Boxed Out

Powerful retailers are killing off small businesses by dominating supply chains. It's time to revive the Robinson-Patman Act and restore antitrust enforcement against predatory buying.

By Stacy Mitchell and Ron Knox
September 2022

ILSR INSTITUTE FOR Local Self-Reliance

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The Institute for Local Self-Reliance (ILSR) is a national research and advocacy organization that partners with allies across the country to build an American economy driven by local priorities and accountable to people and the planet. Whether it's fighting back against the outsize power of monopolies like Amazon, ensuring high-quality locally driven broadband service for all, or advocating to keep local renewable energy in the community that produced it, ILSR advocates for solutions that harness the power of citizens and communities. More at **www.ilsr.org**.

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Summary & Introduction

Walmart, Amazon, and other powerful, well-financed companies have captured control over much of retailing. These giants maintain their extraordinary market position not by competing on the merits of their service. Instead, they exert their power as dominant buyers of food and goods to bully suppliers, extracting discounts for themselves while forcing independent retailers to pay more. This is threatening those small businesses, wounding competition, and hollowing out communities large and small. It's a monopoly tactic we call "predatory buying."

In this report, we examine the history of these abuses, the law Congress passed in 1936 to protect independent businesses' right to compete on fair terms, and the pro-bigness coup that stopped enforcement of the law in the 1970s. Next, we explore how the refusal to stop predatory buying has allowed big businesses to shut out their smaller rivals and the harm this has inflicted on communities and the economy. Finally, we show how regulators and Congress can step in to kickstart enforcement of the law and strengthen it to protect the liberty of independent businesses and the diverse communities they serve.

Bill Hensel was the biggest seed dealer in Peoria County, Illinois.

Hensel's old business, Hensel Seed Solutions, had been a go-to shop for bags of Dekalb seed corn and soybeans for miles around their section of central Illinois. At the height of his business a decade ago, Hensel was moving 11,000 bags of corn and 16,000 bags of beans a year — between $4 and $5 million in product overall. "I was making money, I was paying my bills," he says. "I wasn't getting rich, but I was living off of it."[1]

Hensel bought much of his seed from Monsanto, the agriculture giant whose seeds are found in 80 percent of all corn fields and more than 90 percent of all soybean fields in the U.S.[2] The arrangement was going fine, Hensel says, until Monsanto began talking with chemical conglomerate Bayer about what would eventually become a $66 billion mega-merger between two of the biggest agriculture companies in the world.

Then, he says, Monsanto's tone changed. Monsanto, and ultimately Bayer, favored their biggest buyers, all large farm-supply chains, over smaller, independent sellers like him.

Monsanto didn't cut Hensel's business off entirely; instead, it charged Hensel $100 a bag more than it charged the big farm supply chains, according to his lawsuit against Monsanto. His customers valued his advice, his service, his instincts about farming, Hensel says. But when Monsanto changed its seed prices, he couldn't compete.

"Sometimes in the end, it just comes down to money," he told us. "They just let them steal my customers away from me." The lawsuit settled out of court in 2020 without Monsanto admitting wrongdoing. But stories like Hensel's can be found across the economy.

The Problem of Buyer Power

Independent businesses of all kinds are being boxed out of the market by monopoly tactics similar to those that felled Hensel Seed Solutions. Some of the worst abuses are in the retail sector, where dominant corporations, including Walmart and Amazon, are using their clout as major buyers of goods to compel manufacturers to give them better deals while increasing prices and limiting supply to their smaller competitors.

The pandemic laid bare the reality of how much leverage these corporations have over the supply chain and how they can use that power to crush rivals and control markets. When Covid-related disruptions led to widespread shortages, big retailers pressed manufacturers to steer scarce supplies their way, leaving independent stores scrambling to stock crucial products, from paper towels to ramen noodles.

The pandemic made this power dynamic starkly visible, but it's not new. It's a long-running problem and is getting worse.

Walmart's actions were striking. A few months into the pandemic, when grocery manufacturers were generally able to meet only 60 to 70 percent of demand, Walmart issued a directive to suppliers mandating that 98 percent of its orders be in-full and on-time, or it would impose steep penalty fees on the offending supplier.[3] Walmart is such a dominant force in grocery retailing — it accounts for more than 20 percent of revenue at General Mills, Kraft, Clorox, and many other leading manufacturers — that suppliers can scarcely afford to risk its disfavor.[4]

Amazon likewise told makers of food, personal care, and cleaning items to increase their inventory in its warehouses. Those that failed to comply would be demoted in its search results. Many suppliers did what they had to: they cut off other retailers and shipped the bulk of their inventory to Amazon.[5]

"Right now, I can't get certain products for my members. But I can walk into a Walmart store and they're sitting there with full pallets," says Mike McShane, the vice president of procurement at URM Stores, a wholesaler that serves independent grocers. For small grocers, the harm extends far beyond lost sales. "I didn't have saltine crackers on my shelves for weeks. I go to Kroger and they have extra," says Michael Gay, a second-generation grocer in rural Georgia. "For people in my community, when they go to other stores and they see that, it's a direct reflection on me."[6]

The pandemic made this power dynamic starkly visible, but it's not new. It's a long-running problem and is getting worse. For years, big retailers have concentrated control over our economy by strong-arming suppliers into giving them preferential treatment.[7] These advantages come in a variety of forms, including lower prices, better payment terms, special package sizes, and advertising allowances.[8] The small independent businesses they compete with are left to pay more and get less, making it hard to survive. In some cases, major consumer brands have restructured their operations entirely around the needs of their biggest buyers, cutting off independent businesses altogether.[9]

Decades ago, Congress recognized that big retailers could use their buyer power in predatory ways, undermining competition and harming small businesses and the communities they serve. In 1936, lawmakers passed the Robinson-Patman Act, which makes it illegal both for suppliers to provide discriminatory pricing and for retailers to induce such discounts. From the 1930s until the 1970s, the Federal Trade Commission (FTC), the country's monopoly watchdog, enforced the law. The result was a vibrant retail sector, in which local businesses thrived alongside national chains.[10] The law also supported a diversified manufacturing sector, by ensuring that small and midsized producers had many potential buyers for their products and were not at the mercy of a few big retailers.

The Robinson-Patman Act fulfilled an essential function of antimonopoly policy. Without checks on buyer power, corporations that enjoy the backing of Wall Street can use their sheer size and deep pockets to drive smaller competitors out of business and monopolize industries. They can rise to the top, not by outcompeting or being better at what they do, but simply by being bigger and having financial leverage over suppliers that their smaller rivals lack.

Congress's prohibition on predatory buying worked hand in hand with other federal and state antitrust policies that blocked predatory pricing — a parallel way that big retailers can use their financial power to dominate markets, in this case by selling goods below cost for a sustained period to sink competitors that lack the resources to fund similar losses.

In the 1970s, however, antitrust enforcers and the courts began to ignore these laws. Officials at the FTC came to believe that larger corporations are inherently superior and should be given freer rein to flex their market power.[11] Ignoring the responsibility given to it by Congress, the agency stopped enforcing the Robinson-Patman Act. Although the law remains on the books, predatory buying has gone largely unchecked for the last forty years. Restrictions on predatory pricing have been similarly gutted.

The result is an economy tilted sharply in favor of bigness. Independent retailers were once a thriving presence in many neighborhoods and towns. But in the 1980s and 1990s, Walmart and other big-box chains rose to power in large part by extracting better terms from suppliers.[12] Jeff Bezos took these tactics to new heights, using predatory buying and pricing to establish Amazon as an all-powerful gatekeeper for e-commerce.[13] Concentration among retailers has, in turn, spurred a massive wave of consolidation in production, as large manufacturers, food processors, publishers, and others buy up smaller firms and merge with one another in a bid to keep their footing in a market dominated by giants.

Refusing to enforce the law against predatory buying stands at odds with economic and political fairness, and with ensuring opportunity for businesses of all sizes. The lack of enforcement against predatory buying also continues a decades-long trend of policies that tilt the economy in favor of big business and away from diverse, locally controlled communities. Keeping prices fair would help small sellers compete with big box stores and other powerful sellers on more equal footing. By ensuring small sellers' right to compete, policymakers and enforcers would also help strengthen communities, diversify production, and rebuild our broken supply chain.

The Rise and Fall of the Robinson-Patman Act

Long before the rise of big-box stores, and well before Amazon, Americans grappled with the ways powerful retailers and other gatekeepers could tilt the economy in their favor. In the 1920s and 1930s, chains like A&P and Kroger were rapidly taking over the grocery industry. A&P alone operated nearly 16,000 stores and by the early 1930s was the nation's fifth-largest corporation. Concerns about the market power of these retailers prompted the FTC to launch an investigation. It found that the chains had demanded and received "special discounts, concessions, or collateral privileges which were not available to smaller purchasers."[14] Manufacturers told investigators that the chain stores used threats and coercion to secure these discounts, and that if they refused to sell to the chains at a discount, they'd lose those accounts and put their businesses at risk. To make up for losses suffered at the hands of the chain stores, those suppliers began charging smaller retailers more — forcing those stores to raise prices, driving their customers into the waiting arms of the chains. It was a scheme to monopolize retail, and the chain stores were getting away with it.

Congress at the time understood the danger these chains posed to smaller, independent sellers and the communities they served. Wright Patman, a Congressman from Texas, viewed the struggle as David versus Goliath, with the powerful chain stores "sapping the civic life of local communities with absentee overlordship…and reducing the independent business men to employees or to idleness."[15] So in 1936, Congress passed the Robinson-Patman Act, which amended existing law to ban price discrimination between suppliers and retailers, so that no retailer could leverage their bigness to demand lower prices than what their smaller rivals paid for identical goods, except to the extent a discount was warranted by cost-savings on the part of the supplier. By banning such discrimination, the bill ensured that independent merchants would no longer be "crucified upon the cross of unfair competition," explained Congressman Edward Patterson.[16]

In the decades after the Robinson-Patman Act's passage, federal antitrust enforcers used the act to help ensure economic fairness throughout the economy. The result was a flourishing retail sector.

In the decades after its passage, federal antitrust enforcers used the act to help ensure economic fairness throughout the economy. The FTC brought dozens of cases a year under the act, targeting big retailers that pressured suppliers to grant them favorable deals and suppliers that knowingly discriminated against smaller firms. In the 1950s alone, the FTC brought complaints against Macy's, the supermarket chain J. Weingarten, appliance maker Westinghouse, Continental Baking (the company behind Wonder Bread and Hostess snacks), and many others.[17]

The result was a flourishing retail sector. In groceries, the top four national chains saw their market share decline through the 1960s. Independent grocers regained their footing, accounting for half of grocery sales in the mid 1950s. Fair competition policies worked alongside labor laws to distribute economic power broadly and produce a swelling middle class. Between the 1940s and 1960s, a growing share of people at A&P., Kroger, and other supermarket chains joined unions and won higher wages. At the same time, many Americans made a living running their own grocery stores. Of the 1.1 million people working in grocery stores in these years, about one in four owned or co-owned the store in which they worked.

As William Baxter, President Reagan's pick to run the Antitrust Division at the Department of Justice, explained in 1981, antitrust enforcement was no longer "concerned with fairness to smaller competitors."

But in the 1970s and 1980s, a new generation of pro-monopoly lawyers and economists took the helm at the antitrust agencies and effectively ended enforcement of the Robinson-Patman Act.[19] It amounted to a corporate-backed coup, overturning the democratic will of Congress.[20] By the late 1970s, the agencies were bringing just one or two cases under the act a year, if that many.[21] As William Baxter, President Reagan's pick to run the Antitrust Division at the Department of Justice, explained in 1981, antitrust enforcement was no longer "concerned with fairness to smaller competitors."[22] Today, the FTC has not alleged a violation of the act in two decades.[23]

Without a cop on the beat, big-box stores and Amazon have been free to bully suppliers, who have little choice but to acquiesce to the powerful retailers' demands. For smaller, independent retailers and manufacturers, the refusal to enforce the law has meant struggle and, all too often, demise. The pandemic has put the dangerous power of corporate bigness back in a much-needed spotlight, giving enforcers and Congress an opportunity to ensure we don't reach a tipping point, where the ability of small businesses to open and grow isn't lost for good.

Discrimination Everywhere

Despite scant attention from researchers and journalists, reports of discrimination in the supply chain are widespread, indicating that this is a significant monopoly problem that warrants action by Congress and the federal antitrust agencies. Here are a few examples:

Grocery — For more than two years, independent grocers have struggled to keep items like pet food, Reynolds wrap, and Oreo cookies on their shelves, even as nearby Walmart and Kroger stores are often brimming with the very items they can't get. It's part of a deeper problem that began long before the pandemic and has only gotten worse in its aftermath: Big retailers use their market power to extract lower prices and other concessions from suppliers, while forcing small grocers to pay more. "These retailers use their control over the market to advantage themselves at the expense of everyone else," David Smith, head of Associated Wholesale Grocers (AWG), told Congress last year.[24]

AWG is not small. It supplies thousands of independent grocery stores and, like Walmart, buys products in quantities measured by the truckload. That means, Smith contends, that the discounts the big chains get from suppliers have nothing to do with cost savings and everything to do with brute market power. In the grocery sector, no corporation flexes its muscle with as much force and finesse as Walmart, which rose to power by squeezing suppliers, sometimes even forcing concessions long after their goods had sold, through chargebacks and "margin audits."[25] Today, Walmart captures $1 of every $4 that Americans spend on groceries, and controls more than half the market in 43 metropolitan areas.[26]

Another threat comes from Dollar General and Dollar Tree, whose explosive growth over the last decade has made them a darling of both Wall Street investors and big-name grocery brands. The two chains have persuaded suppliers to treat them as a distinct "channel," with access to special package sizes and pricing denied to independent grocers. "We can't get the same item as the dollar store. They won't give it to us," explains Michael Needler, a third-generation grocer who operates about 100 stores across Ohio, Indiana, and Kentucky, many in small towns and where they compete directly with dollar stores.[27]

Ball's decision to increase its minimum order and hike prices is expected to hurt craft brewers' ability to compete with Budweiser and other big brewers.

Craft Beer — Many craft brewers buy their cans from Ball Corporation, by far the largest maker of cans in the country. But earlier this year, Ball told small craft brewers that they'd have to both buy more cans and pay as much as 50 percent more for them if they wanted to keep using Ball's cans to package their brews.[28] Ball's decision to increase its minimum

order and hike prices is expected to hurt craft brewers' ability to compete with Budweiser and other big brewers. "Craft brewers have and will continue to find it harder to compete with larger brewers not facing similar shortages and price increases in aluminum cans," Bill Pease, head of the Brewers Association, told the FTC last year.[29]

Toys — Bill Stewart has run Long Island Toy & Game in the King Park neighborhood of Long Island since 2015. He says that today he must pay far more to stock big name toys from Mattel and others because of their onerous minimum orders. In 2021, Mattel began requiring retailers to buy a minimum of $20,000 in toys annually.[30] The move cut off many independent toy stores, leaving them to either forgo selling popular Mattel brands, including Fisher-Price and Thomas & Friends, or source them at inflated prices through distributors. "I can't get that stuff at a competitive price anymore," Stewart says.[31] "I just get a few pieces here and there." As Sean Maharaj, a former supply chain analyst for Mattel, explained to the *Washington Post*: "The message in the toy business has always been: Walmart and Target first."[32]

Home Goods — Independent home goods retailers were notified this year that appliance maker Whirlpool would no longer sell its line of popular KitchenAid stand-mixers and other small appliances to them, despite the retailers' years of brand loyalty and dedicated marketing. In a letter sent to small shops, Whirlpool suggested it had shifted its sales strategy to focus on big-box stores, Amazon, and other major accounts. Meanwhile, Lifetime Brands, maker of Farberware pots and pans and other popular kitchen goods, announced a few years ago that it would focus its sales strategy on the needs of Amazon above other customers. Daniel Siegel, president of Lifetime Brands, explained that the company "had a strategic commitment to grow with Amazon."[33]

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Hardware — In a call with investors last November, Ted Decker, president and chief operating officer of Home Depot, described how the company's "scale and… position in the marketplace" had given it leverage in the supply chain that its competitors lacked. Vendors with limited supplies, he said, were steering those goods to Home Depot rather than smaller retailers. "With the shortage of goods," he said, "we've been very pleased with responses from…. supplier partners saying, we can't service the industry. So we'd rather focus on the best partner."[34]

Regulators should step in to stop this kind of abuse, because doing so is central to their jobs as trustbusters. Preventing the kind of predatory buying happening around the economy is core to America's antimonopoly policy; no company should be able to use its power, size, or wealth to manipulate prices and control markets at the expense of fair competition.

The Benefits of Fair Competition

Reviving the Robinson-Patman Act and strengthening enforcement against predatory buying would lead to four major benefits for Americans. Doing so would:

- **Stop powerful retailers from using their size and financial clout to eliminate independent businesses and dominate markets.**

  As we've seen, blocking the ability of financially powerful corporations to manipulate pricing in predatory ways is an essential component of effective competition policy. By not enforcing this principle in recent decades, policymakers have set up a system in which these corporations automatically win simply by virtue of being big and backed by Wall Street. They don't have to compete head-to-head with smaller businesses on the merits of their products and services. They can instead use their financial clout to bully suppliers, securing preferential access to goods and extracting unwarranted discounts, all while driving up the cost of goods for their less powerful rivals.

  It's no coincidence that the consolidation of the retail sector accelerated rapidly in the 1980s and 1990s, after the antitrust agencies and the courts gave large retailers free rein to use their financial power to engage in both predatory buying and predatory pricing. Prior to this radical shift in policy, the nation's retail sector was diverse, with local retailers accounting for more than half of sales.[35] The changes that followed wrecked Main Streets nationwide. Led by Walmart, big-box chains rose to power by strong-arming better terms from suppliers and selling entire categories of products at a loss.[36] Between 1982 and 2017, even as the country grew much more populous, the number of independent retailers declined sharply, falling from about 1 million to 600,000. Their share of the market plummeted to 22 percent.[37]

  By once again restricting the ability of big retailers to leverage their buyer power to undermine competition, we can reinvigorate independent retailing and enable more people to start businesses and succeed.

- **Ensure fair prices and broad access to goods and services in every corner of the country.**

  When big retailers are allowed to engage in predatory buying, communities that depend on independent grocers and other local retailers end up paying more — or worse, lose access to critical goods and services altogether. Evidence shows that when big retailers demand preferential treatment from manufacturers, it can cause a "waterbed effect," leading those suppliers to make up for the lost revenue by increasing the prices they charge independent businesses.[38] These inflated costs ultimately get passed down to their customers.

  This discrimination in supplier pricing exacerbates racial, economic, and geographic injustice. That's because communities that have higher levels of poverty, are home to more Black and Latino residents, are very rural or densely urban, or some combination of these characteristics are significantly more likely to be served by independent grocers, pharmacies, and other locally owned businesses.[39] When these businesses are forced to pay more, their communities suffer disproportionately.

This discrimination in supplier pricing exacerbates racial, economic, and geographic injustice.

Even worse, a growing number of small towns and urban neighborhoods no longer have grocery stores, pharmacies, or other crucial services at all. The independent businesses they relied on are gone, often victims of concentrated market power.[40] Meanwhile, those that wield that power, including Walmart, CVS, and other major retailers, generally avoid these communities, in part because, unlike local entrepreneurs, they're not very adept at operating successful stores in poorer neighborhoods and very small towns.[41]

By putting an end to the predatory tactics of big retailers, we can help ensure that people in every part of the country have access to goods at fair prices.

- **Make our manufacturing and food production sectors more diversified and resilient.**

Walmart and Amazon are both notorious for bullying suppliers and demanding ever-deeper price cuts and other concessions.[42] These relentless cuts inevitably come at someone else's expense. Along with smaller retailers, this also includes production workers, who've seen their wages cut and their jobs shipped elsewhere as manufacturers scramble to do everything on the cheap. Research by Harvard sociologist Nathan Wilmers has found that, among manufacturing companies, greater dependence on a small number of powerful corporate buyers leads to lower wages.[43]

Unchecked buyer power has also destroyed much of the nation's productive capacity. The rise of big retailers spurred a raft of consolidation among manufacturers, as they tried to bulk up to avoid getting crushed in negotiations. In the food

and grocery industry, for example, a few giant processors control meat and dairy production, while a handful of conglomerates own most of the packaged food brands that grace supermarket aisles.[44] As we learned during the Covid pandemic, this drastically narrow supply chain is vulnerable to even modest shocks and disruptions, putting at risk our access to food and other essential goods.[45]

Retail consolidation has also destroyed an entire ecosystem of small manufacturers and producers that depended on small sellers for shelf space and customers. Independent retailers excel at introducing customers to niche products, first-time authors, and small-scale food producers. But big-box chains source nationally and afford few opportunities for smaller brands. And while Amazon may be known as the "everything" store, its algorithms steer shoppers to items that are already selling well, making it hard or impossible for a new product to break through.[46]

By checking the buyer power that big retailers wield in the supply chain, we can expand opportunities for a wide range of producers and products. The result would be a diversified system of production, with manufacturing capacity distributed much more broadly across a multitude of companies and communities. This, in turn, would lead to a more innovative and resilient economy and ensure that shoppers, workers, and creators are not forced to rely on just a few companies to make and distribute the things we need.

- **Increase genuine price competition and revive competition on selection, quality, and service.**

Failing to restrict the predatory buying power of big retailers impedes price competition among manufacturers and can lead to higher consumer prices. In markets structured by predatory buying, brands focus on keeping dominant retailers happy, rather than outcompeting rival brands with better products at lower prices. Consider, for example, the incentives for a book publisher. If the path to higher sales is to get Amazon to promote a particular book by giving the tech giant better pricing than other retailers get, then there's less incentive for the publisher to figure out how to make the book higher quality or less expensive to produce than similar titles offered by competing publishers.

Indeed, evidence from the book industry indicates that limiting the pricing power of big retailers leads to lower prices for consumers. Several European countries, including Germany and France, restrict retailers from discounting books below the retail price set by the publisher. A comparative study found that consumer book prices in these countries have risen much more slowly than those in Britain, where dominant retailers freely wield pricing power.[47] In other words, constraining the predatory tactics of big retailers leads to more vigorous price competition among publishers and ultimately lower prices for consumers.

Many of the most notable shopping innovations… were pioneered by independent merchants striving to outdo their competitors in a market designed (by public policy) to reward good ideas rather than sheer size.

Similarly, removing the ability of retailers to grow their market share through predatory buying forces them to compete in other ways, including on selection, shopping experience, and service. Many of the most notable shopping innovations — including the self-service supermarket, the white sale, the soda fountain, having your picture taken with Santa, and putting a cafe in a bookstore — were pioneered by independent merchants striving to outdo their competitors in a market designed (by public policy) to reward good ideas rather than sheer size. It's no accident that the shift in policy objectives 40 years ago produced today's retail industry, with its dreary uniformity and lackluster service.

Restoring Enforcement of the Robinson-Patman Act

For decades, the FTC enforced the Robinson-Patman Act to the benefit of independent businesses, communities, and the American economy. The decision to not enforce the law contributed to a steep rise in corporate concentration and monopoly power. Federal antitrust enforcers have not filed a case under the act in more than 20 years.

Without a cop on the beat enforcing the law, there's nothing to deter powerful retailers from insisting on preferential pricing from suppliers as a matter of course. And neither independent retailers nor suppliers have any incentive to report abuses to the FTC. Small retailers are unlikely to obtain relief and suppliers risk retaliation from their biggest buyers. As a result, predatory buying is likely widespread and yet remains largely undocumented and has been subject to little in the way of analysis or scrutiny.

Resurrecting the act, then, will require a complete shift in policy and practice at the FTC. There are signs that the beginnings of that shift are underway. Last November, the FTC launched an investigation of supply chain disruptions and their impact on competition by ordering three of the country's largest retailers — Walmart, Amazon, and Kroger — along with leading suppliers and wholesalers, to turn over information about product shortages, pricing, margins, and more.[48]

The inquiry is examining, as FTC Chair Lina Khan said, the "business practices that may have worsened these disruptions or led to asymmetric effects."[49] The agency has also solicited and received dozens of comments from business groups and the public, many suggesting that powerful sellers and suppliers are shutting out smaller businesses.

We recommend that the agencies vigorously enforce the law against powerful companies that use their power to discriminate against smaller sellers and suppliers.

The FTC also signaled new interest in enforcing the Robinson-Patman Act earlier this year when it invoked the law in a broader policy statement about the prescription drug industry. In the statement, the commission suggested that rebates and fees that some drug companies paid to pharmacy industry middlemen in exchange for pushing their expensive, branded drugs to patients might violate the Robinson-Patman Act. The FTC called the practice "commercial bribery," an apt phrase to describe some forms of price discrimination.[50]

Based on the results of these FTC investigations, and on other reports of discriminatory practices from the public and lawmakers, we recommend that the agency restart its Robinson-Patman Act enforcement program and vigorously enforce the law against powerful retailers that use predatory buying to harm smaller competitors. We also recommend that the FTC conduct additional studies and investigations to better understand the extent of predatory buying, document its implications, and identify sectors in which enforcement is needed.

Along with enforcement measures, we recommend the FTC file amicus briefs in private Robinson-Patman Act cases urging judges to rule in favor of plaintiffs in cases in which the facts support a violation of the act. In at least one recent case, the FTC filed an amicus brief in a Robinson-Patman Act case in which a federal court found that Clorox violated the act by supplying powerful wholesale stores like Costco and Sam's Club larger package sizes that they refused to sell to independent wholesalers and retailers.[51] The FTC came to the defense of the big-box retailers. Contrary to its own previous guidance, the agency pushed a restrictive reading of the law and urged the appeals court to overturn the decision. The court did so. Rather than attempting to undermine law enforcement, the FTC should urge courts in legal briefings to respect Congressional intent and support public and private enforcement of the act.

Congress also has a role to play in stopping and preventing predatory buying. Lawmakers should consider amending the act to capture the ways in which dominant buyers can exert power to exclude smaller rivals from accessing supplies altogether. (The act covers the transaction of goods, not whether goods are supplied at all.) An amendment to the act could restrict a dominant company's ability to cut off necessary supplies to small businesses — so that, if a massive retailer like Walmart, Amazon, or Kroger pushed suppliers to sell to them exclusively or to cut off smaller rivals even temporarily, it would run afoul of the law. Likewise, if a dominant manufacturing or consumer goods company chose to only supply big retail chains or ecommerce companies while cutting off their products to independent stores, they too could face a lawsuit under a retooled act.

By amending the law to include both price and supply discrimination, the statute would address a reality that many small and independent sellers face today: That, for one reason or another, they cannot access the same books, toys, household goods or other products as their bigger, more powerful rivals — either at the same price, or at all.

While other antimonopoly laws can technically stop and prevent such abuses, decades of pro-monopoly court decisions have largely defanged those laws. Indeed, federal monopoly cases, including allegations of refusals to deal with small sellers or suppliers, have been nearly as rare as Robinson-Patman Act lawsuits.[52] (In Europe, antitrust authorities and courts there have viewed a dominant company's decision to cut off necessary supplies to smaller sellers downstream "exclusionary conduct," the legal term for a classic monopoly abuse.)[53]

To ensure the Robinson-Patman Act is applied as Congress and the courts have intended, lawmakers should also consider codifying important legal developments of the law into statute. For example, the Supreme Court made clear in the Morton Salt case that plaintiffs could prove violations of the law by proving a supplier discriminated between one seller and another over time.[54] By codifying the so-called "Morton Salt inference" into law, Congress would greatly simplify the law, limit the need for complex economic testimony at trial, and offer judges a clear path to deciding cases.

Leveraging your size and financial power to raise your rivals' costs is fundamental violation of our antimonopoly principles, and, as we've seen, a frequent tactic used by the most powerful retailers and online gatekeepers in America. Curbing these abuses would create a fairer, more resilient, and more innovative American economy. It would also help many communities rebuild and regain their vitality and self-determination after decades of box-store devastation. ■

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