

Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform

Before the Senate Judiciary Committee
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Roger P. Alford
Professor of Law, Notre Dame Law School
Former Deputy Assistant Attorney General, U.S. Department of Justice

January 28, 2025

In response to a letter dated January 22, 2025, from Senator Charles E. Grassley (R-IA) following my Senate Testimony¹ at a hearing held on December 17, 2024 entitled “Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform,”² I am writing to provide answers in response to questions for the record from Committee members of the Senate Judiciary Committee.

Question from Senator Thom Tillis

The Robinson-Patman Act made a comeback at the FTC for the first time in 25 years in a lawsuit involving discounts to small wine and liquor stores. How should we be thinking about Robinson-Patman enforcement? What sorts of cases should this tool be used in by antitrust enforcers?

Answer from Professor Roger Alford

In my written testimony, I noted one can expect that the second Trump Administration will recognize the fallacy that markets self-correct.³ They will reject the anachronistic Chicago-school notion that we should err toward underenforcement because “judicial errors that tolerate baleful practices are self-correcting while erroneous condemnations are not.”⁴ I further noted that we should expect that the second Trump Administration will vigorously enforce the antitrust laws and reject the bias accepted in previous Republican Administrations toward underenforcement.⁵ A faithful analysis of the text and history of the antitrust laws must be skeptical of Robert Bork’s

¹ Roger Alford, *Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform*, (Dec. 17, 2024) <https://www.judiciary.senate.gov/download/2024-12-17-pm-testimony-alford>.

² Continuing A Bipartisan Path Forward for Antitrust Enforcement and Reform, (Dec. 17, 2024), <https://www.judiciary.senate.gov/committee-activity/hearings/continuing-a-bipartisan-path-forward-for-antitrust-enforcement-and-reform>.

³ Roger Alford, *Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform*, 3-4 (Dec. 17, 2024) <https://www.judiciary.senate.gov/download/2024-12-17-pm-testimony-alford>.

⁴ Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 3 (1984). See Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 Antitrust L.J. 1 (2015).

⁵ Roger Alford, *Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform*, 4 (Dec. 17, 2024) <https://www.judiciary.senate.gov/download/2024-12-17-pm-testimony-alford>.

agenda to promote a conservative consensus favoring underenforcement.⁶ This is because Bork was obsessed with intellectual respectability rather than fidelity to the will of Congress.⁷

There is no greater example of underenforcement of antitrust laws than the decades-long absence of government action enforcing the Robinson-Patman Act. In the recent case of *In re Southern Glazer's Wine and Spirits*, the FTC majority emphasized that “the Constitution does not provide for an economic veto over democratic law. The Supreme Court explained to a defendant who made that very argument that it was ‘not in a position to review the economic wisdom of Congress[.]’ Neither are we.”⁸ In dissent, FTC Chair Andrew Ferguson stated the following: “For decades, a bipartisan, anti-enforcement consensus has prevailed among federal antitrust enforcers, the bar, and the academy.... The Executive Branch should not categorically and publicly refuse to enforce laws that Congress has passed and the President has signed. The separation of powers forbids the suspension of the laws merely because of a policy disagreement with that law.”⁹ This sentiment is echoed by Commissioner Melissa Holyoak in the same case, where she stated, despite a strong dissent on the merits of bringing that particular case, that “I take seriously that *Congress* enacted the Robinson-Patman Act. And as law enforcers, the Commission must faithfully execute the law.”¹⁰ And FTC Commissioner-nominee Mark Meador noted that with respect to the Robinson-Patman Act that “conservatives and others who believe in our constitutional order and the rule of law should be deeply troubled by the suggestion that federal law enforcers can decide not to enforce a law simply because they disagree with the policy or outcomes it advances.”¹¹ Thus, in the current antitrust environment, there is overwhelming bipartisan consensus that the government should enforce the Robinson-Patman Act.¹² The only open question today is when the government should bring such cases.

This commitment to enforce the Robinson-Patman Act is a departure from the lax government enforcement approach of past decades. As FTC Chair Andrew Ferguson noted in the recent case of *In re Non-Alcoholic Beverages Price Discrimination Investigation*, “I reject[] the prevailing consensus that the government should never enforce the Act. It is a duly-enacted law that Congress has repeatedly declined to repeal. Whatever policy misgivings I may have with its underling policy, the Constitution forbids me as an officers of the United States from treating a valid law as a nullity.”¹³ In other words, enforcing the Robinson-Patman Act ensures that antitrust agencies fulfill their mandate rather than substituting their judgment for that of Congress. Moreover, if the government never enforces the Robinson-Patman Act, then businesses tempted

⁶ See, e.g., Herbert Hovenkamp, *The Antitrust Text*, 99 *Indiana L.J.* 1063 (2023); Daniel A. Crane, *Antitrust Antitextualism*, 96 *Notre Dame L. Rev.* 1205 (2021); Barack Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 *Antitrust L.J.* 881, 891-895 (2014); George Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 *J.L. & ECON.* S1, S12 (2014); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 *Mich. L. Rev.* 1, 22 (1989).

⁷ See, ROBERT BORK, *ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, 418 (1978) (“The thesis of this book ... has been that modern antitrust has so decayed that the policy is no longer intellectually respectable. Some of it is not respectable as law; more of it is not respectable as economics; and ... a great deal of antitrust is not even respectable as politics.”).

⁸ Statement of Comm'r Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, *In re Southern Glazer's Wine and Spirits*, Matter No. 2110155, at 12 (Dec. 12, 2024).

⁹ Dissenting Statement of Comm'r Andrew N. Ferguson, *In re Southern Glazer's Wine and Spirits*, Matter No. 2110155, at 1 (Dec. 12, 2024).

¹⁰ Dissenting Statement of Comm'r Melissa Holyoak, *In re Southern Glazer's Wine and Spirits*, Matter No. 2110155, at ii (Dec. 12, 2024).

¹¹ Mark Meador, *Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers*, (July 9, 2024), <https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers>.

¹² Dissenting Statement of Commissioner Andrew N. Ferguson, *In re Non-Alcoholic Beverages Price Discrimination*, Matter No. 2210158, at 3 (Jan. 17, 2025) (*Southern Glazer* established that there “was bipartisan agreement among the Commissioners that the government cannot simply ignore the Robinson-Patman Act, and that enforcement may be appropriate under certain circumstances.”).

¹³ Dissenting Statement of Commissioner Andrew N. Ferguson, *In re Non-Alcoholic Beverages Price Discrimination*, Matter No. 2210158 (Jan. 17, 2025).

to engage in price discrimination have little incentive to act in a lawful manner. For example, in the absence of Robinson-Patman Act enforcement since the 1980s, a market may tilt to favor the largest chain stores that wield significant market power over their suppliers, who then may offset their losses to dominant buyers by raising prices for smaller retailers, creating a so-called waterbed effect.¹⁴ “Preventing discrimination in favor of purchasers with buyer market power,” FTC Chair Ferguson emphasized, “lies at the heartland of the policy embodied by ... the Act.”¹⁵

One might say that with respect to the Robinson-Patman Act we are today where we were seven years ago with respect to government challenges to vertical mergers and no-poach agreements. Just as the government’s challenges to no-poach agreements and vertical mergers were controversial then, so too are the recent government challenges alleging unlawful price discrimination controversial now. But by bringing such cases, parties inclined to violate the antitrust laws are put on notice that the era of government underenforcement is over. As the majority and dissenting statements of the FTC Commissioners in the recent cases make clear, the precise contours of the Robinson-Patman Act violations remains uncertain.¹⁶ The decisions that emerge from those cases will clarify the scope of the government’s enforcement authority and encourage further government enforcement actions consistent with such clarifications.

As mentioned in my written testimony, the Trump Administration is embracing common sense economic populism.¹⁷ That means that the Republican Party is emerging as a party of the working class that is moving away from traditional orthodoxies that reflexively support big business and toward policies and practices that support average Americans. Populist antitrust enforcement in the second Trump Administration will focus on anticompetitive conduct that inflicts the greatest harm on average consumers. It should use every tool at its disposal to protect consumers from unlawful anticompetitive behavior. This includes vigorously enforcing antitrust laws that will help lower the price of food and other basic commodities. Given the Trump Administration’s commitment to economic populism that provides economic relief to working class Americans, the DOJ and the FTC should enforce the antitrust laws—including the Robinson-Patman Act—consistent with the Administration’s commitments and priorities.¹⁸ Government enforcers should reinvigorate Robinson-Patman Act enforcement in order to enhance consumer welfare by fostering price competition in the retail market. Robust enforcement in such instances can level the playing field, preventing dominant retailers from using their leverage to distort market dynamics.

¹⁴ See, e.g., Asil, Aslihan, *Can Robinson-Patman Enforcement Be Pro-Consumer?* (May 19, 2024); Matthew Grennan, *Price Discrimination and Bargaining: Empirical Evidence from Medical Devices*, 103 AM. ECON. REV. 145 (2013); Roman Inderst & Tommaso M. Valletti, *Buyer Power and the “Waterbed Effect”*, 59 J. INDUS. ECON. 1 (2011); Sofia Berto Villas-Boas, *An Empirical Investigation of the Welfare Effects of Banning Wholesale Price Discrimination*, 40 RAND J. ECON. 20 (2009); Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2 WIS. L. REV. 332 (2008); Paul W. Dobson & Michael Waterson, *Countervailing Power and Consumer Prices*, 107 ECON. J. 418 (1997); Michael Katz, *The Welfare Effects of Third-Degree Price Discrimination*, 77 AM. ECON. REV. 154 (1987).

¹⁵ Dissenting Statement of Comm’r Andrew N. Ferguson, *In re Southern Glazer’s Wine and Spirits*, Matter No. 2110155, at 27- (Dec. 12, 2024); See also Dissenting Statement of Commissioner Andrew N. Ferguson, *In re Non-Alcoholic Beverages Price Discrimination*, Matter No. 2210158, at 5 (Jan. 17, 2025) (“I remain of the view that the Commission should enforce the Act where it has solid evidence of a violation, and the beneficiaries of the alleged discrimination enjoy market power sufficient to threaten competition in the relevant market.”).

¹⁶ For the most recent Supreme Court pronouncements on the Robinson Patman Act, see, e.g., *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (addressing primary line injury); *Volvo Trucks North Amer., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (addressing secondary line injury).

¹⁷ Roger Alford, *Continuing a Bipartisan Path Forward for Antitrust Enforcement and Reform*, 2-4 (Dec. 17, 2024) <https://www.judiciary.senate.gov/download/2024-12-17-pm-testimony-alford>.

¹⁸ FTC Chair Andrew Ferguson stated that “The Constitution requires that all federal employees, even the heads of so-called independent agencies, answer to the President.” Matt Stoller, *Monopoly Round-Up: Trump Lays Out His Antitrust Agenda*, (Dec. 8, 2024), <https://www.thebignewsletter.com/p/monopoly-round-up-trump-lays-out>.