

NEW BRANDEIS'S NEW BATTLEGROUND

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The neo-Brandeisian movement swept through antitrust like wildfire, hurtling its adherents into prominent Biden Administration posts. But it threatens to be a flash in the pan, for the looming election makes all those new policy priorities uncertain: Whoever wins, it will not be Joe Biden, and the neo-Brandeisians' fate is up in the air. In short, the movement could use some fresh ideas. One place to look might be the last big antitrust revolution, when the Chicago school executed a clean law-and-economics sweep of the field in the 1970s and 1980s.

The Chicagoans understood the importance of antitrust standing—and today's antitrust reformers should too. This obscure procedural backwater determines who benefits from the antitrust laws, how much antitrust enforcement we get, and who controls antitrust litigation. And the Chicago experience goes to show that it is neither immutable nor apolitical. To the contrary: Small, manageable changes in antitrust standing law had huge implications for the law of competition. Reversing course from the Chicago status quo (and even pushing further) could give neo-Brandeisian antitrust a similar boost.

Policy bona fides aside, antitrust standing is politically and doctrinally poised for its time in the spotlight. A broader view of antitrust standing enjoys bipartisan support, even from populist figures on the right, and would thrive in today's text-centric legal environment. Best of all, any changes would endure across administrations—no need to stress about the election. Antitrust standing is the path forward.

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INTRODUCTION

Antitrust is making headlines for the first time in forever. The Biden Administration put together an ambitious competition agenda—and converted it into an impressive resume of executive action. The Federal Trade Commission (FTC) has attempted to ban noncompete agreements

as an unfair method of competition.¹ New merger guidelines hit the books, the first since 2010.² And a top bureaucrat within mainstream antitrust dramatically resigned from her post as FTC Commissioner.³ Within the executive branch, at least, the new “neo-Brandeisian” school of antitrust racked up wins. Two of its leading scholars, Lina Khan and Tim Wu, took top posts in the Administration.⁴ Their unorthodox views—questioning core, long-settled assumptions about antitrust law—motivated the Biden Administration’s big steps.⁵

But the movement may soon run out of steam. Wu, for one, has left the government.⁶ Back in academia, he has warned against “a kind of premature declaration of victory” among his allies.⁷ It is almost inevitable, in his words, that an “Empire Strikes Back situation” will occur.⁸ The antitrust establishment will rise again; future administrations will have different priorities. There are two ways to keep the neo-Brandeisians’ new hope alive: “We can either work through legislative change or win some cases, ideally both. But if neither happen, then we’re in trouble.”⁹

Legislative change is not forthcoming. True, antitrust laws aimed at Big Tech have earned some bipartisan buzz. One bill, cosponsored by eight Democrats and six Republicans, would have limited self-

1. See Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912); Press Release, FTC, FTC Announces Rule Banning Noncompetes, (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [<https://perma.cc/C2HA-L3AY>]. Pending litigation does, however, loom over the new rules. See Andrea Hsu, *Federal Judge Throws Out U.S. Ban on Noncompetes*, NPR (Aug. 21, 2024, 12:31 PM), <https://www.npr.org/2024/08/21/g-s1-18376/federal-judge-tosses-ftc-noncompetes-ban> [<https://perma.cc/7VJN-V7XJ>].

2. U.S. DEP’T OF JUST. & FED. TRADE COMM’N, MERGER GUIDELINES (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf [<https://perma.cc/J7KR-VC GT>].

3. Cecilia Kang, *Republican F.T.C. Commissioner Says She Plans To Resign*, N.Y. TIMES (Feb. 14, 2023), <https://www.nytimes.com/2023/02/14/technology/ftc-commissioner-resigns-christine-wilson.html>.

4. See John Cassidy, *The Biden Antitrust Revolution*, NEW YORKER (July 12, 2021), <https://www.newyorker.com/news/our-columnists/the-biden-antitrust-revolution>.

5. *Id.*

6. David McCabe, *An Architect of Biden’s Antitrust Push Is Leaving the White House*, N.Y. TIMES (Dec. 30, 2022), <https://www.nytimes.com/2022/12/30/technology/tim-wu-leaves-white-house.html>.

7. Josh Sisco, *Biden’s Former Antitrust Guru Issues a Warning*, POLITICO (Mar. 7, 2023, 11:00 AM), <https://www.politico.com/news/2023/03/07/wu-doj-antitrust-ftc-00085760>.

8. *Id.*

9. *Id.*

preferencing behavior from tech companies.¹⁰ But it never got a floor vote.¹¹ Other bills died in the Senate; observers blamed the Democrats' Majority Leader Chuck Schumer for their fate.¹² For all the legislative energy around antitrust, all the reformers got were provisions increasing funding for federal antitrust enforcement¹³—no new substantive antitrust law.

That brings up the second prong of Wu's plan: winning cases. Things have gone quite well, actually, on this front. The FTC and the Department of Justice have brought ambitious cases with mixed results—though the recent trend is unmistakably positive. To be sure, the Government has taken some losses. An aggressive data-control argument in a healthcare merger challenge went nowhere.¹⁴ A novel theory focusing on a single government consulting contract met a similar fate.¹⁵ And more recently, a pair of high-profile tech mergers cleared despite the Administration's efforts—Meta and Microsoft acquired Within and Activision, respectively.¹⁶

Yet the fullness of time has proven the Biden approach can win cases. One example leaps to mind, though others exist. The most conspicuous feather in the government's cap came just this summer, with a district judge concluding—at length—that Google's search product had not just enjoyed a monopoly but exploited it so thoroughly as to break the antitrust laws.¹⁷

Antitrust progressives in the Administration, in short, sit in the catbird's seat. Even so, privately ordered solutions enjoy real advantages over the present government-centered approach. As Wu points out,

10. American Innovation & Choice Online Act, S. 2992, 117th Cong. § 3 (2022).

11. Eric Cortellessa, *Schumer Kills Bills Big Tech Feared Most, but Boosts Budgets of Agencies Targeting Them*, TIME (Dec. 22, 2022, 3:42 PM), <https://time.com/6243256/schumer-kills-antitrust-big-tech-bills/> [https://perma.cc/BY9F-EMTL].

12. *Id.*

13. *Id.*

14. *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 123 (D.D.C. 2022).

15. *United States v. Booz Allen Hamilton, Inc.*, No. CCB-22-1603, 2022 WL 9976035, at *14 (D. Md. Oct. 17, 2022) (denying the Government's motion for preliminary injunction).

16. Lauren Feiner, *Meta Acquisition of Within Reportedly Approved by Court in Loss for FTC*, CNBC NEWS (Feb. 1, 2023, 2:43 PM), <https://www.cnbc.com/2023/02/01/ftc-loses-attempt-to-block-meta-acquisition-of-within.html> [https://perma.cc/HP3T-HBTU]; Tom Warren, *Microsoft Completes Activision Blizzard Acquisition, Call of Duty Now Part of Xbox*, VERGE (Oct. 13, 2023, 7:46 AM), <https://www.theverge.com/2023/10/13/23791235/microsoft-activision-blizzard-acquisition-complete-finalized>.

17. *United States v. Google LLC*, No. 20-CV-3010, 2024 WL 3647498 (D.D.C. Aug. 5, 2024).

antitrust priorities shift between administrations.¹⁸ Indeed, some antitrust hawks have raised questions about Democratic nominee Kamala Harris's attitudes toward rigorous enforcement.¹⁹ To create a durable supply of antitrust enforcement, neo-Brandeisians must (counter-intuitively, maybe) look to private action. Private antitrust litigation is huge: "[P]rivate enforcement continues to far outstrip public enforcement, by a ratio of over 10:1."²⁰ Treble damages provisions give plaintiffs a strong incentive to be more vigilant, collectively, than government agencies could hope to be. The pull to separate antitrust enforcement from political will is perhaps even stronger during this election year.

One problem, for those who favor more enforcement, is antitrust standing. Really a species of "prudential standing," the doctrine constrains private antitrust enforcement.²¹ Only certain plaintiffs can recover for antitrust violations, and only for certain kinds of damages. There is no textual warrant for these limitations. Instead, the relevant antitrust statutes use broad language, offering up treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."²² Yet during the late 1970s and early 1980s, a series of Supreme Court cases birthed a big hindrance on private antitrust litigation.²³ Today we call it antitrust standing.

This Article suggests antitrust standing as neo-Brandeisians' next battleground. It was contested territory in antitrust's last ideological battle. Its contours reflect the values of that skirmish's winner, the Chicago school of economics. Antitrust standing serves three core Chicago values: a focus on consumer welfare, a fear of overdeterrence, and a preference for judges and governmental officials—not juries—to calibrate antitrust enforcement. Neo-Brandeisians hew to none of these premises. So, taken to their natural end, their priorities suggest they should make an issue of antitrust standing, just as the Chicagoans did in that movement's early days.

18. See Sisco, *supra* note 7.

19. See Matt Stoller, Opinion, *It's Unclear What Kamala Harris Thinks About Corporate Power. But the Signs Are Worrisome.*, N.Y. TIMES (Aug. 7, 2024), <https://www.nytimes.com/2024/08/07/opinion/kamala-harris-google-antitrust.html>.

20. Daniel A. Crane, *Toward a Realistic Comparative Assessment of Private Antitrust Enforcement*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 341, 343 (Damien Gerard & Ioannis Lianos eds., 2019).

21. See Paul F. Brzyski, Note, *Collateral Damage: Private Merger Lawsuits in the Wake of Section 2's Contraction*, 68 DUKE L.J. ONLINE 119, 122 (2019).

22. 15 U.S.C. § 15(a).

23. See *infra* Section II.B.

And this argument is novel. True, neo-Brandeisians and their allies have shown some interest—in academia, think tanks,²⁴ and government²⁵—in private antitrust litigation. One blog post²⁶ and an amicus brief²⁷ quickly flag similar points about antitrust standing. But so far, no one has offered a scholarly treatment of antitrust standing from the neo-Brandeisian perspective. This Article fills that gap.

This Article proceeds in four parts. Part I explains the neo-Brandeisian view of antitrust by contrasting it with the Chicago school, whose ideas pervade mainstream antitrust. Part II explains the history of antitrust standing, then summarizes today’s doctrine. Part III explains how today’s antitrust standing law aligns with Chicagoans’ values and is antithetical to those held by neo-Brandeisians. Part IV explains why creating durable change to antitrust enforcement requires addressing antitrust standing, then suggests a possible neo-Brandeisian approach to antitrust standing by analogy to the Supreme Court’s updated framework for prudential standing.

I. TODAY’S ANTITRUST BATTLEFIELDS

No one doubts that there are two big factions in antitrust today.²⁸ This paper accepts that dichotomy as far as it goes. There is the Chicago school: long-established, economics-driven, technocratic, hegemonic.²⁹

24. The American Antitrust Institute has been especially stalwart here, bringing together the key players in the space. See *17th AAI Annual Private Antitrust Enforcement Conference*, AM. ANTITRUST INST., <https://www.antitrustinstitute.org/event/pec2023-2/> [<https://perma.cc/S5BA-5HCL>].

25. SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE COMM. ON THE JUDICIARY OF THE H.R., 117TH CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS* 342 (Comm. Print 2022) (recommending that Congress consider “[e]liminating court-created standards for antitrust injury and antitrust standing” (citations omitted)).

26. Sandeep Vaheesan, *Killing Antitrust Softly (Through Procedure)*, LPE PROJECT (June 11, 2019), <https://lpeproject.org/blog/killing-antitrust-softly-through-procedure/> [<https://perma.cc/E99R-TU2A>].

27. Brief of Open Markets Institute in Support of Petition for Writ of Certiorari, *City of Oakland v. Oakland Raiders*, 20 F.4th 441 (9th Cir. 2021), *cert. denied*, 143 S. Ct. 84 (2022) (No. 21-1243) [hereinafter Brief of Open Markets Institute].

28. This elides a little nuance, but people really are conceptualizing antitrust in this kind of Manichean good-evil frame. There are the post-Chicagoans, to be sure, but as Lina Khan herself put it: “Post-Chicago academics contested the Chicago School primarily by refining and qualifying the conditions under which Chicago’s theories held.” Lina Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1669 (2020) (book review).

29. Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School of Antitrust: Who is Right in Light of Modern Economics?*, 30 GEO. MASON L. REV. 935, 939–44 (2023).

And then there are the neo-Brandeisians: a ragtag gang whose simultaneously new and old brand of antitrust has earned the derisive label “hipster antitrust.”³⁰

This Part will go further, highlighting three specific rifts in antitrust. The neo-Brandeis school has countless specific disagreements with the old guard. But in 2019, several of its adherents boiled things down to twenty-three theses in a document now known as the Utah Statement.³¹ Many are very granular—abstruse, even. Consider one Utah Tenet: “The *LinkLine* doctrine holding that price squeeze allegations fail as standalone Section 2 claims should be overruled.”³² Yet others are general, sweeping, and capture core neo-Brandeisian values. These will help organize a discussion of today’s antitrust battlegrounds.

The three rifts in antitrust—today’s battlegrounds—each come down to a core question. The answers set the stage for tomorrow’s battlegrounds: private enforcement in general and antitrust standing in particular.

1. Whose interests matter?
2. Where does antitrust go wrong?
3. Who decides and how?

A. Whose Interests Matter?

The most remarked-on distinction between the Chicago school and its neo-Brandeisian rivals is their attitude toward the so-called consumer welfare standard: one for, one against.³³ The truth is more nuanced. Chicagoans seek to maximize the size of the pie through antitrust policy and solve for distribution by pulling other policy levers. Neo-Brandeisians reject efficiency as the sole criterion for antitrust, preferring to consider a host of interests. The question, then, isn’t just whose interests matter—it’s whose interests matter *for antitrust*.

30. Andrea O’Sullivan, *What Is ‘Hipster Antitrust?’: Why the Newest Antitrust Thinking Isn’t Actually New*, MERCATUS CTR. (Oct. 18, 2018), <https://www.mercatus.org/economic-insights/expert-commentary/what-hipster-antitrust>; see also Charles Sauer, *Hipster Neo-Brandeisianism Is Sadly Going Global*, REALCLEAR MKTS. (Apr. 11, 2024), https://www.realclearmarkets.com/articles/2024/04/11/hipster_neo-brandeisianism_is_sadly_going_global_1024162.html [<https://perma.cc/JG9C-B8ES>].

31. Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, MEDIUM: ONE ZERO (Nov. 18, 2019), <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7> [hereinafter Wu, *Utah Statement*].

32. *Id.*

33. See, e.g., Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531 (2019); Herbert Hovenkamp, *Is Antitrust’s Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65 (2019).

1. Chicago: Consumers

Congress designed the Sherman Act as a “consumer welfare prescription.”

—*Reiter v. Sonotone Corp.*³⁴

When Robert Bork coined this pithy line in his pathbreaking work, *The Antitrust Paradox*, he revolutionized antitrust.³⁵ The Supreme Court has enthusiastically adopted the mantra.³⁶ What’s more, its consumer welfare logic has long undergirded enforcement standards in the federal government.³⁷ These days, consumer welfare is conventional wisdom. But what does the quote mean? And why does it matter?

It may be best to start by backing up a little. First, we must understand why something like the consumer welfare standard is necessary. The text of the antitrust laws is wildly underdetermined. Put another way, judges must add *something* to the antitrust laws’ text to decide cases. Consider the full text of the Sherman Act, section 2, the statutory provision that criminalizes monopolization:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.³⁸

The text leaves plenty of questions open. What does it mean to monopolize? Is that different from just holding a monopoly? What *is* a monopoly, anyway? The statute is not forthcoming with answers.

34. 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978)).

35. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (“Of all Robert Bork’s many important contributions to antitrust law, none was more significant than his identification of economic efficiency, disguised as consumer welfare, as the sole normative objective of U.S. antitrust law.”).

36. *Reiter*, 442 U.S. at 343; see also *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

37. See Christine S. Wilson, Comm’r, U.S. Fed. Trade Comm’n, *Welfare Standards Underlying Antitrust Enforcement: What You Measure Is What You Get*, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 1 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [<https://perma.cc/3TPX-G9QW>] (referring to consumer welfare as “the yardstick used to evaluate mergers and competitive conduct for more than 40 years”).

38. Sherman Antitrust Act, 15 U.S.C. § 2.

Antitrust practitioners must look elsewhere. And that's true throughout antitrust law.

The Chicago school looks for these answers in economics.³⁹ Judge Richard Posner, then a professor at Chicago and a leading antitrust thinker, recited as “[t]he basic tenet of the Chicago school, that problems of competition and monopoly should be analyzed using the tools of general economic theory.”⁴⁰ For Bork, the economics-driven consumer welfare model was a way of avoiding legislating from the bench. Courts could best understand the antitrust statutes by “ascribing to Congress a consumer welfare goal in each of the antitrust statutes.”⁴¹

Bear with me now. The best way to understand the content of the consumer welfare standard—like most economic concepts—is with a graph. That's how Bork explained it in the 1970s, and it's how I'll explain it today. If antitrust is about providing consumers with utility, and “[b]usiness efficiency necessarily benefits consumers by lowering the costs of goods and services,”⁴² as Bork contended, then efficiency is the key. Efficiency means math. The same graph that Bork used is below. For clarity, the horizontal X-axis represents the output in the market, while the vertical Y-axis represents the price of the relevant good.

39. At the very beginning Bork dug into legislative history, so things *really* started there, but he concluded Congress's goal was to generate the same allocative efficiencies on which the economics-driven Chicago school set its sights. *See Khan, supra* note 28, at 1668 & n.52 (“Only [consumer welfare as a goal] permits courts to behave responsibly and to achieve the virtues appropriate to law.” (quoting BORK, *supra* note 34, at 89)).

40. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933–34 (1979).

41. BORK, *supra* note 34, at 84.

42. *Id.* at 7.

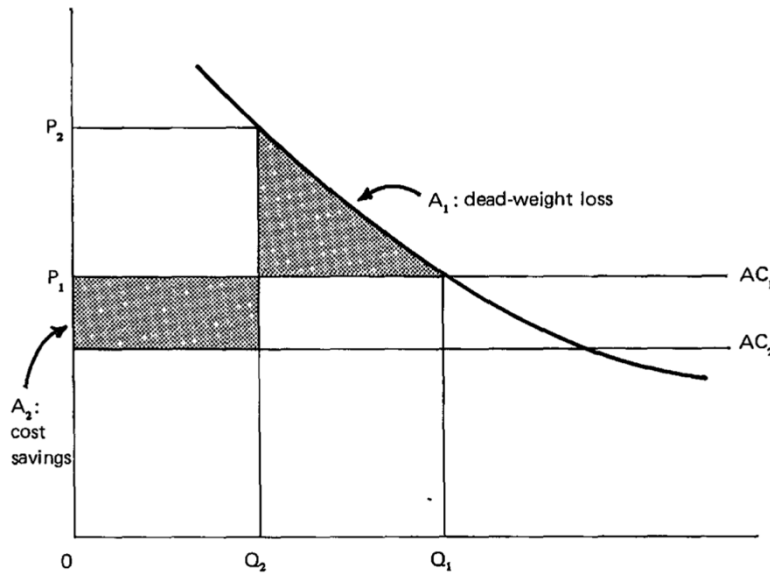


Figure 1. Graph of the Consumer Welfare Model⁴³

Translating that into plain English: suppose a pair of producers are in the business of creating widgets. The market allows them to sell widgets to all consumers at a price P_1 . Under competitive conditions, they'll make as many of those widgets as they can profitably sell for P_1 . That "output" number is Q_1 .

Now suppose those producers decide to work together. They agree to offer their widgets for sale only at a higher price, P_2 . But because fewer buyers will pay the higher price, they can only sell a smaller number: Q_2 .

This will have three interesting effects on the widget economy, say the Chicagoans:

1. All the people who would buy widgets for P_1 , but not the higher P_2 , go from getting widgets to *not* getting widgets. This is bad for them! All the value they would have gotten from those widgets over and above their cost of purchase is lost to the world. We chalk that up as a *deadweight loss* and label it A_1 .

43. *Id.* at 107 fig.4.

2. The average cost of producing a widget for these producers will drop.⁴⁴ The producers will save some money on every widget produced. This time, we chalk that up as a *cost savings* and label it A₂.
3. The consumers who continue to buy widgets at P₂ pay more for their widgets, because it's still worth it to them at the higher price. In economic terms, they previously enjoyed a *consumer surplus*. Much of that surplus now goes to the cooperating firms; this is the rectangle right above A₂.

It is finally time for the consumer welfare standard, which says (in essence) that if the *cost savings* from adopting a given competitive practice exceed the *deadweight loss*, the practice does not harm consumer welfare and should be legal.⁴⁵ If the opposite is true, the practice harms consumer welfare and may be held illegal if it fits one of the substantive antitrust laws.⁴⁶ Note for later that Effect 3—the transfer from consumers to producers—has no bearing on the inquiry. This is so even though the transfer appears to boost producer welfare at the expense of consumers.

2. Neo-Brandeis: “Workers, Producers, Entrepreneurs, and Citizens”⁴⁷

It is not true that “Congress designed the Sherman Act as a ‘consumer welfare prescription.’”

—Utah Statement Tenet B1⁴⁸

Neo-Brandeisians reject the notion that antitrust can be reduced to a graph. The Chicago model boasts simplicity and elegance.⁴⁹ Accept its

44. The reasons for this are complicated, but it is taken as a given for most markets. See William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 941 (1981) (“[I]n most markets marginal cost will increase as output increases.”).

45. BORK, *supra* note 34, at 108.

46. *Id.*

47. Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737 (2017).

48. Wu, *Utah Statement*, *supra* note 31 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

49. See Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybníček, Kristian Stout & Joshua D. Wright, *Consumer Welfare and the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L. REV. 861, 866 (2020) (“[In the Chicago era,] antitrust evolved an elegant framework that simplified the core conception of what constitutes harm to competition into a straightforward question: does the conduct at issue harm consumers?”); see also Christopher R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917, 918 (2014) (explaining that Bork’s—and thus Chicago’s—explanation of antitrust was “influential because [their] explanations of complex economic phenomena were so simple”).

maxims, follow the math, maximize consumer welfare, and antitrust law is almost algorithmic. Today's antitrust progressives spurn that simplicity, insisting that antitrust serves a host of goals. There is no one metric to optimize, no formula for carrying out antitrust policy. Instead, they trace their intellectual bloodline back to Senator Sherman himself, who proclaimed in 1890 that his namesake law—the Sherman Act, the core of antitrust—would be “a bill of rights, a charter of liberty.”⁵⁰ True, the Constitution's Bill of Rights is a kind of “citizen welfare prescription.” But it is more than that. It embodies specific values, protecting the citizen as speaker and worshipper, as bearer of arms, civil and criminal defendant, and as prisoner (among other occupations). The antitrust laws, say the neo-Brandeisians, likewise protect Americans wearing all kinds of hats.

Legislative history is the neo-Brandeisians' trusty weapon. Take Lina Khan, who heads up the FTC at the time of publication.⁵¹ Her famed neo-Brandeisian manifesto, *Amazon's Antitrust Paradox*, discusses the history of the Sherman Act at length, concluding that it “makes clear that Congress passed antitrust laws to safeguard against excessive concentrations of economic power.”⁵² But long before Khan's student note became the rage of antitrust, scholars had closely parsed the legislative history to challenge the Chicago school's focus on consumer welfare.⁵³ This produced two core critiques.

The first critique is this: Antitrust's purpose goes beyond consumer welfare. Khan is on point here, too, chiding the Chicago school for “glossing over questions about the competitive process in favor of narrow calculations.”⁵⁴ Rather than focusing on any one static goal, she says, antitrust should look to the structure of a market and its dynamics of competition—after all, “the best guardian of competition is a competitive process.”⁵⁵ Of course, other Chicago critics also espouse this view. Tim

50. 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman).

51. *Commissioners*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/commissioners-staff/commissioners> [<https://perma.cc/X4FA-TZFQ>].

52. Khan, *supra* note 47, at 739–43.

53. See, e.g., John J. Flynn, *The Reagan Administration's Antitrust Policy, “Original Intent” and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2357–60 (2013); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82–106 (1982) [hereinafter Lande, *Wealth Transfers*]; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 559–62 (2012); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24 (1989).

54. Khan, *supra* note 47, at 744–45.

55. *Id.* at 745.

Wu has argued for a “protection of competition standard,” for one.⁵⁶ Rebutting arguments that rejecting the consumer welfare standard would plunge antitrust into uncertainty, Wu argues for a different question: Is the alleged anticompetitive practice “merely part of the competitive process, or is it meant to ‘suppress or even destroy competition?’”⁵⁷ Still other critics have maintained that “antitrust has always been and will always be about the preservation of competition.”⁵⁸ And they are in good company. Competitive process was the touchstone of Supreme Court antitrust jurisprudence before and even during Chicago’s rise: “Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.”⁵⁹

More concretely, the neo-Brandeisians identify several specific constituencies and values that a revived antitrust would serve—hence Khan’s reference to Congress’s intent that the antitrust laws serve “our interests as workers, producers, entrepreneurs, and citizens.”⁶⁰

Workers and producers are especially salient to neo-Brandeisians.⁶¹ Some contemporary antitrust scholars—including Eric Posner, Judge Posner’s son—worry over the rise of labor monopsony power.⁶² Put simply, they contend there are too few purchasers of labor in too many markets. These monopsony harms may be cognizable under the existing consumer welfare standard. But shifting to “a laser-like focus on consumer welfare . . . naturally favored product market analysis,”⁶³ and

56. Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition Standard” in Practice*, CPI ANTITRUST CHRON. (Apr. 18, 2018), <https://www.competitionpolicyinternational.com/after-consumer-welfare-now-what-the-protection-of-competition-standard-in-practice/> [https://perma.cc/2SYA-TFXM].

57. *Id.* (quoting *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

58. Barak Orbach, *How Antitrust Lost Its Goal*, 81 FORDHAM L. REV. 2253, 2253 (2013).

59. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984).

60. Khan, *supra* note 47, at 737.

61. It is worth noting that Chicago’s approach to antitrust can be helpful to workers, too—but only instrumentally to consumer welfare. In *NCAA v. Alston*, Justice Gorsuch—who has Chicagoan tendencies—wrote for a unanimous Court and stood up for “student-athletes whose compensation the NCAA fixes in its buyer-side labor market.” 141 S. Ct. 2141, 2152 (2021). But the opinion was unambiguously focused on *consumer* welfare—not the athletes. Justice Gorsuch cabined judges’ role, recalling that “[j]udges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare.” *Id.* at 2166.

62. See, e.g., Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1356–62 (2020) (documenting concentrated labor markets nationwide); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 591–95 (2018) (performing a case study on concentration in the market for nurses).

63. Naidu, Posner & Weyl, *supra* note 62, at 541.

so antitrust enforcement on the labor front has languished.⁶⁴ Eric Posner and his coauthors therefore advocate for a “worker welfare” standard in the labor context.⁶⁵ And the neo-Brandeisians find a warrant in the Sherman Act for protecting labor interests. When Senator Sherman was selling his bill on a concept of “industrial liberty,” he spoke of the “right of every man to work, labor, and produce in any lawful vocation.”⁶⁶

Entrepreneurs, too, are a big piece of the antitrust puzzle. Even more than labor, small businesses and startups loom large in leading neo-Brandeisian minds. Writing with C. Scott Hemphill, Tim Wu has theorized at length about the role of “nascent competitors” in antitrust, especially in the tech sector.⁶⁷ They conclude that “[t]he risk of lost innovation strongly tips the balance in favor of a bias to action” against anticompetitive acquisitions.⁶⁸ Wu, along with Chair Khan, has carried sympathies for small business into government. During Khan’s tenure, the FTC has repeatedly tied its most important decisions to small business welfare. When it proposed to ban noncompete agreements early in 2023, the agency charged such agreements with “block[ing] entrepreneurs from starting new businesses,” among other harms.⁶⁹ To justify a “Right to Repair” initiative, the agency reasoned that repair restrictions “prevent small businesses [and others] from fixing their own products.”⁷⁰ And when the agency moved to tighten up the merger guidelines, its rhetoric again focused on a broad array of constituencies—worrying that mergers “imperil[] choice and economic gains for consumers, workers, *entrepreneurs, and small businesses*.”⁷¹ Here, too, the neo-Brandeisians find historical support—as Lina Khan observed in her role as scholar, the

64. *Id.* at 542 (“[The FTC and the DOJ] have never blocked a merger because of its effect on labor markets — or, even, as far as we know, given the labor market effects of a potential merger more than cursory attention.”).

65. *Id.* at 586–87.

66. 21 CONG. REC. 2456–57 (1890) (statement of Sen. Sherman).

67. See C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

68. *Id.* at 1890.

69. Press Release, FTC, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [<https://perma.cc/B8QT-MA53>].

70. Press Release, FTC, FTC To Ramp Up Law Enforcement Against Illegal Repair Restrictions (July 21, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions> [<https://perma.cc/SX8N-C9BC>].

71. Press Release, FTC, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022) (emphasis added), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers> [<https://perma.cc/7EGX-CRXY>].

Congress that passed the Sherman Act feared big business would “crush out all small men, all small capitalists, all small enterprises.”⁷² Small businesses sit at the heart of neo-Brandeisian thought, on equal footing with the consumer and the worker.

Look, finally, to antitrust’s impact on citizen life. Time and again, neo-Brandeisians have alluded to big business’s corrosive impact on democracy. The Utah Statement summed up their position this way: “Excessive concentration of private economic power breeds antidemocratic political pressures and undermines liberties.”⁷³ This strain of neo-Brandeisian thought flows from a 1979 article by Robert Pitofsky, *The Political Content of Antitrust*.⁷⁴ Today’s bunch agree with Pitofsky—himself a former FTC Chair—that “[i]t is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.”⁷⁵ And antitrust rhetoric in the Biden Administration tracks this thinking. President Biden opined in an executive order that “excessive market concentration threatens . . . democratic accountability”⁷⁶ and echoed pre-Chicago precedent to say that antitrust should help “provid[e] an environment conducive to the preservation of our democratic political and social institutions.”⁷⁷ The alleged antidemocratic effects of big business take on goliath proportions in the social media context. Just a handful of large, powerful platforms organize and curate political and artistic content for hundreds of millions of Americans. A Biden Administration antitrust official evoked this specter, citing “new means of [digital] exploitation more threatening to individual freedom than ever before.”⁷⁸ The House Judiciary Committee agreed, with Representative

72. Khan, *supra* note 47, at 741–42 (quoting 21 CONG. REC. 2598 (1890) (statement of Sen. George)).

73. Wu, *Utah Statement*, *supra* note 31.

74. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). Indeed, the Utah Statement’s formulation is ripped nearly verbatim from Pitofsky, who wrote three decades ago of “a fear that excessive concentration of economic power will breed antidemocratic political pressures.” *Id.* at 1051.

75. *Id.* Tim Wu, for one, has cited Pitofsky on this point. See TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 17 (2018).

76. Exec. Order No. 14,036, 3 C.F.R. § 609 (2022). *But see* Herbert Hovenkamp, *President Biden’s Executive Order on Competition: An Antitrust Analysis*, 64 ARIZ. L. REV. 383, 387 (2022) (contending that “[t]he EO could as easily have been written by Friedrich Hayek”).

77. 3 C.F.R. § 611 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

78. David Lawrence, Antitrust Div. Pol’y Dir., U.S. Dep’t of Just., Reemerging Areas of Common Ground, Keynote Address at Brigham Young University Law Conference: Tech Platforms in a New Age of Competition Law (Oct. 21, 2022) (transcript available at <https://www.justice.gov/opa/speech/antitrust-division-policy-director-david-lawrence-delivers-keynote-brigham-young> [<https://perma.cc/DX76-UBJ8>]).

Cicilline intoning that “[o]ur economy and democracy are at stake” in the fight against Big Tech.⁷⁹

Now for the second critique: The Chicago school defined “consumer welfare” wrong. At first blush, readers may assume that neo-Brandeisian attention to competitive process is consistent with the consumer welfare standard. After all, more competition should mean better outcomes for consumers. But that’s not always so—not the way the Chicago school defines consumer welfare. The Chicago school’s exclusive focus on efficiencies entails a comfort with monopoly—an “insistence that market power and high concentration both reflect and generate efficiency.”⁸⁰ So monopolies, through all kinds of modes, may create more “consumer welfare” in the form of raw efficiency. But they come with a transfer to the monopolist: a monopoly profit. Put another way—maybe the monopolist can make a good cheaper, but the savings goes to the monopolist, not the consumer. Recall that for Bork and the Chicagoans, this transfer isn’t an antitrust problem. In Bork’s own words: “This is . . . merely a shift in income between two classes of consumers. The consumer welfare model, which views consumers as a collectivity, does not take this [transfer] effect into account.”⁸¹

Not so for the neo-Brandeisians, who decline to “view[] consumers as a collectivity” in favor of a focus on end users.⁸² In fact, they argue that the authors of the Sherman Act aimed it squarely at the “robbery” and “theft” of monopoly profits from consumers.⁸³ One old favorite article in neo-Brandeisian circles delves into the legislative history of three substantive antitrust laws, concluding that Congress held “primarily objectives of a distributive rather than of an efficiency nature.”⁸⁴

- Sherman Act (1890): Senator Sherman intended that the law prevent “combinations made with a view . . . to increase the profits of the producer at the cost of the consumer.”⁸⁵

79. SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE COMM. ON THE JUDICIARY OF THE H.R., 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 2 (Comm. Print 2022).

80. Khan, *supra* note 47, at 738.

81. BORK, *supra* note 34, at 110.

82. *Id.*

83. See Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 480 (2019) (first quoting 21 CONG. REC. 2614 (1890) (statement of Sen. Coke); then quoting 21 CONG. REC. 4103 (1890) (statement of Rep. Fithian); and then quoting 51 CONG. REC. 13223 (1914) (statement of Sen. Lane)).

84. Lande, *Wealth Transfers*, *supra* note 53, at 68.

85. *Id.* at 94 n.111 (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

- FTC Act (1914): Congress variously justified the law by reference to “[t]he fraud and the theft which is being practiced upon the people of this country,”⁸⁶ a need to “secure the people from unjust tribute levied by monopolistic corporations,”⁸⁷ and its broad consensus on “prohibiting exactions.”⁸⁸
- Celler-Kefauver Act (1950): One Senator inveighed that “sometimes the Government of the United States has to think about that great group of 140,000,000 consumers, and protect them against unjust exploitation.”⁸⁹

The neo-Brandeisians follow this tradition. To the extent that a goal of antitrust is consumer welfare, it means just that—the welfare of consumers, not the efficiency of the whole economy.

To sum up, neo-Brandeisians reject any reduction of antitrust to a narrow set of metrics, preferring to “examine the competitive process itself.”⁹⁰ And the mark of a healthy competitive process is more than bare efficiency. Rather, antitrust policy should support Americans in their roles as consumers, workers, entrepreneurs, and citizens.

B. Where Does Antitrust Go Wrong?

The two camps also spar over the dangers of antitrust enforcement. Quite apart from the question of whom antitrust should benefit, a debate rages about whether antitrust should play a muscular role—structuring the economy and market dynamics—or step aside, deferring to private ordering. This breaks down to a discussion about error costs. Antitrust is hard; mistakes are inevitable. And the old chestnut to “err on the side of caution” could benefit either side. Chicagoans have long insisted that *false positives* (*i.e.*, mistaken enforcement actions) are more harmful than *false negatives* (*i.e.*, mistaken forbearances). Neo-Brandeisians disagree.

86. *Id.* at 113 (quoting 51 CONG. REC. 13223 (1914) (statement of Sen. Lane)).

87. *Id.* at 114 (quoting 51 CONG. REC. 8854 (1914) (statement of Rep. Morgan)).

88. *Id.* at 114 n.187 (quoting 51 CONG. REC. 14792 (1914) (statement of Sen. Burton)).

89. *Id.* at 136 (quoting *Corporate Mergers & Acquisitions: Hearings on H.R. 2734 Before a Subcomm. of the S. Comm. on the Judiciary*, 81st Cong. 180 (1950) (statement of Sen. Kilgore)).

90. Khan, *supra* note 47, at 717; *see also* Wu, *supra* note 56.

1. Chicago: Overdeterrence

[E]rrors on the side of excusing questionable practices are preferable.

—Judge Frank Easterbrook⁹¹

Optimization runs deep in Chicagoans' intellectual DNA. As early as 1968, Gary Becker (an influential Chicago professor of economics) set out to answer the question of “how many offenses *should* be permitted and how many offenders *should* go unpunished,” quickly identifying antitrust as a use case.⁹² Two years later, George Stigler had picked up the thread with *The Optimum Enforcement of Laws*, which aimed to “construct a theory of rational enforcement.”⁹³ These early efforts focused on first-order costs of enforcement. Take Becker—his 1968 paper sought to calculate how much ought to be “spent on policemen, court personnel, and specialized equipment.”⁹⁴ The problem was to marshal those resources to discover, punish, and deter crime efficiently: “to develop optimal public and private policies to combat illegal behavior.”⁹⁵

Optimal enforcement theory soon entered mainstream antitrust—and took on a more sophisticated form. One Chicago professor (and frequent Richard Posner co-author), William Landes, took the issue head on in 1983. In the aptly named *Optimal Sanctions for Antitrust Violations*, the professor filled a gap in “attention [to] the use of economics to examine antitrust enforcement itself,” developing a theory of optimal sanctions and applying it to several business practices that faced antitrust scrutiny.⁹⁶ Two of the theory's features merit special mention. First, and most obviously, the theory is premised on the consumer welfare standard.⁹⁷ Second, and more subtly, Landes expanded the concept of “enforcement costs” well past Becker's original formulation.⁹⁸ Drawing on

91. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984).

92. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170, 198 (1968).

93. George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 526 (1970).

94. Becker, *supra* note 92, at 174.

95. *Id.* at 207.

96. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 652 (1983).

97. See *id.* at 653 (“The standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss . . .”).

98. *Id.*

contemporary scholarship, he worried about “the possibility of legal error, which combined with large fines can deter socially valuable business behavior.”⁹⁹ Fines that grew too large risked “detering a socially beneficial cartel,” an inefficient outcome inconsistent with optimizing consumer welfare.¹⁰⁰

“Antitrust is costly,” Frank Easterbrook observed the next year as he expanded on the error-costs idea.¹⁰¹ Easterbrook divided errors into two types.¹⁰² You might call them sins of commission and omission: in other words, overenforcement and underenforcement. That latter type—underenforcement errors—were safer for three reasons, he argued.¹⁰³ First, “most forms of cooperation are beneficial,” as within a corporation or in a mutually beneficial contract.¹⁰⁴ Second, “the economic system corrects monopoly more readily than it corrects judicial errors.”¹⁰⁵ If a monopolist’s practice succeeds, it will attract competitors. No such error-correcting force exists for wrongly banned practices. This argument dovetailed with other economics-driven arguments about “rent-seeking” in antitrust, the practice of using antitrust regulation to quell competition.¹⁰⁶ Third, Easterbrook argued that error costs of banning beneficial practices exceed costs of permitting harmful ones.¹⁰⁷ After all, “even a small gain in productive efficiency may offset a substantial increase in price.”¹⁰⁸ So antitrust should encourage productive gains, even if it may come with costs on the price side.

But there’s a hurdle in the way of scalpel-precise enforcement calibration: the sledgehammer remedies that antitrust laws afford to judges and juries. Treble damages, injunctive relief, and criminal penalties are a recipe for potent deterrence. So Chicagoans encouraged remedial equilibration: careful titration of punishment to fit the crime.

99. *Id.* at 655 n.4 (citing A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981)).

100. *Id.* at 656.

101. Easterbrook, *supra* note 91, at 4.

102. *Id.* at 14–15.

103. *Id.* at 15–16.

104. *Id.* at 15.

105. *Id.*

106. *Id.* at 34 (“Antitrust litigation is attractive as a method of raising rivals’ costs . . .”); see also Robert D. Tollison, *Public Choice and Antitrust*, 4 CATO J. 905, 910 n.3, 911 (1984) (“[A]ntitrust is at least partly a veil over a wealth transfer process fueled by certain relevant interest groups.”); Roger L. Faith, Donald R. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 342 (1982) (“Our results lend support to a private-interest theory of FTC behavior over the entire period that we investigated.”).

107. See Easterbrook, *supra* note 91, at 15.

108. *Id.* at 16.

Richard Posner, for one, proposed decriminalizing antitrust, varying damage multipliers by type of offense, and limiting certain kinds of injunctive relief.¹⁰⁹ None of these are available—not without legislation—so antitrust standing doctrines stepped in to fill the void for Easterbrook and other Chicagoans.¹¹⁰ More on that later.

The Chicagoan view on enforcement has come to dominate the antitrust world. It's jumped from the academy to the executive: High-ranking antitrust officials espoused concern over asymmetry in error costs during both the Bush¹¹¹ and Trump¹¹² Administrations. And it has pervaded the judiciary: Justice Gorsuch asked at oral argument in *Ohio v. American Express Co.*¹¹³ whether we shouldn't "take Judge Easterbrook's admonition seriously, that judicial errors are a lot harder to correct than an occasional monopoly."¹¹⁴ But Chicagoans' ideological monopoly is succumbing to competition in this area too.

2. Neo-Brandeis: Underdeterrence

*False negatives should not be preferred over false positives,
and the costs of erroneous lack of enforcement should not be
discounted or assumed harmless.*

—Utah Statement Tenet B8¹¹⁵

109. Douglas H. Ginsburg, *Posner on Antitrust Remedies: The Good, the Bad, and the Very Ugly*, ANTITRUST SOURCE, Oct. 2018, at 1, 1.

110. See Easterbrook, *supra* note 91, at 24 ("Unless there is a link between the antitrust injury and the defendant's profit, there is no need for judges to impose a sanction."); see also C. Scott Hemphill, *Posner on Vertical Restraints*, 86 U. CHI. L. REV. 1057, 1058 (2019) ("Antitrust injury provided the means to sidestep and undermine Supreme Court precedent that Posner disagreed with but could not ignore.").

111. See U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 17 (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [<https://perma.cc/QK46-Y927>] ("[P]ersistence of errors can be particularly harmful to competition in the case of false positives.").

112. Makan Delrahim, Antitrust Div. Assistant Att'y Gen., U.S. Dep't of Just., The "New Madison" Approach to Antitrust and Intellectual Property Law, Keynote Address at University of Pennsylvania Law School's Conference: The Future of Standard Essential Patents 8 (Mar. 16, 2018) (transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university> [<https://perma.cc/UUC7-PKCR>]) (raising the specter of "'false positive' errors of over-enforcement that would discourage valuable innovation").

113. 585 U.S. 529 (2018).

114. Transcript of Oral Argument at 18, *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018) (No. 16-1454).

115. Wu, *Utah Statement*, *supra* note 31.

No longer does the executive dread false positives. To give another flavor of the Biden Administration's approach, the Antitrust Division's Policy Director responded to Justice Gorsuch with: "[W]e should not take Judge Easterbrook's admonition seriously because it was wrong."¹¹⁶ Though it came four years later, the bare fact that Biden officials returned to Justice Gorsuch's question reveals their interest in the underdeterrence issue. The neo-Brandeisian stance against underdeterrence operates separately from its critique of the consumer welfare standard. That is, even assuming the Chicagoans are right about consumer welfare, they're wrong about how it informs optimal deterrence. Neo-Brandeisians assert that Chicagoans make two mistakes here. First, they get the classic economics wrong: Monopolists make a lot of money, and they can use it to deter competition. And second, they ignore the stakes of false negatives in a modern economy dependent on network effects.

The first mistake relates to monopoly profits. Recall, the Chicago thinking is that monopolies aren't all that dangerous, because they attract competitors. In Easterbrook's classic formulation, "[a] monopolistic practice wrongly excused will eventually yield to competition, though, as the monopolist's higher prices attract rivalry."¹¹⁷ Not so, say the neo-Brandeisians. Rather, the supra-competitive profits monopoly enables may "be spent to undermine competitors or pay off third parties, either of which create exclusionary barriers to entry."¹¹⁸

The most salient example to neo-Brandeisians is the practice of predatory pricing—lowering prices in the short run to eliminate competitors, then jacking them up to recoup losses after establishing a dominant position in the market. The Chicago-influenced conventional wisdom is that this is next to impossible. As soon as prices exceed competitive levels, "new entrants will be attracted, the price will be bid down to the competitive level, and the attempt at recoupment will fail."¹¹⁹ What's more, prohibiting the practice comes with big error costs. From the consumer welfare perspective, it's hard to imagine how cutting prices could be harmful. But neo-Brandeisians disagree. They disagree on empirical grounds, pointing to research on the topic¹²⁰ and to a litany of

116. David B. Lawrence, Antitrust Div. Pol'y Dir., U.S. Dep't of Just., Evaluating Antitrust's Assumptions, Remarks at the Hal White Antitrust Conference 4 (June 23, 2022) (transcript available at <https://www.justice.gov/opa/speech/file/1519521> [<https://perma.cc/6XWE-CAPA>]).

117. Easterbrook, *supra* note 91, at 15.

118. Lawrence, *supra* note 116, at 4.

119. Posner, *supra* note 40, at 927.

120. See, e.g., Khan, *supra* note 47, at 730 (asserting that "a host of research shows that predatory pricing can be 'an attractive anticompetitive strategy'" (quoting Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81, 82 (2015))).

successful predatory pricing maneuvers.¹²¹ And they disagree on theoretical grounds, contending that the Chicago approach wrongly “assumes that predation is irrational precisely because firms prioritize profits over growth” in a networked world where growth is everything.¹²² Today’s big technology firms aggressively pursue “huge first-mover advantages stemming from data collection and network effects”¹²³ even as they forego profits for decades.¹²⁴

On that note, those same network effects—cases where “the utility that a user derives from consumption of [a] good increases with the number of other agents consuming the good”¹²⁵—further counsel against a passive enforcement strategy. X (formerly known as Twitter) is a familiar example. People visit the platform to interact with interesting users. The more interesting users on the platform, the more each one gets out of it. So far, so good. But neo-Brandeisians contend that “these externalities can serve as barrier[s] to entry.”¹²⁶ Size and connectedness are platforms’ stock-in-trade. Upstart competitors are miles behind in the race to capitalize on market effects. Worse still, these networks now come with vast troves of data that compound incumbent advantages. Companies like Google appear to prioritize “rapid extension into a wide range of related product lines where [they can] collect ever more personal information,” which can in turn be plowed into even greater barriers to entry.¹²⁷

In the neo-Brandeisian paradigm, the power of network effects and data control turn the Chicagoan argument about the harms of overdeterrence on its head. Monopoly profits in these spaces don’t invite competitors—they perpetuate monopoly. And “[i]f we take error cost analysis seriously, that would augur towards favoring overenforcement, not underenforcement, in these markets.”¹²⁸ For these antitrust reformers, the harms that come with permitting firms to ramp up network effects and consolidate control over data may be every bit as resilient and inviolate as a judicial decree.

121. See Vaheesan, *supra* note 120, at 84, 85 tbl.1.

122. Khan, *supra* note 47, at 753.

123. *Id.* at 772.

124. See, e.g., *id.* at 748 fig.1 (depicting Amazon’s meteoric growth in revenue and consistent near-zero profits).

125. Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985).

126. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1025 (2019).

127. Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REGUL. 401, 426 (2014).

128. Lawrence, *supra* note 116, at 5.

Neo-Brandeisians agree with Chicagoans on one point: The deterrence debate comes with high stakes. Underdeterrence can mean greater concentration, reduced innovation, and harms to Americans' roles as citizens. In short, they see the Chicagoan position as a giveaway to big business. Besides its consumer welfare effects, it harms all those other goals that neo-Brandeisians prize. Removing the stigma against false positives in enforcement is of the utmost importance—"the error cost anti-enforcement bias [has turned] into an important vehicle for rent seeking at the expense of consumers, labor, and others who stand to profit from a more competitive economy."¹²⁹ This threat of industry capture motivates the neo-Brandeisian value that the next Section discusses: democratic control over antitrust.

C. Who Decides and How?

1. Chicago: Judges and Technocracy

[T]he ability of the FTC to promote the public interest is impaired by its dependence on Congress.

—Judge Richard Posner¹³⁰

The Chicago school's influence has made antitrust "less democratic and more technocratic."¹³¹ Chicago prizes efficiency and optimal deterrence. Democracy frustrates both goals, placing powerful tools in unskilled hands. That goes double for jury trials. These conclusions have not escaped the Chicago school's notice—even if "[a] focus on institutions was not a major part of the early Chicago School critique."¹³² So while the early Chicagoans did not trust "any of antitrust's major institutional components,"¹³³ modern "neo-Chicago" adherents push for more agency and judicial control—at the expense of Congress and jurors.¹³⁴

The story starts with Richard Posner. As a new law professor just four years removed from a stint at the FTC, he took aim at his old

129. Herbert J. Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293, 349 (2022).

130. Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 82 (1969).

131. Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 (2008).

132. Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 49 (2012).

133. *Id.* at 50.

134. *See generally id.*

employer in 1969.¹³⁵ He started strong, excoriating the Commission for being “rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized; all in all, inefficient and incompetent.”¹³⁶ Posner went on to unleash a withering critique, concluding that on balance, “the costs of having a federal trade commission appear to exceed the benefits.”¹³⁷ Posner blamed all these problems on congressional control over antitrust. In those days, Congress was in constant dialogue with the FTC. One Commissioner complained that “congressional pressure ‘corrupt[ed] the atmosphere’ in which his agency work[ed]” and charged that “congressmen ma[de] private, unrecorded calls on behalf of companies” seeking merger approvals.¹³⁸ In Posner’s view, this meant that the FTC, much like Congress, came to be “guided more by solicitude for parochial interests than by consideration for the general welfare.”¹³⁹ If democratic control of the FTC was appropriate, better that it come from the President, who at least could push for “controversial cases and major doctrinal advances” that the spineless Congress-controlled FTC could not.¹⁴⁰

Posner’s hypothesis was popular in other places. While Chicago was busy applying economic concepts to antitrust, professors at the University of Virginia and elsewhere turned their attention to public choice theory¹⁴¹—“the economic theory of politics,” playfully called “politics without romance.”¹⁴² Their basic mission was to study the economics of political decision-making. Antitrust was fertile ground. Public choice scholars rebranded Posner’s critique as the “antitrust pork barrel,” then delivered the empirical goods.¹⁴³ Their bottom-line conclusion: “Our results lend support to a private-interest theory of FTC behavior over the entire period,” from 1961 to 1979.¹⁴⁴ Under

135. Biography of Richard A. Posner, UNIV. CHI. L. SCH., <https://www.law.uchicago.edu/faculty/posner-r> [https://perma.cc/DM9S-MF98]; Crane, *supra* note 132, at 50.

136. Posner, *supra* note 130, at 47.

137. *Id.* at 89.

138. SUSAN WAGNER, THE FEDERAL TRADE COMMISSION 212 (1971) (quoting Comm’r Philip Elman).

139. Posner, *supra* note 130, at 83.

140. *Id.* at 54.

141. Robert D. Tollison, *Public Choice, 1972–82*, in THE THEORY OF PUBLIC CHOICE–II 3, 3–4 (James M. Buchanan & Robert D. Tollison eds., 1984).

142. James M. Buchanan, *Politics without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications*, in THE THEORY OF PUBLIC CHOICE–II, *supra* note 141, at 11, 11.

143. See Faith, Leavens & Tollison, *supra* note 106, at 329.

144. *Id.* at 342.

Congress's control, the FTC did not live up to Chicagoan optimal-enforcement goals.¹⁴⁵

The Chicagoans likewise take a dim view of antitrust juries. Their reasons are perhaps obvious. Antitrust is hard—especially in the Chicago world, where every case is an economic problem on a fresh blackboard. More than that, it doesn't test the skills that jurors bring to the box. Ever since the consumer welfare revolution, antitrust liability has been totally divorced from questions of “[i]ntent, truthfulness, and moral responsibility—three topics that juries might have some comparative advantage at divining.”¹⁴⁶ In his usual laconic fashion, Easterbrook summed it up as concisely as is possible: “Jurors are amateurs.”¹⁴⁷

Today's Chicago-based status quo has sought to avoid these twin threats—Congress and juries—by placing power in expert bureaucratic hands and channeling the judicial role.

Beginning with bureaucracy: When the Reagan Administration brought a window of opportunity for Chicagoans and their allies, they took advantage. Thinking back on that time, Posner recounted that “the FTC underwent an ideological makeover, becoming a champion of free markets.”¹⁴⁸ It (more or less) stayed that way, too. These days—or at least until recently—Congress and the President keep their hands out of antitrust, preferring to leave it to the experts.¹⁴⁹ The political establishment has reached a “technocratic bargain” with antitrust experts, who “are largely left alone to do their work” in exchange for the “diminished political salience” of the antitrust field.¹⁵⁰

As for the courts, the Chicago school has responded by “contort[ing] the rules of civil antitrust procedure to avoid jury trials.”¹⁵¹ Alongside his critique of juries, Judge Easterbrook complained that “a judge is still a dunce compared with the most junior professor of business at a third-rate college.”¹⁵² The fix, he said, was to give judges new per se rules that

145. Pork barrel theory aside, other Virginian work on public choice in antitrust suggested that FTC enforcement action did not map on to an obvious procompetitive strategy. One study of pre-Reagan FTC behavior, for example, provides support for the conclusion that the FTC appeared to target and fine smaller companies (with smaller antitrust violations). See William F. Shughart II & Fred S. McChesney, *Public Choice Theory and Antitrust Policy*, 142 PUB. CHOICE 385, 395 (2010).

146. Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 34–35 (2008).

147. Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 ANTITRUST L.J. 99, 109 (1992).

148. Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 764 (2005).

149. See Crane, *supra* note 131, at 1165–74.

150. *Id.* at 1181.

151. Crane, *supra* note 146, at 33.

152. Easterbrook, *supra* note 147, at 109.

“resolve most disputes by doing nothing.”¹⁵³ Some of those rules already existed—the Supreme Court had recently instructed trial courts to “consider the absence of a plausible [economic] motive” at summary judgment, so that economically “implausible” cases could not proceed.¹⁵⁴ More followed after Easterbrook’s exhortation, as the Supreme Court extended that logic back to motions to dismiss.¹⁵⁵ In two other cases, *Brooke Group*¹⁵⁶ and *Trinko*,¹⁵⁷ the Court pointed—sometimes explicitly—to “false positives” in creating a no-liability rule. Easterbrook’s vision has become reality. New rules have neutered jury risk in antitrust cases. Instead, judges decide cases for defendants according to per se rules embodying Chicagoan-received wisdom.

2. Neo-Brandeis: Juries & Democracy

*Antitrust rules should be created through case development,
agency rule-making, and legislation.*

—Utah Statement Tenet B2¹⁵⁸

The neo-Brandeisian view of antitrust is bound up with a vision of democracy. For one thing, that means antitrust enforcement should help protect and uphold democracy. After all, neo-Brandeisians contend that concentration “breeds antidemocratic political pressures” as large, powerful entities exercise political control.¹⁵⁹ But it also means that democratic values should inform the institutional structure of antitrust enforcement. Congress should play a greater role at technocrats’ expense. And judges’ strict control over cases should give way to more jury power.

The most common dysphemism aimed at neo-Brandeisian thought—aside from “hipster antitrust”—is “populism.”¹⁶⁰ Critics often juxtapose

153. *Id.*

154. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595–96 (1986).

155. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (requiring “allegations plausibly suggesting (not merely consistent with) agreement”).

156. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226–27 (1993).

157. *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

158. Wu, *Utah Statement*, *supra* note 31.

159. *Id.*

160. *See, e.g.*, Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087 (2022).

this “populist” stance with an untarnished, apolitical status quo.¹⁶¹ But for their part, neo-Brandeisians attack the very premise that antitrust *can* be apolitical; after all, “[a]ntitrust law is unavoidably political” and “political in its *content*.”¹⁶² The very market Chicagoans valorize is the product of politics. There is no apolitical antitrust enforcement policy. The only question is “who should determine the political content of the field.”¹⁶³

The answer, for neo-Brandeisians, is Congress. The last major additions to the antitrust laws date back to the 1970s, before the Reagan era.¹⁶⁴ Yet neo-Brandeisian thinkers have dared to hope that “Congress could become an active player in antitrust again,” that it might someday breach the longstanding technocratic bargain.¹⁶⁵ Still others have exclaimed that “Congress should be able to do better” than it has, since “it remains the only directly democratically accountable branch of government.”¹⁶⁶ Their marquee example of democratic accountability in antitrust is the passage of the Clayton Act in 1914.¹⁶⁷ There, “Congress’s fear was that without greater legislative control, the legality of any particular restraint would be determined by a judge’s individual opinion as an economist.”¹⁶⁸ So the democratic body clarified matters. It proscribed specific categories of conduct. And it thereby ensured that the rules for decision in antitrust cases came from a democratic body—not a judge-cum-economist. Today’s Congress, neo-Brandeisians charge, has turned its back on that example and abdicated its responsibility by focusing attention on “minor issues and outright petty matters”—even trying to push the FTC out of its headquarters in favor of expanded offices for the national art museum.¹⁶⁹

Neo-Brandeisians also contend that, where Congress has made its intentions clear, judicial interpretation has thwarted them. Instead of divining Congress’s intent, “[t]he modern Supreme Court has come to

161. See, e.g., Geoffrey Manne, *The Illiberal Vision of Neo-Brandeisian Antitrust*, TRUTH ON MARKET (Apr. 16, 2018), <https://truthonthemarket.com/2018/04/16/the-illiberal-vision-of-neo-brandeisian-antitrust/> [<https://perma.cc/JDS4-LTWC>] (“If you make antitrust more *political*, you’ll get less democratic, more politically determined, results — precisely the opposite of what proponents claim to want.”).

162. Sandeep Vaheesan, *The Twilight of the Technocrats’ Monopoly on Antitrust?*, 127 YALE L.J.F. 980, 985 (2018).

163. *Id.* at 986.

164. Harry First & Spencer Weber Waller, *Antitrust’s Democracy Deficit*, 81 FORDHAM L. REV. 2543, 2556 (2013).

165. Vaheesan, *supra* note 162, at 990.

166. First & Waller, *supra* note 164, at 2559, 2561.

167. *Id.* at 2548.

168. *Id.*

169. Spencer Weber Waller, *Antitrust and Democracy*, 46 FLA. ST. U. L. REV. 807, 832–33 (2019).

be unmoored from any sense of legislative direction of judicial decision making.”¹⁷⁰ Even the Clayton Act—the exemplar for congressional clarity—has been subsumed into the same consumer-welfare framework that governs Sherman Act claims.¹⁷¹ And picking up where Daniel Crane and other establishment antitrust figures left off, neo-Brandeisians point to a string of decisions that amount to “a relentless effort to keep antitrust away from juries.”¹⁷² Restrictions on antitrust standing combine with higher burdens of proof to survive motions to dismiss and for summary judgment (not to mention tougher substantive law) to make it difficult for cases to reach juries.

But “[j]uries help democratize antitrust.”¹⁷³ And so does private litigation. That’s why the Utah Statement insists that “[p]rivate enforcement is a critical complement to public enforcement.”¹⁷⁴ To be sure, juries lack technical expertise. But that’s a feature, not a bug. When lawyers are forced to put their claims and defenses in plain English a lay jury can comprehend, that body can carry out Senator Sherman’s vision of antitrust as a “comprehensive charter of economic liberty.”¹⁷⁵ That’s what juries are for, after all. Juries have always been important to democracy. Alexander Hamilton observed in *The Federalist Papers* that early critics of the unamended Constitution found it in “want of a constitutional provision for the trial by jury in civil cases.”¹⁷⁶ For Alexis de Tocqueville, juries were a “form of the sovereignty of the people.”¹⁷⁷ And perhaps Blackstone put it best: The civil jury right “preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens.”¹⁷⁸

And that—for the neo-Brandeisians—is the essence of antitrust. In Blackstone’s words, it’s to “prevent[] the encroachments of the more powerful and wealthy citizens.”¹⁷⁹ In their own, it means to resist “an indefensible division of the spoils of progress and economic security that yields human flourishing.”¹⁸⁰ So let the means fit the end. Antitrust and

170. First & Waller, *supra* note 164, at 2548.

171. *Id.* at 2549–50.

172. *Id.* at 2554.

173. *Id.* at 2552.

174. Wu, *Utah Statement*, *supra* note 31.

175. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

176. THE FEDERALIST NO. 83, at 418 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

177. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 363 (Francis Bowen ed., Henry Reeve trans., Cambridge, Sever & Francis 1862) (1835).

178. 3 WILLIAM BLACKSTONE, COMMENTARIES *380.

179. *Id.*

180. Wu, *Utah Statement*, *supra* note 31.

juries serve the same basic goal—it's only natural that juries make key antitrust decisions.

To be sure, only a few antitrust cases reach juries. Those where the government seeks injunctive relief are always tried to a judge. And at least last year, only about one percent of the antitrust cases eligible for jury trials were ever tried.¹⁸¹ But the threat—and the promise—of jury trials remains salient to litigants and policymakers. A looming trial casts a shadow over settlement negotiations, which in turn influence companies' behavior. And the numbers in antitrust verdicts loom large indeed—a recent private enforcement action against the National Association of Realtors rang their bell for \$1.8 billion pre-trebling.¹⁸² Little else exerts so much deterrent pressure.

II. THE CHICAGO SCHOOL STATUS QUO

Today's antitrust standing doctrine grew up alongside the Chicago school. The story starts in 1977, with *Illinois Brick Co. v. Illinois*,¹⁸³ just as “[b]eginning in 1977–78, the Chicago School achieved an almost complete triumph in the Supreme Court.”¹⁸⁴ The notion of antitrust injury entered the scene next—just months later—in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*¹⁸⁵ Six years after that, the transformation was complete. In 1983, *Associated General Contractors*¹⁸⁶ merged the two doctrines (plus more) into what we today call antitrust standing.¹⁸⁷ By that time, it had long been clear that “[t]he Supreme Court [was] increasingly committed to a conception of competition that emphasize[d] efficiency as a dominant social value.”¹⁸⁸

That the rise of antitrust standing coincided with the Chicago school's ascent is no coincidence at all. The doctrine is neatly tailored to align with the three core Chicago school principles: consumer welfare

181. See ADMIN. OFF. OF THE U.S. CTS., TABLE C-4—U.S. DISTRICT COURTS—FEDERAL JUDICIAL CASELOAD STATISTICS (2024), <https://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2024/03/31> [https://perma.cc/C2QD-3VXD].

182. Debra Kamin, *Home Sellers Win \$1.8 Billion After Jury Finds Conspiracy Among Realtors*, N.Y. TIMES (Oct. 31, 2023), <https://www.nytimes.com/2023/10/31/realestate/nar-antitrust-lawsuit.html>.

183. 431 U.S. 720 (1977).

184. Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 123 (2018).

185. 429 U.S. 477 (1977).

186. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

187. *Id.* at 540–46.

188. Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CALIF. L. REV. 1, 2 (1980).

maximalism, worries about overdeterrence, and commitment to technocratic, judicial determination.¹⁸⁹ This Part lays out the state of antitrust standing and then explains its origins in—and fit with—economics-driven scholarship. This history illustrates the potential for non-substantive doctrines to change (even without new legislation) in the face of new thinking. It happened before. And it could happen again.

A. Prototype Standing Doctrine

Non-substantive doctrines in this space are not *entirely* a Chicago creation. Even before the Chicago school emerged to shape antitrust law, judges declined to take the antitrust causes of action literally. In those early days, private plaintiffs sued under the Sherman Act, the 1890 statute that spawned antitrust as an area of statutory law. Section 7 of that statute provided a broadly worded cause of action: “Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor” in federal court—and “recover three fold the damages by him sustained.”¹⁹⁰ Yet the antitrust standing doctrines that emerged from that era were messy and presented conflicting standards. Indeed, a district court lamented in 1970 (just as the decade of Chicago’s rise began) that “[w]e must confess at the outset that we find antitrust standing cases more than a little confusing and certainly beyond our powers of reconciliation.”¹⁹¹ Still, the doctrinal threads of that era could be distilled to two: the “direct injury” and “target” tests.¹⁹²

The first of the pair, “the prevailing approach to antitrust standing at least until the early 1950’s,” was the direct injury test.¹⁹³ Drawn from tort law, it forbade recoveries for plaintiffs who were “too remote and too far removed from the direct injury” a violation of the antitrust laws caused.¹⁹⁴ So it was, for example, that a shareholder in a company harmed by anticompetitive conduct lacked standing as early as 1909.¹⁹⁵ That early court reasoned that to hold otherwise “would be in effect to subject the defendant not merely to treble damages, but to sextuple

189. See *supra* Part I.

190. Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (codified as amended at 15 U.S.C. § 15(a)).

191. *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699, 701 (D. Colo. 1970).

192. See Daniel C. Richman, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1314–19 (1984).

193. *Id.* at 1315.

194. *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962).

195. *Ames v. Am. Tel. & Tel. Co.*, 166 F. 820, 824–25 (C.C.D. Mass. 1909).

damages.”¹⁹⁶ But though that quote seems to sound in Chicago-style overdeterrence fears, the court focused more on the identity of shareholders’ harms with the corporation’s: The shareholder suffers no injury “in his property that . . . is distinguishable from the injury to the corporation.”¹⁹⁷ Other harms were cast more cleanly as too remote to support a cause of action. The next year, for example, a Third Circuit panel held that a creditor could not recover when a debtor could not pay due to anticompetitive harms it had suffered.¹⁹⁸ Courts would go on to hold that the same went for landlords and licensors.¹⁹⁹

But soon, the direct injury test fell out of favor. Some attribute this to “a flood of private actions” in the 1950s.²⁰⁰ True, private enforcement did step up during that era. From the Sherman Act’s origin in 1890 to 1940, private actions totaled just 175.²⁰¹ But from 1951 to 1953, more than 200 were filed *each year*.²⁰² A follow-the-leader effect from public enforcement sometimes takes the blame for this.²⁰³ Maybe so, though public enforcement went on well before 1951. Whatever the cause, to stem the tide of private enforcement—inasmuch as that was a worthy goal—courts needed stronger medicine. As one (Chicago) scholar put it, the core purpose of these early non-substantive doctrines was always to “limit[] the costs of antitrust litigation” for both litigants and courts.²⁰⁴

The replacement for the direct injury test was the “target area” standard. As the Ninth Circuit influentially phrased it in the seminal 1951 case *Loew’s*,²⁰⁵ a plaintiff “must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.”²⁰⁶ Despite a rewording, the doctrine did not

196. *Id.* at 823.

197. *Id.* at 822.

198. *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) (“A creditor would apparently be injured in the same way and to the same extent as a stockholder, assuming that their interests were equal.”).

199. See Jonathan M. Jacobsen & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273, 285 (1998).

200. Richman, *supra* note 192, at 1315–16.

201. Robert A. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 5 (1959).

202. *Id.* at 6.

203. *Id.* at 6–7 (“This private enforcement spurt . . . rests largely on previous government action.”).

204. William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1447–48 (1985). Professor Page identified two main costs of excessive private antitrust litigation: the effects of “rent-seeking antitrust strategy” on private industry and the “significant burden on the federal court system” these suits threatened. *Id.* at 1445–46.

205. *Conf. of Studio Unions v. Loew’s Inc.*, 193 F.2d 51 (9th Cir. 1951).

206. *Id.* at 54–55.

change much. “Tort principles nonetheless continued to permeate lower courts’ discussions of standing,” for one thing.²⁰⁷ For all its supposed pioneering of a new test for antitrust standing, the Ninth Circuit still looked to that venerable tort doctrine, foreseeability, to assess standing nineteen years later in *Mulvey v. Samuel Goldwyn Productions*.²⁰⁸ When a film production company “block booked” a plaintiff’s successful films with other, less desirable films, the Ninth Circuit permitted the case to go forward, stretching the “target area” concept to include not just consumers of films, but also the filmmaker plaintiff himself.²⁰⁹ The panel reasoned that it was “entirely foreseeable” that the block booking practice “could impair the profit potential” of the plaintiff’s films.²¹⁰ Indeed, even the court’s reasoning in *Loew’s* embodied tort principles. The court ended that target area opinion on a note of causation and desert, concluding: “Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm.”²¹¹

Perhaps because of its malleability and similarity to the direct injury test it succeeded, the target area test was likewise short-lived. *Loew’s* came down in 1951—in response to what, again, had been termed a “flood of private actions.”²¹² The test *Loew’s* spawned had little impact. Years later, in 1975, scholars made an eerily similar observation: “The past decade has seen more than a tripling in the number of private antitrust actions filed each year in federal courts under section 4 of the Clayton Act.”²¹³ Whereas scholars had once fretted over 200 private actions per year, the number now stood at a staggering 1,375 in a year.²¹⁴ So naturally, after *Mulvey*, commentators in the 1970s began to criticize the flexibility of target area analysis. Some preferred to focus on “a target area concept that is applied in light of the substantive violation alleged.”²¹⁵ But that was not to be. Today, the target area test has been subsumed and replaced by a flexible, multifactor antitrust standing analysis.

207. Richman, *supra* note 192, at 1317.

208. 433 F.2d 1073 (9th Cir. 1970).

209. *Id.* at 1076.

210. *Id.*

211. *Loew’s*, 193 F.2d at 55.

212. Richman, *supra* note 192, at 1315–16.

213. David B. Lytle & Beverly Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U. L. REV. 795, 795 (1976).

214. *Id.* at 795 n.1.

215. *Id.* at 819.

B. Today's Antitrust Standing

Antitrust standing is a judicial creation. It cannot be found anywhere in the relevant antitrust statutes. Still, it is deeply entrenched in today's antitrust law.

Today, most private antitrust plaintiffs find their cause of action in section 4 of the Clayton Act.²¹⁶ That statute, like its predecessor, provides in so many words that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor” and receive treble damages.²¹⁷ To the uninitiated reader, this language appears to authorize a wide range of claims. Whenever a substantive violation of the antitrust law occurs, anyone who suffers injury may avail herself of the section 4 cause of action.

Courts have greatly narrowed that broad scope. “Antitrust standing” is the question of whether a given plaintiff fits within the statute as judicially construed. Three key Supreme Court cases, all decided within a decade, kicked off today's antitrust standing doctrine. First, *Illinois Brick* barred indirect purchasers from recovery in the mine run of cases.²¹⁸ Second, *Brunswick* specified which kinds of injury meet the statute's “injured in his business or property” language.²¹⁹ Last, *Associated General Contractors* further limited the range of acceptable plaintiffs to those who facilitate efficient enforcement.²²⁰

1. The *Illinois Brick* Indirect Purchaser Rule

Consumers cannot sue manufacturers if they bought from a middleman—even when the manufacturers conspired to fix prices, and even when the middleman passed along the price increase. That is the *Illinois Brick* rule.²²¹

Perhaps the case's background eased any incongruity with the text of section 4 of the Clayton Act. The State of Illinois, along with local government entities in the State, sued a group of concrete block

216. 15 U.S.C. § 15(a).

217. *Id.*

218. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–48 (1977).

219. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485–89 (1977).

220. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983).

221. There is a little more to it than that, though it is not relevant here. Buyers who purchase directly from conspirators may have standing, even if one of the conspirators is a middleman rather than a manufacturer. Courts have different views on this. See *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 838 (7th Cir. 2020).

manufacturers.²²² They claimed these manufacturers had conspired to fix concrete block prices.²²³ Even though the governments had not bought straight from the manufacturers—masonry contractors served as middlemen here—the government plaintiffs said they could prove an injury from the conspiracy.²²⁴ After all, the masonry contractors would surely pass on the higher prices to their customers, the local governments.²²⁵

The problem was that the Court had already heard this kind of “passing on” theory from *defendants*. In *Hanover Shoe*,²²⁶ a shoemaker sued a manufacturer of shoemaking machinery for antitrust violations.²²⁷ In defense, the manufacturer pressed that the plaintiff would have passed along any overcharges to his own retail customers.²²⁸ And “[i]n *Hanover Shoe* th[e] Court rejected as a matter of law this defense that indirect rather than direct purchasers were the parties injured by the antitrust violation.”²²⁹

So when *Illinois Brick* came before the Court, it was just a small step (though a necessary one) to bar the same argument from plaintiffs. The Court outright rejected—over the Federal Government’s objections—the notion that different rules should apply to plaintiffs.²³⁰ It gave two reasons.

First, asymmetry between plaintiffs and defendants could create “serious risk of multiple liability for defendants.”²³¹ Suppose two firms fixed prices. One sold the product to a retailer (direct purchaser), who in turn sold to a consumer (indirect purchaser). Now, if both the retailer and consumer sue the conspiring firm, it could pay for *two* antitrust violations! And because of *Hanover Shoe*, it cannot use the consumer’s recovery to offset what it owes to the retailer. The Court could not accept that risk.

Second, *Hanover Shoe* premised its logic on “the uncertainties and difficulties in analyzing price and output decisions” in the real-world context.²³² Antitrust facts are complicated. Courts are inexpert. Litigating the extent to which a party “passed on” any overcharge “would greatly complicate and reduce the effectiveness of already protracted treble-

222. *Ill. Brick*, 431 U.S. at 726–27.

223. *Id.*

224. *Id.*

225. *Id.* at 726.

226. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

227. *Id.* at 483–84.

228. *Id.* at 491–92.

229. *Ill. Brick*, 431 U.S. at 724.

230. *Id.* at 730.

231. *Id.*

232. *Id.* at 731–32.

damages proceedings.”²³³ In other words, “concentrating the full recovery for the overcharge in the direct purchasers” would most effectively reward enforcement.²³⁴

Make no mistake. *Illinois Brick* did not take the Supreme Court all the way to the Chicago endpoint. But it was that first step. By abandoning compensation as a principal motive for antitrust, the Court set the stage to adopt the rest of the Chicagoan views. Once that efficiency-first logic seeped into Supreme Court precedent, it was only natural to ask how best to promote that efficiency and who can be trusted to make those calls.

The *Illinois Brick* rule is deeply entrenched. Defense-side antitrust practitioners love it—some boast of an “*Illinois Brick* Wall” which “if anything, in recent years . . . has been strengthened.”²³⁵ To be sure, some states have enacted so-called “*Illinois Brick* repealer statutes” that permit indirect purchasers to make state law claims.²³⁶ But at the federal level, *Illinois Brick* is rock-solid.

2. Antitrust Injury

Antitrust injury, another component of the standing inquiry, allows for recovery only on certain kinds of harms: those which are specially connected to the substantive antitrust laws. The doctrine qualifies the section 4 cause of action.

The early antitrust injury case *Brunswick* illustrates the trouble with a literal reading of the statute’s broad terms.²³⁷ There, the Brunswick Corporation had taken advantage of a downturn in the bowling business to purchase failing bowling alleys—so many that soon it boasted “gross revenue more than seven times greater[] than the total for the 11 next largest bowling chains.”²³⁸ Among these acquisitions was an alley in Pueblo, Colorado, that had fallen into financial distress.²³⁹ A rival alley, Pueblo Bowl-O-Mat, sued under Section 4 on the ground that acquiring

233. *Id.* at 732.

234. *Id.* at 734–35.

235. Christopher T. Casamassima & Tammy A. Tsoumas, *The Illinois Brick Wall: Standing Tall*, 20 COMPETITION 67, 67 (2011).

236. Jeffrey J. Amato, *Antitrust 101: The Indirect Purchaser Rule of Illinois Brick* (Jan. 21, 2020), <https://www.winston.com/en/blogs-and-podcasts/competition-corner/antitrust-101-the-indirect-purchaser-rule-of-illinois-brick> [<https://perma.cc/J6C2-Y6R4>]; see also Kellen S. Dwyer, *With the Illinois Brick Wall Down, What’s Left?: Determining Antitrust Standing Under State Law*, 3 J. BUS. ENTREPR. & L. 255, 256 (2010).

237. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487–88 (1977).

238. *Id.* at 480.

239. *Id.*

the Pueblo Brunswick and other alleys violated the Clayton Act's substantive proscription of mergers that "might substantially lessen competition or tend to create a monopoly."²⁴⁰ The theory of injury was that without Brunswick's intervention, Bowl-O-Mat would have enjoyed "an anticipated increase in market shares."²⁴¹ Put another way: Bowl-O-Mat deployed a statute that protects competition to protect themselves from competition.

The Supreme Court rejected that effort. In the process, it birthed the doctrine of antitrust injury. Though it recognized the deterrent effect and intent of Section 4's treble damages clause, it determined that "the treble-damages provision . . . is designed primarily as a remedy."²⁴² To make that remedy available to Bowl-O-Mat would "divorce[] antitrust recovery from the purposes of the antitrust laws," "make Section 4 recovery entirely fortuitous, and . . . authorize damages for losses which are of no concern to the antitrust laws."²⁴³ Justice Marshall—no Chicago devotee—wrote the opinion for a unanimous Court.²⁴⁴ Nine years later, the Court extended *Brunswick*'s logic to claims for injunctive relief under another Clayton Act cause of action, section 16.²⁴⁵ This time, two Justices dissented on the ground that "*Brunswick* merely rejected a 'novel damages theory.'"²⁴⁶

Over time, the broad reading of *Brunswick* prevailed. Today, antitrust injury articulates several crucial limitations on prospective plaintiffs. A plaintiff whose "losses do not flow from the aspects of [the challenged practice] that render it illegal" lacks antitrust injury.²⁴⁷ In other words, "[i]f the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition," the suit cannot proceed.²⁴⁸ Further, even when the injury flows from conduct that is harmful to competition, the injury must be direct: Antitrust injury "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."²⁴⁹ Antitrust injury is required "even in cases involving *per se* violations."²⁵⁰

240. *Id.*

241. *Id.* at 484.

242. *Id.* at 485–86.

243. *Id.* at 487.

244. See Victor Kramer, *The Road to City of Berkeley: The Antitrust Positions of Justice Thurgood Marshall*, 32 ANTITRUST BULL. 335, 340 (1987) ("Marshall apparently has little faith in economic theory as a basis for deciding cases.").

245. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 113 (1986).

246. *Id.* at 123 (Stevens, J., dissenting) (quoting *Brunswick*, 429 U.S. at 490).

247. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 (1990).

248. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995).

249. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

250. *USA Petroleum Co.*, 495 U.S. at 344.

3. Antitrust Standing

Antitrust injury forms a key pillar of a broader doctrine: antitrust standing. Standing adds the requirement that the plaintiff be an “efficient enforcer.”²⁵¹ That is, the remedy for an antitrust violation should go to a potential plaintiff who will tend to enforce the antitrust laws in a judicially manageable and convenient fashion. Other potential plaintiffs are not “injured by reason of a violation of the antitrust laws within the meaning of [section] 4 of the Clayton Act.”²⁵²

The key standing case, *Associated General Contractors (“AGC”)*, marked Justice Marshall’s departure from the consensus around antitrust injury.²⁵³ A seven-Justice majority opinion authored by Justice Stevens added four new factors to the *Brunswick* antitrust injury inquiry.²⁵⁴ Now after *AGC*, courts should also (in addition to the existing requirements) consider a dizzying array of “[o]ther relevant factors—the nature of the [plaintiff’s] injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the [plaintiff’s] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy.”²⁵⁵

One motivation for these factors is to set an ideal level of antitrust enforcement. The *AGC* Court noted that where a better plaintiff exists, there is only a “diminishe[d] . . . justification for allowing a more remote party . . . to perform the office of a private attorney general.”²⁵⁶ Moreover, the twin specters of “duplicate recoveries” and “complex apportionment of damages” threatened excessive penalties on the one hand and “undermin[ing] the effectiveness of treble-damages suits” on the other.²⁵⁷ The other impetus is judicial economy: “keeping the scope of complex antitrust trials within judicially manageable limits.”²⁵⁸ Besides judges’ own self-interest, an “interminable litigation” threatens

251. See, e.g., *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 138 (2d Cir. 2021) (“To demonstrate antitrust standing, a private plaintiff must show . . . ‘it is a suitable plaintiff to pursue the alleged antitrust violations and thus is an efficient enforcer of the antitrust laws.’” (quoting *GATT Commc’ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013))).

252. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 546 (1983).

253. See *id.* at 546 (Marshall, J., dissenting).

254. *Id.* at 545.

255. *Id.*

256. *Id.* at 542.

257. *Id.* at 543–45.

258. *Id.* at 543.

that optimal level of enforcement.²⁵⁹ Throughout the litigation, antitrust violators get to keep their ill-gotten gains and innocent defendants bear undeserved costs.

The antitrust standing doctrine has developed to bar suits by a host of prospective plaintiffs: lessors whose incoming lessees were pushed out anticompetitively,²⁶⁰ suppliers whose customers suffered exclusion,²⁶¹ employees whose employers suffered exclusion,²⁶² shareholders in corporations that suffered exclusion,²⁶³ unions whose members suffered exclusion,²⁶⁴ and “umbrella plaintiffs” who paid the same prices as direct purchasers of goods whose prices were fixed.²⁶⁵

* * *

To sum up: today, antitrust standing unrolls into three big ideas.

1. *Illinois Brick* says that of consumers, only direct purchasers—not indirect ones—may enforce the antitrust laws.
2. *Brunswick* further limits private enforcement to those whose injuries stem from illegal aspects of the defendant’s conduct.
3. *AGC* caps off antitrust standing by shrinking the pool further, to so-called “efficient enforcers” whose suits will remain judicially manageable.

III. STANDING AFFECTS SUBSTANCE

Despite its image as a sleepy and ostensibly neutral corner of antitrust law, standing sits at the heart of core debates in antitrust. Indeed, all three of the disputes between today’s two factions—whose interests matter, where antitrust goes wrong, and who decides—show that standing sets the tone. This Part, then, exposes how the current status quo of

259. *Id.* at 543 n.50.

260. *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597–98 (7th Cir. 1995).

261. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010).

262. *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 (D.C. Cir. 1987).

263. *In re Napster, Inc. Copyright Litig.*, 354 F. Supp. 2d 1113, 1120 (N.D. Cal. 2005).

264. *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Plan. Ass’n*, 830 F.2d 1374, 1380 n.3 (7th Cir. 1987).

265. *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 855463, at *4 (D.D.C. July 2, 2001).

antitrust standing buttresses the Chicago school's dominance and hampers the neo-Brandeisians' continued ascent.

A. Standing Reflects Antitrust's Goals

One core conflict in antitrust law is the relative importance of its two goals, deterrence and compensation. The Chicago school focused almost exclusively on deterrence, and today's antitrust standing serves that goal. But neo-Brandeisians value compensation, too. Antitrust standing (as currently constructed) stands in the way.

1. *Illinois Brick*, Deterrence Primacy, and Efficiency

Chicagoans' dearest maxim—that antitrust should maximize efficiency, distribution be damned—is right there in *Illinois Brick*. The opinion recognized that the cause of action in section 4 of the Clayton Act was “designed to compensate victims of antitrust violations for their injuries.”²⁶⁶ Yet the majority was “unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all ‘those within the defendant’s chain of distribution.’”²⁶⁷ The juice wasn’t worth the squeeze, the Court held, because it would introduce a deadly “combination of increasing the costs and diffusing the benefits of bringing a treble-damages action.”²⁶⁸ And even if a court could distribute the spoils of a treble-damages action to indirect purchasers, “there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.”²⁶⁹ The Court even considered the latest economic learning, citing an economist who proposed a method for calculating passed-on charges.²⁷⁰ Still, it concluded that “it is unrealistic to think that elasticity studies . . . will resolve the pass-on issue.”²⁷¹

Simply put, deterrence was more important. “[T]he longstanding policy of encouraging vigorous enforcement of the antitrust laws . . . supports our adherence to the *Hanover Shoe* rule.”²⁷² No matter that ultimate consumers don’t recover. As far as deterrence is concerned, it doesn’t matter whose pocket treble damages fill—as long as they empty the defendant’s. And the Court reasoned that direct purchasers, with their

266. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

267. *Id.*

268. *Id.* at 745.

269. *Id.* at 747.

270. *Id.* at 741 n.25 (citing Elmer J. Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 887, 893 (1975)).

271. *Id.* at 742.

272. *Id.* at 745.

concentrated interests, would be better positioned to enforce the antitrust laws. That justified their newfound “preferred position as private attorneys general.”²⁷³

The Chicago school leaped to lend support to that conclusion. Richard Posner and William Landes praised the Court’s decision in an article published two years later in none other than *The University of Chicago Law Review*.²⁷⁴

The pair did not mince words about the primacy of deterrence. Sure, compensation is also a worthy goal. “When the two objectives come into conflict, however, [they] believe[d] that achievement of the goals of the antitrust laws requires that deterrence be preferred.”²⁷⁵ They made this argument more explicitly than the Court did, contending that perfect deterrence would obviate the need for compensation.²⁷⁶ But the conclusion was the same. Compensation considerations could not surmount the impact on deterrence.

Landes and Posner also agreed with the Court that concentrating recoveries in direct purchasers advances enforcement goals. Direct purchasers enforce more efficiently, avoid distribution costs, and—even without *Illinois Brick*—have stronger incentives to sue.²⁷⁷ After dozens of pages of theory (complete with graphs and equations) and empirical analysis (complete with tables), the two economists were convinced. “[T]he rule of *Illinois Brick* . . . is probably the soundest rule from the standpoint of maximizing the effectiveness of antitrust enforcement.”²⁷⁸

Posner’s assent is a good sign that *Illinois Brick* earns the Chicago stamp of approval. Other Chicago scholars concur. Judge Easterbrook cited the decision as an example of a then-new Supreme Court approach that “emphasizes efficiency and consumers’ welfare.”²⁷⁹ William Page endorsed “the viewpoint of the majority in *Illinois Brick* that the more appropriate goal for the legal system is effective deterrence,” noting along the way that the opinion “has won the approval of Chicago School analysts.”²⁸⁰

273. *Id.* at 746.

274. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979).

275. *Id.* at 605.

276. *Id.*

277. *Id.* at 608–09.

278. *Id.* at 634.

279. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 & n.7 (1986).

280. William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 1, 38 (1999).

Today's Chicago devotees want to push further. The most recent antitrust standing case to reach the Court, *Apple Inc. v. Pepper*,²⁸¹ asked whether consumers who bought apps were "direct purchasers" from Apple for *Illinois Brick* purposes.²⁸² The Court said they were, even though app developers—not Apple—set prices in the App Store.²⁸³ Four dissenters, with Justice Gorsuch in the lead, chided the majority for adopting "an easily manipulated and formalistic rule of contractual privity."²⁸⁴ By privileging direct purchasers, the majority followed the letter of *Illinois Brick* while ignoring its economic underpinnings—a loss for the Chicago school (though not necessarily for a coherent standing doctrine).²⁸⁵ That outcome, for Justice Gorsuch, was "whittling [*Illinois Brick*] away to a bare formalism."²⁸⁶ The letter of the case—direct purchasers can recover; indirect purchasers may not—does not go far enough for Justice Gorsuch, perhaps the most Chicagoan Justice on antitrust issues today.²⁸⁷ After all, he said, if Apple's conduct added up to a "monopolistic overcharge, the *developers* are the parties who are directly injured by it."²⁸⁸ No one seems to question *Illinois Brick* and its consumer-welfare logic; the open issue is whether to extend it.

2. Neo-Brandeis's Compensation Goals

Neo-Brandeisians do not share Chicagoans sole focus on deterrence. Rather, they value compensation. As this article has outlined, the neo-Brandeisian outlook does not consider overall efficiency as a value in the same way that Chicagoans do.²⁸⁹ Instead, when consumers bear the brunt of competitive harms, it is important that the antitrust laws deliver treble damages *to consumers*.

This compensation focus flows directly out of a neo-Brandeisian insistence that Congress directed antitrust laws at "primarily objectives of a distributive rather than of an efficiency nature."²⁹⁰ To be sure, concentrating recoveries in direct purchasers may help to set the level of deterrence and thereby make the economy more efficient. So, however, would more drastic measures, like concentrating recoveries directly in

281. 139 S. Ct. 1514 (2019).

282. *Id.* at 1519.

283. *Id.* at 1521.

284. *Id.* at 1526 (Gorsuch, J., dissenting).

285. *Id.* at 1529–30 (Gorsuch, J., dissenting).

286. *Id.* at 1531 (Gorsuch, J., dissenting).

287. *Supra* note 61.

288. *Apple Inc.*, 139 S. Ct. at 1528 (Gorsuch, J., dissenting).

289. *See supra* Section I.A.

290. Lande, *Wealth Transfers*, *supra* note 53, at 68.

well-resourced plaintiff's law firms. But that's not what the law does. And for good reason! That would be at odds with the distributive goals of the statute. For neo-Brandeisians, those distributive goals can only be accomplished by assigning recoveries to the intended beneficiaries of the antitrust statutes—the consumers and workers whom anticompetitive conduct harms, even indirectly.²⁹¹

The *Illinois Brick* rule and antitrust standing's general demand that compensation go to "more direct victims of the alleged conspiracy"²⁹² obstruct any reorientation of antitrust law around consumers *qua* consumer. Where the Chicago model "views consumers collectively,"²⁹³ counting monopolists alongside their customers, neo-Brandeisians prefer to ensure that specific consumers get their due. If two manufacturers work together to keep prices high, but their deal also creates efficiencies, that's all to the good in the Chicagoan model so long as the manufacturers get more utility than their customers lose.

Illinois Brick adopts that same frame between middlemen—who are the direct purchasers—and the final consumers, who often bear the final overcharges. It depicts any preference for compensating the end consumer, rather than the middleman, as "carry[ing] the compensation principle to its logical extreme," going further to "question the extent to which such an attempt would make individual victims whole for actual injuries."²⁹⁴ The opinion's logic reflects more than ambivalence toward the funds' rightful claimant. It undermines the whole notion of compensation for individuals, fearing that it would "simply deplet[e] the overall recovery in litigation over pass-on issues."²⁹⁵ If neo-Brandeisians are serious about distribution's key role in antitrust, that litigation has to be worthwhile.

Moreover, efficient enforcer requirements get in the way of distributive goals for non-consumer groups. Lina Khan laid out four non-consumer constituencies for antitrust: "workers, producers, entrepreneurs, and citizens."²⁹⁶ Preferences for buyer-consumers to enforce the antitrust laws lead to courts dismissing meritorious suits. Take, for example, *Huhta v. Children's Hospital of Philadelphia*,²⁹⁷ where the plaintiff was a cardiologist who alleged that the hospital (his employer) used its market power to deny him the right to perform certain

291. See *supra* notes 82–84 and accompanying text.

292. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983).

293. BORK, *supra* note 34, at 110.

294. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977).

295. *Id.* at 747.

296. Khan, *supra* note 47, at 737.

297. No. CIV. A. 93–1765, 1994 WL 245454 (E.D. Pa. May 31, 1994).

diagnostic procedures.²⁹⁸ That is, the plaintiff alleged an injury to himself as a *worker*. The court refused to consider the claim, dismissing the case after accepting the defendant's arguments that "the direct 'victims' of the alleged antitrust violations are those patients and insurance providers who are consumers."²⁹⁹ This was one case where the plaintiff—although a competitor—complained of reduced competition in the market. Yet his antitrust claim could not go forward. And to this author's knowledge, the direct victims never brought such a suit.

For neo-Brandeisians, there are other ways, both less intrusive and less error-prone, to solve the problems that antitrust standing is supposed to alleviate. Sandeep Vaheesan has argued that *Brunswick* itself could have reached its same intuitive conclusion (no recovery for bowling alley owners complaining about more competition) *without* the antitrust standing angle.³⁰⁰ The substantive law itself was enough to bar recovery! The Court should have let the bowling alley bring its claim, then dismissed it on the merits: "It should have decided the liability question before inventing a new doctrine."³⁰¹ Interposing antitrust standing as a pseudo-procedural ground added nothing but headache.

Nor do other solutions solve the problem; only change to antitrust standing would further the compensation goal. Further government action, like the cases the Biden Administration has pursued, would not compensate victims of antitrust violations. Criminal antitrust litigation is the best example of this fact. It deters further antitrust violations, sure. But compensation is not among the well-known justifications for the criminal law, because victims of a crime go uncompensated unless they can bring their own private action. Assault victims can bring tort claims. Antitrust victims, by contrast, often have their own civil claims barred by standing doctrines.

B. Standing Calibrates Deterrence

The proper level of enforcement is perhaps the most direct area of conflict between Chicagoans and neo-Brandeisians. The former fret about overdeterrence, the latter about underdeterrence. Antitrust standing helps set that level of deterrence. After all, private enforcement makes up a large majority of antitrust litigation. Standing rules push on both the number of antitrust suits and their settlement value—and thereby modulate their total deterrent effect.

298. *Id.* at *1.

299. *Id.* at *2, *5.

300. Vaheesan, *supra* note 26.

301. *Id.*

1. Antitrust Injury and Limiting Overdeterrence

The Chicago school was not hostile to private enforcement at first. Early on, two of its pioneers proposed private enforcement of *all* laws.³⁰² The market could provide vigorous law enforcement, so long as “the expected monetary return exceeded the expected costs.”³⁰³ Ultimately the enthusiasm for private enforcement waned amid a Chicago school consensus that its “objective should, of course, be optimal enforcement rather than maximum enforcement.”³⁰⁴ And antitrust actions were no exception. The Chicago school centered optimal deterrence. The Chicago school centered antitrust. It is almost a syllogism to say that these scholars inevitably zeroed in on optimal deterrence *in* antitrust.³⁰⁵

Antitrust standing was one variable that Chicagoans tweaked along the way. Perhaps the earliest sign of a Chicago influence on antitrust standing came in *Brunswick*, the case that introduced the antitrust injury requirement.³⁰⁶ To briefly recap the facts: A competitor bowling alley had sued Brunswick Corporation—then, as now, an owner of many bowling alleys—for buying a failing competitor and eliminating a monopoly profit.³⁰⁷ And to recap the holding: Brunswick Corporation’s entry did not create the right *kind* of injury to state a claim under the antitrust laws.³⁰⁸

The *Brunswick* Court did not reach this conclusion alone. Rather, it drew on contemporary scholarship, citing a law review article from Phillip Areeda and symposium comments from Donald Turner.³⁰⁹ Though these professors were not affiliated with the University of Chicago itself, their Harvard school of antitrust bore many similarities.³¹⁰

302. See Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEG. STUD. 1, 14 (1974) (“Why not . . . generalize this system, and let anyone enforce statutes and receive as compensation for performance the fines levied against convicted violators?”).

303. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEG. STUD. 1, 37 (1975).

304. Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEG. STUD. 47, 55 (1975); see also Becker, *supra* note 92, at 180–81 (theorizing about optimal deterrence in the criminal law context).

305. See *supra* notes 92–110 and accompanying text (explaining the centrality of optimal deterrence to the Chicago school).

306. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

307. *Id.* at 480–81.

308. *Id.* at 490.

309. *Id.* at 487 n.11.

310. See Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2151 (2020) (criticizing those who “attribute the emergence of economic considerations as the exclusive touchstone of antitrust law solely to the Chicago School”).

Both scholars had cited the lower court's treatment of *Brunswick* as an example of antitrust law gone astray. The Supreme Court's opinion reflected their concerns; it is a testament to the influence of that era's economics-driven antitrust scholarship.

Professor Areeda's piece makes a good starting point. There, the scholar chided the Third Circuit for bungling *Brunswick*.³¹¹ He concluded that a "desire to encourage private enforcement and to penalize antitrust violations" had motivated that court to "award[] damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability."³¹² Among other critiques, Areeda took issue with the decision's overdeterrent effects. Reciting that "one who obtains a monopoly merely by vigorous competition is acting entirely properly," Areeda suggested that the court should have allowed *Brunswick* to try and prey on its incumbent competitor, then step in "if predation does occur."³¹³ And "most importantly," Areeda criticized the damages remedy on unambiguous overdeterrence grounds.³¹⁴ He reasoned that it is "hardly desirable" that a competitor might face damages for allegedly predatory pricing in this context.³¹⁵ Better even to enjoin the merger than "to hamstring its efforts to compete effectively [and] to ignore the values the antitrust laws were designed to protect."³¹⁶ Professor Turner's comments sounded in those same overdeterrence fears. He suggested that awarding damages would dissuade "deep pockets" like *Brunswick* from "tak[ing] over the lanes which would otherwise go bankrupt or limp along, and operat[ing] them very well."³¹⁷

The Court embraced those ideas—and embedded them in the United States Reports. To be sure, that Court concluded that treble damages are primarily intended as a remedy, not a deterrent. But it also pointed to legislative history that supported a deterrent view,³¹⁸ and this deterrent position seemed to motivate the Court. Indeed, the Court remarked that "the antitrust laws are not merely indifferent to the injury claimed

311. Phillip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976) (discussing *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975), *rev'd*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)).

312. *Id.*

313. *Id.* at 1135.

314. *Id.*

315. *Id.*

316. *Id.* at 1136.

317. Symposium, *Private Enforcement of the Antimerger Laws*, 31 REC. ASS'N BAR CITY N.Y., 239, 260 (1976).

318. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977).

here.”³¹⁹ Rather, to award damages to Pueblo would be “inimical to the purposes of these laws.”³²⁰ Or put just a bit differently, it would over-deter Brunswick’s procompetitive conduct.

After *Brunswick*, Chicagoan scholars cheered the opinion. Easterbrook, with a coauthor, rejoiced that “[t]he antitrust injury rule of *Brunswick* implements the optimal damages approach” he championed.³²¹ That kind of optimized-enforcement world “allows ‘efficient violations’ to take place, while it deters other violations.”³²² So antitrust standing does more than shape the identity of enforcers. Rather, it helps set the level of deterrence—and all to the good, on the Chicagoan view.

The scholar William Page took things a step further, siting optimal deterrence at the core of antitrust standing. In a dramatic turn from the *Brunswick* recognition that damages are about compensation, Page’s thinking “assumes that the primary function of the treble-damage action is deterrence.”³²³ And from within that shifted frame, he praised the opinion for its “central insight” that “there are inefficient levels of deterrence.”³²⁴ Later, harmonizing *Brunswick* with *AGC* and other standing cases, Page found a common thread: “a consistent economic purpose for private antitrust remedies.”³²⁵ Optimal deterrence is all bound up in antitrust standing.

2. Antitrust Standing Hampers Enforcement

Although neo-Brandeisians value compensation, they do have deterrence goals. And to the extent that the two sides’ respective positions boil down to “we have too much deterrence” and “we have too little deterrence,” perhaps the neo-Brandeisian stance here just takes one logical step. For Chicagoans, antitrust standing is good because it reduces deterrence; that brings things closer to optimal levels. For neo-Brandeisians, antitrust standing is *bad* because it reduces deterrence; that takes things *further* from optimal levels. Yet there is more nuance than that, for not all deterrence is created equal.

Privately supplied deterrence is special for two reasons. First, government machinery—especially the highly technical, relatively boring antitrust machinery—is prone to capture. And second, the profit motive

319. *Id.* at 488.

320. *Id.*

321. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1160 (1982).

322. *Id.* at 1157.

323. William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 472 (1980).

324. *Id.* at 475.

325. Page, *supra* note 204, at 1511–12.

for private litigation means its supply is ample and more stable than government-led enforcement efforts.

First off, consider the capture issue. Neo-Brandeisians are very familiar with this one. Antitrust capture is a well-known and longstanding problem: Regulators are at risk of growing cozy with the regulated, who often employ them before and after their tenure. Conservative economists studied it back in the 1970s, not long after the idea of regulatory capture burst onto the scene.³²⁶ Today's reformers also worry about capture. But unlike the conservatives, who saw capture as a means of misdirecting enforcement, neo-Brandeisians fear that capture *restrains* enforcement.³²⁷ Today's "cultural capture" results from a revolving door, "where officials in federal government agencies see their interests as more closely aligned with the entities they regulate, rather than the interests of the public."³²⁸ Indeed, Rohit Chopra, a neo-Brandeisian figure who heads the Consumer Financial Protection Bureau, has called on Congress to "revisit [and tighten] laws regarding post-employment restrictions for senior FTC officials."³²⁹ A recently-departed FTC Commissioner, Christine Wilson, wrote a scathing critique of Lina Khan's leadership, charging that her zeal for rooting out capture has caused a "brain drain" of FTC talent.³³⁰

Vigorous private enforcement would help solve this capture issue. Imagine if the neo-Brandeisians could accomplish their mission without relying heavily on FTC litigators and staff. There would be no need to resort to measures that might cause brain drain. Moreover, handing off litigation efforts to private parties would allow the government to marshal its antitrust resources elsewhere. Another of Wilson's complaints was that certain policy initiatives had been left by the wayside in favor of a

326. See Faith, Leavens & Tollison, *supra* note 106, at 342.

327. See ROHIT CHOPRA & JULIE MARGETTA MORGAN, ROOSEVELT INST., UNSTACKING THE DECK: A NEW AGENDA TO TAME CORRUPTION IN WASHINGTON 4 (2018), <https://rooseveltinstitute.org/publications/unstacking-the-deck-agenda-tame-corruption-washington/> [<https://perma.cc/E73Q-PHXT>].

328. *Id.*

329. *Hearing on Transforming the FTC: Legislation to Modernize Consumer Protection Before the Subcomm. on Consumer Prot. and Com. of the H. Comm. on Energy and Com.*, 117th Cong. 2 (2021) (statement of Rohit Chopra, Comm'r, Federal Trade Commission).

330. Christine S. Wilson, Comm'r, FTC, *The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC*, Remarks at the ABA Antitrust Law Section's 2021 Fall Forum 12–16 (Nov. 9, 2021) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf [<https://perma.cc/797N-QE77>]).

focus on careful merger reviews.³³¹ The more antitrust policing that private litigants can handle, the more room on the government's plate to handle these policy efforts. But antitrust standing stunts incentives to privately enforce the antitrust laws, leaving much to the government.

Second, the government's lack of resources motivates another advantage: Private litigants can handle a *lot* of antitrust policing. Between March 2023 and March 2024, private plaintiffs brought 445 civil antitrust suits.³³² By way of comparison, the government brought just *sixteen*.³³³ At peak, private litigants brought 1,658 civil antitrust suits in a year.³³⁴ So the treble-damage machinery is strong, but total civil enforcement—at least by number of cases—is down by over seventy percent.³³⁵ What accounts for the drop? Antitrust standing, at least in part. The graph of civil antitrust cases per year that appears below tells the story: In 1977, when the Court decided *Illinois Brick* and *Brunswick*, it dealt a crushing blow to private antitrust enforcement.³³⁶

331. *Id.* at 12 (“[I]mportant staff work has been sidelined. . . . Our Office of Policy Planning engages in key policy initiatives.”).

332. ADMIN. OFF. OF THE U.S. CTS., TABLE C-2—U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS (2024), <https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2024/03/31> [<https://perma.cc/TWE9-S8ZU>] [hereinafter TABLE C-2 (2024)].

333. *Id.*

334. 1977 ADMIN. OFF. U.S. CTS. ANN. REP. 100, <https://www.ojp.gov/pdffiles1/Digitization/43679NCJRS.pdf> [<https://perma.cc/94RZ-NTTG>].

335. Comparing this 1977 peak with the most recent data, private antitrust filings in one year went from 1,658 suits to only 445—a 73.16% decrease. *Compare id.*, with TABLE C-2 (2024), *supra* note 332.

336. Sinchit Lai, *Output Effect of Private Antitrust Enforcement*, 27 FORDHAM J. CORP. & FIN. L. 477, 495 fig.1 (2022). Using a two-stage least squares regression analysis, Lai's work confirms that the two 1977 decisions are “significantly related” to the drop in private enforcement. *Id.* at 498, 502 tbl.2.

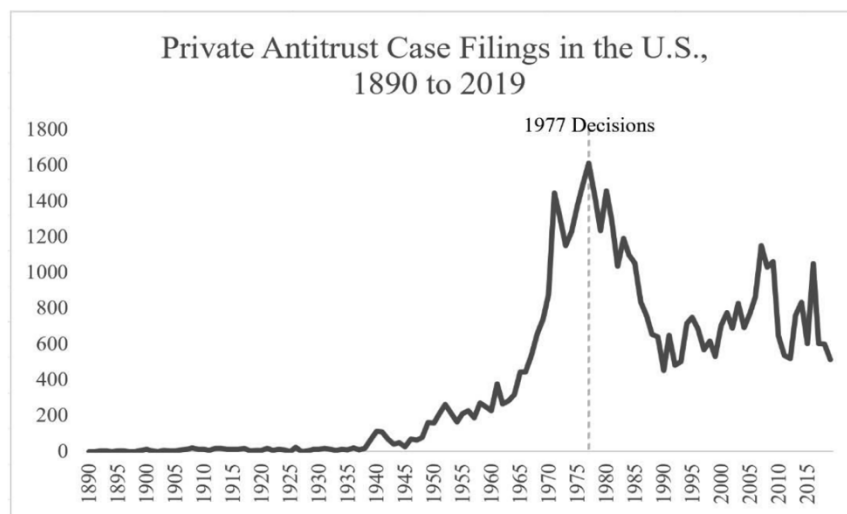


Figure 2. Graph of Annual Private Antitrust Case Filings³³⁷

Neo-Brandeisians are not blind to the way antitrust standing blunted deterrence. One figure in the movement, Sandeep Vaheesan, has contended that—contrary to its stated purpose—*Illinois Brick*’s rule impairs deterrence.³³⁸ Many direct purchasers have little incentive to sue because they pass along overcharges to their own customers.³³⁹ Worse still, it is hard to believe that a direct purchaser “is always going to file an antitrust suit and jeopardize a commercial relationship with a powerful supplier.”³⁴⁰ Likewise, the progressive Open Markets Institute wrote in a recent amicus brief that through antitrust standing, courts “have effectively rewritten and narrowed a law enacted by the people’s representatives,” undermining its twin purposes: “to make injured parties whole and to deter restraints of trade.”³⁴¹ Still, despite this recognition, antitrust standing has not assumed its rightful place as a core issue for neo-Brandeisians. Even where progressives have discussed antitrust standing, it’s far from a focus.

C. Standing Modifies Juries’ Role

Antitrust standing presents a legal avenue by which courts can dispose of antitrust cases. By giving defendants another tool at the motion

337. *Id.* at 495 fig.1.

338. Vaheesan, *supra* note 26.

339. *Id.*

340. *Id.*

341. Brief of Open Markets Institute, *supra* note 27, at 1.

to dismiss and summary judgment stages, antitrust standing facilitates Chicagoans' vision of an expert, technocratic system of antitrust administration—both by shifting enforcement into government hands and by taking it away from juries. At the same time, it hinders the democratic, jury-centric approach to antitrust that neo-Brandeisians favor.

1. Standing Enables Technocracy and Judicial Control

Once Chicagoans—and courts—agreed that deterrence was the primary goal for antitrust suits, the stage was set to centralize control in judicial and technocratic hands. *AGC* took that next step.³⁴² By constraining the set of possible plaintiffs and allowing judges yet more pretrial means to dispose of antitrust suits, the precedent hamstrung private suits.³⁴³ And its “efficient enforcer” factors reflect the day’s Chicago-inflected conventional wisdom. Consider them one by one, and you will find each reveals a preference for close judicial management.

First, the nature of the plaintiff’s alleged injury. This is the now-familiar *Brunswick* antitrust injury requirement. In specific, the Court needed the “nature of the . . . injury” to reflect the fact that “the Sherman Act was enacted to assure customers the benefits of price competition.”³⁴⁴ This is, of course, the Chicagoan consumer welfare standard. And for all the same reasons as in *Brunswick*, it calibrates deterrence to the end of price competition—not democratic health, any distributive purpose, or any other value that Chicagoans rejected.

*Second, “the directness or indirectness of the asserted injury.”*³⁴⁵ This is *Illinois Brick* all over again. The Court cites that case here, rehashing most of its same arguments: pass-on consistency with *Hanover Shoe*, risk of duplicative recoveries, and worries about complex apportionment of damages.³⁴⁶ But one argument drops out. The Court omits any reference to *maximizing* antitrust deterrence—even though that was a major theme in *Illinois Brick*. The shift over just six years is remarkable. The earlier case invokes “the longstanding policy of encouraging vigorous private enforcement of the antitrust laws” to justify the direct-purchaser rule.³⁴⁷ The latter strikes a gloomier (and more defendant-friendly) tone, warning of “the danger of multiple liability” if

342. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

343. *Id.* at 538.

344. *Associated Gen. Contractors*, 459 U.S. at 538.

345. *Id.* at 540.

346. *Id.* at 543–44.

347. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977).

indirect purchasers get involved.³⁴⁸ Put another way, the *Illinois Brick* Court worried about under-enforcement—sounding like today's neo-Brandeisians—and then the *AGC* Court fully took up the Chicagoan cause, positioning courts as guardians against the “danger” of over-enforcement.³⁴⁹ That specter of over-enforcement justifies tighter judicial control over antitrust litigation.

*Third, “the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits.”*³⁵⁰ This is where *AGC* pushed the law forward, and it's where the Court most tipped its hand about judicial control. The *AGC* Court treated major judicial control over antitrust as a given. Judges would have to navigate between “the risk of duplicate recoveries on the one hand,” and “the danger of complex apportionment on the other.”³⁵¹ And it trotted out a parade of tasks judges would have to perform to handle an antitrust case like this one: apportioning damages, figuring out how much business was diverted, and determining which costs were passed on and to whom.³⁵² This all sounds awfully difficult.

But what the Court (or its majority) missed—and what its Chicago-inflected view of antitrust obscured—is that these are all *fact questions*. Who was hurt? How badly were they hurt? Did they mitigate their damages? How much did they mitigate them? These are familiar questions. Juries make findings like this all the time.

Justice Marshall penned a dissent that stood up for juries, envisioning a robust role for them in antitrust. “The ultimate conclusion as to what the evidence proves is for the jury.”³⁵³ Yet the majority insisted on throwing the case out at the earliest opportunity, not even allowing it to reach summary judgment.³⁵⁴ The Court failed to live up to its own ideal that “[d]ifficulty of ascertainment is no longer confused with right of recovery.”³⁵⁵

Courts today continue to use the *AGC* factors to maintain judicial control over antitrust proceedings. In one illustrative case, the Third Circuit affirmed the dismissal of antitrust claims that hospitals brought

348. *Associated Gen. Contractors*, 459 U.S. at 543–44.

349. *Id.* at 544.

350. *Id.* at 543.

351. *Id.* at 544.

352. *Id.* at 545.

353. *Id.* at 552 (Marshall, J., dissenting) (quoting *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969)).

354. *Id.* (Marshall, J., dissenting).

355. *Id.* (Marshall, J., dissenting) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)).

against tobacco companies.³⁵⁶ The damages were too hard to calculate, the trial complexity too great. These were the technical, doctrinal reasons for the court's decision. But the court also raised the specter of a jury verdict, citing a recent \$145 billion jury verdict against tobacco companies.³⁵⁷ Its wry commentary on the dismissal captured the attitude that antitrust standing allows: "We express no view on the propriety of such compensation. We simply hold that, due to the remoteness of the Hospitals' injuries, this third-party suit against the tobacco industry may not proceed."³⁵⁸ Likewise, the Eighth Circuit cited *AGC* to reverse a \$600 million jury award for South Dakota.³⁵⁹

Chicago antitrust scholars, of course, were all too happy with these developments. Writing about antitrust standing, William Page lamented that "[t]he very presence of a jury as trier of fact introduces an irrational element into the award of damages."³⁶⁰ Antitrust standing represents a part of the Chicagoans' solution to that irrationality.

2. Standing Constrains Juries

Neo-Brandeisians have briefly recognized the role that antitrust standing plays in permitting judges to tightly control antitrust litigation: "Antitrust standing gives judges another tool with which to toss private suits on ostensibly procedural grounds."³⁶¹ By shifting more and more antitrust decisions out of substance and into the world of procedure, judges aggrandize themselves and diminish juries' importance. But the specific antitrust *standing* critique is underdeveloped.

Still, antitrust standing is of a piece with other procedural hurdles that antitrust progressives have decried. All of them constrain access to juries and prolong antitrust litigation.

- Antitrust stood at the forefront of a procedural sea change in motions to dismiss—*Twombly*, after all, was an antitrust case.³⁶² Lina Khan and Sandeep Vaheesan summed up the

356. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 433 (3d Cir. 2000).

357. A Florida appellate court later voided the vaunted verdict. See Jeremy W. Peters, *Court Voids \$145 Billion Judgment in Tobacco Case*, N.Y. TIMES, (July 15, 2006), <https://www.nytimes.com/2006/07/06/us/06cnd-tobacco.html>.

358. *Allegheny Gen. Hosp.*, 228 F.3d at 445.

359. *South Dakota v. Kan. City S. Indus., Inc.*, 880 F.2d 40, 46, 49 (8th Cir. 1989).

360. William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1458 (1985).

361. Vaheesan, *supra* note 26.

362. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007).

decision's impact: "Parties injured by collusive activity now have to present much more evidence in support of their complaints before they have had an opportunity to conduct in-depth factual discovery through the judicial process."³⁶³

- Likewise for summary judgment. Amid the Chicago revolution, the Court altered summary judgment standards in *Matsushita*.³⁶⁴ And here, too, neo-Brandeisians have called out the Court for "rewriting pleading standards in a business-friendly manner."³⁶⁵
- The same goes for class certification. The Court—albeit largely outside the antitrust context—has complicated the path to a damages class action.³⁶⁶ These are "often the only means of seeking redress for illegal conduct . . . that inflicts small harm on a large number of individuals," and now they are harder to access.³⁶⁷
- Perhaps most salient to neo-Brandeisians, binding arbitration clauses bar some antitrust suits. Another, more recent decision³⁶⁸ upheld American Express's ability to contractually "coupl[e] a forced arbitration clause with a class action ban."³⁶⁹ This, Khan and a co-author wrote, constituted "a gift for monopolistic companies, who can use their market power to impose contractual terms that shield from liability abuses of that same market power."³⁷⁰

These four procedural devices all frustrate access to jury verdicts. They tie up antitrust actions in federal court. They limit the world of plaintiffs who can bring suits in the first place. And they route private antitrust suits into arbitration, a world without any juries at all.

The same goes for antitrust standing. Just like the pleading standards in *Twombly* and *Matsushita*, antitrust standing puts a roadblock in

363. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 275 (2017).

364. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (demanding more proof when "the claim is one that simply makes no economic sense").

365. Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 808 (2019).

366. See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) ("The class action device . . . has fallen into disfavor.").

367. Vaheesan, *supra* note 365, at 809.

368. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018).

369. Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 516 (2017).

370. *Id.*

plaintiffs' way. Yet antitrust standing wastes even more resources: Unlike *Twombly's* motion-to-dismiss standard, antitrust standing doctrines can overturn jury verdicts even after the fact.³⁷¹ At least with motions to dismiss and for summary judgment, the unsuccessful plaintiff knows relatively early that the claim will fail. Belated dismissals for lack of antitrust standing work to dissuade private enforcers from even making the effort.

Antitrust standing also shares traits with class certification hurdles—both diminish incentives to sue, evading juries by heading cases off even before a complaint gets filed. The problem with hampering class certification is that for a violation “that inflicts small harm on a large number of individuals,” no one person will want to sue.³⁷² When ten dollars are at stake (or even ten thousand), no plaintiff stands to gain from a lawsuit. So if plaintiffs can't aggregate claims, why bother? Antitrust standing works the same way. By assigning enforcement rights to direct purchasers—the very ones in privity with the defendants—the *Illinois Brick* rule ensures that no one with the right to sue has a full treble-damage incentive. Every possible recovery has to be discounted by the lost profits from damaging a relationship with a supplier. Once again, it just isn't worth the hassle.

And then there's forced arbitration, which is like antitrust standing in that it keeps plaintiffs out of court entirely. Many a plaintiff who is “injured in his business or property by reason of anything forbidden in the antitrust laws,”³⁷³ and thus falls within the Clayton Act's cause of action, is left with no remedy for lack of antitrust standing. The effect is the same as if he'd agreed to an arbitration contract—only in the antitrust standing case, he loses the right of action in exchange for nothing. At least with arbitration, the plaintiff would have contracted for something.

Neo-Brandeisians center these four issues (motions to dismiss, summary judgment, class certification, and arbitration) because by obstructing access to juries, they obstruct access to justice. Add antitrust standing to the list. It delays trial, scatters incentives, and kicks would-be enforcers out of court. Neo-Brandeisians should make an issue of antitrust standing—just as they've done with those other four.

IV. THE NEW ANTITRUST STANDING

My core goals are to highlight differences between Chicagoans and neo-Brandeisians and show how antitrust standing cannot be neutral

371. See, e.g., *South Dakota v. Kan. City S. Indus., Inc.*, 880 F.2d 40, 49 (8th Cir. 1989).

372. Vaheesan, *supra* note 365, at 809.

373. 15 U.S.C. § 15(a).

ground. Still, it is worth pointing out one path forward. Thus, this Part briefly outlines (1) why antitrust standing should be a higher priority for neo-Brandeisians than other reforms; and (2) the possible content of a new, reshaped antitrust standing.

A. Why Antitrust Standing?

Antitrust progressives aim to keep a broad coalition, including both Republicans and Democrats. When Democrats lost control of the House of Representatives in late 2022, President Biden published an op-ed calling on “Democrats and Republicans to come together to pass strong bipartisan legislation to hold Big Tech accountable.”³⁷⁴ Yet for all the hype about bipartisan antitrust reform, neo-Brandeisians’ work is often pegged as excessively partisan.³⁷⁵ And Biden’s call went nowhere. Sure, the House’s new conservative majority focused on Big Tech. But rather than working on antitrust reform, they’ve turned their attention to allegations of censorship.³⁷⁶

Perhaps there is a good reason that the bipartisan approach has gone nowhere: Today’s antitrust politics is less right versus left, and more populist versus establishment. In those conditions, progress will require a solution that either (1) garners democratic support from a populist base or (2) eschews the democratic branches altogether. Enter antitrust standing.

1. A Populist Solution Through Legislative Change

There are good reasons to believe that antitrust standing—more than substantive antitrust reforms—can garner populist support for a legislative fix.

For one thing, populist figures on the right have jumped on board for the broad strokes of antitrust reform. Missouri Senator Josh Hawley

374. Joe Biden, Opinion, *Republicans and Democrats, Unite Against Big Tech Abuses*, WALL ST. J. (Jan. 11, 2023, 12:00 PM), <https://www.wsj.com/articles/unite-against-big-tech-abuses-social-media-privacy-competition-antitrust-children-algorithm-11673439411>.

375. See, e.g., Editorial, *The Many Abuses of Lina Khan’s FTC*, WALL ST. J. (Feb. 14, 2023, 12:12 PM), <https://www.wsj.com/articles/christine-wilson-resigns-federal-trade-commission-lina-khan-ftc-87328998> (“Democrats would be screaming from the rooftops if a Republican appointee behaved as Ms. Khan has.”).

376. Austin Denean, *Republican House Shifting Tech Focus from Antitrust to Censorship, More Investigations*, NAT’L DESK (Jan. 11, 2023, 2:37 PM), <https://thenationaldesk.com/news/americas-news-now/republican-house-shifting-tech-focus-from-antitrust-to-censorship-more-investigations-social-media-twitter-facebook-google-amazon-weaponization-of-government-committee> [https://perma.cc/MHR3-CSEK].

makes the best example. He, rather than any Democrat, introduced the Trust-Busting for the Twenty-First Century Act, which would have installed several neo-Brandeisian priorities (including, as many observers noted, a presumption against mergers involving companies worth over \$100 billion).³⁷⁷ One commentator pegged the bill as “a radical, populist transformation to antitrust.”³⁷⁸ Other Senators, including Marco Rubio and J.D. Vance, have referred to “The Realignment,” the phenomenon of some Republicans “recogniz[ing] that at times we have considered people as inputs into our market-based system, as opposed to viewing the market as a powerful tool to benefit our citizens.”³⁷⁹ Rubio specifically called out the need to “prioritize[] our people as opposed to market efficiency.”³⁸⁰ So there is growing populist support for antitrust reform—even if it can’t quite be called bipartisan, given the narrow wedge of Republicans in play.

Antitrust standing is even better positioned for populist reform than the rest of the neo-Brandeisian agenda. This Article has extensively discussed the reasons that progressives should support antitrust standing reform. But populist figures on the right have *already* shown interest in antitrust standing. Five years ago, thirty-one state attorneys general—red and blue alike—signed on to an amicus brief urging the Court to overrule *Illinois Brick*.³⁸¹ These included two “Trumpian” attorneys general: Texas’s Ken Paxton and Arizona’s Mike Brnovich.³⁸² Indeed, Paxton’s

377. See Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. (2021).

378. Tim De Chant, *Hawley’s Antitrust Bill Focuses on Market Cap, Ignoring Consumers*, ARS TECHNICA (Apr. 14, 2021, 6:15 AM), <https://arstechnica.com/tech-policy/2021/04/hawleys-antitrust-bill-targets-big-tech-but-experts-worry-about-collateral-damage/>.

379. Marco Rubio, *A Patriotic, Pro-Worker Republican Party Is Emerging*, ROPON F., Dec. 2020, at 4, 4–5, <https://riponsociety.org/article/a-patriotic-pro-worker-republican-party-is-emerging/> [<https://perma.cc/D24V-FCBF>]; see also Nancy Scola, *Washington’s Angriest Progressive Is Winning Over Conservatives—and Baffling Old Allies*, POLITICO (Apr. 21, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/04/21/matt-stoller-hawley-trust-busting-00092679>.

380. Rubio, *supra* note 379, at 5.

381. See Brief for Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204) [hereinafter Brief for Texas, Iowa, and 29 Other States].

382. See Andrew Solender, *Trump To Meet with Ten State Attorneys General Backing Case To Overturn Election*, FORBES (Dec. 13, 2020, 8:07 PM), <https://www.forbes.com/sites/andrewsolender/2020/12/09/trump-to-meet-with-ten-state-attorneys-general-backing-case-to-overturn-election/> [<https://perma.cc/E2AC-M33B>]. South Carolina’s Alan Wilson also backed Trump’s election efforts as well as the *Pepper* amicus brief. See Press Release, Alan Wilson, S.C. Att’y Gen., AG Alan Wilson’s Statement on Texas Election Lawsuit, (Dec. 9, 2020), <https://www.scag.gov/about-the-office/news/ag-alan-wilson-s-statement-on-texas-election-lawsuit/> [<https://perma.cc/MKD7-7EP8>].

office authored the brief, which concluded that “denying standing to indirect purchasers has severely hindered antitrust enforcement.”³⁸³

These populist figures play into a possible legislative solution. Antitrust standing is atextual, but it is not *antitextual*. A legislative fix clarifying the scope of antitrust causes of action would eliminate the judicial activism issues with antitrust standing. Given establishment opposition to antitrust reform, and given the filibuster, that kind of populist groundswell may be neo-Brandeisians’ best shot at legislative change.

And neo-Brandeisians have shown some signs of pursuing a “lose to win” legislative strategy that relies on populist support. In her own words, Chair Khan is “not somebody who thinks that success is marked by a 100 percent court record.”³⁸⁴ Instead, losing in court is part of an “institutional dialogue among the three branches.”³⁸⁵ This creates a “special obligation to bring the hard cases,” so that Congress knows the enforcers think there is a problem.³⁸⁶ Congress, of course, is meant to be an expression of the people’s will. But neo-Brandeisians can add the people directly to that dialogue. Let them see public enforcers lose, and they can call for Congress to empower enforcers of all stripes.

2. A Textualist Solution Without Legislative Change

At the same time, antitrust standing is also well-suited to develop the antitrust law *without* further legislative changes, operating outside the democratic branches of government.

Neo-Brandeisians may be able to tip the scales on antitrust enforcement without legislation. Even just academic attention could help on that front. When Lina Khan published *Amazon’s Antitrust Paradox*,³⁸⁷ she changed the conversation by questioning long-held assumptions about the purposes of antitrust.³⁸⁸ More scholarly attention to antitrust standing

383. Brief for Texas, Iowa, and 29 Other States, *supra* note 381, at 21 (quoting Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 94 (2007)).

384. David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, N.Y. TIMES (Dec. 7, 2022), <http://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html>.

385. Guy Rolnik, *Q&A with FTC Chair Lina Khan: “The Word ‘Efficiency’ Doesn’t Appear Anywhere in the Antitrust Statutes,”* PROMARKET (June 3, 2022), <https://www.promarket.org/2022/06/03/qa-with-ftc-chair-lina-khan-the-word-efficiency-doesnt-appear-anywhere-in-the-antitrust-statutes/> [https://perma.cc/HQ4N-GFWH].

386. *Id.*

387. Khan, *supra* note 47.

388. See David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/>

from progressives would provide litigants with similar tools to shift judicial attitudes toward a more permissive approach to antitrust standing.

Moreover, from their posts in the government, neo-Brandeisians have a chance to weigh in on these issues. When judges confront problems of antitrust standing, the FTC and Department of Justice should stand ready to push this textualist view as amici curiae. They do not do this. The FTC has a regular practice of submitting amicus briefs,³⁸⁹ but not on this topic, even though they have good arguments to make. Especially in today's textual climate, there is some reason to think that antitrust standing is ripe for an upheaval.

Put simply: The textualist case against contemporary antitrust standing is open and shut. At one time, Posner's pragmatism ruled the roost.³⁹⁰ Not today. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law."³⁹¹ The written word is clear—"any person who shall be injured" may recover under the antitrust laws.³⁹² Certainly, there are some limitations there. Congress legislates against a common-law backdrop, so that interpreting just the text comes with some boundaries—but not many.

No doubt, stare decisis makes legislative action much preferable to judicial re-interpretation. The Court may be loath to overturn *Illinois Brick* and *AGC* when Congress could correct those decisions itself. As future Supreme Court Justice Amy Coney Barrett noted in her academic work: "The Supreme Court has long given its cases interpreting statutes special protection from overruling."³⁹³ Still, the Court has historically found some leeway in the antitrust space. "*Stare decisis* is not as significant [when] the issue before us is the scope of the Sherman Act."³⁹⁴

monopoly-antitrust-lina-khan-amazon.html ("The paper got 146,255 hits, a runaway best-seller in the world of legal treatises. That popularity has rocked the antitrust establishment . . .").

389. See *Legal Library: Amicus Briefs*, FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/amicus-briefs> [https://perma.cc/P6P2-WUW2].

390. Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003)) ("Posner naturally occupies a position at the forefront of legal debates, and he has rapidly become the steward of pragmatism in the law.").

391. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

392. 15 U.S.C. § 15(a).

393. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

394. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

The rule-of-reason analysis that governs most substantive antitrust cases embodies a “common-law approach.”³⁹⁵ And the Court has expanded this reasoning to cases of per se illegality.³⁹⁶ It is time to extend that same courtesy to the antitrust standing world. True, when the Court decided *Illinois Brick*, it stubbornly insisted that “considerations of *stare decisis* weigh heavily in the area of statutory construction.”³⁹⁷ But that case presented a novel issue that its predecessor had not; the *stare decisis* logic was just a fig leaf. The flexible *stare decisis* approach should rule here, just as elsewhere in antitrust.

Moreover, reaffirming the logic of *AGC* is not without its own *stare decisis* implications. One recent case, *Lexmark*,³⁹⁸ provides a competing *stare decisis* thread to follow and proves the cross-ideological potential of broader antitrust standing.³⁹⁹ There, the Court confronted a similarly broad cause of action (this one in the Lanham Act).⁴⁰⁰ And there, the Court confronted the *AGC* multifactor balancing test (this time applied outside antitrust).⁴⁰¹

What result? Justice Scalia’s nutshell, for a unanimous Court, bears block-quoting:

We do not ask whether in our judgment Congress should have authorized [this] suit, but whether Congress in fact did so. Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied . . . it cannot limit a cause of action that Congress has created merely because “prudence” dictates.⁴⁰²

Or, in other words: when Congress authorizes an action at law, any limits on that cause of action must come from the Constitution. Not prudential considerations. *Lexmark* embodies today’s learning about textualism in a way that 1983’s *AGC* could not—it makes an attractive branch of caselaw on which to hang the antitrust standing doctrine. Indeed, antitrust standing doctrine is but a subset of the broader prudential standing maximalism that Justice Scalia railed against. Precious little else in the neo-Brandeisian agenda—if anything—has the

395. *Id.*

396. *See id.* at 899–901.

397. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

398. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

399. *Id.*

400. *Id.* at 122 (quoting 15 U.S.C. § 1125(a)).

401. *See id.* at 126.

402. *Id.* at 128.

potential for such textualist support in the courts. Antitrust standing is the way forward.

And once antitrust standing *does* change, with or without a new statute, private actors will enforce the antitrust laws vigorously regardless of which administration holds power.

Shifting antitrust enforcement into the private sphere insulates enforcement from politics. When enforcement relies on executive action, it is unstable—especially when antitrust is relatively politicized, as it is today.⁴⁰³ By contrast, the supply of private enforcement is stable across administrations. It does not depend on political will. Nor does it require the executive’s attention or resources. Indeed, that was Congress’s intent in creating a treble damages provision with a private cause of action. At one time, the Supreme Court recognized as much: “These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”⁴⁰⁴ Besides, private enforcement does not arouse political controversy. Lina Khan and other public enforcers attract attention for their twenty enforcement actions per year. Private firms, by contrast, attract little scrutiny—even as individual firms regularly do more enforcement themselves than the whole government apparatus.⁴⁰⁵

B. What Antitrust Standing?

Lexmark, the unanimous Scalia opinion outlined above, lights the way. This Article first describes *Lexmark*’s facts, holding, and logic. It then lays out the advantages of “*Lexmark* for antitrust”—that is, a recognition that there’s no “standing” in antitrust standing. It’s statutory interpretation all the way down. This humbler approach would rein in judicial activism in antitrust and restore fidelity to Congress’s will.

403. See John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 1, 21–22 (2022) (cataloging changes in administrative rules across administrations).

404. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

405. Three firms—Hagens Berman Sobol Shapiro LLP, Hausfeld LLP, and Spector Roseman & Kodroff PC—have averaged more than twenty enforcement actions per year for the last thirteen years. And that counts only class action complaints, not suits on behalf of smaller groups or individual clients. JOSHUA DAVIS & ROSE KOHLES CLAR, 2022 ANTITRUST ANNUAL REPORT: CLASS ACTIONS IN FEDERAL COURT 36 (2023) <https://www.hausfeld.com/media/xs0osey5/2022-antitrust-annual-report.pdf> [<https://perma.cc/YD39-PZE5>].

1. *Lexmark* and the Death of “Prudential Standing”

In short, *Lexmark* clarified that “‘prudential standing’ is a misnomer.”⁴⁰⁶ But to back up a little: The case arose from a federal law, the Lanham Act, that proscribes false advertising.⁴⁰⁷ *Lexmark* produced laser printers and their toner cartridges.⁴⁰⁸ The respondent, Static Control, made it a business to supply the components that enabled a market in refurbished, resold toner cartridges.⁴⁰⁹ The gist of Static Control’s Lanham Act claim was that *Lexmark* misled its users to believe they were required to return cartridges to *Lexmark* after one use.⁴¹⁰ That, of course, would dry up Static Control’s supply. So they sued, invoking the statute’s language that makes “any person who . . . misrepresents the nature, characteristics, [or] qualities . . . of his or her or another person’s goods . . . liable in a civil action *by any person who believes that he or she is or is likely to be damaged by such act.*”⁴¹¹ Note: the cause of action is like the one in the Clayton Act. It is broad.

Lower courts had different views on limiting Lanham Act enforcement. The parties portrayed the circuit split as “one of ‘prudential standing.’”⁴¹² Some circuits permitted suits only by actual competitors.⁴¹³ Others applied an approach that checked whether the interest in preventing false advertising was “reasonable.”⁴¹⁴ Still others—the most important for our purposes—used balancing tests that ripped five factors directly from *AGC*.⁴¹⁵ These may sound familiar:

406. *Lexmark*, 572 U.S. at 127 (quoting *Ass’n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675 (D.C. Cir. 2013) (Silberman, J., concurring)).

407. 15 U.S.C. § 1125(a).

408. *Lexmark*, 572 U.S. at 120–21.

409. *Id.* at 122.

410. *Id.* at 122–23.

411. *Id.* at 122 (emphasis added) (quoting 15 U.S.C. § 1125(a)).

412. *Id.* at 125.

413. *Id.* at 124.

414. *Id.*

415. *Id.*

1. The nature of the plaintiff's alleged injury.
2. The directness or indirectness of the asserted injury.
3. The proximity or remoteness of the party to the alleged injurious conduct.
4. The speculative nature of the damages claim.
5. The risk of duplicative damages or complexity in apportioning damages.⁴¹⁶

The Court emphatically rejected the *AGC* approach. It was “a commendable effort” but landed “off the mark.”⁴¹⁷ The balancing approach could “yield unpredictable and at times arbitrary results.”⁴¹⁸ Moreover, some of the “factors are themselves problematic.”⁴¹⁹ It is improper, for example, for courts to make liability decisions based on the difficulty they would face if the case were to proceed. “[P]otential difficulty in ascertaining and apportioning damages is not . . . an *independent* basis for denying standing.”⁴²⁰

The task is not easy, but it is simple: Courts should read the statute and then determine whether Congress intended for this plaintiff to have a cause of action. Prudence plays no part. Now, to be sure, Congress did not intend *everyone* to sue under the Lanham Act—or under the antitrust laws. There are two background principles that inform the statutory interpretation inquiry: “zone of interests and proximate causality.”⁴²¹ More doctrine layered on top of these two can be helpful, but not when (like the *AGC*-based tests the Court rejected) it obscures and distorts the language in the statute.

2. *Lexmark* for Antitrust

The *Lexmark* Court managed to except *AGC* itself from this analysis by insisting that the case “rested on statutory, not ‘prudential’ considerations.”⁴²² But it is hard to square that conclusion with a close reading of *AGC*. That earlier opinion sometimes couched its logic in statutory terms, true, but that frame struggles to contain the Court’s real reasoning. For example, the *AGC* Court considered whether denying antitrust standing was “likely to leave a significant antitrust violation

416. *Id.* at 135 (quoting *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998)).

417. *Id.*

418. *Id.* at 136.

419. *Id.* at 135.

420. *Id.*

421. *Id.* at 129.

422. *Id.* at 126.

undetected or unremedied.”⁴²³ That reflects the Court’s own policy judgment, as does the Court’s choice to deny standing in the interest of “keeping the scope of complex antitrust trials within judicially manageable limits.”⁴²⁴ So too does the choice to “avoid[] the risk of duplicate recoveries . . . or the danger of complex apportionment of damages.”⁴²⁵ None of these forays into policy tie closely to either background factor identified in *Lexmark*. In short, they are prudential considerations.

Antitrust must comply with *Lexmark*’s command that courts “cannot limit a cause of action that Congress has created merely because ‘prudence’ dictates.”⁴²⁶ At least one circuit court has acknowledged that *Lexmark* “casts doubt on the future of prudential standing doctrines such as antitrust standing.”⁴²⁷ The idea has not yet drawn scholarly attention, but litigants⁴²⁸ and one amicus, the progressive Open Markets Institute,⁴²⁹ have put it before the Court. I reserve the task of fully fleshing out a *Lexmark*-compliant antitrust standing doctrine for later work. But to briefly sketch its contours: The new antitrust standing should (a) replace the *Illinois Brick* rule with a proximate causation analysis; (b) rein in comparative rules; (c) eliminate reference to “judicially manageable limits”; and (d) center Congress’s intent, rather than economic—and thus essentially prudential—considerations.

a. Replacing Illinois Brick

Here’s the easy part: Overturn *Illinois Brick*. This is analytically the easiest, since many states already let indirect purchasers enforce their antitrust laws.⁴³⁰ And it is politically the easiest, because (as of 2018)

423. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983).

424. *Id.* at 543.

425. *Id.* at 543–44.

426. *Lexmark*, 572 U.S. at 128.

427. *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1273 n.6 (11th Cir. 2015).

428. Petition for a Writ of Certiorari, *City of Oakland v. Oakland Raiders*, 20 F.4th 441 (9th Cir. 2021) (No. 21-1243).

429. Brief of Open Markets Institute, *supra* note 27, at 15–16.

430. Some state statutes explicitly provide standing for those injured indirectly. *See, e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (West 2024) (“[An antitrust] action may be brought by any person who is injured . . . regardless of whether such injured person dealt directly or indirectly with the defendant.”) (emphasis added); 740 ILL. COMP. STAT. 10/7(2) (2024) (“No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.”). Other state courts have relied on the broad standing language in the remedy provision of their state’s antitrust statute to provide standing for indirectly injured plaintiffs. *See, e.g.*, *Bunker’s Glass Co. v. Pilkington PLC*,

thirty-one states signed on to an amicus brief supporting this position.⁴³¹ They pointed to “decades of judicial experience in indirect-purchaser cases with damages analyses, which can no longer be categorically condemned as unreliable or unadministrable.”⁴³² They are correct. Thanks to the states’ work in this area, federal courts can confidently abandon the atextual *Illinois Brick* rule.

For one, many of the *Illinois Brick* Court’s fears have just not come to pass. Where in 1977 it might have been reasonable to worry about “the uncertainties and difficulties in analyzing price and output decisions,”⁴³³ that is not true today. Both buyers and sellers have much more pricing data than in 1977.⁴³⁴ And economists have built new tools for measuring indirect purchaser damages. Neither of the two leading methods—the “yardstick” and “before-and-after” methods—require measuring how much overcharge the direct purchaser passed on.⁴³⁵ These were well-established even twenty years ago.⁴³⁶ Thus, “the difficulty of computing pass-on is by itself an insufficient justification” for the *Illinois Brick* rule.⁴³⁷ And the Court’s other rationale, that concentrating recoveries in direct purchasers would boost enforcement, has proven empirically suspect.⁴³⁸ Further, it is no longer true—if it ever was—that indirect purchasers would “simply deplet[e] the overall recovery in litigation over pass-on issues.”⁴³⁹ As a society, our data processing skills are much better today than in 1977, to say the least. Computing pass-on

75 P.3d 99, 101–02 (Ariz. 2003) (holding ARIZ. REV. STAT. ANN. § 44-1408(B) (2024) did not preclude suits by indirect purchasers); *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 442–46 (Iowa 2002) (holding IOWA CODE § 553.12 (2024) authorizes indirect purchaser standing).

431. See Brief for Texas, Iowa, and 29 Other States, *supra* note 381, at 1. The District of Columbia is included as a state “pursuant to the Clayton Act’s definition of that term.” *Id.*

432. *Id.* at 7.

433. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731–32 (1977).

434. Indeed, the volumes of pricing data available even to the public today are staggering. One study of price discrimination in Uber’s ridesharing business analyzed “the fare, distance, duration, and wait time for the arrival of UberX for millions of trips” offered to users. Yenjae Chang, Clifford Winson & Jia Yan, *Does Uber Benefit Travelers by Price Discrimination?*, 65 J.L. & ECON. 433, 439 (2022). Such complete and granular data is possible only with relatively recent advances in computing.

435. See Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 940–41 (2003) (book review).

436. See *id.*

437. *Id.* at 941.

438. *Id.* at 940–41.

439. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 747 (1977).

is much easier. Besides, antitrust suits are full of hard calculations. This one does not merit special treatment.⁴⁴⁰

Further, states supply alternative rules that hew closer to *Lexmark*'s proximate cause focus.⁴⁴¹ Even federal courts have experience in deciding state-law antitrust claims where *Illinois Brick* does not apply.⁴⁴² And the sky has not fallen! The majority approach today is to use the *AGC* factors without the additional *Illinois Brick* filter.⁴⁴³ If an indirect purchaser is otherwise a good enforcer, she may proceed. States' experience with indirect purchaser suits should comfort reform skeptics.

b. Reining in comparative rules

Certain circuits indulge in comparisons, reasoning that one plaintiff should not be allowed to recover because another would be a *more* efficient enforcer.⁴⁴⁴ These are egregious examples of extratextual, policy-based "prudential" standing in antitrust. That is not the role of courts. Standing reformers should prioritize rooting out these comparative analyses.

It is one thing to say, without textual justification, that Congress meant to limit enforcement to some set of plaintiffs within a certain zone of interests or within a certain range of causation. It is quite another to say—with even less textual justification—that Congress limited enforcement to *one* plaintiff. That is not how causes of action work. A plaintiff has a case or not; it does not matter whether someone else's case is stronger. The City of Oakland, California, in a recent petition for certiorari on antitrust standing, likened an antitrust violation to a big rig highway accident.⁴⁴⁵ All kinds of tort claims might arise. Other drivers, the truck's owner, and others harmed might sue. Their claims would be evaluated for their causal connection to the accident. But "it is plainly irrelevant whether that connection is stronger" for one claim than the other.⁴⁴⁶ There is an objective threshold for causation. A claim might meet it or not, but the merits do not depend on other possible claims.

440. See Richman & Murray, *supra* note 383, at 98 ("[D]amages calculations from indirect purchaser suits would appear to fall well within the magnitude of complexity regularly tolerated in antitrust law.").

441. See, e.g., *supra* note 430.

442. See, e.g., *Supreme Auto Trans. LLC v. Arcelor Mittal*, 238 F. Supp. 3d 1032, 1039 (N.D. Ill. 2017) (applying state antitrust laws, including states with *Illinois Brick* repealer statutes).

443. *Id.* at 1039.

444. See, e.g., *IQ Dental Supply, Inc. v. Henry Schein, Inc.*, 924 F.3d 57, 66 (2d Cir. 2019) ("[T]he presence of plaintiffs who are better situated to vindicate the antitrust laws is relevant to [antitrust standing].").

445. Petition for a Writ of Certiorari, *supra* note 428, at 29–30.

446. *Id.* at 30.

Oakland's own situation makes a good example in antitrust. They sued the National Football League's thirty-two franchises for a horizontal price-fixing scheme.⁴⁴⁷ No one denies that those franchises limit the supply of NFL teams, or that they have agreed to charge a hefty fee—some \$378 million in this case—to consider giving an NFL franchise to a new city.⁴⁴⁸ It was through this scheme that the erstwhile Oakland Raiders became the Las Vegas Raiders.⁴⁴⁹ Las Vegas, in effect, “bought” the Raiders from the NFL for a supra-competitive price. Oakland alleged that it had lost income and tax revenues in the exchange.⁴⁵⁰ The Ninth Circuit applied a comparative theory to deny antitrust standing: “[T]he City's injuries are less direct than those of actual purchasers, such as the cities of Las Vegas and Los Angeles, each of which recently acquired NFL teams.”⁴⁵¹ That is, because Las Vegas or another successful city could *in theory* more effectively enforce the antitrust laws here, Oakland could not *in practice*. Of course, Las Vegas has not sued the NFL. Instead, it enjoys the fruits of its new franchise.

None of this is necessary. Instead, courts should focus on the *Lexmark* principles: zone of interests and proximate causation. The *Lexmark* Court itself declined to adopt a specific test, preferring instead to rely on the bare principles.⁴⁵² But the Court looked to “the sorts of commercial interests the Act protects” to sort out zone of interests.⁴⁵³ The interest in not being boxed out by a supplier's cartel falls neatly within the antitrust laws' ambit. As for proximate causation, the Court was satisfied with “something very close to a 1:1 relationship” between the defendant's action and the plaintiff's harm.⁴⁵⁴ That was satisfied here—the relationship was *precisely* 1:1. Oakland lost one franchise; Las Vegas gained one.

The same approach works in antitrust as elsewhere. Look to the statute for the zone of interests. Look to “[t]raditional proximate-causation principles” for that factor.⁴⁵⁵ And leave the policy judgments about the best enforcer to Congress.

447. *City of Oakland v. Oakland Raiders*, 20 F.4th 441, 448 (2021).

448. *Id.* at 449.

449. *Id.*

450. *Id.* at 451.

451. *Id.* at 459.

452. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 137 (2014).

453. *Id.*

454. *Id.* at 139.

455. *Id.* at 138.

c. *Expanding past “judicially manageable limits”*

The next item on the reform agenda is to stop dismissals for cases not being “judicially manageable.”⁴⁵⁶ This is not a big leap. The *Lexmark* Court dialed in on “complexity in apportioning damages” as an especially problematic prudential factor.⁴⁵⁷ After all, a plaintiff may still be able to get injunctive relief. Besides, it’s possible that a defendant might proximately injure a plaintiff who nonetheless cannot clearly quantify those damages. The Court left this partly unsaid, but “judicially manageable” requirements butt up against the fact that “‘a federal court’s obligation to hear and decide’ cases within its jurisdiction ‘is virtually unflagging.’”⁴⁵⁸ Congress chose to put these cases before the courts. It may be that some cases “require additional long and complicated proceedings involving massive evidence and complicated theories,” but that’s the job.⁴⁵⁹

One advantage of reform on this front is that—unlike, say, *Illinois Brick*—it doesn’t cry out for a replacement. The alternative path is simple: Judges hear the cases to which they are assigned, regardless of the administrative costs. Some policymakers have come to consider courts’ costs as an input when they model the optimal antitrust world.⁴⁶⁰ This is all to the good for Congress and the executive. But it is unseemly for *courts*, even while doing policymaking, to consider their own dockets alongside the rest of the economic world. They should get out of that business.

Plus, today’s federal courts are experienced with complex proceedings. I have briefly discussed some technical and economic innovations that ease antitrust litigation. There are also jurisprudential innovations. Today, unfathomably complicated cases (by 1977 standards) are routinely handled via multidistrict litigation, or MDL. The *AGC*

456. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983).

457. *Lexmark Int’l, Inc.*, 572 U.S. at 135 (quoting *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998)).

458. *Id.* at 126 (quoting *Sprint Comm’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013)).

459. *Associated Gen. Contractors*, 459 U.S. at 544 (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968)); see also Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 (1984) (“Presumably no one would deny that a federal court cannot legitimately invalidate a federal statute solely . . . because it would make judges work harder than they believe they should . . .”).

460. See, e.g., U.S. DEP’T OF JUSTICE, *supra* note 111, at 9 (“Standards for applying section 2 should take into account the costs, including error and administrative costs, associated with courts and enforcers applying those standards in individual cases . . .”).

Court raised the specter “that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair,” which might last even “twenty years.”⁴⁶¹ How about thirty-three? One MDL, number 875, has been handling asbestos claims since 1991.⁴⁶² Judges can manage a lot—and we’ve learned just how much through the MDL boom. A whole new set of tools aid in handling complicated litigations: special evidentiary orders, common-benefit fees, bellwether trials, fact sheets, and registries are now typical of mass tort MDLs.⁴⁶³ Even if we continue to formally insist that cases be “judicially manageable,” that term must stretch to take account of what judges really do manage today.

d. Centering Congress’s intent

Better to be imprudent than impudent. Yet judges, in the name of “standing,” have taken to substituting their own sense of prudence for Congress’s policy judgments. The new antitrust standing must be rooted in the statutes. It must, in *Lexmark*’s words, use “traditional principles of statutory interpretation” to divine the scope of a cause of action.⁴⁶⁴ To state the obvious: None of those traditional principles are economic. There is no rule of lenity equivalent that demands “when the text is ambiguous, default to the more efficient option.”

Now, to be sure, most agree that the Sherman Act licensed the courts to create a “federal common law of antitrust.”⁴⁶⁵ That permissive attitude could let prudential standing rules govern antitrust, even if they are inappropriate for statutes like the Lanham Act. Still, the Court did not pursue this kind of antitrust exceptionalism in *Lexmark*. Instead, it touted its supposed fidelity to Congress’s background zone-of-interest and proximate-causation principles in *AGC*.⁴⁶⁶

Antitrust progressives could also attack the “federal common law of antitrust” approach more broadly. The exegesis is beyond my scope here, but critiques come from all sides. For conservative figures, like

461. *Associated Gen. Contractors*, 459 U.S. at 543 n.50 (quoting 21 Cong. Rec. 3148 (1890) (statement of Sen. Edmunds)).

462. See Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 100 n.4 (2013).

463. See Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 7 (2021).

464. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014).

465. See, e.g., Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

466. *Lexmark Int’l, Inc.*, 572 U.S. at 126.

now-Judge Andrew S. Oldham,⁴⁶⁷ reading the Sherman Act to grant courts competition carte blanche edges uncomfortably into nondelegation waters.⁴⁶⁸ Even without adopting that argument in full, it may be worth taking a more limited view of courts' role in antitrust policymaking. Using a nondelegation canon approach, you might use constitutional avoidance—one of those “traditional principles of statutory interpretation”—to narrow courts' discretion over antitrust standing.⁴⁶⁹ And as for progressive thinkers, Professor Sanjukta Paul rejects the “common-law-statute thesis” on the ground that “reference to the common-law language in the statutory text signified substantive content, rather than an open-ended delegation.”⁴⁷⁰

Standing debates thus occupy a small piece of the broader antitrust conversation about courts' accountability to Congress. The new antitrust standing, premised as it must be on limiting judges' freewheeling policy judgments, should take the common-law-statute thesis head on.

* * *

Any or all of these reforms (replacing *Illinois Brick*, reining in comparative rules, expanding “judicially manageable” limits, and centering congressional intent) could serve as a jumping-off point for a neo-Brandeisian antitrust standing reform agenda. And pushing on any of these four issues would represent the re-politicization of antitrust standing—the next front in the antitrust wars.

CONCLUSION

It's a cliché, and perhaps a crude one, but Representative John Dingell put it best: “I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time.”⁴⁷¹ Neo-Brandeisians are fighting their war—at least in part—on the wrong battleground. By

467. Contributors: Hon. Andrew Oldham, FEDERALIST SOC'Y, <https://fedsoc.org/contributors/andrew-oldham> (last visited Sept. 17, 2024).

468. Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 379–80 (2007) (contending that such a grant is an unconstitutional delegation).

469. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000) (“These canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary.”).

470. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 223 (2021).

471. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. Dingell).

focusing on substance, they have kept the battle over procedure right where the Chicagoans left it in the 1980s. It's time to bring the fight where it belongs. Now is the time for a new antitrust standing.