

The Myth of “Functional Availability” and the Robinson-Patman Act

by James A. Pikel^{*}

Abstract

This article traces the economic and political bases for the Robinson-Patman Act. It then discusses case law interpreting the Act. It goes on to address, in its main argument, the recent doctrine of “functional availability.” The article discusses how this doctrine is contrary to Supreme Court precedent, rewrites the text of the Act, and will eviscerate the functioning of the Act if applied as stated by the Fifth Circuit. The Article ends with an appeal to the Supreme Court to accept cases for review that embrace the functional availability doctrine, and to overturn them.

Download this article: [WordPerfect](#) or [PDF](#)

TABLE OF CONTENTS

INTRODUCTION

THE PROBLEM IDENTIFIED

PRICE DISCRIMINATION LAW FROM AN ECONOMIC PERSPECTIVE

The Economic Leg

The Political Leg

Economics and Politics Blend Together

THE HISTORY AND PURPOSE OF THE ROBINSON-PATMAN ACT

History

Purpose

STATUTORY DEFENSES

FUNCTIONAL DISCOUNTS

THE MEANING OF “PRICE DISCRIMINATION”

SUPREME COURT RPA CASELAW

1. FTC v. MORTON SALT CO.
2. TEXACO, INC. v. HASBROUCK
3. FTC v. BORDEN CORP.

THE DOCTRINE OF “FUNCTIONAL AVAILABILITY” GAINS MOMENTUM

THE METRO FORD CASE

1. The “same customer” error
2. The “exactly contemporaneous sale” error
3. The “two purchases” error
4. The “exception swallows the rule” error

CONCLUSION

* James A. Pikel is a member of the State Bar of Texas. Mr. Pikel has bachelors' degrees in Economics and Mathematics from Eastern Washington University, and graduated *cum laude* from Gonzaga University School of Law in 1985, where he was managing editor of the Gonzaga Law Review.

INTRODUCTION

[1] In the last twenty-five years, the Robinson-Patman Act, [15 U.S.C. § 13](#) (hereafter the RPA), has come under increasing attack via judicial activism. This attack, if not checked, threatens to completely destroy the salutary purpose of this statutory scheme.

[2] Referred to most often as “functional availability,” the doctrine addressed in this article has recently gained acceptance even though it does not appear to square with statutory or congressional direction, is not found in the text of any Supreme Court case, and is actually admitted to be nothing more than a “judicial graft” on the statute. The fact that the doctrine has no legislative or statutory foundation should be a sufficient basis to discredit it. However, a better reason exists for the courts to reject the doctrine: its acceptance will destroy the RPA’s ability to effect a delicate and much-needed economic balance in the marketplace.

THE PROBLEM IDENTIFIED

[3] All cases in which the “functional availability” issue arises have a common theme: the plaintiffs allege they did not receive the same low price or discount from the same seller (the defendant) as did other buyers. From the plain language of the statute, as well as from discussions in several Supreme Court cases,^{1/} this is the first element in a prima facie claim of price discrimination.

[4] However, a problem appears in the text of these cases concerning use of the term “functional.” That term can mean two very different things in Robinson-Patman law. In one usage, it refers to a discount based on a marketing or distribution “function” being served by the retailer receiving the discount. This usage is proper in cases discussing so-called “functional discounts,” which are a special form of discount that falls under the § 2(a) cost-justification defense (discussed below). The second – and confusing – use of the term comes when “functional” is used as a synonym for “actually” or “readily.” Here, the term is used to mean that a discount is “functionally available” to all customers of the discriminating seller. Confusion occurs when courts do not sufficiently distinguish a “functional discount” (which is a type of defensible discount under the RPA) from a discount that is supposedly “functionally available” to a number of retailers.

[5] Another problem arises from the imprecise use of the term “available.” A price or discount can only be correctly called “available” to a buyer if three things are true: (1) the price or discount is known to the buyer, (2) the buyer is not inhibited or prevented from requesting the price or discount, and (3) the seller is obligated to provide the price

¹ Notably, [Texaco, Inc. v. Hasbrouck](#), 496 U.S. 543, 559 (1990), and [FTC v. Anheuser-Busch, Inc.](#), 363 U.S. 536, 547-551 (1960), hold that the key element in a price discrimination claim is that the plaintiff experienced “merely a difference in price.”

or discount upon request. If these three things – and only these three things – are present, then the price or discount is genuinely “available.” Otherwise, it is not.^{2/}

[6] This article briefly discusses the true “functional discount” and explains why the concept of “functional availability” is not only illogical, but in application assumes or requires business conditions and circumstances that are improbable or impossible. To set the stage for the rest of the article, a brief discussion on economics is necessary.

PRICE DISCRIMINATION LAW FROM AN ECONOMIC PERSPECTIVE

[7] In order to understand the RPA, one must first understand the Congressional thinking that drove its passage. Without this background, neither the necessity nor the effect of the RPA is readily apparent.

[8] The RPA was formed as a three-legged stool: the legs are economic theory, political expediency and legal justification. To ignore any leg is to risk an unbalanced analysis of statutory intent. The political leg is especially important and not so easily observed as the economic. But to say the RPA is founded either solely on economics or solely on politics is equally wrong.^{3/}

[9] Because of the complex or hybrid nature of the RPA, without a basic understanding of the economics and the politics behind the statute, its policy message is blunted or even incomprehensible. Some who have written on the RPA do not seem to appreciate either its economic or its political roots (or both), and, hence, craft their opinions and proposals from an erroneous starting point.

² See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 751 (1st Cir. 1994) (“And, we do not see how ordinarily one could say that a seller has made favorable treatment ‘available’ to a disfavored customer if the disfavored customer does not know about the favored treatment”).

³ Kenneth W. Dam, The Economics and Law of Price Discrimination: Herein of Three Regulatory Schemes, 31 U. Chi. L.Rev. 1, 61-62 (1963): “One is forced to conclude that whatever arguments may be advanced in support of anti-discrimination legislation, one cannot say that an economic objective is served.” This statement is echoed throughout so-called “Chicago-school” articles on antitrust law. See, e.g., Howard A. Shelanski and J. Gregory Sidak, , Antitrust Divestiture in Network Industries, 68 Univ. of Chicago L. Rev. 1, 28-29 (2001); R. Bork, The Antitrust Paradox: A Policy at War with Itself (1978); Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925 (1979). Such sentiments are simply incorrect.

The Economic Leg.

[10] Antitrust laws – either directly or indirectly – seek to prevent monopoly pricing. The goal is to short circuit the anticipated impact monopoly pricing will have on consumers and the marketplace.^{4/}

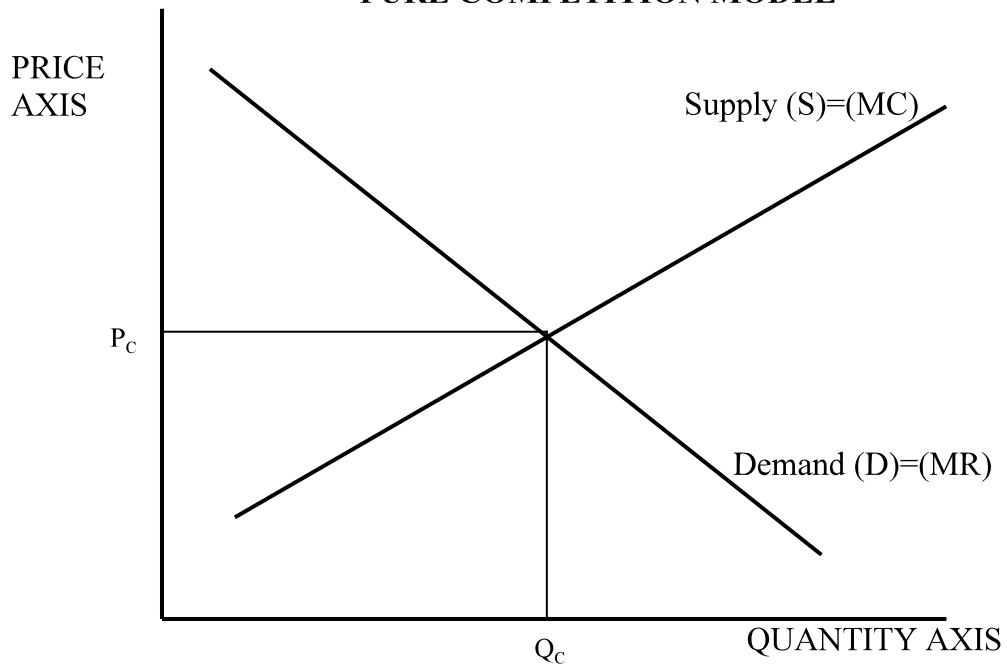
[11] Essentially, economic theory predicts that a rational monopolist will price its products at the point where it will maximize its profits.^{5/} This point occurs at the price where marginal revenue equals marginal cost, a price generally higher than will occur in a competitive marketplace. In order to obtain the higher price, the monopolist must also restrict supply because given a downward sloping demand curve, higher prices can only be achieved with restricted output.

[12] The following graphs show market price and quantity, first in a purely competitive market, and then in a monopoly market:

⁴ See Note and Comment: Leveling the Playing Field: Harmonization of Antitrust Guidelines for International Patent Licensing Agreements in the United States, Japan, and the European Union, 10 Am. U. J. Int'l L. & Policy 447, 448 (1994), which contains references to this assertion and purpose; Lawrence Anthony Sullivan, Handbook of the Law of Antitrust 14 (1977) (discussing the general plenary purpose of antitrust laws); the purpose of the Sherman Act is "to protect trade and commerce against unlawful restraints and monopolies." 26 Stat. 209 (1890) while the purpose of the Clayton Act is to "supplement existing laws against unlawful restraints and monopolies . . ." 38 Stat. 730 (1914); W. Letwin, Law and Economic Policy in America: the Evolution of the Sherman Antitrust Act 53-99 (1965); Bork, Legislative Intent and the Policy of the Sherman Act, 9 Journal L. & Econ. 7 (1966); Clark, Antitrust Comes Full Circle: The Return to the Cartelization Standard, 38 Vand. L. Rev. 1125, 1140-46 (1985); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65, 93-96 (1982); cf. R. Bork, The Antitrust Paradox, 91 (1978) ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare").

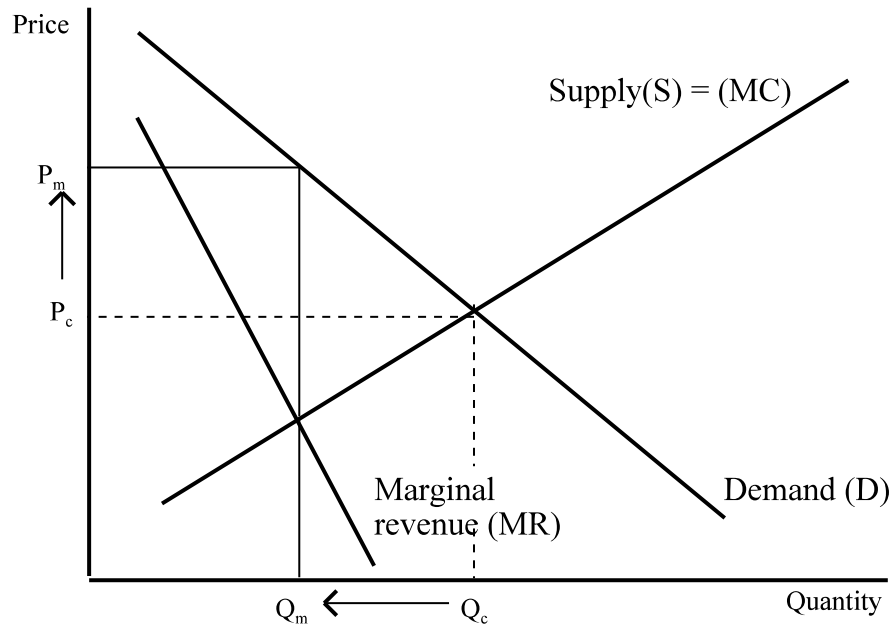
⁵ Jean Tirole, The Theory of Industrial Organization, Chapter 3 (MIT Press 1988), discussing the economics of price discrimination and how it relates to the ultimate goals of competitive businesses.

PURE COMPETITION MODEL



Where P_c is the competitive price and Q_c is the competitive quantity demanded.

Supply always equals “marginal cost” (MC). Demand equals “marginal revenue” (MR) in a competitive marketplace, but not in a monopoly.



MONOPOLY MODEL

[13] In the Monopoly Model above, the monopolist prices his goods at P_m rather than the lower price, P_c (the price charged by the seller in the Pure Competition Model), because this is the price at which he maximizes his profits. As can be seen from the graph, the only way the monopolist can achieve this higher price is by restricting supply or output (which he can unilaterally do, since he controls all supply). Quantity supplied must therefore fall from Q_c to Q_m .

[14] In the world of the monopolist, consumers are hurt in two ways: there are fewer goods in the marketplace, and they pay higher prices for those goods. This basic economic truth explains the fear of monopoly and its consequences, consequences the antitrust laws are designed to curtail.

[15] In order to prevent monopoly pricing, section 1 of the Sherman Act, [15 U.S.C. § 1](#), condemns price fixing, which is just another way for several businesses to achieve what amounts to a monopoly price structure while remaining “competitors” in name only. On the other hand, section 2 of the Sherman Act, Section 2, [15 U.S.C. § 2](#), does so indirectly by dealing with the root cause (*i.e.*, the creation of monopoly), and prohibits or discourages monopolization. In this way, the Sherman Act attacks monopoly pricing both directly (sec. 1) and indirectly (sec. 2).

The Political Leg.

[16] There are also secondary, *non-economic* benefits obtained in markets with large numbers of healthy, small retailers, which were an original political concern of Congress when it passed the RPA toward the end of the Depression. That Congress passed a law favoring politics over raw economics should come as no surprise in a nation where patent and utility-regulation laws (both of which are indisputably anti-competitive and anti-consumer *economically*, but which are politically expedient) are a staple of business and the economy.^{6/}

[17] Where price discrimination is allowed to take place, suppliers who sell to retailers can dictate which retailers get lower prices and which pay higher prices. Over time, such favoritism will eventually put the disfavored retailers out of business, all the while harming the disfavored buyers’ customers who are often paying higher prices than they otherwise would. The disfavored retailers go out of business because they cannot

⁶ See Note, [Antitrust Law – Robinson-Patman Act – Ninth Circuit Rules that Secondary-Line Price Discrimination Cannot be Rebutted by a Showing of No Anticompetitive Effect](#), 111 Harvard L. Rev. 615, 618-20 (1997) (hereafter “Harvard”); Terry Calvani and Gilde Beidenbach, [An Introduction to the Robinson-Patman Act and its Enforcement by the Government](#), 59 Antitrust L. J. 765, 765-66 (1991)(hereafter “Calvani & Beidenbach”).

forever resell at the same low price as the favored retailers. The market is then left with a monopolist in charge of supply.^{7/}

[18] From an economics standpoint, the reason for anti-discrimination laws is the same as that for the anti-monopoly and anti-price-fixing laws: all aim at preventing the hardships that monopoly pricing inflicts on consumers. From a political standpoint, these laws closely parallel other “protectionist” legislation, in that they protect individual competitors, and ultimately consumers, from the effects of monopoly.

Economics and Politics Blend Together.

[19] Congress, ever mindful of the endless creativity of businessmen, devised a third – some might say “less direct” – method of ultimately preventing monopoly pricing in industries where there is a distinction between the manufacturers of goods and the businesses that bring the goods to the retail consumer. In such industries, there is a risk that the manufacturer – almost always the strongest player in the chain of distribution – will use its market power to control the final retail price by controlling the number and strength of downstream businesses, including retailers.^{8/} Manufacturers can accomplish this end by “cartelization,” meaning the gradual reduction of independent retailers selling a product to a number easier for the manufacturer to control.

⁷ No article on this topic would be complete without citing the quintessential quote as to the (indirect) thrust of the RPA: “The original effects clause [which stated that “harm to competition” was the key] has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competition victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.” S. Rep. No. 1502, 74th Cong., 2nd Sess. (1936). Those who would dispute the basic soundness of Congress’ prophylactic reasoning are simply wrong. See, e.g., Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule be Retired?*, 48 SMU L. Rev. 1917, 1925 (1995) (hereafter “LaRue”)). We already have the Sherman Act and its formidable protections of the *general* competitive marketplace. The RPA proceeds from a different, less-direct but equally-important, angle. It is sound policy with the same ultimate goal as the Sherman Act, but achieves that goal through different means.

⁸ For ease of discussion and reference, we assume in this article a two-tiered distribution system, wherein the manufacturer sells at wholesale to retailers who in turn compete with each other to resell to final retail consumers. The RPA also applies in three-tiered and higher systems, and the concepts discussed herein apply equally well to those market structures. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2nd Cir. 1976), cert. denied, 429 U.S. 1097 (1977) (three-tiered market subject to RPA).

[20] While the ultimate *goals* of the Sherman Act and the RPA are the same, it is a misconception of the idea of a diverse and pluralistic legal system to say the *methods* each law employs to achieve its goal must also be the same. There are many paths to most destinations, including a monopoly-free economy. As stated in an article co-authored by Federal Trade Commissioner Terry Calvani:

The federal antitrust laws, the Sherman and Clayton Acts, have as their mission the protection of the competitive process. Put differently, the antitrust laws should protect consumer welfare. The Robinson-Patman Act is quite different. It has little to do with competition as that term is used today. Indeed, its purpose and design is antithetical to consumer welfare. Therefore, lawyers, judges, and commentators who view the statute through the lens of modern antitrust will have a very blurred vision of the law. The purpose of the Robinson-Patman Act is not protection of the competitive process, but the protection of competitors.^{9/}

[21] The indisputable purpose of the RPA is the protection of competitors, with the indirect benefit that will follow as surely as the flower follows the seed: competition will be protected to the benefit of the consumer. Jerry Cohen wryly identified this logical progression:

Now there are some people that think that in order to have competition, you need a few competitors. Not only do a few people think this, but this is also the opinion of the people that wrote the [Robinson-Patman] Act in the first place. The Judiciary Committee report states: "Existing laws [referring to the Sherman and Clayton Acts] have been too restrictive in requiring a showing of injury to competitive conditions in the line of commerce involved; whereas the more immediately important concern is an injury to a competitor victimized by the discrimination. Only through such injury, in fact, can the larger general injury result and that is the key." . . . There has to be some protection for competitors if, in fact, you are going to have competition. Otherwise, there's nobody left to compete.^{10/}

⁹ Calvani and Beidenbach, 59 Antitrust L. J. at 766 (1991). Even more pointed are the remarks of Professor Hansen, who said the RPA is "an antitrust statute in name only." Hugh C. Hansen, Robinson-Patman Law: A Review and Analysis, 51 Ford. L. Rev. 1113, 1124 (1983). But Professor Hansen *also* acknowledged that "the Robinson-Patman Act cannot be understood as designed to encourage allocative efficiency or to maximize consumer welfare. It is designed to protect small businesses from larger, more efficient businesses." H. Hovencamp, Economics and Federal Antitrust Law, § 13.6 at 346 (1985).

¹⁰ Jerry S. Cohen, Let's Retain It, 45 Antitrust Law J. 44, 48 (1976) (hereafter "Cohen") (defending the RPA as a statute outlawing pricing actions which the author believes are as pernicious as price-fixing under the Sherman Act); Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1040 (9th Cir. 1987), aff'd, 496 U.S. 543 (1990) ("Injury to competition necessarily entails (continued...)

[22] In 1976, another Congressional committee defended the RPA's focus on competitors rather than "competition" generally, saying that the language added to the Clayton Act by the RPA was "to focus courts' attention on the harm to specific 'competitive relationships,' not to the 'total relevant market.'" H.R. Rep. No. 94-1738 at 23 (1976).

[23] In other words, the point of RPA is to "nip the weed in the seed" before it comes to flower and destroys competition. It is easy to see that any other focus would change the RPA from a statute aimed at prevention to a statute aimed at remediation, and would require proof that harm had actually occurred, rather than the "reasonable possibility of harm" the Supreme Court has determined is the proper statutory definition of "competitive injury" under the RPA.^{11/}

[24] One of the ways in which a supplier may cut the number of retailers in the market is to increase wholesale costs so high as to price most of them out of the market. The way a supplier does this is to give favorable (i.e., lower) wholesale prices to some retailers (called the "favored retailers"), and to charge other retailers (the "disfavored retailers") correspondingly higher prices. In such a system, the disfavored retailers will soon be driven out of business since they will lack the ability to compete with the favored retailers on price. The supplier will thus have fewer retailers in his chain of distribution, retailers who owe their continued existence not to their own worth or effort, but rather to the largesse of the supplier who chose to favor them with lower wholesale prices.^{12/} It is easy to see that the surviving retailers in such an industry would feel a certain loyalty to (if not outright fear of) the supplier, and would thus be more susceptible to coercion from the supplier in the operation of their businesses, including taking direction from the supplier about such things as retail prices, market areas, and production volumes.

[25] In a cartel situation the few surviving retailers (all the rest having been driven out of business by prohibitive wholesale pricing) can be further restricted in their

¹⁰(...continued)

injury to at least some competitors. Competition does not exist in a vacuum; it consists in rivalry among competitors"). The focus on injury to competitors rather than injury to competition broadly is justified because any changes to this policy and value of this act "would thoroughly destroy the purpose of value of the act . . . [by] effectively deny[ing] any injured party relief until after the price discrimination had . . . foreclos[ed] them from the market." Harvard, 111 Harvard L. Rev. at 620 n. 51 (quoting H.R. Rep. No. 91-1617 at 33, 34).

¹¹ [J. Truett Payne Co. v. Chrysler Motors Corp.](#), 451 U.S. 557, 562 (1981); H.R. Rep. No. 92-1617 at 33-34.

¹² Cartelization is an economic phenomenon closely related to monopolization and predatory pricing. A good discussion of the economic effects of cartelization can be found in Nolan Ezra Clark, [Antitrust Comes Full Circle: The Return to the Cartelization Standard](#), 38 Vand. L. Rev. 1125 (1985).

independent decision-making by the supplier. Cartels of this nature tend to allow for both direct (vertical price fixing, or “resale price maintenance”) and indirect manipulation or coercion of the retail price and supply by the manufacturer. If the cartel is totally successful, the supplier essentially becomes a monopolist with a chain of “subsidiary” retail outlets under its full control.

[26] The evil addressed by anti-discrimination laws such as the RPA is the effect price discrimination has on the overall microeconomic marketplace. Congress has always adopted the sound economic doctrine that more competition is better than less competition, especially at the retail level.^{13/} This doctrine arises from microeconomic theory which holds that where there are many competitors, the price to consumers of the product being supplied will tend toward the “pure competition” price.^{14/}

[27] The existence of many competitors has *secondary* economic benefits to the marketplace as well. Where there are many competitors, they are often spread out

¹³ [George Van Camp & Sons Co. v. American Can Co.](#), 278 U.S. 245, 254 (1929) (“The fundamental policy of the [Clayton Act] legislation is that, in respect of persons engaged in the same line of interstate commerce, competition is desirable and that whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil”). This fundamental economic doctrine is still sound, regardless of attempts to cast it as archaic or untrue. See, e.g., Timothy J. Muris, [Economics and Antitrust](#), 5 Geo. M. L. Rev. 303, 304-306 (1997).

¹⁴ It is interesting to note that commentators who decry the RPA as creating and facilitating inefficient market economics do not clearly explain what inefficiencies they are addressing. See Note: [Single Firm Predatory Pricing in Antitrust Law: the Rose Acre Recoupment Test and the Search for an Appropriate Judicial Standard](#), 91 Colum. L. Rev. 1757, 1780 (1991). Surely, they cannot be upset that some small, “inefficient” stores may remain in business longer than Darwin would allow, since the “survival of the fittest” will eventually weed out such businesses whether they enjoy equal wholesale pricing or not. See Alan O. Sykes, [Countervailing Duty Law: An Economic Perspective](#), 89 Colum. L. Rev. 199, 209 (1989) (“Despite the economic dislocation that may result from competition in the marketplace, however, competition is usually thought to be desirable for its ability to promote efficient resource allocation. It drives inefficient producers from the market and induces workers to move to firms and industries in which their services are most valuable. As a result, goods and services are produced at minimum cost, and prices to consumers decline”) (referencing J. Henderson & R. Quandt, [Microeconomic Theory](#) 292-93 (3d ed. 1980) and E. Mansfield, [Microeconomics](#) 468-71 (5th ed. 1985)). Thus, the continued existence of allegedly inefficient businesses cannot be the bane of the RPA.

Perhaps they object to the inability of suppliers to set their wholesale prices as they see fit, supposedly with the idea that such suppliers will always select the “most efficient” prices. But we know this is only possible coincidentally. Rational businesses set their prices where they will maximize profits, NOT where they will maximize consumer welfare and market efficiency, and if the two happen to coincide, it is completely fortuitous.

geographically, which makes purchasing more convenient for all consumers than if everyone had to go to a centralized place to buy. Another secondary benefit is that, at the “pure competition” price, the quantity available for sale is the total quantity demanded at the particular, lower price. Therefore, more consumers are able to purchase the particular good. If the good is a piece of equipment capable of producing revenue, then having more equipment means more jobs, more production, and more economic viability and benefit for everyone. The protection of competitors thus has obvious economic benefits.

[28] Finally, a word concerning what the RPA is not about. The other major antitrust statute, the Sherman Act, must be viewed in the context of complex and changing market factors. Perhaps because the Sherman Act is so often the statute under which antitrust cases are brought by private plaintiffs and the government, courts have become grounded in the perspectives and proofs necessary to a proper analysis under that statute. Having thus been schooled in the proper application of “antitrust law” from experience with Sherman Act cases, courts must refocus on the different perspectives and proofs under which RPA cases may properly proceed.

[29] Robinson-Patman cases do not require complex analyses of market areas, consumer preferences, competition in the relevant wholesale markets, competition in the relevant retail or resale markets (i.e., whether the victims resell in open markets, bid markets or auction markets), or the misconduct of other market players. All of these issues figure prominently in antitrust analysis under the Sherman Act, but they are mostly or even wholly irrelevant to Robinson-Patman analysis. The RPA is concerned with indirect rather than direct market influence; the only issue is the behavior of the defendant as it prices its products to its buyers.

[30] Given the indirect nature of the RPA’s attack on monopoly pricing, it makes sense to assume Congress felt that, in the absence of discriminatory pricing, the correction of all other market problems would be somewhat “automatically” achieved. This is akin to saying that the laws prohibiting firing weapons within the city limits are ultimately designed to prevent deaths by shooting, and if we outlaw firing weapons in town, whether anyone is killed or not, we accomplish (or at least move toward) the ultimate goal of preventing deaths caused by firearms. But it would be an improper burden to make the prosecutor prove in every such *in-town shooting* case that the trajectory of the bullets was likely to cause harm, that there were potential victims within the line of fire, and that the shooter had the intent to harm someone. Instead, none of those factors are relevant to the inquiry, because they are collateral to enforcement of the shooting law, although each of those factors is very relevant to the *companion* law prohibiting assault with a deadly weapon.

[31] In like manner, when courts impose on RPA plaintiffs “antitrust” burdens of proof that are applicable in Sherman Act cases, they necessarily impose impractical and unnecessary ones. For example, a legitimate concern about the effect pricing has on competitors of the defendant is very relevant to enforcement of predatory-pricing laws, but is of no moment to enforcement of the RPA in secondary-line cases. Likewise, the

ultimate effect pricing has on other (esp. complimentary) goods that consumers might purchase is relevant to enforcement of the laws prohibiting tying arrangements, but is not relevant to claims under the RPA.

[32] Courts must focus their enforcement of the RPA on those factors relevant to the inquiry: did the defendant sell at discriminatory pricing without being justified in doing so by either cost savings or an attempt to meet the competition facing the defendant? If so, the defendant violated the RPA. That is the beginning and end of the liability analysis. The only remaining question is the existence and amount of damages, if any.

THE HISTORY AND PURPOSE OF THE ROBINSON-PATMAN ACT

History.

[33] The Clayton Act, [15 U.S.C. §§ 12-27](#), provides the foundation for the RPA. The Clayton Act (before its amendment) prohibited price discrimination by suppliers, but allowed for very broad “quantity discount” and “meeting competition” defenses. These defenses allowed suppliers to discriminate on wholesale pricing to retailers if the supplier sold a different quantity of products to two different customers,^{15/} or if the supplier is attempting to “meet competition” anywhere in the chain of distribution.

[34] The perception among commentators and Congress was that the “quantity discount” defense in the Clayton Act was too broad and liberal.^{16/} Essentially, the defense allowed by the original Clayton Act let manufacturers “invent” market disparities to justify discriminatory prices, whether such market disparities had anything to do with lower costs or not. Because of this, the Clayton Act was widely seen as a failure in prohibiting price discrimination that harmed individual competitors.^{17/} The RPA was passed in 1936 as an amendment to the Clayton Act.^{18/} Congress felt that the original

¹⁵ Throughout this article we refer to discounts based on nothing other than quantity as “naked volume discounts” to distinguish them from volume discounts that are cost justified.

¹⁶ See Calvani & Biedenbach, *supra* note 6, at 768-770, which provides an excellent description of the Clayton Act’s failings and the case holdings leading up to passage of the RPA. See also, Michael M. Briley, [Price Discrimination Under the Robinson-Patman Act](#), 27 U. Tol. L. Rev. 401 (1996), for a good primer on RPA law.

¹⁷ See Calvani & Beidenbach, *supra* note 6, at 768-770.

¹⁸ Some have argued that Senator Patman pulled off something of a coup d’etat by having the RPA included in the statutes dealing with antitrust (which gave the act the force of treble damages and oversight by the “bulldog” of the government’s enforcement arms, the FTC). See, e.g., Grederich Rowe, [Price Discrimination Under the Robinson-Patman Act](#), p. 23 (1962) (arguing that Representative Patman’s legislation was a “political masterstroke which invested an

(continued...)

Clayton Act's protections of small, downstream businesses were not adequate to the task, and the RPA was its attempt to bolster those protections.^{19/}

[35] The RPA's essence is that "Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability."^{20/} Congress wanted to ensure that all buyers, large and small, started on a "level playing field" as far as wholesale prices are concerned, except in two specific instances, §§ 2(a) and 2(b), that neither economics nor politics fully justified.^{21/}

[36] The RPA also was intended to better define the defenses available to suppliers, and to cut short the defenses of "quantity discounts" and "meeting competition," except in very specific circumstances. Given that the RPA was chosen by Congress as the way to close what it considered a large loophole in the enforceability of anti-discrimination law, it must be assumed that Congress was careful and thorough in crafting what would be the remaining defenses available to suppliers after passage of the Act.

[37] Thus, the RPA is a "hybrid" law, but it is not "schizophrenic" as one court has stated.^{22/} It balances the political interests of small retail dealers with the *legitimate* economic and business concerns of sellers, and actually does so quite well despite the inability of some to comprehend that balance and its inherent market sensibilities.

¹⁸(...continued)

anti-chain store measure with the venerable trappings of antitrust"). However, the RPA legitimately belongs in the antitrust section of the U.S. Code, as the discussion of economics, paragraphs 7 through 32 supra, amply demonstrates.

¹⁹ See S. Rep. No. 1502, 74th Cong., 2d Sess. at 4 (1936).

²⁰ FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).

²¹ Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1142 (D.C. Cir. 1988).

²² Boise Cascade Corp., 837 F.2d at 1138.

Purpose.

[38] The correct way to evaluate or construe any legislation is to begin with the text of the statute.^{23/} The RPA amended the Clayton Act and added a phrase to the so-called “general effects” clause. This new phrase, which we call here the “specific effects clause,” makes it easier to understand the multiple methods and tools of the statute.

[39] The RPA states that price discrimination is illegal “when the effect of such discrimination may be:

- * substantially to lessen competition or
- * tend to create a monopoly . . . , or
- * to injure,
- * destroy or
- * prevent competition

with any person.”^{24/}

[40] Unless we presume that this is nothing more than a list of synonymous, repetitious verbiage, we must look at each of these disjunctive terms individually.

[41] To “tend to create a monopoly” means action that may lead to the (especially forcible) exit of all competitors but one from the marketplace, since that is what is meant by the term “monopoly” (i.e, single seller). To “destroy competition”, by definition, one again needs to eliminate all other competitors^{25/} or to cripple all but one competitor such

²³ [North Dakota v. United States](#), 460 U.S. 300, 312 (1983) (“As with any case involving statutory interpretation, ‘we state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language’”); [FTC v. Anheuser-Busch, Inc.](#), 363 U.S. 536, 553 (1960) (“But the primary function of statutory construction is to effectuate the intent of Congress . . .”).

²⁴ [15 U.S.C. § 13\(a\)](#).

²⁵ Speaking of Boise Cascade’s “defense,” that the prices it received did not harm competition because Boise’s competitors prospered while the prices were available, the FTC made the following comment:

[I]t would be a perversion of the Act to hold that those substantial price

(continued...)

that there remains no genuine competition. To “prevent competition” is prospective, and means to seek to prevent new competitors from entering the monopolist’s domain. Thus, to “destroy” and “prevent” competition both require the creation or maintenance of a monopoly or monopoly-like situation, and speak to reducing the number of competitors in the market. To “lessen competition” and to “tend to create a monopoly” likewise imply a reduction in the number of competitors or, at least, *effective* competitors. These factors address the number of real competitors in the market.

[42] But to “injure” competition means something different. One may “injure” competition without utterly destroying it and without reducing the number of competitors. “Injuring” competition does not necessarily imply quantitative impact (as “lessen” and “tend to monopoly” do).

[43] “Injury” to competition can take place by affecting non-quantitative (*i.e.*, qualitative) factors signaling or growing out of competition. For instance, one may injure competition by reducing the ability of competitors to “compete” (even though they survive), by cutting off their ability to do the things competitors do, such as offer better service, longer hours of operation, better-trained staff, nicer facilities, “free” delivery, etc., all of which cost money to provide. Thus, to “injure” competition might entail actions that merely deprive competitors of the money (*i.e.*, profits) necessary to allow them to provide competitive, non-price amenities and services. Under this definition, lack of a discount – and the extra profit that such a discount would have provided – “may be . . . to . . . injure competition” as surely as lack of money “injures” a retailer’s ability to provide “free” delivery and other competitive perquisites.^{26/}

²⁵(...continued)

differences are lawful because the [other] dealers’ businesses have not been destroyed by them. The extent of their success in the face of these price discriminations is a testimony to their business acumen and establishes that they are as efficient, and perhaps more efficient, than Boise. Rewarding Boise by allowing it to receive the wholesale discount when it competes with dealers would, in effect, reward [Boise’s relative] inefficiency.

In re Boise Cascade Corp., 107 F.T.C. 76, 184 (1986) , rev’d o.g., 837 F.2d 1127 (D.C. Cir. 1988), on remand, 5 Trade Reg. Rep. (CCH) ¶22,902 (11/1/90).

²⁶ See Boise Cascade Corp., 107 F.T.C. at 193 (“[I]njury may be inferred even if the favored customer did not undersell his rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services to his customers” (citing National Dairy Products Corp. v. FTC, 395 F.2d 517, 522-23 (7th Cir.), cert. denied, 393 U.S. 977 (1968)).

Another concern raised to Congress was that there were times when a business was forced to lower its price in order to keep a particular retail customer from switching suppliers.

(continued...)

[44] Aside from the two narrow defenses spelled out in the RPA (*i.e.*, cost justification and meeting competition), Congress clearly intended that all price discrimination by a supplier to its retailers would be illegal and prohibited.^{27/} Congress gave teeth to the prohibition by allowing retailers injured in their business by such practices to sue for treble damages and attorneys' fees.^{28/} To say that Congress was serious about price discrimination is an understatement.

[45] Commentators who suggest the RPA is completely untethered to economic theory are wrong. But even if there were no purpose behind the RPA other than the pure political expedience of protecting small businesses "at the expense of" consumers, that is no reason to repeal it. Congress often passes laws based on perceived non-economic factors that actually work to the detriment of consumers, the patent laws being prime examples. To criticize the RPA because it does not achieve *direct* economic gains for consumers is to criticize a horse – which is a fine means of transportation to the butcher shop – because it does not give bacon.

²⁶(...continued)

Congress agreed, in this narrow situation, that a supplier could grant a price discount to the retailer who was threatening to purchase from another supplier, but only so much as to "meet" the competing supplier's wholesale price, not to "beat it." [Falls City Indus., Inc. v. Vanco Beverage, Inc.](#), 460 U.S. 428, 446-48 (1983).

²⁷ See Note, [The Court's Assault on the Robinson-Patman Act](#), 92 Colum. L. Rev. 634, 637 (1992). "An interpretation of the [RPA] in light of the legislative history would recognize only the [two] statutory defenses to the [Morton Salt](#) inference. Such an interpretation would have at least this virtue: It would make the law under the Robinson-Patman Act consistent and comprehensible." *Id.* at 645. "The Act itself, particularly when read in conjunction with the legislative history, is not ambiguous on the crucial question of defenses (however ambiguous it is on other points). In fact, a fair reading of the legislative history leads to the conclusion that the statutory defenses ought to be the only defenses to a [Morton Salt](#) inference." *Id.* at 647.

²⁸ [15 U.S.C. § 15](#) provides the treble damages private right of action.

STATUTORY DEFENSES

[46] There are only two statutory defenses found in the text of the Robinson-Patman Act, at RPA § 2(a)^{29/} and § 2(b).^{30/} The section 2(a) defense allows price discrimination if it is justified by cost savings to the supplier realized when a sales, marketing or distribution function is performed by the retailer instead of the supplier, or when volume production and sales create economies of scale (*i.e.*, lower average total cost) for the product. The discrimination must have a rational, economic connection to the cost savings of the supplier, and may be no more than necessary to offset that “saved cost” the supplier enjoys from such sales.^{31/}

[47] The second defense, under § 2(b), is the so-called “meeting competition” defense. This defense allows price differences when the supplier is attempting to meet the competing wholesale price being offered to its retailer by a competing wholesaler. This discount can be no more than necessary to meet the competing wholesale price, and must end when the competitive threat ends.^{32/}

²⁹ [15 U.S.C. § 13 \(a\)](#) states in part: “nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .”.

³⁰ [15 U.S.C. § 13\(b\)](#) states in part: “nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”

³¹ [Hasbrouck, 496 U.S. at 560-61.](#)

³² One is hard pressed to find any commentary on the “hazardous” problem to economic efficiency that this pricing restriction (*i.e.*, “meet, but don’t beat”) places on modern business. See [Falls City Indust., Inc., 460 U.S. at 448](#). Yet, even though this restriction is a direct, frontal assault on a wholesaler’s freedom to determine his own prices, there is a deafening silence about this defense and its limitations in the law reviews. See Barbara O. Bruckmann, [Bidding in the Private Sector: Practical Advice for Avoiding Robinson-Patman Pitfalls](#), 59 Antitrust L. J. 901, 903-11 (1991) (citing cases that merely say, if the seller “in good faith” and “inadvertently” beats the competing price, all is well). With all due respect to Ms. Bruckmann, the *easiest* way for a supplier to avoid RPA liability is to set prices fairly and equally.

This limitation (“meet, but don’t beat”) is also concerned – not with consumer welfare, or else such discounts could be unlimited with the hope of sparking a price auction or “price war” between the dealers – but with *competitor* welfare. No other explanation makes sense, yet this limitation is not attacked as “anti-consumer.” See Bernet Rosner, [Buyer Liability under the Robinson-Patman Act](#), 59 Antitrust L. J. 889, 889-91 (1991).

[48] These are the only instances in which Congress allows price discrimination. All others are illegal under the plain language of the statute. Attempts to prove otherwise show only a desire to rewrite the statute to meet a particular political agenda.

[49] A good argument can be made, both from the legislative history of the RPA and from economic theory, that these are the only two defenses that can truly coexist with the RPA. It is impossible to envision any other defense that would be narrow enough in practice that it would not completely negate the purpose of the Act. As explained below, the “defense” of functional availability addressed in this article simply cannot coexist with the RPA because it is too broad; it would void the prohibitions of the RPA. To borrow the words of Justice Goldberg, “it is difficult to perceive convincing reasons rationally confining the thrust of [the functional availability doctrine] to an area narrow enough to preclude effective emasculat[i]on of the prohibitions on discrimination contained in § 2(a).”^{33/}

[50] Courts that embrace the “functional availability” defense have perhaps confused it with a different defense which falls under the § 2(a) “cost justification” rationale: the so-called “functional discount.” Functional discounts, which are a specific instance of the regular cost-justification defense,^{34/} are discussed below.

FUNCTIONAL DISCOUNTS

[51] One form of lawful price discrimination is called a “functional discount.” This is a price discount that matches the extra cost a supplier incurs in sales to some retailers which it does not incur or saves in sales made to other retailers who receive the discount. The idea behind the discount is that the “favored” retailer is performing some function, at its own expense, that other retailers require be provided by the supplier at the supplier’s expense. The purpose of this discount is not to *favor* one retailer over others. Indeed, just the opposite is true. The discount once again “levels the playing field” at the retail level by making all retailers’ “total cost of goods sold” equal as to the price paid at wholesale for the goods in question.^{35/}

³³ [FTC v. Sun Oil Co.](#), 371 U.S. 505, 525 (1963).

³⁴ An exhaustive commentary on functional discounts is beyond the scope of this paper. Suffice it to say, much has been written on this particular doctrine, and many of those commentaries are cited by the Supreme Court in [Texaco, Inc. v. Hasbrouck](#), 496 U.S. 543, 554-571 (1990). The commentaries on the subject are confusing at best and Commissioner Calvani attempted to clear up much of this confusion in his article, Terry Calvani, [Functional Discounts Under the Robinson-Patman Act](#), 17 B.C. Indus. & Comm. L. Rev. 543 (1976) (hereafter “Functional Discounts”).

³⁵ In [Boise Cascade Corp.](#), 837 F.2d at 1139-40, Judge Starr commented that the concept of “functional discounts” was confusing, and voiced his opinion that others were

(continued...)

[52] An example is where retailer A has his own warehouse and keeps an inventory of the supplier's goods at his location. If the average cost of this warehousing is \$1 per unit, the supplier would be justified in selling to retailer A for a wholesale price \$1 per unit less than the supplier charges all other retailers who do not warehouse and inventory the supplier's product.^{36/} Obviously, this situation would only justify a price

³⁵(...continued)

likewise confused by them. However, his belief that Commissioner Calvani was “confused” about functional discounts is not accurate. Indeed, Commissioner Calvani did not appear so confused about the concept of functional discounts as he appeared confused about why courts and commentators have such a difficult time *understanding* that concept: “The result of this failure of recognition [concerning functional discounts] has been a lack of focus upon the validity of the functional discount . . .”. See “Functional Discounts”, *supra* note 34 at 544. Calvani’s article contains a comprehensive and articulate description of the bases and justifications for functional discounts.

The confusion in the courts over the true nature of functional discounts is today even more incomprehensible after the Hasbrouck decision so clearly described their parameters and limits. In fact, Hasbrouck really did nothing more than reiterate the same analysis voiced by the Supreme Court some 40 years earlier in Morton Salt Co., and criticized (and effectively overruled) Boise Cascade Corp. in the process. Hasbrouck, 496 U.S. at 565 n. 22.

³⁶ It is assumed here that the cost of warehousing is roughly the same whether the supplier undertakes the task or whether the retailer does so. If there is a disparity between these relative costs, the true measure of a lawful functional discount should be the cost savings to the supplier, not the added cost incurred by the retailer. For instance, in this example, if the warehousing cost to the retailer is \$1 per unit, but the same warehousing cost to the supplier is only 20 cents per unit, a 20 cents per unit functional discount is all that would be lawful, since that is the “cost saving” to the supplier, a saving eventually “assumed by the [retailer],” that justifies the discount. Hasbrouck, 496 U.S. at 564.

Otherwise, if the cost paid by the retailer was the determining factor, the supplier may be paying for inefficiency of certain retailers who were incurring (or alleging to incur) a much higher cost of warehousing, and granting such inefficient retailers a higher discount could be subsidizing their inefficiency, especially if their alleged “higher costs” were a sham. The functional discount is meant to offset the cost savings of the supplier, not to reward inefficient retailers for their higher costs and inefficiencies. See Morton Salt Co., 334 U.S. at 48 (“Such [carload] discounts, like all others, can be justified by a seller who proves that the full amount of the discount is based on his actual savings in cost”).

Confusion on this topic is rampant among scholarly commentators (see, e.g., Francis H. Dunne, Functional Discounts under Hasbrouck and Secondary Line Competitive Injury, 59 Antitrust L. J. 793, 795-97, 799 (1991)(advocating a seller-cost-based measurement). See also Hasbrouck, 496 U.S. at 579-80 (Scalia, J., concurring).

difference of \$1 per unit, and not more, since more of a discount would “unlevel” the playing field between and among the retailers.

[53] It is readily shown why “cost saved by the supplier” is the best measure of a functional discount. First, if the cost of the function is less when paid by the supplier than when incurred by the retailer, efficiency is best served by having the supplier perform the function. To encourage this efficiency (or to discourage the inefficient retailer from performing the function), the law allows only a discount equal to the supplier’s saved cost.^{37/} The inefficient retailer is thus “punished” for taking on the function. On the other hand, if it is more efficient for the retailer to perform the function, the retailer who elects to do so is “rewarded” for that efficiency with a discount that is greater than his actual cost of performing the function (i.e., with a discount equal to the supplier’s higher cost). This “super discount” encourages all retailers to perform functions they have a comparative advantage in performing in order to earn the discount. Once all retailers “get on the bandwagon,” the supplier will no longer need to perform the function (in his comparatively-inefficient manner). The market is thereby encouraged to become more efficient over time, to the ultimate benefit of consumers.

[54] Functional discounts, as a special form of “cost justified” discounts, are one way in which the underlying purpose of the RPA is fulfilled: all retailers start – or eventually end up – at the same place concerning net wholesale price.^{38/}

THE MEANING OF “PRICE DISCRIMINATION”

[55] According to the United States Supreme Court, price discrimination is “merely a difference in price.”^{39/} This description is not simplistic. Rather, it is the main component in the entire mechanism for preventing the evils anti-discrimination laws are meant to address. If it is only casually acknowledged or ignored, one is cast adrift on a sea of uncertainty in evaluating price discrimination cases.

[56] When passing price discrimination laws, Congress envisioned what both economic theory and common sense predict: a wholesale-price difference will always eventually appear somewhere in the downstream marketplace. That difference can go

³⁷ [Hasbrouck](#), 496 U.S. at 564 (citing In Re General Foods Corp., 52 F.T.C. 798, 824-25 (1956)).

³⁸ The Robinson-Patman Act “was designed to level the playing field and ensure that success in the market was based on business acumen and skill rather than on discriminatory breaks derived from the belief that bigger was necessarily better.” H.L. Hayden Co. v. Siemens Medical Systems, Inc., 672 F.Supp. 724, 743 (S.D.N.Y. 1987), aff’d, 879 F.2d 1005 (2nd Cir. 1989).

³⁹ [Hasbrouck](#), 496 U.S. at 558 (citing FTC v. Anheuser-Busch, Inc., 363 U.S. at 547-51).

only one of two places: it can go into the pocket of the retailer receiving the discount (kept as extra profit), or it can be passed on to the retail customer in the form of a lower retail price. In either situation, competition is either directly or indirectly harmed (even though individual consumers might benefit *in the short run*).^{40/}

[57] If the price discount is retained by the retailer who receives it, the retailer makes a higher profit than does another retailer who did not receive the discount, all other things being equal.^{41/} This impacts the disfavored retailer and his customers in many ways. The disfavored retailer is not as able to provide to his customers the things those extra profits may have allowed him to provide, including (but certainly not limited to) lower retail prices. He is less able to expand or maintain his facilities, offer the same service options the favored dealer can offer, and retain certain customers he had previously been able to retain. If his customer base deteriorates sufficiently, he will be forced out of business.^{42/}

[58] If the price discount is passed on by the favored retailer in the form of a lower retail price, then his retail price will be lower than his competitors. In a market with negative price elasticity of demand (*i.e.*, where a lower price equates to higher quantity demanded), the lower-priced retailer will have a higher demand for his product, and he will sooner or later pull customers from his higher-priced competitors. In this scenario, like the first, the disfavored retailer may be forced out of business, perhaps even more quickly than if the favored retailer had simply pocketed the difference and increased his profits.

[59] The analysis always comes down to the eventual impact of the disparate price on the retail consumers involved. In either case, retail consumers are harmed by the

⁴⁰ See [Hasbrouck](#), 496 U.S. at 578 (Scalia, J., concurring) (“The [RPA] focuses . . . upon predictable commercial motivation; and it is just as predictable that a wholesaler will ordinarily increase sales (and thus profits) by passing on at least some of a price advantage, as it is that a retailer will ordinarily buy at the lower price”).

⁴¹ This article is not intended as an exhaustive treatise on the microeconomic impact of price differences at the wholesale level. Rather, this article addresses the economic impact Congress envisioned when it passed the RPA, and addresses the impact price discrimination has on businesses that are otherwise operating on the same level and with the same potential efficiencies. Courts are charged with attempting to bring to fruition the vision of Congress in passing laws such as the RPA. [Alan’s of Atlanta, Inc. v. Minolta Corp.](#), 903 F.2d 1414, 1418 n. 6 (11th Cir. 1990).

⁴² See [In re Boise Cascade Corp.](#), 107 F.T.C. at 182 (“Injury may be inferred even if the favored customer did not undersell his rivals, for a substantive price advantage can enlarge the favored buyer’s profit margin and enable him to offer attractive services to his customers,” (quoting [National Dairy Products Corp. v. FTC](#), 395 F.2d 517, 522 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968))). Competition can be “harmed” whether the wholesale discount translates into lower retail prices or higher profits to the favored dealer.

disparate pricing, either because they pay higher retail prices than they might if all retailers received the discount, or because eventually they will have a smaller selection of retailers to choose from, which will again lead to higher (monopoly or cartel) retail prices. If the discrimination is pervasive enough, eventually there will be only one favored dealer, who will then be able to force a monopoly price on his market.

SUPREME COURT RPA CASELAW

[60] The article now discusses several important Supreme Court cases addressing the RPA. From there, we proceed to examine the analysis of the circuit and district courts, and point out where those lower courts crafted defenses (including the so-called “functional availability” defense) that Congress never envisioned for the RPA.

1. FTC v. MORTON SALT CO.

[61] It is widely believed that [FTC v. Morton Salt Co.](#)^{43/} was the genesis for the doctrine of “functional availability.”^{44/} In fact, the actual holding in the [Morton Salt Co.](#) case stands for just the opposite proposition.

[62] About the time chain retail supermarkets were making their appearance, the Morton Salt Company offered case-lot discounts on table salt to the large chains. These discounts were not based on cost justification or given to meet competition. As a result of the discounts, large-volume purchasers were able to purchase at wholesale and then resell to their customers at lower resale prices than could purchasers who did not qualify for the highest discounts. This put the disfavored purchasers at a competitive disadvantage. The Federal Trade Commission sued Morton Salt for violation of the RPA.

[63] Morton Salt argued that its dealer discounts of up to 15 cents per case on quantities over 5,000 cases were “available to all on equal terms, as contrasted, for example, to hidden or special rebates, allowances, prices or discounts,” and were

⁴³ [FTC v. Morton Salt Co.](#), 334 U.S. 37 (1948).

⁴⁴ See, e.g., [FLM Collision Parts, Inc.](#), 543 F.2d at 1025-26; Andrew I. Gavil, [Secondary Line Price Discrimination and the Fate of *Morton Salt*: to Save It, Let it Go](#), 48 Emory L. J. 1057, 1109 n. 220 (1999).

therefore not discriminatory under the RPA. The Supreme Court disagreed, holding that whether available or secret or not, unless the discounts could be tied to the supplier's cost savings, they were per se illegal.^{45/}

The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the larger buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.^{46/}

[64] The Court went on to note that the original Clayton Act had provided for discounts based on quantity purchased (which rendered the Act "inadequate, if not almost a nullity"), and that one of the main reasons Congress passed the RPA was to eliminate that justification for disparate pricing.

[I]t was in furtherance of this avowed purpose – to protect competition from all price differentials except those based in full on cost savings – that § 2(a) of the [RPA] was passed.^{47/}

The Court thus found that Morton Salt's "naked volume discounts" were prohibited by the RPA.

[65] Later, critics of Morton Salt Co. argued that the Court did not take sufficient account of "harm to competition," but instead merely looked at harm to individual competitors.^{48/} However, a careful reading of the case dispels that notion. In addition to the quote cited immediately above, the Morton Salt Co. Court discussed at length how naked volume discounts negatively impact competition.^{49/}

[66] The Court also held that the cost-justification defense is the burden of the defendant to prove, *not* the plaintiff to disprove.^{50/} This only makes sense, since it is the supplier who will have access to the information needed to prove the issue, and

45 [Morton Salt Co.](#), 334 U.S. at 48.

46 [Morton Salt Co.](#), 334 U.S. at 43.

47 [Morton Salt Co.](#), 334 U.S. at 44.

48 See, e.g., LaRue, *supra* note 7.

49 [Morton Salt Co.](#), 334 U.S. at 43-47.

50 [Morton Salt Co.](#), 334 U.S. at 44-45.

because it is inherently difficult to prove a negative (i.e., that the difference was NOT justified by cost savings).

[67] Morton Salt and the FTC both argued the “availability” issue. Morton Salt asserted that anyone who bought salt in sufficient quantity would receive the same discount. In other words, Morton Salt’s position was that all buyers who were similarly situated (financially, market-wise, etc.) to take advantage of the discounts could qualify for and receive them.^{51/} The FTC argued several alternative positions on the merits. First, it argued that because the discounts were not tied to any cost savings of the supplier, and were not given to meet the competition facing Morton Salt by any other suppliers of salt, they were per se illegal under the plain reading of the RPA. In answer to Morton Salt’s “defense” that it was not really discriminating because “all were offered” the lower price if they purchased the large quantities for which the discounts were available, the FTC countered that such justification was a pretext because very few retailers and jobbers were able to purchase large enough quantities to receive the discounts.^{52/}

[68] Interestingly, nowhere in the opinion does the Court say whether or not, if the discounts were in fact “available” to every purchaser, they would be legal.^{53/} There was only a single off-hand reference to “availability”: “Theoretically, these discounts are equally available to all, but functionally they are not.”^{54/}

[69] The Supreme Court mentioned these arguments concerning availability, but its ruling did not rest in any measure on the purported “availability” of the discounts to all purchasers. Instead, the actual holding was based on the plain reading of the statute, with the Court finding that, since the discounts did not fall under either of the two statutory defenses, they were unlawful. Essentially, the Court found that because Morton Salt’s discounts were naked volume discounts (i.e., untethered to any cost justification or efforts to meet competition), they violated the RPA.^{55/} The dissent took

⁵¹ [Morton Salt Co., 334 U.S. at 42.](#)

⁵² [Morton Salt Co., 334 U.S. at 42-43.](#)

⁵³ This deficit has probably resulted in some courts actually finding that “functional availability” applies even when the prices are not actually available to all purchasers! See, e.g., Hygrade Milk & Cream Co. v. Tropicana Prods., 1996 U.S. Dist. LEXIS 6598 at *10 (S.D.N.Y. 1996) (“Functional availability, however, does not require that each customer be able to participate or benefit equally”). Compare In re Universal-Rundle Corp., 65 F.T.C. 924 (1964), rev’d o.g., 352 F.2d 831 (7th Cir. 1965), rev’d, 387 U.S. 244 (1967)(truckload discounts not “functionally” available to all purchasers are illegal).

⁵⁴ [Morton Salt Co., 334 U.S. at 42.](#)

⁵⁵ [Morton Salt Co., 334 U.S. at 44](#) (“[Morton Salt’s] standard quantity discounts are
(continued...)”)

up this point in its discussion of alleged “harm to competition,” but the dissent’s reasoning did not prevail.^{56/}

[70] From the discussion of the parties’ *arguments* concerning “availability” in Morton Salt Co., rather than from the actual holding of the case, lower courts later crafted the doctrine of “functional availability.”^{57/} However, a fair reading of the Morton Salt Co. opinion does not bear out the lengths to which later courts have gone to forgive outright price discrimination (especially based on volume). Indeed, the *real* holding of Morton Salt Co. is that volume discounts are per se illegal if they are not tied to cost savings. The Supreme Court was careful to stick to the plain meaning of the RPA, a process all but ignored by the lower courts in later cases.

2. TEXACO, INC. v. HASBROUCK

[71] The most recent RPA case from the Supreme Court is Texaco, Inc. v. Hasbrouck.^{58/} Here, the Supreme Court examined a pricing scheme by a local gasoline supplier located in Spokane, Washington. The supplier, Texaco, sold gasoline to two distributors, Gull and Dompier, at prices lower than Texaco sold the same gasoline directly to 12 retail outlets owned by the plaintiffs. Both Gull and Dompier acted not only as distributors; they also owned several retail outlets that competed with the plaintiffs.

[72] The Court found Texaco liable for violating the RPA. The Court rejected Texaco’s arguments that its discounts were “functional discounts” since there was no

⁵⁵(...continued)
discriminatory”).

⁵⁶ Morton Salt Co., 334 U.S. at 59-60 (Justice Frankfurter, dissenting).

⁵⁷ In this area, perhaps due to the imprecision of language used or the economic complexities of the subject matter, many commentators consistently confuse court dicta with court holdings. See, e.g., James F. Rill, Living with the Robinson-Patman Act: Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L.J. 929, 933 n. 23 (1984) (hereafter, “Rill”). But see David G. Hemminger, Cost Justification – A Defense with New Applications, 59 Antitrust L. J. 827, 830 (1991). Mr. Hemminger actually understands the true holding of Morton Salt Co.: “[Morton Salt] is most known today for the creation of the inference of competitive injury in secondary line price discrimination cases. That holding, reaffirmed by the Court in Falls City, has somewhat eclipsed the fact that Morton Salt is a quantity discount case. The respondent lost because it failed to offer evidence of cost justification for quantity discounts it made available on its Blue Label table salt.” Id. (emphasis added).

⁵⁸ Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990).

evidence the discounts were tied to any cost savings.^{59/} The Court also rejected Texaco's arguments that it did not discriminate as to buyers at the same level of distribution, and that discounts given at different levels are not discriminatory.^{60/} That is, Texaco argued that distributors do not compete with retailers, and hence, giving distributors favored pricing cannot adversely affect competition. The Court found that the distributors (Gull and Dompier) also functioned as retailers in direct competition with the plaintiffs, and, thus, the discounts did impact retail competition. The Court hinted at the possibility that "competition" is a broader concept than Texaco argued, and that, even if Gull and Dompier had not operated retail outlets, the discounts may still have been unlawful since they were not tied to cost savings or efforts to meet competition, and thus they would have thus affected competition with customers of Gull and Dompier.^{61/}

3. FTC v. BORDEN CO.

[73] The first place the concept of "functional availability" appears in RPA jurisprudence is actually in a footnote in Justice Stewart's dissenting opinion in FTC v. Borden Co.^{62/} In Borden, the issue was whether private-label milk was of "like grade and quality" to the identical milk labeled with the manufacturer's "premium" label. The Court rightly held that mere labeling is not relevant to the inquiry of "like grade and quantity," even if such labeling creates a different perception in the mind of the final retail customer.^{63/} The case holding stands for nothing more than this.

[74] In dissent, Justice Stewart stated in a footnote:

So long as Borden makes private label brands available [at the same price] to all customers of its premium milk, it is unlikely that price discrimination within the meaning of § 2(a) can be made out.^{64/}

[75] Not only was this remark made in a dissenting opinion and in a footnote, it is also pure dicta concerning an issue not even being addressed by the Court in the case. Moreover, it is a tautology. Justice Stewart's statement can be restated as follows: "so

⁵⁹ [Hasbrouck](#), 496 U.S. at 555-56.

⁶⁰ [Hasbrouck](#), 496 U.S. at 554-55.

⁶¹ [Hasbrouck](#), 496 U.S. at 557-59. See also Alan's of Atlanta, Inc., 903 F.2d at 1418 n. 6.

⁶² [FTC v. Borden Co.](#), 383 U.S. 637 (1966).

⁶³ [Borden](#), 383 U.S. at 640.

⁶⁴ [Borden](#), 383 U.S. at 660 n. 17.

long as there is no discrimination in prices offered to all retailers, then there is no price discrimination.”

[76] Justice Stewart’s comment tells us nothing about the RPA. Consider: if all buyers *can* purchase for the same low price, then all *will* do so. Of *course* there can be no price “discrimination” in such situations because there is no price *difference*. A more serious question would be: are such low prices really available to all buyers, or is their alleged availability some kind of pretext? It is difficult to imagine that a retailer with access to a lower wholesale price would willingly and consciously chose to pay a higher one.^{65/} By the mere act of paying the higher price, the retailer provides as least some evidence that the lower price was not really available to him for one reason or another.

[77] In the [Borden](#) dissent/footnote, later courts perceived a framework to expand the “functional availability” doctrine into a full-blown legal principal. Never mind that the seminal Supreme Court case discussing such discounts (i.e., [Morton Salt Co.](#)) actually condemned the practice these later courts would bless. Lower federal courts embraced the doctrine as if it were actually part of the Congressional program envisioned by RPA. Nothing could be more inaccurate.

THE DOCTRINE OF “FUNCTIONAL AVAILABILITY” GAINS MOMENTUM

[78] When a court is confronted with the myth of “functional availability, the main question must always be whether such prices are truly available to all purchasers. In a classic understatement, James Rill said: “questions of application remain.”^{66/}

[79] A case frequently cited for the “functional availability” doctrine – and one that really does not stand for the doctrine – is [FLM Collision Parts, Inc. v. Ford Motor Company](#).^{67/} There, Ford sold replacement parts for its vehicles through its dealers. Those dealers then did one of two things with the parts: they used them to repair cars in their *own* shops, or they resold them to *other* (non-dealer) repair shops for their use. Ford had established a program whereby parts it sold to its dealers that the dealers resold to repair shops received a percentage discount greater than that received by the same dealers if they were planning to use the parts in their own repair shops.

[80] Ford’s discount program was held not to violate the RPA. The Second Circuit found that Ford sold parts to all dealers at one price when they acted as retailers (i.e.,

⁶⁵ See [Boise Cascade Corp.](#), 107 F.T.C. at 216, where the Federal Trade Commission comments that the mere fact that a retailer paid a higher price is strong evidence the discount was not really “available.”

⁶⁶ Rill, [supra](#) note 57.

⁶⁷ [FLM Collision Parts, Inc. v. Ford Motor Co.](#), 543 F.2d 1019 (2nd Cir. 1976), cert. denied, 429 U.S. 1097 (1977).

kept the parts for use in their own repair shops), and at a *different* price when the dealers acted as wholesalers (i.e., resold the parts to other purchasers for resale or use in their repair shops). The Court said the RPA “does not prohibit the seller from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler.”^{68/}

[81] Regardless of whether this is a correct statement of the law (and statements made in [Hasbrouck](#) certainly call that into question),^{69/} the court did *not* hold that a supplier can charge different prices to buyers *on the same market level* simply by saying it is “offering” the same low price to each.

We do not suggest or imply that, if a manufacturer grants a price discount or allowance [only] to its wholesalers (whether or not labeled “incentive”), which has the purpose or effect of defeating the objectives of the Act, § 2(a)’s language may not be construed to defeat it. But that is quite different from the situation before us. Here the incentive allowance is given by Ford to its dealers in recognition of the fact that in reselling to independent repair shops the dealer acts as a wholesaler rather than a retailer.^{70/}

[82] Many have incorrectly interpreted this passage to mean that manufacturers may lawfully sell the same product to two different dealers, while both are acting as retailers, for different prices.^{71/} In any event, the FLM case is probably no longer good law in the wake of the [Hasbrouck](#) opinion.

[83] In 1986, the Boise Cascade Corp. case was decided by the FTC.^{72/} This was an RPA § 2(f) case against Boise as the favored purchaser. According to the FTC, Boise had knowingly induced and received favored pricing from many suppliers of office

⁶⁸ [FLM](#), 543 F.2d at 1024.

⁶⁹ [Hasbrouck](#), 496 U.S. at 572-73.

⁷⁰ [FLM](#), 543 F.2d at 1027.

⁷¹ See, e.g., [Metro Ford Truck Sales, Inc. v. Ford Motor Company](#), 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

⁷² [Boise Cascade Corp. v. FTC](#), 107 F.T.C. 76 (1986), rev’d o.g., 837 F.2d 1127 (D.C. Cir. 1988), on remand, 5 Trade Reg. Rep. (CCH) ¶122,902 (11/1/90). [Hasbrouck](#) effectively overruled [Boise Cascade Corp.](#), but a discussion of the [Boise Cascade Corp.](#) case is nonetheless important for the sake of completeness. Also, even the FTC did not go along with the thrust of the D.C. Circuit’s opinion, and upon remand again found Boise in violation. Id. At least one other court has said [Boise Cascade Corp.](#) was contrary to Supreme Court authority. See [J.F. Feeser, Inc. v. Serv-A-Portion, Inc.](#), 909 F.2d 1524, 1528 (3rd Cir. 1990), cert. denied, 499 U.S. 921 (1991).

products. Like the dealers in FLM, Boise was both a wholesaler and a retailer of these products. Boise received its discounts based (supposedly) on its activities as a wholesaler, but these discounts, which applied to all purchases by Boise, allowed Boise to realize lower wholesale costs on those products it purchased for its retail operations as well.

[83] Boise asserted many arguments to counter the government's charges of price discrimination. The FTC opinion is over 150 pages long, most of it spent addressing Boise's defensive arguments. The FTC found that the discounts were not "cost justified" and were not made to "meet competition" or due to "changing circumstances," and were thus illegal.^{73/}

[84] As to "functional availability," Boise argued two alternatives: (1) that other dealers could have received the same discounts if only they were wholesalers (similar to Morton Salt's failed argument), and (2) since there were lower prices allegedly available from suppliers other than those suppliers giving Boise the discount, the disfavored dealers had the option to go elsewhere to purchase their products.^{74/}

[85] The FTC rejected both of these arguments. As for the "you can change your business character" defense, the FTC cited several cases that hold a dealer cannot be forced to change the way he does business in order to qualify for the discounts.^{75/} As for the claim that other dealers could simply have gone elsewhere, the FTC said such an argument ignored reality: "Instead, the continued purchases even in the face of discriminatory prices suggests that the alternative sources are not [really] competitive."^{76/}

[86] At the D.C. Circuit court, Judge Kenneth Starr wrote the opinion reversing the FTC's finding of liability. This court identified the so-called "practically available" defense, which is like the "functional availability" defense:

In addition to the statutory defenses, the Commission recognizes a defense, or more precisely, finds an absence of competitive injury, where

⁷³ Boise Cascade Corp., 107 F.T.C. at *203-20.

⁷⁴ Boise Cascade Corp., 107 F.T.C. at *199-202.

⁷⁵ Boise Cascade Corp., 107 F.T.C. at 184 (citing FLM, 543 F.2d at 1025-26); In re Dayton Rubber Co., 66 F.T.C. 423, 470 (1964), rev'd o.g. sub nom., Dayco Corp. v. FTC, 362 F.2d 180 (6th Cir. 1966).

⁷⁶ Boise Cascade Corp., 107 F.T.C. at *216.

the discounts are generally and practically available to competitors of the favored customer.^{77/}

[87] This is an interesting proclamation of an “FTC rule,” because when faced with that same argument by Boise earlier in the proceeding, the FTC flatly *rejected* Boise’s argument concerning this very issue. Indeed, on remand, the FTC again confronted the “practically available” claims of Boise and again rejected that defense, finding that it went against not only the facts in that case, but was contrary to statutory language and common sense as well.^{78/} Thus, while the Circuit Court opinion in Boise Cascade Corp. seemed to identify an FTC “rule of functional availability,” the FTC itself does not appear to recognize such a rule. On remand, the FTC affirmed its finding that Boise had violated the RPA.

[88] In Precision Printing Co. v. Unisource Worldwide, Inc.,^{79/} a paper company sued its supplier for price discrimination. The supplier had set up three different price levels depending on how sales were made. Level one discounts were called “warehouse sales,” where paper was sold out of the defendant’s warehouse, usually involving small-quantity sales on an as-needed basis. Level two discounts were “direct sales” that were larger-quantity sales shipped directly to the retailers’ warehouse. Level three discounts were “just in time” (or JIT) discounts that were given to customers who committed in advance to purchase a certain amount of paper to be delivered over a set time period. The Court, quoting Shreve Equipment, Inc. v. Clay Equip. Co.,^{80/} said:

Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury.^{81/}

To which one might add: “. . . or the dealer is a complete fool for not taking advantage of it.”

[89] As Justice Scalia pointed out in his concurrence in Hasbrouck, given a *true* choice, “all retailers will simply purchase from [the lowest-priced source] instead of the

⁷⁷ Boise Cascade Corp. v. FTC, 837 F.2d at 1130.

⁷⁸ In the Matter of Boise Cascade Corp., 113 F.T.C. 956, *92-101 (1990).

⁷⁹ Precision Printing Co. v. Unisource Worldwide, Inc., 993 F.Supp. 338 (W.D. Pa. 1998).

⁸⁰ Shreve Equipment, Inc. v. Clay Equip. Co., 650 F.2d 101, 105 (6th Cir.), cert. denied, 454 U.S. 897 (1981).

⁸¹ Precision Printing, 993 F.Supp. at 350.

[higher-priced source]”.^{82/} That is, if all retailers have a true option to purchase from either a lower-priced source or a higher-priced source, they will always choose the lower price. To hold otherwise is to assume that rational businessmen, faced with this choice, may instead prefer to pay the higher wholesale price? Such an assumption is the entire basis for the “functional availability” doctrine, and provides an imminently practical reason why the doctrine is invalid: businessmen simply do not act that way.

[90] In Precision Printing, the JIT discounts and direct sales prices were known to Precision, and were apparently available (even though those discounts appear to be naked volume discounts of the type condemned by Morton Salt). Also, the court noted that Precision had in fact bought truckload paper before, but had made a business decision to buy on an “as needed” basis most of the time. The court incorrectly attributes to Morton Salt the so-called “availability defense” based on the fact that no individual retail grocers ever purchased sufficient quantities of salt to obtain discount pricing. That is not the holding of Morton Salt, nor is such an assumption economically valid.

[91] As shown above, Morton Salt did not suggest that “availability” determines actionable discrimination. The Precision Printing court erroneously cited to Morton Salt as authority for the relevance of “availability” when, in fact, that Court was merely reciting the defendant’s argument.

[92] The law must assume that every rational dealer will apply for and seek every “available” discount possible, because it is in his indisputable economic interest to do so. To assume otherwise is to assume economically faulty reasoning on the part of dealers.^{83/} The Precision Printing decision is wrong on the facts because it is based on

⁸² [Hasbrouck](#), 496 U.S. at 580.

⁸³ In the Boise Cascade Corp. case before the FTC, Boise asserted the so-called “alternative source” defense. This defense is raised to suggest that dealers have not been harmed by the discriminatory pricing if there is another source for the product at a cheaper price and the dealers simply failed to take advantage of it. Boise Cascade Corp., 107 F.T.C. at *201.

In a way, the “functional availability” defense is similar. What the manufacturer is saying is that the dealers have not been harmed by the discriminatory pricing because there was another, cheaper price available (albeit from the *same* source) and they simply failed to take advantage of it.

The FTC was having none of that. “[T]he continued purchases even in the face of discriminatory prices suggest that the alternative sources are not [really available].” Boise Cascade Corp., 107 F.T.C. at *272. That is, the FTC was not willing to hold that dealers, fully informed of an alternative, cheaper price, would instead chose to pay the higher price when to do so was contrary to their self interests. Yet, that is the essence of the “functional availability”

(continued...)

the proposition that a naked volume discount could survive RPA scrutiny merely because “all dealers could supposedly get the discount” for the asking.

THE METRO FORD CASE

[93] In Metro Ford,^{84/} the Fifth Circuit took the “functional availability” doctrine to new heights.^{85/} Here, Ford was selling identical heavy trucks to different retail dealers weeks or even days apart at wholesale prices that differed by as much as \$15,000. Ford admitted these price differences were not justified by differences in cost, and admitted that it was not trying to meet competition from other manufacturers competing for its dealers’ business.^{86/} The discount program at Ford, called the “competitive price assistance” or “CPA” program, offered a dealer different levels of discount allegedly depending on who the dealer’s retail customer happened to be and the level of local, retail competition the dealer was facing from other manufacturers’ dealers; Ford argued its discounts were provided “to meet a competitive need.”^{87/} In reality, the discounts were being offered dependent upon what retail price the dealer was planning to charge the final retail customer, and allowed Ford to control its dealers’ profits.^{88/}

[94] In order to succeed in its scheme to control dealer profits, Ford had to ensure that dealers would participate in the CPA program. To make this happen, Ford priced its trucks to its dealers at so-called “wholesale delivered” prices that were far greater than the retail prices the trucks could command upon resale.^{89/} This forced dealers to

⁸³(...continued)

doctrine: dealers are not harmed because they have the ability to obtain the lower price and simply chose not to do so for some reason. Other than to set his supplier up for an antitrust lawsuit, there are precious few reasons why a dealer would *voluntarily* pay a higher wholesale price when a lower wholesale price was known to him and readily available.

⁸⁴ [Metro Ford Truck Sales, Inc. v. Ford Motor Company](#), 145 F.3d 320 (5th Cir. 1998), cert. denied, 525 U.S. 1068 (1999).

⁸⁵ As predicted by Rill, supra note 57 at 28: “The scope of the availability principle seems to be expanding.”

⁸⁶ [Metro Ford](#), 145 F.3d at 322.

⁸⁷ [Metro Ford](#), 145 F.3d at 323.

⁸⁸ See Metro Ford Truck Sales, Inc. v. Ford Motor Company, Texas Motor Vehicle Board, Docket Nos. 95-137 and 96-567 (consolidated), Proposal for Decision, pp. 29-31 (January 16, 1998).

⁸⁹ In an earlier case involving Ford’s CPA program, a different court found that no
(continued...)

apply for and obtain CPA discounts from Ford so they could purchase the trucks at a true wholesale price below the retail price the dealers' customers were willing to pay.

[95] Ford argued that its discounts were being offered to assist Ford dealers to *compete with other dealers* selling competing brands of trucks.^{90/} In reality, however, Ford based its discounts not on the identity of the particular retail customer, but on what retail price the dealer was contemplating charging the final retail customer.

[96] In a typical scenario, Ford priced a particular truck at \$80,000 wholesale delivered price. When a dealer was contemplating a retail sale at a price of, say, \$65,000, Ford would offer enough of a discount to reduce the wholesale price to \$64,000 allowing the dealer to realize only a \$1,000 profit. When a second dealer was

⁸⁹(...continued)

trucks had been sold since at least 1980 at full "wholesale delivered" prices. Apparently, Ford did not argue otherwise, nor could it since its own records revealed that every dealer received some level of CPA on every sale. See *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F.Supp. 1555, 1560 nn. 8 and 9 (N.D. Ga. 1992). In *Capital Ford*, largely based on the admission of Ford that it priced its trucks in such a discriminatory manner, the court denied summary judgment to Ford on the RPA claims and sent the case to trial.

⁹⁰ [Metro Ford](#), 145 F.3d at 323. This justification does not comport with the § 2(b) "meeting competition" defense. That defense was described by the Supreme Court in [FTC v. Sun Oil Co.](#), 371 U.S. 505 (1963). There, Justice Goldberg, one of the leading antitrust justices in the country's history, remarked that a manufacturer could not look beyond his own customer and grant discounts depending on what competition his customer may be facing from the customer's rivals in a downstream market. In rejecting the so-called "conduit theory" of meeting competition (where the manufacturer regards the retailer as a mere conduit for the "real" competition the manufacturer faces from rival manufacturers), Justice Goldberg said:

In a very real sense, however, every retailer is but a "conduit" for the goods which it sells and every supplier could, in the same sense, be considered a competitor of retailers selling competing goods. We are sure Congress had no such broad conception of competition in mind when it established the § 2(b) defense and, certainly, it intended no special exception for the petroleum industry. It is difficult to perceive convincing reasons rationally confining the thrust of respondent's argument to an area narrow enough to preclude effective emasculatation of the prohibitions on discrimination contained in § 2(a). . . . The "conduit" theory contains no inherent limitations and its acceptance would so expand the § 2(b) defense as to effect a return to the broader "meeting competition" provision of the Clayton Act, which the Robinson-Patman Act amendments superceded.

[Sun Oil](#), 371 U.S. at 524-26. The Supreme Court has thus eliminated the same "defense" offered by Ford concerning its claim to be "meeting competition" in the downstream marketplace.

contemplating a comparable retail sale on an identical truck at a price of, say, \$74,000, Ford offered only so much of a discount to the second dealer so as to reduce the wholesale price to \$73,000, again allowing the second dealer to also make a \$1,000 profit.

[97] Given the manner in which Ford set up its wholesale pricing structure and doled out CPA, Ford's *true* purpose in the program could only have been to control dealer profits on each and every sale. In this way, Ford was able to maximize *its own* profits while rigidly controlling the profit margins of its dealers. In the example above, it is easy to see that, if Ford's cost of production for these two trucks was, say, \$50,000 each, in the first deal Ford would have made a \$14,000 profit (while the dealer earned \$1,000), and in the second deal, Ford would have made a *\$23,000 profit* (again, while the second dealer made only \$1,000, the same profit as the first dealer).

[98] At the companion proceeding before the Texas Motor Vehicle Board in February 1997, after a three-week trial on the merits at which Ford had a full opportunity to present its "meet a competitive need" defense, the Administrative Law Judge, having heard all the evidence for the existence of the CPA program, concluded:

It is the ALJ's opinion that there is more to the pricing system in the medium and heavy duty truck industry than meets the eye. It appears to the ALJ that although there are no mechanisms in place to force the dealers to make retail sales at certain prices, that is the practical effect of the CPA program and similar programs of other OEM's. To use an example devised by Metro during hearing, Ford is able to peek over the wall dividing wholesale from retail sales and learn everything about [the dealer's] retail transaction, including at what price [the dealer] believes it can sell a truck to its retail customer, before Ford has to quote a price to [the dealer] on the wholesale transaction. **Under this system, Ford knows everything about both sides of the sales transaction, which would allow Ford to establish its wholesale price at an amount that maximizes its profit at the expense of its dealers.**

Ford claims that the CPA program, as well as its predecessors, was devised to meet competition from other OEM's and that its dealers must provide detailed information about the retail transaction in order for Ford to accurately assess the competitive situation on each transaction. Ford also claims that since 1990 it has not required dealers to disclose their anticipated profit on a sale, nor does Ford care what the dealer's profit may be. Since it is the dealers that supply most if not all of the information to Ford during a CPA appeal and have engaged in negotiations with the retail customer, it appears that the dealers are more than capable of assessing the competitive situation without input from the manufacturer. **Therefore, the ALJ fails to comprehend why the**

manufacturer is involved in the retail transaction at all, if not to control [dealer] profit.^{91/}

[99] Ford’s argument that it was just “trying to meet competition” was found to be a pretext by the Texas Motor Vehicle Board. The real purpose and effect of the program was borne out by the facts in the record as found by the ALJ.^{92/}

[100] However, in the federal district court case, Ford’s “defense” received a warmer reception. While Ford admitted it discriminated in price, it argued that it could not be held liable for price discrimination because it did give equalized CPA in those transactions where 2 dealers were bidding for the same sale of the same trucks to the same customer at the same time. Ford admitted it never equalized prices to two dealers in any other situation, even when those dealers were competing in the same market area at about the same time for the same pool of retail customers.^{93/}

[101] The Fifth Circuit, however, agreed with Ford’s arguments. That court ruled that since Ford gave equalized CPA in those situations, where two dealers were in “head-to-head” competition (i.e., where both dealers were attempting to make the exact same sale of the exact same trucks to the exact same retail customer at the exact same time), Ford had not violated the RPA. The Fifth Circuit did not rely on any statutory defense for this particular ruling. Rather, the court relied upon a non-statutory doctrine that was admittedly “a judicial graft on § 2(a) and is not explicitly embodied in the text of the [RPA] statute.”^{94/}

[102] We know from the wording of the RPA that this defense – while it shows the absence of discrimination between the two dealers in a head-to-head sale/bid situation – is not sufficient to overcome the discrimination Ford perpetrated on all other dealers unless we narrowly define “competition” as only those sales where head-to-head competition takes place. This is what the Fifth Circuit apparently did. But the RPA does not prohibit price discrimination in only those narrow circumstances. Rather, the statute’s definition of “competition” is far broader. Under the RPA, price discrimination

⁹¹ [Metro Ford Truck Sales, Inc. v. Ford Motor Company](#), Texas Motor Vehicle Board, Docket Nos. 95-137 and 96-567 (consolidated), Proposal for Decision, pp. 29-31 and Findings of Fact Nos. 46 and 47, p. 39 (January 16, 1998).

⁹² [Id.](#)

⁹³ Ford also argued that it never discriminated consistently. That is, Ford argued that since it gave high CPA to each dealer who qualified, rather than to a particular dealer every time, it was not discriminating. We know from the discussion of competitive injury in [J.F. Feeser](#), [supra](#) note 72 at 1538, that such a “defense” is unavailing.

⁹⁴ [Metro Ford](#), 145 F.3d at 326.

is prohibited when the sales under consideration are “reasonably contemporaneous.”^{95/} This implies that the sales need not be exactly contemporaneous, as the Fifth Circuit held. In the Capital Ford case, the court found that even sales made more than one year apart may qualify as “reasonably contemporaneous” under the statute.^{96/} Sales one year apart are obviously not the same sale to the same customer.

[103] In addition, the RPA prohibits discrimination in transactions that are merely “comparable,” and for products that are of “like grade and quality,” not just in transactions that are identical and involve the exact same product.^{97/} Thus, the Fifth Circuit’s definition of “competition” as including only those sales of the identical trucks that are made in head-to-head deals is far narrower than the Supreme Court and the text of the statute have prescribed.

[104] Three errors in the Metro Ford case are worthy of discussion: the “same customer” error, the “exactly contemporaneous sales” error, and the “two purchases” error.

1. The “same customer” error.

[105] Considering Ford’s CPA program, the Fifth Circuit stated that the “‘functional availability’ theory . . . coincides with the purpose of the [Robinson-Patman] Act in that a price discount equally available to all purchasers for the same customer and product is not price discrimination (citing Morton Salt). . . . The CPA program functioned to ensure that all Ford dealers issuing bids to the same customer received equal CPA.”^{98/} The term “customer” and the term “purchaser” must refer to different entities in this quote. Stated another way, what the court said was, if the purchasers (i.e., the dealers) were purchasing for resale to the same customer (i.e., final user), then by giving those dealers equal discounts, Ford did not violate the RPA.

⁹⁵ See Black Gold Ltd. v. Rockwool Indust., Inc., 729 F.2d 676, 683 (10th Cir.) (“In addition, the sales under comparison must be reasonably contemporaneous in that they “must (1) have been entered into within a reasonably short time period and (2) contemplate reasonably simultaneous delivery of the goods involved in the transaction”), cert. denied, 469 U.S. 854 (1984)

⁹⁶ See Capital Ford, 819 F.Supp. at 1572-73.

⁹⁷ See Borden, 383 U.S. at 643 (the Robinson-Patman Act “proscribes unequal treatment of different customers in comparable transactions . . .”).

⁹⁸ Metro Ford, 145 F.3d at 326 (emphasis added).

[106] This is a gross departure from the statute.^{99/} The RPA says nothing about the dealer/plaintiff's customers having to be identical for the Act to apply. Likewise, the Morton Salt case (cited here by the Fifth Circuit as the source of this "rule") says nothing about the customers of the discriminated-against dealers. This "same customer" rule is nowhere in any previous RPA case law, nor is it found in the wording or legislative history of the Act or in any commentaries previously published. It appears to be sui generis with the Fifth Circuit. More importantly, such a narrow definition of "competition," if valid, makes the § 2(b) "meeting competition" defense economically irrelevant and unnecessary, according to at least one commentator.^{100/}

2. The "exactly contemporaneous sale" error.

[107] Similar to the "same customer" error, the Fifth Circuit in Metro Ford also held that only those sales of the exact same trucks that were being made at the exact same time

⁹⁹ According to all courts that have addressed the issue (except Metro Ford), the plaintiff need only show that sales were "reasonably contemporaneous," not "exactly contemporaneous." See Borden, 383 U.S. at 643-44 (1966) (calling them "comparable transactions"); Black Gold, Ltd., 729 F.2d at 683; Zwicker v. J. I. Case Co., 596 F.2d 305, 309 (8th Cir. 1979); Precision Printing, 993 F.Supp. at 348; Mays v. Massey-Ferguson, 1990-1 Trade Cases P 69,028 (S.D. Ga. 1990). See also Capital Ford, 819 F.Supp. at 1572. This last case, Capital Ford, should have influenced the Fifth Circuit's decision in Metro Ford. After all, the Fifth Circuit was dealing with the exact same discount program as Capital Ford, and the court even *cited the case*. Metro Ford, 145 F.3d at 326 n. 15. However, the "reasonably contemporaneous" sales in Capital Ford that the Georgia court found could support a RPA claim were completely ignored by the Fifth Circuit, which found that it was only necessary that Ford offer equal prices when two dealers were contemplating reselling the same trucks to the same retail customer in the same sale.

¹⁰⁰ Dam, supra note 3, at 8-9:

It should therefore be observed that if one adopts the position that differential pricing arising from differences in competitive conditions (such as two sales to different purchasers for resale to different customers – the exact situation suggested in Metro Ford) is not discrimination, it would not be necessary to consider the desirability of a meeting competition defense because such a defense would be superfluous. But if competition is defined more broadly, the availability of a meeting competition defense is crucial.

Hence, this commentator suggests that, unless the Fifth Circuit's definition of "competition" in Metro Ford is wrong, § 2(b) of the RPA is mere legislative surplusage.

were cognizable by the RPA.^{101/} That is, when two dealers are bidding to purchase the same trucks each of them hopes to resell to the same end user, those dealers are attempting to make an “exactly contemporaneous” purchase, or rather, the *same* purchase.

[108] But the RPA does not require this high degree of sameness. Rather, the Act applies to “reasonably contemporaneous” sales in “comparable transactions.” This has been construed to mean sales as far as a year apart (or more).^{102/} Also, the “comparable transaction” requirement suggests that the transactions need not be identical, only “comparable.” This error also implicates the “like grade and quality” requirement. Again, this part of the statute only requires that the two trucks in issue be “alike,” not that they be the exact same trucks. The Metro Ford court substantially rewrote these parts of the statute.

3. The “two purchases” error.

[109] Finally, the Metro Ford case effectively abrogated the RPA by holding that price discrimination is only unlawful if practiced in market situations that will rarely arise.

[110] In industries (such as the heavy truck industry) where products are ordered for sale to specific customers by the dealers involved, there will never be a situation where two dealers in “head-to-head” competition for the same sale will ever BOTH purchase the same products, since the customer is only buying the products from one or the other of the dealers. When the sale is consummated with the favored dealer, the disfavored dealer will not have purchased the products, so he will not be able to show two sales made at discriminatory prices (because there will have been only a single sale to the favored dealer). Therefore, the “two purchases at different prices” requirement will never be fulfilled.^{103/}

¹⁰¹ [Metro Ford](#), 145 F.3d at 323.

¹⁰² See [Capital Ford](#), 819 F.Supp. at 1575.

¹⁰³ [M.C. Manufacturing Co. v. Texas Foundries, Inc.](#), 517 F.2d 1059, 1067 n. 17 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). The [M.C. Manufacturing](#) case attempted to distinguish another Fifth Circuit decision, [American Can Co. v. Bruce’s Juices](#), 187 F.2d 919 (5th Cir.), *cert. dismiss’d*, 342 U.S. 875 (1951), where the court held that the two-purchaser requirement is not necessary in cases where the failure of the plaintiff to make the second purchase was due to the defendant’s discriminatory pricing. That is, under [Bruce’s Juices](#), where only one of two bidders will be awarded the retail sale, only the successful retail bidder will eventually make the wholesale purchase; the losing bidder no longer has any need to purchase the product. It would be anomalous to hold that in that situation the unsuccessful bidder did not have a RPA cause of action because he did not make the second purchase (because he could not resell it), even though he was clearly “charged” – or offered – a discriminatory price. [Bruce’s Juices](#) is the better law, (continued...)

[111] What this means is that Metro Ford effectively ended RPA applicability in industries where spot or bid sales are made, where products are ordered by dealers with custom options for a particular customer, and where customers of dealers only purchase from one of the several dealers competing for the sale. There are only two forms of wholesale purchases: those where the dealers order products (often custom-made) for sale to pre-arranged retail customers, and those where dealers order products to hold in inventory for sale to unknown customers in the future. The RPA (under Metro Ford) will never apply in the first type of market. Metro Ford thus significantly narrowed the reach of the RPA to only markets where dealers purchase products to hold in inventory.^{104/}

[112] Also, given that such head-to-head competition is the exception rather than the rule (i.e., Ford dealers much more frequently competed with dealers selling Freightliner or Mack trucks than with other Ford dealers), the Court was addressing a situation not likely to come up very often, and ignored the more-likely situation where dealers are competing in the general marketplace with dealers selling competing brands of trucks.^{105/} Further, these disparate discounts affected competition since they placed certain dealers (i.e., those not selling to large fleet customers) at a price disadvantage with dealers of competing manufacturers who may have been getting the lowest price

¹⁰³(...continued)

because it takes full account of “harm to competition” even when two sales at discriminatory prices are not consummated.

¹⁰⁴ Compare DeLong Equipment Co. v. Washington Mills Electro Minerals Corp., 990 F.2d 1186 (11th Cir.), cert. denied, 510 U.S. 1012 (1993), where the Eleventh Circuit properly construed the RPA and found that where the price discrimination effectively foreclosed the plaintiff from purchasing products so it could compete with the favored dealer, an RPA case is made out. “While there must be two sales made by the same seller to a least two different purchasers at two different times [citations omitted], there is no requirement that the two sales be made at precisely the same time or place.” DeLong, 990 F.2d at 1202 (emphasis added).

¹⁰⁵ To borrow an idea that Justice Scalia articulated on another topic, the Fifth Circuit’s rationale “focused upon the damage caused by the rare exception rather than the damage caused by the almost universal rule.” Hasbrouck, 496 U.S. at 578. Indeed, the Fifth Circuit said that Ford could escape all price-discrimination liability by merely showing it did NOT discriminate in those rare situations of head-to-head competition, even though it admittedly practiced outright price discrimination in all other situations where the dealers were engaged in “reasonably contemporaneous” sales of comparable products in the same market during the same relevant time period. Acceptance of the “equalization” defense posited by Ford is perhaps the single most important error made by the Fifth Circuit in Metro Ford. It literally spells the end of RPA jurisprudence in all markets (in Texas, Louisiana and Mississippi, at least) where sales at retail are made on the spot or “bid” basis, rather than on the general market/inventory basis.

from their own manufacturer regardless of the identity of the final customer.^{106/} All dealers selling to non-fleet, low-volume customers (and those non-fleet customers themselves) thus pay higher prices for Ford trucks, harming competition in that market, a situation that the RPA was expressly written to prevent.

[113] In essence, the [Metro Ford](#) court's acceptance of the "equalization" defense narrowed the definition of "competition" to encompass only situations of head-to-head, same-sale competition, rather than competition generally as described in [Hasbrouck](#). [Hasbrouck](#) had defined competition in relation to the relevant market area and a discrete time frame. [Metro Ford](#) defines "competition" as only those situations of exactly contemporaneous sales in a "market area" encompassing only a single point of sale. With such a narrow definition of "competition" the RPA is relegated to defending price discrimination in a minuscule segment of the economy: head-to-head sales. It writes out of the statute the requirement of "reasonably contemporaneous sales" and "like grade and quality" and writes into the law a requirement that the plaintiff prove "coincidental sales or bids" of the "exact same products." The Supreme Court has already rejected the equivalent of Ford's "equalization" defense outright.^{107/}

¹⁰⁶ Even if we assume that discounts are allowed under the RPA if "equally available" to all dealers, the discounts in [Metro Ford](#) clearly were not. That is, all dealers did not have the chance to bid sales to large fleet customers, either because fleets were not their regular customers or because they were not "geared up" or sophisticated enough to handle such large accounts. Ford argued, in part, that all dealers buying trucks for resale to fleets were offered the same discount, so no discrimination occurred. This is akin to saying that all salt purchasers buying car-load quantities of salt (for resale to large buyers) were offered the same discounts, so no discrimination occurred; the same argument made by Morton Salt and expressly rejected by the Supreme Court.

Regardless of why a particular dealer is not able to enjoy the disparate, lower price (either due to size, market, financial wherewithal, supplier choice, or deciding not to change his marketing strategies such as by joining a co-op or buying group), if he is not offered and cannot obtain the discount, he has been the victim of discrimination. When the manufacturer says "all may have the discount if only they will [fill in the blank]," he imposes conditions on the availability of that discount and it is no longer "freely" available to all dealers (by definition). This leads one to the actual holding of [Morton Salt Co.](#), [Hasbrouck](#), and the RPA itself: price discrimination not tethered closely to cost savings or meeting competition is unlawful, regardless of claims of "equal availability." The so-called "judicial gloss" on the statute is revealed to be not only a bad idea but one completely antithetical to the purpose of the statute as envisioned by Congress and as interpreted by the Supreme Court. [Metro Ford](#) almost certainly will be disapproved the next time the Court has the opportunity to examine similar claims in another case.

¹⁰⁷ See [Hasbrouck](#), 496 U.S. at 556-58.

[114] The logical fallout from Metro Ford's narrowing of the RPA's coverage is that dealers in the same market area, competing for the same pool of potential customers, will not receive equal pricing. Even if they find themselves in a head-to-head situation, problems of detection and enforcement arise. Dealers do not always know about all rival dealers their customers are considering for the sale, and even more rarely do they know the prices rival dealers are quoting.^{108/} Since the manufacturer will make the same sale regardless of which of its rival dealers makes the retail sale, it does not really care which of those dealers is successful, since it will make the wholesale sale in either event. There is no incentive for a manufacturer to "equalize" prices to rival dealers competing for the same sale. Indeed, there is a perverse incentive for the manufacturer to NOT equalize prices, because it is at least possible that the customer will purchase from the disfavored dealer (the dealer paying the manufacturer the higher wholesale price) based on non-price criteria like better service offered by the higher-priced dealer, which would yield the manufacturer a higher profit.

4. The "exception swallows the rule" error.

[115] The RPA says all price discrimination is prohibited except in limited circumstances. The Metro Ford case says all price discrimination is permitted, except in limited circumstances (i.e., in situations of head-to-head, same-sale competition). Thus, Metro Ford turned the RPA upside down and makes lawful all price discrimination where the manufacturer simply says to its dealers: "You would have received the same price if only you had been purchasing the exact same products for resale to the exact

¹⁰⁸ As an example of why dealers do not talk to each other about their respective prices (i.e., justified fear of the FTC and enforcement of price-fixing laws), see the comments by Assistant Attorney General Thomas E Kauper in Hearings on the Robinson-Patman Act Before the Domestic Council Review Group on Regulatory Reform, 336-37 (1975):

And thus you find in some industries relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act. . . . Now the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once the exchange process begins, certain understandings go along with it – that we will exchange prices, but it will be understood, for example, you will not undercut my prices. . . . And from there it is a rather easy step into a full-fledge price-fixing agreement.

Cited in Wesley J. Liebeler, Let's Repeal It, 45 Antitrust Law J. 18, 31 n. 34 (1976) (hereafter, "Liebeler"). Unless the supplier tells its dealers what prices it is charging all other dealers, those dealers are really not able to determine them, nor are they able to "police" their right to equal prices without the information.

same customer at the exact same time in the exact same sale.” A greater departure from the Congressional intent of the RPA is difficult to imagine.

[116] Also, under Metro Ford a manufacturer need only *allege* that its discounts are “available” to all retailers in order to avail itself of the defense. Apparently, the burden then shifts back to the plaintiff to *disprove* that the discounts were available to him. This is going to be an impossible burden in most cases, not only because the proof needed by the plaintiff is in the hands of the defendant, but because there are an unlimited number of possible circumstances the dealer will need to “disprove” in order to negate the defense.

CONCLUSION

[117] The RPA is well-written to effectuate its intended purpose: to prevent wholesale price differences that favor certain buyers and force other, “disfavored” buyers out of the market, thus engendering cartels or monopolies and the consumer-hostile pricing that accompanies them. The cries that the RPA is “not a model of legislative clarity” are made by those who would either call for its repeal, or by those whose opinion is colored by unthoughtful interpretations of the Act. There is nothing unclear about “thou shalt not sell to your competing retailers at different prices,” nor are the two statutory defenses difficult to understand or apply. The problem does not lie with the statute or its wording. The problem lies with courts who embrace the arguments of people bent on the repeal of the RPA, and with commentators and expert witnesses who have an economic agenda contrary to the purpose of the Act, and thus pervert the Act to further those purposes.^{109/}

[118] It would be a huge mistake for Congress to repeal the RPA. What is needed is for the Supreme Court to correct in clear language the erroneous interpretations of the RPA promulgated by the lower federal courts as soon as it is given the chance to do so. Cases getting the “certiorari denied” ruling are just fueling the continued fire that threatens the economic viability of many small businesses, and leads the lower courts to see the Court’s silence (in the face of such clearly erroneous precedents as Metro

¹⁰⁹ In what is surely one of the boldest “defenses” of judicial activism ever written, Harry Ballan’s Note, The Court’s Assault, *supra* note 27 at 646 n. 62, says: “The illegitimacy of the original enactment [of the RPA] licenses an active judicial response as a corrective.”

This suggestion is faulty from so many different perspectives. First, it is circular reasoning (i.e., the original enactment was illegitimate so we should judicially repeal it; we may judicially repeal the law because it is illegitimate). It also suffers from overbreadth. Who decides, exactly, that the original enactment was “illegitimate,” and how exactly do they do so? If this rationale and the process of its implementation are valid, what statute is immune from attack on the same basis? It is hard to imagine *any* statute that could withstand such preposterous reasoning.

Ford) as acquiescence – or worse. The [Morton Salt Co.](#) decision was wise precedent, and it should be forcefully and cogently rearticulated. Apparently, [Hasbrouck](#) was not a strong enough restatement of the law.

[119] It is difficult to read the legislative history of the RPA and come away with any impression other than that the Act is designed to protect competitors and their profit margins. As distasteful as this may seem to some, the RPA actually performs this function in a remarkably efficient and intelligent manner, if and when it is enforced.

[120] Perhaps Congress envisioned that suppliers and manufacturers, intent on their own self interest (as they should be), were not the best arbiters of deciding which retailers should live and die. Perhaps Congress instead proposed a rule of law that mandated a level playing field as to wholesale prices so that the retail marketplace (rather than individual wholesale suppliers) could decide the fate of “inefficient” retailers based on non-price criteria that are not controllable by the supplier. Perhaps the reason Congress has not seen fit to repeal the RPA despite dozens of misinformed articles coming from academia for the past twenty years is because the RPA is fulfilling its intended function in a manner far-superior to that even envisioned by the drafters.^{110/} The mark of truly brilliant legislation is that it survives such attacks and outlives the narrow circumstances of its birth with vigor and constantly-renewed applicability. The Civil Rights Act of 1964 is such a law. So is the RPA. Perhaps all those who advocate the continuation of the RPA (and there are many of them) are not drunk, as Professor Liebler suggests.^{111/} Perhaps instead they see the reality of the marketplace through

¹¹⁰ Opponents of the RPA often sarcastically chide proponents by their self-deprecating caricatures of “greedy businessmen.” See Liebler, supra note 108, at 22:

Beyond the issue of antitrust policy, continued preoccupation with Robinson-Patman-type economics breeds a caricatured view of market processes. It promotes an image of the world in which, but for the snarling watchdogs at the Federal Trade Commission and the selfless efforts of the plaintiff’s antitrust bar, each businessman of more than modest means (or with more than one store) would become a predator, a modern-day robber baron cum-monopolist who, unleashed, with his fellows would do such injury to the welfare of consumers the world had never seen before.

With all due respect, that caricature is completely the product of commentators such as Liebler, not proponents of the RPA. It is not wrong for businesses to pursue their own best interests, and referring to them as “predators” for doing so is hyperbole designed to inflame prejudice, not scholarly debate. Politics is all about balancing self-interests with the greater good. The purpose of the law is to create the boundaries of acceptable behavior so that everyone has a fair chance to succeed; a “level playing field.”

¹¹¹ See Liebler, supra note 108 at 45.

the lens of practical experience, rather than from the high tower windows of the university.

[121] As shown herein, the doctrine of “functional availability” has no legislative roots, is contrary to the plain language of the RPA, is unvarnished and misguided judicial activism, and requires courts to assume dealers are completely unsophisticated about the economics of their own businesses. The doctrine will eviscerate the RPA if it continues to gain a foothold in the federal common law. Any one of these problems provides sufficient basis to quash the doctrine in its entirety; all of them together demonstrate that the doctrine of “functional availability” is remarkably bad law. Courts must not be led astray by arguments advocating the doctrine, but must instead return to the plain meaning and purpose of the RPA in order for the salutary purpose of that statute to have its rightful place in American antitrust law. The alternative will be manufacturers’ control of retail pricing, eventual cartelization of many industries, and the “weed in the seed” will become a veritable garden of monopoly pricing and limited markets, to the detriment of competition and the consuming public.

END