R.D. 142, 146 (E.D.N.Y. 1977) (“The difficulty in proving individual competitive injury is why the courts in Robinson-Patman Act cases have generally denied class action motions.”). At the same time, small retailers began to disappear from the American landscape, replaced by chain stores and affiliated groups like Tru-Value and IGA, leaving fewer potential plaintiffs to be discriminated against. Then the Internet emerged, which drove still more small retailers out of business and changed retail competition even more dramatically. See generally Ethan Lieber & Chad Syverson, *Online Versus Offline Competition*, in *THE OXFORD HANDBOOK OF THE DIGITAL ECONOMY* 189, 202–212 (Martin Peitz & Joel Waldfogel eds., 2012).



Court by two titans of antitrust: Professors Areeda and Bork.<sup>138</sup> Brooke Group brought suit under Robinson-Patman against Brown & Williamson.<sup>139</sup> Brooke Group alleged discriminatory and below-cost discounts.<sup>140</sup> The Supreme Court summarized primary-line price discrimination in the case as follows:

[P]rimary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act. . . .

. . . First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. . . .

. . . [Second,] the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.<sup>141</sup>

Finding that there was below-cost pricing was already a daunting task.<sup>142</sup> However, recoupment meant that in practice, it has become nearly impossible for a plaintiff to win a primary-line Robinson-Patman claim.<sup>143</sup> Indeed, as Figure 1 below shows, there have been nineteen Robinson-Patman cases decided since *Brook Group*.<sup>144</sup> Only one has resulted in a pro-plaintiff victory.<sup>145</sup> Also of note is dicta in *Brooke Group* that suggests the purpose of Robinson-Patman is no different from that of the other antitrust statutes.<sup>146</sup> By the early 1990s, there was clearly an economics based approach (whether total or consumer welfare), which reached even Robinson-Patman cases.<sup>147</sup> It seems the lag between the Supreme Court's modifications to the Sherman Act doctrine to make economic sense of antitrust to a time when there was a doctrinal shift in Robinson-Patman cases was quite a bit longer than Sherman Act cases (where similar per se activity in

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<sup>138</sup> *Brooke Grp.*, 509 U.S. at 211.

<sup>139</sup> *Id.* at 216–17.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 221–22, 224.

<sup>142</sup> See Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2271–73, 2282–85 (2000).

<sup>143</sup> See *id.* at 2266–67.

<sup>144</sup> See *infra* Figure 1.

<sup>145</sup> See *id.*

<sup>146</sup> *Brooke Grp.*, 509 U.S. at 220 (“Thus, ‘the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.’” (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979))).

<sup>147</sup> See *infra* notes 172–74 and accompanying text.

vertical restraints moved to rule of reason analysis and toward more defendant victories). The overall shift in both Sherman Act and Robinson-Patman Act cases may have impacted developments even in secondary-line Robinson-Patman enforcement cases. Figure 1 analyzes the empirics of plaintiff victories in Robinson-Patman based on this hypothesis.<sup>148</sup>

Secondary-line price discrimination has not been so neatly dispatched as a viable claim as primary-line price discrimination. Indeed, scholars view secondary-line price discrimination as one of the troubling areas of antitrust.<sup>149</sup> Lamentably, *Morton Salt* technically remains good caselaw, although it has been limited.<sup>150</sup> The most recent limitation at the Supreme Court level has been *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,<sup>151</sup> in 2006. *Volvo* presented the court with two secondary-line issues.<sup>152</sup> The Court resolved the first by holding that a manufacturer was not liable under Robinson-Patman for secondary-line price discrimination unless the plaintiff-dealer showed that the manufacturer discriminated between dealers that competed contemporaneously in reselling the manufacturer's product to a retail customer that was identical.<sup>153</sup> Second, the Court found that the plaintiff-dealer was not able to establish an injury to competition;<sup>154</sup> thus, the Court stated it "would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*."<sup>155</sup>

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<sup>148</sup> See *infra* Figure 1.

<sup>149</sup> Hovenkamp, *supra* note 9, at 125 ("The principal reason for distinguishing secondary-line Robinson-Patman Act cases is a belief that the legislative history of the Robinson-Patman Act reveals that the statute was motivated by different concerns than the ones that inspired the Sherman and Clayton Acts generally. That proposition is false.").

<sup>150</sup> See *id.* at 128–29, 132–33.

<sup>151</sup> *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

<sup>152</sup> See *id.* at 169–73.

<sup>153</sup> *Id.* at 175.

<sup>154</sup> *Id.* at 181 ("[T]here is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act 'consistently with broader policies of the antitrust laws.'" (citations omitted)). All, however, is not totally resolved regarding secondary-line injury cases, and it is still possible to run afoul of Robinson-Patman post-*Volvo*. See Barbara O. Bruckmann, *Volvo Seven Years Later: Williams v. Duke Energy International, Inc.*, ANTITRUST SOURCE, Feb. 2013, at 1, 1–2, [www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/feb13\\_bruckmann\\_2\\_26f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb13_bruckmann_2_26f.authcheckdam.pdf). Additional case refinement (or ideally, repeal of the statute) is still required.

<sup>155</sup> *Volvo*, 546 U.S. at 181.

The review of caselaw development for Robinson-Patman leads to three questions about FTC enforcement. First, why did the FTC not unilaterally abandon all Robinson-Patman enforcement like the DOJ, but instead continue to bring such cases? Second, why did the FTC not undertake competition advocacy in every subsequent private Robinson-Patman case through amicus briefs with the purpose of limiting the reach of the Act? And third, why did FTC cases continue under the Reagan Administration, when during that same period, the number of vertical restraints Sherman Act cases per year dropped from 5.8 per year under President Carter to 0.6 per year under President Reagan?<sup>156</sup>

One possibility is that unlike the multiple goals of the Sherman Act, Robinson-Patman was unambiguously a competitor welfare act.<sup>157</sup> If so, there is a question of democratic legitimacy in going against the express wishes of Congress.<sup>158</sup> However, the FTC undertook advocacy work in anti-dumping investigations in front of the International Trade Commission ("ITC"), where much like Robinson-Patman, the law penalized firms that charged prices that were "too low" where the only harm was to competitor firms.<sup>159</sup>

To the extent that democratic legitimacy matters, why was the FTC willing to ramp up competition advocacy during the 1980s before the ITC but not do so in private cases for Robinson-Patman? Both types of cases were based on spurious economics that punished firms

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<sup>156</sup> See MURIS, *supra* note 62, at 10–11.

<sup>157</sup> See Sokol, *supra* note 41, at 128.

<sup>158</sup> See *supra* notes 89–93 and accompanying text.

<sup>159</sup> See Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 N.C. L. REV. 357, 360 (2009) ("[T]he government, through its trade policies, often hampers foreign competition, protecting domestic producers at the expense of all the benefits that foreign competition might bring to the economy."); Pierre F. de Ravel d'Esclapon, *Non-Price Predation and the Improper Use of U.S. Unfair Trade Laws*, 56 ANTITRUST L.J. 543, 547–49 (1987) (providing an overview of how the anti-dumping regime is anti-competitive). Perhaps the one distinction is that The International Trade Act of 1974, 19 U.S.C. § 1337 (2012), had a requirement that the ITC request input from the FTC for each investigation on unfair methods of competition in imported goods. *Id.* § 1337(b)(2). Overall, the DOJ and FTC's advocacy was ineffective. See generally Harvey M. Applebaum, *The Interface of Trade/Competition Law and Policy: An Antitrust Perspective*, 56 ANTITRUST L.J. 409, 410 (1987). In terms of the hostility that the FTC faced from the ITC, ITC Commissioner Moore left the hearing whenever FTC lawyers appeared to testify. Telephone Interview with Harvey Applebaum, Senior Counsel, Covington & Burling LLP (Dec. 12, 2014). For FTC reports about this period, see MORRIS E. MORKRE & KENNETH H. KELLY, FTC, EFFECTS OF UNFAIR IMPORTS ON DOMESTIC INDUSTRIES: U.S. ANTIDUMPING AND COUNTERVAILING DUTY CASES, 1980 TO 1988 3–32 (1994), <http://www.ftc.gov/sites/default/files/documents/reports/effects-unfair-imports-domestic-industries-u.s.antidumping-and-countervailing-duty-cases-1980-1988/232233.pdf>.

for which prices were too low.<sup>160</sup> This is all the more peculiar because change was underway regarding FTC competition advocacy starting in 1974.<sup>161</sup> That year, FTC Chairman Lewis Engman articulated his concern that the lack of competition in a number of sectors of the economy was contributing to the general economic malaise of the 1970s.<sup>162</sup> Advocacy took an even larger role under the Reagan Administration, particularly under the Chairmanship of James Miller.<sup>163</sup> The staff review of the competition advocacy program explained:

Markets are imperfect mechanisms. In some instances regulation can promote outcomes more desirable from society's viewpoint than would result from the free play of private interests. In short, regulation can be appropriate and beneficial. At the same time, regulation, by its nature, may impede the market process. That regulation may be required when markets fail is not denied. But neither can it be denied that misdirected regulation can reduce efficiency and diminish consumer welfare.<sup>164</sup>

The staff report helped reaffirm the importance of the competition advocacy agenda under Chairman Miller. The advocacy program, as a percentage of the total FTC budget was greater in the 1980s than at any time in the modern era.<sup>165</sup>

One factor that may explain the lack of focus on competition advocacy against private Robinson-Patman cases, at least from the period of the late 1980s to the present, is the pushback that the FTC received from its advocacy program.<sup>166</sup> As one review of the history of the competition advocacy work at the FTC explained, "due to complaints from adversely affected interest groups, in the late 1980s Congress attempted to cripple, if not totally eliminate, the advocacy

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<sup>160</sup> See *supra* notes 4, 159.

<sup>161</sup> See Todd J. Zywicki & James C. Cooper, *The US Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy*, in *COMPETITION LAW AND POLICY IN LATIN AMERICA* 351, 356–57 (Eleanor M. Fox & D. Daniel Sokol eds., 2009).

<sup>162</sup> *Id.* at 356. The advocacy mission was particularly active starting in the late 1970s regarding the International Commerce Commission. See Arnold C. Celnicker, *The Federal Trade Commission's Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379, 383 n.23 (1989).

<sup>163</sup> See Cooper, *supra* note 58, at 1095.

<sup>164</sup> FRED MCCHESENEY ET AL., FED. TRADE COMM'N, *COMPETITION AND CONSUMER ADVOCACY: POLICY REVIEW SESSION 2–7* (June 9, 1982) (May 24, 1982, transmittal letter from Executive Director and Bureau Directors Bruce Yandle, Timothy Muris, Thomas Campbell, and Robert Tollison, to the Commission).

<sup>165</sup> Zywicki & Cooper, *supra* note 161, at 362.

<sup>166</sup> See *id.* at 369–73.

program.”<sup>167</sup> But given the FTC’s current lack of enforcement of Robinson-Patman, perhaps the better question is what is the legitimacy of a regime that is not in use?<sup>168</sup>

Why did the FTC not stop all Robinson-Patman enforcement at the time the DOJ essentially stopped civil Section 2 enforcement under the Reagan Administration?<sup>169</sup> When asked about DOJ enforcement priorities in 1986, then-Assistant Attorney General Douglas Ginsburg famously responded, “legislative reform, legislative reform, and legislative reform.”<sup>170</sup> He conspicuously did not mention unilateral conduct enforcement. Indeed, the Reagan DOJ Antitrust record was one of nearly exclusive cartel enforcement.<sup>171</sup> Surely the FTC could have shut down Robinson-Patman enforcement and focused exclusively on cases with actual consumer harm. It did not.

## II. EMPIRICAL ANALYSIS

### A. Overview

Antitrust law on mergers and conduct has undergone structural shifts.<sup>172</sup> This Essay is the first to examine structural shifts in Robinson-Patman case outcomes for the entire period of the life of the Robinson-Patman Act. The purpose for doing so is to examine how trends in intellectual thinking—which create changes in ideas in antitrust, and which stemmed largely from a revolution in thinking traditionally labeled “Chicago”<sup>173</sup>—creates a long-run shift in case

<sup>167</sup> *Id.* at 368.

<sup>168</sup> *Cf.* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 559–95 (2014) (providing an analysis of desuetude in the criminal law context for cruel and unusual punishment).

<sup>169</sup> *See* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 947 (1987) (“The enforcement record of the Reagan Administration directly corresponds with its repeated assertion that virtually all business activity except horizontal price fixing is good for the American consumer and good for the economy.”).

<sup>170</sup> Colloquy, 60 Minutes with Douglas H. Ginsburg, Assistant Attorney General, Antitrust Division, 55 ANTITRUST L.J. 255, 260 (1986).

<sup>171</sup> Fox & Sullivan, *supra* note 169, at 947–48 (“From 1981 to 1985, the Department brought only two civil and one criminal monopoly cases, compared with eleven civil and three criminal monopoly cases brought from 1976 to 1980. In 1985 the Department brought only two civil restraint-of-trade cases, compared with eighteen in 1976, nineteen in 1977, twenty in 1978, fourteen in 1979, and fifteen in 1980.” (footnotes omitted)).

<sup>172</sup> *See e.g.*, Ghosal, *supra* note 76, at 737–38; Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, 57 J.L. & ECON. S51, S51 (2014).

<sup>173</sup> Importantly, this was broader than just Chicago. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 32–35 (2005); Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST

outcomes. This is not to suggest that antitrust ignored economics prior to the 1970s; rather, economics was not the sole criterion for analysis.<sup>174</sup> In this sense, the model of analysis changed.<sup>175</sup>

Many of these shifts in thinking emerged in case law starting in the late 1970s and continued to the 2000s. A broader trend was in the area of vertical agreement cases, cases that were once viewed as per se illegal: those cases were moved to a rule of reason category based on the changing interpretation of their behavior as potentially pro-competitive.<sup>176</sup> The shift in caselaw was also a function of a move to a singular economics-based goal of antitrust.<sup>177</sup> Whether this goal was consumer welfare or total welfare is, for the purposes of this article, irrelevant. What matters is that the Supreme Court no longer saw politically-based justifications for antitrust<sup>178</sup> as valid.<sup>179</sup> The doctrinal shift owing to seminal Robinson-Patman cases explains both the frequency and outcomes of litigated cases that followed.

## B. Empirical Methods

### 1. Hypotheses

Hypothesis 1 posits that plaintiff win rates under the Robinson-Patman Act decline as the Supreme Court shifts toward holding

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LAW 109, 109–10 (Robert Pitofsky ed., 2008); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 4–5.

<sup>174</sup> HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937 268 (1991) (“One of the great myths about American antitrust policy is that courts began to adopt an ‘economic approach’ to antitrust problems only in the 1970’s. At most, this ‘revolution’ in antitrust policy represented a change in economic models. Antitrust policy has been forged by economic ideology since its inception.”).

<sup>175</sup> See *id.* The shift towards an economic approach was not exclusive to antitrust, although it was felt the most strongly there. See *id.* Within the world of administrative and regulatory law, the period of 1970–90 experienced a similar shift in the scope and nature of economic regulation in a number of different fields. See Paul L. Joskow & Roger G. Noll, *Economic Regulation I*, in AMERICAN ECONOMIC POLICY IN THE 1980s 367, 378 (Martin Feldstein ed., 1994).

<sup>176</sup> On maximum resale pricing restraints, *State Oil Co. v. Khan*, 552 U.S. 3, 22 (1997), overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 152–53 (1968). On minimum resale price restraints, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007), overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911). And on non-price vertical restraints, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977), overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967).

<sup>177</sup> See *supra* note 5; see also Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 873–74 (1999).

<sup>178</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (providing justification for non-economic goals).

<sup>179</sup> See *supra* notes 173–75 and accompanying text.

strongly for defendants in these cases. To test this hypothesis, this Essay examines plaintiff win/loss rates in decided Robinson-Patman primary- and secondary-line cases.

Most cases settle before they go to trial.<sup>180</sup> It is possible that cases that go to trial are not representative of the kinds of cases that parties settle before an outcome.<sup>181</sup> The overall win/loss ratio may not be the 50 percent that the Priest-Klein Model hypothesizes because of information asymmetries between the parties.<sup>182</sup>

Recent scholarship by Professors Klerman and Lee on the use of win/loss ratios cautiously concluded, “plaintiff trial win rates can provide useful information about the law.”<sup>183</sup> Much like their article, this Essay provides some caveats to the use of win/loss outcomes in litigated cases. We lack access to data about the quality of legal representation in these cases, which may help explain outcomes. These concerns do not prove fatal to the ultimate research question, which is to understand the long-term shifts in Robinson-Patman cases. After all, client counseling is a function of precedent and therefore impacts future business behavior.

Hypotheses 2 and 3 are offshoots of Hypothesis 1. Hypothesis 2 posits that *Brooke Group* transformed primary-line price discrimination cases because of its strong language that—using the same consumer welfare standard that the Supreme Court applied in Sherman Act cases—made a predation claim hard to win. Hypothesis 3 suggests that the broad language of *Brooke Group*, which announced that the goal of the Robinson-Patman Act is the same as the Sherman Act, served to transform secondary-line price discrimination to be akin to primary-line price discrimination, even though no case formally overruled *Morton Salt*.

## 2. Data Description

We coded all Robinson-Patman cases in the Westlaw ALLFEDS database,<sup>184</sup> from the time the Act became law through August 2014,

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<sup>180</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2 (1984).

<sup>181</sup> See *id.* at 13, 16; see also Keith N. Hylton, *An Asymmetric-Information Model of Litigation*, 22 INT'L REV. L. & ECON. 153, 153–55 (2002); Joel Waldfogel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229, 230 (1995).

<sup>182</sup> Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 498–501 (1996).

<sup>183</sup> Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 214 (2014).

<sup>184</sup> WestlawNext, WESTLAW, <https://next.westlaw.com> (last visited Nov. 5, 2015).

which addressed primary-line and secondary-line Robinson-Patman claims. We excluded those cases for which Robinson-Patman was mentioned but did not impact the holding of the case. Many other cases never reached this determination because the cases were decided on procedural grounds such as standing or antitrust injury. This resulted in 546 cases, including those cases that were appealed and those cases that also had both primary- and secondary-line case claims.

In the first test, we analyzed the data for potential structural shifts in Robinson-Patman enforcement by examining all primary- and secondary-line cases.

### 3. Data

We analyzed the annual proportion of cases where the decision outcome was for the defendant (1939–2014, for a total of 76 years). We transformed to stabilize the Variance<sup>185</sup>:

$$Y_i = \sec^{-1}(\sqrt{p_i}) \text{ where } p_i = \frac{\text{\# of cases for defendant}}{\text{\# of cases}}$$

### 4. Model

$$\text{AR}(3): Y_t = \beta_0 + \beta_1 Y_{t-1} + \beta_2 Y_{t-2} + \beta_3 Y_{t-3} + \varepsilon_t$$

$Y_t$  = Transformed proportion of cases that were in favor of the defendant in Year  $t$  (arc-sin transformation, to stabilize variance). Then the model is autoregressive of order 3.<sup>186</sup> The rolling and recursive regressions visualize shifts in regression coefficients over time.<sup>187</sup>

### 5. Rolling Regression

Beginning with period 2 (Year = 1940), we fit sequential regressions, each based on a window of twenty years. We then plotted the intercepts and lag coefficients over the various regressions (beginning at years 1940, 1941 . . . 1995). We looked for shifts on the plots of coefficient versus year.

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<sup>185</sup> See generally RONALD CHRISTENSEN, ANALYSIS OF VARIANCE, DESIGN AND REGRESSION: APPLIED STATISTICAL METHODS 108–39 (1996).

<sup>186</sup> See generally GEBHARD KIRCHGÄSSNER ET AL., INTRODUCTION TO MODERN TIME SERIES ANALYSIS 27–56 (2008).

<sup>187</sup> See generally CHRISTENSEN, *supra* note 185.



## 6. *Recursive Regression*

We fit regression over a pre-specified time window  $[1, w]$ . We re-fit the model by sequentially increasing the upper bound of the window by 1, until the entire sample was used. We used  $w = 20$ . We plotted the intercepts and lag coefficients over the various regressions (ending at years 1958 . . . 2014). We looked for shifts on the plots of coefficient versus year.

## 7. *Quandt Likelihood Ratio Test*

This tests for structural breaks.<sup>188</sup> For the middle (approximately) seventy percent of the years, we created a dummy variable, allowing the coefficients to change during that year. We then conducted a Chow test for each year to test for a structural break<sup>189</sup> to obtain the largest F-Statistic for testing the following model/hypothesis:

$$Y_t = \beta_0 + \beta_1 Y_{t-1} + \beta_2 Y_{t-2} + \beta_3 Y_{t-3} + \delta_0 Z_t + \delta_1 Z_t Y_{t-1} + \delta_2 Z_t Y_{t-2} + \delta_3 Z_t Y_{t-3} + \varepsilon_t \quad Z_t = \begin{cases} 1 & \text{if Year} \geq t \\ 0 & \text{otherwise} \end{cases}$$

Test for constant intercept (Autoregressive components assumed constant):  $H_0: \delta_0 = 0$

Test for constant intercept and Autoregressive components:

$$H_0: \delta_0 = \delta_1 = \delta_2 = \delta_3 = 0$$

The null hypothesis reflects no shifts in Regression coefficients.<sup>190</sup> Special tables are needed for critical values of the QLR statistic, which depends on the number of restrictions under the null hypothesis (three in this case).

## 8. *Results*

Fit for the AR(3) model, a fourth order term was not significant:

<sup>188</sup> Richard E. Quandt, *Tests of the Hypothesis That a Linear Regression System Obeys Two Separate Regimes*, 55 J. AM. STAT. ASS'N 324, 324–25 (1960).

<sup>189</sup> Gregory C. Chow, *Tests of Equality Between Sets of Coefficients in Two Linear Regressions*, 28 ECONOMETRICA 591, 592–602 (1960).

<sup>190</sup> See generally KIRCHGÄSSNER ET AL., *supra* note 186.

FIGURE 1. SIGNIFICANCE

Source	SS	df	MS	Number of obs = 73		
Model	2.21154403	3	.737181342	F( 3, 69) = 5.64		
	9.01915122	69	.130712337	Prob > F = 0.0016		
Residual				R-squared = 0.1969		
				Adj R-squared = 0.1620		
Total	11.2306952	72	.155981878	Root MSE = .36154		

y	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
y						
L1.	.135834	.1077692	1.26	0.212	-.0791597	.3508277
L2.	-.2518884	.1047192	-2.41	0.019	-.4607974	-.0429793
L3.	.3816035	.1113477	3.43	0.001	.159471	.6037361
_cons	.7582138	.2050863	3.70	0.000	.3490778	1.16735

FIGURE 2. PLOT OF THE ROLLING INTERCEPT  
(Year represents the center of the window)

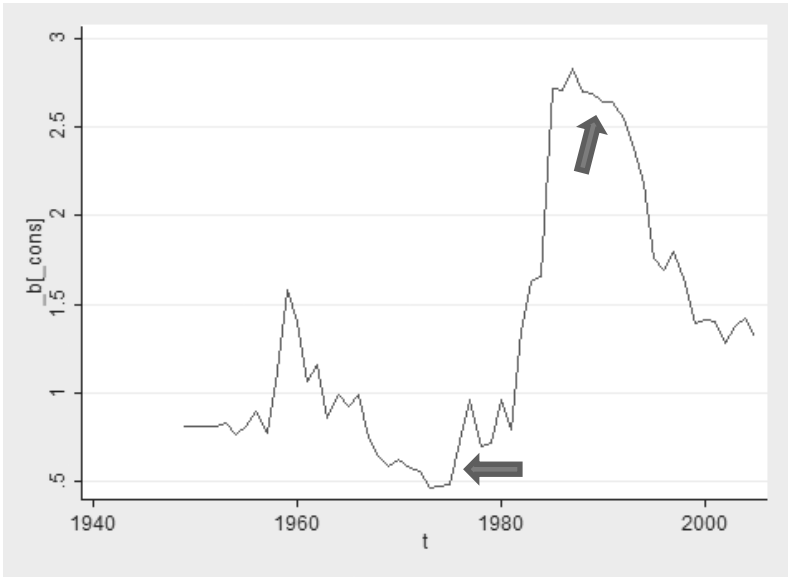
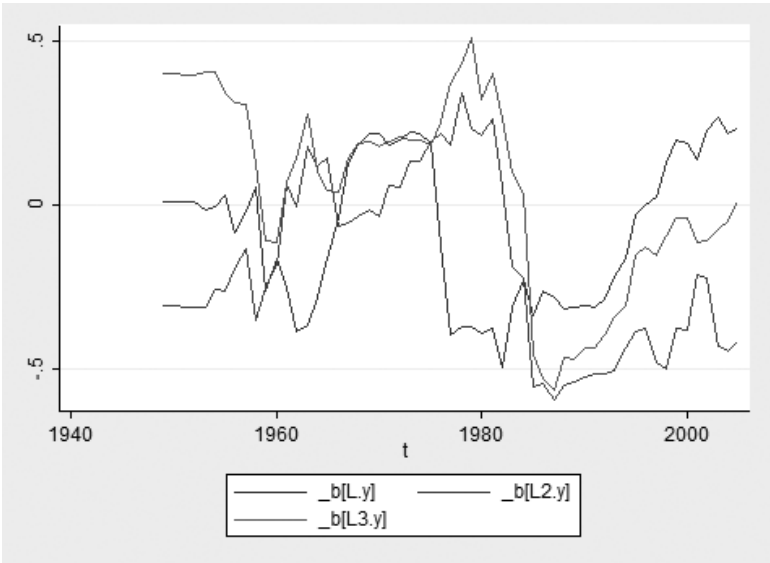


Figure 2 shows that structural breaks appear in mid-1970s and around 1990. These breaks coincide with changes in enforcement patterns for federal Robinson-Patman enforcement (significant reduction in enforcement)<sup>191</sup> and in 1990, around the time of the *Brooke Group* Supreme Court decision that all but eliminated primary-line claims.<sup>192</sup>

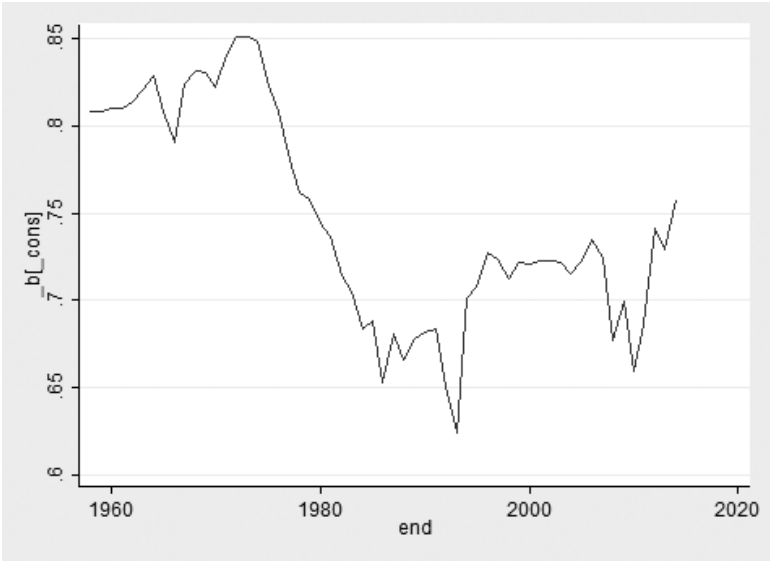
191 See *supra* notes 72–81, 94–95 and accompanying text.  
192 See *supra* notes 137–46 and accompanying text.

FIGURE 3. PLOT OF THE AUTOREGRESSIVE COEFFICIENTS



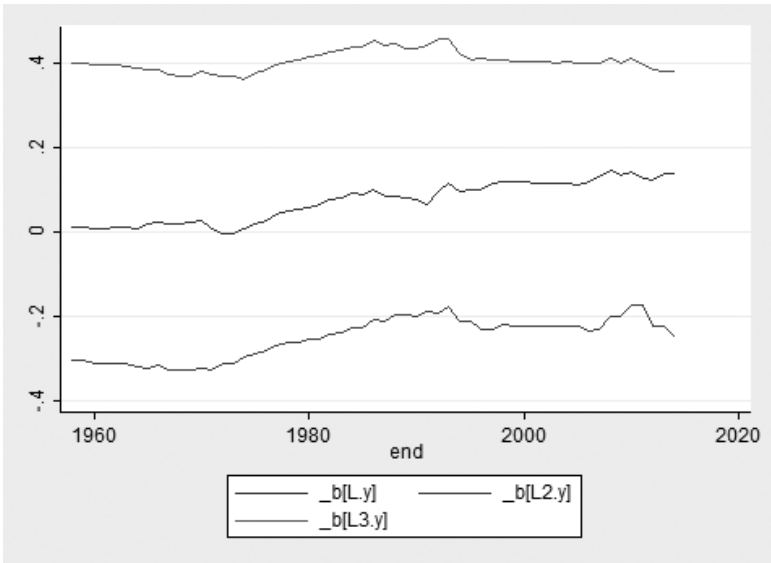
In Figure 3, for the AR(1) coefficients (blue), there appears to be breaks in the early-1960s, mid-1970s, and around 1990. For the AR(2) and AR(3) coefficients (red and green), there appears to be breaks in the early-1980s.

FIGURE 4. PLOT OF THE RECURSIVE INTERCEPT  
(Year represents the upper end of the window)



In Figure 4, there appears to be a break during the early to mid-1970s.

FIGURE 5. PLOT OF THE AUTOREGRESSIVE COEFFICIENTS



The Autoregressive coefficients, as seen in Figure 5, show little evidence of a structural break when the regressions are conducted recursively. All show a slight increase beginning in the mid-1970s.

The regression models were fit, with break points at each year from 1952–2001 (fifty regressions). First, we tested whether the intercept was constant, assuming the Autoregressive Parameters were constant. Second, we tested whether the intercept and the Autoregressive parameters were constant. These are special cases of the Quandt Likelihood Ratio Test,<sup>193</sup> which select the period with the highest Chow F-statistic for testing the particular null hypothesis.<sup>194</sup> For the first model, with one restriction, the 5% Critical value is 8.68 and the 1% value is 12.16. For the second model, with four restrictions, the 5% Critical value is 4.09 and the 1% value is 5.12.

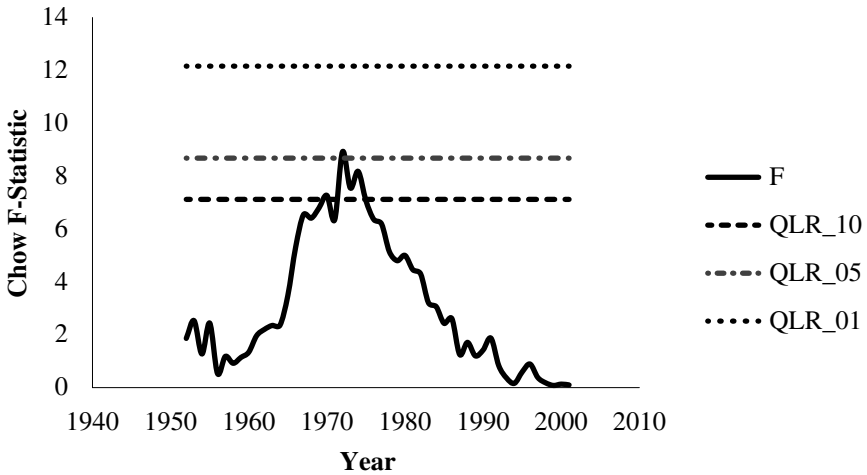
$$Y_t = \beta_0 + \beta_1 Y_{t-1} + \beta_2 Y_{t-2} + \beta_3 Y_{t-3} + \delta_0 Z_t + \delta_1 Z_t Y_{t-1} + \delta_2 Z_t Y_{t-2} + \delta_3 Z_t Y_{t-3} + \varepsilon_t$$

$$Z_t = \begin{cases} 1 & \text{if Year} \geq t \\ 0 & \text{otherwise} \end{cases}$$

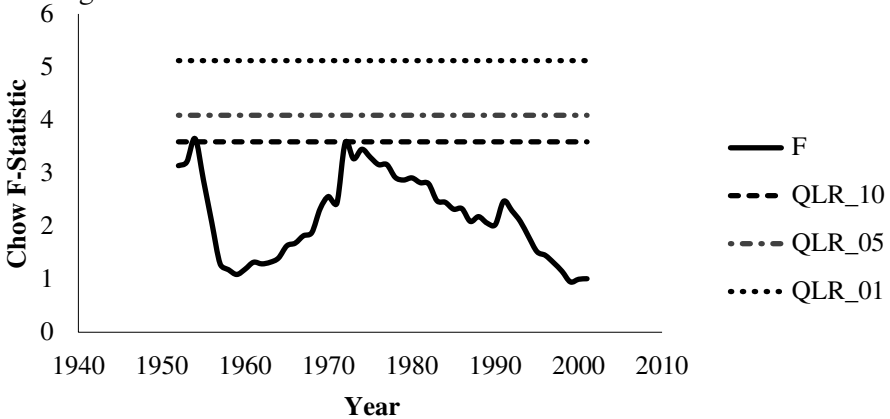
Test for constant intercept (Autoregressive components assumed constant):  $H_0: \delta_0 = 0$

Test for constant intercept and Autoregressive components:  
 $H_0: \delta_0 = \delta_1 = \delta_2 = \delta_3 = 0$

<sup>193</sup> Quandt, *supra* note 188, at 324–25.  
<sup>194</sup> See generally Chow, *supra* note 189, at 594–95.



For the first model, the maximum F-statistic is 8.92 for 1972, exceeding the 5% critical value.



For the second model, none of the F-statistics are significant at the 5% level. Thus, while we have seen evidence of a shift for the intercept term, there is no evidence of a shift in the Autoregressive parameters (see also Chart 4, which plots the recursive model).

There is some evidence of a downward shift in the outcome favoring the defendant beginning in the early- to mid-1970s. This occurs roughly at the time when the DOJ ended its Robinson-Patman enforcement and when the FTC significantly curtailed its enforcement.<sup>195</sup>

<sup>195</sup> See *supra* notes 74–81, 94–99 and accompanying text.

## 9. Robustness Check

The preceding empirical analysis uses a time series approach.<sup>196</sup> Some might argue that this is much more forecast than causal.<sup>197</sup> As a robustness check, we utilize a causal model in which changes in the independent variables cause changes in the dependent variable.<sup>198</sup> We introduce variables of changes in presidency and economic cycle data. We also specify a test (shift in 1970 with a significant decrease in government Robinson-Patman cases and investigations and again in 1993 with *Brooke Group*) and then estimate model to see if this exogenous shift model is supported in the data.<sup>199</sup>

We use U.S. macroeconomic data from the Federal Reserve Bank of St. Louis and utilize economy-wide merger activity to control for our cases.<sup>200</sup> The data used for total number of mergers in the United States are from the Federal Trade Commission merger series (1958–1977) and Thompson’s Financials (1978–2012).<sup>201</sup> We measure all monetary data in real 2005 dollars. We also examine the potential presidential effect as a broader indication of enforcement patterns.

In running this model, we showed no significance except the 1993 dummy variable (1 for Year  $\geq$  1993, 0 otherwise) in which we have a small p-value for 1993 modeling: P (Defendant wins).

## C. Specific Patterns of Primary- and Secondary-Line Robinson-Patman Enforcement

### 1. Overview

We broke the dataset into pre-1993 and post-1993 (leaving out the 1993 cases—most notably *Brooke Group*). We examined outcomes by primary- and secondary-line status. Note that cases that considered “both” line types (because there were both primary- and secondary-line arguments decided in each decision) appear twice (six cases pre-1993, one case post-1993). The rationale for examining the effects of *Brooke Group* for both primary- and secondary-line cases is

<sup>196</sup> See generally KIRCHGÄSSNER ET AL., *supra* note 186.

<sup>197</sup> See generally *id.*

<sup>198</sup> See generally *id.*

<sup>199</sup> We do this because otherwise we run the risk of concluding some result generated by chance is significant.

<sup>200</sup> *Federal Reserve Economic Data*, FED. RES. BANK ST. LOUIS, <https://research.stlouisfed.org/fred2/> (last visited Nov. 5, 2015).

<sup>201</sup> Data provided by Dr. Vivek Ghosal. Dr. Ghosal is a Professor at the School of Economics at the Georgia Institute of Technology. *Vivek Ghosal, Phd*, GA. TECH SCH. ECON., <http://www.econ.gatech.edu/people/person/10b08939-7db5-53ec-870c-f07fe0ea9d2a> (last visited Nov. 5, 2015).

dicta in *Brooke Group* that the Act “should be construed consistently with broader policies of the antitrust laws.”<sup>202</sup>

FIGURE 6. PLAINTIFF WIN/LOSS RATIOS IN ROBINSON PATMAN CASES:

Counts				Counts			
Pre-1993	"Both" Counts Twice			Post-1993	"Both" Counts Twice		
All Cases	P	D	Total	All Cases	P	D	Total
Primary	24	58	82	Primary	1	18	19
Secondary	93	273	366	Secondary	28	66	94
Total	117	331	448	Total	29	84	113
Row Percents				Row Percents			
Pre-1993	"Both" Counts Twice			Post-1993	"Both" Counts Twice		
All Cases	P	D	Total	All Cases	P	D	Total
Primary	29.27	70.73	100	Primary	5.26	94.74	100
Secondary	25.41	74.59	100	Secondary	29.79	70.21	100
Total	26.12	73.88	100	Total	25.66	74.34	100
Col Percents				Col Percents			
Pre-1993	"Both" Counts Twice			Post-1993	"Both" Counts Twice		
All Cases	P	D	Total	All Cases	P	D	Total
Primary	20.51	17.52	18.30	Primary	3.45	21.43	16.81
Secondary	79.49	82.48	81.70	Secondary	96.55	78.57	83.19
Total	100	100	100	Total	100	100	100

2. Results

a. Part 1 Results

We examine the case trends from Robinson-Patman cases. Using *Brooke Group* as a structural break and *Volvo* as a second structural break (because these are Supreme Court cases and we hypothesize that such cases change the shape of cases below), we find that the reduction in plaintiff victories for primary-line cases was rather significant. Pre-1993, the plaintiff won 29.27% of primary-line cases and 25.41% of secondary-line cases (Chi-square(1df) = 0.52, p-value = 0.47). In contrast, post-1993, the plaintiff won 5.26% of primary-line

202 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

cases and 29.79% of secondary-line cases (Chi-square(1df) = 4.98, p-value = 0.03).

b. Part 2 Results

Having determined that *Brooke Group* was a shift in caselaw, we then utilized a probit model.<sup>203</sup> The case outcome serves as the dependent variable favoring either a plaintiff or defendant.

Probit Regression, modeling Pr{Plaintiff wins} to Secondary Line Dummy, Post 1993 Dummy, Secondary Line\*Post 1993 Interaction (Product of the individual dummies).

Probit regression

Number of obs = 561

LR chi2(3) = 6.89

Prob > chi2 = 0.0755

Pseudo R2 = 0.0107

Log likelihood = -318.18666

plaintwin	Coef.	Std. Err.	z	P> z	[95% Conf. Interval]	
1.sl	-.1160844	.1624895	-0.71	0.475	-.434558	.2023891
1.post1993	-1.074293	.4987401	-2.15	0.031	-2.051805	-.0967799
1.post1993sl	1.205411	.5218301	2.31	0.021	.1826428	2.228179
_cons	-.5455637	.1461573	-3.73	0.000	-.8320267	-.2591007

While post 1993 and the interaction are significant, the Pseudo-R<sup>2</sup> is very small, so there still must be other relevant factors. We interpret post1993 as the post *Brooke Group* effect for primary-line cases (large negative effect). We interpret post1993+post1993sl as the post *Brooke Group* effect for secondary-line cases (small positive effect) even as the holding in *Brooke Group* indirectly implicated secondary-line cases and even though the Court did not explicitly overrule *Morton Salt*. We interpret sl as the pre-*Brooke Group* secondary-line effect (not significant), consistent with pre-1993 chi-square statistic above. This suggests that there are other factors at play. These other facts may include: specific details of the case; the politics of the judge (which are not necessarily based on political affiliation—for example, a Republican appointee under Eisenhower or Nixon may have a different worldview than a Republican appointee under George W. Bush); the precedents in that particular circuit; or the quality of the lawyers and judges.

203 See TIM FUTING LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS 1, 21–22 (1994).



c. *Part 3 Results*  
*Average Marginal Effects:*

Average marginal effects  
Model VCE : OIM

Number of obs = 561

Expression : Pr(plaintwin), predict()  
dy/dx w.r.t. : 1.sl 1.post1993 1.post1993sl

	Delta-method					
	dy/dx	Std. Err.	z	P> z	[95% Conf. Interval]	
1.sl	-.038134	.0545023	-0.70	0.484	-.1449566	.0686886
1.post1993	-.2505591	.0700806	-3.58	0.000	-.3879146	-.1132036
1.post1993sl	.414141	.1534156	2.70	0.007	.1134519	.7148301

Note: dy/dx for factor levels is the discrete change from the base level.

III. EMPIRICAL RESULTS IN CONTEXT OF FTC ENFORCEMENT

The results in Part II above provide some empirical record to suggest how and why changes occurred under Robinson-Patman doctrine. These results must be understood as limited by the particular empirical research question addressed. Additional research into Robinson-Patman will be able to provide more definitive conclusions on Robinson-Patman enforcement.

How might we explain the first structural shift from the mid-1970s? In that period, the courts and agencies were beginning to shift towards more of an economic approach to antitrust enforcement.<sup>204</sup> For Robinson-Patman, this includes the Senate hearing on FTC enforcement and DOJ’s unilateral end to Robinson-Patman enforcement.<sup>205</sup> Case law had not yet shifted to comport with economic theory, however, even though a series of Supreme Court cases began shifting per se rules to a rule of reason analysis during this same period.<sup>206</sup>

The increase in the number of Robinson-Patman cases and the relatively high frequency of wins for plaintiffs suggests that during this period (one in which protection of competitors rather than protection of consumers dominated), public and private enforcement may have

204 See *supra* notes 172–79 and accompanying text.

205 See *supra* notes 88–79 and accompanying text.

206 Indeed, the change occurred even with particular members of the Supreme Court. Justice Brennan—who wrote *United States v. Philadelphia National Bank*, 374 U.S. 321, 370–71 (1963), which was suspicious of efficiency—joined *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 85, 103–04 (1984), which applied a rule of reason analysis for certain horizontal restraints.

been substitutes.<sup>207</sup> Since public enforcement collapsed, in practice there was only private enforcement left.<sup>208</sup> In the traditional model of private and public enforcement, Professors Becker and Stigler provided the parameters for optimal public enforcement.<sup>209</sup> This model assumes that public and private enforcement are substitutes.<sup>210</sup> To the extent that they are substitutes, it may be that although the FTC stopped bringing as many Robinson-Patman cases (which by their nature were consumer welfare-reducing), private plaintiffs were happy to step into the shoes of government to benefit competitors at the expense of consumers and to take advantage of the favorable caselaw of this period.

The very conduct that may drive out less efficient competitors from business is the same behavior that, in the mid-1970s, was a violation of Robinson-Patman.<sup>211</sup> This allowed private plaintiffs to misuse antitrust for private ends—such as extortion or contract renegotiation—against efficient competitors, thus harming consumers.<sup>212</sup> Contemporaneous scholarship by the then-FTC Chairman supports this view of antitrust law misuse by competitors through the 1990s.<sup>213</sup> Chairman Miller wrote:

[The] premise—that the antitrust laws can be abused for purposes of seeking special advantage—is entirely correct. Such rent-seeking behavior by competitors is widespread . . . and is costly to the economy. It is costly not only when it succeeds in specific cases, but also when the fear of possible antitrust litigation intimidates firms from engaging in competitive conduct.<sup>214</sup>

Miller's analysis as to the motives of the misuse of antitrust is particularly interesting given that he did not stop Robinson-Patman

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<sup>207</sup> See Sokol, *supra* note 81, at 689–96 (discussing public and private models of antitrust enforcement).

<sup>208</sup> See *id.* at 691–92 (“[P]rivate rights can be seen as the outsourcing of government litigation resulting from budget constraints. In this sense, private rights are a substitute for government enforcement.” (footnote omitted)).

<sup>209</sup> Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13–16 (1974).

<sup>210</sup> *Id.* at 2–5, 14.

<sup>211</sup> See *supra* notes 85–93 and accompanying text.

<sup>212</sup> R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. STRATEGIC MGMT. EDUC. 37, 39–40 (2004).

<sup>213</sup> See James C. Miller III, *Comments on Baumol and Ordover*, 28 J.L. & ECON. 267, 267 (1985).

<sup>214</sup> *Id.*

enforcement.<sup>215</sup> Overall, Robinson-Patman enforcement by the FTC is not one of the agency's great moments.<sup>216</sup> Robinson-Patman is a relic from an earlier protectionist era.<sup>217</sup> It created consumer harm from its introduction and continues to do so to the present.<sup>218</sup> As countries around the world introduce industrial policy into their competition laws,<sup>219</sup> the FTC should learn from its own experience regarding Robinson-Patman and advocate that other competition regimes do not undertake similar folly in their respective systems.

This Essay identified the enforcement trends and rationales for FTC enforcement of the Robinson-Patman Act. Overall, it identified a number of situations that support inferences that private interests shaped enforcement policy by the FTC to the detriment of consumers.<sup>220</sup> The Essay also contributes to the understanding of Robinson-Patman case development over time by being the first to analyze all decided primary- and secondary-line Robinson-Patman cases in federal courts.<sup>221</sup>

The empirical analysis shows a decline in plaintiff victories as a percentage of all case outcomes for both primary- and secondary-lines cases over time.<sup>222</sup> It finds two structural shifts in enforcement. The first, in the 1970s, shows increased plaintiff victories as a percentage of all cases.<sup>223</sup> During this period, there was no antitrust injury requirement for Robinson-Patman claims.<sup>224</sup> After the Supreme Court applied the antitrust injury requirement to Robinson-Patman, courts were able to weed out weaker cases, although "stronger" Robinson-Patman cases could still make it through this procedural screen.<sup>225</sup> The continued success of some Robinson-Patman cases is particularly interesting because it coincides with a shift that favored shrinking plaintiff victories under the Sherman Act for vertical restraints.<sup>226</sup> The

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<sup>215</sup> See *supra* notes 163–65 and accompanying text.

<sup>216</sup> See *supra* notes 10–18 and accompanying text.

<sup>217</sup> See Sokol, *supra* note 41, at 128–29.

<sup>218</sup> See *supra* notes 96–104 and accompanying text.

<sup>219</sup> See, e.g., D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J.L. & BUS. 1, 2–3 (2013); D. Daniel Sokol, *Tensions Between Antitrust and Industrial Policy*, 22 GEO. MASON L. REV. 1247 (2015); D. Daniel Sokol, *What Drives Merger Control? How Government Sets the Rules and Play*, in COMPETITION AND THE STATE 89, 89–90 (Thomas K. Cheng et al. eds., 2014).

<sup>220</sup> See *supra* Part I.

<sup>221</sup> See *supra* Part II.

<sup>222</sup> See *supra* Part II.C.

<sup>223</sup> See *supra* Part II.B.1.

<sup>224</sup> See *supra* notes 118–21 and accompanying text.

<sup>225</sup> See *supra* notes 129–31 and accompanying text.

<sup>226</sup> See *supra* notes 123–29 and accompanying text.

second structural shift occurred in the 1990s.<sup>227</sup> This coincides with *Brooke Group*, which narrowed the scope of liability for Robinson-Patman primary-line cases and, by dicta, brought the Robinson-Patman Act within the same framework as the other antitrust acts (a shift from benefitting competitors to benefitting consumers).<sup>228</sup>

The current phase of case outcomes suggest a weakening of Robinson-Patman over time. To win a primary-line Robinson-Patman case is nearly impossible, even though private plaintiffs have attempted to circumvent this trend. Some risk from secondary-line private litigation remains, largely because the Supreme Court has yet to overturn *Morton Salt*.<sup>229</sup> What this means for business planning for firms that are contemplating differential pricing is beyond the scope of this Essay, other than to note that firms must still incorporate some low level Robinson-Patman risk into their planning, which may be costly and potentially lead to less efficient outcomes that may hurt consumers.

The empirical analysis suggests that the common law may be efficient.<sup>230</sup> Over time, Robinson-Patman cases, as well as the antitrust agencies, have taken on a more efficient approach, although there has been a greater lag for cases under Robinson-Patman than under the Sherman Act. Nevertheless, bad Supreme Court precedent that has not been explicitly overruled still creates potential negative outcomes for consumers. As more cases on secondary-line Robinson-Patman enforcement appear before the courts, this folly hopefully will be corrected. The FTC could play a more significant role in pushing for such changes. At the very least, it could make the same statement that the Department of Justice did: the Robinson-Patman Act hurts consumer welfare. The FTC is finally moving in this direction (at least in terms of competition advocacy although not yet in a categorical statement). It recently filed an amicus brief in the appeal of *Woodman's Food Market, Inc. v. Clorox Co.*,<sup>231</sup> in which it advocated further circumscribing Robinson-Patman because the FTC was incorrect in its prior

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<sup>227</sup> See *supra* Part II.B.8.

<sup>228</sup> See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

<sup>229</sup> See *supra* note 150 and accompanying text.

<sup>230</sup> See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10–40 (1st ed. 1972); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 53–57 (1977).

<sup>231</sup> Brief of Amicus Curiae the Federal Trade Commission in Support of Defendants-Appellants and Reversal, *Woodman's Food Mkt., Inc. v. The Clorox Co. and the Clorox Sales Co.*, No. 15-3001 (7th Cir. Nov. 2, 2015), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/woodmans-food-market-inc.plaintiff-appellee-v.clorox-co.clorox-sales-co.defendants-appellants/151102woodmanvscloroxamicusbrief.pdf).

cases *Luxor*<sup>232</sup> and *General Foods Corp.*<sup>233</sup> This is a much-needed revision and hopefully portends more aggressive advocacy of limitations of Robinson-Patman on the part of the FTC. Overturning Robinson-Patman will help consumers, and the FTC can do a lot to help towards this noble end.

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<sup>232</sup> *Luxor Ltd.*, 31 F.T.C. 658 (1940).

<sup>233</sup> *General Foods Corp.*, 52 F.T.C. 798 (1956).