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# Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent

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**Abstract**
We take an economic perspective to analyze the recurring criticisms of the Robinson-Patman Act as being anticompetitive or inefficient. We determine that the legislative history of the Act identifies economically rational objectives that are consistent with the efficiency concerns of so-called modern antitrust law. Further, we reject (as unnecessary and inconsistent with the Act's clear goals and legislative intent) recent attempts to narrow the Act's applications through judicial interpretation of provisions such as the cost justification defense, the "like grade and quality" requirement, and the competitive injury element.

**Keywords**
Robinson-Patman, legislative intent, cost justification, competitive injury

## I. Introduction

The Robinson-Patman Act (RPA or the Act) is under attack and has been for some time by economists and critics willing to dismiss the goals of the Act as out of step with modern economics and "antithetical to core antitrust principles."[1] That position, in our view, unduly minimizes the value of the congressional goals behind the law and is largely based on a mischaracterization of the Act—a "Straw RPA" if you will—that is easier to knock down than the actual Act.

1. Antitrust Modernization Comm'n, Report and Recommendations iii (2007).

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The explicit goal of the RPA is to protect small businesses—a goal not recognized by many economists as a priority, despite its relatively narrow scope under the Act. As clearly laid out in the Act and its legislative history, the statutory protection granted to small business was intended to eliminate the competitive advantages a larger firm may gain by exercising buyer power. The Act was never intended to preclude differential treatment based on any efficiencies derived from a firm's larger size or sources other than buyer power. Yet much of the criticism of the Act is leveled at just such allegedly efficiency-robbing concerns—a misinterpretation or misapplication of the RPA, in our view.[2]

In enacting the RPA, Congress attempted to balance the goals of protecting small business and local economies while preserving the legitimate efficiency-based competitive advantages resulting from economies of scale and scope. But the standard microeconomic model does not emphasize protecting small business and local economies. Failing to recognize the explicit congressional balancing of efficiencies and competitive impact underlying the RPA, limits economists' (and commentators') ability to contribute to an informed understanding of the essential elements of a RPA claim. When those criticisms find their way into judicial opinions and motivate judicial tightening of the Act, however, the real and legitimate purposes of the Act are frustrated.

In this article, we discuss several important elements of an RPA claim, with the goal of bringing more clarity to these provisions through the lens of economic theory tempered by legislative intent. Our approach accepts the congressional goals for the RPA as a legitimate policy decision with a basis in economic and sociological facts. We maintain that being true to Congress' purposes in enacting the RPA mandates interpreting the Act's requirements with an eye towards protecting small business from competitive advantages derived from buyer power, while preserving businesses' rights to price discriminate based on other efficiencies.

Our view is that the Act was and is based on valid objectives and that recent judicial trends—fueled by academic criticism—that seek to reduce the Act's effectiveness are unwarranted and inconsistent with clear legislative intent underlying the Act. More fundamentally, however, if the RPA has in fact outlived its usefulness—as its critics maintain—then the solution is for Congress to repeal it, not for the judiciary to undermine it through judicial burden-shifting that makes it more difficult for an antitrust plaintiff to state and prove an RPA claim. This article examines three examples of this unfortunate trend towards judicial narrowing: (1) the expansion of, and shifting of burdens in, the cost justification defense through functional discount analysis; (2) the increasing scrutiny applied, often at inception of the case and without the benefit of discovery, to the "like grade and quality" requirement; and (3) the enhanced burden placed on RPA plaintiffs, again often at case inception without the benefit of discovery, to establish competitive injury. We conclude that none of these court-imposed hurdles is necessary or justified when viewed consistent with the legislative history of the Act and its early jurisprudence. We then offer what we view as a workable solution to allocating the burdens in an RPA case consistent with congressional intent and as a reasonable acknowledgement of the disparate information available to the parties in such cases. We maintain that, properly understood, construed, and applied, the RPA has a place in American jurisprudence: a place promoting an important social value and, as we explain below, benefitting consumers in many ways.

## II. Historical Context, Legislative Intent, and Early Jurisprudence of the Robinson-Patman Act

Examining the historical context and legislative history of the RPA reveals that its objective was limited to prohibiting price discrimination that (1) harms a competitor and (2) is not justified by cost-

2. In this article, we discuss only secondary line RPA cases. A secondary line case involves the sale of commodities to two competing buyers, usually wholesalers or retailers.

saving efficiencies. The mere fact of a price difference was never sufficient evidence of illegal price discrimination, unless that price differential could not be justified by efficiencies (such as lower costs) the "favored" buyer enjoyed. Efficiency-justified price differentials, or those with no competitive implications, were preserved through proper interpretation of the Act's statutory requirements and affirmative defenses. This section outlines the evidence of this efficiency-focused intent in both the historical context for the Act and the debates surrounding its enactment, as recognized in early court cases interpreting the Act.

## A. Historical Context of the RPA

The primary congressional goal in enacting the Act was to protect small businesses from being underpriced by larger competitors who possessed buyer power that allowed them to extract concessions from manufacturers. The RPA was a revision to section 2 of the Clayton Act of 1914, which itself was the result of lobbying by the small business community and political action by progressive movement politicians. Champions of small business like Robert LaFollette pushed forward the Clayton Act in reaction to the Supreme Court's 1911 adoption of a "rule of reason" interpretation of the Sherman Act.[3] Louis Brandeis, one of the Clayton Act's original authors, staunchly opposed big business, in particular chain stores, because they threatened the decentralized economic power he believed was critical to a workable democracy.[4] The original Clayton Act section 2 language (prior to amendment by the RPA) read,

> [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchases of commodities, which commodities are sold for use, consumption, or resale ... where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation or discrimination in price in the same or different communities made in good faith to meet competition.[5]

As applied by the courts, there were two serious limitations to the original section 2 of the Clayton Act. First, in the 1920s, two Second Circuit cases held that the Clayton Act did not apply to so-called "secondary line" cases—cases where price discrimination impacts competition downstream from the seller.[6] In *Mennen Co. v. FTC*,[7] the Second Circuit held that the language "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce"—which replaced language referring specifically to "purchaser or seller" in an earlier version of the Clayton Act—reflected Congress's intent to limit Clayton section 2 to primary line cases.[8] One year later, in *National Biscuit Co. v. FTC*,[9] the Second Circuit reaffirmed *Mennen*'s interpretation of the legislative history and its policy implications. *National Biscuit* was important because it

3. *See* Rudolph Peritz, Competition Policy in America 1988-1992, at 65 (1996); *see also* James Weinstein, The Corporate Ideal in the Liberal State 1900-1918, at 62 (1965).
4. *See* Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 Iowa L. R. 101 (2005).
5. Clayton Act, ch. 323 § 2, 38 Stat. 730 (1914), quoted in ABA Section of Antitrust, The Robinson-Patman Act: Policy and Law, at 7 (Monograph 4, 1980).
6. Primary line price discrimination refers to pricing below costs to harm a horizontal competitor.
7. 288 F. 774 (2d Cir. 1923).
8. *Id.* at 779.
9. 299 F. 733, 739 (2d Cir. 1924).

involved a complaint against the advances of the large chain stores. Such chain stores aggregated their purchases such that each individual store qualified for a larger discount than their mom-and-pop competitors could obtain. It was not until 1929 that the Supreme Court in *George VanCamp & Sons Co. v. American Can Co.*,[10] reversed both *Mennen* and *National Biscuit*. In *American Can*, the Court held that the Second Circuit erred in concluding that the language "in any line of commerce" meant only the market in which the defendant competed. Instead, the Court held that "in any line" means any market, including the market in which purchasers from the defendant compete (i.e., secondary line cases).[11] Nonetheless, in the seven years between *Mennen/National Biscuit* and *American Can*, the Federal Trade Commission (FTC) and private parties were prohibited from bringing secondary line cases under the Clayton Act.

Second, the Court in *American Can* interpreted broadly the words "nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or *quantity* [emphasis added] of the commodity sold" to immunize price differences when quantities delivered were different, regardless of whether the quantity difference was material—that is, resulted in lower costs to the supplier, justifying a lower price. In its 1934 Report to Congress, the FTC opined that the language "on account of differences in ... quantity" allowed sellers to easily evade Clayton section 2: different buyers could simply be supplied with slightly different quantities.[12] Similarly, the Report of the House Committee on the Judiciary contended that the quantity loophole, "so materially weakened section 2 of that Act ... as to render it inadequate, if not almost a nullity."[13] Thus, enactment of the RPA was motivated by concerns that the price discrimination provisions of the original Clayton Act section 2 had been effectively gutted by judicial interpretation.

### B. Enactment of the RPA

The RPA was the culmination of a wide-ranging political struggle between wholesalers and small retailers and large chain stores. Chain stores had grown significantly more predominant between 1920 and 1930, particularly in the grocery, variety store, apparel, and retail drug markets. For example, Godfrey Lebhar estimates that the top twenty chains grew by more than 250%—from 9,912 to 37,524 stores—between 1920 and 1930.[14] Opposition to the chain stores, however, was organized and effective. The resistance first took the form of a push for state fair trade laws that allowed manufacturers to impose resale price maintenance on the chains, as well as laws that either capped the number of stores allowed under single ownership in a state or taxed additional stores. The well-organized small business lobby was able to introduce 1,312 such tax bills—and enact 62 such state laws—between 1923 and 1961.[15]

According to Godfrey Lebhar,

> One of the first concrete results of the anti-chain crusade was a resolution introduced in the U.S. Senate by Senator Smith W. Brockhart, of Iowa, and approved May 5, 1928, calling for an extensive chain-store inquiry by the Federal Trade Commission.[16]

10. 278 U.S. 245 (1929).
11. *Id.* at 113–14.
12. FTC, Chain Stores: Sources of Chain-Store Merchandise, S. Doc. No. 30, 72d Cong., 1st Sess. (1932) at 97 (quoted in Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620, 623 (6th Cir. 1939)). In *Goodyear Tire*, the Sixth Circuit held that the word "quantity" in the original act was not limited to "cost justified" quantities.
13. Rep. of H. Comm. on the Judiciary, H.R. Rep. No. 2287, pt. 1, 74th Cong., 2d Sess. 3187 (Mar. 31, 1936).
14. Godfrey Lebhar, Chain Stores in America, 1859-1962 (1958).
15. *Id.* at 142.
16. *Id.* at 162.

In 1934, the FTC issued its Final Report on the Chain Store Investigation, which became the backdrop for much of the legislative debate leading to the RPA's passage.

Several aspects of the FTC's findings are significant for understanding and properly applying the RPA today. The first part of the report documented the growth and success of chain stores in the United States from 1919 to 1928.[17] The FTC found that chain stores were not monopolies subject to Sherman Act scrutiny because they competed among themselves; however, the FTC also concluded that:

> The ability of the chain store to obtain its goods at lower cost than independents and of large chains to obtain goods at lower cost than small chains is an outstanding feature of the growth and development of chain store merchandising.[18]

The FTC found that, on average, chain grocery stores were able to underprice independents by 7.31%.[19] This advantage was even higher in other products, such as drugs.[20] Critically, the FTC found that the chain stores had lower prices, even adjusting for special discounts, indicating that prices were lower for reasons other than buyer power.[21] For instance, chain stores also paid lower wages, enjoyed lower rental costs, and provided fewer services than independents. Indeed, for the subsample of independent grocery and drug stores for which the FTC had data on both wholesale and retail prices, the FTC found that the chains' lower buying prices contributed to, but were not the sole factor in, lower chain store retail prices:

> [I]t is possible to estimate how much of the difference in selling prices between the chain and independent distributors is represented by the differences in the buying prices in these two lines. Based on the unweighted figures for grocery items purchased by consumers at chain and independent stores, it would appear that *as high as 45 percent of the difference* between chain and independent selling prices on standard grocery items *is attributable to the lower buying prices of the chains*.[22]

Thus, at the time that Congress began to debate the RPA, it was apparent that chain stores' lower prices were due in part to greater buyer power, but also resulted from other, efficiency-based cost savings. By passing the RPA, Congress sought to level the playing field between chain stores and independents somewhat by prohibiting pricing differentials that were not justified by lower costs.

In June 1935, Representative Wright Patman (D-TX) introduced the original Patman Bill. The bill was drafted by E.B. Teegarden, counsel for the United States Wholesale Grocers Association, an organization of small groceries.[23] Mr. Patman described his bill's purpose thus:

> This bill is designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves, and the manufacturers from whom he buys, from exploitation by his chain competitor.[24]

In the House of Representative hearings on the bill in July 1935, Mr. Patman reiterated,

17. FTC, Final Report of the Chain Store Investigation 8 (1934).
18. *Id.* at 24.
19. *Id.* at 29.
20. *Id.* at 36.
21. *Id.* at 67.
22. *Id.* at 53 (emphasis added).
23. Earl W. Kintner and Joseph P. Bauer, Federal Antitrust Law, A Treatise on the Antitrust Laws of the United States, at 2933 (Anderson Publications 1989).
24. *Id.* at 2927.

> I believe it is the opinion of everyone who has studied this subject that the day of the independent merchant is gone unless something is done and done quickly.[25]

The House Hearings did not ignore the issue of efficiency, however. For example, Mr. Teegarden submitted a brief on behalf of the United States Wholesale Grocers' Association in which he summarized ills the proposed legislation would eliminate, including:

> (1) In the grant of quantity discounts *exceeding any marginal cost differences* between the customers concerned: that is, unsupported by "differences in the cost of manufacture, sale or delivery" ...[26]

In other words, the bill's advocates knew that larger purchases could justify some price differences. The bill aimed only to address the "abuse of the larger buying power ... to extract ... price preferences ... *not* justified by any sound economics."[27] The bill's defenses—in particular, the cost justification defense, which was designed to filter out cases where differential pricing was a result of efficiencies rather than buyer power—addressed legitimate price differentials.

In the Senate debate, Senator Joseph Robinson (D-AR), the bill's sponsor, responded to concerns about efficiencies in distribution by citing the need to protect the independent dealer:

> How long does the Senator think the little man, the little man, the independent dealer, would last if he were left absolutely to the mercy of the large dealer ... ?[28]

That the Act was designed to redress only economically unjustified price differentials was made evident by the Report of the Senate Committee on the Judiciary:

> The bill proposed to amend Section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences* in their business position or in the cost of serving them.[29]

In other words, the bill was aimed at stopping discrimination in prices unrelated to underlying costs. Price differences due to lower costs were excluded from antitrust scrutiny.

In March 1936, the House Committee on the Judiciary reported out the House bill. The majority report reiterated that "the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary."[30] Again, the clear objective identified was protecting small business. The importance of efficiencies was recognized, but dealt with by the cost justification defense:

> This proviso [the cost justification defense] is of great importance, for while it leaves trade and industry free from any restriction or impediment to the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery, wheresoever they may be employed in streams of production or distribution; it also *limits the use of quantity price differentials to the sphere of actual cost differences*. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression.[31]

25. *Id.* at 2930.
26. *Id.* at 2984 (emphasis added).
27. *Id.* (emphasis added).
28. *Id.* at 3117.
29. *Id.* at 3014 (emphasis added).
30. *Id.* at 3183. The House Committee report also quoted extensively from the earlier FTC study commissioned by Congress.
31. *Id.* at 3189 (emphasis added).

The report of the House Committee minority is particularly interesting because it raised the concern that the bill might harm efficiency. In particular, the minority report opined that the bill would not allow a manufacturer to discount a large order that resulted in economies for the seller. The concern was that the "bill would place so many restrictions upon 'quantity discounts' as to render them meaningless and therefore valueless."[32] Representative John Miller's remarks during the House debate reflect the majority's reaction to the efficiency argument:

> I can see no field of economy in production or distribution that the wit of man could invent, the savings from which could not be expressed in price differentials between the various customers who do and do not take advantage of it. *The bill only prohibits price discrimination in excess of such differences in cost*, for it is there and only there, so far as we are concerned, that the mass buyer evades his just and proportionate share of the manufacturer's burden of cost and unloads it upon the shoulders of his smaller competitor.[33]

Thus, Congress attempted to strike a balance between protecting small business and preserving cost efficiencies attributable to scale.

The economic merits of chain stores versus small, independent retailers are beyond the scope of this article, other than noting that the congressional compromise between protection and efficiencies is not clearly erroneous, and should not be dismissed as anachronistic with "modern economics." Consumer welfare is not advanced solely by lower end-user prices. A significant and growing body of literature shows that small businesses are a significant source of innovation, competitive entry, new employment, and market efficiencies.[34] In particular, small business is a fundamental source of specific types of innovation critical to growth and development.[35] Indeed, the Leffler and Tatos, and Kirkwood articles in this volume are significant contributions to this body of literature.[36] Moreover, a credible case can be made that, in some instances, so-called "big box" development has harmed local economies by creating substantial direct costs to communities, undermining the integration of local businesses, or reducing consumer access to the variety and valuable services offered by small retailers.[37] These studies support the original conclusion of Congress that there was value (to consumers and markets) in protecting small business from encroachment by chain stores unduly favored by suppliers.

32. *Id.* at 3201.
33. *Id.* at 3230 (emphasis added). The Conference Committee Report contains little about the ultimate purposes of the bill, but significantly, the Conference Committee adopted most of the more stringent House version of the bill. ABA Section of Antitrust, *supra* note 5, at 18.
34. *See*, *e.g.*, Paul Almeida, *Semiconductor Startups and the Exploration of New Technological Territory*, in Are Small Firms Important? Their Role and Impact (Zoltan Acs ed., 1999); John R. Baldwin & Joanne Johnson, *Entry, Innovation and Firm Growth*, in Are Small Firms Important? Their Role and Impact (Zoltan Acs ed., 1999); Steven J. Davis, John Haltiwanger, & Scott Schuh, Small Business and Job Creation: Dissecting Myth and Reassessing the Facts (1993).
35. Sam Hogg, *Why Small Companies Have the Innovation Advantage*, Entrepreneur, Nov. 15, 2011.
36. Keith Leffler & Ted Tatos, *Competitive Injury and Damages Under the Robinson-Patman Act: Morton Salt and Statistical Analysis*, 60 Antitrust Bull. 318–344 (2015) (making the case that price discrimination not justified by cost savings distorts the competitive process and impairs allocative efficiency); John B. Kirkwood, *Reforming the Robinson-Patman Act to Serve Consumers and Control Powerful Buyers*, 60 Antitrust Bull. 358–383 (2015) (identifying ten scenarios in which buyer-driven price discrimination could reduce competition and diminish the welfare of consumers or powerless suppliers).
37. *See* Stacy Mitchell, Big-Box Swindle: The True Cost of Mega-Retailers and the Fight for America's Independent Business (2006). *See also* Tim Wu, The Master Switch: The Rise and Fall of Information Empires (2010) (contending that domination by big firms can have a negative effect on culture).

## C. Early Judicial Interpretation of the RPA

Early court interpretations recognized the Act's limited goal of protecting small business from unjustified price differentials. Only in recent years have some courts—fueled by academic criticism—lost sight (in our view) of the proper scope of the Act and Congress' intent, and begun to graft unjustified restrictions in the form of "new" defenses and heightened proof requirements. Reexamining early judicial interpretations of the Act and its legislative history reveals the statute's limited scope and provides a ready means for limiting its reach to anticompetitive activity consistent with the RPA's original intent.

In 1948, the Supreme Court in *Federal Trade Commission v. Morton Salt Co.*[38] reviewed the legislative history of the Act and concluded that the legislative goal was to eliminate the disadvantage a small buyer has due to limited buyer power. In the Court's view, the legislative history of the RPA made it "abundantly clear" that Congress intended to prohibit favorable treatment to large buyers "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."[39] The Court was careful to explain, however, that the price differential had to be limited to the cost savings actually experienced by the seller. As discussed above, the original Clayton Act had protected any volume discount, and the RPA was designed to close that loophole unless actual cost savings justified the discounts.[40] Indeed, in *Morton Salt*, the Supreme Court found that the volume discounts at issue were prohibited by the RPA because they were not fully justified by cost savings.[41] Thus, properly applied, the cost justification defense addresses legitimate efficiencies attributable to large buyers, without accepting the proposition that the sheer volume of purchases necessarily warrants more favorable pricing than that received by smaller buyers.[42]

More recent Robinson-Patman cases appear to take the legislative goals articulated by earlier cases as self-evident and address the legislative history only if necessary to resolve issues in analyzing proof of an RPA element. However, some of those cases fail (in our view) to recognize that the RPA's prohibition is already appropriately limited only to price differences not justified by economic efficiencies. Instead, these cases seem to evince a motivation to insulate big business from the Act's reach. As we discuss in the next section, this concern is evident in the courts' more recent treatments of the cost justification defense, the like grade and quality requirement, and the proof necessary (and allocation of burdens of proof) for establishing competitive injury.

38. 334 U.S. 37 (1948).
39. *Id.* at 43. The Court reaffirmed that view in 1960 in Federal Trade Commission v. Henry Broch & Co., 363 U.S. 166 (1960):

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

*Id.* at 168–69. *See also* Federal Trade Commission v. Sun Oil Co., 371 U.S. 505, 520 (1963) ("in short, Congress intended to assure to the extent reasonably practicable, that businessmen at the same functional level start on equal competitive footing so far as price is concerned"); Volvo Trucks N. America v. Reeder-Simco GML, 546 U.S. 164, 176 (2006) ("Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers ...").
40. *See Morton Salt Co.*, 334 U.S. at 44. As subsequently reiterated by the Court, "Congress did not intend to outlaw price differences that result from or further the forces of competition." Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578 (1993).
41. *Id.*
42. *See*, *e.g.*, 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 (2d Cir. 1989) (finding that 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").

## III. Recent Judicial Encroachment on the Intended Scope of the Robinson-Patman Act

### *A. Evolving Judicial Treatment of the Cost Justification Defense Reveals an Underlying Hostility Towards the RPA Inconsistent with Its Congressional Intent*

A claim of price discrimination under the RPA is subject to the affirmative defense of cost justification. Understanding the cost justification defense's intended role and function is critical to proper application of the RPA. While some critics claim the cost justification defense places an excessive evidentiary burden on the proponent, we do not believe this claim warrants abandoning the RPA or the intended role of the defense. In most cases, defendants can arrive at a reasonable calculation of cost savings with the help of economists. Applied correctly, moreover, the cost justification defense can resolve significantly the "anticompetitive" concerns raised by modern opponents of the RPA, while preserving the intended protection of small businesses.

This section addresses (1) how to prove a cost justification defense, (2) the developing "functional discount" subset of the cost justification defense, and (3) the interplay between the cost justification defense and the frequent criticisms that the RPA is anticompetitive.

*1. Proving cost justification.* Consistent with the legislative goals of the RPA, the cost justification defense was created to preserve price variations that could be justified by economic differences, and to permit large buyers to benefit from efficiencies that would reduce sellers' costs. Specifically, the statute stipulates that:

> [N]othing herein contained shall prevent [price] 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 . . . [43]

The Act thus anticipates and acknowledges that the specifics of some transactions (i.e., "differing methods or quantities") might result in cost savings that the seller could pass through to a buyer in the form of a reduced price.

In order to claim the cost justification defense, the defendant must prove that the price differential at issue is justified by cost savings of the type described in the Act.[44] Examples of permissible cost differentials include savings for differences in freight and delivery, differences in methods of sale (e.g., catalog orders versus sales representatives), savings for legal compliance, manufacturing cost savings, or savings for offering diminished services (e.g., delivering the product at the buyer's loading dock rather than stocking shelves directly).[45] Such savings are properly calculated by reference to the

43. 15 U.S.C. § 13(a).
44. 15 U.S.C. §13(b); *see* U.S. v. Borden Co., 370 U.S. 460, 467 (1962); *Morton Salt Co.*, 334 U.S. at 44–45 (burden on defendant to prove as affirmative defense).
45. The risk in detailing a list of permissible cost differences is that the cost justification defense, by its nature, is intended to be highly context-specific, subject to evaluation based on the actual savings experienced and their relation to the discount passed on to the "favored" purchaser. A customer who requires spot deliveries during the seasonal period of high demand, requiring the manufacturer to produce the goods in advance and provide storage in order to fully utilize plant capacity, might be subject to justifiably higher prices than the customer who provides storage and makes purchases throughout the year. However, the RPA does not broadly sanction price differences merely because the buyers purchase in different seasons of the year; translation of those transactional differences into actual cost and price differentials is critical to their legal treatment.

seller's avoided costs, not the costs incurred by the buyer in providing the services.[46] Doing so encourages buyers and sellers to allocate efficiently their potentially shared functions.

Consider a scenario where a retailer agrees to collect goods at the seller's manufacturing plant and deliver them to the retailer's outlets. This clearly saves the seller delivery costs, but it may be that the seller has a more efficient delivery network than the retailer. The retailer should not be granted a discount greater than the costs avoided by the seller, because (from a purely economic perspective) the market is actually better off if the more efficient seller has an incentive to perform those functions itself.

Although sometimes discussed in general terms,[47] the cost justification defense likely will be rejected if it is based on mere assertions of saved costs not supported by record evidence. For example, the Seventh Circuit denied the defense where a seller argued that the discount in question was justified because the "favored" buyers warehoused the seller's products, reducing the seller's costs of maintaining inventory.[48] The Seventh Circuit found that while this may have been true, the favored buyers also received the discount on transactions even where they did *not* perform the warehousing function for the seller, thereby undermining the asserted link between cost savings and the discounts. Although the seller argued that "special handling" involved in those orders might make the costs greater, the court concluded that "[t]he mere possibility of greater cost is not sufficient."[49] In this case, it is clear the court believed that the defendant's lower costs claims were pretextual.

To prove a cost justification defense, a defendant generally will categorize its customers and attempt to demonstrate the varying costs associated with sales to each category. This "grouping" itself can be problematic: such groupings must be "of such selfsameness as to make the averaging of the costs of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member."[50] Again, with the help of economists, this is hardly an impossible undertaking.

The examples of cases where a court rejected the cost defense do not (in our view) demonstrate an insurmountable hurdle for the defendant. In *Allied Accessories*,[51] the Sixth Circuit described the defendant's attempt to justify price differences it charged to different purchasers as a "textbook example of the analysis prohibited by *United States v. Borden*."[52] The defendant had created two arbitrary classes for cost comparison: (1) the favored purchaser and (2) all 2,000 other customers. The court criticized the defendant's failure to even attempt a breakdown of the less-favored class by geographic area, volume of purchases, or any other relevant characteristic. The favored purchaser had been offered a "special contract" waiving the right to participate in various programs, which allegedly resulted in the seller saving on expenses related to those programs (i.e., field representatives, catalogues, advertising reimbursements, and incentives programs).[53] Squarely rejecting this rationale for applying the cost justification defense, the court held:

> [T]his method of justifying a price discount violates a number of principles set forth by the Supreme Court in *Borden*. First, defendant never offered to the class of 2,000 the option of giving up the additional GM

46. *See Texaco*, 496 U.S. at 564; *see also* James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed Cts. L. Rev. 1, ¶ 53.
47. *See*, *e.g.*, Refrigeration Eng'g Corp. v. Frick Co., 380 F. Supp. 702, 713 (W.D. Texas 1974) (finding that the discount was cost justified where the favored buyers performed "promotional and other distributive services ... thereby incurring expenses, saving [seller] similar expenses, and warranting the discounts allowed them for the products"). The court's discussion of the cost justification defense is not much longer than the quoted excerpt, referring only to "credible evidence" of the justification, but without any finding equating the amount saved to the discount given.
48. Mueller Co. v. F.T.C., 323 F.2d 44, 47 (7th Cir. 1963).
49. *Id*. at 47.
50. *Borden,* 370 U.S. at 469.
51. 825 F.2d 971.
52. Allied Accessories & Auto Parts Co., Inc. v. GMC, 825 F.2d 971, 975 (6th Cir. 1987).
53. *Id.*

> services which [the favored distributor] was permitted to forego. . . . In regard to the cost savings allegedly peculiar to [the favored distributor] as a distributor of oil filters, plaintiff correctly notes that several of the services not provided to [the favored distributor] would have been unnecessary for any distributor selling [the key account].[54]

Moreover, it did not appear that even a majority of the 2,000 customers took advantage of the extra services that allegedly justified the increased price they paid for goods.[55] The defendant asserted that mere availability of those services warranted treating the customers as a separate group for pricing purposes. The defendant's simplified classifications, the court held, "failed to show that the economics relied upon were isolated within the favored class," and raised questions as to differences within the disfavored class of purchasers.[56] The court stated that not only should the defendant have addressed potential differences within the larger class, but it also should have presented evidence that the average cost of dealing with that group (however defined) was "a reasonable indication of the cost of dealing with any one particular buyer."[57]

Thus, it is clear that asserting a successful cost justification defense requires proof not only of the asserted cost savings, but also requires reasonably attributing those cost savings to a particular customer or group of customers, notwithstanding options given only to certain customers.[58] Attribution can present proof problems, but no more than causation requirements in other contexts. Moreover, the cost to each customer need not be supported by an individualized cost study, so long as the customers are classified in a reasonable and rational manner.[59] Cases following *Borden* have generally approved grouping methodologies that appear reasonable, "particularly if they showed a significant good faith effort and no superior alternative was apparent."[60]

As the FTC stated in a 1976 Opinion Letter, "[a] cost justification must reflect the true cost of transacting business and the actual pattern of sales experienced."[61] Although a discount for high volume purchases *may* be cost-justified, it would be erroneous to assume that a volume discount necessarily immunizes all transactions between buyer and seller, or even all transactions involving large volumes:

> Only that portion of the operating cost which varies with the size of the orders processed is suitable for consideration in the cost justification. That portion of the cost which depends on the total volume of business transacted without regard to the size of orders on which that business is divided would not be relevant to a cost justification.[62]

The FTC's early interpretation may help explain why some regard the cost justification defense as unduly burdensome. Indeed, even the Supreme Court has commented on the difficulty of proving a

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54. *Id*. at 976.
55. *Id.* at 977; *see also Borden*, 370 U.S. at 470 (rejecting defendant's attempt to rely on the cost of "optional customer service" that were used by some customers but not by others).
56. *Allied Accessories*, 825 F.2d at 976.
57. *Id.* at 977.
58. The argument that an "opt-out" may be required for a valid cost justification defense is not settled, but it may be that the defense cannot be used to justify costs or discounts that are made available only to a favored set of buyers. *See*, *e.g.*, *Mueller*, 323 F.2d at 47 (unless right to perform additional services made available to all wholesalers, price discount to one who performed additional services illegal).
59. *See*, *e.g.*, *Borden*, 370 U.S. at 469 (rejecting classifications of customers as lacking "sufficient homogeneity"); Uniroyal, Inc. v. Hoff and Thames, Inc., 511 F. Supp. 1060, 1072 (S.D. Miss. 1981) (rejecting argument that a cost study could only be proper if individualized).
60. 14 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 2351(d) at 197-198 (3d ed. 2012); *see also* cases cited in *id.*, n. 83.
61. Nov. 19, 1975, Opinion Letter, 86 F.T.C. 1629, 1631.
62. *Id.*

cost justification defense, calling it "difficult, expensive and often unsuccessful" and citing to the Report of the Attorney General's National Committee on the Antitrust Laws, which concluded that the defense "has proved largely illusory in practice."[63] The defense's proof difficulties apparently stem from the requirement that the seller "show that the price reductions given did not exceed the actual cost savings," a "requirement of exactitude" that critics latch onto as evidence of the defense's failure in practice.[64] However, requiring some proof is hardly unreasonable: absent an accounting of costs saved and attributed to alleged efficiencies provided by the favored buyer, the defense would consist merely of the court choosing to accept or not to accept the defendant's assertions of "justification" for the price differentials, unbounded by an economic link between savings and discounts. This result is irreconcilable with the legislative intent behind the RPA or the statutory defense.[65]

In terms of burden allocation, requiring the defendant-seller to justify and document its claimed cost difference is not unreasonable, because the necessary documentation is clearly more accessible to the seller than it is to the buyer-plaintiff. In our opinion, therefore, courts should give significant weight to a defendant's reasonable ex ante attempt to cost justify a price difference. Higher scrutiny should be reserved for ex post attempts to match cost savings to price differences, which arguably may align only by coincidence.

*2. The rise of functional discounts.* Although not explicitly discussed in the text of the Act or its early jurisprudence, we believe that the concept of "functional discounts" is properly viewed as a variation of the cost justification defense.[66] Unlike cost justifications, however, courts typically have not required RPA defendants to substantiate functional discounts, ruling instead that the RPA plaintiff's prima facie case must defeat any functional discount defense.

Adopting the FTC's proposed definition, the Supreme Court described a functional discount as "one given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier."[67] While functional discounts arguably are simply a subset of the cost justification defense (compensating the buyer for performing a service that saves the seller money), in judicial practice they differ in several critical ways from the traditional defense—ways that, in our view, endanger the legislative purposes of the RPA.

First, unlike the cost justification defense, the amount of a functional discount, as applied by the courts, is generally not limited to the seller's cost savings, nor must those savings be shown with any precision. In *Texaco, Inc. v. Hasbrouck*, the Supreme Court rejected the claimed functional discount at issue in that case but ruled that

> [A seller] need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.[68]

63. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 561 n. 18 (1990), citing 3 E. Kintner & J. Bauer, Federal Antitrust Law § 23.19, at 366–67 (1983).
64. *See Texaco*, 496 U.S. at n. 18, citing Rep. of Attorney General's National Comm. to Study the Antitrust Laws 171 (1955).
65. Similarly, cost justification will not be permitted as a defense where any cost savings are based on a difference in policies that are not rooted in efficiencies. *See*, *e.g.*, Gorlick Distrib. Centers, LLC v. Car Sound Exhaust System, Inc., No. C07-1076RAJ, (Oct. 27, 2010 W.D. WA) (rejecting cost justification defense where there was no apparent cost reason for the seller's different shipping policies towards the two purchasers, i.e. they simply refused to ship to the disfavored buyer in the Pacific Northwest).
66. *See*, *e.g.*, *Texaco*, 496 U.S. at 555 (noting that the RPA "contains no express reference to functional discounts" despite provisos in earlier drafts of the Act).
67. *Id*. at n. 11.
68. *Id*. at 561

Regarding the lower standard of proof for functional discounts, the Court noted that the "requirement of exactitude is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors."[69] The amount of the functional discount, it ruled, need only be "*reasonably related* to the expenses assumed by the buyer."[70]

This concept is not without limits. In *Texaco*, the Court rejected the defendant's proposed functional discount defense for lack of supporting evidence.[71] Specifically, the two favored purchasers could not claim a warehousing discount because they did not maintain significant storage facilities. Moreover, one of the purchasers was compensated separately for hauling gasoline to its stations, precluding its claimed discount for hauling. The Court, however, described the arguments in that case as failing due to an "extraordinary absence of evidence to connect the discount to any savings enjoyed by Texaco," and noted that there will be "exceptional cases" where a nominal functional discount may still fall within the coverage of the Act.[72] This language implies a presumptively favorable treatment of functional discounts in cases where the discount may be established "using any commercially reasonable measure."[73] Generally, functional discount defenses are rejected only when (1) "the discount is being given for services that are not performed at all" or (2) "the amount of the discount greatly exceeds the value or cost of the service."[74]

Moreover, the burden of (dis)proving a functional discount is placed on the plaintiff seeking to show price discrimination. As the Supreme Court explained,

> [T]he burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation.[75]

The Court continued, "[w]hen a functional discount is legitimate, the inference of injury to competition recognized in the *Morton Salt* case will simply not arise."[76] In other words, the existence of an alleged functional discount presumptively disproves the requisite competitive injury, unless a plaintiff rebuts that presumption by showing that the discount is not "commercially reasonable" given the actual services performed or their (nonexact) value.

This allocation of burdens is counterintuitive and, in our view, unjustifiably flips on its head the requirements for what is essentially a cost justification defense. Asking the RPA plaintiff to allege and then to substantiate the cost structure related to services allegedly provided by the favored buyer requires evidence uniquely within the defendant's possession. This somewhat illogical burden-shifting may represent a tacit judicial nod to the Act's critics, who maintain that it should cohere more with "standard" antitrust goals and focus on protecting competition, not on safeguarding specific

69. *Id.* at n. 18.
70. *Id.* at 564 (emphasis added).
71. *Id.* at 562.
72. *Id.* at 562, 568. *See also* Vernon Walden, Inc. v. Lipoid GmbH, No. 01cv4826 (DRD) (Jan. 20, 2005 D. N.J.) (dismissing functional discount claim where defendants failed to connect the discount given with any cost savings attributable to the favored buyer).
73. *See* Coalition for a Level Playing Field, LLC v. Autozone, Inc., 737 F. Supp.2d 194, 211 (S.D.N.Y. 2010) (citing *Hasbrouck*).
74. *Id.* at 211, citing 14 Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 2333, at 108 (1999).
75. *Texaco*, 496 U.S. at 461, n. 18 (quoting James F. Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L. J. 929, 935 (1985)).
76. *Id.* at 571.

competitors (i.e., small businesses).[77] Nonetheless, this reading, for reasons explained above, is inconsistent with the RPA's express legislative purposes.

*3. Cost justification and "anticompetitive" concerns.* Critics of the RPA often minimize its policy justifications and criticize the effectiveness of statutory defenses, such as cost justification, in protecting the "free" market. This view appears to have influenced judicial interpretations of the cost justification defense, particularly the evolving use of functional discounts as a shield for sellers accused of discriminatory pricing. Next, we address some of the criticisms raised by the Act's modern opponents and examine how they resurface as justifications for expanding the cost justification defense in Robinson-Patman cases via functional discounts and otherwise.

Commentators have advocated repealing the RPA for decades. In 1976, Richard Posner remarked that the RPA could not be salvaged by amendment and needed to be discarded as "almost uniformly condemned by professional and academic opinion, legal and economic."[78] By 2007, voices opposing the Act had grown, and the Antitrust Modernization Commission noted that the RPA's "repeal or substantial overhaul" had been recommended by reports in 1955, 1969, and 1977.[79] Opposition to the RPA generally consists of three main arguments: (1) the RPA hurts consumers by causing increased prices, (2) the RPA is unnecessary because the Sherman Act addresses any real competitive harm, and (3) the RPA is ineffective in protecting the very small businesses it is meant to save.[80]

Each of those claims is subject to debate and competing economic and legal analyses, and rebutting each point is beyond the scope of this article.[81] As detailed above, however, these arguments were not foreign to the original sponsors, debaters, and signers of the Act. More fundamentally, subsequent Congresses have been fully capable of repealing or modifying the Act if they so desired, yet have so far refused to do so. To the extent that the RPA's critics raise valid concerns, it is the legislature, not the judiciary, that must address them.

Arguments for repealing the RPA—particularly concerns about the Act's anticompetitive effects—inform our discussion here, however, to the extent they provide context for understanding recent judicial interpretation of RPA elements. The argument that the Act is "anticompetitive" takes several forms, commonly focused on the notion that protecting small business is unfair and restricts the level of competition essential in a free market. As stated by the 2007 Commission, "the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage."[82] Similarly, Professor Hovenkamp has argued that application of the RPA has not been properly limited to those price differentials where the injury to

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77. Indeed, the Third Circuit candidly acknowledged that functional discounts and the accompanying implicit reasoning regarding the difficulty of showing an impact on competition are some of the ways that courts limit the effect of the RPA:

> [B]ecause the RPA often has "anticompetitive" effects that "promote rather than ... prevent monopolistic pricing practices," the Supreme Court, in seeking to construe the statute consistently with the broader policies of the antitrust laws, has repeatedly limited its reach by: Expanding the means through which RPA defendants can attack the "competition" element of a prima facie case of price discrimination ... [citing the availability of the functional discount].

Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, 198 (3d Cir. 2010) (internal citations omitted).

78. Richard Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 1 (1976).
79. Antitrust Modernization Comm'n, *supra* note 1, at iii.
80. *See*, *e.g.*, *id.* at 317–22; *see also* Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L. J. 1 (2000); Posner, *supra* note 78, at 50 (1976) (arguing that the RPA is unnecessary as any significantly anticompetitive practice would certainly violate the Sherman Act).
81. Professor Kirkwood ably rebuts the ability of other antitrust laws to address all of the concerns underlying the RPA in his article in this volume. *See* Kirkwood, *supra* note 36.
82. Antitrust Modernization Comm'n, *supra* note 1, at iii.

a competitor can reasonably be viewed as a prerequisite to the larger injury to competition.[83] The Third Circuit summarized the perceived tension thusly:

> The RPA places the federal courts in an inescapable Catch-22. We are asked to apply the RPA, a statute that "is fundamentally inconsistent with the antitrust laws", in a fashion that is "consistent[] with the broader policies of the antitrust laws."[84]

Whether or not the RPA is anticompetitive, the fact that so many academics and courts have embraced that perspective informs their interpretation of it. This article addresses competitive injury in subsequent sections, but concerns regarding competition clearly bleed into judicial treatment of available defenses. We raise these concerns primarily because they call into question the Act's ability to accurately identify potential injury to competition, rather than exposing "legitimate" types of price discrimination to potential liability, and the cost justification defense is central to evaluating that concern.

Not surprisingly, critics of the Act frequently claim that the cost justification defense is essentially worthless. Judge Posner has argued that interpretation and application of the defense has made it "virtually impossible for firms to justify price differences on the basis of cost differences."[85] He concludes that "the [A]ct has in practice undoubtedly operated to suppress price differences that were justified by differences in cost. This is a serious interference with the efficient functioning of the economy."[86] The Supreme Court has also noted the defense's various issues and shortcomings.[87] But, as we have noted, it is not obvious from these critiques that the burdens placed on a defendant to measure cost savings are excessive. They are not more onerous, economically speaking, than the plaintiff's burden of proving antitrust injury using econometrics.

Depictions of the cost justification defense as "toothless" fuel RPA critics' efforts to bypass the defense's role in preserving the focus on competitive injury. But is the criticism justified? As its drafters well knew, the Act was never set up to preserve small business at any cost, or to require equal pricing at all times. The Act's drafters did not ignore scenarios where injury to a competitor might not translate into injury to competition; rather, they provided statutory defenses to limit enforcement (public and private) to instances where it was more likely that competition *would* be harmed. In that context, is it unreasonable to ask a supplier to prove (and document) that its differential pricing is justified by cost differences? We think not, and the evidence to meet that burden is more readily available to the seller-defendant than to the buyer-plaintiff.

The statutory defense of cost justification is essentially an exception to the *Morton Salt* inference of competitive injury. Where a valid cost justification for a discount is shown, "injury to a competitor occasioned by a persistent price discrimination is excused because it appears to have resulted from actions deemed beneficial to competition—meeting a competitor's lower price or rewarding another

83. Hovenkamp, *supra* note 80, at 137. The stated goals of these critics often reflect a commitment to unregulated markets as a value in and of itself, directly in conflict with the legislative goals of the RPA (and many other antitrust laws). The 2007 Antitrust Modernization Commission emphasized that its goal was "an endorsement of free-market principles," because "[f]ree trade, unfettered by either private or governmental restraints, promotes the most efficient allocation of resources and greatest consumer welfare." Antitrust Modernization Comm'n, *supra* note 1, at i.
84. Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, n. 17 (3d Cir. 2010) (internal citations omitted). The 2007 Antitrust Modernization Commission similarly argued that the anticompetitive nature of the Act has put courts in the untenable position of trying to enforce a law that harms competition even as it seeks to redress "competitive injury," noting that, "[t]he language in the Act regarding competitive injury has resulted in the protection of competitors, at the expense of competition overall and consumer welfare." Antitrust Modernization Comm'n, *supra* note 1, at 322.
85. Posner, *supra* note 78, at 40–41.
86. *Id.* at 41.
87. *See Texaco*, 496 U.S. at n. 18 (citing, among others, the Rep. of Attorney General's National Comm. to Study the Antitrust Laws 171 (1955) ("the cost defense has proved largely illusory in practice").

dealer's efficiency."[88] This approach is consistent both with the general antitrust preference for preserving competition, not competitors, and with the RPA's goal of sparing small businesses price discrimination without economic justification.

Additionally, it is not clear that the alleged problems in establishing a cost justification defense lead to anticompetitive outcomes. Were the defense as toothless as critics maintain, we would expect to see a flood of sellers being held liable for legitimate cost-based discounts, or evidence that the prohibitive cost of mounting the defense led sellers to eliminate efficient discounts. Yet there is no empirical evidence that either of these scenarios has become a reality. Plaintiffs' recent track record in RPA cases undercuts the likelihood of the first scenario. Of 200 reported cases with Robinson-Patman Act claims filed in federal court from 1996 to 2006, *only three* resulted in jury verdicts in favor of plaintiffs that were affirmed on appeal.[89] One of those three ultimately was reversed by the Supreme Court.

Moreover, the glut of academic commentary may mask the difficulty in actually measuring the economic effect of the Act, particularly the cost justification defense. In response to the 2007 Commission's conclusion that the RPA should be repealed, Commissioner Shenefield offered a separate statement on the Act in which he noted that the Commission's recommendation was based "on a record composed more of academic opinion than of solid evidence."[90] In other words, the philosophical conflict between "small business" and "free market" legislation—and the hesitation to single out certain types of competitors as protection-worthy—may be supplanting a fact-based inquiry into whether the RPA works.

Regardless, it is not difficult to see why concerns regarding the anticompetitive effects of the Act and the efficacy of the cost justification defense have led to judicial liberalization of the functional discount defense. Calls for expanding the cost justification defense were early harbingers of the functional discount defense's rise as a "defendant-friendly" alternative. For example, the 1969 White House Task Force on Antitrust Policy recommended "a modest broadening of the cost justification defense."[91] And Commissioner Shenefield (of the 2007 Commission) specifically identified relaxing the cost justification standard as an appropriate response to stated concerns.[92]

Frequently, suggestions for liberalizing the cost justification defense call for reversing the presumption that discounts are illegitimate unless justified by cost savings, asking courts to instead assume that price differentials are procompetition unless proven otherwise. Judge Posner, for instance, found the very structure of the cost justification defense "objectionable" in that it presumed that most price differences were discriminatory, that is, not cost-justified.[93] He argued that because "discriminatory prices in the economic sense are surely the exception rather than the rule," "[a] better presumption would be that a price difference *was* cost-justified than that it was not."[94] Professor Hovenkamp echoed Posner's belief in presumptive cost-justification, stating that, in the absence of buyer coercion, "the various price discriminations resulting from a supplier's unilateral pricing decisions must enjoy a very strong presumption that they are socially beneficial and do not 'injure competition.'"[95] This

88. Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of* Morton Salt: *To Save It, Let It Go*, 48 Emory L. J. 1057, 1121, n. 267 (1999).

89. Antitrust Modernization Comm'n, *supra* note 1, at 316, n. 48.

90. *Id*. at 442.

91. Posner, *supra* note 78, at 51.

92. Antitrust Modernization Comm'n, *supra* note 1, at 443 ("I would relax the cost justification standard by permitting a preferential price that was 'reasonably related' to cost savings attributable to dealing with the favored buyer.").

93. Posner, *supra* note 78, at 40.

94. *Id.* However, Posner admits that the burden of proof is not the critical factor in the failure or success of the cost justification defense, which he claims is attributable to "arcane and unrealistic cost-accounting principles" that exclude items of genuine economic cost. *Id.* at 40–41.

95. Hovenkamp, *supra* note 80, at 127.

presumption of legitimacy was reiterated in the 2007 Commission's assertion that "[t]he economic reality is that price differences and price discrimination typically benefit, not harm consumers."[96]

Even if this presumption were once true, recent scholarship indicates that it—along with the expected competitive effect of price discrimination—should be reevaluated in light of evolving markets. For example, the vast growth of Internet sales now makes perfect price discrimination a real possibility. As fine-tuned price discrimination against particular customers becomes more feasible, additional analysis is necessary to determine whether technological developments alter the traditional views of consumer choice in preventing harmful price discrimination.[97]

Of course, this debate really is about burden-shifting—alleviating the burden on the defendant to establish a cost-savings justification for the discount by requiring the plaintiff to *disprove* that justification using the same data that allegedly are too unwieldy and expensive to be effectively used by defendants. It is not a great leap from calling for "presumptive" legitimacy of discounts to pushing for the use of functional discounts. Recall that with a functional discount, the plaintiff bears the burden of proof, allegedly because functional pricing negates the probability of competitive injury required for a prima facie case. The evidence and arguments then focus squarely on the competitive injury prong—the very element that critics claim is ignored by the RPA's desire to protect individual competitors.

Setting aside the issue of presumptive justification, proper application of the cost justification defense (and functional discounts in particular) consistent with the Act's legislative history should allay criticisms that the RPA is anticompetitive. Both defenses are properly limited to scenarios where the discount at issue is not attributable to efficiencies or cost savings linked to the favored buyer. Although Professor Hovenkamp, for example, claims that the Act should be repealed or limited to situations where buyer power forces price discrimination, he seems unnecessarily to discount the possibility that a sensible application of the cost justification or functional discount defenses can accomplish this (and still advance the purpose of the RPA).[98]

Indeed, an overly liberalized application or expansion of the cost justification defense may weaken the RPA. Specifically, if the threshold for proving cost justification or functional discount is significantly lower than the burden of proof on the plaintiff to show price discrimination and competitive injury, then the Act's goals likely will be frustrated. Although courts historically have interpreted the cost justification defense narrowly, its expansion through functional discounts may signal a significant weakening of the defendant's burden, resulting in an effective presumption of cost justification (again, much as advocated by RPA critics).

For example, consider *Coalition for a Level Playing Field, LLC v. Autozone, Inc.*,[99] which addressed price discrimination allegations by a number of small, independently owned auto parts stores against defendant auto parts manufacturers and large chain retailers. The court dismissed plaintiff's *third* amended complaint for (still) failing to "plausibly allege violations of the RPA."[100] The court found that the alleged price differentials were "presumptively allowable" because of the existence of a potential functional discount arrangement.[101] Although the plaintiffs alleged that the discriminatory price was *not* attributable to any cost savings, efficiency, or service provided by the favored purchaser to the manufacturer, the court found that those allegations were conclusory.[102] In dismissing the complaint for lack of specific facts regarding the price discrimination, the court admitted that while

96. Antitrust Modernization Comm'n, *supra* note 1, at 318.
97. *See* Spencer Weber Waller, *Antitrust as Consumer Choice: Comments on the New Paradigm*, 62 U. Pitt. L. Rev. 535, 542–43 (2001).
98. Hovenkamp, *supra* note 80.
99. 813 F. Supp. 2d 557 (S.D.N.Y. 2011).
100. *Id.* at 559.
101. *Id.* at 566.
102. *Id.* at 567.

such information might be solely within the defendant's control, the plaintiffs nevertheless should have pled "factual content that explained why it is plausible—not merely possible—that defendants have broken the law."[103]

Significantly, the court's assessment of "plausibility" seemed less stringent when applied to the potential functional discount, which it found was "a natural reading of the Proposed Complaint," given apparent differences between the large defendant buyer and the small independent retailers that might account for price differentials.[104] The court did not discuss any evidence that such an arrangement was reasonably related to the amount of the discounts, or even that evidence was put forth to explain the different prices. Essentially, the court found the possibility of a functional discount so persuasive that the defendant was able to overcome the contrary allegations of competitive injury by the plaintiffs.

This type of dismissal reflects the increasingly high evidentiary and pleading standards placed on RPA plaintiffs, likely in response to concerns regarding RPA's "anticompetitive effects." By expanding the cost justification defense to include functional discounts with apparently presumptive validity, however, the courts have (in our view) disregarded the careful balancing of interests undertaken by the RPA drafters and the provisions the Act put in place to limit liability to scenarios with a reasonable probability of competitive injury.

## *B. Misapplication of the "Like Grade and Quality" Criterion Also Frustrates Congressional Intent Under the RPA*

Section 2(a) of the RPA prohibits price discrimination only where the products sold by the seller to both the favored and disfavored buyers are of "like grade and quality."[105] This requirement speaks to likelihood of competitive injury by ensuring that the products at issue compete with each other. Without competition between the products in question, there can be no competitive injury, and the inquiry under the Act should end.

In our view, this relatively simple economic requirement of injury-in-fact has, over time, been improperly transformed into a jurisdictional requirement, resulting in much confusion and frustration of the RPA's laudable purposes. Since the RPA does not require a relevant market analysis, the "like grade and quality" requirement allows courts to screen out cases where injury is extremely unlikely.[106] As the Supreme Court noted, "if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact."[107]

Seen this way, the "like grade and quantity" criterion was meant as a mechanism to weed out cases posing no risk of competitive injury, not as an excuse to ignore the impact of the alleged discrimination.[108] When courts or parties use the criterion to preemptively avoid analysis of the actual competitive impact, however, the remedial purposes of the Act are frustrated.

This section discusses expansion of the "like grade and quality" requirement as an example of the current trend toward narrowing the RPA. We argue that the Supreme Court in *FTC v. Borden* correctly identified the competitive injury and cost justification elements as the proper domain for economic

103. *Id.* at 569.
104. *Id.* at 566.
105. 15 U.S.C. § 13(a).
106. *See*, *e.g.*, Areeda, *supra*, at ¶ 2315(a) (noting the Act's concern with identifying sales of identical "or at least closely competing commodities" at different prices, thus disadvantaging the disfavored purchaser).
107. FTC v. Borden Co., 383 U.S. 637, 643 (1966).
108. *See* Areeda, *supra* at ¶ 2302 ("the original statute was thought to be largely ineffective, because it was interpreted by the courts to permit rather trivial differences in products to justify large discriminations in price").

analysis, rather than importing such analysis into the threshold "like grade and quality" requirement. We also describe how courts go astray by forcing important economic analysis into simple screening rubrics such as "like grade and quality."

*1. Purpose and function of the "like grade and quality" requirement.* Though sometimes referred to as a jurisdictional prerequisite, "like grade and quality" should not be misinterpreted as shielding a seller from the Act where there is reason to believe that the goods at issue compete enough to risk competitive injury. The Supreme Court's decision in *Borden* offers clear guidance for the proper approach to the "like grade and quality" requirement. Returning to the principles underlying that decision will, in our view, avoid further misapplication of the "like grade and quality" requirement.

The first and only Supreme Court opinion to address "like grade and quality," *Borden* offers well-reasoned analysis of the relationship between this criterion and the remaining elements of a price discrimination claim under the RPA. The *Borden* case involved milk that, although physically identical, was packaged and sold under both a nationally advertised brand name (Borden) and the in-house brand of various chain supermarkets. Even though customers were willing to pay more for the nationally branded product, the Court held that the "like grade and quality" inquiry should focus on physical characteristics, not on consumer preferences.[109] While acknowledging that labels or brands might have economic value, the Court nonetheless concluded that "the economic factors inherent in brand names and national advertising should not be considered in the preliminary inquiry under the statutory 'like grade and quality' test."[110]

Even where physically identical products are marketed very differently, *Borden* holds that it is imperative for courts to consider potential competitive injury, or risk creating an inadvertent loophole for sellers under the Act:

> We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such transactions are *too laden with potential discrimination and adverse competitive impact to be excluded from the reach of §2(a)* by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.[111]

The Court clearly recognized the potential harm in allowing nonphysical differences to trump the Act's focus on competitive harm to disfavored buyers. Imagining the trouble that could result if the RPA could not reach situations where the seller marketed two physically identical products differently, the Court said:

> If two products, physically identical but differently branded, are deemed to be of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2(a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition.[112]

Importantly, the Court did not ignore the impact of marketing-based consumer preferences on competition; it merely shifted that analysis to other prongs of a price discrimination claim. Explaining the relationship between the elements of a § 2(a) claim, the Court found that customer preferences "should

109. *Id.*; *see also* Areeda, *supra* at ¶ 2315(d).

110. *Borden*, 383 U.S. at 645–46 (quoting Rep. of Attorney General's National Comm. to Study the Antitrust Laws 158 (1955)).

111. *Id.* at 643–44 (emphasis added).

112. *Id.* at 644.

receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute."[113] In other words, arguments about the benefits or economic impact of non-physical differences in the products must be addressed, but not under the guise of determining whether the products are of like (physical) grade and quality. Only if it is readily apparent, based solely on physical differences, that the products do not compete with each other (and thus that the alleged price discrimination could not result in competitive injury), should an RPA case be dismissed for lack of like grade and quality.

*2. Post-*Borden *cases generally adhere to the proper standard and focus on physical differences in assessing "like grade and quality.".* "Since Borden the courts have been relatively consistent in holding that absolutely identical products differentiated only by brand or other collateral items such as packaging meet the 'like grade and quality' test."[114] In keeping with Borden and the legislative history of the RPA, courts generally have acknowledged that the like grade and quality requirement "was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statutes."[115] Under this line of reasoning, products have been deemed to be of like grade and quality if they differ only in nonphysical aspects such as labeling,[116] warranties,[117] and marketing.[118] Indeed, the ABA Model Jury Instructions for civil antitrust cases reflect this consensus, defining "like grade and quality" in line with Borden's focus on physical differences:

> If the products involved were physically identical, except for labeling or branding, then they were of like grand [*sic*] and quality. . . . *If you find that there are no physical differences in the products sold in the sales being compared*, or that any physical differences are not functional and are not substantial enough to affect their desirability to buyers, *then you must find that plaintiff has established that the products were of like grade and quality*.[119]

Thus, physical identity ends the inquiry for "like grade and quality," and even some physical differences may be irrelevant if they are "not functional." There have, however, been cases that misapply *Borden*, taking a broader approach to the like grade and quality requirement.

*3. Post-*Borden *cases misapplying the "like grade and quality" criterion.* The majority of post-*Borden* cases follow *Borden* with regard to "like grade and quality," but a few appear to extend the competitive analysis to nonphysical aspects of the products. Although these cases do not represent the majority approach, they do share a similar focus in viewing the like grade and quality criterion as a means of filtering out claims that lack the potential for competitive injury. The primary difference is in the depth of economic analysis the court is willing to entertain as part of this threshold inquiry. Specifically, some courts have pointed to nonphysical differences as evidence of economic value that may explain the asserted price discrimination.[120] We describe some of these cases below and conclude that,

113. *Id.* at 646.
114. Areeda, *supra* note 109, at ¶ 2315(d).
115. Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701, 710 (8th Cir. 2004), *rev'd on other grounds*, 546 U.S. 164 (2006) (quoting Moog Indus. v. Fed Trade Comm'n, 238 F.2d 43, 50 (8th Cir. 1956)).
116. Texaco v. Hasbrouck, 496 U.S. 543, 556 (1990).
117. Perma Life Mufflers v. Int'l Parts Corp., 376 F.2d 693, 703 (7th Cir. 1967) (holding that differences in guarantees did not warrant a finding that mufflers were not of like grade and quality), *rev'd on other grounds*, 392 U.S. 134 (1968).
118. Hartley & Parker v. Florida Beverage Corp., 307 F.2d 916, 923 (5th Cir. 1962) (holding alcoholic beverages that were physically identical but sold under different brands to be of like grade and quality); *see also* Borden, 383 U.S. at 646 (brand name advertising, packaging and promotional techniques do not affect a determination of whether two products are of like grade and quality).
119. ABA Model Jury Instructions in Civil Antitrust Cases, E-49 (2005 ed.) (emphasis added).
120. None of them addresses whether differences in *price* alone could remove those products from the scope of the Robinson-Patman Act.

whether or not the outcome reached was proper, the analytical process would have been clearer if the courts had addressed nonphysical differences under other prongs of the RPA inquiry and restricted the "like grade and quality" analysis to the *Borden*-endorsed threshold examination of physical characteristics.

*i.* Liggett Group, Inc. v. Brown & Williamson Tobacco Corp. *(M.D.N.C. 1988).*[121] *Liggett* involved a dispute between cigarette manufacturers over the pricing of generic and branded cigarettes. Among other claims, Liggett alleged that Brown & Williamson ("B&W") sold identical branded and generic cigarettes at different prices in violation of the RPA.[122] Significantly, the *Liggett* court's "like grade and quality" analysis found undisputed *physical* differences between B&W's branded and generic cigarettes. The court then extended this analysis, asking whether those physical differences were "sufficiently minor, arbitrary or fanciful as to have no effect on consumer preferences or the competitive environment."[123] The court ultimately concluded that B&W generic cigarettes were "physically different from [B&W's] branded cigarettes in ways that could affect consumer preferences and perceptions."[124]

The *Liggett* court also identified a nonphysical difference in the products—that generic cigarettes were subject to a different return policy—and observed that a difference in return policy "is, without question, a difference that can affect the competitive environment."[125] It is not clear, however, whether this observation about return policies was a necessary basis for the court's ruling that Liggett had failed to establish that the branded and generic cigarettes were of like grade and quality for purposes of the Act, given that physical differences alone distinguished the products in competitive ways.[126] Perhaps due to this lack of clarity, *Liggett* has not been cited to stand for the proposition that the competitive effect of nonphysical differences may result in otherwise physically similar products being found *not* of like grade and quality.

*ii.* Flair Zipper Corp. v. Textron, Inc. *(S.D.N.Y. 1980).*[127] *Flair Zipper* addressed whether two zipper designs manufactured by Textron were sufficiently similar to satisfy the RPA's "like grade and quality" requirement. The court held that the zippers were not of like grade and quality for multiple reasons. First, the zippers had different physical properties: different inspection steps, spools of varying quality, and a different process used to strengthen the zipper bond.[128] Further, the court found that those physical differences translated into a 10% to 20% difference in manufacturing costs.[129] Although such physical differences might appear to support a conclusion that the products were not of "like grade and quality," the court properly should have addressed issues related to cost differences as evidence to support a potential cost justification defense, not as a prima facie element of the RPA

121. Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1989-1 Trade Cas. (CCH), at 68,583 (M.D.N.C. 1988).
122. The issue of competitive injury in the primary line RPA claim later reached the Supreme Court and is discussed *infra*.
123. *Id.* at 61,104–5 ("Nevertheless, the fact that B&W's generic and branded cigarettes were never physically identical does not end the Court's inquiry on the issue of like grade and quality. . . . Goods with physical differences that are sufficiently minor, arbitrary or fanciful as to have no effect on consumer preferences or the competitive environment may be found to be of like grade and quality for purposes of the Act.").
124. *Id.* at 61,106.
125. *Id.*
126. *See*, *e.g.*, *id.* ("The Court concludes that B&W has established, primarily on the basis of the Reynolds affidavit, that its generic cigarettes were . . . physically different from its branded cigarettes in ways that could affect consumer preferences and perceptions.").
127. Flair Zipper Corp. v. Textron, Inc., 1980-2 Trade Cas. (CCH), at 63,555 (S.D.N.Y. 1980).
128. *Id.* at 79,959.
129. *Id.* at 76,960.

claim.[130] Finally, the *Flair Zipper* court pointed to different return policies as another distinguishing feature between the types of zippers; however, as with *Liggett*, it is unclear what weight would have been given to return policies had they been the *only* difference between otherwise physically identical products.

*iii.* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc. *(7th Cir. 1989).*[131] In *A.A. Poultry Farms*, defendant Rose Acre Farms was a vertically integrated egg producer and processor, competing with rival egg processors to sell eggs to supermarkets. A.A. Poultry Farms alleged that Rose Acre priced its "special" (i.e., surplus) eggs too low, in violation of the RPA, to win the business of ten large supermarket chains. Unlike *Liggett* and *Flair Zipper*, however, the court found absolutely no physical differences between Rose Acre's "special" eggs and the eggs sold under long-term contracts. Nevertheless, and despite their physical identity, the court held that "special" eggs were not "fundamentally the same" as eggs sold on long-term contracts, because Rose Acre Farms specifically chose the delivery timing, size, and grade of "special" eggs in order to reduce its surplus inventory.[132] Employing a dubious analogy, the court reasoned that:

> Although "special" eggs as delivered may be physically indistinguishable to the buyer, they are not fundamentally the same good, for the same reason a seat on the 6:00 a.m. flight from Chicago to New York is not the same as a seat on the 5:00 p.m. flight, and a seat on the 5:00 p.m. flight reserved two weeks in advance is not the same as a seat on that flight for which the passenger had to stand by.[133]

With respect to the flights at different times, it seems clear that the products are not identical, given customers' varying needs or preferences for arrival and departure times. Thus, that example seems inapt to support the court's conclusion that the eggs were physically identical yet competitively unique products.

The second part of the court's analogy—the stand-by flyer versus the passenger with a reserved seat—also ignores the "reasonably contemporaneous" requirement of the RPA and the court's own acknowledgement that price discrimination under the RPA "depends on whether it charged the same price to customers *at the same time*."[134] Clearly, the passenger who reserves two weeks in advance is not purchasing "at the same time" as the passenger who flies last-minute and is left waiting for a stand-by seat. Perhaps the court reasoned that while aircraft seats themselves are physically identical, the confirmed right to sit in one of those seats is distinguishable from the passenger waiting to take whatever (if anything) remains. With the eggs at issue in *A.A. Poultry Farms*, the seller similarly offered special product based on what remained after long-term contracts were fulfilled and discounted those surplus eggs accordingly.

Despite ostensible competitive differences between the products, there is simply no justification under *Borden* for such factors to be part of the "like grade and quality" inquiry. As with *Flair Zipper*, these factors would be more appropriately addressed as part of a cost justification or competitive injury analysis. The issue is not whether the eggs (or seats) were so dissimilar as to preclude any competitive

130. The court apparently did not take into account the potentially perverse outcome that could result from its approach: If a 10% difference in manufacturing costs removes a claim from the Robinson-Patman Act's purview as failing the "like grade and quality" requirement, then any amount of price difference could be legitimized. In other words, a 10% cost difference could be used to validate a 50% difference in price, despite the lack of a direct relationship between the costs and the price differential.

131. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989).

132. *Id.* at 1408. The court specifically criticized plaintiff's expert for failing to "account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract."

133. *Id.*

134. *Id.* at 1407 (emphasis added).

injury but whether their similarities were outweighed by contractual (or timing) differences that may or may not have affected their commercial appeal and pricing.[135] "Consumer preference considerations, to the extent that they are to be recognized, are to be treated under the defenses to the Act and are not a part of the plaintiff's prima facie case under the statute."[136]

The Seventh Circuit's recognition of different market conditions surrounding the sale of special (spot market) eggs is by no means irrelevant, but it is inappropriate, in our view, for the "like grade and quality" analysis. Regardless, *A.A. Poultry* and the last-minute traveler analogy have been cited to support the general proposition that goods sold under a long-term contract are not "of like grade or quality" to physically identical goods sold on the spot market.[137] Some cases have found that higher-priced spot purchases and sales under long-term contracts are not comparable for purposes of RPA price discrimination because they are not reasonably contemporaneous, and different market conditions may exist at the time of the transactions, *not* because the products fail to meet the "like grade and quality" criterion.[138] Other cases have more explicitly addressed the differences in market conditions as a part of the "like grade and quality" analysis, and found that contracts containing "materially different terms" are not prohibited under the RPA.[139]

While the case outcome may be the same, it matters, in our view, whether the contractual differences are treated as prima facie differences for purposes of "like grade and quality" or considered later in the analysis. When addressed later in the analysis, apparent differences may be subject to factual disputes regarding market conditions or costs. The outcomes of these evidentiary disputes may blur the economic line between "spot" and "contract" sales.[140] Moreover, because "contractual differences" often turn on the same points at issue in cost justification and competitive injury analyses—issues beyond the scope of the "like grade and quality" analysis as delineated by *Borden*—they are more properly dealt with at a later stage in the analysis.

*iv.* Cleveland v. Viacom, Inc. *(5th Cir. 2003).*[141] Similarly applying a more expansive approach to "like grade and quality," the Fifth Circuit in *Cleveland v. Viacom, Inc.* addressed the difference in prices paid by independent video retailers and Blockbuster for rental tapes. Although Blockbuster received video tapes for lower prices, the terms under which it received the videos were also markedly different in aspects other than price. For example, independent distributors could select movies title by title, while Blockbuster was locked into purchasing a movie studio's entire output, regardless of popularity or box office results.[142] The court focused on these contractual differences, noting that the RPA and the California Unfair Trade Practices Act "prohibit price discrimination only where customers are otherwise purchasing on like terms and conditions."[143] It is worth noting that the phrase "like terms

135. Indeed, the fact that goods were described identically on an invoice (other than price), regardless of actual differences in quality or specifications, has been deemed sufficient to establish "commercial identity or commercial fungibility, which is all that the Robinson-Patman Act demands." Fred Meyer, Inc. v. F.T.C., 359 F.2d 351, 359 (9th Cir. 1966) (rejecting argument that canned peaches sold as "fancy" were not like grade and quality where the actual quality of peaches varied based on multiple factors).
136. Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 106 (10th Cir. 1973) (citing *Borden* as controlling this line of analysis).
137. *See*, *e.g.*, Coalition for a Level Playing Field, LLC v. AutoZone, Inc., 737 F.Supp.2d 194, 212 (S.D.N.Y. 2010).
138. *See*, *e.g.*, Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 990 F.2d 25, 27 (1st Cir. 1993) (RPA "does not prohibit price differences between spot sales and long-term contract sales that reflect different market conditions"); Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 806-808 (9th Cir. 1969).
139. Coalition for a Level Playing Field, LLC v. AutoZone, Inc., 737 F.Supp.2d 194, 212 (S.D.N.Y. 2010) (allowing different prices for goods sold under materially different contract terms because they were not "of like grade or quality").
140. *Coastal Fuels*, 990 F.2d at 27.
141. Cleveland v. Viacom, Inc., 73 Fed Appx. 736 (5th Cir. 2003).
142. *Id.* at 741.
143. *Id.*

and conditions" is not found in the text of the RPA, despite the court's citation to *Borden* for that proposition. The court observed that spot sales and long-term contract sales are essentially different transactions, reflecting different market conditions, and concluded that "[a]s a result of the significant differences among between [*sic*] the terms of the agreements, any disparities in amounts paid cannot support a claim for price discrimination."[144]

Although *Cleveland* moves beyond mere differences in "spot" versus long-term contracts, it shares *A.A. Poultry*'s interest in market conditions that may distinguish one transaction from the other. Unfortunately, given the brief mention of this argument in the court's analysis, it is difficult to assess whether the court would consider *any* difference in "like terms and conditions," even under similar market conditions or timing, to similarly be excluded from the RPA's scope. In our view, there are more appropriate ways to address the court's concern. For example, the court could have addressed whether different titles or catalogs of movies should be considered physically different products. Blockbuster was allegedly locked into purchasing an entire catalog, rather than cherry-picking the most popular releases, as the independent distributors did. Yet the *Cleveland* court did not address this difference. Nor did the court address the fact that Blockbuster purchased at higher volumes, perhaps qualifying for lower pricing due to a permissible cost justification.

In any event, the analysis would be clearer had these issues been addressed outside of the "like grade and quality" threshold requirement and based on a more complete evidentiary record. In this way, the *Cleveland* holding exemplifies cases that conclude transactions are sufficiently dissimilar to not be susceptible to a price discrimination claim, without considering where such questions of similarity/dissimilarity are best addressed.

We now turn to the area where such factors *are* appropriately addressed—the requirement of competitive injury. In doing so, we address other ways in which some courts have erred (in our view) and narrowed the RPA inconsistent with its legislative history.

### *C. Recent Trends in Application of the Competitive Injury Requirement Similarly Endanger Congressional Intent Under the RPA*

Critics often argue that the RPA lacks legitimacy because it does not exclusively concern itself with consumer welfare. They call for a shift from the original intent of the competitive injury requirement under the RPA to a goal of consumer welfare, often by limiting RPA cases to circumstances where upstream price discrimination leads to higher prices for downstream end-users. While several courts have embraced this approach, the majority of appellate courts have appropriately rejected it.

*1. The original intent of the RPA was to limit, within reason, plaintiffs' burden to show competitive injury.* The legislative history clearly shows that Congress intended the competitive injury prong of the RPA to be satisfied by evidence of injury to the disfavored buyer, independent of any demonstrated higher price to the end-user. For example, during the House Hearings, Mr. Teegarden was questioned as follows:

Mr. McLaughlin: May I ask you a question there? How do you distinguish between proof of the fact of damages and proof of damage itself?

Mr. Teegarden: Well, stating it objectively, in terms of testimony at the bar, I should say that the fact of damage could be proved by the injured competitor producing customers who would testify that they had ceased doing business with him and had gone over to the other fellow by reason of the lower prices which resulted from these discriminations.[145]

144. *Id*.

145. Kintner, *supra* note 23, at 2974. *See also* Teegarden testimony, *id.* at 3042 (it is "only through the injury to specific competitors that violations of this act can be established").

This point was made even more emphatically in the Report of the Senate Committee on the Judiciary, which discussed adding the language "or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination":

> This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes the substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter 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 competitor victimized by 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.[146]

Early Supreme Court precedent was also faithful to these expressions of legislative intent. The Supreme Court's statement in *FTC v. Morton Salt*, *Co*.,[147] is probably the most direct affirmation of the legislative intent:

> The new provision [the RPA], here controlling, was intended to justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination.[148]

More recent decisions have demonstrated less fidelity to this congressional intent, as we discuss in the next section.

*2. Recent decisions increasing plaintiffs' burden of proof by requiring evidence of harm to consumers.* Despite strong evidence of contrary legislative intent, a number of courts have required that the RPA plaintiff demonstrate either an impact to downstream prices or potential consumer injury through another mechanism in order to state a claim under the Act. In 1985, the Tenth Circuit, in *Motive Parts Warehouse v. Facet Enterprises*,[149] considered a case of price discrimination by an auto parts warehouse, upholding a jury instruction that stated: "This law does not have as its purpose the protection of individual competitors."[150] The Tenth Circuit held that "the naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination may substantially lessen competition."[151]

146. *Id.* at 3015 (emphasis added).
147. 334 U.S. 37 (1948).
148. *Id*. at 49. *See also* Corn Products Co. v. Comm'n, 342 U.S. 726, 739 ("divert[ed] business from one manufacturer [buyer] to another, readily admit of the Commission's inference that there is a reasonable probability that the effect of the discrimination may be substantially to lessen competition"); FTC v. Sun Oil Co., 371 U.S. 505, 518 (1963) (emphasizing that plaintiff's "sales declined appreciably after the December 27, 1955, cut in price by Sun to McLean ... "); Falls City v. Vanco, 460 U.S. 428, 437 (1983) (some lost sales attributable to price discrimination).
149. 774 F.2d 380 (10th Cir. 1985).
150. *Id*. at 393–94.
151. Two recent district court decisions in the Tenth Circuit show that the *Motive Parts* analysis is alive and well. In Raynor Mfg v. Raynor Door, 2008 WL 5706522 (D. Kan. 2008), the Kansas district court held that:

> This rule is consistent with the view that the Robinson-Patman Act is designed for the protection of competition, not individual competitors, and that price discrimination is not unlawful unless its effect may be to substantially harm competition, not an individual competitor such as RDCI. (2008 WL 5706522 at 7)

Similarly, in Western Convenience Stores v. Suncor Energy, (D. Colo. February 13, 2014) (in which one of the authors, Mark Glick, was an expert for the plaintiff), the court stated:

> It is worth pausing at this juncture to focus on the primary purpose of the Robinson-Patman Act. Its function is not to protect one competitor against another, but instead to protect the competitive process for the benefit of the ultimate consumer. (Case 1:11-cv-01611-MSK-CBS at 18)

The Tenth Circuit's sole citation on this issue (*Foremost v. Eastman Kodak*[152]) is instructive. In that case, Foremost, a Kodak distributor, sued Kodak, alleging that competing distributors received a lower price and better terms on the purchase of photographic paper. The Ninth Circuit dismissed Foremost's claim because the distributor had failed to allege harm to competition, stating that:

> [N]either section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition.... [I]njury to a specific competitor is not enough from which a court may infer that an alleged price discrimination may "substantially" injure competition.[153]

The court did not explain what more a plaintiff would need to show to satisfy the injury to competition requirement, nor was there any explanation for the obvious contradiction between this statement and the Supreme Court's *Morton Salt* holding, as well as the legislative history of the RPA.[154] Yet just one year after *Motive Parts*, the Eighth Circuit held in *Richard Short Oil Co. v. Texaco*[155] that a plaintiff must demonstrate a harm to competition, not an individual competitor, stating that "[t]he Act refers not to the effect upon competitors, but to the effect upon competition in general."[156]

In *Boise Cascade v. FTC*,[157] the D.C. Circuit similarly increased the burden on RPA plaintiffs, stating that *Morton Salt*'s inference of competitive injury could be rebutted by presenting evidence of "healthy competition." It is difficult to see, however, how the existence of "healthy competition" could rebut an inference that the disfavored buyer has lost sales or profits. Both conditions can exist simultaneously.[158] The D.C. Circuit's *Boise Cascade* reasoning essentially introduced a new requirement that the plaintiff show that price discrimination harmed competition generally, thereby raising end-user retail prices. This is substantially the same burden imposed by the Tenth Circuit in *Motive Parts*. These decisions ignore not only explicit Congressional intent under the RPA, but also the Supreme Court's holding in *Morton Salt*.

The Supreme Court's 1993 holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[159] further clouded the requirements for proving competitive injury under the RPA. *Brooke Group* involved Liggett's claim that Brown & Williamson was engaged in primary line price discrimination in the generic cigarette market by selling generic cigarettes below cost. Liggett brought its case under

152. 793 F.2d 534, 548 (9th Cir. 1983).
153. *Id*. at 548.
154. The Ninth Circuit abandoned this position in *Hasbrouck v. Texaco*, 830 F.2d 1513 (9th Cir. 1987). There the Ninth Circuit refused to uphold the defense argument that Hasbrouck had failed to demonstrate injury to competition and not just competitors. The court stated:

> The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is not true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly injury to competitors may be probative of harm to competition. (*Id.* at 1518.)

To the extent the suggestion is that a loss of sales to the disfavored buyer (harm to a competitor) is probative of higher retail prices (harm to competition), the court is misguided. The loss of sales may be the result of lower retail prices from the favored distributor. Nonetheless, this oft-quoted passage has been cited to support the traditional injury to competition rule.
155. 779 F.2d 415 (8th Cir. 1986).
156. *See id*. at 420. One year subsequent, the Eighth Circuit rendered its opinion *in Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir.1987)*. There the court simply ignored the *Richard Short* opinion and reaffirmed that injury to competition can be shown by "lost sales" or profits as a result of the discrimination. *Id*. at 385. The Eighth Circuit later followed *Rose Confections* in finding that lost sales constituted injury to competition in White Indus. v. Cessna Aircraft, 845 F.2d 1497, 1499 (8th Cir. 1988).
157. 837 F.2d 1127 (D.C. Cir. 1988).
158. *See Note: Price Discrimination Under the Robinson-Patman Act*, 57 Geo. Wash. L. Rev. 1093 (1988–1989).
159. 509 U.S. 209 (1993).

both the Sherman Act and as a primary line RPA price discrimination case.[160] The Court first articulated the standard for proving predatory pricing under the Sherman Act, and then applied that same standard to primary-line RPA cases:

> Whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery [below cost pricing and a reasonable prospect of recoupment] remain the same.[161]

It was unclear what, if any, implication this language had for secondary-line cases where the definition of competitive injury is distinct from "antitrust injury" under the Sherman Act. Indeed, on the heels of the *Brooke Group* case, one district court in Indiana held that "we are persuaded that the Seventh Circuit would extend the reasoning of *Brooke Group* to secondary-line competitors and require actual injury to competition."[162]

As we detail in the next section, however, most appellate courts have resisted *Brooke Group's* potentially confusing implications, limiting its holding to primary line cases and continuing to apply the competitive injury element of the RPA consistent with its legislative history and *Morton Salt*.

*3. These misguided attacks on the intended scope of competitive injury under the RPA have been rejected by a majority of appellate courts.* In contrast to the few courts that have floated dicta requiring proof of higher downstream end-user prices, several circuit courts have concluded that injury to competition under the RPA requires only lost sales or lost profit to the disfavored buyer. In our view, these opinions more appropriately resolve the potential conflict between expanding the competitive injury requirement and enforcing the clearly-articulated goals of the Act.

The Eleventh Circuit's lengthy footnote in *Alan's of Atlanta, Inc. v. Minolta Corp.*[163] described Supreme Court precedent as firmly establishing that "injury to competition is proved by showing an injury to competitors."[164] While acknowledging the Chicago School's position that the antitrust laws should be concerned only with "the detrimental effects of prices on consumers," the court noted that "economic argument is not ultimately controlling; judicial precedent is."[165] In the same year, the Third Circuit felt "compelled to address ... whether the protective concern of the Robinson Patman Act is one directed towards competition in general or whether its goal reaches to protection of specific competitors."[166] Considering the language of the Act and its legislative history, the Third Circuit concluded that the "competitive injury" requirement clearly refers to injury to the disfavored buyer who competes with the favored buyer.[167]

Similarly, in *Rebel Oil Co, Inc. v. Atlantic Richfield Co.*,[168] the Ninth Circuit distinguished RPA claims from claims brought under the Sherman Act and the Clayton Act, specifically because the RPA does *not* focus on consumer welfare or end-user prices:

> The Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act. While the framers of the Sherman and Clayton Acts intended to proscribe only conduct that threatens

160. *Id*. at 220.
161. *Id*. at 222.
162. Bob Nicholson Appliance v. Maytag, 883 F. Supp. 321 (S.D. Ind. 1994).
163. 903 F.2d 1414 (11th Cir. 1990).
164. *Id*. at 1418–19, n. 6.
165. *Id*.
166. J.F. Feeser v. Serv-a-Portion, 909 F.2d 1524, 1532 (3 rd Cir. 1990).
167. *Id.* The Third Circuit reaffirmed its position after the *Brooke Group* decision in Stelwagon v. Tarmac Roofing Systems, 63 F.3d 1267 (3d Cir. 1995).
168. 51 F.3d 1421 (9th Cir.1995).

> consumer welfare, the framers of the Robinson-Patman Amendments intended to punish perceived economic evils not necessarily threatening to consumer welfare per se. Fairness and protection of secondary line purchasers are the concerns of the Robinson-Patman Act, a conclusion that is confirmed by the language of the statute, legislative history and judicial precedent.[169]

Citing extensively to *Rebel Oil*, in 1996 the First Circuit joined, in its own words, "the two other circuits that have addressed competitive injury in secondary-line cases since *Brooke Group* in refusing to disregard the rule the Supreme Court formulated in *Morton Salt.*"[170] The Second Circuit then followed suit in 1998 in *George Haug v. Rolls Royce Motor Cars*, endorsing the analysis of the Ninth and First Circuit cases.[171]

Finally, in its most recent RPA case, *Volvo Trucks North America v. Reeder–Simco GMC*,[172] the Supreme Court reaffirmed its holdings in *Morton Salt*, *Sun Oil* and *Falls City*, recognizing that the RPA is directed to protecting competitors rather than competition—or, at least, to protecting competition by protecting competitors. Unfortunately, the *Volvo* case also contains somewhat contradictory dicta:

> Interbrand competition, our opinions affirm, is the primary concern of the antitrust law. . . . The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition.[173]

This dictum is confusing at best. Even if interbrand competition is the primary concern of the antitrust laws generally, it manifestly is *not* the primary concern of the RPA. Because price discrimination involving products that are of like grade and quality will often (but not always) involve price differences between goods of the same brand, the RPA is explicitly aimed at preserving *intra*brand competition; thus calling into question the applicability of the Court's statement regarding "resisting protection of existing competitors" in the context of the RPA.

*4. Requiring proof of higher end-user prices to establish competitive injury is also problematic from an economic perspective.* From an economic point of view, the only sensible objective consistent with the RPA's legislative history is that injury to an individual plaintiff—not injury to competition as a whole—is sufficient to state a RPA claim. This is because it is often difficult to know whether (and to what extent) the alleged price discrimination resulted in higher end-user prices.[174]

Consider the prototypical secondary-line situation: a manufacturer sells the same product downstream to two competing retailers, who pay different prices. The retailers then sell the products to end-users. What can "harm to competition" mean in this scenario? Traditional consumer welfare economics would contend that harm results only if end-users pay higher retail prices than they would have paid if the manufacturer had not imposed the upstream price differential. But when would this be the

169. *Id.* at 1446. The Ninth Circuit provided further analysis of the RPA's legislative history and came to the same conclusion in Chroma Lighting v. GTE Products, 111 F.3d 653 (9th Cir. 1977).
170. *See* Coastal Fuels of Puerto Rico v. Caribbean Petroleum, 79 F.3d 182, 191-92 (1st Cir. 1996).
171. 148 F.3d 136 (2d Cir. 1998). Three district courts in the Second Circuit have applied the *George Haug* approach. *See* Innomed Labs v. ALZA, 2002 WL 31521084 (S.D.N.Y. 2002); The Intimate Bookshop v. Barnes & Noble, 2003 WL 2251312 (S.D.N.Y. 2003); Drug Mart Pharm. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385 (E.D.N.Y. 2007).
172. 546 U.S. 164 (2006)
173. *Id*. at 179.
174. Moreover, as discussed above, *supra* notes 35–38, there are numerous aspects of consumer welfare that do not exhibit themselves in the level of end-user prices. *See also* John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485 (2012).

case? Economic theory suggests that if firms are profit-maximizing, price is determined by the costs and elasticity of demand facing the firm.[175] Price discrimination does not necessarily impact elasticity of demand, but it does impact firm cost. Price discrimination should, therefore, also impact end-user price.

How price discrimination impacts end-user price depends on whether it leads to higher or lower overall cost to retailers. For example, suppose in the absence of price discrimination both competing retailers/buyers would receive a price of $10, for a total cost of $20. Now suppose the price discrimination results in a price of $10 to the favored buyer and $15 to the disfavored buyer. Now total costs have increased ($25 compared to $20), and the result will be higher end-user prices. Even if the favored buyer makes all the sales, he likely will raise his prices above $10. Suppose instead that the favored buyer receives a discounted price of $5 while the nonfavored buyer's price remains at $10. Now overall costs are lower, so end-user prices should decline.

Consumer injury thus depends on how the seller would have eliminated the price discrimination in the "but-for" world—by raising the favored buyer's price, by lowering the nonfavored buyer's price, or by some combination of both.

A second situation where end-user prices could decrease absent price discrimination is where the price discrimination would otherwise drive the disfavored distributor out of business. In this case, less competition at the retail level could lead to higher end-user prices. Elasticity, rather than cost, is primarily impacted. In sum, the practical consequence of imposing a consumer welfare standard on an RPA plaintiff is to limit RPA cases to those where the sum of the "but for" prices (i.e., the prices to both the favored and disfavored buyers) is lower, or the plaintiff is unable to compete for some reason such as bankruptcy.

*5. Improper allocation of the burdens of proving the various elements of competitive injury similarly threaten the integrity of the RPA.* Even assuming a general judicial consensus that harm to the disfavored buyer is sufficient to establish competitive injury under the RPA, judicial analysis has been unclear as to how such injury is proven, and who has the burden of proof at each step in the analysis. As we now discuss, imposing unreasonably high standards of proof or improperly allocating those burdens can be equally deleterious to proper interpretation of the RPA consistent with its legislative history.

At this point in RPA jurisprudence, it is clear that the plaintiff bears the ultimate burden of showing injury caused by the price discrimination. If a plaintiff seeks damages, it must demonstrate "antitrust injury" for purposes of section 4 of the Clayton Act. In *Chrysler Credit Corp. v. J. Truett Payne Co.*, the Supreme Court held that the plaintiff must show antitrust injury, and defined antitrust injury as lost profits or sales to the plaintiff caused by the price discrimination.[176] Thus, the antitrust injury requirement in an RPA case is essentially the same as that required to establish competitive injury, i.e. that the alleged price discrimination caused lost profits to the non-favored buyer.

Whether defined as antitrust injury or competitive injury, an RPA plaintiff must do three things to show lost profits from price discrimination:

1. Prove that the plaintiff competes with the favored purchaser;
2. Establish the "but-for" price if there were no price discrimination; and
3. Show that there is some pass-through of cost changes to retail prices, or, alternatively, demonstrate that the favored buyer used the margin gained from price discrimination to gain a competitive advantage.

175. Formally, $p = \frac{c}{1-\frac{1}{e}}$, where $c$ = marginal cost, $p$ = price, and $e$ = elasticity.
176. J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557, 564, n.4 (1981).

These steps form a logical syllogism. The plaintiff must establish that the lower wholesale price given to the favored buyer (the price discrimination) caused the plaintiff to earn lower profits (his injury).[177] Courts have been less than clear, however, on how each of these steps is to be demonstrated, and there is considerable room to impose unrealistic proof burdens on the plaintiff in the process.

*i. Proving competition between the favored and disfavored buyer.* The first step is establishing that the favored and disfavored buyers compete. Absent competition between the favored buyer and the disfavored buyer, no injury to competition is possible.[178] However, what remains unclear is the degree of competition required.

Competition means that the retail prices of the favored buyer impact the sales or profits of the disfavored buyer. This is merely a restatement of the definition of cross-elasticity of demand, but there can be a broad range of cross-elasticities. Close competitors have a high-cross-elasticity, while more distant competitors have a lower cross-elasticity. The question posed in an RPA case is whether the change in the relative retail prices (with respect to the disfavored and favored buyers, where the change is from the actual world to the "but-for" world) impacts the disfavored buyer's sales. The cross-elasticity must be high enough that this price change impacts the sales of the disfavored buyer.[179]

*ii. Proving the "but-for" price.* Once price discrimination and competition are established, the plaintiff must determine the "but-for" price to support a claim of damages. The "but-for" price is the price that the defendant would have charged both the favored and disfavored buyers in the absence of price discrimination. Prices can be equalized by lowering the disfavored buyer's price, raising the favored buyer's wholesale price, or a combination of both.

Determining the likely scenario of how price discrimination is eliminated is the starting point for establishing the existence of competitive injury. We have shown elsewhere that, in general, if the set of buyers does not change, the profit maximizing "but-for" price must be between the actual world disfavored price and the actual world favored price.[180] But this is not necessarily the case; volume effects and other special circumstances may exist.[181] Nor does the plaintiff generally have sufficient

177. The analysis could also run in reverse: assume that to eliminate price discrimination in the "but-for" world, the manufacturer raised the favored buyer's price. Now the actual world differs from the "but-for" world only for the favored buyer (who has lower prices in the actual world). How is the disfavored buyer injured in this scenario? The question is whether the disfavored buyer would have more sales in the "but-for" world. A positive answer requires only that the favored and disfavored buyers compete, and that the favored buyer passed on some of the benefits of the lower price in retail prices. Pass-through by the disfavored buyer is less relevant in this case because its costs are unchanged in the "but-for" and actual worlds.

178. Volvo Trucks v. Reeder-Simco, 546 U.S. 211 (2006).

179. This is why many courts ask whether consumers are "price sensitive" in addition to asking whether competition exists. *See*, *e.g.*, FTC v. Morton Salt Co., 334 U.S. 37, 68 (1948); Corn Prods. Refining Co. v. FTC, 324 U.S. 726 (1945) ("Customers for such candies may be diverted ... by a difference in price of a small fraction of a cent per pound") Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 581 (5th Cir. 1982) ("Morton Salt upheld an inference of likely injury from the fact of substantial price differences granted to market leaders in a highly competitive market in which minor price differences significantly affected competitors' low profit margins."); Coastal Fuels v. Caribbean Petroleum Corp., 79 F.3d 182, 194 (1st Cir. 1996) ("Presumably, regardless of whether these costs were factored directly into the prices that Coastal offered, or were later calculated into Coastal's bottom line, these costs affected Coastal's pricing.").

180. Mark Glick, Donald Campbell, & David Mangum, *Measuring Damages in a Private Robinson-Patman Case: Applying Economics to Relieve the Pain of* J. Truett Payne 48 Antitrust Bull. 77 (2003).

181. In Huntsman Chem. Corp. v. Holland Plastics Co., 2000 -1 Trade Cas. (CCH) P. 72, 807 (2000), the Tenth Circuit allowed an expert to present a single model based on "a comparison of the profits the disfavored plaintiff would have made had it received the same discriminatory price as his favored competitors." 2000 -1 Trade Cas. (CCH) p. 72,807 at 5. This was based on the argument that "the discriminatory price was obviously an economically viable one for Huntsman." *Id*. at 6. We have criticized this reasoning in a previous paper. *See* Glick et al., *supra* note 180.

knowledge about all elasticity of demand facing the defendant to estimate the "but-for" price with great precision.[182]

As a result, requiring the plaintiff to establish with a high degree of certainty how the defendant would act under hypothetical circumstances could effectively eliminate the plaintiff's ability to pursue a successful RPA case. Instead, courts should require only a reasonable assumption about the "but-for" price in light of the facts of the case. This is what the Ninth Circuit did in *Hasbrouck v. Texaco*.[183] In *Hasbrouck*, the plaintiff's expert posited several possible "but-for" prices. The court held that this was acceptable to satisfy the plaintiff's burden of proof because the "but-for" price is a fact issue for the jury:

> Hasbrouck's expert presented a market analysis that compared Hasbrouck's actual prices, volumes and profits to its estimated amounts had the price discrimination not occurred. The expert arrived at the estimated figures using six economic projections based on different underlying assumptions. Texaco ... argues that the jury was impermissibly shown evidence of an overcharge. This argument is not persuasive.... The various projections simply permitted the jury to compare estimates of damages in different market situations, *allowing them* to determine what Hasbrouck's sales and profits would have been in the absence of price discrimination.[184]

This is a reasonable allocation of the burden in our view. As more RPA cases are litigated, we hope more courts will adopt the *Texaco* court's approach to establishing the "but-for" price.

*iii. Proving pass through.* To establish injury, the plaintiff must next establish a link—called "pass through"—between the price discrimination and the retail prices of the favored buyer. Pass through is one of the most misunderstood aspects of the analysis of competitive injury under the RPA. In the past, most courts have addressed pass through by assumption, or found pass through based on testimony or evidence of lower prices generally.[185]

For example, in *Richard Short Oil Co. v. Texaco*,[186] the court opined that "[i]n most cases it is reasonable to infer that the disfavored competitor is injured as the result of the competition." The Sixth Circuit is probably the most explicit on this point:

> It is sensible to acknowledge that whenever there is price discrimination of the sort involved here, the overall health of the disfavored purchaser will usually be affected for the worse. We already have recognized

182. One issue that often arises is whether the "but-for" price should be calculated taking into account all the buyers that buy from the manufacturer and compete with the disfavored buyer or only the identified favored buyer's price. In Olympia v. Celotex, 771 F.2d 888 (5th Cir. 1985), the court suggested that the "but-for" price must take into account all competing buyers. *Id*. at 892 ("Olympia cannot show damages merely by saying that it would have benefited by sharing in the lower, discriminatory price with standard."). *See also* Rose Confections v. Ambrosia Chocolate Co., 816 F. 2d 381, 394 (8th Cir. 1987) ("Even if the discrimination between Rose Confections and Barg & Foster were to disappear, if both had received free freight chips, there would still be price discrimination against Sather Cookie. This state of affairs cannot be said to be violation-free.").
183. 663 F.2d 930 (9th Cir. 1981).
184. 842 F.2d at 1043 (emphasis added).
185. *See*, *e.g.*, FTC v. Sun Oil Co., 371 U.S. 505, 518 (1962) ("Their sales declined appreciably after the December 27, 1955, cut in price by Sun to McLean, and while perhaps not all of the attrition in sales was attributable to the fact that McLean was thereby enabled to drop his price, certain dealers were able to identify customers who, apparently retaining a preference for Sun products, shifted their patronage from the competing Sun stations to McLean."); Perkins v. Standard Oil, 395 U.S. 642, 648 (1969) ("There was evidence that Signal received a lower price from Standard than did Perkins, and this price advantage was passed on, at least in part." The Court does not elaborate on what this evidence was, however.); Falls City v. Vanco, 460 U.S. 428, 433 (1983) (stating, without citation to evidence, that "[t]his pricing policy resulted in lower retail prices for Falls City Beer").
186. 799 F.2d 415, 421 (8th Cir. 1986).

> this proposition in our precedents. *See Kroger v. FTC*, 438 F.2d 1372, 1378 (6th Cir. 1971) (quoting *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 522 (7th Cir. 1968) ("It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field.").[187]

If there is price discrimination, competition, and pass through, then it follows that the plaintiff's profits must have been affected, although this tells us nothing about the amount of the loss.[188] If no witnesses, such as customers or salespeople, can establish loss of customers to the plaintiff due to price, or price reductions to meet the favored competitor's lower prices, then these elements must be shown by expert testimony.

Recently, some courts have required the plaintiff to demonstrate pass through by the favored buyer, whether through expert testimony or otherwise.[189] This is unreasonable and unjustified, in our view, because it creates often insurmountable data and econometric burdens for the plaintiff that are inconsistent with the purposes of the RPA.[190] Paradoxically, as discussed by Leffler and Tatos in this issue, these data burdens become more severe as the price competition between the disfavored buyer and the favored buyer increases—the very scenario where harm to competition is most likely.[191]

Suppose that several gas stations compete for the sale of generic gasoline within a two block radius. When one gas station receives a discriminatory price, all prices are impacted. How can the impact on the disfavored buyer be isolated from the impact on other competitors? As Leffler and Tatos show, this problem can take the form of multicollinearity that infects the significance tests of any econometric analysis attempting to isolate these effects.[192] Indeed, in an age where more and more products are sold as systems or bundles, putative RPA defendants could avoid liability altogether simply by using the discriminatory benefit gained on one product to lower the retail price of a complementary product.

Requiring a plaintiff to demonstrate pass through empirically is unjustified. The economic literature on this issue is reviewed in depth by Alexei Alexandrov and Sergei Koulayev in this issue.[193] However, the basic economics of the pass through are clear—there is *always* some pass through, except in very limited circumstances including perfect competition,[194] menu pricing, focal pricing, and a few other cases.[195] As stated by Malcom Burns:

187. Schwartz v. Sun Co., 276 F.3d 900, 905 (6th Cir. 2002).
188. In addition, in some markets, sales respond to advertising or product features. In such a situation, the relevant inquiry is whether the cost advantage from discrimination was used to better compete with the disfavored buyer, or the disfavored buyer would have been a stronger competitor if it got the "but-for" price. *See*, *e.g.*, Alan's of Atlanta v. Minolta, 903 F.2d 1414, 1426 (11th Cir. 1990) ("Wolf Camera may not have passed on its discriminatory benefits in the form of lower prices . . . but lower resale prices are not necessary to establish injury.") (following J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557, 564 n. 4 (1981)).
189. See Western Convenience Stores, 970 F.Supp.2d 1162 (D. Colo. 2013); *see also* American Bookseller's Assn v. Barnes & Noble, 153 F.Supp. 2d 1031, 1140 (N.D. Cal. 2001) ("By failing to determine whether any of the discounts received by defendants actually are passed on to consumers in the form of lower prices, the Fisher Model fails to show that those discounts caused harm to plaintiffs.")
190. *But see* Coastal Fuels of Puerto Rico v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996) (noting that the plaintiff "put forth expert testimony that Caribbean and Harbor had fully passed on their lower costs to the ships purchasing marine fuel"; what proof the plaintiff relied on to show pass through is not identified in the opinion, however).
191. Leffler & Tatos, *supra* note 36.
192. *Id*.
193. A thorough examination of this issue can be found in Alexei Alexandrov & Sergei Koulayev, *Using the Economics of the Pass-Through in Proving Antitrust Injury in Robinson-Patman Cases*, 60 ANTITRUST BULL. 345–357 (2015).
194. Paul Yde & Michael Vita, *Merger Efficiencies: Reconsidering the "Passing-On Requirement,"* 64 ANTITRUST L.J. 735 (1996). What we mean here is infinite elasticity, a condition that does not exist in reality.
195. *See* Alexandrov & Koulayev, *supra* note 193.

> Th[e] "pocketing" scenario [i.e., the opposite of pass through] generally is inconsistent with rational behavior and is nonsense: while the favored dealer could do nothing to take advantage of the discriminatory discount, normally he would not be so forbearant.[196]

While the Supreme Court has not opined on calculating pass through, it has recognized its difficulty:

> The principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions in the real economic world rather than an economist's hypothetical model, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.[197]

In our view, it is entirely reasonable for a court to assume pass through, subject to rebuttal by the defendant. Even in the special cases of menu pricing or focal point pricing, it is likely that the defendant will use its extra margin to gain a competitive advantage, but this presumption should also be rebuttable.[198]

## IV. Proper Allocation of the Burdens of Proof Under the Robinson-Patman Act: A Modest Proposal for Judicial Interpretation of the RPA Consistent with Its Legislative Intent

In light of the confusion regarding the proper evidentiary burdens and allocation of those burdens consistent with the legislative intent of the RPA, we outline in this section what we suggest an RPA plaintiff should be required to show in order to maintain a claim. We do so in the context of the following hypothetical fact pattern.

Suppose an oil refinery ("Refinery") sells gasoline to several retail gasoline companies. Each of these companies owns numerous stations in different locations around the state. Refinery negotiates different prices for identical generic gasoline to each retailer based on a variety of circumstances determined by Refinery's management team. Station owner A receives a 2 cent per gallon lower price than station owner B. Several of B's stations are located across the street or down the block from A's stations. B sues Refinery, alleging a violation of the RPA.

What must B allege to survive a motion to dismiss, and what must it prove to win?

### *A. Is There Price Discrimination?*

An RPA plaintiff must first plead and prove price discrimination—that it was charged a higher price for a good of like grade and quality in a comparably contemporaneous transaction. What is reasonable to expect from the plaintiff prior to discovery?

196. Burns, *The Analysis of Secondary Line Injury and Damages Under Section 2(a) of the Robinson Patman Act*, 58 UMKCL. Rev. 1, 22 (1989–1990).
197. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (discussing pass-through).
198. For example, in Alan's of Atlanta v. Minolta, 903 F.2d 1414, 1427 (11th Cir. 1990):

> The effects from which the RPA injury may flow, then, are the effects one would expect to injure competitors on the wrong end of a supplier's price discrimination scheme. These effects include a lowering of price by a favored purchaser. They also include a favored purchaser's effectuation of some other means by which it uses price discrimination benefits to lure from its rivals sales or profits or present value; for example by increasing some expenditure that ultimately leads to a lower price, enhanced product, or extra promotion.

The plaintiff rarely has advance proof of price discrimination; nor should it be expected to have such proof. Sometimes a plaintiff learns about the possibility of price discrimination through conversations with sales staff or competitors. This should be sufficient to support an allegation of price discrimination. Other times, a plaintiff may suspect that price discrimination is occurring through observation of competitor pricing patterns. In the gas station hypothetical, B may learn or observe that other stations, which also obtain the gas from Refinery, are pricing their gas below B's wholesale gasoline price from Refinery. This should be sufficient to state a claim. In any event, some facts should be pled consistent with the existence of price discrimination. The other elements that must be pled are more apparent: competition exists, the products are commodities, they are sold in commerce, and so forth.

Suppose that Refinery responds in discovery that its pricing policy initiates all negotiations on gasoline prices at the same price, but then factors in numerous other considerations in arriving at a final price. How should the court address this issue? The alleged disfavored buyer, B, bears the burden of demonstrating price discrimination. It has to show that its price per gallon is higher than what the favored buyer, A, pays. The comparison must involve products of like grade and quality, and the purchases have to be reasonably contemporaneous in time. Suppose that the gas stations fill their tanks every day from a daily delivery from Refinery, and typically sell their entire volume over that day. In that situation, "contemporaneous in time" would reasonably be defined as the price per gallon each day from Refinery. Moreover, the only gasoline that should be compared is gasoline delivered to competing stations. This is because the RPA is only interested in price discrimination to the extent that it has the potential to impact competition.

Since B bears the burden of demonstrating price discrimination, in the discovery process it should be given access to Refinery's full records concerning volumes and prices of gasoline delivered to each of its customers. Moreover, the records produced should cover a period longer than the alleged price discrimination. The reason B needs information on prices and volumes to all customers is because the "but-for" price must be calculated based on Refinery's entire business strategy.[199] And B needs pricing information over a longer period of time because, in order to prove competitive injury, B will need to compare the competitive situation before and after the alleged price discrimination.

The gasoline compared also has to be of like grade and quality. As discussed above, hopeless confusion may result unless the court adheres strictly to *Borden*, which teaches that the key factor in the "like grade and quality" analysis is physical differences impacting demand. Suppose A's favored stations buy gasoline with slightly different additives than that purchased by B's disfavored stations. How should this be handled? If the additives allow A to advertise its gas differently, then an argument could be made that the products have sufficient physical differences to impact demand. In contrast, if the additives render the gasoline physically different in only trivial ways, then they should be considered of like grade and quality. In no event, however, should different "terms and conditions" that form part of the negotiations on price be considered sufficient to render the products not of like grade and quality. For example, perhaps Refinery decided to give A a greater discount because it bargains harder, has more options, is expected to grow, or pays on time. None of these factors should be considered under the "like grade and quality" inquiry. None of them is relevant unless it results in an absence of competitive injury or contributes to one of the statutory defenses.

Having identified the relevant product and the time period at issue, calculating price discrimination simply involves comparing the price per gallon paid by B and A, taking into account all discounts, rebates, and other incentives.

199. Of course, discovery could be considerably narrowed if the parties enter into a stipulation concerning the "but-for" price.

## B. Is There Competitive Injury?

Next, the RPA plaintiff must prove competitive injury. As explained above, this inquiry requires only asking whether the disfavored buyer lost sales or profits as a consequence of the price discrimination. Inquiring into the general competitive "health" of the market is neither required nor appropriate.

But who reasonably bears the burden of proof? Essentially, both parties do, depending on the element at issue. Plaintiff bears the burden of proving that the price discrimination is significant, that it is sufficient to justify an inference of competitive harm. In our hypothetical, the price difference was 2 cents per gallon. Is that amount of discrimination significant? To answer that question, we must know whether a 2 cent per gallon change in the wholesale price of gasoline will impact retail gasoline prices to end-users. At the preliminary stages of the case, the plaintiff, B, should be able to satisfy this burden through use of his own or his competitor's internal strategy documents obtained in discovery. If these are unavailable, there is a wealth of economic research on this issue that B could turn to. Numerous government agencies collect and distribute economic data on gasoline markets. And since gas is sold on a daily basis, the durational significance of the price discrimination should be satisfied by periods of time involving weeks or months, not years.

After B demonstrates that price discrimination exists and is significant, the *Morton Salt* inference is invoked and the burden shifts to the defendant, A, to break the chain of causation. This means that A must show that its 2 cent advantage over the time period at issue did not in fact impact retail prices and did not impact the competitive ability of B in any other manner, such as through additional competitive advertising.

Even if B maintains an unrebutted *Morton Salt* inference, it still must show that the price discrimination reduced its profits. This is because if B is seeking damages, section 4 of the Clayton Act requires a showing of "antitrust injury," which is the plaintiff's burden. As we discussed earlier, the Supreme Court in *J. Truett Payne* defined antitrust injury in an RPA case as proof that the price discrimination caused lost profits to the plaintiff.[200] The Court described this burden as demonstrating the "fact of damage."[201]

Demonstrating a link between price discrimination and B's claimed lost profits requires only that the price discrimination was a material cause or contributing cause of the loss. No economic phenomenon has a single cause, be it prices, quantities, or profits. Numerous factors will impact competition between the favored and disfavored buyers. The focus in any RPA case is whether the price discrimination has had *some* negative influence on the plaintiff's profits, as opposed to no impact whatsoever. In our view, the Sixth Circuit held correctly in *Allied Accessories* that "it is enough that the challenged price discrimination is a material cause of that injury. A plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury."[202]

Because B has the burden of proving antitrust injury, it must also demonstrate that the 2 cent disadvantage in wholesale price reduced its profit and that this reduction in profit was because of a competitive response to or effect of A's (the favored competitor's) actions. It is not enough to simply claim that, absent price discrimination, B's margin would have been 2 cents higher. As discussed by Leffler and Tatos, proof based on econometric analysis of data is a Herculean task that is often unachievable.[203] For example, if numerous economic variables are moving together, it may be difficult to isolate the impact of the margin change.

For this reason, courts should credit the direct testimony of parties involved in the competitive process, including customers, business owners, and employees. Courts have found the testimony of

200. J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981).
201. *Id*. at 564, n. 4.
202. Allied Accessories & Auto Parts v. GMC, 901 F.2d 1322, 1325 (6th Cir. 1990).
203. Leffler & Tatos, *supra* note 36.

customers who switched between the disfavored and the favored buyers to be particularly credible. For example, in *Hasbrouck v. Texaco*,[204] the Ninth Circuit held that customer testimony regarding "direct evidence of displaced sales" was sufficient to establish competitive injury. In that case, the business owners "testified as to diverted sales and lost profits. . . ."[205] Similarly, in *J.F. Feeser v. Serv-a-Portion*,[206] the plaintiff offered testimony from its company president, sales representatives, and customers. The court commented that "[t]he evidence we find most persuasive is that of the customers of Feeser, corroborating the sales personnel's testimony, that the reason Feeser lost sales was because its prices for Serv-a-Portion products were not competitive."[207]

Such direct testimony is often unavailable, however. Consider our hypothetical situation between the competing gas stations. Gas station owners and employees do not, in the regular course of business, create documents identifying customers who did not buy gas from them. They likewise do not usually have the ability to observe what is happening at competing stations. They may see their own volumes reduced, but they do not know if this is a competitive effect or a market demand effect. Adducing such evidence is often an ex post exercise achieved by comparing the plaintiff's customer records with the records from the favored buyer. This can be difficult, however, because the favored buyer is usually a third party and will strongly resist turning over customer records to attorneys that represent a competitor. Records from credit card transactions are often the only way to identify specific customers who switched. Accordingly, at a minimum, the court should allow the plaintiff through the discovery process to compare daily volumes of sales between competing gas stations to attempt to discern customers switching in response to price changes. Precluding such discovery may prematurely end an otherwise viable case of price discrimination under the Act.

In the absence of direct testimony, the burden falls to the plaintiff's experts. Even then, however, some adjustments should be made based on what is reasonable to expect from an RPA plaintiff in such circumstances. To begin with, the difficulty of the exercise warrants careful attention to the level of proof that can reasonably be expected. As recognized by the Supreme Court in *J. Truett Payne*:

> The vagaries of the marketplace deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not "come with very good grace" for the wrongdoer to insist upon specific and certain proof of injury which it has itself inflicted.[208]

We now turn to the three factors the plaintiff or its expert will have to prove to show competitive injury: (1) the existence of competition between favored and disfavored buyers, (2) a defensible but-for price, and (3) pass through of wholesale costs to retail charges.

*1. Competition between the favored and nonfavored buyers.* The plaintiff must demonstrate that he competes with the favored buyer(s). In our gas station hypothetical, B must identify which of his gas stations directly compete with each of the favored buyer A's stations. When an A station changes its retail price, what other gas stations are impacted? The proof will differ on a case-by-case basis. However, gas stations (like grocery stores and restaurants) are highly price-competitive. Station managers typically price-check the stations they compete with daily before setting their own prices, and presumably maintain records documenting this process. Such price-checking records should be strong evidence of who the favored and disfavored gas stations believe are their closest competitors. Often, a central

204. 830 F.2d 1513, 1519 (9th Cir. 1981).
205. *Id*. at 1521.
206. 909 F.2d 1524 (3d Cir. 1990).
207. *Id*. at 1537.
208. 451 U.S. at 567.

office will compile strategy documents summarizing which stations are other stations' closest competitors. Courts should look first to what competitors say and do outside of the litigation context before requiring econometrically precise estimates of cross-elasticities.

*2. The "but-for" price.* As to this element of proof, we advocate that courts follow the Ninth Circuit's approach in *Hasbrouck v. Texaco* and treat the "but-for" price as a fact issue for the jury once sufficient evidence has been adduced by the RPA plaintiff. Experts should be given leeway to explain the factual basis for their opinion concerning the "but-for" price. For example, suppose in our hypothetical that Refinery must run at close to full capacity in order to remain solvent, and the favored buyer, A, constitutes 20% of Refinery's gasoline sales, while B purchases only 1% of Refiner's output. Suppose further that other customers buy at the same price as A. Under these circumstances, all else being equal, it is unlikely that Refinery would choose to raise all of its customers to the level of the disfavored buyer and risk a shortfall in demand. However, each situation is different and common sense should prevail. Further, to the extent that the "but-for" price is at issue, courts should recognize that the defendant possesses most (if not all) of the relevant information, and is at a distinct advantage over the plaintiff. Accordingly, fairness dictates that courts grant liberal discovery on this issue.

*3. Pass through.* We believe that courts should take advantage of economic theory on this element and, concomitantly, adjust the need for direct evidence. There is no reason to start from scratch and significantly extend the costs of litigation to both parties. As detailed by Alexandrov and Koulayev, if the defendant is maximizing profits, there will always be some pass through of wholesale costs charges to retail prices, except in a few (rare) identifiable cases.[209] Therefore, courts should adopt a presumption of pass through, absent a sound reason for the defendant to deviate from profit-maximizing behavior. Accordingly, the defendant should bear the burden of rebutting the presumption of pass through.

## *C. Who Should Bear the Burden of Proving a Cost Justification Defense, Including the Related Concept of Functional Discounts?*

If the plaintiff demonstrates the existence of price discrimination and competitive injury, the burden must then shift to the defendant to demonstrate that the discrimination was a result of "meeting competition," or that it has a cost justification for charging different prices to different buyers. Courts should not assume a priori that it is unreasonably burdensome for the defendant to prove such a cost justification.

The defendant should also bear the burden of proving any claimed functional discounts to explain the price difference. The RPA plaintiff should not be required to disprove this as part of its prima facie case. While it appears that reliance on functional discounts has arisen from a frustration with the strict accounting requirements of the cost justification defense, we have explained why the liberalized functional discount approach goes too far in presuming the price differential's validity and placing the burden on the plaintiff to rebut it. Instead, we suggest that an approach more in keeping with the legislative intent and the objectives of the RPA would be to allocate the burden of proving cost justification—*including* any claimed functional discount iteration of that defense—to the defendant. Even tinkering with the standard to allow proof of price differentials that are "reasonably related" to the cost savings (rather than strictly limited to the actual cost savings) would be a more reasonable means of avoiding the accounting morass that some critics claim dooms the traditional cost justification defense.

In any event, it makes sense (in our view) to put the burden of proof on the defendant, who clearly is more likely to have physical possession and control over the necessary financial data to prove (or

209. *See* Alexandrov & Koulayev, *supra* note 193.

disprove) the defense. Such an allocation of burdens properly rejects the presumption that functional discounts negate the possibility of competitive injury, and preserves that economic analysis for the competitive injury prong.

Turning again to our gasoline example, suppose that A's favored gasoline stations had surplus storage tanks, and A agreed to allow Refinery to store gasoline in A's tanks so that more distant stations could pick up gas at an intermediate point. Clearly, this would be a service that benefits Refinery and warrants compensation. In such a circumstance, it seems reasonable to require Refinery to estimate and offer proof of the cost savings. Refinery could, for example, calculate the additional wages, fuel, and maintenance costs it would incur if it had to make deliveries to the distant stations, or obtain an estimate from a third-party trucking company of the cost of that service. Indeed, if the storage discount is in fact legitimate, one would expect to find evidence that Refinery's management team undertook a good faith effort to estimate the anticipated savings before providing the discount in exchange for the service.

If the evidence shows that a cost analysis was performed a priori, then courts should be lenient in their treatment. If, on the other hand, the cost justification appears to be an elaborate exercise in ex post data crunching to justify a discount provided for reasons related to buyer power, then courts should impose greater scrutiny.[210] In either event, the defendant must bear the burden of proving the defense. In our view, there is no justification for merely assuming the existence of a cost justification under the guise of functional discount analysis, or otherwise raising the RPA plaintiff's burden on other elements. Doing so runs afoul of express congressional intent to protect small businesses from exercises of buyer power that are not justified by cost efficiencies.

## V. Conclusion

Much of the academic and judicial criticism of the RPA is, in our view, unjustified. The Act has a unique (and uniquely clear) legislative history, and judicial interpretation of the Act should respect that unique history. If the RPA has in fact outlived its policy usefulness, then Congress should amend or repeal it and explain to its constituents why protecting small businesses is no longer good policy. It is not appropriate for courts to emasculate the Act based on academic criticism and attempt to accomplish what Congress has so far declined to address.

More fundamentally, much criticism of the RPA rests (in our view) on mischaracterizations of the Act and its purposes. Congress did not prohibit all price discrimination, only discrimination resulting from buyer power not justified by cost and other efficiencies. Properly interpreted and applied, we believe the RPA still has a legitimate role to play in the nation's antitrust laws. We hope that our modest proposal for allocating the burdens and standards of proof in RPA cases will advance the debate and permit the Act to continue to serve its congressionally intended role.

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210. *See*, *e.g.*, Philadelphia Carpet Co., 64 F.T.C. 762, 776 (1964), *aff'd per curiam*, 342 F.2d 994 (3d Cir. 1965) (scrutinizing more closely costs studies prepared postlitigation).

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