

ARTICLE

Fairness and Redistribution in Antitrust Law

Herbert Hovenkamp

Abstract: Many parts of the legal system are devoted to promoting “fair” outcomes in the distribution of wealth or economic status. Antitrust law is not among them. The antitrust statutes authorize the courts to pursue practices that reduce output (“restrain trade”) or threaten monopoly, measured by higher prices, lower market output, or restraints on quality or innovation. Antitrust provides neither the authority nor the metrics for pursuing more distributive goals. Congress deviated from these concerns a single time, when it fell to interest group politics and passed the Robinson-Patman Act. That Act was part of a three-pronged attack on chain stores, a major innovation in retail distribution that was transforming the structure of American retail. The chains benefited customers, but they harmed politically powerful interest groups dedicated to established ways of doing business. The courts themselves, without statutory authority, have also attempted to promote distributive concerns on a few other occasions, all of them short-lived.

*

What role does antitrust law play in determining whether business conduct is “fair”? Or when can it intervene to correct imbalances in wealth? The legal system contains many provisions that do these things. Among them are the Internal Revenue Code, with its mandate for progressive taxation and its use of equalizing principles in estate tax, gift tax, and other taxes.¹ Others include the Social Security Act’s provisions for retirement pensions, disability insurance, supplemental income, and Medicaid.² The Federal Unemployment Tax Act provides relief to unemployed workers.³ One must also include ERISA, which protects retirement benefits;⁴ the Fair Labor Standards Act⁵ and National Labor Relations Act;⁶ the National Housing Act and Housing and Community Development Act,⁷ and the Civil Rights Acts. In addition, state law provisions, including tort law, also pursue

¹ 26 U.S.C. §1 et seq.

² 42 U.S.C. §§301, 401, 1396 et seq.

³ 26 U.S. §3301 et seq.

⁴ 29 U.S.C. §1051 et seq.

⁵ 29 U.S.C. §§206–207.

⁶ 29 U.S.C. §151 et seq.

⁷ 12 U.S.C. §1701 et seq.; 42 U.S.C. §§5301 et seq.

conduct deemed to be unfair. Finally, the FTC Act, which is not an antitrust law, was intended to authorize the Federal Trade Commission to pursue unfair conduct as something distinctive from antitrust liability.⁸ Many of the federal statutes in this list also contain metrics for treating people differently depending on their wealth, income, employment status, retirement, or some other factor that we associate with fair distribution.

The antitrust statutes contain none of these things, with one exception: the Robinson-Patman Act, which subsidizes smaller businesses at consumers’ expense.⁹ The other antitrust laws use purely economic terms to reach practices that reduce output (“restrain trade”), monopolize markets, or threaten to lessen competition substantially. Antitrust’s two protected classes are those who benefit from unrestrained competition – namely, those on the demand side of the market, including consumers, and those on the supply side, including labor. What these groups have in common is that they benefit from high output, prices that are close to cost, and the removal of any restraints on product quality or innovation.

Antitrust law also protects small firms, provided that their injury is aligned with these goals. For example, it seeks to break down barriers to entry, which protects competitive pricing by permitting new firms to enter markets that are experiencing unreasonably high prices. It also protects competitors from anticompetitive exclusionary practices intended to reduce market output and increase prices. It does not provide any authority, however, for subsidizing them by imposing costs on consumers, labor, or more successful rivals.

As is also clear from the above list, antitrust law’s non-involvement in redistribution is in no way a policy prescription for the entire legal system. These other statutes each work to redistribute wealth or opportunity within their own domain. Further, antitrust policy rarely interferes with them. Instead, antitrust law seeks to accommodate virtually any regulatory requirement that a different statutory framework might create, including expansive regulation of prices, new entry, or even government control of production. The heavily market-driven antitrust rules co-exist with extensive *ex ante* regulation over such things as banking and finance, securities, health, the environment, transportation, and public utilities.¹⁰ Indeed, under such rules as the antitrust “state action” doctrine, antitrust law even accommodates anticompetitive redistribution rules created by lower levels of government, provided that the state properly authorizes and manages them.¹¹ While antitrust law itself is market-centric to the extent of its support for competitive market behaviors, it is in no way a neoliberal prescription for the entire economy.

⁸ See Gilbert Holland Montague, *Unfair Methods of Competition*, 25 Yale L.J. 20, 22, 24, 29 (1915).

⁹ 15 U.S.C. §13. See Herbert Hovenkamp, *Antitrust Policy Design*, Ch. 5 (MIT Press, forthcoming 2027).

¹⁰ On antitrust law’s interaction with federal regulatory statutes, see 1A & 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶¶240–257 (5th ed. 2022).

¹¹ *Id.*, ¶¶221–231.

Antitrust law's requirement of competitive harm is also important as a means of limiting legislative capture by specific interest groups. Overall, it has been more successful at doing that than many other regulatory regimes. Here, the primary example of antitrust gone wrong is the Robinson-Patman Act, where Congress acted at the behest of organized small businesses, mainly wholesale grocers.¹² To be sure, small grocers were being seriously injured by the Depression and also by the migration of retail business from single-store operators to multistore chains. But consumers were hit equally hard by the Depression, and the chains gave them relief. As the FTC itself acknowledged in its Report on the Chain Store Investigation (1934), one large beneficiary of the chain store movement was consumers of "smaller means," for whom "lower prices" was the "most frequently stated reason" for their decisions to shop at the chains.¹³ The Robinson-Patman Act ignored their plight, then as well as now.

Under the historically established retail system, manufacturers sold to various middlemen, who owned warehouses, trucks or wagons, and other facilities. They resold to independent retailers, who were typically single-store operations. The middlemen were being pushed out of the market, however, by firms that owned multiple stores and had integrated vertically into supply and product distribution for themselves. These firms were able to purchase in large quantities that the independents could not match.

The anti-chain campaign had started two decades prior to the Robinson-Patman Act and became a three-pronged attack. The first prong was a series of boycotts organized by independent middlemen against larger stores that were integrating into the supply for themselves. In *Eastern States Lumber* (1914), the Supreme Court held that a boycott organized by independent lumber distributors against larger distributors who had begun to operate their own retail stores was a per se violation of the Sherman Act.¹⁴ A few years later, another court condemned a similar boycott organized by the Arkansas Wholesale Grocers, another association of middlemen, against vertically integrated grocery stores that were developing their own supply networks.¹⁵

The Sherman Act completely undermined this boycott strategy when the courts found the boycotts to be unlawful per se. The anti-chain movement turned to a second strategy, which ultimately failed on Substantive Due Process grounds. These were state laws that attempted to tax the chains to death, or at least disable them from undercutting the independents' prices. In *Liggett v. Lee* (1933), the Supreme Court struck down a Florida chain store tax. The law defined a chain as a firm that operated two or more stores selling the same goods and under the same ownership or management.¹⁶ It then taxed them at progressively higher rates as

¹² 15 U.S.C. §13.

¹³ FTC, Chain Stores: Final Report on the Chain-Store Investigation 66 (FTC 1934).

¹⁴ *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600 (1914).

¹⁵ *Arkansas Wholesale Grocers' Ass'n v. FTC*, 18 F.2d 866 (8th Cir. 1927).

¹⁶ *Liggett Co. v. Lee*, 288 U.S. 517, 520-521 (1933) (noting that "The fee for each store is stepped up in amount as the number constituting the chain reaches certain specified limits.").

they had more stores. The decision condemning the statute provoked a famous dissent by Justice Brandeis.

At that point, the wholesale grocers turned to a third strategy, which was attacks on pricing itself. Congress, completely captured by the politically influential independent grocery industry, went to the national Wholesale Grocers Association. They enlisted Henry B. Teegarden, its General Counsel, to draft the bill that became the Robinson-Patman Act. The House Committee Hearings candidly acknowledged that “Mr. Teegarden wrote this bill.”¹⁷

As the discussion of the boycotts indicates, before the Robinson-Patman Act statute was even enacted, the anti-chain movement provoked tension with the Sherman Act. The boycotts were nothing more than cartels intended to protect a method of doing business that was becoming obsolete. The Supreme Court would later spend decades trying to interpret the Robinson-Patman Act itself so as to minimize inconsistencies with the competition-furthering goals of the Sherman Act. One example is the forty years that it took the Supreme Court to undo the damage done by the *Staley* decision, which interpreted the Robinson-Patman Act to require bidding firms to “investigate or verify” one another’s bids to ensure that they were not so low as to beat, rather than merely “meet,” competitors’ prices.¹⁸ It is difficult to think of a more anticompetitive rule than one requiring sellers bidding on a contract to “verify” one another’s bids before proceeding. The Supreme Court later undermined most of the damage by holding that the Robinson-Patman Act must be interpreted so as to be consistent with the more general goals of the Sherman Act.¹⁹

The framers of Robinson-Patman also acknowledged from the beginning that the statute had nothing to do with monopoly. The original Clayton Act provision condemned price discrimination only when it threatened to lessen competition or create a monopoly. The Robinson-Patman amendments added another form of injury — namely, of an individual trader forced to compete with a lower price given to one of its competitors.²⁰ As the Senate Report stated, the original Clayton Act was “too restrictive, in requiring a showing of general injury to competitive conditions.” By contrast, the revised statute required only “injury to the competitor victimized by the discrimination.”²¹ This was a tort statute disguised as an antitrust law. In a 2026 application of the statute, the Ninth Circuit affirmed a jury verdict condemning different prices with no inquiry into market power, market share, or the impact of the challenged discrimination on market prices.²² Market injury, which has always been the central concern of antitrust, was irrelevant.

¹⁷ Prohibition on Price Discrimination: Hearings on H.R. 8442 Before the H. Comm. on the Judiciary, 74th Cong. 9 (1935).

¹⁸ *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945).

¹⁹ *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), and limited yet again by *Fall City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983).

²⁰ 5 U.S.C. §13.

²¹ S. Rep. No. 1502, 74th Cong., 2d Sess., at 4 (1936).

²² *LA Int’l Corp. v. Prestige Brands Holdings, Inc.*, 168 F.4th 608 (9th Cir. 2026).

Today, chains account for roughly two-thirds of the U.S. grocery business. The impulses that drove consumers to use them had nothing to do with monopoly. The multistore grocery industry is highly competitive, with multiple sellers in most places and among the lowest margins in retailing.²³

While small grocers would certainly be injured by chain store monopoly, the fact is that they are injured even more by chain store competition. A monopoly large grocer in an area would charge a “limit” price, producing fairly high margins for itself, while smaller grocers would operate competitively vis-à-vis one another.²⁴ But that is not what is happening. Instead, the chains are competing against each other, driving their prices down to their own costs. Kroger cares far less about what Harry’s single-store grocery is charging. Its real concern is the prices of Walmart or Costco down the street.

In any event, the Robinson-Patman Act did not do much for small businesses either. It was too focused on price differentials. But as the early boycott cases indicated, pricing differences were not the dominant problem. Rather, it was that the chains were attaining significant cost savings by integrating into distribution and taking advantage of scale. Indeed, the Chain Store Investigation concluded that no more than 10% of the chains’ lower prices could be explained by lower wholesale purchasing prices. Most of it came from the fact that the chains were vertically integrated and operated with very low markups.²⁵

Nevertheless, lower buying prices were the only thing that the Robinson-Patman Act condemned, and the courts necessarily focused on them. In its *Morton Salt* decision, the Supreme Court added an extremely harmful element that was not even mentioned in the statute.²⁶ *Morton*, a large wholesaler of table salt, sold it under a pricing schedule that gave lower prices for larger purchases. In order to get the largest discounts, however, small retailers had to buy much more salt than they could resell. The Court agreed with the FTC that even a quantity discount program that is offered to everyone discriminates if the volume of sales attached to it is so high that it is not “functionally available” to all buyers. This was nothing more than a declaration of war against economies of scale. For example, if a lumberyard gave a discount for a truckload of lumber, a small builder who could not use an entire truckload could bring a Robinson-Patman suit. “Functional availability” — a term that is not in the statute itself — became a shorthand for saying that sellers had a duty to offer even their smallest buyers the same price that larger volume buyers received.

²³ See “Margins by Sector” (US, Jan. 2026), <https://pages.stern.nyu.edu/~adamodar/>. See also *Grocery Retail for All* (Hagstrom Rep. 2024); accord Caitlin E. Caspi et al., *Pricing of Staple Foods at Supermarkets versus Small Food Stores* (NIH, Nat. Lib. Medicine, Aug. 2017).

²⁴ Darius W. Gaskins, Jr., *Dynamic Limit Pricing: Optimal Pricing Under Threat of Entry*, 3 J. Econ. Theory 306 (1971).

²⁵ See Charles F. Phillips, *The FTC’s Chain Stores Investigation: A Note*, 2 J. Marketing 190 (1938). See also FTC, *Chain Stores: Prices and Margins of Chain and Independent Distributors* 12 (1934) (chain margins lower than independent margins).

²⁶ *FTC v. Morton Salt Co.*, 334 U.S. 37, 42–43 (1948).

Morton’s response indicated why the statute rarely aided small buyers. After the decision, both Morton and its competitors changed their policy from one of quantity discount to a minimum order requirement, or MOQ. Under it, they would sell salt only in lots of five tons or more – far more than a typical small retailer could use.²⁷ While the Robinson-Patman Act prohibited price discrimination, or charging two actual buyers different prices, it also expressly permitted refusals to deal. Rather than being unable to obtain a discount, smaller buyers were knocked out of the market altogether.

In other areas, the Supreme Court has also attempted to create redistributive roles for antitrust even when there is no statute to support it. One example is *Albrecht*, where the Supreme Court used the Sherman Act to condemn a newspaper’s attempt to control the subscription prices of its independent carriers.²⁸ Under the practice of the day, newspaper delivery carriers purchased newspapers at wholesale from the publisher and resold them to subscribers. *Albrecht*, a sole entrepreneur, had an exclusive route to deliver the *Herald*, and it charged monopoly prices. When the *Herald* tried to force *Albrecht* to lower its price, he sued and won, with the Supreme Court holding that maximum RPM, or a supplier’s stipulation of the maximum price at which its goods could be resold, was per se unlawful under the Sherman Act.²⁹ The Supreme Court did not realize that even small businesses can be monopolists if they have exclusive territories.³⁰ After *Albrecht*, newspapers wishing to avoid carrier monopoly switched away from a resale system to employee carriers, as nearly every newspaper since has done.³¹ As employees, the carriers have largely been relegated to low wages. The Supreme Court finally overruled its *Albrecht* decision in 1997 and now condemns maximum resale price maintenance only when it threatens to restrain trade.³² Since then, no instances of maximum RPM have been condemned.

There are other examples, and also a message. For instance, the *Brown Shoe* merger case ignored a powerful and consistent economic tradition of viewing high industry concentration as a producer of stagnant markets with high prices and lower quality. Instead, it saw the merger law’s concern as protection of smaller, higher-cost competitors.³³ Fortunately, the Supreme Court itself fixed this problem,³⁴ eventually stating that it would be “inimical” to antitrust goals to

²⁷ John L. Peterman, *The Salt Producers’ Discount Practices Before and After the Robinson-Patman Act and the FTC’s Challenge to Them: The Morton and International Salt Cases* 135 (FTC working paper, Sep. 1995).

²⁸ *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

²⁹ See Roger D. Blair & John E. Lopatka, *Albrecht Rule after Khan: Death Becomes Her*, 74 *Notre Dame L. Rev.* 123 (1998).

³⁰ For analysis, including the rationale for monopolies in delivery, see Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 *Iowa L. Rev.* 451 (1984).

³¹ See Note, *The Independent Contractor Status of Newspaper Carriers: Some Antitrust Questions*, 2 *Val. Univ. L. Rev.* 157 (1967).

³² *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

³³ *Brown Shoe v. United States*, 370 U.S. 294, 314 (1962).

³⁴ See Herbert Hovenkamp, *Did the Supreme Court Fix Brown Shoe?* (Stigler Center, Promarket, May 12, 2023).

condemn mergers because they preserved firms that otherwise would have failed³⁵ or enabled a firm to reduce its prices, although not to predatory levels, putting competitive pressure on a rival.³⁶

The message is simple: the antitrust laws provide no authorization and no metric for redistributing wealth or business opportunity based on some idea of fairness. The concept itself is arbitrary. What is “fair” to competitors will be unfair to consumers, and vice versa. The statutes provide no means of distinguishing among them, and attempting to do so would forever subject antitrust policy to interest group politics.

Herbert Hovenkamp

³⁵ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

³⁶ *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).