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Democracy Dies in Darkness

The FTC may crack down on price discrimination. Will it matter?

The Robinson-Patman Act was supposed to prevent price discrimination — but consumers wanted cheap goods

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In 1909, the Kellogg Toasted Corn Flake Company offered a “Square Deal.” Hoping to get its flakes on more grocers’ shelves, Kellogg set the cash price for wholesalers at 6.8 cents per box. Wholesalers were required to charge retailers 7.8 cents. Kellogg permitted no volume discounts, placing the neighborhood grocery store “on an equal footing with every other retailer, great or small.”

Consumers paid 10 cents a box, a 47 percent markup over the factory-gate price, no matter where they purchased their corn flakes. This price-fixing pleased mom-and-pop grocers, but shoppers didn’t buy it: As bargain hunters sought out cheaper cereals, Kellogg cut prices for its largest customers, and the Square Deal faded away.

This history is worth keeping in mind as the Federal Trade Commission tries to revive the Robinson-Patman Act, an 83-year-old law against price discrimination. According to news reports, the FTC is investigating whether soft drink bottlers and an alcohol distributor violated that law by selling to big retailers on better terms than small ones. On March 27, Lina Kahn, the FTC’s chair, said the commission will move to enforce Robinson-Patman “in short order,” and her fellow commissioners have also called for reviving enforcement of the law. If the FTC does so, it will wade into a dispute that has pitted advocates of efficiency and low prices against supporters of small, independent businesses for well over a century.

As chain food stores first emerged in the early 1900s, complaints spread that suppliers unfairly favored them with discounts and inducements not available to smaller wholesalers and retailers. “The general working rules should be, ‘A fair price and the same to everybody,’” an official of the National Association of Retail Grocers demanded in 1914. Just as federal regulations kept railroads from favoring one shipper over another, the reasoning went, the law should require manufacturers and growers to charge all buyers the same price for the identical product. The Clayton Antitrust Act, passed that same year, gave small businesses half a loaf, prohibiting price discrimination when the effect “may be to substantially lessen competition or tend to create a monopoly.”

And what of consumers? The leading consumer advocate of the day, Boston attorney Louis Brandeis, insisted they would barely be affected by a crackdown on price competition. He envisioned a marketplace where a consumer would not be confused by the possibility that "at some other store he could get that same article for less money." In 1916, President Woodrow Wilson, an unabashed critic of price discrimination, named Brandeis to the Supreme Court.

Yet, shoppers plainly rejected Brandeis's view, flocking to chain merchants. The most powerful was Great Atlantic & Pacific Tea. A&P had 4,588 stores when it became the largest retailer in the world in 1920. By 1929, it owned nearly 16,000 stores, along with a produce wholesaler, fish canneries and even a macaroni plant. It flourished because it undercut competitors. To hold costs down, it demanded that suppliers offer volume discounts, give it rebates for advertising their goods and sell to it directly without paying commissions to wholesalers.

Wholesalers and independent grocers complained bitterly. They were supported by business groups and small-town politicians who feared that economic opportunity would be suppressed by "foreign" companies based in New York or Chicago. Chain store employees, proclaimed advertisements in Springfield, Mo., were "'mechanical operators' controlled entirely by a set formula." From Washington, the U.S. Chamber of Commerce warned that "the death knell has been sounded" for hundreds of thousands of small retailers.

With early radio talk-show hosts fueling the uproar, governments raced to aid the mom-and-pops. By 1933, 17 states hit chain stores with punishing taxes. State "fair trade" laws regulated markups and required chains to maintain identical prices in every store. Officials in Kansas attacked A&P for charging more for coffee in Kansas City than in Topeka. A&P could sell five boxes of Waldorf tissue for 19 cents in Indiana, but across the state line in Ohio, that price was illegally low.

The federal government joined in. To stem the spiral of wage and price cuts amid the Great Depression, Congress enacted the National Industrial Recovery Act of 1933, which authorized private industries to adopt binding codes of conduct. The code for the grocery trade mandated a specified percentage markup on each item, putting an end to loss leaders and two-for-one sales. This was intended to protect the small shops that provided livelihoods for hundreds of thousand of families, and it worked: With price discounting prohibited, chains rapidly lost market share.

In May 1935, the codes were overturned by a unanimous Supreme Court, freeing chain retailers to demand better deals from suppliers and pass the savings on to customers. Within days, H.B. Teegarden, the general counsel of the Wholesale Grocers Association, drafted legislation to limit the impact of the court's ruling by making it illegal, in most circumstances, for manufacturers to offer volume discounts. The bill barred lower prices for direct purchasers such as A&P than for retailers that purchased through wholesalers. A manufacturer paying a giant customer for advertising its product had to offer a proportionate allowance to the tiniest business.

Manufacturers generally opposed this legislation: It cost them far less to sell by the boxcar rather than by the case, and they worried that higher prices might drive more retailers into manufacturing. Nonetheless, Congress enacted Teegarden's bill as the Robinson-Patman Act in 1936. President Franklin D. Roosevelt apparently approved it reluctantly, for there are no known photographs of him signing it.

The two main antitrust agencies responded in very different ways. The Justice Department, which handles most

industrial competition matters, generally ignored Robinson-Patman, while the FTC, which oversees competition in retailing, enforced the law aggressively. In 1938, it required A&P to pay for brokerage commissions on purchases involving no brokers. A decade later, it restrained Morton Salt from selling small quantities of table salt at $1.60 per case while charging less to customers buying by the rail-car-load. These sorts of orders, repeatedly upheld by the courts, forced chain stores to raise prices. The discount revolution would be postponed by several decades, to help keep small businesses alive.

By the 1960s, though, competition was driving manufacturers and retailers to find ways to work around Robinson-Patman. Can't offer a volume discount to a big retailer? No problem: Tinker with the product, so a giant chain can order a customized version, perhaps with a unique brand name, at a lower price. Want to grant a big buyer a discount for purchasing directly, without going through a wholesaler? Permit a discount for small customers, too — if they can master the technical demands for ordering, paying and taking delivery on the same terms as their larger competitors. With such circumventions, discount chains gained market share as Robinson-Patman fell into disuse.

Global supply chains have made Robinson-Patman even less relevant. Large retailers and manufacturers commonly deal directly with foreign suppliers. Whether they are selling fuel injectors, frozen fish fillets or jars of artichoke hearts, those suppliers have no obligation to offer their goods at the same price to all U.S. customers. Despite all the talk about "reshoring" manufacturing, if the FTC tightens enforcement of Robinson-Patman, you can expect to find even more imported merchandise at the store, because shoppers' interest in saving money is unlikely to go away.