THE ROBINSON-PATMAN ACT - AN HISTORICAL PERSPECTIVE

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ABSTRACT

The Robinson-Patman Act, an antitrust statute, has been a thorn in the side of judges, lawyers, scholars, and firms since its passage in 1936. This paper discusses the complexity of the Act and antitrust legislation in general in an historical perspective. It offers observations with respect to the Act and summarizes some of its effects. Key questions are raised. Ramifications for the teaching of marketing and retailing are offered.

INTRODUCTION

The Robinson-Patman Act (RP) of 1936 is an amendment to Section 2 of the Clayton Act. The Act by-and-large makes it unlawful to discriminate in price between different business buyers in certain circumstances (Shenefield and Stelzer 1996, 77). Price discrimination covered by the Act applies to buyers paying different prices for goods that are essentially of like grade and quality. The prices must be net after all discounts, rebates, and the like (Shenefeld and Stelzer 1996, 77). RP also forbids, under some conditions, price discrimination in the form of brokerage fees, promotion allowances, and consideration for services performed. Some circumstances, however, are excluded. For example, the Act does not apply to the sale of services nor does it apply when the selling price to two different buyers is the same though the seller's cost of selling to each differs (see Voorhees 1991, Clark 1995). In price discrimination cases Section 2 of the Sherman Act (attempt to monopolize) and Section 5 of the Federal Trade Commission Act (unfair methods of competition) can also be used (Howard 1983, 179).

This paper: 1) discusses elements of RP and their historical context; 2) delineates broad changes in antitrust over time; 3) offers some observations with respect to RP; 4) describes some of the effects of the Act; 5) discusses some key questions posed by the Act; and 6) offers possible changes that might be made in the teaching of RP in marketing and retailing courses.

THE ROBINSON-PATMAN ACT

Robinson-Patman consists of 6 sections, the first two of which are concerned with direct or indirect price discrimination[1]. Section 2(a) makes price discrimination between different purchasers of commodities of "like grade and quality" illegal where the effect is to "...lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." Over the years, an important test has been whether or not the price discrimination caused competitive injury[2] (Shenefeld and Stelzer 1996, LaRue 1995, Levin 1994, Pinkerton and Kemp 1996). The injury may be at the level of the seller's competition (primary), the level of the customer (secondary), or the level of a customer of the disfavored customer (tertiary)[3].

The Act recognizes, however, the appropriateness of some price differences. Section 2(a) makes allowances for "...differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities." While ostensibly allowing the selling price to vary with costs and quantities purchased, the Act requires the Federal Trade Commission (FTC) to determine the appropriate quantity for the prices charged – eliminating a blanket authorization of quantity discounts. The section also allows for a price difference based on changing market conditions such as might occur with perishable products or products facing obsolescence. Finally, Section 2(b) provides a defense for price differences based on an effort "...made

in good faith to meet an equally low price of a competitor."

Section 2 (c) of the Act prohibits the granting of a commission or brokerage fee except for services rendered. The purpose was to prevent sellers from effectively providing a price difference in the form of a brokerage fee to a non-brokerage buyer such as might occur when a large retail chain purchases direct from the manufacturer. Sections 2 (d) and (e) prohibit giving advertising, promotional allowances or services to a customer if they are not freely available on proportionally equal terms to competing customers. The purpose was to prevent discrimination in the form of advertising, promotion or service allowances. Section 2 (f) holds that it is illegal for buyers to induce or knowingly receive a discriminatory price.

RP is an antitrust statute. Further, the Supreme Court has repeatedly indicated that interpretations of RP should seek to reconcile it with the nation's other antitrust statutes (LaRue 1995; Clark 1995). Indeed, changes in antitrust over time have had an important impact on how RP is interpreted and enforced. There are two problems introduced by RP's relationship to antitrust. First, Hovenkamp (1985) suggests if one hundred years of antitrust has taught us anything it is that antitrust is both political and cyclical as each political generation abandons the policies of its predecessors. Second, the language and legislative history of RP point to two different and arguably contradictory anti-trust thrusts: one based on the protection of small competitors and the other on economic efficiency. While protecting small retailers may ensure a certain number of competitors, it need not be a method of ensuring economic efficiency.

HISTORICAL ENVIRONMENT

RP is the result of complex environmental forces coming together in an exceptionally difficult economic period. There was the regulatory psychology resulting from certain practices of Standard Oil. Despite the break-up of Standard Oil in 1911, regulators worried price discrimination was not sufficiently addressed by the courts (Palamountain 1955, 189). Standard Oil was accused of charging different prices to customers in different geographic areas, but the practice was not of primary importance in the court's decision to break-up the company.

The economic argument against price discrimination is that a "monopolist" will garner moderate or excessive profits from the practice resulting in a less than efficient allocation of market capital (Pozner 1976). In the absence of a "monopoly," however, price discrimination can be a symptom of aggressive economic activity. Price discrimination can indicate short-term disequilibrium in a competitive industry or a price defection among members of an industry cartel, both of which could mean improved economic efficiency. The alleged practices of Standard Oil raised such concern within the FTC that arguments highlighting the positive effects of price discrimination appear not to have been widely voiced.

The Clayton Act, passed in 1914, strengthened the government's regulatory position regarding price discrimination. Section 2 of the Clayton Act forbade the charging of discriminatory prices where the effect may be to lessen competition with, as above, allowance made for sellers making a good faith effort to meet competition. Two court decisions, *Mennen Co. v. F.T.C.* in 1923 and *National Biscuit Co. v. F.T.C.* in 1924, focused only on competition among sellers (i.e. primary competition) and essentially made Section 2 impotent (Palamountain 1955, 190). The major conflict was in reconciling the good faith effort condition with the practice of price discrimination. If interpreted too broadly, sellers in any industry might claim the need to lower price to meet the competition, effectively allowing all sellers to price discriminate. If interpreted too narrowly all price discrimination could become a per se violation of the Act. Although the Supreme Court provided some clarification in *George Van Camp & Sons v. American Can*, the earlier decisions resulted in an eight-year hiatus in new FTC cases, from 1925 until 1933 (Palamountain 1955, 190).

At the same time retail chains were growing. From 1914 to 1936 a huge growth of chain stores challenged and threatened small business (Howard 1983, 180). Retail chains already dominated the variety store industry and the Atlantic & Pacific Tea Company (A & P) was in the process of becoming the largest national food retailer. A & P's success was at the expense of food wholesalers and independent retailers. By the late 1920s food wholesalers were becoming politically organized.

The depression of the 1930s brought increased price-cutting as sellers fought to maintain or gain share of shrinking markets, exacerbating the apparent price discrimination problem. The federal government implemented the National Recovery Act (NRA) in an attempt to stop the downward price trend, maintaining retailer and supplier margins. Under the NRA supplying firms were allowed to act in concert for the purpose of maintaining prices. Because the negative effects of the depression were felt disproportionately by wholesalers and independent retailers relative to retail chains, the NRA

provide some relief from the competitive pressures applied by retail chains. In 1935 the Supreme Court concluded the NRA was unconstitutional. Within days of the Supreme Court decision Congressman Patman introduced the first version of the Robinson-Patman bill (Palamountain 1955, 197).

The bill introduced by Congressman Patman and Senator Robinson was actually written by Mr. Teegarden, the general counsel for the United States Wholesale Grocer's Association (USWGA). Thus wholesalers and some, though not all, independent retailers strongly supported the early language of the bill. The legislative history suggests that many firms (e.g. manufacturers and agricultural producers) affected by the bill did not actively participate in political discussions until late in the process (Palamountain 1955). Eventually, committee discussions included concerns about: 1) sellers losing pricing flexibility, 2) the anti-monopoly attitude lingering from the Standard Oil case, 3) the increased economic efficiency and market share of retail chains, 4) the corresponding negative impact on wholesalers and independent retailers, and 5) the social and economic role of independent retailers. Confusion was such that rather than limit amendments to the bills moving through both Houses of Congress, committee chairmen openly expressed the desire to pass broad bills and allow the joint committee to make a final determination (Palamountain 1955, 228).

As might be expected, the bill that became RP was general with poorly defined terminology. It has been described as "... the misshapen progeny of intolerable draftsmanship... " (Bork 1978, 382). Though compromises are an ongoing part of the legislative process, RP and some say the Clayton Act before it (Bork 1978, 64) contains inherently contradictory goals built upon poorly defined yet important terms such as "competition," "costs," and "good faith effort." The overriding issue is the degree to which the bill should promote economic efficiency at the expense of monopolies, (e.g. the Standard Oil) versus the degree to which the bill should protect or maintains certain competitive relationships (e.g. ensuring the survival independent retailers).

The intent of RP is not readily apparent in the language of the statute (Hovenkamp 1985, 254). One can only infer intent by reading the Congressional Record and reports of the times. RP is seen as a model of statutory obfuscation (Gellhorn and Kovacic 1994, 29). Howard (1983, 181) states that hardly a phrase or clause of the Act has gone without litigation as to its proper interpretation. For example, the Act suggests that price differences are only deemed discriminatory "...where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them..." (Howard 1983, 207).

The above wording of the Act introduced the distinction between an injury to competition and injury to a competitor (Howard 1983, 181). With the statute specifically referring to injury to an individual competitor, the antitrust agencies and courts were put to the task of differentiating between injury to a competitor and competition (Woods 1988, 804; Howard 1983, 181). In recent years the thrust has been away from that of the competitor and to that of competition. There appears to be substantial, if not universal support (see Ballan 1992, Varney 1995), today for the proposition that there must be damage to competition (Clark 1995, LaRue 1995, Levin 1994, Pinkerton and Kemp 1996, 31,33); and that the Act requires a stronger demonstration of injury to competition than was required in past years (LaRue 1995).

ANTITRUST

As mentioned above, interpretations of RP vary with political views of antitrust. Gellhorn (1986) sees four antitrust phases (up to that point in time): a contractual phase (1890-1910), prior to the establishment of the "Rule of Reason"; an analytical phase (1911-1940) influenced by a continuing search for a unifying theory; a structural phase in which the court increasingly relied on per se rules and structural tests to challenge boycotts, marketing allocations, vertical restraints, mergers and monopolies; and an economic phase developed by the Chicago school (1970 forward)[4]. In 1972 a professionalization process was instituted in the Antiturst Division of the Department of Justice to bring in a large number of Phd economists (Eisner and Meier 1990). Bork (1978), a leader in fostering an approach based on neoclassical economic theory, saw consumer welfare as the prime goal of antitrust and "efficiency" as the key tool of developing that welfare (Kovacic 1990, 1448). Kovacic (1990) maintained that from President Reagan's election to the writing of his book, the federal enforcement agencies largely embraced the Bork (1978) vision of antitrust policy. Some of the shortcomings of the Chicago model are outlined by Hovenkamp (1985) and Shores (1995).

ROBINSON-PATMAN OVER TIME

Quite clearly interest groups have been extremely important in influencing the direction of antitrust over time (Benson, Greenhut, and Holcombe 1987, 813). Indeed, the strength of interest groups with regard to antitrust is enhanced by the inherent and deliberate vagueness of the antitrust statutes (Benson, Greenhut, and Holcombe 1987, 814 and many others). In the case of RP, small business was an important supporter in its creation and protection against change over time (Hovenkamp 1985, 253, Kintner and Bauer 1986, Aalberts and Judd 1991, 416). RP was seen as protecting wholesalers and small retailers (the most frequently mentioned type of retailing in the literature is small grocers) from the aggressive pricing of large chains, which had lower costs and would drive the less efficient small units out of business in a competitive market[5]. Clarkson and Muris (1982) noted that prior to 1969 the bulk of the FTC antitrust enforcement cases were aimed at discouraging price competition under RP when it threatened the well-being of small firms.

After criticism, the FTC in 1969 suddenly closed about 600 of its investigations. The FTC's enforcement has changed over time and the late 60s and 70s saw a major reversal in its focus (Hollander and Sheffet 1986, 767). From 1975 to 1982 the FTC issued only six RP complaints and from 1983 to 1985 none were issued (Aalberts and Judd 1991, 415).

SOME OBSERVATIONS

RP is a very difficult piece of legislation to try to understand. In this section we offer observations designed to give the reader some appreciation for the many perspectives, dimensions, and nuances of the Act.

The Justice Department has been a foremost critic of RP and has never actively been engaged in enforcing its provisions (as of 1986, Kintner and Bauer 1986, 605). RP is rarely enforced by federal enforcement authorities who apparently view the Act as an anachronistic remainder from the depression-day efforts to spare mom-and-pop stores from the rigors of chain store competition (Shenefield and Stelzer 1996, 78,79). To the enforcement authorities, RP seems to protect competitors rather than competition. Ross (1986) suggested that enforcement of RP had all but stopped. Yet each time that Congress has held hearings to determine what reforms of RP were desirable, it was determined that RP was still sound legislation (Kintner and Bauer 1986, 604).

Despite inactivity by federal enforcement agencies, the statute does generate private treble damage suits (Gellhorn and Kovacic 1994, 434). Less than 10 percent of the antitrust cases in 1986 were filed by the United States (Kintner and Bauer 1986, 609). Private plaintiffs often rely on RP (Shenefield and Stelzer 1996, 79). The costs of pursuing legal action under the Robinson-Patman Act are likely to be very large (Posch 1994). The costs of defending against FTC actions are high even if eventually dismissed (Ross 1984).

RP influences the pricing decisions of almost every major supplier business in the U.S. (Gellhorn and Kovacic 1994, 434, see Thayer 1995). The threat of public and private prosecution prevents unbridled price negotiations. There is also continuing debate about RP's influence on the behavior of large retailers in their negotiations (Hollander and Sheffet 1986). Most suppliers will not publicly challenge their important customers when they are being pressured for price considerations (Thayer 1995 quoting others). Large retailers may also get around RP by purchasing goods that are not deemed to be of like grade and quality (Dickinson 1967).

Small business has prevented a repeal of RP (Kintner and Bauer 1986, 595, Aalberts and Judd 1991, 416). Many, however, suggest that elements of the small business community have been hurt by RP, e.g. it hampered cooperative buying efforts. Calvani of the American Bar Association has maintained that "...historically the brunt of the FTC's enforcement efforts has fallen on small businesses." (Pinkerton and Kemp 1996, 33). Nonetheless, many small firms see RP as providing some protection from the competitive forces that might otherwise occur.

RP is one of a mix of statutes that can be used by plaintiffs in price discrimination cases. Howard (1983, 179) mentions section 2 of the Sherman Act (attempt to monopolize) and Section 5 of the Federal Trade Commission Act (unfair methods of competition). In addition, there is a continuing "overlap" between the Justice Department and the Federal Trade Commission. And state's Attorneys General are taking a more active role in antitrust. There is uncertainty and incoherence in the antitrust law in general and RP in particular as seen today (Ballan 1992, 645). There have been recent academic and judicial attempts to erode RP (Ballan 1992). The degree to which Congress had efficiency in mind when it passed RP is in some dispute, (Hovenkamp 1985, 250; Bork 1978), which raises questions regarding RP's congruence with other antitrust

legislation and the overriding goals of antitrust legislation in general.

SOME EFFECTS OF THE ACT

We now offer a summary of what some authors see as the effects of the Robinson-Patman Act. As one would expect, the evidence is sparse. With respect to antitrust Gellhorn (1986, 357) maintains that after nearly 100 years (to 1986), it is still not clear whether antitrust enforcement has significantly contributed to consumer welfare. Evidence of the actual effect of RP in promoting competition is meager (Kintner and Bauer 1986, 589). Schwartz (1986) outlines some of the perverse effects that may be attributed to the Act.

A 1975 study by Professor Brooks of eight randomly selected RP proceedings concluded that the Act helped make competition more vigorous in some markets and would assure vigorous competition in others (Kintner and Bauer 1986, 590). Alternatively, a 1976 report by the Justice Department concluded that the provisions of RP have not improved the ability of small businesses to survive and predicted that the future would be no different in that respect (Kintner and Bauer 1986, 577). Bork (1978, 382) suggests with respect to RP. "...it does not prevent much price discrimination... " and "...it has stifled a great deal of competition."

After fifty years of its existence, Hollander and Sheffet (1986) conclude that independent retailers had a smaller share of the U.S. market than they had in 1936. Hollander and Keep (1994) suggest that from 1953 to 1988 the single unit enterprise market share steadily declined but that total business had grown. But these results may not be attributable to RP.

RP has also reshaped business strategies. Pricing decisions of most major selling firms and some large buying firms are influenced in some respects by the possibilities of being seen in violation of the statute (Gellhorn and Kovacic, 1994, 434, See Thayer 1995). In addition, the brokerage provision has caused some firms to operate in a manner that is less efficient than otherwise (Edwards 1959; Schwartz 1986).

RP has fostered private brands although a private brand alone will not bring firms outside the purview of the Act (Converse Borden case). For example after the passage of RP, A & P undertook an aggressive private brand campaign (Fitzell 1982, 45, 46). A & P's own brands increased their share of the business from 15 to 20 percent in 1936 and to 25 percent by 1940.

KEY QUESTIONS

Many questions have been raised about RP. Here we select key questions in the hope that their examination by researchers will add to the understanding of RP and its attendant problems.

<u>What are the goals of antitrust and RP today?</u> Bork (1978) suggests a key problem (RP being one component) is that the legislature, the courts, and the various elements of the enforcement elements have no clearly articulated goals for antitrust in general or RP in particular. According to Bork's view the goal ought to be that of consumer welfare. Efficiency in the context of neoclassical economic theory should be the tool by which the consumer welfare is achieved.

Clearly Congress had multiple goals in mind when it passed the antitrust statutes. The protection of small business is one. The protection of competition in general is another. Are these two to be seen as ends in and of themselves or are they means to achieve other goals, perhaps something called consumer welfare?

<u>Have small retailers benefited?</u> Some evidence on what happened to small retailers over time was presented in an earlier section. However, evidence about whether or not small retailers have done well or poorly in any particular time frame under RP is suspect. One contaminating factor is the dramatic growth of franchising over the relevant time periods. Further, there are many kinds of small retailers (Hollander and Sheffet 1986).

As suggested earlier, there are those who feel small firms have been damaged (Pinkerton and Kemp 1996, Dickinson 1967). The arguments include the following:

1. Small business has often been misled into thinking that they are protected by RP. Large business, however, has many ways to avoid RP, e.g. by developing goods that are not judged to be of like grade and quality. There are

many others.

2. Small business may feel the Act is being enforced by federal government agencies.

3. Small and medium sized businesses have often been discouraged from negotiating with large suppliers by a supplier using RP as an excuse. "I can not offer you a better deal. It is not legal under RP."

4. RP is extremely complex. The typical small businessperson really has little hope of understanding its complexities. Larger firms either have or can seek extensive legal help if it is deemed desirable to avoid RP's impact.

The argument has further been made that when a "small" retail firm gets larger it will tend to be able to bargain more effectively and obtain better prices. But here there is obvious data that the firm knows that they are receiving a "lower than market price." They had just paid the higher prices. And smaller firms getting larger were often targets of RP prosecution (Dickinson 1967).

Do we as a society want to subsidize smallness? There is some evidence that individuals have strong feelings in favor of the so-called "mom and pop" store (Hovenkamp 1985, 243). There is also evidence that most consumers prefer to shop for the best value, i.e. they are not willing to pay more unless there are direct benefits to be derived, e.g. convenience, friendliness and the like. Are laws the way to create a balance between the society's desire to have small firms and society's desire for efficiency? Is it reasonable to have all consumers pay for the desire to have many small outlets? The "perceived" tax that can be alleged to be created by RP can be seen as being paid by all, e.g. not only do small retailers tend to charge higher prices, perhaps Wal-Mart's prices might otherwise be lower. Ross (1984, 271) raises the question of how much more do consumers pay in the form of higher prices.

If and how does relationship marketing relate to RP? What does RP mean in the context of relationship marketing? A characteristic of close relationships between buyer and seller is that price-related factors become less important. Almost by definition, a relationship based on price can be severed by another supplier offering a lower price. Such a relationship is tenuous at best. Relatedly, when a relationship develops over time, a myriad of other factors that have price connotations, but are not directly price, become relevant. For example note the possible problems with a policy where the supplier is made to be responsible for markdowns at the retail level? (Kahn 1996). Applebaum (1984, 1990) offers some perspectives on what is relevant to sections dealing with services (section 2(e) of RP), and promotion (section 2(d) of RP) There are such considerations as discrimination in delivery time, access to distribution facilities, and freight rates. Discriminatory payments to customers for booths at a trade show may be legal because they are related to original sales and not for resale (Applebaum 1984, 991).

What does a meeting of competition defense (section 2b, see Joseph and Harrop 1993, LaRue 1986) mean in the context of close buyer-seller relationships? Does meeting competition apply to all the myriad price-related elements? In some sense "everything" in a relationship can be seen as having price connotations, but will the law take that view at this point in time (see Applebaum 1984, 1990)?

Does incoherence and uncertainty make a difference in a law? Any serious reading of the literature with respect to RP will lead an observer to suggest that at least in its application RP has been incoherent and uncertain. The law has caused problems for Supreme Court judges (the Automatic Canteen Case, 346 U.S. 61 1953), lawyers, academics, and business people. Many have suggested repeal, but whatever its limitations, repeal does not seem likely given the opposition of small business (Kintner and Bauer 1986, Aalbert and Judd 1991).

Perhaps "judicial legislation" is the more reasonable avenue to pursue. And indeed judges have set up new defenses against RP claims (Ballan 1992). The result has been substantial confusion. And as suggested earlier, the enforcement of RP at the federal level has been sparse. But perhaps an inconsistently interpreted act is better than an iniquitous act, if that is what RP is? Predictability and coherence are not the only measures of a law's value.

Should buyers have any liability? The 1977 report of the Justice Department recommended the total elimination of the buyer liability provision (Kintner and Bauer 1986, 600). Such has not happened. But the potential problems for buyers appear great. How do buyers know when they are violating the law? If a buyer does not bargain, he/she runs a business risk of doing poorly (i.e. getting fired). If a buyer bargains vigorously, there may be a legal risk, however small, of being in violation of the law? What should a buyer do in his or her own interest? What should be

the ethical response to this conundrum? Rosner (1991) reports that the buyer is much safer in accepting an offer made to meet somebody else's price than in accepting the initial low offer of a supplier.

MARKETING ACADEMIA

Marketing and retail academics and texts have favored a statute-oriented approach to RP. In this conservative approach, RP is described and the defenses offered by the statute may be articulated. Different prices charged to different business customers are seen as illegal subject to the particular defenses outlined in the Act. However, as we have seen, RP is far more complex than that. Students are led to believe that charging different prices to different customers is illegal under most circumstances and that the enforcement agencies and the courts are somehow making sure that this price discrimination is penalized.

A possible cause of this bias in presentation by academics in marketing is that marketing academics have focussed on the perspectives of the supplier in the context of the four P's. The study of retailing and negotiation has become less important, at least if one starts the period of analysis from the late 1950s. The presumption of much of marketing academia today is that the supplier makes an offering and the buyer either accepts that offering or not. On this view, negotiation is almost irrelevant.

A further problem for academics created partially by RP relates to the definition of price discrimination (Dickinson and Hollander 1996). For many years a price discrimination meant that the action was in violation of the Act. Further, economists have had a specific definition of price discrimination that was related to the Act. Price discrimination described activities in which a firm charged a disproportionately lower price to some than to others for a given product (Cassady 1946, Monroe 1979). Dickinson and Hollander (1996) suggest price discrimination should describe one of two activities of a single firm: "(1) any activity by which two customers are charged different amounts for the same basic product or service; or (2) customers are charged the same price for a bundle of different goods and services of different 'substantive' value." (p. 11)

The consideration of goals of RP raises another issue. Americans have always distrusted power. Perhaps liberty depends on sharing in self government (Sandel 1996, 2) Small business can be seen as an element of this that may create civic virtue and better citizens. Thus efficiency is not everything and much of American history can be seen as an effort to have participation in business as fundamental to creating better citizenship. On this view, citizenship comes first, economic efficiency after. Whatever one may think of this view, it has been a very important part of our history (Sandel 1996).

CONCLUSION

RP must be seen in its historical context. This paper does not offer any resolution to the fundamental conundrums posed by RP. However, whatever the misfortunes of RP, until it is repealed or changed legislatively, RP has to be seen as a balanced statute (Hovenkamp 1985). It is a balance between: 1) the feeling of many who created the statute that small business in the form of a lot of small competitors should be protected against the ravages of more efficient, large competitors: and 2) consumer welfare and efficiency. The courts have made it plain that the benefit of low prices to consumers is not to be disregarded in enforcing the Robinson-Patman Act (LaRue 1995, 1923). Yet RP has not been disregarded and is not likely to be. The balance between the two perspectives changes according to various political pressures at particular points in time. The judicial and regulatory sensitivity to political climates appears to be both a strength and weakness of RP.

REFERENCES

Aalberts, Robert J. and L. Lynn Judd. (1991). "Slotting in the Retail Grocery Business: Does it Violate the Public Policy Goal of Protecting Businesses Against Price Discrimination?" *Depaul Law Review* 40 (2) Winter: 397-416.

Applebaum, Harvey M. (1984). "Allowances and Services." *Antitrust Law Journal* 53 (4) Fall: 987-997.

_____ (1990). "Allowances and Services under the Robinson-Patman Act and the Revised FTC Guides." *Antitrust Law Journal* 59 (3) Fall: 855-869.

Bain, Joseph. (1954). "Economies of Scale, Concentration, and The Condition of Entry in Twenty Manufacturing Industries." *American Economic Review* 44: 15-39.

Ballan, Harry. (1992). "The Court's Assault on the Robinson-Patman Act." *Columbia Law Review* 3 (April): 634-650.

Benson, Bruce L, M. L. Greenhut, and Randall G. Holcombe. (1987). *Cato Journal* 6 #3 (Winter): 813.

Bork, Robert. (1978). *The Antitrust Paradox*. New York: Basic Books.

Cassady, Ralph. (1946). "Some Economic Aspects of Price Discrimination Under Non-Perfect Market Conditions." *Journal of Marketing* 11 (July): 7-20.

Clark, Donald S. (1995). Secretary Federal Trade Commission. June 7.

Clark, J. M. (1940). "Toward a Concept of Workable Competition." *American Economic Review* 30: 241.

Clarkson, Kenneth, and Timothy J. Muris. (1982). "Letting Competition Serve Consumers." in *Instead of Regulation: Alternatives to Federal Regulatory Agencies*. Ed. Robert W. Poole. Lexington, MA: Lexington Books, 135-68.

Dickinson, Roger. (1967). "The Retail Buyer and the Robinson-Patman Act." *California Management Review* 9 (Spring): 47-54.

_____ and Stanley C. Hollander. (1996). "Some Definition Problems in Marketing Channels." *Journal of Marketing Channels* 5 (1): 1-15.

Edwards, Corwin D. (1959), *The Price Discrimination Law*. Washington, D.C.: The Brookings Institute.

Eisner, Marc Allen and Kenneth J. Meier. (1990). "Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust." *American Journal of Political Science* 34 (1) February: 276.

Fitzell, Philip B. (1982). *Private Labels-Store Brands and Generic Products*. Westport, CT: AVI Publishing.

Gellhorn, Ernest. (1986). "Climbing the Antitrust Staircase." *The Antitrust Bulletin* Summer: 341-357.

_____ and William E. Kovacic. (1994). *Antitrust Law and Economics in a Nutshell*. St. Paul, MN: West.

Hollander, Stanley C. and Mary Sheffet. (1986). "The Robinson-Patman Act: Boon or Bane for Retailers." *The Antitrust Bulletin* 31 (3) Fall: 759-795,

____ and William Keep. (1994). "Mass Merchandising/Traditional Retailing." in *The Future of U.S. Retailing*. Ed. Robert. A. Peterson. New York: Quorum Book, 129-163.

Hovenkamp, Herbert. (1985). "Antitrust Policy After Chicago." *Michigan Law Review* 84: 213-284.

Howard, Marshall C. (1983). *Antitrust and Trade Regulation*. Englewood-Cliffs, N.J.: Prentice-Hall.

Joseph, Robert and Blake Harrop. (1993). "Proof of the Meeting Competition Defense: Investigation and Verification of Reported Competing Offers." *Antitrust Law Journal* 62 (1) Summer: 127-149.

Kahn, Robert. (1996). "Would Sam Have Approved?" *Retailing Today* 31 (7) July: 1.

Kintner, Earl and Joseph Bauer. (1986). "The Robinson-Patman Act: A Look Backwards, A View Forward." *The Antitrust Bulletin* 31(3) Fall: 571-609.

Kovacic, William. (1990). "The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy." *The Wayne Law Review* 63: 1445.

LaRue, Paul H. (1986). "The Robinson-Patman Act: The Great Issues and Personalities." *Antitrust Law Journal* 55 (1) Spring: 146-147.

____ (1995). "Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule be Retired?" *SMU Law Review* 48: 1923.

Levin, Lawrence R. (1994). "Antitrust: Competitors vs. Competition." *Beverage World* March: 128.

Monroe, Kent. (1979). *Pricing*. New York: McGraw-Hill: chapter 16.

Palamountain, Joseph Cornwall, Jr. (1955). *The Politics of Distribution* Cambridge, MA: Harvard University Press.

Peritz, Rudolph. (1996). *Competition Policy in American 1888-1992*. New York: Oxford University Press.

Pinkerton, Richard L. and Deborah J. Kemp. (1996). "The Industrial Buyer and the Robinson-Patman Act." *International Journal of Purchasing and Materials Management* (January): 29-36.

Posch, Robert. (1994). "Antitrust is Back." *Direct Marketing* 56(10) February: 46-48.

Pozner, Richard A. (1976). *The Robinson-Patman Act: Federal Regulation of Price Differences*. Washington, D.C.: American Enterprise Institute for Public Policy.

Rosner, Bernat. (1991). "Buyer Liability under the Robinson-Patman Act." *Antitrust Law Journal*, 99 (3) Fall: 900.

Ross, Thomas. (1984). "Winners and Losers Under the Robinson-Patman Act." *Journal of Law and Economics*, Vol. 27 (2) October: 243-272.

_____ (1986). "Store Wars: The Chain Tax Movement." *Journal of Law and Economics* 29 (1) April: 137.

Sandel, Michael. (1996). *Democracy's Discontent*. Cambridge, MA: Belnap Press.

Schwartz, Marius. (1986). "The Perverse Effects of the Robinson-Patman Act." *The Antitrust Bulletin* 31 (3) Fall: 733-757.

Shenefield, John H. and Irwin M. Stelzer. (1996). *The Antitrust Laws*. Washington, D. C.: The AEI Press: 77.

Shores, David F. (1995). "Law, Facts and Market Realities in Antitrust Cases After Brooke and Kodak." *SMU Law Review* 48 (5) July-August: 1855-1880.

Thayer, Warren. (1995). "Robinson-Patman Lives, say Kushner and Larson." *Frozen Food Age* 43(6) January: 14+.

Varney, Christine. (1995). Commissioner, Federal Trade Commission. "Ensuring Competition in the Food Marketing Industry." June 6.

Voorhees, John J. (1991). "Price Discrimination and Software Licensing: Does the Robinson-Patman Act Fail to Accommodate Modern Technology?" *Washington University Law Quarterly* 69 (1) Winter: 317-336.

Woods, R. Kyle Woods. (1988). "Functional Discounts and Integrated Distribution Under the Robinson-Patman Act." *Emory Law Journal* 37 (3) Summer: 799-833).

ENDNOTES

1..For substantial discussions of the act see Ballan (1992), Howard (1983), Monroe (1979), and Clark (1995).

2..Actual injury was not always required. There need only to have been the possibility of such injury.

3..Although rare, violations at a fourth or even higher level are possible (Aalberts and Judd 1991, 404).

4..The economic analysis suggested here was a particular kind of economic analysis, i.e. neoclassical economics. See Bork (1978). Clearly economic analysis was important at prior times, e.g. J. M. Clark (1940) and Bain (1954).

5..While many chains were important, e.g. Sears & Roebuck and Woolworth, the act has often been referred to as the anti A & P act. The 1935 hearings with respect to the Robinson-Patman act sugge[1]st that A & P captured fully one-half of its 1934 profits from "secret and confidential rebates" obtained through "threats and coercion." (Peritz 1996, 150)