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Lost in Conversation: The Compensatory Function of Antitrust Law

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**LOST IN CONVERSATION:
THE COMPENSATORY FUNCTION OF ANTITRUST LAW**

Harry First

ABSTRACT

Today's conversation about antitrust civil remedies generally, and the private action specifically, focuses most often on optimal deterrence and effectiveness. Generally lost in conversation is the basic idea that antitrust violations cause economic harm, and that those victimized by that harm should be entitled to damages from those who have violated the law. This article seeks to revive the underappreciated compensatory function of antitrust. The article reviews the debates over the Sherman and Clayton Acts, showing that compensation was the main focus of debate, traces the shift from compensation to deterrence in a series of Supreme Court cases decided in the 1960s and 1970s, and concludes with a review of three areas in which a focus on compensation could produce results different than current law and enforcement practice—indirect purchaser suits, suits by persons injured outside the United States, and federal government suits under Section 4A of the Clayton Act for damages that the United States has suffered from antitrust violations.

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Harry First*

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Introduction

Everyone knows that the private right of action has been an important part of U.S. antitrust law since the passage of the Sherman Act in 1890. Although the Sherman Act created a dual federal system of enforcement—establishing Justice Department civil and criminal jurisdiction, along with a federal right for private parties to seek damages—in fact, as an historical matter, more private suits than government suits have been filed under the Sherman Act.¹ In recent years, most important doctrinal decisions

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¹See, e.g., Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 699-700 (2003) (comparing numbers of U.S. government and private case filings, as well as private antitrust class actions); B.

have been made in the context of private litigation.² Particularly in the last decade, substantial monetary recoveries have been awarded.³

For all its importance to antitrust, however, the private action has also had a difficult time. Beginning in the 1970s—at virtually the same time that the private action was emerging as a substantial force in antitrust—courts began to cut away at its edges. New concepts, such as “antitrust injury,” emerged;⁴ old concepts, such as proximate cause, were revived.⁵ A whole class of injured parties—end-user consumers—were cut out of federal damages relief.⁶ Broad efforts to detreble antitrust private damages were proposed;⁷ some narrower efforts succeeded.⁸

Zorina Kahn, *Federal Antitrust Agencies and Public Policy Toward Antitrust and Intellectual Property*, 9 CORNELL J.L. & PUB. POL’Y 133, 137 fig.1 (1999); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & ECON. 365, 366-71 (1970).

² See, e.g., *Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc.*, 129 S. Ct. 1109 (2009); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Ill. Tool Works Inc. v. Ind. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Verizon Commc’ns Inc. v. Trinko*, 540 U.S. 398 (2004); *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied* 542 U.S. 953 (2004). Establishing important antitrust doctrine in private litigation is not a new phenomenon. See Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 789 n.60 (1987) (listing cases from the 1980s).

³ See Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 1, 4 (2008).

⁴ See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

⁵ See *Assoc’d Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

⁶ See *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977); see also *Hanover Shoe, Inc. v. United States Mach. Corp.*, 392 U.S. 481 (1968).

⁷ See, e.g., Antitrust Remedies Improvement Act of 1986, S. 2162, 99th Cong. § 201 (1986) (proposing to detreble antitrust damages except where plaintiffs are damaged by overcharges or underpayments) (reviewed in Cavanagh, *supra* note 2, at 833).

⁸ See, e.g., Local Government Antitrust Act of 1984, 15 U.S.C. § 34-36 (1984) (immunizing local governments and their officers from Section 4 Clayton Act treble damage actions); Export Trading Companies Act of 1982, 15 U.S.C.

Criticism of the private remedy continues to this day, with the Supreme Court most recently heightening the standard for pleading in private antitrust cases⁹ and the Antitrust Modernization Commission's review of an array of proposals to restrict the private remedy.¹⁰

Whether we view the private action as a necessary component of our antitrust enforcement system, or as a magnet for private interests whose actions are likely to subvert proper antitrust policy, depends, in part, on an empirical assessment of how the private action has functioned. Important scholarly efforts to assess the scope and effect of private actions have been made in the past and more recently.¹¹ But an assessment of the private action also depends on what we think might be the proper function of antitrust relief more generally and how the private action might advance those functions.

Most commentators' today view antitrust relief generally as having two major functions—deterrence and remediation. The debate over deterrence has focused on the optimal level of monetary sanctions (whether civil or criminal) that will deter

§§ 4001-3, 4011-21 (antitrust exemption for exporters that comply with certification procedures); National Cooperative Research and Production Act of 1993, as amended by the Standards Development Organization Act of 2004, 15 U.S.C. § 4301-6 (limiting antitrust recovery against applicable joint research and development ventures to actual damages).

⁹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (pleading standard for conspiracy in Section 1 case).

¹⁰ Although the Commission declined to propose dramatic legislative changes in the private action, there was some support for, e.g., detrebling at least some private claims and for preempting state indirect purchaser statutes. See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 244, 266 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

¹¹ See, e.g., KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS (1976); LAWRENCE J. WHITE, PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (1988); Lande & Davis, *supra* note 3 (recent cases).

antitrust violators from engaging in behavior whose social cost exceeds its social benefit.¹² The debate over remediation has focused on what types of judicial orders might be used to restore competition in particular cases.¹³

Lost in conversation, however, has been a third important function of antitrust law—the compensation of victims of antitrust violations. One might think compensation to be an obvious function of relief in antitrust cases, yet the compensatory function of antitrust has receded from consideration as an important aspect of the private action. If anything, compensating “victims” has taken on a slightly distasteful connotation, conjuring up a protectionist side of antitrust that current economic theory views as misplaced.¹⁴

¹²See, e.g., William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 655 (1983); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147 (2005).

¹³The major debate has been over the remedy in the monopolization litigation against Microsoft. See, e.g., Timothy F. Bresnahan, *A Remedy That Falls Short of Restoring Competition*, ANTITRUST, Fall 2001, at 69; John E. Lopatka & William H. Page, *Devising a Microsoft Remedy That Serves Consumers*, 9 GEO. MASON L. REV. 691 (2001) (opposing structural relief); R. Craig Romaine & Steven C. Salop, *Slap Their Wrists? Tie Their Hands? Slice Them Into Pieces? Alternate Remedies for Monopolization in the Microsoft Case*, ANTITRUST, Summer 1999, at 15 (discussing various forms of structural relief); Carl Shapiro, *Microsoft: A Remedial Failure*, 75 ANTITRUST L. J. 739 (2009) (concluding that the remedy “did nothing significant to affirmatively restore competition” and that “the remedy in the most prominent antitrust case of our era has failed”).

¹⁴ This is in contrast to the current debate in Europe over the development of private rights of action for violations of Articles 81 and 82 of the EC Treaty, where the Commission has stressed the importance of compensating victims. See, e.g., COMM’N OF THE EUR’N CMTYS, WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES 3 (2008), available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitpaper_en.pdf (“Full compensation is . . . the first and foremost guiding principle.”). The arguments in Europe appear to be less over antitrust philosophy than over the perceptions that Europeans have about how their legal culture contrasts with the legal culture in the United States. See, e.g., Neelie Kroes, European Commissioner for Competition Policy, Address at ALDE Conference: Collective Redress – Delivering Justice for Victims at 4 (Mar. 4, 2009)

The purpose of this article is to revive the underappreciated compensatory goal of antitrust law. Compensation of victims was important to the enactment of both the Sherman and Clayton Acts and should be important to today's debate over the private action. An effort to discuss compensation as an important function of antitrust, however, should not be confused with the related but separate question whether treble-damages are appropriate. As important as that issue is, the justification for having a private action must come before deciding on whether to treble damages or not.

The article proceeds as follows. Section I discusses the legislative history of the Sherman and Clayton Acts and what that history tells us about antitrust's compensatory function. Section II discusses the transformation of the debate, as it has unfolded in the United States and as it is currently unfolding in Europe. Section III looks at three areas of particular relevance to the compensatory function of antitrust law: (1) *Illinois Brick* and indirect purchaser suits; (2) *Empagran* and suits by persons injured outside the United States; and (3) actions by the federal government to recover damages incurred by the federal government. The article concludes with some final thoughts on economic justice and the compensation of victims of antitrust violations.

I. Legislative History

A. Sherman Act

Commentators have long had a lively debate over what Congress intended to achieve when it passed the Sherman Act. Robert Bork has argued, for example, that Congress intended the

[hereinafter Kroes Address], *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/88&format=HTML&aged=0&language=EN&guiLanguage=en> ("I would like to assure you we are not proposing anything like the US system. Not at all. We are striking a European model that protects against excesses and unmeritorious litigation...What you see in the White Paper is a truly European model that reflects legal traditions of Member States. Clearly, we do not want an excessive litigation culture.")

Act to advance “consumer welfare” as neoclassical economists view it, that is, to achieve allocative efficiency.¹⁵ Robert Lande, on the other hand, has argued that Congress was most concerned with preventing wealth transfers between producers and consumers.¹⁶ Herbert Hovenkamp has argued that competitors were the “principal protected class of the Sherman Act.”¹⁷

It is no wonder that commentators have had trouble understanding exactly what Congress had in mind when it passed the Act, at least if that understanding is to come from studying legislative debate.¹⁸ Senator Edmunds, a member of the Judiciary Committee that reported out the bill that passed, and who is credited with drafting the actual language of Sections 1 and 2,¹⁹ remarked that “we were trying to strike at great evils in a broad way” and “would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case as it might arise.”²⁰ Representative Culberson, reporting the bill on behalf of the House Judiciary Committee, explained: “Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill will not be known until the

¹⁵See ROBERT BORK, *THE ANTITRUST PARADOX* 50-61 (1978); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

¹⁶See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

¹⁷Herbert Hovenkamp, *Antitrust’s Protected Classes*, 88 MICH. L. REV. 1, 29 (1989).

¹⁸For broader views, see HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY* (1955); Hovenkamp *supra* note 17, at 27-30; John Flynn, *The Reagan Administrations’ Antitrust Policy, “Original Intent” and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988); James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989).

¹⁹See THORELLI, *supra* note 18, at 212. Senator Evarts drafted seven words in Section 1: “in the form of trust or otherwise.” *Id.*

²⁰51 CONG. REC. 3148 (1890).

courts have construed and interpreted this provision.”²¹ Congress apparently wanted to pass something dealing with the “trusts.” Exactly what, few were prepared to say except in mostly general terms.

There was one thing, however, that was clear throughout the rocky passage of what we call the “Sherman Act.” There would be a private right of action for those injured by its violation.

The original bill introduced by Senator Sherman on August 14, 1888—a broad bill “to declare unlawful trusts and combinations in restraint of trade and production”—provided that “any person or corporation” injured by a prohibited contract or trust could sue in federal court for “double the amount of damages suffered by such person or corporation.”²² When the bill came back from the Committee on Finance one month later, double damages had been replaced by a recessionary measure of damages (the amount the “injured or damnified” party had paid for the goods sold by an illegal combination).²³ But the idea that enforcement would come through private litigation was still front and center. Section 1 of the bill declared certain “contracts, combinations, agreements, [or] trusts” void as against public policy. Section 2 provided the private civil remedy. Senator Sherman explained: “If any combination should be made to strike down any particular person or corporation, if that person or corporation should be injured by the combination, he or it can sue in the courts and recover according to the language of the bill.”²⁴

Sherman’s proposal for a federal private right of action was a departure from how the common law dealt with restraints of trade. As a general matter, to the extent that the law gave relief, contracts that imposed such restraints might be declared void as against public policy, but, otherwise, private relief was not to be

²¹*Id.* at 4089.

²²S. 3445, 50th Cong. (1888).

²³ S. 3445, 50th Cong. § 2 (as reported by Sen. Sherman, Jan. 25, 1889).

²⁴50 CONG. REC. 1167 (1889).

had.²⁵ Adding a private remedy, and one that could be obtained in federal court, was an important innovation in Sherman’s proposal found in only one other contemporaneous bill.²⁶ Most of the bills introduced viewed unlawful restraints or “trusts” as crimes, to be punished by imprisonment or fine (Sherman’s original bill did not include a criminal remedy);²⁷ private remedies were generally limited to some form of defense if a party were sued by a “trust.”²⁸

As Sherman’s proposal wound through debate no one challenged the idea that there should be a private cause of action for those who were injured by violations of the Act. There was, however, substantial argument over whether an effective private action had been proposed.

Early in the debate, Senator George argued that consumers would have a difficult time bringing suit for price increases. The bill then under consideration had returned to Sherman’s original proposal for double damages and specifically outlawed agreements “intended to advance the cost to the consumer.”²⁹ George pointed

²⁵ See, e.g., THORELLI, *supra* note 18, at 40-44; Hovenkamp, *supra* note 17, at 24 (“The common law generally denied consumer damages actions for overcharge injuries. As a general matter, cartels were unenforceable at common law; yet neither were they challengeable by third parties such as consumers.”); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 52 (1965) (“[T]he Sherman Act went far beyond the common law when it authorized the Attorney General to indict violators of the Act, and gave injured persons the power to sue them, thus making it possible to enforce competition actively.”).

²⁶ Section 6 of Senator Cullom’s bill, S.3510, 50th Cong. (introduced Sept 4, 1888), contains the same language as Sherman’s on the private action.

²⁷ For Sherman’s original bill, see S. 3445, 50th Cong. (1888). He quickly added a criminal provision, though. See *id.* (as amended, Sept. 11, 1888).

²⁸ See e.g., S. 3440, 50th Cong. (1888) (providing only criminal penalties); S. 3476, 50th Cong. (1888) (providing a defense against suits by trusts or their agents, and causes of action that “grow out of...some business or transaction of” a trust.); H.R. 11401, 50th Cong. (1888) (providing for criminal fines and revoking federal jurisdiction over any controversy or cause of action related to a trust).

²⁹ See S.1, 51st Cong. §§1, 2 (1890) (as referred to Committee on Finance, Jan. 14, 1890).

out that middlemen weren't mentioned—advances in price would not harm them, but, rather, “be a benefit.”³⁰ Consumers were the ones “necessarily damnified or injured” because they would pay “all the increased price advanced by the middlemen and profits on the same.”³¹ But the increase would be “so small as not to justify the expense and trouble of a suit in a distant court.”³² George predicted that “few, if any of such suits will ever be instituted and not one will ever be successful.”³³

Senator Reagan later echoed George's criticism. Discussing a version of the bill that contained only civil provisions (federal government suits for “remedial process” and civil suits for double damages³⁴), Reagan said: “Who can avail themselves of that [civil suit] remedy? Rich corporations and rich men may, but the great mass of the people are not able to employ counsel and go with witnesses to the circuit court for the vindication of their rights.”³⁵

Senator Morgan pointed out another difficulty in getting damages against the original “trust” that had increased the price of a commodity: “What does a man get? Double damages. For what? . . . You have got to identify the sugar, or the molasses, or whatever it is, and run it back to the manufacturer or to the refiner and prove the conspiracy.” His prediction? “There will not be a suit brought in twenty-five years to come under the bill”³⁶

Sherman did not appear to disagree with the argument that civil suits would prove difficult to bring and win. He had earlier

³⁰51 CONG. REC. 1767 (1890).

³¹*Id.*

³²*Id.* at 1768.

³³*Id.*

³⁴*See* S. 1, 51st Cong. (1890) (as reported by Committee on Finance, Mar. 18, 1890).

³⁵51 CONG. REC. 2564 (1890).

³⁶*Id.* at 2610.

said that the “measure of damages, whether merely compensatory, putative, or vindictive, is a matter of detail depending on the judgment of Congress.” His own opinion, however, was that damages “should be commensurate with the difficulty of maintaining a private suit against a combination such as is described.”³⁷ In response to Senator Reagan’s concerns, he then elaborated on who he thought should be able to bring suit and the likelihood of their doing so:³⁸

Why, sir, I know of one case where a man in good circumstances, a thrifty, strong, healthy American, was engaged in this kind of competition [below-cost sales by a competitor to prevent competition]. . . . If he had the right to sue this company in the courts of the United States under this section he would have been able to indemnify himself for the losses that he suffered. Sometimes the damages would be too slight to give the courts of the United States jurisdiction. In the case of a single individual whose bread has been advanced in price or whose small expenditures have been somewhat increased, there is no remedy for him. The remedy is only for those largely enough interested to sue in the courts of the United States. * * * Now, sir, . . . it is important to citizens that they should have some remedy . . . to sue for and recover the damages they have suffered. I think myself the rule of damages is too small. It provides for double damages and reasonable attorneys’ fees. Very few actions will be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations.

On March 27, 1890, Sherman’s bill with double damages was narrowly referred to the Judiciary Committee.³⁹ Although

³⁷*Id.* at 2456.

³⁸*Id.* at 2569.

³⁹*Id.* at 2731. The motion, which passed 31-28, instructed the Committee to report back within twenty days. *Id.* Thorelli concludes that this instruction

some may have thought this a way to bury the bill— one Senator called the Committee the “grand mausoleum of Senatorial literature”⁴⁰—the bill emerged from Committee just six days later, virtually completely rewritten and in the form in which it would ultimately be enacted. The private remedy was now Section 7 of the bill and it had two significant changes from the version referred to the Committee. First, instead of just referring to any person “injured” by an unlawful arrangement, the bill now referred to any person injured “in his business or property.” Second, the bill increased the measure of damages from “twice the amount of damages sustained” to “threefold the damages by him sustained.”

No explanation was offered for either change. Although Senator Edmunds began his statement on the bill by specifically stating that Section 7 was the “one section . . . which I think goes further than it ought to do,” and Senator Vest (also a member of the Committee) then stated that he thought “it does not go far enough,” neither Senator indicated what his objections were.⁴¹ Whatever the compromise that produced the provision, however, it is plausible to read the two changes against the earlier proposal and debate. Given that the debate had discussed two types of injuries—injuries to businesses from exclusionary conduct or lower prices and consumer injury from increased prices—adding “business or property” to injury arguably made clearer that the bill intended to include compensation for injuries suffered both by business firms and by consumers. Similarly, one can argue that the Committee heeded Sherman’s own criticism that double damages were not “commensurate” with the difficulties of bringing such

was “extraordinary” and provides a strong indication that a number of senators wanted an antitrust bill. See THORELLI, *supra* note 18, at 199 n.81.

⁴⁰51 CONG. REC. 2610 (1890) (statement of Sen. Vance). See also Editorial, *National Authority Over Trusts*, CHI. TRIB., Apr. 5, 1890, at 4 (“If the Sherman Antitrust Bill was referred to the Senate Judiciary Committee in the belief that it would be quietly strangled that body has certainly disappointed the expectation by promptly reporting the measure back in an amended but not weakened form.”).

⁴¹Vest later decided not to propose an amendment to Section 7, sacrificing his “private judgment to a certain extent in order to facilitate its immediate passage.” 51 CONG. REC. 3145 (1890).

suits and decided that treble damages were necessary.⁴²

That Congress was focused on making the civil remedy an effective tool for compensating victims, rather than on it being a tool for deterring violations of the Act, can be seen in the debate over two amendments to Section 7 that Senators Reagan and George subsequently offered, amendments that were consistent with the criticisms they had made of the remedy provision in the earlier bill. Reagan's proposal would have given jurisdiction to state courts to enforce the private remedy provision of the Act. George's would have created a form of class action, allowing the aggregation of claims in one suit.

Senator Reagan explained the purpose of his amendment: The new bill, like the "original section," "purports to give a remedy," but "it really in most cases amounts to no remedy at all." "Men of ordinary means (and that is the class of men who are usually subjected to wrongs of this kind) would not be able to employ lawyers and to take witnesses to the circuit court of the United States, and perhaps travel a great distance to reach there, in order to prosecute a suit for few hundred dollars." Giving state courts jurisdiction would make the remedy available "within the reach of the people." Otherwise, it would be only for "corporations or wealthy men."⁴³

Senator George supported Reagan's amendment. If the "parties who are injured by these trusts" are restricted to the federal courts, there would be "a denial of justice to the small men, the people of small means, the people who have suffered small injuries individually, though very large ones in the aggregate. It

⁴²Section 7 was authored by Senator Hoar. See THORELLI, *supra* note 18, at 212. Hoar had criticized an earlier version providing for double damages and no criminal penalties because it failed "to afford any considerable remedy to anybody, either to the public or to any private citizen, except so far as it may give a power to private citizens to bring their suits." 51 CONG. REC. 2567 (1890). Contemporaneous accounts had given Hoar credit (or blame) for authoring the entire bill, but Thorelli concludes that this was in error. See THORELLI, *supra*, at 211.

⁴³51 CONG. REC. 3146 (1890).

will in a measure deprive them of any remedy against the wrongs perpetrated by the combinations and conspiracies against which the bill is directed.”⁴⁴

Senator George then explained his own amendment which would allow “any number of persons complaining of such injuries by the same defendant” to “join as plaintiffs” and proceed to trial jointly, thereby giving a more effective remedy to “the wretched victims of these great combinations and trusts.”⁴⁵ George then discussed the cotton bagging trust (which had been the subject of earlier Congressional hearings). Hypothesizing that the small farmer in his home state would “lose by the combination, by the increased price,” from one to two dollars on each bale of cotton and that if the small farmer makes from three to twenty bales of cotton, “he will be injured” by the trust from ten to fifty or sixty dollars. “I put it to the Senators to think about this candidly.” How will someone “thus injured” be able to employ a lawyer and sue in federal court? The amendments were necessary to give “the real sufferers” a chance to “get something back” from the illegal combinations and conspiracies.⁴⁶

Hoar spoke in opposition to Reagan’s amendment, arguing that it would be “clearly unconstitutional” because the section establishes a “penalty” in the form of threefold damages. “You cannot clothe a state court with authority to enforce a penalty,” Hoar argued, and treble damages is “purely penal and punitive.”⁴⁷ Reagan disagreed with Hoar’s characterization, though. “The measure is giving a civil remedy” for “damage done.” The award of treble damages, costs, and attorney’s fees is simply “a part of the measure of damages in a civil suit and is not in the nature of a

⁴⁴*Id.* at 3147.

⁴⁵For the full text of the amendment, see *id.* at 3148.

⁴⁶*Id.*

⁴⁷*Id.* at 3146-7. Hoar also apparently conceded that it was the triple damages, rather than giving states the power to entertain such suits, that might cause the problem. *Id.*

prosecution for a crime.”⁴⁸

Edmunds addressed George’s amendment. He first pointed out that George had offered the amendment in Committee, but that after “careful[] consideration” all had rejected it (except for George himself).⁴⁹ Edmunds’ main concern at this point, however, was that such a provision would actually be counter-productive. If he had been “a lobbyist and wished to bedevil this bill as it stood . . . in order to break it down in the end,” he would introduce “exactly such amendments” as George and Reagan were proposing. In introducing a “new line of legislation” the committee sought to “frame a bill that should be clearly within our constitutional power,” using terms that were “well known to the law already.” George’s amendment would make “a regular *potpourri* of the affair,” leaving it “to the lawyers of the trust to have an interminable litigation” as to who the proper parties were, whether their interests were “common or diverse,” or “how they were affected.” It would take “twenty years” to get a result “as to a single one of them.”⁵⁰

Edmunds’ predictions about the complexities of class actions are fairly prescient, but may not have really been at the heart of his concerns. The committee had come up with a bill on which all members had agreed, with whatever compromises were necessary, but the bill still needed to pass a fractious Congress that had been dealing with the “trust” issue for some time. Senator Morgan, who had earlier criticized the efficacy of a double-damages remedy, now spoke of how the committee had been “remarkably successful in the suggestion of their remedies.” He would have been satisfied with the first three sections of the bill—which declared illegality, gave a criminal punishment, and provided for suit by the United States to (in Edmunds’ words) “repress” illegal combinations—but “we have gone further and

⁴⁸*Id.* at 3147.

⁴⁹*Id.* at 3148. *See also* THORELLI, *supra* note 18, at 213 n.124 (citing Judiciary Committee Minute Book).

⁵⁰ 51 CONG. REC. 3148 (1890).

given a personal remedy.” There was now no reason “to give every remedy that ingenuity could possibly suggest” or to bring up a “great constitutional difficulty over which war will be had.”⁵¹

Indeed, Morgan’s view was that “[t]he bill ought not be a breeder of lawsuits,” to which Reagan responded: [T]he very object of this [bill] is to make litigation, or there would be no use of it.” Morgan disagreed:

No; it is not. Every man can not go to the circuit court of the United States and bring his suit. My view of the bill was that there was a little too much temptation of that kind presented in it, for when a plaintiff is allowed reasonable attorney’s fees, if he has but 75 cents interest, he will always be very likely to find an attorney who will prosecute his case.⁵²

George was not convinced, of course. Humorously acknowledging the presence of lobbyists against the bill—“I understand they infest the Capitol . . . so I suppose I must have seen, at one time or another, an individual who occupies that position in reference to Congress”—he stuck to his view that the bill “will amount to nothing” and “not one suit will ever be brought under this seventh section by any person who is simply damaged in his character as consumer.”⁵³

If some great manufacturer has been injured by an advance in the price of his raw material, he can sue, but the poor man, the consumer . . . that large class of American citizens . . . who are the real sufferers, will have no opportunity for redress . . . and the bill, as far as they are concerned, will be a snare and a

⁵¹*Id.* at 3149.

⁵²*Id.*

⁵³*Id.* at 3150.

mere delusion.⁵⁴

Senator Butler had the last word in the debate. “It seems to me that this is a very good bill as it stands, and I shall therefore vote for it as it stands, and shall vote against all amendments, because I desire to get some legislation upon this subject.” If the difficulties pointed out by Reagan and George exists, “there is nothing easier than for Congress to amend this law in the future.”⁵⁵

Both the Reagan and George amendments were defeated and the bill passed the Senate with only one dissent. Subsequent debate in the House focused on the substantive provisions of the bill, with almost no discussion of the private remedy (except for general concern about the power of the states to enact and enforce their own antitrust legislation⁵⁶). The bill as passed by the Senate was eventually adopted by both Houses without change and signed into law by President Harrison on July 2, 1890.

B. Clayton Act

As predicted by critics of the private remedy, there were not large numbers of private actions filed under Section 7 after passage of the Act. In the thirteen year period between 1890 and 1903, for example, private parties filed eleven cases for damages under Section 7. The federal government was busier, but not dramatically so, filing twenty-three Sherman Act cases.⁵⁷ Private cases were filed both by consumers claiming overcharges and by business firms complaining about exclusionary conduct, but the plaintiffs who filed suit were not the farmers of George’s

⁵⁴ *Id.*

⁵⁵ *Id.* at 3151.

⁵⁶ *See, e.g., id.* at 5961 (referring to recently enacted legislation in Missouri and Iowa).

⁵⁷ *See* THORELLI, *supra* note 18 at 590 fig.16, 597 fig.17. *See also* S. DOC. NO. 57-73, at 29-35 (1903) (listing suits and prosecutions brought by the United States under the Sherman Act).

hypothetical. They were business firms or larger buyers.⁵⁸

One important example during this period of a consumer suit seeking compensation for economic harm is *Atlanta v. Chattanooga Foundry & Pipeworks*,⁵⁹ a suit brought by the City of Atlanta in the wake of the federal government’s successful civil prosecution in the *Addyston Pipe* case.⁶⁰ The City had purchased cast-iron pipe and fittings from two of the companies that were members of the cartel and the question was whether the suit for the overcharge was (1) barred by a one-year state statute of limitations because treble damages constituted a “penalty,” (2) barred by a three-year state statute of limitations as an injury to “personal or real property,” or (3) allowed under a ten-year state statute as a case “not expressly provided for.”

The Court, in an opinion by Justice Holmes, allowed the suit to go forward. As to the first argument, the lower courts had found that the award of treble damages was not a penalty, and the Supreme Court agreed without much elaboration: “The plain intent [of Section 7] is to compensate the person injured,” Circuit Judge Lurton had written.⁶¹ As to the second argument, although the City was “injured in its property” within the meaning of the Sherman Act— “at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe.”⁶²—this type of injury was just a general diminution in “total wealth” (today we might call it a consumer welfare loss). It was not a harm to some specific property, which is what the state had in mind in its more limiting statute of limitations.⁶³ “[W]hen a man is made poorer by

⁵⁸For business firms, see, e.g., *Montague v. Lowry*, 193 U.S. 38 (1904). For consumer damages suits, see, e.g., *Gibbs v. McNeeley*, 118 F. 120 (9th Cir. 1902).

⁵⁹ 203 U.S. 390 (1906).

⁶⁰*Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

⁶¹*City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 29 (6th Cir. 1903).

⁶² *Chattanooga Foundry*, 203 U.S. at 396.

⁶³ The Court viewed the more limiting statute of limitations as applying primarily to physical damage to tangible property. *See id.* at 398.

an extravagant bill” no specific property is diminished, the Court wrote: “We do not go behind the person of the sufferer.”⁶⁴ That left only the “dragnet at the end,” the ten-year period for all cases “not expressly provided for.”⁶⁵

As the early enforcement of the Sherman Act unfolded, however, the main concern was not the private action, but whether the Sherman Act was an effective statute at all and whether the Justice Department was an effective enforcer. Federal government enforcement increased gradually during this period, and state enforcement grew as well, but the Supreme Court’s 1911 decision in *Standard Oil* and the presidential election of 1912 crystallized the movement for strengthening the Sherman Act and making antitrust enforcement more effective.⁶⁶ The result was the Clayton Act and the Federal Trade Commission Act, passed within a month of each other in 1914.

The Clayton Act’s approach was to proscribe particular antitrust offenses more specifically than had the Sherman Act. Even though private actions were far from its main focus, the bill, as originally proposed and eventually enacted, did include three provisions relating to private enforcement.⁶⁷ The enactment of these provisions demonstrated a continuing commitment to a private remedy, as well as an effort to make that remedy more effective.

On January 20, 1914, President Wilson addressed a joint session of Congress on the “great question” of “trusts and monopolies.”⁶⁸ Wilson urged that the “actual processes and

⁶⁴*Id.* at 399.

⁶⁵ *Id.*

⁶⁶ See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 ANTITRUST L.J. 1, 2-15 (2003). For Department of Justice enforcement, see 1914 ATT’Y GEN. ANN REP. 11-22.

⁶⁷ The Federal Trade Commission Act had no private right of action, instead establishing a new administrative agency to enforce the antitrust laws and to proscribe “unfair methods of competition.”

⁶⁸ See H.R. DOC. NO. 63-625 at 3 (1914).

methods of monopoly” be “explicitly and item by item forbidden by statute,” although he did not spell out what those practices were.⁶⁹ He was more specific, however, about “another matter in which imperative considerations of justice and fair play suggest thoughtful remedial action.”⁷⁰ Wilson pointed out that “many of the combinations” not only work an “injustice” on the general public, but also “directly and seriously injure the individuals who are put out of business in one unfair way or another by the many dislodging and exterminating forces of combination.” Wilson then proposed to give private individuals “injured by these processes” the right rely on facts proved in suits that the Government had filed and won, as well as a tolling of the statute of limitations until the successful conclusion of the Government suit. Arguing that it is not “fair” to require private litigants to re-prove the facts that the Government had already established, because “[h]e can not afford” to make use of the processes at the Government’s command, Wilson concluded: “Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.”⁷¹

Following Wilson’s address, the House Judiciary Committee drafted bills, held hearings, and on May 16, 1914, reported out a proposed bill. Section 5 of the bill was a re-enactment of Section 7 of the Sherman Act, the only change being to “extend[] the remedy” to allow suit for anything forbidden “in the antitrust laws,” which would include the Clayton Act itself, rather than just for violations of the Sherman Act.⁷² Section 6 provided that whenever any “final judgment or decree” was entered in a government suit that a defendant “has or has not” violated the Sherman Act, it would be “conclusive evidence of the same facts” to the “full extent” that the judgment would constitute an estoppel between the United States and the defendant in any other proceeding, and would be conclusive “as to the same

⁶⁹*Id.* at 6.

⁷⁰*Id.* at 8.

⁷¹*Id.*

⁷²*See* H.R. REP. NO. 63-627, pt. 1, at 14 (1914).

questions of law.” Section 6 also provided that the statute of limitations would be suspended during the pendency of the government suit.⁷³ Finally, Section 14 provided injunctive relief to “any person, firm, corporation, or association” against “threatened loss or damage by a violation of the antitrust laws.” Under the Sherman Act, only the federal government could seek injunctive relief; Section 7 had provided private parties with only a damages remedy. The House Report explained that both Sections 6 and 14 were “in keeping with the recommendation made by the President in his message to Congress on the general subject of trusts and monopolies.”⁷⁴

There was some dissent from these proposals in the House Judiciary Committee and, subsequently, in the Senate Judiciary Committee. As with the original private remedy proposal in the Sherman Act, however, no one questioned the basic idea of allowing a private remedy. The issue, rather, was whether the remedy was effective and, if not, what should be done. Three members of the House Committee felt that there was no need to have the proposed “extraordinary remedies” added to the existing remedy when it appeared that in a “large number” of private cases “the plaintiffs have obtained substantial verdicts.” Treble damages, costs, and attorney’s fees were “sufficient inducements to any aggrieved party” to bring suit under current law.⁷⁵

On the other hand, one member complained that the bill did not go far enough and was too accommodating to “big business.”⁷⁶ The fault with the Sherman Act was not its substantive provisions, but that the Act “has not been vigorously enforced.”⁷⁷ The Committee, however, had rejected a “large number of most excellent proposals,” including allowing States to intervene in

⁷³ See *id.*

⁷⁴ See *id.* at 21.

⁷⁵ *Id.* pt. 2 at 9 (1914).

⁷⁶ See *id.* pt. 3 at 2 (1914).

⁷⁷ *Id.* at 5.

dissolution suits against the trusts.⁷⁸ Section 6's purpose to "afford means" for private parties to recover was "good," but it was also "open to severe criticism."⁷⁹ As reported, it did not provide for preclusive effect in cases brought under the bill itself, the tolling period for the statute of limitations was inadequate, and, most importantly, the estoppel effect could work against private plaintiffs, for it allowed successful defendants to claim estoppel as well. This meant that "whenever the Government suit miscarries or an Attorney General allows a feeble compromise to be entered," private parties "injured by a trust" will be denied "all chance for relief."⁸⁰

The House began debate on the bill on May 25, 1914, passing it on June 5.⁸¹ Representative Webb began debate by explaining the bill's provisions to the House, giving a "running outline" of the "meaning and meat" of each section. He sweepingly described the purpose of Section 5, which extended the private treble damage action to violations of all antitrust laws: "Mr. Chairman, section 5 . . . opens the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and gives the injured party ample damages for the wrong suffered."⁸² Representative Floyd, one of the three framers of the bill, explained the need for improving the private remedy in terms reminiscent of George's criticism of the original Section 7: "[T]he remedy given in section 7 of the Sherman Act has been of little value and practically useless in the past, because the individual, the small man, and the small concern, were utterly helpless in their

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.* at 6.

⁸¹See Winerman, *supra* note 66, at 59.

⁸²63 CONG. REC. 9069 (1914). Rep. Volstead, in his "general statement opposing the legislation," 2 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 1004 (1978), had this to say regarding Section 5: "Section 5 has been commented on by the chairman, and I think his comment is fair. I think that section may add quite a little to the remedy which private parties have in securing relief where they have been oppressed by unfair methods of competition." 63 CONG. REC. 9079 (1914).

efforts to confront in the courts these great and powerful corporations”⁸³ Still, some felt, apparently, that the “door of justice” was not open wide enough and sought to expand the statute to allow suit in any district in which the defendant is “doing business and the cause of action may accrue.” The proposal was withdrawn after the Committee amended the bill to add that suit would be allowed in any district where a defendant “has an agent.”⁸⁴

The Senate Judiciary Committee then took up consideration of the House bill. It had no objection to Section 5, but adopted two changes to Section 6. First, it changed the estoppel provision to one which gave only prima facie effect to a prior government decree. Although admitting that “considerations of public policy” favored conclusiveness, current Supreme Court decisions indicated that Congress could not go so far.⁸⁵ Second, the Senate extended the normal statute of limitations, from three to six years, but did not change the House’s tolling provision.⁸⁶

The bill that the Senate Judiciary Committee reported out did have one major change from the House bill, a change that perhaps influenced subsequent debate over the sections dealing with the private remedy. The House bill had provided for criminal enforcement of the new prohibitions on price discrimination, exclusive dealing, and the formation of holding companies. The Senate Judiciary Committee eliminated those provisions, substituting; instead, civil enforcement by the yet-to-be created Federal Trade Commission. “This was done because it was thought best, especially in view of the experimental nature of this legislation, that the harshness of the criminal law should not be applied”⁸⁷

⁸³63 CONG. REC. 9490.

⁸⁴See 2 KINTNER, *supra* note 82, at 1005-06.

⁸⁵See S. REP. NO. 63-698, at 45 (1914).

⁸⁶See *id.*

⁸⁷*Id.* at 43.

It was at this point in the process that legislators began articulating—for the first time—both a compensation and a deterrence rationale for the private action. Senator Walsh, for example, echoing Wilson’s address in discussing Section 6, stated: “[W]e give to the private individual the benefit which accrues by reason of the long litigation pursued by the Government in endeavoring to secure the judgment. . . . We all know that the private individual is always at a disadvantage. He is never armed with the means at his command to cope with these great organizations”⁸⁸

Borah, on the other hand, who was critical of the proposed Clayton Act for weakening enforcement (as he was critical of the pending Federal Trade Commission Act for attempting to “kill cancer with cologne water”⁸⁹), talked of strengthening the private action:⁹⁰

[W]e might have strengthened the Sherman law by making it easier for private individuals to recover under that law; making it less expensive to recover their treble damages. There is no influence or power quite so effective in the enforcement of law as that of the injured private party. A bureau or a department of justice may postpone or procrastinate with reference to the enforcement of statutes, but a man who has suffered an injury, and knows that he has suffered an injury, and sees a speedy remedy for it, a remedy which he can pursue without the fear of bankruptcy, though he be a man of limited means, will almost invariably seek his recovery: and while he is seeking his recovery he is bringing about greater respect for the law and more obedience to the law upon the part of those who might violate it.

⁸⁸63 CONG. REC. 13,851 (1914).

⁸⁹*Id.* at 15,956. *See also* Winerman, *supra* note 66, at 73, 89.

⁹⁰63 CONG. REC. 15,986 (1914).

Representative Webb, now seeking House support for the conference version of the bill which lacked criminal penalties, focused on the private action as an enforcement mechanism:⁹¹

Now, gentlemen, as to the ‘teeth’ that they say have been extracted from this bill. I tell you that there are more ‘teeth’ in these two sections [sections 5 and 6] than anyone may imagine All through this bill we have provided civil remedies to stop the practices denounced . . . and I for one was very, very insistent on keeping these two sections in the bill in order that these extraordinary remedies given to the individual might apply. . . . Now, let a business man somewhere in the United States, or 40 or 50 of them, be damaged by the things that are denounced as unlawful in this section, and let them all bring suit. That is bigger . . . than a ‘harrow tooth,’ and will have a more deterrent effect on the men who practice those things than a mere criminal penalty, and we all know that the disinclination of juries in some quarters to convict men under these criminal sections has resulted in their acquittal. . . . Now, the next thing is to give the individual who is harmed by these practices . . . the right to bring suit for any amount he pleases. . . . If I had to choose between the civil remedies provided in this bill and the criminal provisions, I would let the criminal penalties go and keep the civil remedies.

Certainly the deterrence arguments are not without force. But they are also johnny-come-lately arguments in the discussion of the private remedy, arguments being put forward in the somewhat chaotic last-minute effort to figure out how the Clayton and Federal Trade Commission Acts should be enforced and to rationalize removal of the Clayton Act’s criminal provisions. In context, at best the deterrent function of the private action may be said to counter-balance weakened government enforcement. But

⁹¹*Id.* at 16,274-75.

deterrence does not explain why the provisions to strengthen the private action were put in the bill in the first place. That explanation traces directly back to President Wilson and his address to Congress: “Thus shall individual justice be done”

II. The Debate Transformed

A. The Early Experience

Albert H. Walker, writing his *History of the Sherman Law of the United States* in 1910, had this to say about the meaning of Section 7 of the Sherman Act: “This section is so plain and precise in all its parts that it requires only to be attentively read in order to be understood.”⁹² Surely Walker knew that this statement was false when he wrote it; and even if not demonstrably false at that time, it certainly was shown to be so shortly thereafter.

Questions of the meaning of Section 7 arose early. Could private parties sue for an injunction under the original Section 4?⁹³ (The negative answer in a number of cases led eventually to Section 12 of the Clayton Act, allowing private parties to sue for injunctive relief.) Who could sue for damages: Could employees of a company that was victimized by an unlawful restraint of trade? Could a shareholder of a victimized corporation?⁹⁴ Could a salesman sue for loss of commissions?⁹⁵ How specific must the

⁹² Albert H. Walker, *History of the Sherman Law of the United States of America* 61 (1910).

⁹³No. *See* *Blindell v. Hagan*, 54 F. 40 (1893). *See also* *Minnesota v. N. Sec. Co.*, 194 U.S. 48 (1914).

⁹⁴No. *See* *Loeb v. Eastman Kodak*, 183 F. 704 (3d Cir. 1910) (shareholder suit); *Ames v. Am. Tel. & Tel. Co.*, 166 F. 820 (1909) (shareholder suit). *See generally* Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damages Suit*, 61 *YALE L.J.* 1010, 1020 (1952) [hereinafter 1952 Yale Comment].

⁹⁵Yes. *See* *McWhirter v. Monroe Calculating Mach.*, 76 F. Supp. 456 (D.C. Mo. 1948). One commentator called this case “unusual.” *See* Homer Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 *MICH. L. REV.* 363, 365 n. 10 (1954)

pleading be? If you sued the Standard Oil Trust for selling below cost to your customers, or intimidating them by threatening them with boycotts, must you name in the complaint each of the customers whose business you lost?⁹⁶ What would be the measure of damages?⁹⁷ If a plaintiff could no longer buy particular goods because a producer's cartel would only sell to him at the fixed retail price, how should the plaintiff prove its lost profits?⁹⁸ If competing producers combined to form a company, which then bought from its owners at ten percent less than the price at which it sold, was the measurement of loss the ten percent? How would we know that the individual producers would have sold to the plaintiff at that price?⁹⁹ If the plaintiff lost business because the combination sold directly to its former customers, could you assume that the customers would have continued to buy from the plaintiff had there been no combination?¹⁰⁰ And how should attorney's fees be determined? (In no set way, it turned out.¹⁰¹)

Although lower courts often seemed hostile to the private action, the Supreme Court generally was not. The *Chattanooga Foundry* decision of 1906, a consumer suit, was an early example of the Court's willingness to allow private actions so as to give redress "to the sufferer."¹⁰² In three later cases the Court again favored the injured plaintiff, now by taking a flexible approach to

⁹⁶Yes. See *Rice v. Standard Oil Co.*, 134 F. 464, 469-470 (C.C.N.J. 1905).

⁹⁷For discussions, see Clark, *supra* note 95, at 369-70 n. 27 (citing authorities requiring that damages be clearly established).

⁹⁸See *Cent. Coal & Coke Co. v. Hartman*, 111 F. 96 (1901) (need reliable evidence of damages; anticipated profits of a business are dependent on "numerous and uncertain contingencies" and cannot be proved "with any reasonable degree of certainty"). See also *Loder v. Jayne*, 142 F. 1010 (C.C.Pa. 1906) (measure of damages).

⁹⁹You can't. See *American Green Slate Co. v. O'Halloran*, 229 F. 77, 81 (2d Cir. 1915).

¹⁰⁰No. See *id.*

¹⁰¹See *Straus v. Victor Talking Mach.*, 297 F. 791 (2d Cir. 1924) (fees related to the amount of recovery, but denied for earlier litigation). See generally Clark, *supra* note 95, at 412-13 (reviewing related cases).

¹⁰²See *supra* note 64.

the proof of damages.

The first case was *Eastman Kodak Co. v. Southern Photo Materials Co.*¹⁰³ a suit by a retailer against a manufacturer that had acquired its retailer competitors and, after the plaintiff had refused to sell its business to the defendant, refused to sell needed photographic supplies to the plaintiff except at retail prices. The Court turned away the defense argument that computing damages on the basis of lost profits was too speculative; rejected an argument that the plaintiff should be denied recovery because it was *in pari delicto* by its earlier participation in the unlawful conspiracy; and found that venue in the district where the plaintiff brought suit was proper even though the defendant had no agent there. On the venue point the Court took pains to emphasize the Clayton Act's "enlargement" of the private action and Congressional desire to "redress injuries" by relieving the "injured person" from having to proceed in a distant district, "often an insuperable obstacle."¹⁰⁴

In the second case, *Story Parchment Co. v. Paterson Parchment Paper Co.*, the plaintiff sued two of its competitors for selling their product "below the point of fair profit, and finally below the cost of production."¹⁰⁵ Plaintiff argued that its paper was superior and had sold for a price higher than defendants' before the unlawful price cutting. Defendant argued that it was speculative as to whether plaintiff's paper would have continued to sell at a premium absent the conspiracy and that, in any event, the plaintiff's business would have failed for want of capital and expertise. The Court upheld the jury's verdict as within its "exclusive province" and cited with approval this statement from a lower court decision that had allowed damages in a case where the buyers were forced to pay a higher price for the goods purchased from the sellers: "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has

¹⁰³273 U.S. 359 (1927).

¹⁰⁴*Id.* at 373-74.

¹⁰⁵282 U.S. 555, 561 (1931).

been done. Difficulty of ascertainment is no longer confused with right of recovery.”¹⁰⁶

The third case was *Bigelow v. RKO Radio Pictures, Inc.*,¹⁰⁷ one of the many private cases to come out of the Justice Department’s litigation against the major motion picture exhibitors.¹⁰⁸ There the plaintiff theater owner claimed lost profits as its damages when it was no longer able to obtain first-run movies from the defendants because of their collusive distribution system. Defendants argued that damages were speculative because it was impossible to say whether the plaintiff would have continued to be able to obtain these films if there had been no unlawful distribution agreement. Chief Justice Stone rejected the defense. Damages could be inferred from defendants’ “wrongful acts” and their tendency to “injure” plaintiffs’ business. “The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”¹⁰⁹

B. The Modern Era

For all the contentious litigation and the Supreme Court’s

¹⁰⁶*Id.* at 565-66 (citing Straus, *supra* note 101, at 802, where plaintiff had been terminated after refusal to follow resale price maintenance scheme, requiring it to pay higher prices than previously to obtain the necessary products).

¹⁰⁷327 U.S. 251 (1946).

¹⁰⁸*See* United States v. Paramount Pictures, Inc., 328 U.S. 781 (1946). For estimates of the number of private actions related to the movie industry, see 1952 Yale Comment, *supra* note 94, at 1043.

¹⁰⁹*Bigelow*, 327 U.S. at 265. Justice Frankfurter dissented on the ground that there was no “legal injury,” that is, that there was no proof that the distribution system caused harm to the plaintiff, given that there was no indication that the distributors would have supplied an independent theater like the plaintiff with first-run films even absent any conspiracy. *Id.* at 267-68. Although this sounds more like factual (“but for”) causation than legal (“proximate”) causation, it is also a preview of how causation concepts would come to be substituted for failure to prove damages as a way to keep plaintiffs from recovering.

receptivity to seeing that wronged parties obtained recoveries as a matter of “justice and public policy,” the general view of the private action prior to 1950 was that it was ineffective. Estimates of pre-1950 filings vary (a 1939 Yale Law Journal Comment reported 103 private suits filed since 1890,¹¹⁰ a 1950 University of Chicago comment reported 175 cases in the first fifty years,¹¹¹ and Richard Posner estimated 423 cases for 1890-1940¹¹²) and estimates of total damages awarded can only be speculative (the Yale comment indicates \$1.27 million awarded in 12 suits, while the Chicago comment indicates \$12.76 million in awards *reversed* on appeal¹¹³). Nevertheless, no one thought that the results of the private action had measured up to the hopes for the private action when the Sherman Act was passed. More accurately, the record of private enforcement came closer to the predictions of the Act’s critics, both for lack of consumer actions and for the difficulty that business firms would likely have in proving their damages.

Criticism of the private action, however, was often made in the context of criticism of antitrust enforcement in general. Franklin Roosevelt’s message to Congress in 1938 calling for increased antitrust enforcement—arguing that “business monopoly paralyzes the system of free enterprise on which it has been grafted”—was followed by Thurman Arnold’s program of increased public enforcement and a Temporary National Economic Committee report criticizing the lack of private enforcement.¹¹⁴

¹¹⁰Comment, *Fifty Years of Sherman Act Enforcement*, 49 YALE L. J. 284, 296 (1939) [hereinafter 1939 Yale Comment].

¹¹¹Comment, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130, 138 (1950) [hereinafter Chicago Comment].

¹¹²Posner, *supra* note 1, at 371 tbl.3 (1970).

¹¹³See 1939 Yale Comment, *supra* note 110, at 298; Chicago Comment, *supra* note 111, at 138.

¹¹⁴See Message from the President of the United States, Transmitting Recommendations Relative to the Strengthening of Antitrust Laws, S.Doc. No. 75-173, (3d Sess. 1938); Temporary National Economic Committee, 76th Cong., Monograph No. 16: Antitrust in Action (Comm. Print 1940) (written by Walton Hamilton and Irene Till).

Against this backdrop the private action came to be discussed as creating “an ancillary force of private investigators” designed to “supplement the Department of Justice in law enforcement.”¹¹⁵ Indeed, a post-War increase in private enforcement went hand in hand with the increase in public enforcement under Arnold and his successors. Reported successful suits between 1945 and 1951 were 1-1/2 times the number of reported successful suits for the entire previous fifty-five years; the number of antitrust suits pending increased from 118 in 1947 to 367 in 1951.¹¹⁶ By 1954 this increase in private cases led one commentator to conclude that “the treble damage suit may have substantial effect both in compensating the victims of violations, and in deterring violators who might be willing to risk the nominal fines of a criminal prosecution, or even an equity decree, but would be slow to subject themselves to million-dollar treble damage recoveries.”¹¹⁷

By the 1960s the perfect storm of increased government antitrust enforcement (particularly the highly-publicized electrical equipment bid-rigging case), increased private enforcement, and the Warren Court’s receptivity to antitrust led to an increased willingness to see private actions as part of a system of antitrust enforcement, playing an important public role in addition to its core function of compensation. Government resources were limited, criminal fines were low (they had been increased in 1955 to \$50,000 from the original \$5000), and jail sentences almost unheard-of (an increase to three years from the original one year imprisonment did not come until 1974). No wonder that the private action would do increasing duty as a necessary part of antitrust enforcement.

The Supreme Court this expanded role for private actions in 1968 in *Perma Life Mufflers v. International Parts Corp.*¹¹⁸ Involved there was a claim by Midas Muffler Shops franchisees

¹¹⁵1939 Yale Comment, *supra* note 110, at 296.

¹¹⁶ 1950 Yale Comment, *supra* note 94, at 1010-11.

¹¹⁷Clark, *supra* note 95, at 364.

¹¹⁸392 U.S. 134 (1968).

that their franchisor had violated the Sherman and Clayton Acts by imposing exclusive dealing arrangements that kept them from buying supplies from any other company. The lower courts had dismissed the suit on the grounds that the franchisees were *in pari delicto* because they had “enthusiastically” become franchisees and had “solemnly subscribed” to the restrictive franchise agreement. The Supreme Court found itself “in complete disagreement” with the court of appeals, stating that there was no indication that Congress intended to adopt this common law defense and that, in any event, the doctrine would not apply in this case “even if it did exist.”¹¹⁹ The Court wrote:

[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

Justice Black’s opinion commanded a bare majority of the Court.¹²⁰ Justice Fortas concurred in the result. Referring to private plaintiffs as “‘private attorneys general’ to enforce the

¹¹⁹*See id.* at 138.

¹²⁰Justices Harlan concurred in part and dissented in part, in an opinion in which Justice Stewart joined. Justices Fortas and Marshall concurred in the result, writing separate opinions. Justice White joined the majority opinion, but added some “observations” in a separate opinion. *Id.* at 147, 148, 142.

antitrust laws” (using that phrase apparently for the first time in Supreme Court antitrust cases), he took the position that the defense should be available in cases of reasonably equal fault. Both Justice White and Justice Marshall, however, offered a glimmer of the downside (at least from a plaintiff’s point of view) of using the deterrence rationale. Although both rejected the use of the defense in the particular case, both also acknowledged that there could be times when granting recovery to a plaintiff in some “delicto” might conflict with the deterrence rationale of the private action. White saw that there might be cases where providing a party who participates in an illegal agreement “illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails,” might actually “encourage what the Act was designed to prevent.”¹²¹ Marshall acknowledged that in cases where a plaintiff has “actively sought to bring about restraints on competition,” the “possible added deterrence to violations of the antitrust laws . . . may well be equaled, if not surpassed, by the new incentive it will create to commit such violations.”

Three subsequent cases continued this elevation of the deterrence function of the private action, thereby helping the Court find for the plaintiff.

First was *Fortner Enterprises v. U.S. Steel*,¹²² in which the Court decided that the substantiality of the amount of commerce affected by a tying arrangement should be determined by looking at the total volume of sales affected by the defendant’s practice, not just at the amount foreclosed by a particular plaintiff’s sales: “Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.”¹²³

The second was *Zenith v. Hazeltine*.¹²⁴ There the Court

¹²¹ *Id.* at 146.

¹²² *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969).

¹²³ 394 U.S. at 502.

¹²⁴ *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969).

reversed the court of appeals' refusal to enjoin the defendants from excluding the plaintiff from the Canadian market based on a finding that Zenith had suffered no economic injury from the patent pool's activities (a finding the Supreme Court also reversed). The injunctive remedy was included in the Clayton Act, the Court wrote, for the traditional equitable purpose of protecting a party from "a significant threat of injury." But treble-damages and injunctive remedies were intended "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws. Section 16 should be construed and applied with this purpose in mind" ¹²⁵

The third case, *Reiter v. Sonotone*, ¹²⁶ came a decade later. In that case the court of appeals had held that end-user consumers were not entitled to bring suit under the Sherman Act because the phrase "injured in his business or property" must have been intended to narrow the class of proper plaintiffs, allowing only those whose commercial interests were harmed to bring suit. The Court rejected this profoundly anti-historical reading of the legislative history, pointing out that the debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'" ¹²⁷ But the Court did not rest with the legislative history point. Responding to the defense argument that allowing consumer suits, along with Rule 23's provision for class actions, would overwhelm the federal courts with litigation, the Court wrote that Congress created the private remedy "precisely for the purpose of encouraging *private* challenges to antitrust violations," ¹²⁸ thereby providing "a significant supplement to the

¹²⁵ 395 U.S. at 130-31.

¹²⁶ *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

¹²⁷ 442 U.S. at 343. Although the Court cited Robert Bork for this proposition, the Court's use of the term actually is more in line with Lande's concern for the redistribution of the consumer surplus from producers to consumers, *see* Lande, *supra* note 16, than with Bork's concern for the deadweight welfare loss. Note that the Court also under-rated the ability to understand the phrase "injured in his business or property" from the legislative context. Compare *supra* text accompanying note 42.

¹²⁸ 442 U.S. at 344 (emphasis in original). Recall, however, the exchange between Senators Morgan and Reagan over the desirability of encouraging

limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.”¹²⁹ Indeed, The Court pointed out that “nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice.”¹³⁰

The deterrence rationale was perhaps even more crucial in two other decisions of this time. The first is *Pfizer v. Government of India*¹³¹ in which the question was whether a foreign government could be considered a “person” within the meaning of Section 4 of the Clayton Act and therefore entitled to sue for damages arising out of “foreign sales” whose prices the defendants had allegedly fixed.¹³² The Court wrote that “Section 4 has two purposes: “to deter violators and deprive them of “the fruits of their illegality,” and “to compensate victims of antitrust violations for their injuries.””¹³³ The Court rested its decision to allow India to sue on both points—denying recovery would deny “compensation to . . . victims” and “lessen the deterrent effect of treble damages”—but it elaborated more on the deterrence point:¹³⁴

If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation

litigation. *See supra* text accompanying note 52. It may be that other Senators agreed with this criticism of the private right of action, but assumed that the remedy would not often be used.

¹²⁹ 442 U.S. at 344.

¹³⁰ *Id.*

¹³¹ 434 U.S. 308 (1977).

¹³² Suits were brought by India, Iran, the Philippines, Spain, South Korea, West Germany, Colombia, Kuwait, and the Republic of Vietnam, for their own purchases and on behalf of several classes of foreign purchasers of antibiotics. *See id.* at 309-310 & n.1 (1977).

¹³³ *Id.* at 314.

¹³⁴ *Id.* at 315.

that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.

The other case is *Hawaii v. Standard Oil* in which Hawaii sought damages as *parens patriae* for injury to “the economy and prosperity of the State of Hawaii” caused by antitrust violations arising from the sale and marketing of refined petroleum products.¹³⁵ This time, however, the Court rejected the plaintiff’s claim. Admitting that “[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress,” the Court pointed out that Congress chose a specific remedy. “By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged *these persons* to serve as ‘private attorneys general.’”¹³⁶ Not only would allowing suit by a state for injury to its general economy open the door to duplicative recoveries, but such litigation was not necessary to insure that violations are remedied. Private citizens still have many avenues open for litigation, including injunctions and class actions. “The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney’s fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.”¹³⁷ In other words, there was adequate deterrence without adding the state’s claim for injuries to its economy.

The shift to the explicit inclusion of a deterrence rationale for the private action thus opened up a potential new policy ground for interpreting the statute, but one that would not necessarily lead to a decision for the plaintiff. Both *Pfizer* and *Hawaii* illustrate a

¹³⁵405 U.S. 251, 255 (1972).

¹³⁶*Id.* at 262 (emphasis added).

¹³⁷*Id.* at 266.

point first uncovered in the concurring opinions in *Perma Life Mufflers*. Deterrence arguments may be easy to make, but are often difficult to prove. In *Pfizer* the three dissenting Justices complained about the “Court's uninformed speculation about some possible beneficial consequences to American consumers of this ‘maximum deterrent.’”¹³⁸ In *Hawaii* the Court similarly made a guess about the need for extra deterrence, this time deciding it was unnecessary; but its decision was no more empirically grounded than its opposite view in *Pfizer*.

However difficult the empirics of deterrence might be, however, arguments over deterrence could easily be fit into the framework of economic theory. Deterrence is an instrumental argument, leading inevitably to questions of marginality and efficiency. In any particular case one might ask whether the marginal increase in deterrence from granting relief (and treble damages) outweighs the marginal cost of its imposition (including potential unanticipated incentives that such recoveries might supply). One might then ask, if private remedies are being provided as an incentive to bring litigation that deters antitrust violations, shouldn't the rules for invoking these remedies be interpreted in a way that would advance the public purposes of the antitrust laws rather than the private interests of the litigant who claims to have been injured? Indeed, if deterrence is the rationale, is the private action even the most efficient way to deter anticompetitive conduct or would that objective be achieved more efficiently by eliminating the private action completely and choosing some other remedial device?

It is questions such as these that commentators began to raise beginning in the 1970s, questions that came at the same time that an economics-only approach to antitrust was growing in favor.¹³⁹ As the general argument was being made that economic

¹³⁸*Pfizer*, 434 U.S. at 329.

¹³⁹For a thorough exposition of an economics approach to antitrust penalties generally, including private damages actions, see. ELZINGA & BREIT, *supra* note 11, at 150 (1976) (arguing for the replacement of all current penalties with “a severe monetary exaction paid to the state.”).

efficiency was the only basis for antitrust, similar arguments were being made for antitrust remedies. These arguments inevitably downplayed the importance of compensation, both on legislative history grounds and on policy grounds.¹⁴⁰ Deterrence should be the “primary function” of the private action. Not only is antitrust litigation unable to accomplish compensation in any equitable way.¹⁴¹ The imposition of liability will inevitably deter something, so remedies must be keyed to the social costs of alleged anticompetitive behavior. The private remedy should not reach “inefficient levels of deterrence.”¹⁴²

III. Issues in Today’s Debate

The idea that compensation should again be viewed as a proper function of antitrust law is not self-executing. Even when cases were focused only on compensation as the purpose of the private action, the courts were hardly in agreement about who might be considered a “victim” or how that victim’s injuries should be measured. These problems affect all compensatory legal schemes, including, for example, RICO, which borrowed Section 4’s language to create a private remedy.¹⁴³

Deciding that compensation deserves close attention, however, does not mean that compensation should be the only function of the private action. The legislators who debated and drafted the Sherman Act and the Clayton Act were not in thrall to a single theory for antitrust or for the private remedy. Sherman

¹⁴⁰For discussion of the legislative history as supporting a deterrence rationale, see William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 473 (1979). See generally ELZINGA & BREIT, *supra* note 11, at 67 (arguing that the Congress that enacted the Sherman Act saw only a “modest role” for “reparations-induced antitrust enforcement.”).

¹⁴¹See Page, *supra* note 140, at 472.

¹⁴²Id. at 475.

¹⁴³See, e.g., *Anza v. Ideal Steel Corp.*, 547 U.S. 451 (2006) (holding that plaintiff’s damages were not proximately caused by the defendant’s alleged fraud which constituted the requisite “pattern of racketeering” under RICO).

began his discussion by stating that he did not have a fixed theory for his original double damages proposal. Certainly by the end of the Clayton Act debate clear acknowledgment had been given to the idea that private actions could help stop violations—an idea that must have been obvious to Congressmen worried about whether the Sherman Act would be an effective statute—but that did not mean a rejection of the compensatory idea.

The argument, rather, is that the compensatory function of antitrust can provide useful guidance in enforcing and shaping the private remedy. Indeed, there may be cases where compensation provides a surer guide to remedies decisions than deterrence, whose arguments may rest on untested or untestable empirical outcomes. If economic theory provided perfect guidance on its own terms to remedies questions, the desirability of looking to other policies would be weaker. But economics can be indeterminate as well.

A. Indirect Purchasers

Perhaps the most enduring problem for the private remedy is the question whether indirect purchasers should be allowed to sue for the amount of their overcharges. The current state of federal law is that only direct purchasers can sue and that it is no defense in such suits that the direct purchaser passed-on the overcharge down the chain of distribution.

Federal law came to this position through two well-known cases. The first is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,¹⁴⁴ an outgrowth of the monopolization litigation that the Justice Department successfully brought against United Shoe over its lease-only policy for its shoe-making machinery. The defendant argued that the illegal overcharge was reflected in the price that the plaintiff charged for its shoes, so the plaintiff suffered no injury. The district court rejected this “passing-on” defense, finding the measure of damages to be the difference between what the plaintiff would have paid had it been able to buy

¹⁴⁴392 U.S. 481 (1968).

the machines from United and what it paid under the lease. The Supreme Court affirmed.

The Court reached back to *Chattanooga Foundry* for the proposition that the overcharge is the proper measure of damages.¹⁴⁵ “As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.”¹⁴⁶ The Court was unimpressed about the value of using the “economist’s hypothetical model” to determine what effect a change in a company’s input prices might have on total sales and profits, concerned that such an inquiry would lead to “long and complicated proceedings involving massive evidence and complicated theories.”¹⁴⁷

As with other contemporaneous cases (the Court had handed down *Perma Life Mufflers* only one week before) the Court bolstered its decision with support from the deterrent function of the private remedy. The ultimate impact of the defense could be to pass down the claim to the ultimate consumer, “in this case the buyers of single pairs of shoes [who] would have only a tiny stake in a lawsuit and little interest in attempting a class action.” Antitrust violators would thus retain the “fruits of their illegality” because no one would sue them. The private action, “the importance of which the Court has many times emphasized,” would be “substantially reduced in effectiveness.”¹⁴⁸

Nine years later the Court decided *Illinois Brick Co. v. Illinois*,¹⁴⁹ a case in which Illinois, suing in its proprietary capacity, sought to recover for overcharges on building projects that used concrete block, the price-fixed product. The block had been sold to masonry subcontractors who bid jobs to general contractors who

¹⁴⁵ For discussion of the case, see *supra* notes 59 - 64 and accompanying text.

¹⁴⁶ *Id.* at 489.

¹⁴⁷ *Id.* at 493.

¹⁴⁸ *Id.* at 494.

¹⁴⁹ 431 U.S. 720 (1977).

then bid (and won) jobs for the State. The Court put the issue this way: “Having decided that in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.” Not surprisingly, the Court was unwilling to allow an asymmetric use of pass-on given the possibility that such an approach could lead to duplicative recoveries, a concern previously expressed in *Hawaii v. Standard Oil*.¹⁵⁰

But the Court also provided a more affirmative policy justification for its refusal to allow recovery beyond the direct purchaser, for there were arguments that duplication in recoveries might be judicially manageable. The policy justification was efficiency in judicial procedures and, ultimately, efficiency in deterrence. The Court repeated its view from *Hanover Shoe* that trying to trace damages through the chain of distribution “in the real world” would increase the complexity of antitrust litigation and “reduce the effectiveness” of the private action. This efficiency concern, the Court pointed out, was not just a matter of increasing the cost of litigation, however. The Court believed that “the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.”¹⁵¹ Allowing indirect purchasers to sue would “increas[e] the costs and diffus[e] the benefits” of the private action, which could “seriously impair this important weapon of antitrust enforcement.”¹⁵² Relying again on the deterrence policy justification from *Perma Life Mufflers*, and even recognizing that direct purchasers might not want to sue for fear of disrupting relations with suppliers—a point actually made in debate over the Sherman Act¹⁵³—the Court chose to “elevat[e]

¹⁵⁰ *See id.* at 730.

¹⁵¹ *Id.* at 735.

¹⁵² *See id.* at 745.

¹⁵³ *See* 51 CONG. REC. 2571 (1890) (remarks of Senator Hiscock).

direct purchasers to a preferred position as private attorneys general,” on the theory that they were better positioned for the job.¹⁵⁴ Indeed, the Court agreed with Justice Brennan’s dissenting view: “from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation.”¹⁵⁵

The Court did not ignore the compensatory function of antitrust, but it also did not spend much time considering it. The Court pointed out that the *Hanover Shoe* rule advances compensation, at least to the extent that direct purchasers have likely absorbed “at least some and often most of the overcharge.”¹⁵⁶ Otherwise, the Court was not going to carry compensation to its “logical extreme” by compensating everyone hurt down the chain of distribution, particularly when it was so likely that few end-user consumers with such small stakes in the litigation would ever claim or get any of their damages.¹⁵⁷

Justice Brennan’s dissenting opinion also discussed compensation and deterrence. Referencing the private action’s legislative history, he pointed out that Section 7 of the Sherman Act, and its later extension in the Clayton Act, were “clearly intended to operate to protect individual consumers who purchase through middlemen.”¹⁵⁸ If the statute’s language is to mean anything, a seller should be liable to those within its chain of distribution. It would be “paradoxical to deny recovery to the ultimate consumer while permitting the middlemen a windfall recovery.”¹⁵⁹ Most of the opinion, however, concentrated on the argument over what would produce better deterrence, with Brennan taking the position that direct purchasers were actually the less-likely plaintiffs because of their weak incentives to sue.

¹⁵⁴*See Illinois Brick*, 431 U.S. at 745-46.

¹⁵⁵*Id.* at 746.

¹⁵⁶*Id.*

¹⁵⁷*See id.* at 746-47.

¹⁵⁸*Id.* at, 749.

¹⁵⁹*Id.* at 761 (quoting P. Areeda, *Antitrust Analysis: Problems, Text, Cases* 75 (2d ed. 1974)).

The problem with the deterrence arguments in *Illinois Brick* is not that one side is clearly wrong and the other clearly right; both sides made some plausible arguments. The problem is the indeterminacy of the deterrence argument. Assessing the effect of the rule on incentives to sue fundamentally raises empirical issues about which the Court (and everyone else) lacked reliable data. The historical record was thin. Most private actions had been brought by business firms, not by consumers, and the consumer indirect purchaser question was just beginning to work its way through the courts because of the growth of the class action vehicle, the more favorable antitrust climate, and the growth of the plaintiff's bar.¹⁶⁰ Indeed, beyond the issue of which rule would provide greater incentive to sue lurked the issue of which rule might provide optimal deterrence to antitrust violations. What if allowing indirect purchasers to sue would dramatically increase private actions, with their attendant award of treble-damages, leading ultimately to recoveries in excess of the social harm from the practice? Who could possibly know the answer to that?

Post-*Illinois Brick* the debate has continued over the economic issues raised in *Hanover Shoe* and *Illinois Brick*—the computation of damages down the chain of distribution, the incentives to sue, and optimal deterrence.¹⁶¹ But the most interesting development has been the unwillingness on the state level to accept the Court's decision and the continued advocacy of indirect purchaser actions by the state attorneys general. Through various devices—including assignment clauses in state purchasing contracts, the enactment of state indirect purchaser statutes, and the use of other state statutory vehicles such as disgorgement statutes—the states have set up a natural experiment to test the administrability and incentive effects of allowing indirect purchaser suits. The Supreme Court allowed this experiment to

¹⁶⁰Clark's mid-century review of damages issues barely mentions the question of consumer recoveries for overcharges, citing only three cases. See Clark, *supra* note 95, at 404 and n.56.

¹⁶¹See, e.g., Andrew I. Gavil, *Thinking Outside the Illinois Brick Box: A Proposal for Reform*, 76 ANTITRUST L.J. 1101 (2009).

unfold by deciding in 1989, in *California v. Arc America Corp.*,¹⁶² that state indirect purchaser suits were not preempted by the federal antitrust laws. State indirect purchaser cases have since flourished, including large recoveries obtained, for example, against the vitamins cartel for price fixing, the pharmaceutical industry for exclusionary patent settlements, and Microsoft for maintenance of monopoly in the PC operating systems market.¹⁶³

The continued effort to secure relief for end-user consumers may have something to do with increasing the deterrent value of the antitrust laws, but, at heart, it is an affirmation of the compensatory function of antitrust. The argument that antitrust was meant to protect consumers from price increases has animated antitrust legislative policy from its beginnings in the Sherman Act to today. It has been a fundamental economic premise of antitrust that sellers should not be allowed to combine to raise prices that buyers pay above what sellers could get in the market, a premise supported by economic theory (whether one is concerned about the extraction of the consumer surplus or the welfare loss that comes from an inefficient allocation of resources). Surer than the deterrence argument, the concern for injury to consumers supports the view that consumers who are victimized by higher prices should be allowed to recover compensation for their injury. Where the Court went wrong in *Illinois Brick* was in submerging the compensation argument and fighting the issue on deterrence grounds. A better solution would have been for the Court to have ground its decision on compensation and to have recognized its inability to determine the effect on the deterrent function of private actions of allowing indirect purchaser suits.

B. Foreign Purchasers

¹⁶²490 U.S. 93 (1989). Note that Justice White authored all three opinions concerning indirect purchaser suits.

¹⁶³For a list of prominent state indirect purchaser class action settlements, see Public Comment from Patrick E. Cafferty to the Antitrust Modernization Commission on the Subject of Indirect Purchaser Actions (June 2, 2006), http://govinfo.library.unt.edu/amc/public_studies_fr28902/remedies_pdf/060602_Cafferty_Persky_Gustafson_Remedies.pdf.

In *Pfizer v. Government of India* the Supreme Court allowed foreign government purchasers to sue for their damages from overcharges on pharmaceutical drugs they had purchased from U.S. companies. The Court’s holding, however, did not explicitly consider whether there was any jurisdictional problem in suing for “foreign sales,”¹⁶⁴ nor was it clear where those sales occurred. Legislation enacted after *Pfizer*, the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), narrowed the jurisdictional reach of U.S. antitrust laws with regard to “trade or commerce with foreign nations,” by providing that the Sherman Act would not apply to foreign conduct other than import trade unless the conduct has “a direct, substantial and reasonably foreseeable effect” on the relevant U.S. commerce and the effect “gives rise to a claim” under the Sherman Act.¹⁶⁵

In *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,¹⁶⁶ decided in 2004, the Supreme Court was presented with its first opportunity to interpret the FTAIA. Plaintiffs were foreign corporations located in Ukraine, Australia, Ecuador, and Panama who alleged that they had purchased vitamin products from the defendants for delivery outside the United States. The defendants were members of the “vitamins cartel,” the subject of criminal prosecution in the United States, prosecution by non-U.S. enforcement authorities, and suit by direct and indirect purchasers domiciled in the United States. The Court saw its task as one of interpreting the statute through the lens of comity and history—comity in not wanting to impose U.S. antitrust law on other nations “in an act of legal imperialism, through legislative fiat,” legislative history in light of the Court’s view that Congress in the FTAIA wanted to clarify and limit the Sherman Act’s jurisdictional reach.¹⁶⁷

¹⁶⁴“We hold today only that a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff.” *Id.* at 319.

¹⁶⁵*See* 15 U.S.C. § 6a (2008).

¹⁶⁶542 U.S. 155 (2004).

¹⁶⁷*See id.* at 169.

The parties and amici, in their arguments to the Court, had placed great stress on the impact of the Court's decision on deterrence. The United States Department of Justice, for example, argued against allowing the foreign plaintiffs to sue because an increase in liability for cartel participation might act as a disincentive for cartel members to seek amnesty from the Justice Department in return for providing information about the cartel.¹⁶⁸ Amici for the plaintiffs argued that increased civil liability for sales made outside the United States would increase deterrence and make it less likely that firms would form international cartels in the first place, all to the benefit of U.S. consumers.¹⁶⁹

Although the “pro-deterrence” argument was similar to the one accepted by the Court in *Pfizer*, this time the Supreme Court declined to make use of the deterrence arguments one way or the other. “We cannot say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct.”¹⁷⁰

The Court was certainly correct in being cautious about

¹⁶⁸Brief for United States as *Amicus Curiae* Supporting Petitioners at 19-21, *Empagran*, 542 U.S. 155 (No. 03-724) (“The program has been responsible for cracking more international cartels than all of the Division's search warrants, secret audio or videotapes, and FBI interrogations combined. Since 1997, cooperation from amnesty applications has resulted in scores of criminal convictions and more than \$1.5 billion in criminal fines. . . . In the government's judgment, the amnesty program, by creating a high risk of defection and exposure, deters cartel behavior more effectively than an increase in private litigation after the cartel has been exposed. It follows that deterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and thus expose cartels in the first place.”). *See also, e.g.*, Brief of the Governments of the Federal Republic of Germany and Belgium as *Amici Curiae* in Support of Petitioners at 25, 542 U.S. 155 (No. 03-724) (arguing that extraterritorial application of United States jurisdiction would ultimately undermine deterrence efforts by hampering international cooperation in the investigation and prosecution of cartels).

¹⁶⁹*See* Brief for Certain Professors of Economics as *Amici Curiae* in Support of Respondents at 2-4, 542 U.S. 144 (No. 03-724).

¹⁷⁰542 U.S. at 174.

assessing the deterrence arguments. The *Pfizer* Court's deterrence argument, although plausible, lacked empirical backing when made, but the deterrence effects of including sales made outside the United States would be even more complicated today than it was when *Pfizer* was decided. The chance of detection of illegal cartels is likely greater today, in major part because of the Department of Justice's amnesty program but also in part because of the greater investigative efforts of the private bar.¹⁷¹ Greater potential civil liability might decrease the incentives of parties to seek amnesty from the Government, but it is unclear by how much. The benefits of amnesty still remain great and the desire to beat one's competitor to the prosecutor's office are likewise quite strong (a true "prisoners' dilemma"), particularly given the presence of private investigation and enforcement in uncovering cartels. Of course, any diminution in using amnesty programs might diminish the likelihood of cartel detection, thereby increasing the incentives for companies to join cartels in the first place. On the other hand, even if cartelists are marginally less likely to seek amnesty, imposing civil liability for sales outside the United States might increase their incentives not to join cartels. Given the magnitude of sales outside the United States for some international cartels, it is certainly possible that this increase to deterrence would swamp the marginal effects from the possible diminution in the use of amnesty programs, but it is difficult to know for certain.¹⁷²

Missing from the discussion of the policy effects of

¹⁷¹See Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 712-14 (2001) (discussing efforts of private counsel in uncovering vitamins conspiracy).

¹⁷²See JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 295 tbl. 10.4 (2001) (estimating approximately 75 percent of annual sales of vitamins took place outside the United States). See also Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689, 692 (2003) (finding that exports by vitamins cartel to countries without active cartel enforcement regimes rose more in value than exports to countries with active cartel regimes, which supports the hypothesis that the vitamins cartel raised prices more in nations without active antitrust enforcement).

denying recovery to non-U.S. plaintiffs in *Empagran* was any mention of the compensatory function of antitrust. If we take seriously the idea that one purpose of the private action is to compensate those who have been victimized by anticompetitive behavior, and if the core class of victims are those who have been overcharged by price-fixing cartels, what justification could there be for backing away from that purpose in cases like *Empagran*? The Court, of course, thought that Congress had backed away, a conclusion open to debate. But beyond the specifics of the language of the FTAIA, is there reason to bar plaintiffs from our courts in international cartel cases when it is clear we have jurisdiction over the defendants, indeed, sufficient jurisdiction to sentence executives of the non-U.S. defendants to spend time in our jails?

What makes the case for compensating such non-U.S. plaintiffs more compelling is that these plaintiffs are seeking recourse in our courts often because there is either no private antitrust remedy at all in their home countries, or no effective private antitrust remedy.¹⁷³ If the Court is concerned with comity, the comity-deference question might be, “What interest do these other countries have in barring their citizens from using *our* courts to obtain compensation?” Perhaps the answer is that these countries are simply seeking to protect their home-country defendants from antitrust damages suits, but surely this is a weak argument for deference in international cartel cases where non-U.S. companies and their employees are routinely prosecuted criminally in U.S. courts.

¹⁷³ The European Commission’s effort to increase the availability of the private remedy in Europe, see *supra* note 14, will not likely bear fruit soon enough to provide injured parties with adequate compensation in their home jurisdiction, although one of the EC’s goals is to diminish incentives for seeking redress abroad. See Kroes Address, *supra* note 14, at 4 (“What exists now is an uneven collection of mechanisms, full of gaps and low on effective guarantees of justice. We see problems such as ‘forum shopping’ where victims of antitrust infringements have an incentive to take their case to a different jurisdiction – including the US courts – because they have no effective alternative in their home country. A proper set of European minimum standards would reduce these practices and inconsistencies.”).

The more important policy question for the United States in these cases is not a comity-deference one. The real question is, “What interest does the United States have in opening its courts to such litigants?” Answering this question requires us to think about antitrust’s purposes in light of the social and economic conditions in today’s globalized world. Justice Breyer asks rhetorically in *Empagran* why it would be reasonable to apply the antitrust laws to allow non-U.S. purchasers to recover for antitrust injury in our courts. The answer comes by thinking about what Learned Hand wrote in *Alcoa*: “We should not impute to Congress an intent to punish all whom its courts can catch, *for conduct which has no consequences within the United States.*”¹⁷⁴

A decision to open our courts—or to keep them closed—does have consequences for the United States. At least so long as we do have jurisdiction because non-U.S. conduct has effects in the U.S., and those effects link to the foreign harm about which the non-U.S. parties are complaining, we can advance economic justice by providing a forum where those injured by such conduct can come to obtain redress. In today’s international world, with criticisms of globalization, this is actually a place to recognize that the compensatory function of antitrust should be available to all parties injured by cartels operating in international markets, not just to those who actually purchase in the United States.

C. Damages Suits by the Federal Government

On February 20, 1939, Thurman Arnold filed the first suit that the Justice Department had ever brought for damages suffered by the United States as a result of a violation of the antitrust laws.¹⁷⁵ The suit alleged a conspiracy among eighteen defendants to fix the prices of tires sold to the United States. The Government

¹⁷⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

¹⁷⁵ See 1939 Yale Comment, *supra* note 110, at 296 n.76. This was apparently the first antitrust suit for damages filed by a governmental entity since the *Chattanooga Foundry* case. See *supra* notes 60-65 and accompanying text.

alleged that it had received bids in two consecutive years which were “identical to the penny on eighty-two different sizes of tires” and that such bids were “collusively fixed” by the defendants. The United States sought damages in the amount of \$351,158.21 prior to trebling.¹⁷⁶

The lower courts dismissed the complaint on the ground that the United States was not a “person” within the meaning of Section 7 of the Sherman Act. In the Supreme Court the Government argued that the lower courts’ construction “leaves the United States powerless to recover compensation for the deliberate damage which respondents have inflicted upon it.” Citing a recently concluded TNEC study showing identical bidding in nearly ten percent of \$913 billion in annual government expenditures, the Department argued that “[t]he problem of collusive bids is serious and recurrent.”¹⁷⁷ True it could seek injunctions or criminal penalties, but these remedies “could not compensate the United States for the damages which wrongful acts have inflicted upon it.”¹⁷⁸

The Supreme Court was unpersuaded. It viewed the past history of non-action, along with aspects of the legislative history of the Sherman and Clayton Acts (plus other legislative proposals), as indicating that no one thought the United States could bring a private action for damages under Section 7.¹⁷⁹

Congress finally changed the law in 1955, amending the Clayton Act to add Section 4A, allowing the federal government to sue for injury to its business or property, but only for single damages. The House Report on the bill indicated that a remedy

¹⁷⁶See Brief for the United States at 3-6, *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (No. 484), 1941 WL 53259.

¹⁷⁷See *id.* at 24 n.11 (citing Temporary National Economic Committee, 76th Cong., Monograph No. 19: Government Purchasing--An Economic Commentary (Comm. Print 1940).

¹⁷⁸*Id.* at 27.

¹⁷⁹See *United States v. Cooper Corp.*, 312 U.S. 600 (1941).

was necessary so that “injury to the coffers of the Treasury resulting from violations of the law” would not “remain uncompensated.”¹⁸⁰ Single damages was sufficient, in part because of the concern for the “disastrous impact” treble damages could have on companies doing a large proportion of their business with the Government and in part because the Government needed no “special incentive” to use this remedy in enforcing the antitrust laws.¹⁸¹

Congress need not have worried about any “disastrous impact” on government contractors, though. Despite the passage of the 1955 bill, and a subsequent amendment in 1990 to raise the damages from single to treble, government actions for damages have never come close to achieving the promise held out in the TNEC’s 1940 study. The 1970s appear to be the high-water mark for Section 4A litigation, with the Justice Department bringing sixty-six cases.¹⁸² But between 1980 and 2009—a period of nearly 30 years—the Justice Department brought only five cases. And it has not brought a case since 1994, fifteen years ago.¹⁸³

¹⁸⁰H.R. REP. NO. 84-422, at 4 (1955).

¹⁸¹*Id.*

¹⁸² See Antitrust Div. Workload Statistics, FY 1970-1979 at 5 (66 cases filed, 1970–1979), available at <http://www.justice.gov/atr/public/215792.pdf>. There are only five reported litigated cases filed prior to 1970. See *United States v. Pfizer, Inc.*, 560 F.2d 323, 326 (8th Cir. 1977) (dismissing count for common law fraud and deceit in overcharges through fraud on Patent Office; count seeking damages for United States overpayments not dismissed by district court) (tetracycline); *Rutherford v. United States*, 365 F.2d 353 (9th Cir. 1966) (price-fixing of milk and milk products); *United States v. Beatrice Foods Co.*, 330 F. Supp. 577 (D. Utah 1971) (conspiracy to fix price of dairy products); *United States v. Grinnell Corp.*, 307 F. Supp. 1097 (S.D.N.Y. 1969) (follow-on litigation to *United States v. Grinnell*, 236 F. Supp. 244 (D.R.I. 1964) (government cannot use collateral estoppel arising out of former litigation); *United States v. General Electric Co.*, 209 F. Supp. 197 (E.D.Pa. 1962) (action for single damages from price-fixing in electrical equipment manufacturing industry).

¹⁸³ See Antitrust Div. Workload Statistics, FY 1999-2008 at 6; Antitrust Div. Workload Statistics, FY 1990-1999 at 6; Antitrust Div. Workload Statistics, FY 1980-1989 at 5, available at

Two recent cases underscore the lack of a clear Justice Department policy on how—or whether—to use its authority to sue for monetary damages suffered by the federal government because of antitrust violations.

The first involved an auction of broadband radio spectrum licenses for personal communication services (“PCS”) that the Federal Communications Commission conducted between August 1996 and January 1997. During the course of the auction three of the bidders placed codes in their bids to signal to a rival bidder an interest in a particular license and to reach an agreement with the rival to stop bidding on mutually-desired licenses. This strategy apparently resulted in the non-competitive allocation of eight licenses, to the financial detriment of the federal government which received less for the licenses than competitive bidding would have produced.

Despite the potential loss of revenue to the government, the Justice Department did not bring suit for damages. Instead, it sought only injunctive relief, subsequently entering into a consent decree enjoining the bidders from engaging in such bidding in the future.¹⁸⁴ In its competitive impact statement the Department wrote that a trial with “substantial cost and . . . risk” was not warranted, “considering that the proposed Final Judgment provides full injunctive relief for the violations of the Sherman Act.”¹⁸⁵ Not

http://www.justice.gov/atr/public/division_operations.htm. The last case was *United States v. Alliant Techsystems Inc.*, Civ. No. 94-1026 (C.D. Ill. 1994) (agreement to engage in joint bidding process for cluster bombs purchased by U.S. Army), available at <http://www.justice.gov/atr/cases/f0700/0756.htm>. For the settlement and competitive impact statement, see 59 Fed. Reg. 6651 (Feb. 11, 1994).

¹⁸⁴ The Department brought three separate suits against the bidders. See *United States v. Mercury PCS II, L.L.C.*, No. 98-2751 (D.D.C. Nov. 10, 1998), available at <http://www.justice.gov/atr/cases/f2000/2070.htm>; *United States v. Omnipoint Corp.*, No. 98-2750 (D.D.C. Nov. 10, 1998), available at <http://www.justice.gov/atr/cases/f2000/2064.htm>; *United States v. 21st Cent. Bidding Corp.*, No. 98-2752 (D.D.C. Nov. 10, 1998), available at <http://www.justice.gov/atr/cases/f2000/2074.htm>.

¹⁸⁵ See 63 Fed. Reg. 65,228 (Nov. 25, 1998) (Competitive Impact Statement), 1999 WL 1425379 at 3.

mentioned in the competitive impact statement was why the United States did not bring suit for the financial harm it suffered. Surely if buyers collude on the price they will pay for a government asset, the Justice Department should see to it that taxpayers are compensated for their losses rather than simply being the beneficiaries of a “sin no more” injunction.

The second case involved the class action suit filed on behalf of retail merchants (including Wal-Mart) against Visa and MasterCard for tying debit cards to credit cards and attempting to monopolize the debit card market in the United States.¹⁸⁶ Numerous government agencies accept credit and debit cards, including military post exchanges and the United States post office.¹⁸⁷ Despite the potential for large damages, the Civil Division of the U.S. Department of Justice informed plaintiffs’ class counsel that the United States could not legally participate in the class and would not participate even if it could.¹⁸⁸ Rather than filing an action under Section 4A of the Clayton Act to protect the financial interests of the United States—something that an opt-out plaintiff would normally do—the Department did nothing, that is, not until after the private class-action plaintiffs reached a settlement of the litigation for \$3 billion. In 2006, with the

¹⁸⁶See *In re Visa Check/Mastermoney Litig.*, No. 96-CV-5238, 2007 WL 4350707 (E.D.N.Y. Dec. 12, 2007) (approving settlement).

¹⁸⁷Among the potential claimants were the Army and Air Force Exchange Service, the Air Force Services Agency, the Army Installation Management Agency, the Army Litigation Division, the Coast Guard, the Marine Corps Community Services, the Navy Exchange Service Command, the Navy Morale, Welfare and Recreation service, the Army Community and Family Support Center, the United States Department of the Treasury, the United States Postal Service, and the Smithsonian Institution. The claims submitted on the USPS’s behalf were subsequently withdrawn. See United States’ Memorandum of Law in Support of Government Merchants’ Participation in the Distribution of Net Settlement Funds at 17 n. 34, *In re Visa Check/Moneymaster Litig.*, No. 96-CV-5238 (E.D.N.Y. 2007), available at <http://www.usdoj.gov/atr/cases/f215100/215175.htm>.

¹⁸⁸See Letter from Polly A. Dammann to Constantine & Partners, *et al.* (Nov. 14, 2002), Exhibit F in Declaration of Allen P. Grunes, *In re Visa Check*, No. 96-CV-5238, available at <http://www.usdoj.gov/atr/cases/f215100/215178.htm>.

settlement having been finally approved by the courts, the Department of Justice filed a petition with the district court, based “on equitable principles,” to be allowed to participate in the distribution of the settlement fund on the same basis as other merchants. The parties eventually agreed to settle the government’s claim for approximately \$7.2 million.¹⁸⁹

Why is it that the Justice Department has been so loathe to use its power under Section 4A to sue for damages that the United States has suffered? The answer would not appear to lie in partisan politics, or in different views of the appropriate scope of the antitrust laws that different administrations might take, because the failure stretches over different administrations. Perhaps even more puzzling, antitrust law has become increasingly critical of cartels over time and the Justice Department has developed an increasingly strong criminal enforcement stance in this area.¹⁹⁰ One might think that an important component of an anti-cartel enforcement policy would be to see that the victims of cartels—here, the United States—get compensated for their losses.

It may be that the current mix of cartel cases provides one explanation for the desuetude in Section 4A enforcement. As a general matter, many of the Division’s most prominent criminal enforcement cases—lysine, vitamins, DRAMs, LCD displays—involve upstream products purchased by intermediate manufacturers. The United States is not likely to be an

¹⁸⁹See Agreement with Respect to U.S. Government Merchant Claims, *In re Visa Check*, No. 96-CV-5238, available at <http://www.usdoj.gov/atr/cases/f220500/220593.pdf>. Approximately \$3.7 million came from the settlement fund; Visa paid an additional \$2 million and MasterCard paid an additional \$1.5 million. The agreement provided that the “Government Merchants are solely releasing claims for monetary compensation that could have been asserted under 15 U.S.C. § 15a or otherwise.” *Id.* at ¶ 7.

¹⁹⁰ See *Trinko*, 540 U.S. at 408 (collusion is “the supreme evil” of antitrust). For a recent review of the Department’s criminal enforcement efforts, see Scott D. Hammond, Dep’ty Ass’t Attny Gen’l for Criminal Enforcement, U.S. Dep’t of Justice, Antitrust Div., *Recent Developments, Trends, and Milestones In The Antitrust Division’s Criminal Enforcement Program* at 11 (2008), available at <http://www.usdoj.gov/atr/public/speeches/232716.pdf>.

intermediate purchaser, even if it is likely to be a subsequent downstream consumer. Under *Illinois Brick*, of course, the United States, as an indirect purchaser, would lack standing to bring a suit for damages.

Although the interplay between Section 4A and the indirect purchaser rule is little appreciated today, this was not the case when *Illinois Brick* came up for decision. The private litigation filed against Illinois Brick was in fact an outgrowth of the Justice Department's successful criminal prosecution of the concrete block cartel.¹⁹¹ When the case came to the Supreme Court, the United States filed an amicus brief on the side of the plaintiffs, the State of Illinois and the 700 local governmental entities that had sued the concrete block manufacturers.¹⁹² In the Government's amicus brief setting out its interest in filing, the Justice Department noted that private enforcement has "served an important role" in enforcing the antitrust laws, but it also pointed out that the United States has an interest in recovering the "damages it suffers" from antitrust violations, pursuant to Section 4A of the Clayton Act.¹⁹³

The United States purchases substantial quantities of goods from distributors, wholesalers and contractors that have in turn purchased goods (or parts of goods) from others. In these cases the United States stands in the same relation to any price fixer which sold to its supplier as respondents do to petitioners, and the adoption of petitioners' arguments therefore would restrict the right of the United States to recover for loss caused by overcharges passed on to it by intervening parties.

Indeed, the Government specifically noted that the United States "purchases drugs for use in federal hospitals and pays through

¹⁹¹ See *United States v. Ampress Brick Co.*, No. 73 CR 312 (charging violation of Section 1; defendants entered pleas of nolo contendere).

¹⁹² See Brief for the United States as Amicus Curiae, *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (No. 76-404), 1977 WL 205087.

¹⁹³ *Id.* at 1-2.

Medicare and Medicaid for drugs purchased by others” and was then a plaintiff in the broad spectrum antibiotic drug antitrust litigation, seeking damages for its purchases.¹⁹⁴ In addition, it had also filed two Section 4A suits seeking damages as an indirect purchaser of building reinforcing rods and folding cartons. “If the arguments of petitioners are accepted, the prospects of recovery by the United States in these and similar cases may be substantially undermined.”¹⁹⁵

The arguments for allowing indirect purchasers to recover were not accepted, of course, turning the law against the government’s effort to use Section 4A for its indirect-purchaser damages. Perhaps more critically, however, the emphasis on deterrence in the Court’s opinion in *Illinois Brick* and in other opinions of the time helped turn the philosophical tide against the compensatory function of antitrust. Indeed, it may be that this philosophical shift provides the most compelling explanation for the thirty-year drought in 4A litigation. For during this period, as the Justice Department increased its enforcement effort in pursuing massive international price-fixing cartels, it also increased its attention to the penalties that might deter such behavior, seeking ever-larger fines and the imposition of jail terms for guilty executives. Congress validated this enforcement effort with two statutory increases in fines and imprisonment (in 1990 and 2004). Presumably if the government thought that these penalties underdeterred, it could always go back to Congress. In a world where deterrence rules and fines are high, one might view a Section 4A suit as unnecessary piling-on.

¹⁹⁴ See *United States v. Pfizer, Inc.*, *supra* note 182.

¹⁹⁵ Brief for the United States, *supra* note 192, at 2 n.1. At oral argument counsel for the United States made one reference to the importance of allowing “truly injured” government bodies to prove their damages, lest “we lose the value” of this remedy “to the taxpayers.” The statement, however, does not make clear that the United States had an interest in addition to the interest of the government entities that had brought the litigation. See Transcript of Oral Argument at 59, *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (No. 76-404), reprinted in *THE COMPLETE ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: 1976 TERM 74* (19__).

Sidelining Section 4A as unnecessary because we have adequate tools for deterrence, however, is a mistake for two reasons. It ignores the possibility that the United States could be injured by antitrust violations that are not criminally prosecuted today¹⁹⁶ and it reflects a serious misunderstanding of the differences between criminal penalties and civil recoveries.

First, with regard to non-criminal antitrust violations that could injure the United States, we could start just where the Justice Department left off in 1977. As the Government said in its amicus brief in *Illinois Brick*, the United States “purchases drugs for use in federal hospitals and pays through Medicare and Medicaid for drugs purchased by others.” The last decade has seen extensive litigation by the FTC, the states, and private parties, over a number of allegedly anticompetitive practices by which brand-name and generic pharmaceutical manufacturers have sought to maintain high monopoly prices.¹⁹⁷ All these drugs must have been purchased by the federal government, whether for use in military hospitals or through Medicare and Medicaid reimbursement payments. And yet no effort was made to recover the government’s over-payments through a Section 4A treble-damages

¹⁹⁶ For an argument that at least some of these violations may be underdeterred because of the lack of civil penalties, particularly in Section 2 cases, see Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L. J. 127 (2009).

¹⁹⁷ See, e.g., *In re Cardizem CD Antitrust Litigation*, 481 F.3d 355 (6th Cir. 2007) (\$80 million settlement of reverse-payments case, part of which went to state agency purchasers of the drug Cardizem); *Maryland v. SmithKline Beecham Corp.*, No. 2:06-cv-01298-JP (E.D. Pa. Mar. 27, 2006) (\$14 million settlement of state proprietary claims; alleging abusive litigation and patenting involving the antidepressant drug Paxil); *In Re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002) (\$100 million settlement of state indirect claims for monopolization of two generic anti-anxiety drugs; includes \$28 million for state purchasing claims and \$71 million for end-user consumer damages); *Ohio v. Bristol-Myers Squibb*, No. 1:02-CV-01080 (D.D.C. 2002) (\$55 million settlement for monopolization claim involving fraudulently filed patent for Taxol; part of settlement allocated to state purchasing claims). Note that in *Lorazepam* the FTC had also filed a separate claim for disgorgement of \$120 million, a claim that was satisfied through the \$100 million settlement.

suit.¹⁹⁸

Second, viewing Section 4A as unnecessary in cases where criminal penalties are imposed takes the compensatory function out of the antitrust conversation and reflects a serious misunderstanding of the different nature and functions of criminal penalties and civil recoveries. Obviously, criminal penalties and civil damages both serve a deterrent function, but criminal penalties also reflect a society's judgment that certain behavior is fundamentally blameworthy, the "concurrence of an evil-meaning mind with an evil-doing hand," in Justice Jackson's timeless words.¹⁹⁹ This is why the Supreme Court has read the Sherman Act to include a mens rea requirement for a criminal prosecution, despite the lack of any such intent language in the statute itself.²⁰⁰ Indeed, it is arguable that a sense of moral consensus about cartel price-fixing is as much behind the willingness of governments around the world to condemn such collusion as is the economic harm that such cartels cause.

¹⁹⁸ See Concurring Statement of Commissioner Liebowitz to Press Release, Fed'l Trade Comm'n, FTC Sues Drug Companies for Unlawfully Conspiring to Delay the Sale of Generic AndroGel Until 2015 (Feb. 2, 2009) (noting that not only are "the victims here," but "[s]o is the federal government, which pays nearly one-third of the nation's prescription drug costs overall and will have to pay dramatically higher prices for AndroGel.") (reverse payment case), available at <http://ftc.gov/speeches/leibowitz/090202watsonpharm.pdf>. Note that in *Lorazepan*, *supra* note 197, the States' expert estimated Medicaid damages of \$59.5 million, see 205 F.R.D. at 402 n.13, but no claim was made for these damages and the settlement did not include any payment to the federal government. A search of the Justice Department and Health and Human Services websites revealed no announcement of a government settlement of any other claim for damages for anticompetitive behavior involving lorazepan or lorazepate. It may be, however, that Medicaid would be an indirect purchaser, as a third-party payor, and hence unable to sue for its damages under Section 4A.

¹⁹⁹ *Morissette v. United States*, 342 U.S. 246, 351 (1952).

²⁰⁰ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 442, 444 (1978) (antitrust criminal sanctions should be used "to punish conscious and calculated wrongdoing"; criminal violation of Sherman Act requires proof that the conduct was undertaken with "knowledge of its probable consequences").

This combination of blameworthiness and deterrence that distinguishes the criminal penalty in antitrust from civil damages for compensation shows up in many areas. For example, fines in antitrust cases are not based solely on economic harm. The Sentencing Guidelines combine elements of harm, based on presumed overcharges, with considerations of fault, taking account of aggravating and mitigating circumstances such as cooperation and acceptance of responsibility.²⁰¹ By contrast, measures of civil damages have nothing to do with fault; they are based solely on the economic harm that the plaintiff has suffered. Our tax laws reflect this basic dichotomy as well: fines are not deductible from income, but damages are.²⁰² Even the government's use of antitrust fines is very different from the way a damages recovery on behalf of the United States would be treated. By statute, criminal antitrust fines are placed in the "Crime Victims Fund," a separate account in the U.S. Treasury managed by the Justice Department's Office for Victims of Crime.²⁰³ Its beneficiaries have been crime victims generally. Its recipients have not been those injured by antitrust violations but, rather, the victims of child abuse, domestic disputes, and other violent crime who are otherwise unable to obtain restitution from the criminal perpetrator.²⁰⁴ By contrast, damages

²⁰¹ See U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, Application Note 1 (aggravating and mitigating circumstances). For examples in the context of a guilty plea, see, e.g., *United States v. Allison*, Crim. No. H-07-487-01 (S.D. Tex. 2007) (setting out aggravating and mitigating circumstances), *available at* <http://www.justice.gov/atr/cases/f228500/228588.htm>; *United States v. British Airways PLC*, Criminal No. 07-183 JDB (D.D.C., filed Aug. 23, 2007) (setting out defendant's cooperation) (corporate criminal fine), *available at* <http://www.justice.gov/atr/cases/f225500/225523.htm>.

²⁰² See 26 U.S.C. §§ 162(a), (f), (g) (no deduction for fines and penalties; two-thirds of any civil damages payment made after an antitrust criminal conviction or nolo contendere plea are not deductible under subsection (a)).

²⁰³ See 42 U.S.C. §10601.

²⁰⁴ For a summary of funding and disbursements of the Crime Victims Fund from 1985-2005, see U.S. DEP'T OF JUSTICE, Office for Victims of Crime, OVC FACT SHEET: VICTIMS OF CRIME ACT CRIME VICTIMS FUND (October 2005), *available at* http://www.ojp.usdoj.gov/ovc/publications/factshts/vocacvf/fs_000310.html.

For more recent information, see Office for Victims of Crime, Report to the Nation: Fiscal Years 2007 – 2008,

for antitrust violations would go to the general benefit of all taxpayers, the very parties whose taxes were used to pay the overcharges in the first place.

This is not to say that antitrust prosecutors have been completely indifferent to obtaining monetary remedies on behalf of the federal government. There certainly have been occasions when government antitrust prosecutors have obtained restitutionary payments in plea agreements in criminal prosecutions involving government purchases. These payments have generally gone to the federal government, sometimes in the form of contractual offsets.²⁰⁵ However done, there is no indication of any consistent

<http://www.ojp.usdoj.gov/ovc/welcovc/reporttonation2009/ReporttoNation09full.pdf>. Ironically, antitrust fines have been a major source of funds for the Crime Victims Fund, *see* JOHN M. CONNOR, GLOBAL PRICE FIXING 422 (2d ed. 2008), even though the Fund has not been available to victims of antitrust violations.

²⁰⁵ *See, e.g.*, United States v. NEC-Business Network Solutions, Inc, No. CR 04-184 CRB (N.D. Cal. May 27, 2004) (guilty plea agreement to wire fraud and bid rigging of contracts for federal “E-rate” program funding the connection of libraries and schools to the Internet; in addition to fine, defendant agrees to \$10 million settlement of civil qui tam claims which included “partial restitution,” release of \$3.8 million in uncompensated E-rate work, and \$5 million “community service” payment to school systems), *available at* <http://www.justice.gov/atr/cases/f203800/203868.htm>; United States v. ABB MEA AG, Crim. No. CR-01-N-135-S (N.D. Ala. April 11, 2001) (\$53 million fine; as part of plea agreement, U.S. Agency for International Development agrees to accept additional \$10 million restitutionary payment) (conspiracy to rig bids on USAID-funded wastewater construction contract in Egypt), *available at* <http://www.justice.gov/atr/cases/f8000/8059.htm#A>; Press Release, Dep’t of Justice, Antitrust Div., Charged With International Conspiracies, Three Companies To Pay Second Largest Fine In Antitrust History (Dec. 22, 1997) (reporting that guilty-pleading defendant in conspiracy to rig bids for semisubmersible heavy-lift transport had agreed to pay \$15 million fine and \$4 million in civil damages to the U.S. Navy as a result of contracts related to the conspiracy), *available at* http://www.justice.gov/atr/public/press_releases/1997/1325.pdf ; United States v. Alliant Techsystems Inc., 59 Fed. Reg. 6651 (Feb. 11, 1994) (settlement of Clayton 4A complaint alleging illegal teaming agreement in bidding to supply cluster bombs to U.S. Air Force; defendants agree to reduction in negotiated contract price plus \$4 million in cash “refunds” to be forwarded by Justice Department to “to the appropriate military account”; net price to United States will be about 10 percent less than the bid, the estimated average overcharge

policy for seeking restitution.²⁰⁶ And, of course, restitution is, at best, single-damages, not the treble damages permitted under Section 4A.

Thus it is quite likely that current enforcement practice is leaving taxpayer money on the table, even in cartel cases and even given the bar on indirect purchaser suits. Indeed, there are several examples of recent Justice Department prosecutions of cartels that either clearly involved government contracting (for example, freight forwarders of military personnel household goods²⁰⁷ and marine hose²⁰⁸) or potentially involved government over-payments

from price fixing under the Sentencing Guidelines; no mention of treble damages possibility) (Competitive Impact Statement).

²⁰⁶ One consequence of obtaining restitution in the context of a guilty plea is that guilty plea agreements are not subject to the Tunney Act's requirements of notice and the filing of a competitive impact statement. *See* 15 U.S.C. §5(b) (statute applies only to consent judgments filed in antitrust civil proceedings). Note that restitution is a mandatory sentence in mail and wire fraud cases, *see* 18 U.S.C. § 3663A, but can be imposed in criminal antitrust cases only as a condition of probation, *see* 18 U.S.C. §§ 3563 (b), 3663. For an example of restitution imposed in sentencing, see Press Release, Dep't of Justice, Antitrust Div., Former New York City Food Company Executive Receives Record Prison Term For Antitrust Crimes (Nov. 9, 2001) (63 month sentence and \$2.2 million in restitution to 138 victims, including local school systems and not-for-profit social service organizations; guilty plea to antitrust, fraud, and tax conspiracies), available at http://www.justice.gov/atr/public/press_releases/2001/9518.htm.

²⁰⁷ *See* Press Release, Dep't of Justice, Antitrust Div., U.S. Freight Forwarder Pleads Guilty To Criminal Charges Involving The Military's Program For Shipment Of Household Goods (Oct. 19, 2007) ("In recent years, DOD has spent hundreds of millions of dollars annually to transport the household goods of its military and civilian personnel between the United States and foreign destinations."), available at http://www.justice.gov/atr/public/press_releases/2007/226872.htm.

²⁰⁸ *See* Press Release, Dep't of Justice, Antitrust Div., British Marine Hose Manufacturer Agrees To Plead Guilty And Pay \$4.5 Million For Participating In Worldwide Bid-Rigging Conspiracy (Dec. 1, 2008) ("Price fixing and bid rigging are serious crimes that drain resources from the Department of Defense and the American taxpayer. The Defense Criminal Investigative Service takes very seriously all violations of U.S. antitrust laws that affect products and services procured for our soldiers, sailors, airmen and Marines. DCIS aggressively investigates those who seek to cheat the DOD and the public by

to cartel participants (for example, international freight and passenger service²⁰⁹). None of those cases, however, led to a Section 4A suit.²¹⁰

It may be that the Department feels ill-equipped to handle civil litigation for damages (although the Civil Division does so all the time); or, perhaps, the Department feels that it could better deploy its resources for other enforcement tasks. Neither is an adequate reason for the Department to ignore the authority it has to get compensation for the damages that the United States has suffered as a result of antitrust violations, thereby advancing an important, if neglected, goal of the antitrust laws, this time, to the benefit of taxpayers.

IV. Conclusion

Today's conversation about remedies generally, and the private action specifically, focuses most often on the question of optimality—have we gone too far?—and feasibility—what are the costs and benefits of particular remedies? Generally missing from the conversation, however, is the basic idea that antitrust violations cause economic harm and that those victimized by that harm

conspiring to suppress competition,” said Sharon Woods, Director, DCIS.”), available at http://www.justice.gov/atr/public/press_releases/2008/239884.pdf.

²⁰⁹ See Press Release, Dep't of Justice, Antitrust Div., British Airways Plc And Korean Air Lines Co. Ltd. Agree To Plead Guilty And Pay Criminal Fines Totaling \$600 Million For Fixing Prices On Passenger And Cargo Flights (Aug. 1, 2007) (“Passengers pay hundreds of millions of dollars in ticket prices each year, and the conspiracy raised the price on virtually every ticket purchased between 2004 and 2006 for the conspirators’ long-haul international flights, the Department said.”), available at http://www.justice.gov/atr/public/press_releases/2007/224928.pdf.

²¹⁰ See also Statement of Scott D. Hammond, Dep'ty Ass't Attny Genl, U.S. Dep't of Justice, Antitrust Div., U.S. Dept. of Justice, Antitrust Div., Before Sen. Comm. on Homeland Sec. and Govt. Affairs at 7 (Sept. 10, 2009) (describing Antitrust Division's active program of investigating and prosecuting procurement fraud schemes that “undermine competitive bidding for government . . . awards,” but making no mention of civil antitrust litigation to recover damages suffered by the government), available at <http://www.justice.gov/atr/public/testimony/250274.pdf>.

should be entitled to get damages from those who have violated the law.

There is no reason to be apologetic about protecting victims of antitrust violations. The desire to protect those victims has animated the antitrust laws since they were enacted in 1890. This desire has never been rejected legislatively and it is particularly alive on the state level where suits on behalf of indirect purchaser consumers have flourished.

Protecting and compensating victims of antitrust violations accords with the basic economic policy of the Sherman Act. It distributes back to consumers money that should have been in their hands in the first place, but which, instead, producers had improperly put into their own pockets. Compensating victims will indeed help deter violations of the antitrust laws, and this is a policy reason that supports the private action. But deterrence should not be viewed as the only reason for allowing private parties to sue antitrust violators.

There is also a political gain for antitrust in rescuing the compensatory function of antitrust law. Compensating victims of antitrust violations is a benefit of antitrust that is easily understood and readily supportable. Critics have often questioned the utility of antitrust enforcement. Compensating victims demonstrates antitrust's utility, thereby helping to maintain public support for antitrust and for a system of competition.

Ultimately, we would do well to remember that the law tries to do justice; in the case of antitrust, economic justice to those harmed by violations of the law. As Woodrow Wilson told Congress when recommending improvements to the antitrust private action: "Thus shall individual justice be done" Keeping the compensatory function of antitrust in the conversation can keep Wilson's idea alive.