

Rethinking the Key Role of Private Antitrust Enforcement

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This Article focuses on the institutional design of American competition policy. It argues that any long-term effective revival of U.S. antitrust policy requires a better acknowledgement of the key and irreplaceable role played by private litigation and proposes a rethink of private antitrust enforcement policy.

To unpack the nuanced interconnection between public and private competition enforcement, the Article begins by tracing the rise and fall of private antitrust. It builds on a novel, hand-coded, and comprehensive analysis of the entire Supreme Court antitrust track record—all 474 decisions over 130 years—to outline how an ideologically mixed coalition of anti-enforcement Justices seized on private cases to, in effect, reform U.S. competition policy at large. Indeed, almost all Supreme Court decisions that significantly changed U.S. antitrust laws after the mid-1970s were private litigation cases. Over time, a weakened competition policy led to more unchecked abuses of market power in the U.S. economy. A growing recognition of these abuses motivates current calls for an antitrust revival.

Relying on insights from political economy, this Article then explores the root political causes of these changes at the Supreme Court level and the key role played by private plaintiffs in the enforcement ecosystem. Reformers face a challenge: Too little private litigation exposes competition policy to the risks of long-term political gaming—private parties exploiting the political system to their own advantage—while too much private litigation risks triggering the type of judicial antagonism that helped undermine the system over the past decades.

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The Article proposes the creation of “antitrust super-complainants” and the expansion of standing rights, combined with stricter motion practice rules and maintaining treble damages and fee shifting rules, as ways to strike such a balance and help reinvigorate private antitrust enforcement.

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INTRODUCTION

Antitrust is “[b]ack in America.”¹ The rise of the Neo-Brandeisian movement,² combined with increased concerns about the competitiveness of digital markets, a general increase in market concentration and markups in the U.S. economy, and declines in the labor share of profits, business dynamism, and productivity (among other factors), has led to public, bipartisan calls to increase U.S. antitrust enforcement.³ Both houses of Congress ran large, bipartisan antitrust investigations.⁴ Former President Biden made increasing antitrust enforcement a central tenet of his agenda: adopting an executive order on “Promoting Competition in the American Economy” through a “whole of government approach,”⁵ appointing pro-enforcement notables such as Lina Khan and Jonathan Kanter to head the

1. Eric Posner, *Antitrust Is Back in America*, PROJECT SYNDICATE (Mar. 12, 2021), <https://www.project-syndicate.org/commentary/biden-big-tech-and-the-return-of-antitrust-by-eric-posner-2021-03> [<https://perma.cc/3VGY-Q5V8>].

2. The movement proposes using antitrust as a tool to promote economic and political liberty and has Lina Khan, the former head of the Federal Trade Commission, as one of its main exponents. *See, e.g.*, Lina Khan, Editorial, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).

3. *See* Eleanor Fox, *The Battle for Reform of US Antitrust Law*, 11 J. ANTITRUST ENF’T 179, 179, 181 (2023); *see also infra* Section I.B (describing how the Court’s turn against private antitrust plaintiffs has also weakened, public antitrust enforcement).

4. *See, e.g.*, Andrew Duehren, *Rare Bipartisan Ground Emerges over Big Tech Worries*, WALL ST. J. (June 11, 2019, at 09:43 ET), <https://www.wsj.com/articles/rare-bipartisan-ground-emerges-over-big-tech-worries-11560260611>; *Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted by Monopoly Power*, U.S. HOUSE COMM. ON THE JUDICIARY (Oct. 6, 2020), <https://democrats-judiciary.house.gov/media-center/press-releases/judiciary-antitrust-subcommittee-investigation-reveals-digital-economy-highly-concentrated-impacted-by-monopoly-power> [<https://perma.cc/CJ2J-GTZR>].

5. *See* Exec. Order No. 14036, 86 Fed. Reg. 36987, 36987, 36989 (July 9, 2021).

Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ),⁶ increasing the budget of both regulators,⁷ and even mentioning the word “antitrust” in a State of the Union Address for the first time since 1979.⁸ Important lawsuits followed, including those seeking the breakup of Google and Meta,⁹ two of America’s most valuable companies.¹⁰ Law firms went on a hiring spree for antitrust expertise to cope with an expected increase in demand.¹¹ Vice President Vance has equally pushed for stronger enforcement—openly praising the work of Lina Khan¹² and Jonathan Kanter¹³—and the second Trump Administration appointed antitrust chiefs committed to maintaining a strong anti-trust policy.¹⁴ Yet, from an enforcement perspective, most of this push focuses on

6. See Fox, *supra* note 3, at 179.

7. Harry T. Robins, *New Legislation Dramatically Increases Funding to US Antitrust Agencies Over Five Years, Ensuring Aggressive Enforcement*, MORGAN LEWIS (Jan. 10, 2023), <https://www.morganlewis.com/pubs/2023/01/new-legislation-dramatically-increases-funding-to-us-antitrust-agencies-over-five-years-ensuring-aggressive-enforcement> [https://perma.cc/R5L4-K72B].

8. See Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, 85 ANTITRUST L.J. 441, 459 (2023); Tim Wu, *The President’s Role in Antitrust Policy*, 11 J. ANTITRUST ENF’T 300, 303–04 (2023) (describing and defending President Biden’s strong engagement with antitrust policy).

9. See *Justice Department Sues Google for Monopolizing Digital Advertising Technologies*, U.S. DOJ (Jan. 24, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies> [https://perma.cc/AA4J-FPN4]; *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> [https://perma.cc/48NN-SFH3]; Steve Lohr, *What History Can Teach Us About Breaking Up Giant Companies*, N.Y. TIMES (Apr. 21, 2025), <https://www.nytimes.com/2025/04/15/technology/antitrust-structure-deals-challenge.html>.

10. See U.S. DOJ, *supra* note 9 (“Google’s global network business generated approximately \$31.7 billion in revenues in 2021.”); FTC, *supra* note 9 (“According to the FTC’s complaint, Facebook is the world’s dominant personal social networking service and has monopoly power in a market for personal social networking services.”); PWC, *GLOBAL TOP 100 COMPANIES BY MARKET CAPITALISATION 22* (2021), <https://www.pwc.com/gx/en/audit-services/publications/assets/pwc-global-top-100-companies-2021.pdf> [https://perma.cc/8JNF-4MU6] (ranking Alphabet at five and Facebook at six).

11. See, e.g., David Thomas, *Antitrust Hiring Spree Continues as Mayer Brown Taps FTC Vet with Uber, Verizon Ties*, WESTLAW TODAY: REUTERS LEGAL (May 18, 2021, at 22:01 ET), <https://today.westlaw.com/Document/Ia40e8d90b82511ebb5dd9c05c2c541c1/View/FullText.html> [https://perma.cc/CVM8-3Y4F].

12. See *Trump 2.0 – What to Expect in Antitrust Enforcement*, BAKERHOSTETLER: INSIGHTS (Nov. 15, 2024), <https://www.bakerlaw.com/insights/trump-2-0-what-to-expect-in-antitrust-enforcement> [https://perma.cc/SR2C-G9U8].

13. See Stefania Palma, *DoJ’s Jonathan Kanter Does Not See a ‘Complete U-turn on Antitrust’ Under Donald Trump*, FIN. TIMES (Dec. 23, 2024), <https://www.ft.com/content/6cf66449-1d54-45dc-95c8-cf30a8bda51f> (“Vance has expressed support for breaking up Google.”).

14. See Leon B. Greenfield et al., *Meet the New Boss, Not So Different from the Old Boss? Antitrust in the Trump Era*, WILMERHALE (June 2, 2025), <https://www.wilmerhale.com/en/insights/client-alerts/20250602-meet-the-new-boss-not-so-different-from-the-old-boss-antitrust-in-the-trump-era> [https://perma.cc/B9PX-T6ME] (discussing recent speeches by Gail Slater, Mark Meador, and Andrew Ferguson that show commitment to antitrust enforcement).

empowering public regulators such as the FTC and the DOJ.¹⁵ Private litigation—historically considered a “chief tool”¹⁶ of American competition policy—has received surprisingly limited attention.

Looking at the institutional design of the antitrust enforcement system through the lens of political economy and the political coalitions that sustain or undermine public regulation,¹⁷ this Article argues that effective long-term reform requires a significant expansion and strengthening of private antitrust litigation. The reason is simple—the treble damages awarded by the Sherman Antitrust Act provide companies and class action lawyers with incentives to litigate whenever they find violations. In doing so, these private actors complement the work of regulators, working as a partial insurance mechanism that safeguards the deterrence capacity of the system during windows of weak public enforcement caused by changes in administrations or regulatory capture. However, in reinvigorating private enforcement, system reformers must acknowledge that large increases in private litigation can lead to negative spillovers to the broader enforcement ecosystem.¹⁸ Indeed, the Article also shows that a post-1970s general perception that much of private antitrust litigation focused on somewhat “misguided” claims helped spur a political and judicial backlash that undermined U.S. antitrust policy as a whole—for both public and private enforcers. A new recalibrated policy towards private litigation is needed—one that better enables the system to safeguard meritorious lawsuits while weeding out bad claims. Although complex, such a balance can be struck through reforms to adjust antitrust standing and motion practice regime—while maintaining the current treble damages and fee shifting system—as a way to increase the overall enforcement resiliency of the system in the long run.

Exploring the importance of a recalibrated role for private plaintiffs in a long-term, resilient antitrust enforcement policy first requires a better understanding of their current role and how that role has changed over time. This is the goal of Part I, which outlines how American antitrust policy was historically designed to promote robust private and public enforcement in ways that complemented one another. For decades, this interconnected structure performed as envisioned: it created a mutually reinforcing system that yielded a vigorous competition policy. However, from the mid-1970s to 2020 (at least), dozens of Supreme Court decisions in what were almost exclusively private litigation cases significantly

15. See *infra* Part II.

16. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

17. More specifically, political economy encourages scholars to understand the economic incentives of the different agents involved, the coalitions that they must form for the system to work, and the strategies companies use to undermine legal enforcement and capture regulations in the shadows of the law. See, e.g., Lancieri et al., *supra* note 8, at 518.

18. Or an associated increase in lawsuits that cannot articulate a clear theory of harm connecting anticompetitive conduct with both private and market-wide harms. An example is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Pueblo Bowl argued that Brunswick’s acquisition of a competing bowling alley violated the antitrust laws because the increased competition caused by that acquisition reduced Pueblo’s profits. See *Brunswick*, 429 U.S. at 479, 484. The Supreme Court disagreed, famously affirming that antitrust harm requires harm to competition, not *only* to competitors. *Id.* at 488.

reformed U.S. competition law. The impact of these decades-long changes, however, affected public enforcement as well. There were two reasons for this ripple effect. First, public and private actors share many similar legal standards for what qualifies as anticompetitive behavior—thus undermining potential attempts to ring-fence private plaintiffs. Second, regulators incorporated the Court’s directions (and other academic influences) in their enforcement practices through changes in guidelines and case prioritization, which created a feedback loop. The result was a weakened antitrust policy that could not prevent abuses of market power in many sectors of the U.S. economy, setting the stage for the current movement to bring antitrust “[b]ack.”¹⁹

Reform movements, potentially learning from this history, have predominantly focused on reviving U.S. antitrust by changing substantive laws on what qualifies as anticompetitive behavior and empowering public regulators.²⁰ Part II draws upon the recent history of American competition policy to suggest that while these proposed changes—new legislation that alters what type of conduct is considered anticompetitive—are extremely important, they are insufficient. Reformers should also pay more attention to the institutional design of the enforcement structure. In particular, reformers must better acknowledge the key complementary role played by private actors in helping protect the deterrence capacity of the system from undue political influences. Private enforcement plays a key and irreplaceable role in properly enforcing competition policy in the U.S. and abroad.

Indeed, in a way, a public-enforcement-only solution has already been unsuccessfully tried. As Part II also shows, the changes promoted by the Supreme Court over the past decades reduced private antitrust litigation against potential abuses of market power or illegal mergers to a minimum. This exposed at least two ways companies can exploit politics to undermine the effectiveness of the antitrust regime.

First, public enforcement is naturally subject to political fluctuations, as different administrations have different views on how strictly to enforce antitrust and other laws.²¹ The challenge posed by antitrust cases is that many defendants are—by definition—large, sophisticated companies with the resources, institutional capacity, and motivation to play a long-term game. This empowers them to exploit weak enforcement windows in an almost irreversible manner—for example, it took ten years and three attempts, under different administrations, to consolidate the U.S. wireless market from four to three players.²² Once a transaction is concluded, it can hardly be undone.

19. See Posner, *supra* note 1.

20. These objectives are oftentimes combined. For example, several high-profile antitrust bills proposed over the past years defined novel antitrust violations in certain markets (e.g., digital) and then granted public authorities exclusive enforcement powers. See *infra* Part II.

21. Mitigating these fluctuations was one of the key reasons for the broader expansion of private rights of action in the United States in the first place. See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 19–59 (2010) (detailing how and why Congress mobilizes private antitrust litigation).

22. See *infra* Section II.A.

Second, sophisticated companies will employ multiple strategies—including lobbying,²³ relying on revolving doors,²⁴ providing judicial training programs,²⁵ and the funding of academic ideas²⁶ and think tanks²⁷—to undermine a policy essentially designed to stop them from extracting economic rents. Concentrating all enforcement powers in the hands of a few regulators increases the incentives for and the risks of regulatory capture. Indeed, an effective and comprehensive strategy is to lobby Congress to restrict regulatory agencies’ funding,²⁸ thus preventing them from properly performing their work.²⁹ This type of corporate influence has been shown to explain much of the decline of U.S. antitrust policy over the past decades.³⁰ By removing private actors from the mix, system designers lose the complementary enforcement resiliency that those actors provide, empowering companies to pursue both strategies.

Yet, private litigation can also be seen as excessive,³¹ enabling judicial and other backlashes that undermined American competition policy in the past. That is either because large increases in the number of lawsuits give antagonistic

23. See Mihir N. Mehta, Suraj Srinivasan & Wanli Zhao, *The Politics of M&A Antitrust*, 58 J. ACCT. RSCH. 5, 8 (2020); and Jana P. Fidrmuc, Peter Roosenboom & Eden Quxian Zhang, *Antitrust Merger Review Costs and Acquirer Lobbying*, 51 J. CORP. FIN. 72, 91–92 (2018), as two sources finding that companies who lobby in advance received favorable treatment in merger review by the FTC and the DOJ. One of the studies also found that when acquiring companies “have judiciary committee representation, the antitrust review results in fewer regulatory obstacles.” Mehta et al., *supra*, at 7.

24. See Lancieri et al., *supra* note 8, at 508–11 (mapping the increase of the revolving doors between FTC Commissioners, DOJ Assistant Attorneys General, and antitrust defendants).

25. See generally Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29788, 2022) (finding that law and economics training courses sponsored by antitrust defendants led judges to rule against antitrust enforcement).

26. See Jesse Eisinger & Justin Elliot, *These Professors Make More than a Thousand Bucks an Hour Peddling Mega-Mergers*, PROPUBLICA (Nov. 16, 2016), <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers> [<https://perma.cc/D62Y-LEB9>] (discussing the pervasiveness of private consulting by economic professors engaged in antitrust policy).

27. See Daisuke Wakabayashi, *Big Tech Funds a Think Tank Pushing for Fewer Rules. For Big Tech.*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html> (documenting how large technology companies strategically use their connections to think tanks to influence the public debate on antitrust).

28. See Cristiano Lima-Strong, *A Fight Is Brewing in Congress over Antitrust Funding*, WASH. POST (July 25, 2023), <https://www.washingtonpost.com/politics/2023/07/25/fight-is-brewing-congress-over-antitrust-funding> (describing how Big Tech companies are lobbying Congress to restrict funding to the antitrust agencies).

29. See Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 ANTITRUST L.J. 1, 7 (2023) (arguing that budget restrictions forced antitrust agencies to only challenge the most damaging mergers); Lancieri et al., *supra* note 8, at 480–83 (discussing how antitrust budget cuts were implemented in stealthy ways).

30. See Lancieri et al., *supra* note 8, at 519 (using different sources of evidence to find that “big business drove a steady decline in antitrust enforcement against the public will to benefit itself”).

31. See Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371, 372, 376 (1986). See generally Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) (arguing that excessive private litigation can produce negative externalities, as even claims with a net positive expected value do not consider system-wide costs).

courts too many opportunities to change the antitrust laws, or because these increases facilitate the formation of coalitions against the policy in the first place. Part III builds on a comprehensive analysis of the entire Supreme Court antitrust track record—all 474 decisions over 130 years³²—to showcase how this is more than a speculative concern. More specifically, it explores three different theories that explain why most of the Supreme Court decisions that made U.S. competition law more defendant-friendly over the past five decades took place in private enforcement cases. All three theories point toward the importance of creating procedural mechanisms that allow courts to filter out lawsuits they perceive as unmeritorious if reformers are to deliver sustainable, long-term change in an environment of judicial antagonism against private litigation that persists to this day.

The first theory focuses on the nature of the cases decided by the Court, arguing that the changes in antitrust policy reflected a broader judicial antagonism towards the private “litigation explosion” that occurred in the U.S. since the 1960s.³³ If this were the case, then weakening a private right of action would remove much of the Court’s motivation to target competition policy. This view, however, is only partially supported by the facts, as the Supreme Court continued its antagonism to private antitrust enforcement actions even as private litigation weakened.

A second theory is competition-policy specific, arguing that these changes were caused by both the anti-antitrust enforcement teachings of the so-called “Chicago School,”³⁴ as well as a more conservative judiciary.³⁵ While under-explored, the outsized role of private litigation could be explained by a combination of a general lack of public cases (given diminishing enforcement levels) and the lower reputational costs³⁶ of reverting decades-long precedents³⁷ through cases involving private plaintiffs rather than the U.S. government. If this were the

32. Appendix I summarizes and details the comprehensive database of 474 Supreme Court antitrust decisions built for this Article that supports this analysis. Appendix II summarizes the key cases and changes made by the Supreme Court to antitrust law beginning in the 1970s in more detail.

33. Daniel A. Crane, *Private Enforcement of U.S. Antitrust Law—A Comment on the U.S. Courts Data*, CPI ANTITRUST CHRON., Feb. 2019, at 3; see Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1587 (2014) (explaining the broad judicial backlash to private enforcement).

34. The Chicago School criticized all antitrust policy and advocated for a reduction in overall enforcement as part of a broader de-regulatory movement. See Anu Bradford, Adam S. Chilton & Filippo Maria Lancieri, *The Chicago School’s Limited Influence on International Antitrust*, 87 U. CHI. L. REV. 297, 303–09 (2020) (summarizing the different views held by Chicago School scholars).

35. This is the preferred explanation of antitrust scholars. See, e.g., William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 459–71 (2020) (summarizing mainstream views on why the antitrust laws changed).

36. See generally NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* (2015) (developing a theory of judicial reputation that constrains how constitutional courts wield power).

37. See Barak Orbach, *Antitrust Stare Decisis*, ANTITRUST SOURCE, Oct. 2015, at 5 (describing how the Court’s antitrust reforms overturned precedents protected by decades of stare decisis).

case, recalibrating private litigation would deprive antagonistic courts of opportunities to change the law during periods of judicial antagonism.

A third, more comprehensive theory advanced by this Article relies on the rise of the so-called “Modern Harvard School” to combine both explanations. Proponents of the Modern Harvard School, such as former Justice Stephen Breyer, believed that the institutional characteristics of American competition policy increased the risks of defendants settling even abusive lawsuits and justified a curtailment of antitrust private rights of action.³⁸ These scholars’ views partially complemented and partially opposed those of the broader anti-enforcement Chicago School. Such an environment may have shaped the views of different Justices, most of whom knew little about competition policy but had to decide dozens of antitrust disputes. As the novel database employed here shows, between 1945 and 1995, antitrust cases represented, on average, approximately 4% of the merits decisions issued by the Supreme Court in any given term.³⁹ Private lawsuits, then, enabled groups “representing” either the Harvard School or the Chicago School to meet in the middle.⁴⁰ The result was a long-term, non-ideological, anti-antitrust enforcement majority at the Court. This theory also encourages limiting private rights of action, lest courts with similar pro-business or anti-private enforcement members would be given reasons and ammunition to undermine competition policy.

The combination of Parts II and III puts antitrust reformers in a quandary: Too little private litigation will expose antitrust enforcement to risks of political gaming, while too much could trigger judicial antagonism. A solution to this quandary—especially given the current Supreme Court’s apparent solid, enduring majority that is pro-business, anti-regulation, and distrustful of private enforcement⁴¹—is to rethink the essential role played by private plaintiffs in the enforcement mix. Indeed, similar discussions have already started in other areas of legal

38. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 29–32 (summarizing the views of the Harvard School and arguing that it played a key role in the changes to US competition policy). As mentioned above, potentially abusive lawsuits would be lawsuits that could not connect a specific anticompetitive behavior with both private and market-wide harm. Specific antitrust characteristics that would encourage defendants to settle even meritless claims include the fact that many plaintiffs are former competitors, expansive standing rights, treble damages, high discovery costs, and extensive jury trials. See Jeffrey M. Perloff & Daniel L. Rubinfeld, *Settlements in Private Antitrust Litigation*, in PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 149, 165 (Lawrence J. White ed., 1988).

39. See *infra* Appendix I Figure 8.

40. See *infra* Part III. Justices Alito, O’Connor, Rehnquist, Souter, and Thomas’s voting patterns aligned with the Chicago School and opposed most antitrust enforcement, while Justices Breyer, Ginsburg, Kennedy, Roberts, and Scalia’s voting patterns aligned with the Harvard School, opposing private antitrust plaintiffs.

41. See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (strengthening the major questions doctrine); *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 82 (2021) (imposing restrictions to the FTC’s disgorgement power); *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180 (2023) (allowing potential challenges to the constitutionality of the agency’s administrative structure); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 417 (2021) (restricting Article III standing for private rights of action in statutory privacy violations).

policy also impacted by the broader anti-private litigation shift at the Supreme Court.⁴² Competition law can build on the lessons of this broader movement and adapt them to antitrust's specific characteristics.

Part IV is prescriptive, drawing the contours of such a reenvisioned policy for private antitrust litigation. Precisely because it targets the largest companies in a given economy, competition policy is subject to heightened risks of undue political influence. This suggests that enforcement resiliency—or the delivery of constant levels of enforcement that are not subject to political fluctuations—should be a central goal of any long-term efforts to reform the antitrust laws beyond occasional bursts. Private litigation has historically been the main source of resiliency for much of the U.S. regulatory state,⁴³ and antitrust is no different.

Three proposals for changes in the antitrust laws can help reformers overcome this quandary and maximize private enforcement's complementary role. These proposals would work together with much-needed, broader reforms to U.S. antitrust laws to expand the power of public enforcers and to expand what types of conduct would be deemed anticompetitive, an area not covered directly by this Article because of extensive discussion elsewhere.⁴⁴

The first is the creation of “antitrust super-complainants,” or private parties that benefit from targeted standing provisions that allow them to litigate anticompetitive conduct under much lower legal and evidentiary standards to prove a violation. Many bills aim to reform antitrust policy by designing specific, stricter regimes on what qualifies as anticompetitive conduct for specific sectors of the U.S. economy.⁴⁵ These bills could impose stricter standing requirements that only enable better-resourced private plaintiffs to file lawsuits under the modified liability standards and lower burdens of proof established by these targeted laws. Building on experience from the United Kingdom and the European Union, this Article proposes that one way to implement these stricter standing provisions is to require that potential plaintiffs be pre-certified by either the FTC, the DOJ, or a combination of state attorneys general representing at least 15% of the U.S. population before granting the plaintiffs standing.⁴⁶

42. For examples of scholars discussing ways to better target private enforcement in different policy areas, see generally J. Maria Glover, *The Structural Role of Private Enforcement Mechanism in Public Law*, 53 WM. & MARY L. REV. 1137 (2012); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); and Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016).

43. See Clopton, *supra* note 42, at 307, 299–305 (arguing that legal scholarship has been “slow” in appreciating the benefits of redundant public/private enforcement and mapping redundant enforcement regimes in the federal judiciary); Glover, *supra* note 42, at 1142–45 (“[O]ffering a more unified view of the structural role of private enforcement mechanisms within our regulatory system . . .”); LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* 199 (2012) (stressing the role of class actions in helping offset the power of special interests).

44. See *infra* note 139.

45. Such as laws targeting the technology and agricultural markets. See *infra* Part II.

46. The specific percentage may vary according to political determinations. A minimum 15% threshold ensures that the supporting coalition represents either a small combination of large states (for example, two large democratic states such as California and New York, or two large republican states

The second and third proposals are to significantly expand the current U.S. antitrust private litigation rules on standing (broadly defined) while safeguarding stricter motion practice rules that allow for the weeding out of “bad” lawsuits and maintaining treble damages and fee shifting. Antitrust harm may materialize in any market, so general provisions against anticompetitive behavior (such as Sections 1 and 2 of the Sherman Act) should continue to account for the bulk of enforcement actions. For these “traditional” antitrust laws, legal reforms should ensure broader access to the courts through the reversal of decisions that restricted standing, prevented parties from going to court, and restricted class certification,⁴⁷ while preserving rules that increased thresholds for parties to survive a motion to dismiss or a motion for summary judgment.⁴⁸ To survive such motions, parties would need to articulate a clear theory of harm that connects specific anti-competitive conduct with both private and market harms. The main rationale is that—in the antitrust-specific context—stricter pleading and summary judgment standards provide the judiciary with a better-targeted tool to weed out bad lawsuits than across-the-board restrictions in standing that, in combination, create gaps in the ability of private plaintiffs to work as complements to public enforcement. Finally, maintaining the long-standing treble damages and fee-shifting system will continue to encourage private parties to litigate these hard-to-detect and prosecute harms—there is no systematic, reliable evidence that these characteristics harm overall welfare.

Before continuing, two additional notes about this argument are necessary. First, this discussion primarily covers federal public and private litigation. State attorneys general also enforce the U.S. antitrust laws.⁴⁹ Nonetheless, available data indicates that the real-world impact of state antitrust litigation is limited.⁵⁰

such as Texas and Florida) or a larger coalition of small states, diminishing incentives for political agreements that weaken enforcement.

47. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 521 (1983); *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 477 (1982); *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013). Appendix II describes these cases in more detail.

48. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488–89 (1977); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–97 (1986); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Decisions such as *Matsushita* and *Twombly* have broad negative effects on private litigation that go beyond antitrust. The discussion herein is restricted to the changes they implemented in antitrust law, given the particularities of antitrust litigation.

49. Many, including myself, would welcome more state antitrust litigation. See, e.g., Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 ANTITRUST BULL. 281, 283–85 (2009).

50. For example, a 2020 survey of forty-three state Attorneys General offices showed that only sixteen offices had more than two staff fully dedicated to antitrust enforcement. See *Modern Antitrust Enforcement*, YALE SCH. OF MGMT.: THURMAN ARNOLD PROJECT, <https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement> [<https://perma.cc/2H85-6HRW>] (last visited Sep. 27, 2025). The largest office (California) had twenty-two antitrust attorneys, while the second largest (New York) had fourteen. *Id.* By comparison, the FTC had around 400 to 500 antitrust staff members in 2020, and a large law firm such as Latham and Watkins has more than 200 partners and associates in their antitrust practice. See Lancieri et al., *supra* note 8, at 484; *Antitrust & Competition*, LATHAM & WATKINS LLP, <https://www.lw.com/en/practices/antitrust-and-competition> [<https://perma.cc/2H85-6HRW>].

Future work should incorporate reinvigorated state enforcement in this recalibrated policy.

Finally, this Article focuses on U.S. competition policy. Hybrid regimes are a pervasive feature of U.S. policymaking,⁵¹ meaning that this public vs. private rebalancing discussion is also occurring in fields as disparate as securities, consumer torts, and labor law.⁵² Scholars studying the consequences of the Supreme Court's anti-private-litigation turn are increasingly arguing for more in-depth studies that map how private enforcement mechanisms enable or hinder the achievement of broader regulatory goals.⁵³ This Article addresses this exact issue, and, in doing so, contributes to this literature.

I. THE KEY ROLE OF PRIVATE PLAINTIFFS IN THE CHANGES TO AMERICAN ANTITRUST LAWS

The specific role played by private litigation in the broader decline of U.S. antitrust policy remains largely underexplored.⁵⁴ To understand why a targeted private right of action plays a key role in a long-term, resilient antitrust enforcement policy, it is important to know what this role initially was and how it has changed over time.

Section A builds on history and data from all federal antitrust cases to describe how private plaintiffs have historically complemented the work of the FTC and the DOJ, helping deliver a vigorous antitrust policy. At some point, however, this interconnection backfired. An analysis of all Supreme Court antitrust cases shows

cc/V7CR-TD4D] (last visited Sep. 27, 2025) (choose the tab “Meet the Team”) (presenting L&W’s antitrust team). This lack of resources impacts enforcement capacity: All combined, state attorneys general started a dozen or so lawsuits per year (including criminal and civil prosecution) in the five years that preceded COVID-19, many of which are aligned with federal enforcement. See Robert M. Feinberg & Kara M. Reynolds, *State-Level Antitrust Enforcement: Revisiting the Determinants*, 64 REV. INDUS. ORG. 793, 793, 795 (2024). States are sometimes active in sectors that are salient in the state, such as mergers between hospital systems. See *State Antitrust Litigation and Settlement Database*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/issues/antitrust/state-antitrust-litigation-and-settlement-database> [https://perma.cc/GU5K-DLJ7] (last visited Sep. 27, 2025) (select “Hospitals” from the drop-down menu for “Related Industry”) (listing forty-three state antitrust enforcement actions in the hospital industry since the 1990s). Even then, however, independent enforcement is rare and only does so much. See Cory Capps, Tetyana Shvydko & Zenon Zabinski, *Healthcare Antitrust Enforcement and Regulation by the States*, in *THE ECONOMICS OF US HEALTHCARE: COMPETITION, INNOVATION, REGULATION, AND ORGANIZATIONS* 194 (2023) (ebook) (surveying state antitrust enforcement in healthcare and affirming that independent enforcement is “relatively rare”).

51. See Glover, *supra* note 42, at 1145–46 (arguing that private litigation is an institutional feature of American public law); Clopton, *supra* note 42, at 295–99 (surveying the existence of hybrid regimes in US policy); Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, 172 U. PA. L. REV. 61, 85–87 (2023) (surveying the prevalence of private enforcement in state law).

52. See Glover, *supra* note 42, at 1148–51, 1160–75 (describing the many areas where private enforcement plays an important role, and then discussing judicial changes that have curtailed private enforcement).

53. See Glover, *supra* note 42, at 1178–79.

54. But see DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 49–67 (2011) (studying the role of private plaintiffs in the enforcement system, but in a way that is critical of their motivations and capacity).

that, as the Court turned against antitrust plaintiffs, private lawsuits became the mechanism through which the Supreme Court reformed U.S. competition laws into a generally more defendant-friendly policy. Section B then describes how these changes had important spillovers that also contaminated, and weakened, public antitrust enforcement.

A. THE RISE AND FALL OF PRIVATE ANTITRUST ENFORCEMENT

Congress historically designed the U.S. federal antitrust regime to rely on a combination of public and private enforcement, and deemed private lawsuits an important tool to detect violations and ensure proper compensation for victims of antitrust abuses.⁵⁵ From its inception, the Sherman Act empowered district attorneys and any other person “injured in his business or property” to police antitrust violations; private parties could recover three times the damages sustained, as well as the costs of the suit and a reasonable attorney’s fee.⁵⁶ Congress considered this broad, dual enforcement system a legal victory.⁵⁷ Over time, Congress passed a series of additional statutes with the overall intent of strengthening antitrust enforcement,⁵⁸ thus continuing to promote vigorous public and vigorous private litigation.⁵⁹

55. See Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 437 (2000); Harry First, Eleanor M. Fox & Daniel E. Hemli, *The United States: The Competition Law System and the Country’s Norms*, in THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES 329, 333 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

56. For the original version of the Sherman Act, see *Sherman Anti-Trust Act (1890)*, NAT’L ARCHIVES: MILESTONE DOCUMENTS (Mar. 15, 2022), <https://www.archives.gov/milestone-documents/sherman-anti-trust-act> [https://perma.cc/PM3E-DGF4]. Violations were considered a misdemeanor punishable by a fine of up to \$5,000 and imprisonment of up to one year. See *id.* District attorneys could also institute “proceedings in equity to prevent and restrain” violations of the law. *Id.*

57. See William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 254–58 (1956); Andrew I. Gavil, *Private Enforcement Under US Antitrust Law: Origins and Contemporary Context*, in RESEARCH HANDBOOK ON PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE EU 52, 55–56 (Barry Rodger et al. eds., 2023).

58. See Daniel A. Crane, *Antitrust Antitextualism*, 96 NOTRE DAME L. REV. 1204, 1207–08 (2021) (arguing that most U.S. antitrust statutes intended to increase enforcement of the antitrust laws).

59. In 1914, Congress created the FTC through the passage of the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58), then envisioned as a regulator capable of understanding business conduct and market structures and stopping persons and companies from using “unfair methods of competition in commerce.” See W.H.S. Stevens, *The Trade Commission Act*, 4 AM. ECON. REV. 840, 850 (1914). In the same year, the Clayton Antitrust Act, Pub. L. No. 63-203, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–19, 21–27 and 29 U.S.C. §§ 52, 53), outlawed price discrimination, exclusive dealings, or the tying of goods; prohibited companies from acquiring stock or capital of another corporation (effectively creating a merger review system); and restricted interlocking directorates in between competitors. See W.H.S. Stevens, *The Clayton Act*, 5 AM. ECON. REV. 38, 42, 44 (1915). The Clayton Act also empowered the DOJ, the FTC, and private plaintiffs to ensure legal compliance, allowing private actors to sue for injunctive relief in addition to treble damages (including in merger cases), and establishing that condemnation in a DOJ lawsuit would be prima facie evidence of illegal behavior in private follow-on cases. See *id.* at 47, 49–50. In 1936, Congress passed the Robinson–Patman Anti-Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13–13b, 21a), which strengthened protections against price discrimination, again foreseeing both public and private enforcement. See W.H.S. Stevens, *An Interpretation of the Robinson–Patman Act*, 2 J. MKTG. 38, 39 (1937). In the subsequent decades,

After an initial period of waxing and waning litigation, antitrust enforcement became more common during the late part of the Franklin Delano Roosevelt Administration,⁶⁰ and further accelerated during the post-war period. By then, both political parties shared the belief that industrial cartels facilitated the rise of Nazism in Germany and that market concentration was a feature of Soviet economies—a view that led to the passage of the Celler-Kefauver Act (informally known as the anti-merger act).⁶¹ This period of robust (and some would say inefficient)⁶² enforcement continued until the late 1970s, with the system performing as it was designed: public and private litigation complemented one another to create a mutually reinforcing ecosystem. Indeed, the Supreme Court stressed the key deterrence role of treble damages and private plaintiffs in numerous decisions,⁶³ as did U.S. regulators.⁶⁴

Figure 1 below primarily relies on data from the Administrative Office of the U.S. Courts to represent the changing patterns in antitrust enforcement—and demonstrate that private enforcement played a determinant role.⁶⁵ The ratio of

Congress would pass a series of statutes that further expanded antitrust enforcement, leaving the basic structure of parallel public and private enforcement provisions largely untouched. *See, e.g.*, Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18).

60. *See* CRANE, *supra* note 54, at 30.

61. *See* Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315, 1321–26 (2019). For a summary of the act and its impacts, see Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

62. *See generally* ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (2d. ed. 1993) (“Fifteen years ago the Introduction to this book spoke of ‘The Crisis in Antitrust,’ and noted that this law’s basic premises were flatly inconsistent with one another, some of them leading to the preservation of competition and others to its suppression.”).

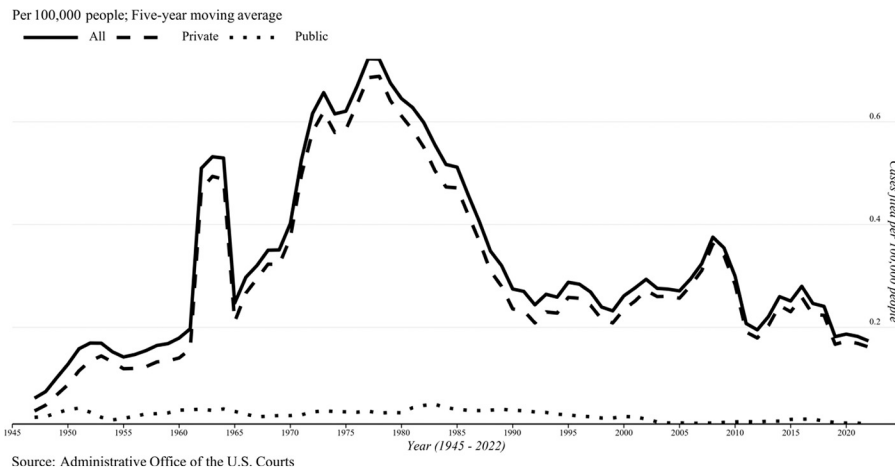
63. For example, the Court praised the fact that treble damages enabled private plaintiffs to act as “private attorneys general” on several occasions. *See* *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 147 (1968) (Fortas, J., concurring), *abrogated by* *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972). The Court stressed how these damages are a “chief tool in the antitrust enforcement scheme.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

64. For example, H. Graham Morison, head of the DOJ’s Antitrust Division under the Truman Administration, stated before Congress that private plaintiffs were of “of substantial help” to antitrust enforcement. *Study of Monopoly Power: Hearing on H.R. 3408 Before the Special Subcomm. on the Study of Monopoly Power of the H. Comm. on the Judiciary*, 82d Cong. 15 (1951) (statement of H. Graham Morison, Assistant Att’y Gen. in charge of the Antitrust Div., DOJ) (“[I]f you did away with the triple-damage suit entirely, and you still wanted substantial enforcement . . . you would have to quadruple the size of the Antitrust Division.”).

65. The data for Figure 1 was compiled from the Yearly Reports and Judicial Business reports produced by the Administrative Office of the U.S. Courts. *E.g.*, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1948 (1948), available on LLMC DIGITAL, <https://llmc.com> (last visited Oct. 19, 2025). Each report was read and hand coded to determine the number of civil cases, antitrust cases, and the nature of case (public or private). For recent years, the data was supplemented by reviewing the DOJ’s Antitrust Workload Statistics and the DOJ’s Antitrust Division’s Case Filings website. *See* ANTITRUST DIV., U.S. DOJ, WORKLOAD STATISTICS FY 2015–2024 (2025), <https://www.justice.gov/atr/media/1385421/dl?inline> [<https://perma.cc/HKE2-X784>]; *Antitrust Case Filings*, U.S. DOJ: ANTITRUST DIV., <https://www.justice.gov/atr/antitrust-case-filings> [<https://perma.cc/72DN-X5RM>] (last visited Sep. 29, 2025). The early 1940s was selected as the starting date range because the Administrative Office of the U.S. Court established in 1939 and, in 1943, the Judicial Conference established the Committee on Judicial Statistics (later replaced in 1968 by the

private-to-public⁶⁶ antitrust cases filed in federal courts rose from 2:1 in the 1940s to around 4:1 in the 1950s, further expanded to 10:1 in the 1960s, and reached 15:1 in the 1970s.⁶⁷ This was in line with a major expansion of private federal litigation in many other areas of the law.⁶⁸ The bump in the 1960s reflects the so-called “electrical equipment” cartel in the early 1960s, which led to the filing of almost 2,000 lawsuits and the subsequent creation of the Judicial Panel on Multi-District Litigation.⁶⁹

Figure 1: Antitrust Cases Over Time.



Source: Administrative Office of the U.S. Courts

Figure 1, however, also shows how the fortunes of private enforcement would change. As Appendix II surveys in greater detail, starting in the mid-1970s, the Supreme Court turned against the expansive enforcement of competition policy that existed up until that time. Over the next decades, it issued important judgments that would modify legal standards about what qualifies as antitrust injury, collusion, an illegal merger, illegal vertical conduct, tying, predation and price

Subcommittee on Statistics of the Committee on Court Administration) to improve the collection and reporting of caseload statistics. See *Caseloads: History of Federal Caseload Reporting*, FED. JUD. CTR., <https://www.fjc.gov/history/work-courts/caseloads-history-federal-caseload-reporting> [https://perma.cc/2EL6-Y67M] (last visited Sep. 29, 2025).

66. A public case involves either the FTC, DOJ, or a U.S. state among its litigants. Private cases involve solely private actors.

67. *Infra* Figure 1. There are different accounts on what judicial changes led to this rise. Some blame the rise of per se rules, while others blame the uncertainty generated by shifting legal doctrines. See Douglas H. Ginsburg & Leah Brannon, *Determinants of Private Antitrust Enforcement in the United States*, 1 COMPETITION POL’Y INT’L 29, 37–42 (2005); CRANE, *supra* note 54, at 56.

68. See Burbank & Farhang, *supra* note 33, at 1547 (describing the rise of the “litigation state” in the 1960s and tying it back to a deliberate choice by members of Congress to protect enforcement from changes in political administration). Burbank and Farhand divide their analysis per 100,000 people to account for population and economic growth. See *id.* at 1548. This Article does the same.

69. See Tracey E. George & Margaret S. Williams, *Venue Shopping: The Judges of the U.S. Judicial Panel on Multidistrict Litigation*, 97 JUDICATURE 196, 197 (2014).

discrimination, refusal to deal, boycott, and margin squeeze.⁷⁰ The Court also ruled on whether patents grant market power, whether regulatory and statutory regimes preclude the application of antitrust laws, and whether monopolization cases should be the focus of the antitrust system altogether.⁷¹ All those cases helped advance a more defendant-friendly antitrust policy.

The Court also issued many decisions that more directly targeted private anti-trust plaintiffs, such as cases that heightened pleading requirements, expanded the use of summary judgments, prevented indirect purchasers and other parties from filing lawsuits, required some parties to exhaust administrative instances before filing antitrust claims in U.S. courts, increased thresholds for class certification, narrowed the possibility of injunctive relief, restricted the award of treble damages, and affirmed that arbitration clauses may prevent the filing of antitrust lawsuits in federal courts.⁷² Many of these decisions can be seen as part of a broader anti-private litigation movement that the Supreme Court sponsored across different areas of the law,⁷³ even if the over-representation of antitrust cases in this broader group is remarkable.⁷⁴

Overall, the changes in substantive antitrust standards and general procedural rules combined to create a more defendant-friendly competition policy.⁷⁵ [Figure 2](#) below builds on a novel, hand-coded comprehensive database of all 474 antitrust cases decided by the Supreme Court since the enactment of the Sherman Act in 1890⁷⁶ to represent the Court's attitude towards antitrust enforcement, or its pro-enforcement score.⁷⁷ More specifically, [Figure 2](#) illustrates the median

70. See *infra* Appendix II.

71. See *infra* Appendix II.

72. See *infra* Appendix II.

73. See generally Jason Rathod & Sandeep Veheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303 (2015) (describing similar changes promoted by decisions in other areas of the law, such as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (pleading), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (summary judgment), *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (class certification), *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (limits on arbitration)); Richard D. Freer, *The Roberts Court and Class Litigation: Revolution, Evolution, and Work to Be Done*, 51 STETSON L. REV. 285 (2022) (discussing the impact of Roberts Court decisions on class action litigation more broadly).

74. See Gavil, *supra* note 57, at 64. (“Antitrust cases have frequently served as the prompt for the Supreme Court to revisit the original goals of the Federal Rules [of Civil Procedure]” leading to an “interdependent relationship.”). For example, Congress created the Judicial Panel on Multidistrict Litigation in reaction to the more than 2,000 *Electrical Equipment* antitrust cases filed in the 1960s. *Id.* at 70.

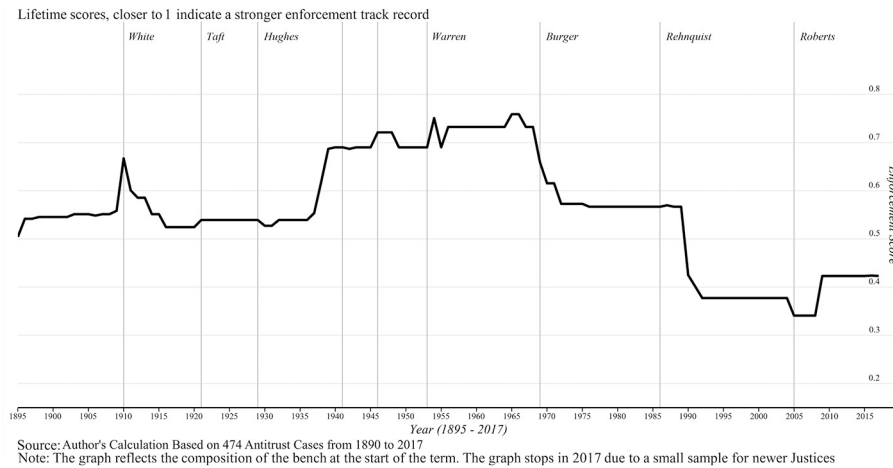
75. As most scholars would agree. See Jonathan B. Baker, *Taking the Error out of “Error Cost” Analysis: What’s Wrong with Antitrust’s Right*, 80 ANTITRUST L.J. 1, 2 (2015); Jonathan B. Baker, Jonathan Sallet & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L.J. 1916, 1919 (2018); Crane, *supra* note 58, at 1207.

76. See Appendix I for a description of the database construction and its variables.

77. Figure 2 builds on the methodology developed by Lee Epstein, William M. Landes, and Richard A. Posner to understand whether the Court became more “business-friendly” over time and adapted by Filippo Lancieri, Eric A. Posner, and Luigi Zingales to understand the Court’s attitude towards antitrust. See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1446–52 (2013); accord Lancieri et al., *supra* note 8, at 491–93. To build the

pro-enforcement score of the full bench in a given term, with changes in the score reflecting who was the swing vote on the Court at a given time. Scores closer to one reflect a more pro-antitrust enforcement composition of the Court in that given term.

Figure 2: SCOTUS Antitrust Enforcement Score Over Time: Median of Full Bench.

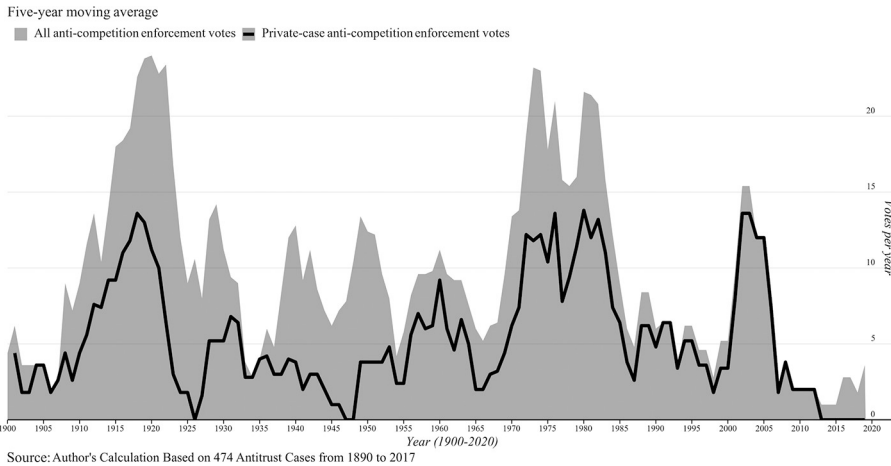


What is both noteworthy and underappreciated is that, especially after the 1980s, almost all of the pro-defendant decisions take place when the Court is analyzing private cases. Figure 3 showcases this disproportional representation, depicting the five-year moving average of the number of votes cast against antitrust enforcement and identifying votes issued in private lawsuits.⁷⁸

Court's average, the authors first built a Justice-specific score. See *infra* note 340 and accompanying text. A score of 1 means that a given Justice voted in favor of businesses in all (100%) of the business-related cases in which she participated during her entire tenure at the Supreme Court. For example, if throughout her tenure Justice X participated in 10 judgments that included businesses and voted in favor of these companies in 6 cases, her business-friendly score is 0.6. This is fixed for that Justice. The Court score then reflects the average composition at the Court in a specific term (e.g., if during the terms 1962 through 1964 the Court was composed of two justices with scores $X=0.6$ and $Y=0.2$, then the Court score for those years is 0.4. If, in 1965, Justice Y retires and is replaced by Justice Z, who has an overall business-friendly score of 0.8 throughout his entire tenure. Then in 1965 and for all the years for which the Court composition was $X + Z$, the Court score was 0.7 ($(X's\ 0.6 + Z's\ 0.8)/2$).

78. This graph follows the methodology described in note 77 and in Appendix I. Few state antitrust cases are heard before the Supreme Court, so results do not change materially if one codes them as private litigants or removes them. First, a case is coded according to whether it involved a public or private litigant. The cases are then coded according to whether the result was for or against the initial plaintiff in the antitrust litigation. The graph adds the individual votes against antitrust plaintiffs per year, separating them according to the nature of the case composition (public versus private).

Figure 3: SCOTUS Anti-Competition Enforcement Votes Cast by Litigation Type.



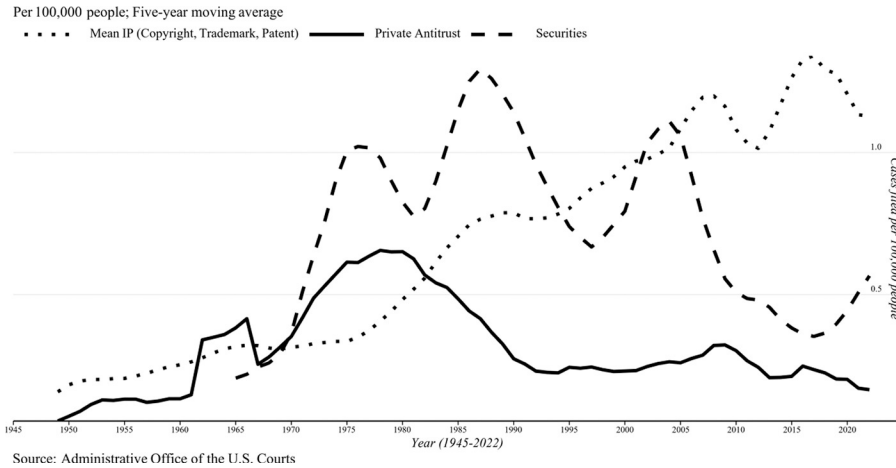
As can be seen, private cases play a central role in shaping the Court’s pro-defendant jurisprudence. During the 1970s, most anti-enforcement decisions (and most key rulings) were private cases. Since the 1980s, some exceptions aside, all pro-defendant decisions were private cases. Part III below explores the potential root causes of this phenomenon, but its existence alone is noteworthy.

Available data also indicates that these legal changes had a real-world impact. Figure 4 shows that the number of private antitrust lawsuits filed in federal court fell both in absolute numbers and in relation to potential “peer” lawsuits such as securities or intellectual property cases—private antitrust litigation mostly tracked IP and securities until the 1980s, but then disproportionately declined.⁷⁹ IP and securities are “peer” lawsuits in that these areas share common characteristics of being complex cases that have significant private litigation and tend to involve business interests.⁸⁰

79. The data for Figure 4 was compiled using a similar methodology as Figure 1. See *supra* note 65. The mean IP value was created by taking and taking the five-year moving average of all IP cases (trademark, patent, and copyright) per year.

80. See CRANE, *supra* note 54, at 54–55 (comparing “the number of new private filings on an annual basis for antitrust and four of its closest analogues: securities, trademark, patent, and copyright, for 1961–2008”).

Figure 4: Private Antitrust, Securities, and IP Cases Filed in Federal Court Over Time.



Indeed, a rare, well-identified study in this area finds that a single case, the *Illinois Brick* prohibition on indirect purchasers litigating complaints, led to a 20% reduction in the number of private lawsuits.⁸¹

Available data also indicates changes in the composition of lawsuits, which move away from cases against monopolization and the abuse of market power, and toward cases alleging some form of collusion. The most comprehensive study in this area, performed by Salop and White,⁸² found that between 1973 and 1983, a majority of cases filed in the five most important U.S. jurisdictions⁸³ did not focus on collusion (37% of total cases),⁸⁴ but rather on other types of antitrust abuses such as refusals to deal (25.4% of total), predatory pricing (10.4%), price

81. See Spencer Smith, *The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment*, 17 J. COMPETITION L. & ECON. 642, 677 (2021) (employing a difference-in-differences method to assess the impact of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

Another study was conducted by William H.J. Hubbard which found that *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), did not impact the overall number of civil cases filed in U.S. courts but impacted the types of pleadings and evidence presented—as expected by antitrust scholars who foresaw impacts on antitrust-specific pleadings and burdens of proof. See William H.J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 474, 505–07 (2017); see also Randal C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 164 (“*Twombly* will shrink substantially the ability of antitrust plaintiffs to file a complaint and find conspiracies through discovery.”); Gregory G. Wrobel, Michael J. Waters & Joshua Dunn, *Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, 26 ANTITRUST 8, 9 (2011) (surveying published antitrust decisions on motions to dismiss between 2007–2011 and finding that the change in standard had an impact).

82. See generally Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001 (1986).

83. See *id.* at 1003 (listing the Southern District of New York, Northern District of Illinois, Northern District of California, Western District of Missouri, and Northern District of Georgia).

84. The term “collusion” refers to horizontal price fixing, vertical price fixing, and “conspiracy” claims. See *id.* at 1006.

discrimination (16.4%), tying or exclusive dealing (21.1%), and even private merger challenges (5.8%).⁸⁵ The quality of the data decreases from the 1990s onwards, but the available evidence indicates that lawsuits against collusion become the almost exclusive focus of private antitrust enforcers in the United States, with very few cases challenging abuses of dominant position or potentially illegal mergers.⁸⁶

85. *See id.*

Salop and White, John Guilfoil, and Posner conducted the three largest surveys analyzing case composition, though these studies stop in the 1980s. *See* Lawrence J. White, *The Georgetown Study of Private Antitrust Litigation*, 54 ANTITRUST L.J. 59, 60 (1985); John D. Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747, 748–50 (1965); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 365 (1970). They find largely similar results: Abuse of dominance and refusal-to-deal cases were the majority of private litigation, followed by a significant number of private price fixing cases. *See* Salop & White, *supra* note 82, at 1005; Guilfoil, *supra*, at 748; Posner, *supra*, at 396–98. The study by Salop and White is considered the most comprehensive because it includes all 2,350 private antitrust cases filed between 1973 and 1983 in five U.S. federal districts, covering both settlements and decisions. *See* Salop & White, *supra* note 82, at 1001–02. Data from Guilfoil (covering 1940 through 1963) finds similar patterns to Salop and White. *See* Guilfoil, *supra*, at 748.

86. Paradoxically, as one moves into the 1990s, the quality of the data decreases significantly. Crane finds that after the 1990s, private plaintiffs filed between twenty and thirty monopolization cases per year, or around 5% or less of total private antitrust litigation in a given year. *See* Daniel A. Crane, *Toward a Realistic Comparative Assessment of Private Antitrust Enforcement*, in RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 341, 349 (Damien Gerard & Ioannis Lianos eds., 2019). An overview of the rise in private lawsuits filed during the 2000s also finds that these are largely driven by a growth in duplicative class actions following the governmental condemnation of cartels. *See* William Kolasky, *Antitrust Litigation: What's Changed in Twenty-Five Years?*, 27 ANTITRUST 10 (2012). The data improves slightly again after 2009.

For example, a company called Lex Machina started using machine learning tools to provide a comprehensive assessment of some areas of federal litigation (including antitrust). *See Behind the Scenes with Lex Machina: Our Journey to a Successful Acquisition*, LEXISNEXIS, <https://lexisnexis.shorthandstories.com/behind-the-scenes-with-lex-machina/index.html> [<https://perma.cc/4CKD-RK55>] (last visited Oct. 11, 2025). Combining Lex Machina's data on litigation with the information on plaintiffs and types of claims, one can infer that independent monopolization claims are rare, though there are many cases with a primarily Sherman Act § 1 and a subsidiary § 2 claim. *See* LEX MACHINA DATA TEAM, LEX MACHINA, ANTITRUST LITIGATION REPORT 2023, at 5–8, 30 (2023) (discussing statistics on case filings from 2013 to 2022, distinguishing between private plaintiffs and agencies, and reporting antitrust findings by judgment events findings). The majority of district court antitrust cases are either dismissed on procedural grounds or settled. *See id.* at 26.

A study covering all antitrust class actions between 2009 and 2021 finds that private plaintiffs filed, on average, 127 consolidated class actions per year during this period. *See* JOSHUA DAVIS & ROSE KOHLES CLARK, 2021 ANTITRUST ANNUAL REPORT: CLASS ACTIONS IN FEDERAL COURT 6 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930 [<https://perma.cc/5AE7-LPXK>]. The majority of cases are settled, and these led to almost \$30 billion in awards during the thirteen-year period (approximately \$2.3 billion per year). *See id.* at 12; *see also* Crane, *supra*, at 346. Section 1 cases dominated litigation topics: 88% of all settlements involve purely a § 1 claim, and “[a]pproximately 9% of recoveries came in actions pursuing claims under both Section 1 and Section 2.” DAVIS & CLARK, *supra*, at 17. Both the data on class actions and on litigation more broadly indicates that private antitrust lawsuits are declining. *See, e.g.,* LEX MACHINA DATA TEAM, *supra*, at 3 (“Antitrust cases have declined continuously over the last four years, regardless of whether the focus is on general antitrust cases, antitrust cases excluding MDL Associated cases, or Contested DOJ/FTC Enforcement cases.”).

B. THE ASSOCIATED DECLINE OF PUBLIC ENFORCEMENT

The impact of these legal and procedural changes was not limited to private litigation. Rather, it also influenced the actions and attitudes of public regulators. This was due to, at least, two different mechanisms: (i) courts directly building on private cases to undermine public litigation and (ii) regulators incorporating these decisions into their own administrative practices.

On the first point, lower courts directly relied on private cases to undermine public litigation. Some notable examples include:

- i. **Predatory pricing:** The case law affirming that predatory pricing claims are usually speculative developed over decades as courts decided private cases.⁸⁷ Then, when the DOJ brought a predatory pricing claim against American Airlines in 1999, it lost on summary judgment at both the district and circuit courts in rulings affirming that the potentially speculative nature of such claims justified underinclusive liability rules for the government too.⁸⁸
- ii. **Monopolization cases:** The FTC lost its high-profile litigation against Qualcomm⁸⁹ and a dozen U.S. states lost their high-profile litigation against Facebook⁹⁰ in decisions where appeals courts relied on the Supreme Court's *Trinko* decision⁹¹—a private case where Justice Scalia affirmed that dominant companies have almost no duty to deal with independent competitors.⁹² Back in the 2000s, the DOJ lost its high-profile tying claim against Microsoft in a D.C. Circuit decision⁹³ that used as a reference⁹⁴ private cases such as *Jefferson Parish*⁹⁵ and *Kodak*,⁹⁶ even though the DOJ would go on to win its broader Section 2 monopolization claim.⁹⁷

87. See *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 431 (1983); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 323–24 (2007).

88. See *United States v. AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003) (citing *Matsushita and Brooke Group* to assess the predatory pricing claim); see also CRANE, *supra* note 54, at 64–65 (“The government lost the case . . . because the courts applied off-the-rack predatory pricing liability rules designed to avoid abusive private litigation.”).

89. See *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1005 (9th Cir. 2020) (vacating the district court's grant of a permanent, worldwide injunction prohibiting Qualcomm's business practices).

90. See *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 302 (D.C. Cir. 2023) (“Nevertheless, we agree again with Judge Boasberg's comprehensive and well-reasoned opinion determining that the States' Platform-based allegations failed to state a cause of action.”).

91. See *id.* at 305–06; *Qualcomm*, 969 F.3d at 994.

92. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004).

93. *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (per curiam).

94. *Id.* at 85.

95. *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

96. *Eastman Kodak Co. v. Image Techn. Servs., Inc.*, 504 U.S. 451 (1992).

97. See *Microsoft*, 253 F.3d at 51. Indeed, some have argued that decisions such as *Trinko* and *Credit Suisse*, if decided earlier, would have precluded a large number of important historical antitrust enforcement actions in regulated settings, such as the break-up of AT&T in the 1980s. See Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 714–15

- iii. **Regulatory fraud:** In 2008, the FTC lost its high-profile litigation against Rambus when it alleged that the company violated Section 2 of the Sherman Act by defrauding the standard essential patent process.⁹⁸ The D.C. Circuit ruling against the FTC relied on a private enforcement Supreme Court case against boycotts involving NYNEX.⁹⁹ In *NYNEX*, Justice Breyer questioned the wisdom of extending antitrust enforcement to regulatory fraud cases.¹⁰⁰
- iv. **Pay-for-Delay:** The FTC's partial wins in pay-for-delay cases only occurred after the agency managed to overcome many setbacks in lower courts stemming from a pro-defendant rule set in private litigation.¹⁰¹

Second, regulators incorporated specific decisions and the overall animosity against antitrust enforcement in their everyday practices through changes in guidelines and case prioritization.¹⁰² Indeed, the mid-1970s through the early 1980s also marked the beginning of a decline in the strength and intensity of overall *public* antitrust enforcement in the U.S., with civil enforcement actions by both the DOJ and the FTC decreasing across the board. These included cases against monopolization, vertical restrictions, exclusionary practices, and price discrimination.¹⁰³ In terms of merger policy, there was a decline in both the

(2011). For an analysis of how the *Trinko* decision is slowly undermining most monopolization litigation, see Andrew I. Gavil, *Trinko Creep*, PROMARKET (July 20, 2023), <https://www.promarket.org/2023/07/20/triko-creep> [https://perma.cc/7S59-W2BL].

98. *Rambus Inc. v. FTC*, 522 F.3d 456, 459 (D.C. Cir. 2008).

99. *Id.* at 464–65 (citing *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998)).

100. See *NYNEX Corp.*, 525 U.S. at 136–37.

101. See ADAM ACOSTA ET AL., AMERICAS ANTITRUST REV., *FTC v ACTAVIS AND PRICING PRACTICES SPEARHEAD RISE IN US PHARMACEUTICAL ANTITRUST CASES* (2025) (available for download at <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2025/article/ft-c-v-actavis-and-pricing-practices-spearhead-rise-in-us-pharmaceutical-antitrust-cases>) (“The US Supreme Court’s decision in *FTC v Actavis* opened a floodgate for more than 30 separate antitrust cases that have been filed or revived under that decision.”). Pay-for-delay involves practices where a brand-name drug manufacturer pays a potential generic competitor to settle patent litigation concerning the manufacturer’s product to delay the launch of the competitor’s products on the market—effectively paying a potential competitor not to enter the market. See *id.* Courts initially ruled, in private litigation cases, that these practices were protected by the initial patent grant to the brand manufacturer. See, e.g., *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) (“At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market.”).

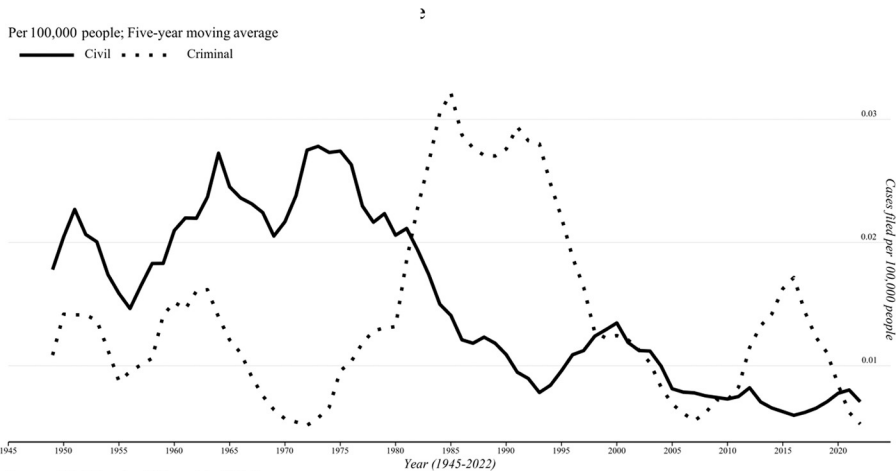
102. See generally Spencer Weber Waller, *Prosecution by Regulation: The Changing Nature of Antitrust Enforcement*, 77 OR. L. REV. 1383 (1998) (describing the important shift that happened through antitrust enforcement by means of changes in practices of the FTC and the DOJ); Eric A. Posner, *The Whig History of the Merger Guidelines*, PROMARKET (May 31, 2023), <http://www.promarket.org/2023/05/31/the-whig-history-of-the-merger-guidelines> [https://perma.cc/L779-FG82] (discussing the impact of the changes in the merger guidelines on merger review).

103. For example, between 1955 and 1979, the DOJ started at least 221 lawsuits challenging these practices, a number that fell to only twenty-two between 1980 and 1997. See Lancieri et al., *supra* note 8, at 447 (citing Joseph C. Gallo, Kenneth Dau-Schmidt, Joseph L. Craycraft & Charles J. Parker, *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 100 (2000)). The focus also shifts: While the DOJ and the FTC brought an average of twenty-one cases per year against Fortune 500 companies between 1955 and 1979, the number dropped to only six per year between 1980 and 1997. See *id.* Changes to price-discrimination litigation happened sooner. The FTC used to bring an average of nineteen complaints per year for violations of the Robinson–Patman

absolute number of transactions challenged by the FTC and DOJ and the percentage of challenges vis-à-vis the total mergers that private parties were required to notify both regulators.¹⁰⁴ Authorities also raised the screening and other thresholds that help determine what types of transactions qualified as anticompetitive, effectively weakening merger review.¹⁰⁵ Additionally, there is evidence that, for the past two decades, resource constraints prevented authorities from challenging cases they believed would violate the antitrust laws.¹⁰⁶ The only area where there was a temporary increase in enforcement actions was horizontal collusion (in particular, criminal challenges).¹⁰⁷ Even these cases, though, declined after the mid-1990s.

Figure 5 below represents these changing trends in public antitrust enforcement, distinguishing civil from criminal cases as weighed by population.¹⁰⁸

Figure 5: Public Antitrust Cases Over Time.



Source: Administrative Office of the U.S. Courts

Based on an analysis conducted by George Priest and Benjamin Klein in the 1980s, we understand that litigation takes place in general equilibrium, meaning that litigation data paints a distorted picture of the reality on the ground—maybe antitrust enforcement went down because there are fewer violations of the U.S.

Act between the 1960s and 1980s but challenges dwindled after the 1980s. *See* Lancieri et al., *supra* note 8, at 448.

104. *See id.*

105. *See id.* at 486–87; Billman & Salop, *supra* note 29, at 3; Volker Nocke & Michael D. Whinston, *Concentration Thresholds for Horizontal Mergers*, 112 *AM. ECON. REV.* 1915, 1944–46 (2022). While the passage of the Hart-Scott-Rodino (HSR) Antitrust Improvement Act in 1976 and the transition to a pre-merger clearance system had a role in this shift, it does not explain the whole drop, nor why challenges continue to decrease even in the post-HSR world. *See* Reza Rajabian, *Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States*, 8 *J. COMPETITION L. & ECON.* 187, 209 (2012) (“[T]he level of merger investigations and adverse decisions actually fell in the two decades following [HSR’s] adoption.”).

106. *See* Billman & Salop, *supra* note 29, at 7.

107. *See* Lancieri et al., *supra* note 8, at 447.

108. *See supra* note 65 for a description of how Figure 5 was created.

antitrust laws to begin with.¹⁰⁹ However, available data does not indicate that the decreasing enforcement numbers reflect fewer abuses of market power in the U.S. economy.

Growing micro-level evidence indicates that U.S. competition policy has been lax. For example, different meta-merger retrospectives generally find that U.S. mergers have led to higher prices, lower output, and/or assumed overly optimistic efficiencies.¹¹⁰ Complementary, well-identified studies find that mergers led to price increases and/or output decreases in the broader U.S. manufacturing sector,¹¹¹ healthcare,¹¹² pharmaceuticals,¹¹³ telecommunications,¹¹⁴ appliances,¹¹⁵ supermarkets,¹¹⁶ and beer markets,¹¹⁷ among others. Almost no studies identify significant merger efficiencies.¹¹⁸ A comprehensive analysis of all DOJ antitrust enforcement in non-tradable (mostly locally consumed) sectors between 1971 and 2018 finds the opposite: Enforcement actions increase employment levels,

109. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984). In a summary, they argue that whenever there is legal certainty, parties will adapt their behavior to reflect the law, settling cases outside of the courtroom. See *id.* at 26. This means that the cases filed in court do not represent the universe of disputes out in the world. See *id.* at 2.

110. See JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 83–104 (2015) (analyzing the price effects for 119 products as affected by forty-nine mergers and finding, on average, a postmerger price increase of 9%); Orley Ashenfelter, Daniel Hosken & Matthew Weinberg, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, 57 J.L. & ECON. 567, S71–73 (2014) (criticizing Robert Bork’s view that mergers provide efficiency benefits and showing that “mergers can cause economically significant increases in price”); Nocke & Whinston, *supra* note 105, at 1918 (finding that 5% or greater efficiency gains are “unlikely in the typical merger”); John Asker & Volker Nocke, *Collusion, Mergers, and Related Antitrust Issues*, in 5 HANDBOOK OF INDUSTRIAL ORGANIZATION 177 (Kate Ho et al. eds., 2021) (conducting a unilateral effects analysis on output and prices, and weighing impact of transaction to predicted efficiencies).

111. See, e.g., Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 24 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22750, 2016).

112. See Thomas G. Wollmann, *How to Get Away with Merger: Stealth Consolidation and Its Real Effects on US Healthcare* 5 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27274, 2024); Leemore Dafny, Kate Ho & Robin S. Lee, *The Price Effects of Cross-Market Mergers: Theory and Evidence from the Hospital Industry*, 50 RAND J. ECON. 286, 286 (2019); Alice Bonaimé & Ye (Emma) Wang, *Mergers, Product Prices, and Innovation: Evidence from the Pharmaceutical Industry*, 79 J. FIN. 2195, 2195 (2024).

113. See, e.g., Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649, 694 (2021).

114. See, e.g., Mara Faccio & Luigi Zingales, *Political Determinants of Competition in the Mobile Telecommunication Industry*, 35 REV. FIN. STUD. 1983, 1983 (2022).

115. See, e.g., Felix Montag, *Mergers, Foreign Competition, and Jobs: Evidence from the U.S. Appliance Industry* 2 (Stigler Ctr. for the Study of the Econ. & the State, Working Paper No. 326, 2023).

116. See, e.g., Vivek Bhattacharya, Gastón Illanes & David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods* 2 (Nat’l Bureau of Econ. Rsch., Working Paper No. 31123, 2024).

117. See, e.g., Vanessa Alvarez, Keith Head & Thierry Mayer, *Global Giants and Local Stars: How Changes in Brand Ownership Affect Competition*, 17 AM. ECON. J.: MICROECONOMICS 389, 389 (2025).

118. See Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PA. L. REV. 1941, 1945 (2020). But see Mert Demirer & Ömer Karaduman, *Do Mergers and Acquisitions Improve Efficiency? Evidence from Power Plants* 18 (Nat’l Bureau of Econ. Rsch., Working Paper No. 32727, 2024) (finding that mergers involving power plants led to an average productivity increase of 2% and a 5% efficiency gain).

business formation, average wages, and the labor share of profits in the targeted markets.¹¹⁹

This micro-level data is backed by some macro-level evidence¹²⁰ finding that during this period of declining enforcement, U.S. productivity declined, both in absolute levels and in relation to other countries,¹²¹ business dynamism declined,¹²² market concentration and markups increased,¹²³ and the labor share of profits declined.¹²⁴ Overall, these data indicate that entry barriers have risen in the U.S. economy.¹²⁵

Some challenge the pervasiveness of these economy-wide trends and how much they are directly connected to antitrust enforcement.¹²⁶ Indeed, competition policy is only one part of an array of confounding factors that influence economy-wide trends—including trade policy, changes in technology, and tax policy. Nonetheless, antitrust is a key policy lever,¹²⁷ and even more conservative critics generally agree that U.S. competition policy needs reform to increase enforcement against illegal mergers and abuses of market power.¹²⁸ By late 2021, 60%

119. See Tania Babina, Simcha Barkai, Jessica Jeffers, Ezra Karger & Ekaterina Volkova, *Antitrust Enforcement Increases Economic Activity* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31597, 2023).

120. For a more detailed overview, see Lancieri et al., *supra* note 8, at 499.

121. Robert Gordon finds that annual growth in output per hour worked in the U.S. declined from 2.82% (1920–1970), to 1.75% (1970–2006) and then to 0.97% (2006–2016). Robert J. Gordon, *Why Has Economic Growth Slowed when Innovation Appears to Be Accelerating?* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24554, 2018). OECD data shows that U.S. increases in labor productivity between 1980 and 2020 are below those of countries such as the UK, France, and Japan. See Lancieri et al., *supra* note 8, at 499–500.

122. Death rates for firms remained steady but entry rates declined. For a review of the literature, see generally Ryan A. Decker, John Haltiwanger, Ron S. Jarmin & Javier Miranda, *Declining Business Dynamism: Implications for Productivity?* (Hutchins Ctr. on Fiscal & Monetary Pol'y, Working Paper No. 23, 2016).

123. See Matias Covarrubias, Germán Gutiérrez & Thomas Philippon, *From Good to Bad Concentration? US Industries over the Past 30 Years*, 34 NBER MACROECONOMICS ANN. 1, 22–26 (2020); Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 561, 580 (2020); Hendrik Döpfer, Alexander MacKay, Nathan H. Miller & Joel Stiebale, *Rising Markups and the Role of Consumer Preferences 2* (Harvard Bus. Sch., Working Paper No. 22-025, 2023).

124. See Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FIN. 2421, 2460 (2020); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q.J. ECON. 645, 645 (2020).

125. See Filippo Lancieri & Tommaso Valletti, *Towards an Effective Merger Review Policy: A Defence of Rebuttable Structural Presumptions*, 40 OXFORD REV. ECON. POL'Y 763, 767 (2024); see also Autor et al., *supra* note 124, at 703–04 (concluding that superstar firms have higher markups, but then describing an alternate theory: once firms gain a commanding position in the market, “they use their market power to erect various barriers to entry to protect their position”).

126. See, e.g., Richard J. Gilbert, *Antitrust Reform: An Economic Perspective*, 15 ANN. REV. ECON. 151, 157 (2023).

127. Some studies show that increased antitrust enforcement is highly correlated with increases in the labor share of profits. See, e.g., Amit Zac, Carola Casti, Christopher Decker & Ariel Ezrachi, *Competition Policy and the Labor Share*, 40 J.L. ECON. & ORG. 786, 789 (2023).

128. See Gilbert, *supra* note 126, at 170 (affirming that “there is scope for improved antitrust enforcement” in merger policy and the “critical area . . . is antitrust liability for firms with market power that engage in conduct that handicaps their rivals” given that “Supreme Court decisions in the United

of a panel of leading U.S. economists either agreed or strongly agreed that “industry consolidation and weaker competition in the United States meaningfully constrain innovation and wage growth,” while only 8% disagreed.¹²⁹

II. A POLITICAL ECONOMY CASE FOR PRIVATE ENFORCEMENT

A growing public perception that U.S. competition policy has under-delivered has led to increased calls to reinvigorate antitrust enforcement. On the academic front, the rise of the Neo-Brandeisian movement injected new energy into the field¹³⁰ and has opened the door to complementary reform proposals by other scholars.¹³¹ Antitrust is also once again high on the public agenda. Witness, for example, former President Biden’s calls to increase enforcement,¹³² the appointment of enforcement-friendly agency heads, the growth in high-profile litigation, and even the direct involvement of Congress in antitrust legislation.¹³³ These calls have been echoed by others, such as Vice President JD Vance.¹³⁴

Perhaps emanating from the view that private litigation has become a drag on public enforcement, most reform proposals are focused on empowering regulators. For example, in 2022, Congress passed bipartisan laws to modernize the fees charged by the FTC and the DOJ in merger review¹³⁵ and to allow state attorneys general to litigate in their jurisdiction of choice.¹³⁶ Three other high-profile bills proposed to revamp parts of U.S. antitrust policy in digital markets, establishing exclusive enforcement powers for public authorities.¹³⁷ Other proposed bills strengthened substantive antitrust standards for what is considered

States have almost eliminated the obligation of firms to accommodate their rivals” which “empowers dominant firms to raise artificial barriers to competition”).

129. See *Is Corporate Consolidation Driving Up Prices?*, CHI. BOOTH REV. (Oct. 25, 2021), <https://www.chicagobooth.edu/review/corporate-consolidation-driving-prices> [<https://perma.cc/6DTU-GWZV>]. 35% were “uncertain.” *Id.*

130. See Khan, *supra* note 2, at 131.

131. See generally William E. Kovacic, Comment, *Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy?*, 35 ANTITRUST 46 (2021) (describing the different movements that permeate current U.S. antitrust policy, and their relative impacts).

132. See, e.g., *Biden Administration Steps Up Antitrust Enforcement*, A.B.A., <https://www.americanbar.org/news/abanews/aba-news-archives/2021/11/antitrust-enforcement> [<https://perma.cc/B3T7-L46X>] (last visited Oct. 12, 2025).

133. See *supra* notes 3–5 and accompanying text.

134. See Alex Thompson & Ashley Gold, *Vance Allies Set to Flex Antitrust Muscle Against Big Tech*, AXIOS (Apr. 15, 2025), <https://www.axios.com/2025/04/15/vance-antitrust-big-tech-corporations> [<https://perma.cc/R4HS-UXGY>].

135. See Merger Filing Fee Modernization Act of 2022, Pub. L. No. 117-328, § 101, 136 Stat. 5967, 5967–68 (codified at 15 U.S.C. § 18a note).

136. See Venue for State Antitrust Enforcement, Pub. L. No. 117-328, § 301, 136 Stat. 5967, 5970 (codified at 28 U.S.C. § 1407).

137. See American Innovation and Choice Online Act, S. 2992, 117th Cong. §§ 1, 3 (2022) (limiting self-preferencing and other discriminatory conduct and limiting enforcement authority to the DOJ, the FTC, and state AGs); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. §§ 2–4 (2021) (imposing line-of-business and interlocking directorate restrictions and limiting enforcement authority to the DOJ and the FTC); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2023, S. 2521, 118th Cong. §§ 1, 4 (2023) (increasing market interoperability and granting exclusive enforcement to the FTC).

anticompetitive behavior while leaving unchanged the status of private actors.¹³⁸ Most academic experts, meanwhile, are focused on reinvigorating the FTC and the DOJ by changing substantive legal standards, burdens of proof, and providing agencies with better resources.¹³⁹

These proposals are important stepping stones: Effective antitrust reforms require reinvigorating and better resourcing public authorities, changing legal standards to expand the types of conduct that are deemed anticompetitive, and streamlining legal procedures to deliver faster and more effective enforcement. Still, a better understanding of the root causes of the decline of U.S. antitrust enforcement in the past helps illustrate why it is important to preserve an important role for private actors in the enforcement mix.

Indeed, the Supreme Court has, in effect, already created an environment where public actors lead the policy. By restricting the ability of private plaintiffs to file and win lawsuits, the changes imposed by the Court helped reduce private antitrust litigation against abuses of market power or illegal mergers to a minimum.¹⁴⁰ These changes exposed how a primarily public enforcement structure enables companies to use politics to their advantage. In particular, we see that an overreliance on public actors: (i) allows defendants to exploit enforcement fluctuations between administrations; and (ii) increases the risks and incentives of regulatory capture, also increasing the likelihood that such windows will exist in the first place.

A. EXPLOITING NATURAL ENFORCEMENT FLUCTUATIONS

According to scholars, the expansion of hybrid enforcement systems in the U.S. was motivated by an increase in the historical frequency of divided governments and shifts in party control, something that weakened public agendas.¹⁴¹ Private litigation was an insurance mechanism against political and other

138. See generally Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. §§ 1, 4–5, 7 (2021) (imposing new rules on digital platforms and granting complementary enforcement authority to the FTC, DOJ, State AGs, and private parties); Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. §§ 1, 4, 9 (2021) (expanding the definitions of “unlawful acquisition” and “exclusionary conduct” while granting complementary enforcement authority to the FTC, DOJ, State AGs, and private parties).

139. See, e.g., STIGLER COMM. ON DIGIT. PLATFORMS, STIGLER CTR. FOR THE STUDY OF THE ECON. & THE STATE, FINAL REPORT 16–18 (2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms--committee-report--stigler-center.pdf> [<https://perma.cc/RWV9-KRL5>] (discussing the creation of a new federal agency to increase competition in digital markets); Baker et al., *supra* note 75, at 1917 (describing that special issue of the *The Yale Law Journal* as “primarily focused on the efforts that can be taken by the federal antitrust agencies”); JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* 207 (2019) (same); Filippo Lancieri & Tommaso Valletti, *Structuring a Structural Presumption for Merger Review*, PROMARKET (Apr. 14, 2023), <https://www.promarket.org/2023/04/14/structuring-a-structural-presumption-for-merger-review> [<https://perma.cc/HA2D-AF4M>] (proposing an inversion in burdens of proof for merger review that only applies to public authorities). See generally TIM WU, *THE CURSE OF BIGNESS: HOW CORPORATE GIANTS CAME TO RULE THE WORLD* (Atl. Books 2020) (criticizing current antitrust policy and proposing a roadmap for the revival of enforcement that is largely focused on public litigation).

140. See *supra* Section I.A.

141. See Burbank & Farhang, *supra* note 33, at 1549; Farhang, *supra* note 21, at 34–35.

fluctuations that prevented public authorities from delivering constant and adequate levels of enforcement.¹⁴²

Antitrust policy provides a good example of this dynamic. Since the 1980s, the field has experienced significant variations in enforcement between administrations. For example, the Reagan Administration largely stopped bringing cases against abuses of market power and, by some accounts, declined to challenge mergers during the 1986–1987 merger boom.¹⁴³ Similar trends of waxing and waning enforcement also occurred during the 1990s and 2000s—an analysis of DOJ enforcement under the George W. Bush Administration found it to be “minimal.”¹⁴⁴ A senior antitrust scholar even argues that antitrust is better defined as a policy that moves in pendulum.¹⁴⁵

In general, these variations are not problematic. Indeed, changes in overall law enforcement trends are a key outgrowth of the democratic process and reflect the changes in political, economic, and other preferences of the electorate. No regulatory regime requires maximum permanent enforcement.¹⁴⁶ The problem with such variations in antitrust policy in particular is that, by definition, many defendants are some of the most powerful, sophisticated companies in a given economy. This enables them to play a long-term game, exploiting windows of weak enforcement in ways that can hardly be reversed. There are many such examples throughout the past decades, three of the most notable being:

- i. **IBM litigation:** In 1969, President Lyndon B. Johnson’s DOJ filed a lawsuit against IBM for the monopolization of the general-purpose mainframe computer market and sought a break-up of the company.¹⁴⁷ As expected, IBM used its extensive resources to challenge and delay the litigation—there were 700 trial days over nearly seven years with more than 860 depositions and 104,400 transcript pages.¹⁴⁸ Some estimates place the litigation costs at \$50–\$100 million per year.¹⁴⁹ The election of Ronald Reagan shifted

142. See Burbank & Farhang, *supra* note 33, at 1549.

143. See Joseph C. Gallo, Kenneth Dau-Schmidt, Joseph L. Craycraft & Charles J. Parker, *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 96 (2000); see also Mark Glick & Andrew Abernethy, *Mergers and Acquisitions in the Age of Wall Street: An Assessment*, 35 N.Y.L. SCH. L. REV. 1095, 1096 (1990) (“These data indicate that from 1981 to 1987 the Department of Justice received 10,723 premerger notifications, yet only 26 cases challenging mergers were actually filed.”).

144. See Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L.J. 601, 634 (2014); see also Ronan P. Harty, Howard A. Shelanski & Jesse Solomon, *Merger Enforcement Across Political Administrations in the United States*, 2 CONCURRENCES 1, 8 (2012) (finding significant variation in merger enforcement across administrations).

145. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 381 (2003).

146. See Glover, *supra* note 42, at 1204.

147. See Edwin McDowell, *What’s New on the Corporate Bookshelf: How the U.S. Flubbed the I.B.M. Case*, N.Y. TIMES (Apr. 17, 1983), <https://www.nytimes.com/1983/04/17/business/what-s-new-on-the-corporate-bookshelf-how-the-us-flubbed-the-ibm-case.html>.

148. See John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 145–46 (2000).

149. See *id.*

enforcement priorities and led the DOJ to drop the case altogether in 1982.¹⁵⁰

- ii. **Microsoft litigation:** In 1998, the Clinton Administration's DOJ filed a high-profile lawsuit against Microsoft, accusing it of illegally maintaining its monopoly in operating systems.¹⁵¹ Microsoft actually lost the case at both the district court and the *en banc* D.C. Circuit, with the district court affirming the need to break up the company.¹⁵² The D.C. Circuit Court remanded, however, due to potential procedural problems in the remedy decision.¹⁵³ The election of George W. Bush provided the company with the opportunity to negotiate a modest 2001 settlement, which did not include a breakup.¹⁵⁴
- iii. **Consolidation of the U.S. Wireless Telecom Sector:** AT&T first attempted to buy T-Mobile in 2011.¹⁵⁵ The DOJ under the Obama Administration moved to block the deal, citing the loss of one of the only four nationwide wireless carriers as detrimental to competition.¹⁵⁶ In 2014, Sprint seriously considered merging with T-Mobile, but dropped the idea because it anticipated strong antitrust opposition.¹⁵⁷ In 2018, T-Mobile offered to acquire Sprint.¹⁵⁸ As expected, the DOJ staff proposed to block the deal.¹⁵⁹ The then-DOJ Assistant Attorney General for the Antitrust Division in the Trump Administration, however, designed a weak remedy that allowed the transaction to go forward, approving it in 2019.¹⁶⁰ He then “revolved the door” and went to work for one of the law firms advising the parties

150. *See id.*

151. *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001) (per curiam).

152. *See* Randal C. Picker, *The Arc of Monopoly: A Case Study in Computing*, 87 U. CHI. L. REV. 523, 546 (2020).

153. *See id.*

154. *See id.*

155. *See* Michael J. de la Merced, *AT&T Ends \$39 Billion Bid for T-Mobile*, N.Y. TIMES: DEALBOOK (Dec. 19, 2011, at 16:44 ET), <https://archive.nytimes.com/dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile>.

156. *See id.*; *Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc.*, U.S. DOJ (Dec. 19, 2011), <https://www.justice.gov/archives/opa/pr/justice-department-issues-statements-regarding-att-incs-abandonment-its-proposed-acquisition> [<https://perma.cc/Z8LJ-3SQG>] (praising the dropping of the acquisition as “[c]onsumers won today”).

157. *See* Michael J. de la Merced, *Sprint and SoftBank End Their Pursuit of a T-Mobile Merger*, N.Y. TIMES: DEALBOOK (Aug. 5, 2014, at 19:24 ET), <https://dealbook.nytimes.com/2014/08/05/sprint-and-softbank-said-to-abandon-bid-for-t-mobile-us>.

158. *See T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition*, T-MOBILE (Apr. 29, 2018), <https://www.t-mobile.com/news/press/5gforall> [<https://perma.cc/T5EZ-V6AW>].

159. *See* Sheila Dang & Diane Bartz, *U.S. Justice Department Staff Recommends Blocking T-Mobile-Sprint Deal, Sources Say*, REUTERS (May 22, 2019, at 14:41 ET), <https://www.reuters.com/article/us-sprint-m-a-t-mobile-idUSKCN1SS1DP> [<https://perma.cc/DY4Q-K2KQ>].

160. *See* Katie Benner & Cecilia Kang, *How a Top Antitrust Official Helped T-Mobile and Sprint Merge*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html>.

involved in the deal.¹⁶¹ Early results show that the merger negatively affected competition in U.S. telecom markets.¹⁶²

Many other examples could be cited here.¹⁶³ The problem with political swings in antitrust enforcement, however, is that once an administration decides to approve a merger or drop a multi-year investigation, this decision can hardly be reversed—for example, authorities almost never revisit past merger approvals,¹⁶⁴ and break-up remedies are quite rare.¹⁶⁵ Therefore, a system that relies solely on public enforcement loses the insurance protection afforded by private litigation, thus enabling companies to play the long-term game and engage in regulatory arbitrage by exploiting weak enforcement windows to increase their market power.

B. INCREASING THE RISKS OF REGULATORY CAPTURE

Political gaming can negatively influence the long-term enforcement of the antitrust laws in another way: A policy exclusively reliant on public enforcement is under heightened risk of regulatory capture. This means that “weak enforcement windows” exist not only due to legitimate variations in political preferences, but also through the active lobbying steps by companies to create these windows in the first place.

George Stigler famously affirmed that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”¹⁶⁶ Stigler argued that one of the main drivers of regulatory action is the demand by private, politically powerful interest groups trying to appropriate economic rents.¹⁶⁷ This process of regulatory capture is not easy to achieve, however, because it requires

161. See *Latham & Watkins Advises T-Mobile in Completed Merger with Sprint to Create the New T-Mobile*, LATHAM & WATKINS LLP (Apr. 1, 2020), <https://www.lw.com/en/news/2020/04/latham-watkins-advises-tmobile-completed-merger-sprint> [<https://perma.cc/XWF8-V3BZ>]; Chinekwu Osakwe, *Ex-DOJ Antitrust Chief Delrahim Jumps to Latham & Watkins*, REUTERS (Apr. 5, 2022, at 14:08 ET), <https://www.reuters.com/legal/legalindustry/ex-doj-antitrust-chief-delrahim-jumps-latham-watkins-2022-04-05> [<https://perma.cc/6Z9S-WRFZ>].

162. See Melody Wang & Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal from the Start*, PROMARKET (Apr. 23, 2021), <https://www.promarket.org/2021/04/23/dish-t-mobile-sprint-merger-disastrous-deal-lessons> [<https://perma.cc/CK2K-R47Y>] (“[T]he merger has already produced harm and threatens to wreak more damage.”).

163. For example, the fast reconsolidation of American landline markets during a favorable political window in the years after the passage of the 1996 Telecommunications Act. See RANDAL C. PICKER, *THE QUEST FOR NEXT* (forthcoming 2025) (manuscript at 548–56) (on file with author). Indeed, a large comprehensive study of all challenges to mergers between 2000 and 2020 found that authorities did not have the resources to challenge all illegal deals and had to choose between the least bad option. See Billman & Salop, *supra* note 29, at 6–8. This opens up opportunities for corporate arbitrage between administrations. See *id.* at 13 (“The data also can explain why playing the odds makes business sense.”).

164. But see John Kwoka & Tommaso Valletti, *Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms*, 30 INDUS. & CORP. CHANGE 1286, 1293–94 (2021) (discussing the FTC’s challenge to a previously cleared acquisition involving the Hearst Trust).

165. See Lancieri et al., *supra* note 8, at 504.

166. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

167. See *id.* at 5–7.

coordination among industry members who have private incentives to defect or to free ride.¹⁶⁸ A large body of scholarship has subsequently analyzed the conditions under which public regulation may be more or less aligned with the overall public interest.¹⁶⁹

In particular, part of modern political economy scholarship is focused on mapping how firms spend different forms of political capital¹⁷⁰ through various mechanisms¹⁷¹ to influence public policy, and how the public interest can resist these pressures. A rough summary of this literature indicates that market characteristics that facilitate private capture include: (i) the concentration within the industry and the alignment of interests between industry players (which helps parties overcome collective action problems); (ii) the number of public and private agents that industry members have to sway in order to influence the policy; (iii) market opacity and the information asymmetries between regulators, civil society, and industry members; (iv) the dispersion in the group paying the rent; (v) the opacity of rent payment (or how clear it is to society that there is rent extraction); and (vi) the salience of the topic for the general public, which may then exert countervailing pressure.¹⁷²

168. See Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 346 (1974); Stigler, *supra* note 166, at 10–13.

169. See generally Christopher Carrigan & Cary Coglianese, *George J. Stigler, “The Theory of Economic Regulation,”* in THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 287 (Steven J. Balla et al. eds., 2015) (evaluating Stigler’s article); Sam Peltzman, *“The Theory of Economic Regulation” After 50 Years*, 193 PUB. CHOICE 7 (2022) (same); John M. de Figueiredo & Brian Kelleher Richter, *Advancing the Empirical Research on Lobbying*, 17 ANN. REV. POL. SCI. 163 (2014) (discussing future research opportunities to answer “additional questions of public policy interest”).

170. See STIGLER COMM. ON DIGIT. PLATFORMS, *supra* note 139, at 279–93 (discussing sources of political power, including: (i) structural power/size, (ii) financial power, (iii) media power, (iv) complexity and opacity, (v) connectivity and membership, and (vi) national champions and other strategic considerations); Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL’Y 37, 38 (2014) (proposing a framework/taxonomy of the ways through which companies exercise political power); Ivana V. Katic & Amy Hillman, *Corporate Political Activity, Reimagined: Revisiting the Political Marketplace*, 49 J. MGMT. 1911, 1911 (2023) (updating the literature on how companies obtain power and operate in political marketplaces).

171. Two mechanisms stand out for their potential use in the case of antitrust: (i) The “acquisition” of the policy, which takes place when private interests use financial and other resources to directly influence the policy to its advantage (for example through the use of revolving doors), and (ii) epistemological or cultural capture, which takes place when experts enact policies after being disproportionately exposed to information/data/ideas that favors the interest group. These mechanisms explore the opacity and information asymmetries between regulators/civil society and companies and does not require cooption. See Filippo Lancieri & Luigi Zingales, *The Mechanisms of Regulatory Capture*, PROMARKET (June 15, 2022), <https://www.promarket.org/2022/06/15/new-ebook-revisits-george-stiglers-theories-of-regulatory-capture-50-years-later/> [https://perma.cc/26RT-GJJ7]; Cass Sunstein, *Stigler’s Interest-Group Theory of Regulation: A Skeptical Note*, PROMARKET (Apr. 16, 2021), <https://promarket.org/2021/04/16/george-stigler-theory-regulation-capture-cass-sunstein/> [https://perma.cc/ZT86-ZHNJ] (discussing “epistemic capture”).

172. See Luigi Zingales, *Preventing Economists’ Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 124, 126–130 (Daniel Carpenter & David A. Moss eds., 2014); Filippo Lancieri, *Narrowing Data Protection’s Enforcement Gap*, 74 ME. L. REV. 15, 44–45 (2021).

Overall, special interests thrive in the world of “quiet politics,”¹⁷³ with the risk of capture increasing the more the structure of a specific industry targeted by a specific public policy aligns with the abovementioned characteristics. Political influence is always a matter of degree, and different regulatory initiatives reflect different combinations of public and private interests that may shift over time.

These insights could be better integrated into antitrust scholarship.¹⁷⁴ Indeed, some of the main conclusions of this body of work apply directly to the discussion about the optimal levels of public and private antitrust enforcement. From this political economy standpoint, the presence of a strong antitrust plaintiffs’ bar is important because it tackles items (ii), (iii), (iv), (v), and (vi) above. More specifically, private antitrust enforcement plays a key role in helping diminish risks of regulatory capture in three ways: diminishing incentives to influence regulators, increasing the transparency of rent payments, and creating a countervailing interest group.

1. Diminishing Incentives

The most consequential way that private enforcement can decrease the risk of regulatory capture is by reducing incentives for parties to engage in influence campaigns in the first place. In general, a greater number of enforcers, along with a more divergent set of incentives, is associated with a diminished risk of regulatory capture.¹⁷⁵ That is because special interests must spend more political capital to influence the policy’s outcome, spreading their political resources thin.

The presence of a strong private antitrust bar that overlaps with and works as an alternative to public enforcement accomplishes this goal. Private plaintiffs have a general (treble) incentive to sue in the case of any violation of the law¹⁷⁶ and, because of their dispersed nature, can hardly be subject to coordinated

173. See generally PEPPER D. CULPEPPER, *QUIET POLITICS AND BUSINESS POWER: CORPORATE CONTROL IN EUROPE AND JAPAN* (2011).

174. See William F. Shughart II, *On the Virginia School of Antitrust: Competition Policy, Law & Economics and Public Choice*, 191 *PUB. CHOICE* 1, 1–3 (2022) (arguing that antitrust scholarship on both public and private enforcement continues to ignore public choice questions and rely on public interest explanations). There are exceptions. See generally *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* (Fred S. McChesney & William F. Shughart II eds., 1995) (analyzing the public choice model of antitrust; William F. Shughart II & Fred S. McChesney, *Public Choice Theory and Antitrust Policy*, 142 *PUB. CHOICE* 385 (2010) (discussing Robert Tollison’s “insight that public-choice reasoning fruitfully could be applied to the analysis of antitrust law enforcement”); Robert D. Tollison, *Public Choice and Antitrust*, 4 *CATO J.* 905 (1984) (developing a positive public choice theory of antitrust). These normally criticize public enforcement as being captured by small players and are skeptical that antitrust enforcement can improve welfare. For a political economy overview of the changes to U.S. antitrust over time, see MATT STOLLER, *GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY* (2019).

175. See Lancieri, *supra* note 172, at 51.

176. See William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning*, 28 *J. L. & ECON.* 405, 430–33 (1985) (“Under a system of treble damages, private parties may alter their economic behavior in such a way as to be wealth contracting for the economy.”).

influence campaigns.¹⁷⁷ The weakening of private litigation, however, allows antitrust defendants to influence the outcome of the policy by swaying only one or two dedicated regulators. From the defendants' perspective, the weakening of private enforcement increases the potential returns on political influence campaigns—not only do companies know exactly who to target, but they also know that success means they will get their way, as no private plaintiffs will pick up the slack.¹⁷⁸ Many defendants can be the targets of the antitrust system for a long time, so they can plan a long-term influence game that slowly erodes antitrust enforcement to their advantage.¹⁷⁹

2. Increasing Consumer Awareness that They Are Paying Rents

Private plaintiffs also play another important role in increasing the societal transparency and awareness that the increasing exercise of market power is extracting economic rents from consumers and workers (among others).¹⁸⁰ Antitrust injury can occur in all corners of the U.S. economy. As such, regulators do not have the funds to police all violations—they currently lack the funds to police even the main violations.¹⁸¹ At the same time, illegal increases in market power can lead to large gains for a given company but a marginal price increase for the typical consumer.¹⁸² Private litigants (including class action plaintiffs) suing for treble damages have both the incentives and the tools to overcome information asymmetries and the dispersions of harm that undermine responses by injured parties.¹⁸³ This produces system-wide positive externalities not only by increasing deterrence and compensation of antitrust harm but also by increasing the saliency of antitrust policy to the public as a whole and, likely, the political support for the activity of public regulators. As private plaintiffs discover more violations and earn damages that compensate consumers and smaller companies, these stakeholders will support a stronger enforcement of the antitrust laws—both public and private enforcement.

177. See Eric Helland & Jonathan Klick, *Why Aren't Regulation and Litigation Substitutes? An Examination of the Capture Hypothesis*, in REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 227, 228 (Cary Coglianese ed., 2012).

178. Cf. Lancieri, *supra* note 172, at 44.

179. See Lancieri et al., *supra* note 8, at 517–18 (arguing that special interests helped shape the evolution of antitrust laws into a more defendant-friendly policy).

180. See generally Loecker et al., *supra* note 123 (discussing the macroeconomic implications of an increase in average market power, including the decline in labor and capital shares).

181. See Billman & Salop, *supra* note 29, at 7 (analyzing twenty years of merger review and concluding that resource constraints force the FTC and the DOJ to only challenge the most damaging mergers).

182. For example, one of the most successful modern international cartels, involving vitamins, lasted for at least nine years and potentially impacted \$5 billion in commerce. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 714–15 (2001). Assuming that 10% of the U.S. population was impacted by the cartel—a low estimate, as vitamins are also included in fortified foods such as cereals—the average surcharge would amount to less than \$20 per person per year.

183. See Lancieri, *supra* note 172, at 36.

3. Creating a Countervailing Interest Group

Finally, as Louis Brandeis long recognized, “[s]unlight is said to be the best of disinfectants” when it comes to fighting powerful, vested interests.¹⁸⁴ A strong antitrust plaintiffs’ bar plays a key role in providing this sunshine.

First, a strong plaintiffs’ bar helps diversify the marketplace of ideas.¹⁸⁵ For example, the American Antitrust Institute—a leading think tank backing stronger enforcement of antitrust laws—is primarily supported by a combination of annual donations from plaintiff’s law firms and other usual antitrust plaintiffs as well as by *cy pres* awards from antitrust condemnations.¹⁸⁶ This helps partially offset similar support from antitrust defendants to anti-enforcement think tanks,¹⁸⁷ grants and other sponsorship of academic research,¹⁸⁸ and even training courses for judges.¹⁸⁹

Second, a strong plaintiffs’ bar can also help shape future economic incentives for regulators. For example, the decline in U.S. antitrust enforcement is associated with an increase in the antitrust revolving door. After the 1980s, more than 66% of FTC Commissioners and DOJ Assistant Attorneys General for Antitrust (the heads of the agencies) accepted a job with either a law firm associated with the defendants’ bar or in large industry players *immediately* after resigning from their public posts—a pattern that correlates with decreasing antitrust enforcement.¹⁹⁰ This is a conservative estimate for the growth in the revolving door, as it does not include scholars working as expert witnesses for defendants—something that appears increasingly pervasive in today’s world.¹⁹¹ This process partially reflects the significant differences between the salaries of public enforcers and their private counterparts. In the 1950s, a partner at a top U.S. law firm earned

184. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

185. *See, e.g.*, ZINGALES, *supra* note 43, at 200 (discussing the importance of a strong plaintiffs’ bar to “balance the intellectual battlefield”). This can be done, for example, through the hiring of academics and others to work as expert witnesses for plaintiffs rather than defendants, the creation of repeat players on the plaintiff’s side, the award of *cy pres* grants to help promote research on antitrust harms, and other tools.

186. *See Supporting AAI’s Research, Education, and Advocacy Mission*, AM. ANTITRUST INST., <https://www.antitrustinstitute.org/about-us/supporting-aais-research-education-and-advocacy-mission> [<https://perma.cc/QZZ4-CGBK>] (last visited Oct. 12, 2025).

187. *See* Wakabayashi, *supra* note 27 (discussing the Global Antitrust Institute’s “long-term agenda of weakening antitrust laws” and sources of funding, including Google).

188. *See* David Dayen, *Google’s Insidious Shadow Lobbying: How the Internet Giant Is Bankrolling Friendly Academics—And Skirting Federal Investigations*, SALON (Nov. 24, 2015, at 10:57 ET), https://www.salon.com/2015/11/24/googles_insidious_shadow_lobbying_how_the_internet_giant_is_bankrolling_friendly_academics_and_skirting_federal_investigations [<https://perma.cc/RPF9-UAWQ>]; Hubert Horan, *Uber’s “Academic Research” Program: How to Use Famous Economists to Spread Corporate Narratives*, PROMARKET (Dec. 5, 2019), <https://promarket.org/ubers-academic-research-program-how-to-use-famous-economists-to-spread-corporate-narratives> [<https://perma.cc/TU25-K2QQ>]; Eisinger & Elliot, *supra* note 26.

189. *See* Ash et al., *supra* note 25, at 9–10 (finding that a law and economics course funded by antitrust defendants helped sway the decisions of appellate judges against regulation and antitrust enforcement—though results are imprecise due to the small sample size).

190. *See* Lancieri et al., *supra* note 8, at 510.

191. *See* Eisinger & Elliot, *supra* note 26.

approximately four times more than an average FTC staffer.¹⁹² By the 1980s, this ratio increased to 5:1 and today it exceeds 10:1.¹⁹³ Small exceptions aside,¹⁹⁴ this revolving door only connects regulators and antitrust defendants. A growing number of studies across multiple industries find negative policy impacts related to a consistent revolving door between industry and regulators,¹⁹⁵ though the literature is underdeveloped.

This process of direct and indirect political influence over the specific work of the FTC and the DOJ, as well as its systemic implications, is supported by recent studies that analyzed how companies used their lobbying power to obtain more favorable outcomes when the FTC and the DOJ reviewed general mergers¹⁹⁶ and very large transactions.¹⁹⁷ Another study found that mergers increased the ability and willingness of companies to lobby in the first place,¹⁹⁸ while a fourth finds that trade-shocks lead inefficient firms to lobby for lax antitrust regulations.¹⁹⁹

192. See Lancieri et al., *supra* note 8, at 512.

193. See *id.*

194. Jonathan Kanter, the former Assistant Attorney General for the Antitrust Division of the DOJ under President Biden, represented Microsoft as a “plaintiff” lawyer while the company challenged practices by Google (among others). See David McCabe, *The Trustbuster Who Has Apple and Google in His Sights*, N.Y. TIMES (Mar. 22, 2024), <https://www.nytimes.com/2024/03/22/technology/jonathan-kanter-apple-antitrust.html>.

195. See Ivana V. Katic & Jerry W. Kim, *Caught in the Revolving Door: Firm-Government Employee Mobility as a Fleeting Regulatory Advantage*, 35 ORG. SCI. 281, 281, 303 (2024) (surveying the literature on revolving doors and finding that firms use revolving doors to generate performance benefits, although the benefits are short lived); Logan P. Emery & Mara Faccio, *Exposing the Revolving Door in Executive Branch Agencies*, 60 J. FIN. & QUANTITATIVE ANALYSIS 1625, 1649, 1651 (2025) (finding no evidence that revolving doors lead to quid pro quo in the award of public procurement contracts, but finding that they do lead to contract renegotiations that are costly and inefficient for the government vis-à-vis the private company).

196. See generally Mehta et al., *supra* note 24. The study found that, between 1998 and 2016, the outcome of merger review by the FTC and the DOJ was more likely to be favorable when a firm was headquartered in the electoral district of a member of congressional committees that oversee antitrust regulators (of either the House or the Senate). *Id.* at 49. This was true for both the target and the bidder of friendly mergers. *Id.* However, the study did find that when targets have judiciary committee representation, the merger review process was lengthier, and the likelihood of regulatory obstacles was higher. *Id.* at 7.

197. See generally Fidrmuc et al., *supra* note 23. This 2018 study, looking at 370 mergers that involved deals exceeding \$100 million between 2008 and 2014, found that when companies increased their direct lobbying expenditures before announcing a deal, they were significantly more likely to receive a positive response from antitrust authorities during the merger review process. See *id.* at 74, 87. The overall conclusion is that “[a]cquiring firms seem to lobby preemptively to accommodate the expected antitrust review process.” *Id.* at 87. Shareholders seem to anticipate this effect, as stocks reacted more positively to the announcement of horizontal mergers when the bidder lobbied in advance. See *id.* at 90.

198. See Bo Cowgill, Andrea Prat & Tommaso Valletti, *Political Power and Market Power* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 33255, 2024) (finding that the “average merger is associated with a \$70K to \$180K increase in the amount spent on lobbying”). But see Nolan McCarty & Sepehr Shahshahani, *Testing Political Antitrust*, 98 N.Y.U. L. REV. 1169, 1169, 1192 (2023) (building on a novel database of lobbying contributions and concluding that there is no strong relationship between economic concentration and concentration of lobbying expenditure at the industry level, but also finding that “there is a positive and statistically significant correlation between GDP and lobbying”).

199. See Olimpia Cutinelli Rendina, *Lobbying or Innovation: Who Does What Against Foreign Competition?* 1 (Paris Sch. of Econ., Working Paper No. 2023 – 08, 2023) (studying changes to

Older studies have also consistently found that the FTC incorporates the political preferences of members of congressional committees that oversee the agency in its work.²⁰⁰

Regulatory capture does not imply or require malfeasance. One of the most effective strategies through which companies can influence the work of regulators is by shaping information environments so that enforcers implement a policy that advances private interests while believing that they are acting on behalf of the common good.²⁰¹ Another strategy is to lobby Congress to cut budgets, depriving authorities of the resources they need to perform their work.²⁰²

A stronger plaintiffs' bar can offset some of these processes. It provides an exit opportunity for regulators committed to stronger enforcement of the antitrust laws,²⁰³ and it creates countervailing forces that can help lobby for stronger antitrust laws²⁰⁴ and even shed light on the relationship between antitrust defendants and other institutional actors such as academics.²⁰⁵

lobbying expenditures in the context of the China shock, and finding that inefficient firms confronted with international competition from China increased their lobbying expenditures in antitrust policy).

200. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983) (arguing that changes in enforcement patterns by the FTC reflected changes in the political preferences of members of oversight committees); Roger L. Faith, Donald R. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 331 (1982) (finding that FTC case dismissals were nonrandomly concentrated on defendants headquartered in the districts of congressmen members of committees and subcommittees with budgetary and oversight jurisdiction over the agency); William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 669 (1982) (finding that the FTC has consistently chosen policy agendas that follow the will of the committees with oversight powers over the agency).

201. See James Kwak, *Cultural Capture and the Financial Crisis*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 79 (Daniel Carpenter & David A. Moss eds., 2014) (discussing “external check[s] on the information and analysis used to justify agency actions” as one way to approach the problem of cultural capture); Sunstein, *supra* note 171 (arguing that epistemic capture occurs “not when regulators are literally pressured . . . but when what they believe to be true is only a subset of the truth”); Jan Broulík, *Cultural Capture of Competition Policy: Exploring the Risk in the US and the EU*, 45 WORLD COMPETITION 159, 168 (2022) (“[P]ublic officials’ views can be shaped by their social interaction with representatives of the private sector . . .”).

202. See Lima-Strong, *supra* note 28 (discussing how tech companies are lobbying Congress to cut the budget of antitrust authorities); Billman & Salop, *supra* note 29, at 7–8 (finding that restrained budgets restricted the merger review capacity of the FTC and the DOJ).

203. For example, antitrust enforcers under the Biden Administration created their own plaintiff-focused law firms after their public positions, explicitly disclaiming that they wanted to increase enforcement and target gaps. See *Nachawati Law Group Launches Antitrust Practice*, PR NEWSWIRE (Aug. 4, 2025, at 09:00 ET), <https://www.prnewswire.com/news-releases/nachawati-law-group-launches-antitrust-practice-302520293.html> [<https://perma.cc/J3XW-BZQ7>].

204. See generally RAISING THE BAR WITH REBUTTALPR: *Pamela Gilbert on Four Decades of Consumer Advocacy* (RebuttalPR, Apr. 2, 2025), <https://www.rebuttalpr.com/podcast/pamela-gilbert-on-four-decades-of-consumer-advocacy> [<https://perma.cc/7X9E-XU5M>] (discussing Gilbert’s career leading the Consumer Product Safety Commission and lobbying work).

205. See, e.g., *Amazon Ordered to Reveal Academic Research Ties in Major Price-Fixing Case*, HAGENS BERMAN SOBOL SHAPIRO LLP (Aug. 12, 2025), <https://www.hbsslaw.com/press/amazoncom-antitrust/amazon-ordered-to-reveal-academic-research-ties-in-major-price-fixing-case> [<https://perma.cc/VQ5R-GX82>]. On how these relationships can decrease trust in academia in general and in antitrust in particular, see generally John M. Barrios et al., *The Conflict-of-Interest Discount in the Marketplace of Ideas* (Nat’l Bureau of Econ. Rsch., Working Paper No. 33645, 2025).

In summary, a public policy that relies solely on public enforcement to ensure high levels of deterrence places a major target on regulators' backs and faces a higher risk of failure due to politics—either because companies exploit natural variations in policy cycles or because they use their political power to create windows of opportunity to shape the policy. Antitrust, by definition, tries to prevent some of the most powerful, sophisticated companies in a given economy from increasing their profits through rent extraction, which gives those companies incentives to undermine the system's effectiveness.

As such, reform proposals aiming to reinvigorate antitrust in a sustainable manner would do well to preserve a role for private actors in the enforcement mix, safeguarding the political insurance provided by private litigation.

III. TOO MUCH PRIVATE ENFORCEMENT CAN BACKFIRE

Political economy arguments encourage those shaping competition policy to safeguard a role for private plaintiffs in antitrust. Yet, private litigation can also be excessive in a way that has system-wide implications. In particular, very large volumes of private lawsuits can encourage judicial and other forms of backlash that undermine the antitrust enterprise in the first place. This can happen either because a larger volume of lawsuits gives antagonistic courts more opportunities to change the antitrust laws or because these lawsuits facilitate the formation of coalitions against the system.

As this Part explores, this risk is more than merely a speculative concern. The outsized role of private litigation in the Supreme Court's reforms of American competition laws remains under-explored in antitrust scholarship—due, in part, to important data limitations that prevent researchers from precisely identifying the reasons behind this disproportional representation.²⁰⁶ Still, as Section III.A explains, there are three primary explanations for private plaintiffs' key role in shaping antitrust law: (1) antitrust is but one element of a broader anti-private litigation agenda; (2) a Chicago School-based theory of antitrust change; and (3) private litigation as the focal point of a broader anti-enforcement coalition. All these explanations would counsel reformers to carefully consider the role of private plaintiffs in the antitrust enforcement mix. Section B builds on the Supreme Court antitrust decisions database constructed for this Article to argue that (3) is the most likely explanation given the Supreme Court's voting patterns between the mid-1970s and the 2020s.

206. Currently, there is no comprehensive information on what types of antitrust cases are filed in federal courts. This means researchers cannot know the degree to which there is overlap among claims and among antitrust defendants, nor how many and what types of cases different companies decided to settle versus defend. There is also no comprehensive database of antitrust decisions in federal district or circuit courts, nor of antitrust cases for which the Supreme Court has denied certiorari petitions since the 1970s—something that could, for example, provide a better understanding of whether the Court had the opportunity to promote similar changes to the law during a similar period of time for cases involving public actors.

A. FROM ANTI-PRIVATE LITIGATION TO ANTI-ANTITRUST: THE RISKS OF EXCESSIVE LITIGATION

1. Antitrust as Part of a Broader Anti-Private Litigation Movement

The first potential explanation focuses on the nature of the cases decided by the Court, and the fact that the Court's growing antagonism to private actors was not antitrust-specific. Rather, this antagonism would reflect the Justices' general beliefs that the fast increase in across-the-board private litigation from the 1960s onwards—described in Section II.A above—was excessive. This critical view of the “litigation explosion” led to changes against private enforcement in many policy areas, including competition policy.

These views would be likely based, at least in part, on strong academic foundations. Indeed, around the late 1970s and early 1980s, a body of law and economics literature started modeling potentially optimal levels of public and private litigation—partially in reaction to a perception that there were too many private lawsuits in the United States.²⁰⁷ Shavell and Kaplow famously argued that externalities produce mismatches between the incentives of private parties to file lawsuits and what would be socially optimal.²⁰⁸ This would create room for welfare-enhancing social interventions that better align the public and the private interests.²⁰⁹ They argue that, if negative externalities prevail, legislators and courts should restrict private litigation, or promote private litigation if positive externalities prevail.²¹⁰ A large body of scholarship then started applying these and other insights to different fields, exploring whether systems encouraged too little or too much litigation in areas including securities fraud,²¹¹ insurance litigation,²¹²

207. See Burbank & Farhang, *supra* note 33, at 1588 (discussing the diagnostics of “litigation explosion” that started to proliferate in the mid-1970s).

208. These authors argued that, on one hand, private plaintiffs do not bear the full system-wide costs of litigation, potentially leading to excessive lawsuits. See Shavell, *supra* note 31, at 333; Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 575 (1997); Kaplow, *supra* note 31, at 376. On the other, private lawsuits may help deter unwanted future behavior, a not-internalized societal benefit that may lead to too little litigation. See Shavell, *supra* note 31, at 334; Shavell, *supra*, at 579; Kaplow, *supra* note 31, at 376.

209. See Shavell, *supra* note 208, at 579.

210. See generally *id.*; Louis Kaplow, *Optimal Design of Private Litigation*, 155 J. PUB. ECON. 64 (2017). Kaplow's study is grounded in Shavell's theory that “in even the most basic setting there is no tendency of plaintiffs' filing decisions to be socially optimal.” Kaplow, *supra*, at 64. Kaplow's study explores three instruments—filing fees, damages awards, and a transfer from losing plaintiffs to defendants—that legislators and courts can leverage to achieve different goals like “increase deterrence, hold chilling constant, and reduce filing rates and thus total litigation costs.” *Id.* at 65.

211. See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 500 (1991) (arguing that a set of institutional characteristics linked to securities class action settlements leads to outcomes that are disconnected from the merits of the dispute underlying the suit).

212. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1987–88, 1988 n.151 (1987) (discussing different ways through which expansion of tort liability was negatively impacting the insurance market).

False Claims Act litigation,²¹³ and consumer and other class actions.²¹⁴ The Supreme Court and lower courts adopted many of those anti-private litigation views and curtailed private enforcement through changes in judicial rules on standing, summary judgment, class formation, and the enforceability of arbitration clauses (among other changes).²¹⁵ As discussed in Part I, many of these decisions were antitrust cases, but others were not.

If this broader anti-private litigation antagonism were indeed the root cause of the changes to antitrust, then weakening a private right of action would remove much of the Court's motivation to modify competition policy. Yet, this explanation is at odds with most antitrust and associated scholarship, which usually credits the reforms to the rise of the Chicago School of antitrust, combined with a more conservative judiciary.²¹⁶ In addition, this broader anti-private litigation trend can explain only some of the changes to competition policy. For example, most of the Court's rulings targeted substantive antitrust doctrines that had no connections to other fields, and antitrust litigation also appears to have suffered larger impacts than other types of litigation.²¹⁷ Private antagonism alone cannot fully explain these changes.

2. A Chicago School Theory of Change

An alternative potential explanation for the over-reliance on private cases is more antitrust-specific. This theory argues that the genesis of the Supreme Court's changes was, indeed, the combination of the so-called Chicago School with a more conservative judiciary that was convinced of the need to reform antitrust policy.²¹⁸ The outsized role of private plaintiffs remains underexplored by the proponents of this theory. Yet, one could argue that, given the diminished levels of public litigation, private cases were the only ones available for the Court to implement such reforms to competition policy. In addition, one could say that if the Court were going to overrule precedents that have been in place for

213. See, e.g., David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1247–49 (2012) (describing a body of scholarship criticizing qui tam litigation, analyzing 4,000 cases, and finding that most criticism is not backed by data).

214. See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987) (arguing that agency problems in mass class actions plague the system, which should focus solely on deterrence).

215. See, e.g., Burbank & Farhang, *supra* note 33, at 1613.

216. See generally MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE 2 (1991) (describing antitrust policy during the Reagan Administration as “defined in the terms presented by the Chicago school” and describing courts’ approach to antitrust as closely tied “with the central concerns of American liberalism”); Kovacic, *supra* note 35 (surveying U.S. antitrust scholarship on the sources of antitrust reform and criticizing the “Chicago Obsession” in such explanations).

217. See *supra* Figure 4.

218. See Kovacic, *supra* note 35, at 469–71, 478–82; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 730 (2017).

decades,²¹⁹ it would likely face less political resistance and lower reputational costs by deciding a case involving two private plaintiffs rather than one involving the U.S. government.²²⁰

These beliefs are also based on strong academic foundations—indeed, they remain the preferred explanation by antitrust scholars.²²¹ The well-known Chicago School began forming in the 1960s, with exponents such as Robert Bork, Richard Posner, and George Stigler famously arguing that U.S. antitrust policy was too strict and deterred pro-competitive, efficiency-enhancing market behavior.²²² Frank Easterbrook advanced these ideas by arguing that because markets self-correct faster than courts, antitrust policy should target only cartels and be mindful of the welfare costs of false positives.²²³ As part of the broader deregulatory movement, Chicago School scholars distrusted the entire antitrust enterprise, and wanted to limit it no matter the plaintiff’s nature. Supreme Court opinions, lower court opinions, and the work of regulators moved in the direction of the Chicago view in the decades that followed. In addition, as discussed in Part I, public enforcement cases dwindled in many policy areas targeted by the Supreme Court—such as price discrimination, predatory pricing, and vertical relations. Finally, many of the underlying private cases decided by the Court between the 1970s and 2010s were understood by the Court as substantially weak claims,²²⁴ making it easier and less politically charged for the Court to reverse old precedents.

If this argument undergirds the basis for altering antitrust policy, then reformers would also do well to recalibrate the role of private litigation in the system. Reducing the amount of private litigation would provide the Court with fewer possibilities to change the law during periods of judicial antagonism, enabling an easier “return” once the political mood or the composition of the Court changes.²²⁵ A high volume of private litigation also increases the possibility of

219. See Orbach, *supra* note 37, at 5 (describing how reforms to antitrust policy required the Court to revert many precedents protected by decades of stare decisis).

220. See GAROUPA & GINSBURG, *supra* note 36, at 22–24 (developing a theory of judicial reputation that constrains the way constitutional courts wield their power).

221. See Kovacic, *supra* note 34, at 483.

222. See BORK, *supra* note 62, at ix–x; Bradford et al., *supra* note 34, at 303–09 (summarizing the different views of the Chicago School); Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848–49 (2020) (positioning the views of the Chicago School as part of a broader de-regulatory movement).

223. See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–3 (1984).

224. See, e.g., Shelanski, *supra* note 97, at 694 (“[Trinko’s] section 2 claim was at best weak and duplicative of ongoing regulation; it was at worst an attempt to use antitrust law as a cover for bringing a class action suit he did not have standing to file under the 1996 act and to use that act as a basis for liability he would be unlikely to establish under antitrust law.”).

225. See Eric A. Posner, *Eric Posner: The Revised Merger Guidelines Will Restore Principle of Competition to Merger Review*, PROMARKET (July 19, 2023), <https://www.promarket.org/2023/07/19/eric-posner-the-revised-merger-guidelines-will-restore-principle-of-competition-to-merger-review> [<https://perma.cc/4M9V-VA33>] (identifying that the stricter 2023 Merger Guidelines issued by the FTC and the DOJ rely on many of the pro-enforcement precedents that the Supreme Court adopted in the 1960s).

weak claims making their way through the system, giving courts a less reputationally-costly avenue to change policy.²²⁶

Yet, while this theory can explain changes in some areas, it cannot explain them all. In particular, it cannot explain broader anti-private enforcement decisions that had nothing to do with competition policy. In addition, from the 1970s onwards, the Court decided fifty-eight public enforcement cases (twenty-seven after the 1980s and fourteen after the 1990s) and ruled in favor of the government in some important cases.²²⁷ This indicates not only that public litigation still existed, but also that the Court was not purely anti-enforcement. This theory is also at odds with the Court selecting a private enforcement case to change the law on illegal collusion, where there was still public litigation.²²⁸ Indeed, senior antitrust scholars have challenged this so-called “Chicago Obsession” of antitrust history, saying it is incomplete.²²⁹

3. Combining Both Movements: The Focal Point Nature of Private Litigation

A third, more comprehensive account combines both explanations, building on this history of judicial antagonism as well as adding an antitrust-specific component. It argues that private litigation became the focal point of a broader anti-competition policy coalition that united Justices from different ideological spectrums.²³⁰

To explore why, one must first better understand the changes occurring in antitrust scholarship from the mid-1970s onwards. The broader, anti-private-plaintiff academic debate described above also reached antitrust policy, causing a split into, at the time, two different reform groups: the Chicago School and the less-explored Modern Harvard School.²³¹ This second group—which counted Donald Turner, Philip Areeda, former Justice Stephen Breyer, and Herbert Hovenkamp as some of its main exponents—drew upon the abovementioned discussion about the optimal level of litigation to target private antitrust plaintiffs more directly, thus safeguarding a role for public enforcers.²³² In summary, Harvard School adherents largely believed that U.S. antitrust laws allowed private plaintiffs to use litigation as a mechanism to extract rents from defendants.²³³ That was due to a combination of private plaintiffs’ selfish motivation and specific characteristics of the U.S. antitrust system that further increased the risk of abuse, including:

226. See Orbach, *supra* note 37, at 1, 9 (discussing the Court’s patterns of antitrust stare decisis, and quoting the Supreme Court’s discussion of antitrust plaintiffs’ unsophisticated litigation strategy).

227. See *infra* Figure 7.

228. See *infra* Appendix II.

229. See generally Kovacic, *supra* note 35.

230. This section builds and extends the insights of Kovacic. See generally Kovacic, *supra* note 38.

231. See *id.* at 28.

232. See *id.* at 13, 28–32, 36–37.

233. See *id.* at 51.

- i. The fact that harm to competitors may not equal harm to competition—a company may be excluded from the market precisely because it was less efficient, thus increasing the disconnect between the incentives of private parties to litigate and the gains this litigation brings to society;²³⁴
- ii. The availability of injunctive relief and treble damages, which further encourages baseless lawsuits that lead to excessive deterrence;²³⁵ and
- iii. The high litigation costs typical of an antitrust lawsuit—which increasingly requires extensive discovery and the use of many expert witnesses.²³⁶ This encourages defendants to settle even abusive claims.²³⁷

According to the Harvard School perspective, public prosecutors are better positioned to address society-wide harms and maximize overall deterrence through their ability to prosecute certain forms of behavior over a longer period.²³⁸ Public agencies would also possess better information and incentives to start welfare-enhancing litigation.²³⁹ Thus, a good way to address antitrust woes, in their view, was to weaken the role of private plaintiffs.

In such an information environment, private litigation could have enabled the formation of a coalition between Chicago and Harvard School-aligned Justices. Had this been the primary motivation for the Supreme Court's changes to anti-trust policy, then reformers would also do well to reconsider the role of private litigation in the system. Fewer private cases would diminish antagonism against the policy and would provide the Court with fewer opportunities to change the laws.

234. See Ilya R. Segal & Michael D. Whinston, *Public vs. Private Enforcement of Antitrust Law: A Survey* 9–10 (Stanford L. Sch., Working Paper No. 335, 2006); Easterbrook, *supra* note 223, at 35.

235. See Donald I. Baker, *Revisiting History—What Have We Learned About Private Antitrust Enforcement that We Would Recommend to Others?*, 16 *LOY. CONSUMER L. REV.* 379, 384–85 (2004).

236. See Kolasky, *supra* note 86, at 9, 15 (“Until recently, the shift to e-discovery has greatly increased the cost of antitrust litigation, increasing the incentive for defendants to settle if a case moved beyond the motion to dismiss stage.”); Stephen E. Nagin, *Economic Experts in Antitrust Cases*, 8 *LITIG.* 36, 36 (1982) (“The high cost of economic experts is a deterrent to the early and extensive use of an expert. . . . Nevertheless, experienced antitrust lawyers generally retain primary and backup experts on key issues early in the case, discharging them later as the issues narrow.”).

237. See Segal & Whinston, *supra* note 234, at 2 n.5.

238. See *id.* at 5. Because private parties are typically not repeat players nor can they account for social gains of deterrence, they would not be able to do the same.

239. See *id.* at 2–3 (assuming that maximizing total welfare “is the primary objective of the enforcement system” to assess the public and private systems). One prominent Harvard School scholar argues that “public antitrust authorities also have greater resources than private plaintiffs to assess the costs and benefits of antitrust enforcement” and discusses the authorities’ reliance on coercive powers to collect information. See Shelanski, *supra* note 97, at 714.

B. PRIVATE ANTITRUST LITIGATION IN A SHIFTING COURT

Both the Harvard²⁴⁰ and Chicago²⁴¹ Schools faced their own academic challenges. Yet, as seen, these challenges did not prevent the Supreme Court from reconfiguring U.S. antitrust laws. A key question, again, is why the Court relied so heavily on private litigation when doing so.

Appendix II provides a comprehensive analysis of the most important decisions among the 149 antitrust judgments by the Supreme Court since the beginning of the Burger Court in 1969. This analysis indicates an evolving Court.

In particular, the first part of the Burger Court (1969–1986)²⁴² can be characterized as reflecting many of the teachings of the Chicago School and its dislike for over-inclusive legal presumptions.²⁴³ In this era, there was a broad rebalancing of substantive aspects of antitrust policy, and a move towards economic analysis and the case-by-case focused rule of reason. This included a series of important pro-enforcement and anti-enforcement decisions involving private plaintiffs and public actors, even if the overall record is anti-enforcement.²⁴⁴

This somewhat plaintiff-agnostic focus, however, started shifting in the early 1980s with the appointment of Justice O'Connor.²⁴⁵ It then changes decisively during the Rehnquist Court (1986–2005)²⁴⁶ and the Roberts Court (2005–present),²⁴⁷ when private plaintiffs become the exclusive focus of anti-enforcement decisions.²⁴⁸ For this post-1980s period, the rationale for a focus on private litigation becomes clearer. In particular, private cases seem to have enabled the formation of

240. Scholars used a combination of theory and data to challenge the Harvard School. *See, e.g.*, Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 39 (2013). On the theory side, they argued that because private actors are closer to markets and to the potential injury, they are better placed than regulators to detect violations, more motivated to litigate, better positioned to bring successful lawsuits, can help alleviate public resource constraints and can compensate victims. *See, e.g., id.* at 38–78 (discussing criticisms of private enforcement and concluding that “there is insufficient evidence to support the conventional wisdom in the antitrust field that private antitrust enforcement is unproductive and even counterproductive”). Defenders also criticized the Harvard School for relying mostly on theory or anecdotes that were disputed by actual evidence on how the system behaved. *See, e.g., id.* at 39.

241. The introduction of game theory and other theoretical advancements allowed scholars to challenge many of the anti-enforcement assumptions of the Chicago School, leading to what is known as the more pro-enforcement, Post-Chicago School of antitrust. *See* Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2160–63 (2020) (discussing the Post-Chicago Revolution). *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008) (assembling a collection of articles on the excesses and theoretical failures of the Chicago School).

242. *Warren Burger Court (1969-1986)*, JUSTIA: U.S. SUPREME CT., <https://supreme.justia.com/supreme-court-history/burger-court> [<https://perma.cc/LAJ2-WLBN>] (last visited Oct. 13, 2025).

243. *See, e.g.*, Lino A. Graglia, *The Burger Court and Economic Rights*, 33 TULSA L.J. 41, 56 (1997) (describing a Burger Court decision as “represent[ing] an almost complete acceptance by the Court of the Chicago School approach to antitrust”).

244. *See infra* Table 1; *infra* Figure 9.

245. *See infra* Table 1; *infra* Figure 9; *infra* Appendix II.

246. *William Rehnquist Court (1986-2005)*, JUSTIA: U.S. SUPREME CT., <https://supreme.justia.com/supreme-court-history/rehnquist-court> [<https://perma.cc/FCC4-NVAR>] (last visited Oct. 13, 2025).

247. *John Roberts Court (2005-Present)*, JUSTIA: U.S. SUPREME CT., <https://supreme.justia.com/supreme-court-history/roberts-court> [<https://perma.cc/K9W6-6ACE>] (last visited Oct. 13, 2025).

248. *See supra* Section I.A.

a coalition between two groups of Justices: those who distrusted the whole antitrust enterprise (as per the teaching of the Chicago School) and those who distrusted private antitrust plaintiffs in particular (as per the Harvard School).

The stability and non-ideological nature of this apparent coalition are noteworthy. For example, Democrat-appointed Justices Breyer and Ginsburg were at the forefront of many key rulings. Justice Breyer authored *Credit Suisse*, which affirmed that courts should treat private antitrust litigation skeptically when facts are complex,²⁴⁹ and *NYNEX*, which affirmed that courts should not accept regulatory fraud as antitrust injury based on factual complexity.²⁵⁰ Justice Ginsburg joined him in both.²⁵¹ Justice Ginsburg, joined by Justice Breyer, authored the decision in *Volvo Trucks* that undermines the Robinson–Patman Act as a standalone source of enforcement.²⁵² Both joined the unanimous vote in *Trinko*, where Justice Scalia’s opinion affirms that refusal-to-deal theories of harm are on the outer boundary of antitrust liability,²⁵³ and both concurred in the judgment in *Pacific Bell*, where the Court further restricts such claims and extends a partial exemption for antitrust injury in regulated markets.²⁵⁴ Justice Breyer is also in the majority in *Twombly*, a case that heightened pleading requirements.²⁵⁵ This pattern stands in contrast to both Justice Breyer’s and Justice Ginsburg’s broader track record on private enforcement, given that both Justices sided with plaintiffs in two-thirds of the cases before them.²⁵⁶ Some Republican-appointed Justices are also in the majority in important government wins during the same period.²⁵⁷

Figure 6 complements Figures 2 and 3 in Part I and illustrates this evolving nature of the Court’s jurisprudence by representing how different Justices appointed between the 1970s and 2005 voted on antitrust cases, distinguishing between public and private enforcement. As can be seen, the Court became increasingly more anti-antitrust over time. In addition, the post-1980s Court (right side) was increasingly characterized by the existence of two groups of Justices: Alito, O’Connor, Rehnquist, Souter, and Thomas opposed most antitrust enforcement, while Breyer, Ginsburg, Kennedy, Roberts, and Scalia opposed more private enforcement than public actors. Opposition to private litigation thus provided a point of agreement for the two groups.

249. See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282–83 (2007).

250. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 130, 135–36 (1998).

251. See *id.* at 130; *Credit Suisse*, 551 U.S. at 266.

252. See *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169–170 (2006).

253. See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

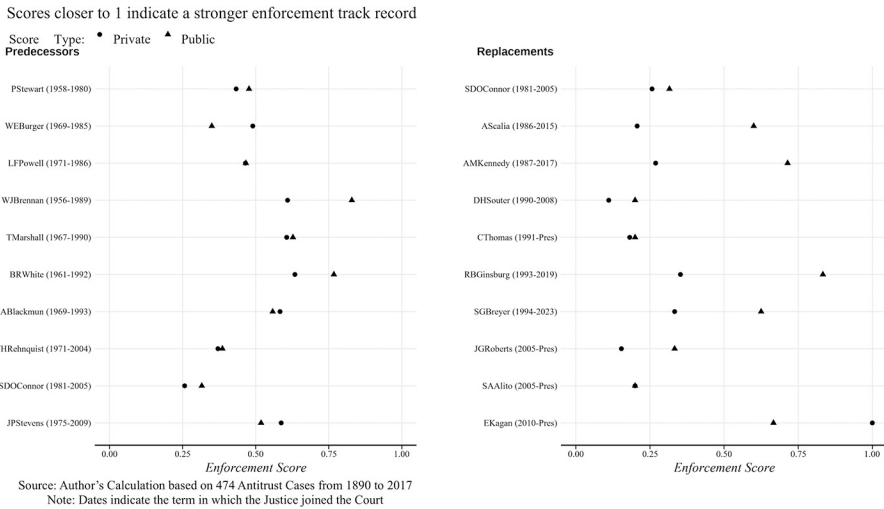
254. See *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 450 (2009).

255. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007).

256. See *Burbank & Farhang*, *supra* note 33, at 1607 (surveying Breyer’s and Ginsburg’s track record on federal rules private enforcement cases and finding that they voted in favor of private plaintiffs approximately 68% and 64%, respectively, of the time).

257. See *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 413 (1989) (Justices Scalia, Kennedy, Stevens, and Rehnquist are in the majority); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) (unanimous opinion); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (Justices Blackmun, Scalia, Stevens, and Kennedy are in the majority); *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015) (Justices Roberts and Kennedy are in the majority). These decisions safeguarded some minimum levels of public antitrust enforcement amidst the broader policy changes. See *infra* Appendix II.

Figure 6: Antitrust Enforcement Scores for Selected Justices by Litigation Type.



Without knowledge of their internal deliberations, one cannot know for sure why certain judicial coalitions formed and what sustained them over time. Still, as the rest of this Section explores, possible building blocks that could have contributed to the formation and stability of this antitrust coalition include the Justices’ ideological bent, a general lack of knowledge or interest in antitrust policy, the policy discourse at the time, the presence of intra-Court leadership, or potential strategic litigation by antitrust defendants.

Most Justices were not appointed to the Court due to their specific antitrust knowledge; indeed, few had a competition policy background. When asked about antitrust during their nomination hearings, the majority either affirmed their disinterest in competition policy or asserted the importance of ensuring strong antitrust enforcement to protect economic freedom and small businesses in the American economy.²⁵⁸ They were, however, generally pro-business,²⁵⁹

258. See Lancieri et al., *supra* note 8, at 475–76 (providing an analysis of the antitrust discussions in the nomination hearings of Supreme Court Justices since the 1930s). Justice Scalia provides an amusing example:

Senator, antitrust law has never been one of my fields. Indeed, in law school, I never understood it. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then. As to whether the Court has—so I really am in no position. All I can tell you is hearsay, Senator, from those who follow the field. . . . I have not had a single antitrust case since I have been on the D.C. Circuit. And I have not complained about that, either.

Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 36 (1986) (statement of nominee J. Antonin Scalia).

259. See, e.g., Epstein et al., *supra* note 77, at 1468 (finding that the Court became more friendly to business interests after the Warren Court—in particular the Roberts Court).

and many were anti-regulation.²⁶⁰ Only Justices Stevens²⁶¹ and Breyer²⁶² knew antitrust well.

During their time at the bench, these Justices faced dozens of antitrust disputes.²⁶³ It is possible, then, that they looked for guidance from antitrust scholarship, and were exposed to the predominant views (at least in public discourse) of either the Chicago or the Harvard School. Over time, they sorted themselves into two different groups, which partially reflected their initial ideological leanings about regulation and litigation more broadly (including a more general distrust of private plaintiffs).²⁶⁴ Justice Breyer, a proponent of the Harvard School, may have convinced some of the more liberal Justices that, with respect to antitrust policy in particular, expansive private litigation rights were problematic. This pattern would explain, for example, why Justices Ginsburg, Breyer, and Souter sided against private plaintiffs in antitrust significantly more often than in other areas.²⁶⁵ Justices Ginsburg and Breyer voted in the same direction in 91.5% of the antitrust cases where both of them participated.²⁶⁶ It is interesting to notice that Justice Stevens, generally a liberal Justice with strong prior antitrust knowledge,

260. See *id.* at 1470.

261. See *John Paul Stevens*, OYEZ, https://www.oyez.org/justices/john_paul_stevens [<https://perma.cc/E44W-7WKJ>] (last visited Oct. 13, 2025) (discussing Justice Stevens's career as a "talented antitrust lawyer"); *John Paul Stevens, 1975-2010*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/associate-justices/john-paul-stevens-1975-2010> [<https://perma.cc/Z9PY-VGBL>] (last visited Oct. 13, 2025) ("[Justice Stevens] served as Associate Counsel to the House Judiciary Committee's Subcommittee on the Study of Monopoly Power.").

262. See William F. Cavanaugh, Jr. & Amy N. Vegari, *Justice Breyer's Antitrust Legacy*, PATTERSON BELKNAP WEBB & TYLER LLP: ANTITRUST UPDATE (Apr. 26, 2022), <https://www.pbwt.com/antitrust-update-blog/justice-breyers-antitrust-legacy> [<https://perma.cc/2BZX-SQYG>] (discussing Justice Breyer's career as Assistant U.S. Attorney General for Antitrust); Justice Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996) (discussing "Areeda's dedication to his treatise," which indicates Justice Breyer's familiarity with the scholar and antitrust scholarship).

To a lesser degree, Chief Justice Roberts (and maybe Justice Thomas) also had some experience. See Todd Bishop, *Roberts and Miers Linked to Microsoft*, SEATTLE PI (Oct. 3, 2005), <https://www.seattlepi.com/business/article/roberts-and-miers-linked-to-microsoft-1184318.php> [<https://perma.cc/GD9Z-PEGG>] ("Arguing on behalf of the states, Roberts told the court that Microsoft wrongly used its influence and power to stifle consumer choice."); Clarence Thomas, U.S. EEOC, <https://www.eeoc.gov/history/clarence-thomas> [<https://perma.cc/S9W8-QN6P>] (last visited Oct. 13, 2025) (discussing Clarence Thomas's career as an attorney for the Monsanto Company "where he monitored a variety of federal regulations and handled antitrust").

263. See *infra* Figure 8. Between the 1980s and 2010, the Court decided seventy-five antitrust disputes. In 2024, the number was eighty-five. Justice Kagan has the fewest votes in antitrust cases of those represented in Figure 6, with ten decisions since she joined the Court—four private cases and six public cases. Justice Alito is second, with fifteen decisions since he joined the Court in 2005—ten private cases and five public cases. He did not participate in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). Justice Sotomayor has the same track record as Justice Kagan.

264. See Burbank & Farhang, *supra* note 33, 1568–79.

265. See Burbank & Farhang, *supra* note 33, 1571–72 (modeling "the relationship between Justices' ideological preferences and their votes on private enforcement issues," and finding that Justices Ginsburg, Breyer and Souter voted in favor of private enforcement in 65%, 63% and 58% of the cases before them, respectively). In antitrust, their track records are 35%, 33%, and 11%, respectively. See *infra* Figure 9.

266. See *infra* Figure 9; *infra* Table 1.

seems not to have been swayed by Justice Breyer's views and remained largely pro-enforcement.²⁶⁷

Adherents of the Harvard School may have been partially blindsided by the ultimate impact of the changes the Court implemented in the aggregate. At least in theory, some decisions by the Court could have been construed narrowly.²⁶⁸ Justices Breyer and Ginsburg also changed positions during their tenure: from a solid anti-enforcement vote between 1995 and 2008, to a solid pro-enforcement vote from 2009 onwards.²⁶⁹ This could indicate an evolving understanding of the overall impact of the changes promoted by the Court.

They would not be alone in apparently missing this broader impact. A comprehensive analysis of all U.S. government *Amici Curiae* filings in private antitrust cases before the Supreme Court since 1961²⁷⁰ indicates that antitrust regulators themselves seemed somewhat oblivious to the strength of the interconnection between public and private enforcement. The government was absent in most decisions. Out of 111 private antitrust cases decided by the Supreme Court since 1961, the government filed amicus briefs in only forty-four (sixteen are generally pro-plaintiff; twenty-six are against; two support neither side). More importantly, out of the twenty-six key private decisions that substantively changed the antitrust laws after 1980,²⁷¹ the government positioned itself in favor of *defendants* in eighteen.²⁷² This is in contrast, for example, with governmental practice in other areas such as securities litigation, where the government's briefs are largely pro-enforcement.²⁷³

267. See *infra* Figure 9; *infra* Table 1.

268. See Gavil, *supra* note 97 (discussing how *Trinko* could have been construed narrowly, but courts have been expanding its application over time in a way that undermined cases against abuses of market power); C. Scott Hemphill & Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 YALE L.J. 2048, 2057–58 (2018) (relying on Justice Blackmun's papers to argue that the Supreme Court initially understood the *Brooke Group* decision as "very narrow," but that its reasoning expanded over time).

269. See *infra* Appendix I. Between 1995 and 2008, Justice Breyer participated in fifteen decisions (thirteen private cases) and voted against plaintiffs in thirteen of them (a 0.14 pro-enforcement score). From 2009 onwards, Breyer participated in eleven decisions, voting in favor of plaintiffs in nine. Ginsburg's track record is nearly the same, with the exception of her pro-enforcement vote in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The breakdown of the per-Justice vote can be found in the database constructed for this Article, which is on file with the author.

270. This is based on a hand-coding of all *Amici Curiae* briefs filed by the government and by private parties in private antitrust cases before the Supreme Court since 1961. After identifying these private cases using the methodology described in Appendix I, a search was conducted for each case on LEXIS's U.S. Supreme Court Briefs Database. The LEXIS database had a total of forty-four government amicus briefs, and 383 briefs by other parties for these cases. These briefs were read and hand coded to understand their content and direction. For further instructions on how to find amicus briefs on LEXIS, see *Finding United States Supreme Court Briefs on Lexis*, LEXISNEXIS: SUPPORT HOME, https://supportcenter.lexisnexis.com/app/answers/answer_view/a_id/1096232/~/_/finding-united-states-supreme-court-briefs-on-lexis [https://perma.cc/LM3K-B2LW] (last visited Oct. 14, 2025).

271. See *infra* Appendix II.

272. For the remaining cases, the government did not file an amicus brief in three, positioned itself in favor of neither party in two, and positioned itself in favor of plaintiffs in only three.

273. See, e.g., E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1625 (2004) ("The

Structural reasons suggest at least some concerns that this process was more than a mere accident. Defendants may have recognized that the Court was becoming increasingly business-friendly and distrustful of private enforcement, and that a majority of Justices had little antitrust-specific knowledge, and then strategically leveraged these trends to shift U.S. competition policy.

Defendants have long used multiple different strategies to influence and weaken antitrust policy.²⁷⁴ For example, companies spent significant resources to develop courses to train judges on a stylized version of law and economics—including antitrust—that was found to help sway rulings in their favor.²⁷⁵ By definition, many antitrust defendants also tend to be larger companies accused of abusing their market power, and many become recurrent targets of the system.²⁷⁶ They have the resources and sophistication to (theoretically) develop long-term defense strategies by which they settle meritorious antitrust cases and appeal the bad cases—providing Justices with the exact type of “bad” private litigation that confirms their general priors.²⁷⁷ The strategic use of litigation to promote one’s cause before the courts has long been a feature of American policymaking.²⁷⁸

The focal-point nature of private litigation theoretically explains many of the changes made by the Court after the 1980s: an anti-competition policy turn, the

government’s influence before the Court is significant, especially when it files an amicus brief in an antitrust case.”). In securities litigation, the government was part of 86% of the litigation before the Court and argued in favor of an expansive interpretation of the law in 88% of the cases, with a 50% win ratio. *See id.* at 1598.

274. *See* Lancieri et al., *supra* note 8, at 503.

275. *See* Ash et al. *supra* note 25, at 2. For example, for decades, Henry Manne organized a training course to teach judges about law and economics. *Id.* at 2.

Henry Manne himself noted that business support for the program came from its antitrust implications: “. . . I could handle a fund-raising job of raising \$10,000 from ten of them [major corporations]. I wrote to eleven, and I related it heavily to antitrust. . . . of the eleven I wrote to, within a few weeks I had \$10,000 from ten of them, and the last \$10,000 came in a few weeks later.’

Id. at 33 n.33. A study finds that the Manne training course helped sway the decisions of appellate judges against regulatory agencies and antitrust enforcement. *See id.* at 3–4. One curious finding is that Justice Ruth Bader Ginsburg, but not Justice Scalia, attended the program. *Id.* at 47.

276. For example, defendants in antitrust cases before the Supreme Court include American Express, Apple, AT&T, Blue Shield, Cargill, Chicago Mercantile Exchange, Chrysler, Comcast, Credit Suisse, Mitsubishi, Monsanto, the NCAA, New York Stock Exchange, Target, Texaco, U.S. Steel, Verizon and Volvo. Many defendants also rely on a common pool of large law firms that traditionally represent multiple different companies. *See* LEX MACHINA DATA TEAM, *supra* note 86, at 22–23.

This contrasts with more dispersed plaintiff’s lawyers. These lawyers often represent smaller companies (such as distributors or smaller competitors like Reeder-Simco GMC, PSKS Inc., Discon, Inc., and others) excluded from the market—a group that has incentives to litigate claims until the end because of treble damages. They also represent class-action plaintiffs that are at least theoretically encouraged to litigate and settle claims more easily because of the presence of competition and preemption on the private side. On the latter point, see Clopton, *supra* note 42, at 3221–22 (discussing suboptimal litigation and settlement in private mass litigation, which leads to strategic litigation strategies by defendants such as “corporate settlement mills”). This area, however, deserves future studies to better understand potential strategic litigation tactics by different parties.

277. *See, e.g.,* Gavil, *supra* note 97 (“Justice Scalia’s opinion in *Trinko* was laced with concerns for judicial competence, judicial error, and litigation costs that collectively constituted a broad rejection of the utility of antitrust enforcement . . .”).

278. *See, e.g.,* Burbank & Farhang, *supra* note 33, at 1613 (describing the strategic use of courts to clamp down on expansive private litigation rights in the absence of political power to do so).

prevalence of private litigation, and a theory as to why some decisions are anti-trust-specific but others are not. It would also recommend caution in adding expansive private rights of action to antitrust reforms.

All three potential primary causes for the over-prevalence of private cases in the changes made to competition policy deserve further analysis in projects with better databases—we do not have enough data to properly disentangle them. Still, regardless of exactly how this shift unfolded, what this broader history demonstrates is that a judiciary that is opposed to broad private litigation, generally business-friendly, and distrustful of expansive government can build on expansive private rights of action to undermine attempts to revive antitrust enforcement.

After the first Trump Administration, the Supreme Court appears to have a solid, enduring majority that is pro-business, anti-regulation, and distrustful of private enforcement. Antitrust scholars have already expressed concerns that the current composition of the Court may become a roadblock to any attempts to revive competition policy.²⁷⁹ This would warrant reformers to carefully consider the role of private litigants in the enforcement mix lest they provoke a backlash that undermines their overall pro-enforcement goals.

IV. RECALIBRATING PRIVATE ANTITRUST ENFORCEMENT

The evidence offered up in Parts II and III demonstrates the quandary faced by the movement to reform antitrust policy: A solution that relies solely on public enforcement can be undermined by politics, while a hybrid system with unrestricted private enforcement can be undermined by judicial antagonism.

This Part suggests that recalibrating private antitrust enforcement is a way to solve this quandary. It first explores the importance of enforcement resiliency as a pillar of a reinvigorated competition policy that delivers more than occasional bursts of enforcement. It then proposes three legal changes that could create an appropriate place for private antitrust litigation in an enduring enforcement system: (i) the creation of antitrust “super-complainants”; (ii) the major expansion of antitrust “standing” rights while maintaining stricter motion practice rules; and (iii) maintaining treble damages and fee shifting rules. These proposals aim to expand private enforcement while safeguarding the system’s ability to weed-out bad lawsuits.

A. INTEGRATING ENFORCEMENT RESILIENCY IN REFORM DISCUSSIONS

As discussed above, much of the conversation around potential reforms to U.S. antitrust policy is focused on making changes to substantive laws that define what is considered anticompetitive conduct—with a particular focus on public enforcement.²⁸⁰ This makes sense: high levels of litigation will be ineffective if

279. See, e.g., Jonathan B. Baker, *What About the Supreme Court? The Lurking Threat to US Antitrust Reform*, 11 J. ANTITRUST ENF’T 154, 154 (2023).

280. Some proposals are also indifferent to the enforcement type. See, e.g., Daniel Francis, *Making Sense of Monopolization*, 84 ANTITRUST L.J. 779, 781–82 (2022) (proposing a new, three-step framework to drive modern anti-monopolization law in the U.S.).

substantive rules about illegal conduct are permissive. As mentioned above, an effective “revival” of competition policy requires the implementation of at least a subset of these substantive reforms that broaden the types of conduct considered anticompetitive.

Yet, this should not come at the cost of equally important debates about procedural and other structural decisions that may ultimately determine overall compliance with a given regulatory scheme.²⁸¹ Poor structural design has been shown to undermine the achievement of important public policy goals.²⁸²

From a political economy perspective, high-resiliency enforcement systems—that is, systems that deliver a constant level of enforcement not subject to fluctuations in politics—are appealing where: (i) special interest groups have the sophistication and the resources to wait for and exploit weak enforcement windows; and (ii) enforcement gaps can lead to significant societal harm.

These characteristics are present in different policy areas,²⁸³ including anti-trust. Indeed, exactly because competition policy usually targets the largest, most-politically powerful companies in a given economy, it needs strong institutional safeguards to work as intended. Reform proposals aiming to revive competition policy in the long term must establish enforcement resiliency as a key central goal.

It is worth noting that discussions about enforcement resiliency usually imply a second-best world, one where parties trade off some potential inefficiencies created by redundancy in enforcement powers against protections to mitigate external influences.²⁸⁴ This second-best world is, by definition, one without the optimal set of reforms. Decisions are contingent; they depend on complex interactions between different actors and on how information about these interactions reaches system designers.²⁸⁵ In addition, it is likely that optimal strategies will change over time, as special interest groups change their tactics to influence

281. See William E Kovacic & David A Hyman, *Competition Agency Design: What's on the Menu?*, 8 EUR. COMPETITION J. 527, 537 (2012) (stressing the importance of agency design to the performance of antitrust agencies); David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1484 (2014) (same).

282. See *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Reguls. of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Com.) (“But I’ll let you write the substance . . . and you let me write the procedure, and I’ll screw you every time.”); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 532 (2022); Lancieri, *supra* note 172, at 56–60 (describing how lack of attention to enforcement mechanisms undermines data privacy laws).

283. A useful analog could be election gerrymandering. A high-resiliency system would prevent a party that suddenly finds itself with a supermajority at a key juncture in time from exploiting this juncture to reshape election rules in a way that solidifies this majority into the future. See Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 374 (2022). As expected, private enforcement plays an important role in this area. See generally *id.* (discussing changes to voting rights cases brought by private plaintiffs and the federal government in a world without the preclearance regime).

284. See Clopton, *supra* note 42, at 311 (“In short, although redundancy has direct costs and risks over-enforcement, it also can be effective at fighting under-enforcement resulting from errors, resource constraints, information problems, or agency costs, if agents are sufficiently diverse.”).

285. See *id.* at 331 (“Legislatures must make the underlying judgments about which pathologies are sufficiently pernicious to justify redundant enforcement. Legislatures have to decide whether to organize

outcomes. Ideally, suitable reform proposals should share an overall goal of using institutional design to safeguard the enforcement capacity of the system.

There are different potential sources for such resiliency. Many of the specific institutional design options of antitrust policy—such as the creation of two different public regulators or the imposition of the merger filing fees as an independent source of funding for the FTC and the DOJ—were attempts to use institutional design to safeguard the system.²⁸⁶ Yet, as Part I discussed, private litigation has historically been a leading source of redundancy in U.S. competition policy. Indeed, private litigation has historically been a key source of enforcement resiliency for most of the U.S. regulatory system.²⁸⁷ This next Section, then, focuses on rethinking current rules on U.S. private enforcement.

B. RECALIBRATING THE ROLE OF PRIVATE ENFORCEMENT IN THE CURRENT SYSTEM

A downside of private litigation as a source of resiliency is its cost,²⁸⁸ which materializes not only in terms of the extra resources dedicated to the system, but also through the risks associated with false positives, false negatives, and even incoherent enforcement increases. These costs and risks increase as the judiciary receives more and more uncoordinated and potentially lower average quality private lawsuits vis-à-vis public enforcement.²⁸⁹ As Part III discussed, very high levels of private litigation may even lead to a backlash that undermines the entire policy. This helps make the case for a recalibrated, better-targeted system of private enforcement.

The growing judicial antagonism to private litigation in general pushed scholars to study how different rules on access to court, the distribution of legal costs, the allocation of burdens of proof, and other procedural decisions can help moderate the amount and type of private litigation in a given legal system.²⁹⁰ More

decisions based on enforcement unit or regulated area. And legislatures must set enforcement policy by making choices about procedural and remedial design.” (footnotes omitted)).

286. Future research should explore how to leverage different mechanisms to better protect antitrust policy from external influences.

287. See Glover, *supra* note 42, at 1140; ZINGALES, *supra* note 43, at 200 (stressing the role of class actions in helping offset the power of special interests); Zambrano et al., *supra* note 51, at 4 (finding more than 3,000 private-rights-of-action provisions in state law). See generally Clopton, *supra* note 42 (arguing that legal scholarship has been “slow to appreciate the benefits of redundancy,” mapping redundant enforcement in the federal judiciary, and discussing potential benefits and downsides).

288. See generally Shavell, *supra* note 31 (arguing that excessive private litigation can produce negative externalities, as even claims with a net positive expected value do not consider system-wide costs); Kaplow, *supra* note 31 (arguing that costs of operating legal system creates divergence between private incentive to sue and the socially optimal outcome).

289. See Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 636 (2010) (organizing the Court’s skepticism towards private action into four themes: “(1) fear of false positives; (2) lack of confidence in judges and juries to achieve correct outcomes; (3) the inability of federal judges to manage antitrust litigation in a cost-effective manner; and (4) a preference for regulation over judicial intervention”).

290. See Shavell, *supra* note 208, at 579 (discussing the role of restrictions such as “all manner of policies discouraging suit (including its outright prohibition in some areas), policies promoting settlement, and policies intended to reduce litigation expenditures” as ways to calibrate private enforcement); Kaplow, *supra* note 210, at 64 (discussing the use of filing fees, damages awards and

recently, scholars have begun to better articulate the benefits and downsides of public-private enforcement complementarity.²⁹¹

Antitrust should build on this and other scholarship when shaping the appropriate role of private plaintiffs in the enforcement mix. In particular, three potential ways to recalibrate the role of private litigation in the current antitrust policy include: (1) using targeted standing provisions for special antitrust regimes; (2) adjusting motion practice rules to better target general private litigation; and (3) maintaining treble damages and fee shifting rules.

1. Sketching a Super-Complainant System for Special Antitrust Regimes

Legislators are actively discussing the establishment of specific antitrust obligations that apply only to certain sectors of the economy identified by authorities/legislators as particularly problematic or strategic (for example, technology, finance, or agriculture).²⁹² These proposals would, for example, broaden the definition of anticompetitive conduct to prevent some companies from privileging their own products vis-à-vis those of competitors and then lower the burden to prove the illegality of such conduct in court,²⁹³ or impose a moratorium on mergers involving large agribusinesses and grocery retailers.²⁹⁴ As discussed, these proposals share a general shortcoming in relying *exclusively* on public enforcement.²⁹⁵ Legislators could increase enforcement resiliency by enabling a restricted number of sophisticated and diverse private actors to file lawsuits under similar or slightly modified standards—complementing the work of regulators.²⁹⁶

There are different ways to set these stricter standing requirements in practice, and it is possible that they will vary depending on the sector. One alternative is to delegate such tasks to a broad array of public authorities by creating a pre-certification system—that is, only private parties expressly authorized to file lawsuits can go to court.

Different versions of this pre-certification system exist in Europe for different regulatory regimes. In the UK, so-called “super-complainants” are consumer-protection organizations that are pre-certified to file complaints before regulators—including competition authorities—which are then required to provide a response under an expedited timeframe.²⁹⁷ A stricter system exists for collective data

evidence thresholds as ways to manage incentives in private litigation); Burbank et al., *supra* note 42, at 679; Glover, *supra* note 42, at 1189–98.

291. See, e.g., Clopton, *supra* note 42, at 307.

292. See, e.g., JAY B. SYKES, CONG. RSCH. SERV., R46875, ANTITRUST REFORM AND BIG TECH FIRMS 51 (2023) (“As discussed, some legislative proposals would create special competition rules for large technology platforms.”).

293. See American Innovation and Choice Online Act, S. 2992, 117th Cong. § 3 (2022).

294. See Food and Agribusiness Merger Moratorium and Antitrust Review Act of 2022, S. 4245, 117th Cong. (2022). The bill grants enforcement authority to the Attorney General and creates a new commission—the Food and Agriculture Concentration and Market Power Review Commission. *Id.* § 101(e), § 201(a).

295. See *supra* Part II.

296. Burbank et al., *supra* note 42, at 673–74 (affirming that legislators may restrict standing to a specific set of plaintiffs as a way to help balance private litigation).

297. See Enterprise Act of 2002, c. 40, § 11 (UK).

privacy lawsuits under the European Union's General Data Protection Regulation: only previously certified bodies can represent a large group of citizens in court.²⁹⁸ The Digital Services Act (DSA) foresees the creation of "Trusted Flaggers," or pre-certified, independent third parties that can notify companies about potential violations of the law.²⁹⁹ The DSA also forces these companies to answer these complaints on an expedited timeframe.³⁰⁰ A modified version of the system exists in the U.S., for example, with Title VII discrimination claims, whereby parties must notify a regulatory agency before filing a lawsuit, giving it the opportunity to intervene beforehand.³⁰¹ While neither is exactly what is proposed herein, they can provide the basis for this more targeted regime.

In particular, the law setting specific antitrust rules for a specific sector of the economy could define broad characteristics that private parties must meet to qualify for pre-certification. In the case of British super-complainants, this is a combination of proven expertise in the area, the ability to represent a wide range of views, and financial independence.³⁰² Authorities retain some discretion in assessing exactly how these requirements are met in practice.³⁰³ In the U.S. case, obligations might be a combination of proven expertise and the representation of a wide range of stakeholder views. The high costs associated with American antitrust litigation dictate against restricting representation only to so-called independent organizations, as these may not be able to secure the tens of millions of dollars required to sustain a large antitrust lawsuit solely from independent sources of funding (other than funding from injured parties and potential third-party funders).

298. See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) art. 142 ("Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a not-for-profit body, organisation or association which is constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest and is active in the field of the protection of personal data to lodge a complaint on his or her behalf . . .").

299. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) arts. 42, 61. The DSA establishes minimum standards for platform governance in digital markets. See *id.*

300. *Id.* at art. 22 ("[T]he provider should, upon obtaining actual knowledge or awareness of illegal activities or illegal content, act expeditiously to remove or to disable access to that content.").

301. See *What You Need to Know About Title VII of the Civil Rights Act*, THOMSON REUTERS (Aug. 6, 2024), <https://legal.thomsonreuters.com/en/insights/articles/what-is-title-vii-civil-rights-act> [<https://perma.cc/V73P-2CJE>].

302. See HM TREASURY, GUIDANCE FOR BODIES SEEKING DESIGNATION AS SUPER-COMPLAINANTS TO THE FINANCIAL CONDUCT AUTHORITY 1–2 (2013), https://assets.publishing.service.gov.uk/media/5a7b96ebd915d13110603b7/guidance_for_super_complainants_120313.pdf [<https://perma.cc/4VUY-LUFZ>]. In the case that the super-complainant represents the interest of businesses in their capacity as consumers of a good/service, the body must demonstrate that it primarily represents the interests of small or medium-sized businesses, which are defined as companies that employ fewer than 250 employees and have an annual turnover below fifty million pounds. *Id.* at 6.

303. See *id.* at 2 ("The Treasury may designate a body only if it appears to *them* to represent the interests of consumers of any description.") (emphasis added).

Certifying bodies should include a range of agents with different incentives. For example, the law could establish that a given organization should receive standing under a specific antitrust regime if it obtains a pre-certification from either the FTC, the DOJ, *or* a combination of state attorneys general that represent at least a certain percentage of the U.S. population (for example, 15%).³⁰⁴ This certification could either be granted in advance (encouraging the agent to monitor the market) or for a specific lawsuit. If the latter, parties would need to demonstrate their expertise and ability to represent a wide range of views, as well as explain how their specific lawsuit articulates a theory of harm connecting an illegal behavior with both private and market harm. Allowing authorities to retain some discretion is an important element that can diminish the risks of defendants gaming the system.³⁰⁵ Rules should depend on the specific sector and the criteria set by the different certification bodies, according to their own standards. Ultimately, pre-certified plaintiffs could include a range of sophisticated agents from non-governmental organizations (NGOs) to plaintiff coalitions to specialized plaintiff law firms.³⁰⁶

The strategic use of standing to add restricted private litigation to the enforcement mix of these special antitrust regimes has benefits vis-à-vis the status quo of relying solely on public enforcement. On the one hand, it weakens the interconnection between public and private enforcement, allowing for lower burdens of proof for public regulators when they are enforcing these special, sector-specific regimes. On the other hand, it integrates the enforcement resiliency provided by a certain group of pre-selected private plaintiffs.

2. Using Motion Practice Rules to Better Target General Private Antitrust Litigation

Targeted standing provisions might be an efficient element of legislation that sets specific, stricter antitrust laws for specific markets or specific types of conduct (for example, an equivalent of the Digital Markets Act in the EU,³⁰⁷ which

304. See *supra* note 46. This diminishes incentives for smaller states to specialize in providing plaintiff-friendly certification processes while also ensuring a broad enough pool that makes it harder for private parties to influence the entire certification process.

305. In theory, allowing authorities to retain authority would make defendants “more uncertain about the consequences of their actions.” Florian Ederer, Richard Holden & Margaret Meyer, *Gaming and Strategic Opacity in Incentive Provision*, 49 RAND J. ECON. 819, 844 (2018) (discussing the possibility of gaming, or the exploitation of an incentive scheme by an agent for his own self-interest and arguing for the introduction of “opacity” or lack of transparency to deter gaming).

306. Potential examples include the American Antitrust Institute, the Coalition for App Fairness (a coalition of app developers injured by app store practices) and specialized plaintiff law firms such as Berger Montague. See *generally Mission and History*, AM. ANTITRUST INST., <https://www.antitrustinstitute.org/about-us/mission-and-history> [<https://perma.cc/B4HA-S83C>] (last visited Oct. 14, 2025); *Our Vision for the Future*, COAL. FOR APP FAIRNESS, <https://appfairness.org/our-vision> [<https://perma.cc/R2S2-DX3N>] (last visited Oct. 14, 2025); *Antitrust Cases*, BERGER MONTAGUE, <https://bergermontague.com/cases/antitrust> [<https://perma.cc/EA2Z-N9B5>] (last visited Oct. 14, 2025).

307. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265).

imposes specific, stricter obligations on large digital platforms deemed gatekeepers).

This approach, however, is and should continue to be the exception. Antitrust harm may materialize in any market. This means that general provisions against anticompetitive behavior (such as those outlined in Sections 1 and 2 of the Sherman Act) will continue to account for the bulk of enforcement. Recalibrating and better targeting this more general private litigation will require adjusting rules on antitrust standing, motion practice, and in other areas.

In effect, the Supreme Court has tried this approach with respect to its antitrust and broader civil procedure jurisprudence over the past several decades. Consequently, one can draw upon the Court's decisions when designing potential reforms that target antitrust policy. These could be implemented through broader bills that also change substantive antitrust laws.³⁰⁸

A general guiding principle one can use for these reforms is that, in the antitrust context, stricter pleading requirements and increases in burdens of proof provide courts with a more targeted mechanism to weed out bad claims, which is preferable to indiscriminate restrictions on standing, access to the courts, and class formation. With respect to general litigation, standing limitations and other rules can ultimately create gaps in the enforcement system, thus reducing the resiliency afforded by private actors. Yet, parties must also be able to articulate clear theories of harm that connect a specific illegal behavior with harm to consumers and/or to markets and society more broadly.

a. Reverting Restrictions on Standing and Plaintiffs' Ability to File Lawsuits

Reform efforts could start by adjusting rules on antitrust standing and other rules that impact the ability of private antitrust plaintiffs to file lawsuits before the federal judiciary. Decisions in this area include: (i) the 1977 *Illinois Brick* decision that blocks indirect purchasers from filing lawsuits;³⁰⁹ (ii) the 1982 and 1983 decisions in *Blue Shield* and *Associated General*, which employed common-law proximate cause doctrines to narrow antitrust standing;³¹⁰ (iii) the 1985 and 2013 *Mitsubishi* and *Italian Colors* decisions that expanded the enforceability of arbitration clauses for both statutory and non-statutory (antitrust) claims;³¹¹

308. See, e.g., Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021) (introduced by Senator Klobuchar).

309. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745–47 (1977) (preventing indirect purchasers from filing lawsuits). This decision led to a decline in the number of cases filed. See Smith, *supra* note 81, at 673–78. Many states have passed so-called Illinois Brick repealer statutes, which enable indirect purchasers to file lawsuits in the states. See Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 1–2 (2004). These, however, are insufficient because of their limited coverage and their inability to impact out-of-state claims. See *id.* at 30.

310. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532–33 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477–78 (1982). These have a disproportionate impact on labor plaintiffs and their ability to be represented by unions. See Gavil, *supra* note 57, at 76–77.

311. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013); see also *AT&T Mobility LLC*

and (iv) the 2013 *Comcast* decision that increased burdens for class certification.³¹²

In the antitrust context, the Court's jurisprudence has gone too far, as the combination of these rulings has led to private enforcement gaps in vertical and certain horizontal relations.³¹³ The problem is more acute in vertical antitrust violations: *Illinois Brick* prevents indirect purchasers from filing lawsuits due to lack of standing; *Blue Shield* and *Associated General* further restrict the pool of potential complainants to exclude consumer associations or unions (for example); *Mitsubishi* and *Italian Colors* ultimately force many of the potential remaining plaintiffs—directly harmed parties—to go to mandatory arbitration that precludes class-wide representation of small claims; and *Comcast* makes it harder to certify classes of those who are left. In addition, many potential plaintiffs are afraid to sue incumbents because they depend on them for a large portion of their income, making them vulnerable to retaliation.³¹⁴ Similar restrictions in standing or the ability to file lawsuits can also hinder the filing of much-needed horizontal collusion cases, or cases involving abuses of monopsony power.³¹⁵ In both areas, class-action plaintiffs or unions and associations representing small and disparate groups of consumers and workers are the main potential litigants.³¹⁶

As others have pointed out, standing and class certification are not the place to decide the merits of bad antitrust claims: that should be confined to pleading and

v. *Concepcion*, 563 U.S. 333, 344 (2011) (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”). These decisions have been criticized for their broad impact on multiple areas of the law. See generally J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (arguing, among other things, that the Court's jurisprudence has left too little to stop the erosion of substantive law).

312. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 (2011) (increasing the burden for class certification by requiring a greater showing of commonality among class member claims).

313. See, e.g., Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115, 2132 (2015) (arguing that the combination of *Illinois Brick* and *Italian Colors* created gaps in private antitrust enforcement).

314. See MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM., AND ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 58 (Comm. Print 2020) (describing the “prevalence of fear” of market participants dependent on large digital platforms). A good example is the high-profile litigation between Epic (an app developer) and Apple for the potential abuse of Apple's dominant position in the app distribution market. See Lora Kolodny, *Judge Calls Out ‘Apple Official Who Is Personally Responsible’ in Fortnite App Order*, CNBC (May 19, 2025, at 16:22 ET), <https://www.cnbc.com/2025/05/19/apple-fortnite-epic-games.html> [<https://perma.cc/3YG3-V6CU>]. After Epic filed the lawsuit, Apple terminated all of Epic's accounts—a major blow for the company's long-term viability. See *id.* The district court judge had to issue an injunction to force Apple to reverse course. See *id.* The dispute is still ongoing. See *id.*

315. Cf. Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws*, 2011 BYU L. REV. 315, 317 (arguing that private enforcement has provided better deterrence against collusion than DOJ enforcement actions).

316. See Glover, *supra* note 42, at 1187 (“Those with the best information about antitrust violations—arguably, direct purchasers—may not be the parties with any motivation to sue, given that direct purchasers often wish to avoid ‘disrupting relationships with [limited] suppliers.’”).

summary judgments.³¹⁷ Overall, restrictions on standing require a careful consideration of potential trade-offs between increased access to courts and the costs of false positives. As such, they should be tailored to specific situations. Legislators are better placed to make those determinations than courts,³¹⁸ as they have better information about trade-offs and can devise more targeted rules. In the case of antitrust, legislators explicitly opted for broad standing rights to increase deterrence. These legal commands should be respected by the courts—and when not, such decisions should be overruled by Congress.

b. Maintaining Stricter Rules for Motion Practice

The Court tightened antitrust pleading and summary judgment rules in three landmark rulings: (i) in the 1977 *Brunswick* decision, the Court required plaintiffs to show at least prima facie evidence that the alleged illegal conduct negatively impacted market competition beyond the impact on the plaintiff itself;³¹⁹ (ii) in the 1986 *Matsushita* decision, the Court required plaintiffs to demonstrate how their claim for antitrust harm makes economic sense to survive motions for summary judgment;³²⁰ and (iii) in the 2007 *Twombly* decision, the Court extended *Matsushita* to the pleading phase, requiring plaintiffs to include enough facts in their complaints to make it plausible (not possible or conceivable) that they could support such claims during litigation.³²¹ The last two cases were complemented by other, non-antitrust rulings and had substantial impact far beyond antitrust policy.³²²

These decisions make sense in the antitrust context and should be maintained. *Brunswick* is particularly important, as it required parties to articulate clear theories of harm beyond potential damages to their own businesses or personal interests.³²³ Indeed, one of the main substantive defenses of the efficacy of private

317. See, e.g., Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 969–70 (2010) (identifying that changes to the class certification standard for antitrust cases may violate the Seventh Amendment).

318. See Shavell, *supra* note 208, at 592.

319. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488–89 (1977). *Brunswick* can be interpreted as a decision that impacts both standing and pleadings—by redefining what is characterized as harm, it redefined what parties can plead on. See Jonathon M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273, 285 (1998) (describing *Brunswick*'s holding as a standing requirement, despite the procedural posture of the case).

320. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–97 (1986); see also Gavil, *supra* note 57, at 65–66. It is noteworthy that *Matsushita* also changed substantive antitrust rules, affirming that claims for long-term market predation are inherently speculative, and then raised burdens of proof whenever private parties attempted to prove collusion under § 1 of the Sherman Act. See *Matsushita*, 475 U.S. at 588–89. This discussion does not cover that.

321. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *Twombly* also increased the burden of proof for parties relying on parallel conduct to affirm a violation of § 1 of the Sherman Act. *Id.* at 557.

322. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), complemented *Matsushita*. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), complemented *Twombly*.

323. See 429 U.S. 477, 488–89.

antitrust plaintiffs is that they are closer to the market and, as such, have better information about the harmful nature of a given conduct.³²⁴ Others have explored how better access to information is one of the principles that should drive the allocation of burdens between litigants.³²⁵ Therefore, a calibrated antitrust policy should acknowledge this advantage and require plaintiffs to provide at least a coherent description of how the alleged conduct plausibly harmed competition or society more broadly (not simply the plaintiffs themselves). Discovery should then only strengthen these claims. Further, antitrust discovery is usually expensive and procedures involve extensive expert testimony,³²⁶ increasing the pressure on defendants to settle disputes. This supports the argument for stricter pleading rules,³²⁷ particularly in a world with more expansive standing rights.

3. Maintaining Treble Damages and Fee Shifting

Mandatory treble damages and fee-shifting have been contentious topics in antitrust scholarship for a while. Many criticize their use (particularly in dominance cases), while others defend them fiercely.³²⁸ There are also many proposals for intermediary solutions that depend on the type of harm and the intent of the parties.³²⁹ These proposals, however, are not yet backed by persuasive data, although the available data is incomplete.

The Supreme Court has not been particularly active in this area, with its most significant ruling limiting the award of treble antitrust damages in specific circumstances when there was overlap with a regulatory regime.³³⁰ This is another area where legislators are better positioned than courts to make rules that weigh the tradeoffs between incentives to litigate versus the risk of excessive penalties. In a context of antitrust under-enforcement, challenges in detecting violations and high litigation costs,³³¹ the burden of proof required to change rules that are

324. See Bauer, *supra* note 55, at 438.

325. See Glover, *supra* note 42, at 1180–81.

326. See Nagin, *supra* note 236, at 36; Ramsi A. Woodcock, *The Hidden Rules of a Modest Antitrust*, 105 MINN. L. REV. 2095, 2102 (2021).

327. See Glover, *supra* note 42, at 1197 (discussing high litigation costs and recommending (1) “a permissive pleadings standard for antitrust conspiracy” as well as (2) “a modified discovery regime”).

328. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 OHIO STATE L.J. 115, 115–16 (1993) (summarizing the different sides of the debate).

329. See generally Henry J. Hauser, Tiffany L. Lee & Thomas G. Krattenmaker, *Antitrust Reformers Should Consider the Consequences of Mandatory Treble Damages: What the Admonition Against Putting New Wine in Old Wineskins Can Teach Us About Antitrust Reform*, 107 MINN. L. REV. HEADNOTES 9 (2022) (summarizing proposals to improve the antitrust damages framework).

330. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986). The Court upheld treble damages in other cases. See, e.g., *California v. ARC Am. Corp.*, 490 U.S. 93, 102–03 (1989).

331. See Woodcock, *supra* note 326, at 2102 (describing how the rise in the rule of reason significantly increased costs to bring antitrust cases in the first place, making it more defendant friendly).

more than a century old should be high. There is no evidence that courts systematically award disproportionate damages in antitrust litigation.³³² It is worth noting that an analysis by Salop and White of data from the Georgetown Project came down in favor of treble damages, even at the height of the private litigation boom.³³³ However, more data and better studies are needed to understand the real impact of these obligations in order to justify any proposal for such sweeping changes.³³⁴

The combined impact of changes in antitrust standing with the maintenance of stricter motion practice rules and rules for damages and fees will likely lead to a more calibrated role for private litigation in the enforcement mix. It acknowledges the important complementary role of private plaintiffs for the overall resilience of the enforcement ecosystem while relying on procedural differences to minimize the burdens of private antitrust litigation.

CONCLUSION: ANTITRUST AS A CASE STUDY

Private enforcement is a key feature of the U.S. antitrust enforcement regime, and any attempts to revive competition policy in the long run must better acknowledge its central role. Private enforcement increases deterrence and creates redundancy, helping protect the enforcement system from political fluctuations.

Hybrid regimes that mix public and private enforcement are a pervasive feature of the U.S. regulatory state. Indeed, the Supreme Court's turn against private enforcement has impacted fields as diverse as securities, consumer torts, civil rights, labor law, and False Claims Act litigation. For scholars working on those areas, antitrust should make an interesting case study for at least two reasons. First, because of its specialization, antitrust is a reasonably well-defined field, allowing for more holistic analysis such as the one performed herein. Second, while antitrust databases could improve in quality, they seem better than those in other fields, allowing for a more concrete discussion of the real-world impact of policy changes.

Some civil procedure scholars have begun to examine how private litigation can increase enforcement redundancy, but this scholarship is still incipient. In

332. On the contrary, available evidence indicates that, in most cases, damages are below the gains associated with the abuse of market power (especially once low detection rates are considered). See Lande, *supra* note 328, at 118–19; John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 IOWA L. REV. 1997, 2018 (2015).

333. See Steven C. Salop & Lawrence J. White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73, 86–91 (1986) (analyzing four reasons commonly cited to argue against treble damages and affirming they are not supported by the data gathered by the Georgetown Project).

334. Perhaps a more interesting aspect is to understand dynamic effects—that is, whether judges believe that treble damages are overly punitive and then use rules on standing, burdens of proof, and other legal options to acquit defendants altogether. While this is an interesting theory, the available data does not allow for anything more than speculation. See *generally* Hauser et al., *supra* note 329 (summarizing the discussion for or against treble damages and proposing a simple model on how it may have adverse impacts on enforcement).

addition, redundancy—particularly the diffuse, high-volume redundancy created by private plaintiffs—is costly, and no regulatory regime requires permanent maximum enforcement. A key challenge, then, is building better tools to identify the policy areas where enforcement gaps may lead to significant, long-term harm. This is leading to growing calls for in-depth analyses of how private enforcement mechanisms help accomplish overall regulatory goals in order to develop better-targeted policies.

This Article contributes exactly this type of holistic study, and the main lesson from antitrust is that attempting to design a regulatory system while ignoring political economy considerations can lead to the unravelling of the entire enforcement system.

APPENDIX I: A SUMMARY OF THE SUPREME COURT ANTITRUST DATABASE

The construction of a comprehensive database of all Supreme Court antitrust decisions started with a search on LEXIS to identify all Supreme Court decisions that mentioned the words “Sherman” or “Clayton” (the two main antitrust statutes) since the 1890 term.³³⁵ I read and manually coded all the cases. I recorded the name, date, and citation for each case. I filtered out those cases that did not involve antitrust litigation,³³⁶ and augmented the database with the Supreme Court’s citations of past cases involving antitrust enforcement that did not mention the words “Sherman” or “Clayton.”³³⁷ The result is a total of 474 antitrust cases over the past 130 years where the Court directly dealt with either public or private antitrust enforcement—from *E.C. Knight*³³⁸ (a public enforcement case decided in 1895) to *Axon*³³⁹ (another public enforcement case decided in 2023). Finally, I manually coded the topic of the litigation, the parties involved, and a dummy variable on the case outcome (among other variables). After a merge with other databases containing per-Justice votes in each specific case,³⁴⁰ as well as the full text and the number of citations for each decision, this is likely the most comprehensive database of Supreme Court antitrust decisions to date—with detailed information on almost 4,200 unique Justice votes from 1890 to 2023.

Figure 7 below depicts the distribution of antitrust cases decided by the Supreme Court per term, dividing them according to whether they involved public or private enforcement.³⁴¹ Out of 474 antitrust decisions, 283 involve public litigation, while 191 involve solely private parties.

335. This initial search yielded 947 decisions. The date was selected since the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C §§ 1–7), was enacted in 1890.

336. For example, cases that involve someone named Sherman or Clayton, cases that only quoted once the Sherman Act in a footnote, etc.

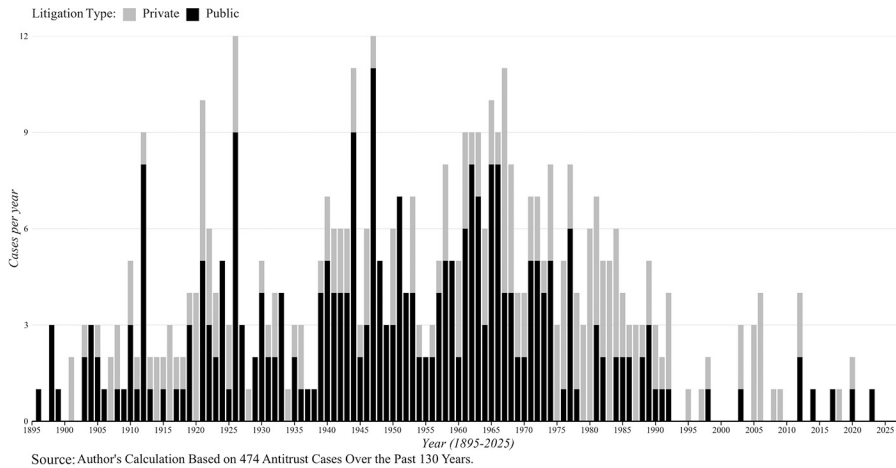
337. This is important for two reasons. First, in the early days, the Court sometimes referred to the Sherman Act by its modern name, but sometimes only through alternative names such as the “Anti-trust Act of 1890.” Indeed, important decisions, such as the landmark *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), do not mention the word “Sherman.” However, the Court regularly cross-references its earlier decisions in subsequent litigation, allowing one to fill gaps by checking cross-citations for cases not in the database. By the 1920s, the Court starts to consistently refer to the Sherman Act by its modern name. Second, in some cases involving the FTC between the 1910s and the 1940s, the Court would only mention the FTC Act with no cross mention to the Sherman or Clayton Acts. *See, e.g., FTC v. Winsted Sted Hosiery Co.*, 258 U.S. 483 (1922). To fill this gap, I also identified initial cases through cross-citations by looking up early decisions involving the FTC (some do mention Sherman or Clayton). After the 1940s, cross-citations between the FTC Act and other statutes become more common, diminishing the risks of gaps in the database.

338. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

339. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180 (2023).

340. *See MODERN Database: 2025 Release 01*, WASH. U. LAW: SUP. CT. DATABASE, <http://supremecourtdatabase.org/data.php> [<https://perma.cc/5UGH-PTT4>] (last visited Oct. 14, 2025) (click show/hide file sets under “Justice Centered Data”).

341. A public case involves either the FTC, DOJ, or a U.S. state among its litigants. Private cases involve solely private actors.

Figure 7: Composition of the SCOTUS Antitrust Docket Over Time.

This slight historical prevalence of public over private litigation at the Court is partially due to the Expediting Act, a law passed in 1903, which allowed the DOJ to appeal antitrust cases directly from the district court to the Supreme Court, obliging the Court to take the case.³⁴² As expected, under the Expediting Act, the government had an impressive 72% win ratio.³⁴³ Once the Supreme Court had control over its own docket, it increased its caseload of private cases in relation to public litigation. Indeed, after Congress removed direct appeals under the Expediting Act, the historical case composition at the Supreme Court diminished to 329 cases: 142 involving public litigation and 187 involving private litigation.

Figure 8 below complements this analysis by plotting the number of decisions issued by the Supreme Court per term over the same period, as well as the moving average of how much antitrust represented of the total cases.³⁴⁴ This was done by matching the case name and identification number from the antitrust database with the same information from the Modern Spaeth database.

Table I presents the antitrust enforcement scores³⁴⁵ of Supreme Court Justices since the 1890s according to the party of the nominating president, grouping them in variations of 0.5 points to facilitate comparisons.

Finally, Figure 9 represents the specific scores of each Justice, separating them between public and private enforcement cases. This is an extension of Figure 6.

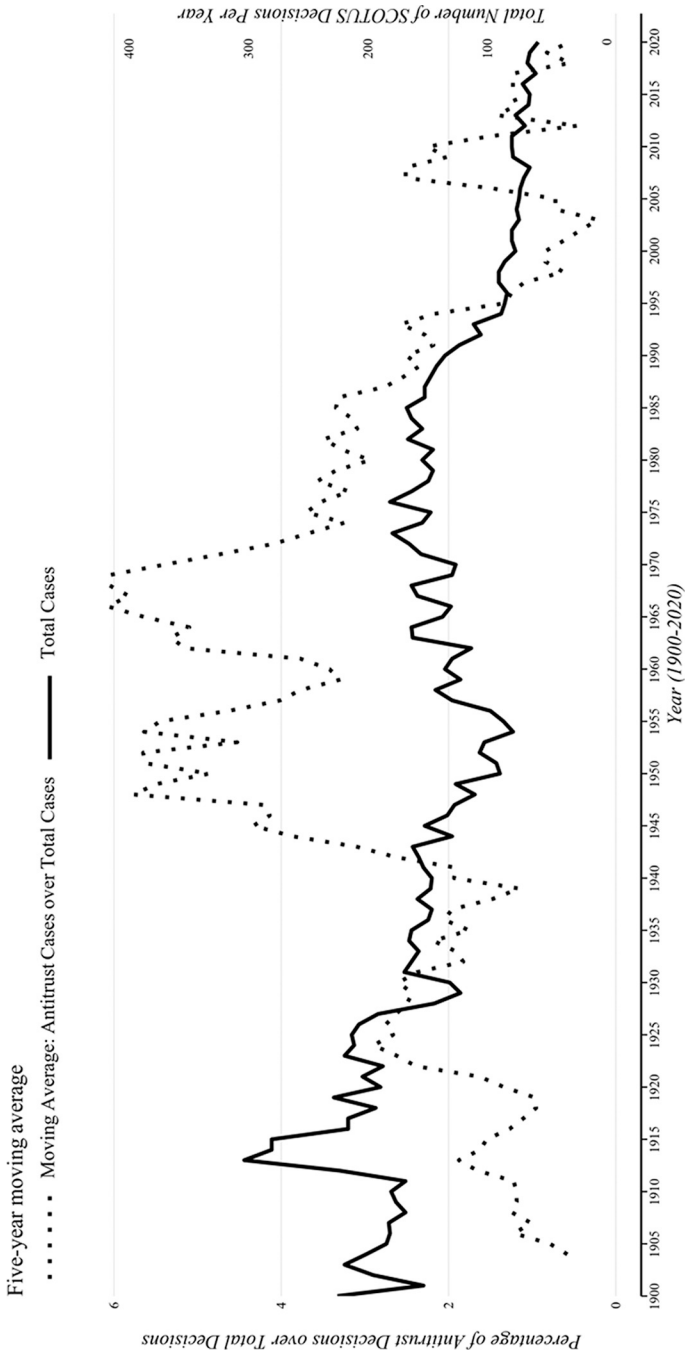
342. See Act of Feb. 11, 1903, ch. 544, 32 Stat. 823. The Tunney Act repealed this “fast-track” mandatory process created by the Expediting Act. See Tunney Act, Pub. L. No. 93-528, § 4, 88 Stat. 1706 (1974).

343. These cases can be identified as direct appeals from the district court.

344. See MODERN Database: 2025 Release 01, *supra* note 340.

345. For a description of the methodology used to build Table I, see *supra* note 77.

Figure 8: Antitrust Decisions Over Total Number of SCOTUS Decisions.



Source: The Supreme Court Database (SCDB) and the author's calculations

TABLE I. ANTITRUST ENFORCEMENT SCORES PER NOMINATING PARTY

Antitrust Enforcement Score Range	Democrat-nominated Justices	Republican-nominated Justices
0.10–0.14		Souter (1990–2008)
0.15–0.19		Thomas (1991–Present)
0.20–0.24		Gorsuch (2016–Present) Alito (2005–Present) J. Roberts (2005–Present)
0.25–0.29		O'Connor (1981–2005)
0.30–0.34		Scalia (1986–2015)
0.35–0.39		Rehnquist (1971–2004) Harlan (1954–1970)
0.40–0.44	Breyer (1994–2022)	Whittaker (1956–1961) Kennedy (1987–2017) Burger (1969–1985)
0.45–0.49	Ginsburg (1993–2019) Clark (1916–1921) Frankfurter (1938–1961)	Stewart (1958–1980) E. White (1893–1920) Powell (1971–1986)
0.50–0.54	Jackson (1941–1953) McReynolds (1914–1940) Brandeis (1915–1938) Minton (1949–1956)	Sutherland (1922–1937) Holmes (1895–1931) O. Roberts (1929–1944) Van Devanter (1910–1936) Fuller (1988–1909)
0.55–0.59	Peckham (1895–1908) Burton (1945–1958) Goldberg (1962–1964)	McKenna (1895–1924) Butler (1922–1939) Brewer (1889–1909) Stevens (1975–2009) Blackmun (1969–1993) Pitney (1911–1922) Brown (1890–1905)
0.60–0.64	Marshall (1967–1990)	Sanford (1922–1929)
0.65–0.69	Reed (1937–1956)	Day (1895–1922) Taft (1921–1929) Stone (1924–1945) Lurton (1909–1913)

Antitrust Enforcement Score Range	Democrat-nominated Justices	Republican-nominated Justices
0.70–0.74	B. White (1961–1992) Vinson (1946–1952)	Hughes (1910–1915) Hughes (1929–1940) Cardozo (1931–1937) Brennan (1956–1989) Lamar (1910–1915)
0.75–0.79	Fortas (1965–1968)	
0.80–0.84 0.80–0.84	Murphy (1939–1948) Clark (1949–1966) Rutledge (1942–1948) Sotomayor (2009–Present) Kagan (2010–Present)	Moody (1906–1910)
0.85–0.89	Douglas (1938–1975) Black (1937–1970)	Harlan (1876–1910) Warren (1953–1968)
0.90–0.94		
0.95–1.00	Byrnes (1941–1942)	

Note: Table I excludes Justices Fields, Shiraz, Gray, Kavanaugh, and Barrett because they did not vote in at least 5 cases.

APPENDIX II: THE POST-1970s SUPREME COURT ANTITRUST JURISPRUDENCE

The appointment of Justice Burger in 1969 marked a shift in how the Supreme Court treated antitrust policy. In a rough outline, the Burger Court (1969–1986) is characterized by a series of important pro and anti-enforcement decisions involving both public and private plaintiffs (though the overall record is, on aggregate, anti-enforcement).

On the *public side*, substantive changes included an increase in the number of markets that are altogether exempt from antitrust enforcement;³⁴⁶ a narrowing of what types of economic activity classify as inter-state commerce for the purposes of the Sherman Act;³⁴⁷ higher burdens of proof when proving collusion between rivals;³⁴⁸ an expansion of the “meeting the competition” defense against claims of price discrimination;³⁴⁹ restrictions on the use of potential competition as a theory of harm in merger review;³⁵⁰ and decisions that required a precise relevant market definition in merger challenges.³⁵¹ On the procedural side, two noteworthy changes were restrictions on the ability of states to sue for treble damages under their *parens patriae* powers³⁵² and a general restriction on indirect purchasers suing for treble damages.³⁵³

These decisions, however, are partially offset by the Court expanding the use of the *per se* rule for certain agreements involving associations,³⁵⁴ expanding the

346. See *United States v. Interstate Com. Comm’n*, 396 U.S. 491, 512 (1970) (exempting railways from antitrust enforcement); *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 108 (1975) (exempting banking); *United States v. Nat’l Ass’n of Sec. Dealers*, 422 U.S. 694, 697 (1975) (exempting certain sales and distribution practices of mutual funds); *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982) (expanding the circumstances under which state laws may preempt the Sherman Act, in this case in the liquor market); *Bankamerica Corp. v. United States*, 462 U.S. 122, 128 (1983) (allowing interlocking directorates between banks and insurance companies).

347. See *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 278 (1975) (“The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods.”).

348. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435, 464–65, 453 (1978) (requiring plaintiffs to prove intent in the case of collusion, allowing parties to claim vigorous price competition as evidence of withdrawal from a collusion, and expanding the use of the “meet the competition” defense in *Robinson–Patman* cases).

349. See *id.* at 453; *Great Atl. & Pac. Tea Co., Inc. v. FTC*, 440 U.S. 69, 78 (1979) (expanding the circumstances under which companies can claim a “meet the competition defense” under the *Robinson–Patman Act*).

350. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 605–06 (1974) (diminishing the scope of the potential-competition doctrine in Section 7 cases).

351. See *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 510–11 (1974) (requiring a more precise market definition in merger challenges).

352. See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 258, 264 (1972) (preventing states from suing for treble damages under *parens patriae* but enabling lawsuits when they are directly harmed). The *Hart–Scott–Rodino Act* would later grant states this power through a statutory change. See 15 U.S.C. § 15c.

353. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745–47 (1977) (preventing indirect purchasers from filing complaints in case of antitrust violations).

354. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (affirming that territorial licenses and restrictions on the wholesale sales of private label goods are subject to the *per se* rule when maintained by associations of potential competitors).

application of antitrust laws to certain sectors of the economy,³⁵⁵ expanding the powers of the FTC to challenge resale price maintenance cases³⁵⁶ and anticompetitive state laws,³⁵⁷ and blocking important acquisitions.³⁵⁸ On the procedural side, the Court also affirmed that the Expediting Act applies to interlocutory orders³⁵⁹ and that the filing of a class action stops the clock of statutes of limitation.³⁶⁰

A similar dynamic of anti-enforcement decisions that are partially offset by some pro-enforcement wins also materializes in *private litigation* cases before the Court. Substantive anti-enforcement decisions include the Court expanding antitrust immunities for certain sectors;³⁶¹ narrowing the definition of interstate commerce for cases involving products that are sold locally;³⁶² narrowing the definition of what types of injury qualify as “antitrust harm”;³⁶³ restricting the use of the Sherman Act against firms belonging to the same economic group;³⁶⁴

355. See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (affirming that antitrust laws apply to energy markets subject to the Federal Power Act); *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695–96 (1978) (affirming that professional associations allegedly establishing minimum quality standards are subject to the antitrust laws).

356. See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (allowing the FTC to use Section 5 of the FTC Act against resale price maintenance provisions).

357. See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454, 458, 459 (1986) (expanding the FTC's Section 5 authority to include professional associations and establishing the “quick look doctrine” for potential violations—although weakening the per se rule for cases under Section 5).

358. See *Ford Motor Co. v. United States*, 405 U.S. 562, 573, 575 (1972) (ordering Ford to divest assets from a vertically related company and prohibiting the company from manufacturing competing products for ten years); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973) (remanding a district court decision to allow an acquisition, and instructing the lower court to assess the target “as a potential competitor”).

359. See *Tidewater Oil Co. v. United States*, 409 U.S. 151, 173–74 (1972).

360. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552–53 (1974).

361. See *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 389 (1973) (immunizing certain acquisitions and other decisions made under the purview of the Civil Aeronautics Board); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 685–86 (1975) (immunizing fixed commission rates set by exchanges due to active supervision by the SEC); *Abbott Lab'ys v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 14 (1976) (exempting non-profit hospitals from the application of certain provisions of the Robinson–Patman Act).

362. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199–201 (1974) (affirming that the sale of local products, such as asphaltic concrete, is not within the scope of the Sherman Act because it does not impact interstate commerce, even when used in interstate infrastructure such as highways).

363. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488–89 (1977) (affirming the requirement of a connection between the type of antitrust injury alleged and the market power of the defendant for the finding of antitrust injury because antitrust laws were designed for “the protection of competition, not competitors” so that the injury has to be connected to a practice “forbidden by the antitrust laws”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532–33 (1983) (employing proximate cause common-law doctrines to generally restrict what qualifies as an antitrust injury and what parties have standing to sue); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477–78 (1982) (same).

364. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771–72 (1984) (affirming that a parent and a wholly owned subsidiary cannot collude under § 1 of the Sherman Act).

increasing burdens of proof for findings of defendant market power;³⁶⁵ requiring clear evidence of collusion to prove a conspiracy under § 1 of the Sherman Act;³⁶⁶ reverting or relaxing the application of the per se for a series of conducts;³⁶⁷ and narrowing the application of the Robinson–Patman Act.³⁶⁸ Procedural anti-enforcement decisions include the Court expanding the use of summary judgements against plaintiffs;³⁶⁹ affirming that administrative remedies must be exhausted before parties can file some antitrust lawsuits before U.S. courts;³⁷⁰ making it more costly to certify class-actions due to increases in notification costs;³⁷¹ and affirming that arbitration clauses may prevent the filing of antitrust lawsuits in federal courts.³⁷²

Even on the private side, though, plaintiffs scored some important wins before the Burger Court, as it expanded the definition of what types of economic activity qualify as interstate commerce;³⁷³ expanded the application of antitrust laws to different sectors of the economy and different types of conduct not previously covered by it;³⁷⁴ expanded the potential liability of companies in cases of refusals

365. *See* U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 622 (1977) (requiring evidence that the defendant “had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer”).

366. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (affirming that, to find a violation of § 1, plaintiffs must provide evidence “that tends to exclude the possibility of independent action by the manufacturer and distributor,” showing that there is direct or circumstantial evidence that tends to prove that there was “conscious commitment” to an illegal agreement). For consistency, this case is coded as pro-enforcement in the database, as ultimately plaintiffs prevail. This is an exceptional case, and modifying its coding does not change overall trends.

367. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57 (1977) (affirming that intra-brand non-price exclusivity clauses should be analyzed under the rule of reason); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 10 (1979) (reverting the per se illegality rule for blanket licenses); Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984) (weakening the per se rule in tying cases).

368. *See* Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 444–45 (1983) (expanding the “meeting the competition” defense under the Act).

369. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (“To survive a motion for a summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”).

370. *See* Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 302 (1973) (affirming that the self-regulation of trading rules is subject to a primary jurisdiction of the administrative body of the Commodity Exchange Commission).

371. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (requiring the notification of all potential class members who can be identified through reasonable effort—without consideration for the size of the class or the overall cost—and imposing all notification costs on plaintiffs).

372. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632–34 (1985) (affirming that the Federal Arbitration Act is broad enough to require the arbitration of both statutory as well as contractual antitrust claims—including international arbitration of disputes).

373. *See* Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 745 (1976) (affirming that a hospital is engaged in interstate commerce when patients come from outer state and the parent company is not located in the state where the hospital is located); McLain v. Real Est. Bd. of New Orleans, Inc., 444 U.S. 232, 245 (1980) (affirming that there is potential interstate commerce in a case involving an alleged cartel of real estate brokers in New Orleans because buyers and sellers could be from other states).

374. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 550 (1978) (expanding the application of the antitrust laws to insurance companies); Grp. Life & Health Ins. Co. v. Royal Drug Co.,

to deal;³⁷⁵ and expanded the reach of the Robinson–Patman Act to certain types of price arrangements involving governmental purchases.³⁷⁶ On the procedural side, the Burger Court enabled consumers to file antitrust class actions;³⁷⁷ expanded the right to file a class action to include anyone whose injury is directly or proximately caused a defendant’s actions;³⁷⁸ and affirmed that attorney fees are also due for costs associated with appeals.³⁷⁹

This somewhat relative indifference to the public or private nature of the plaintiffs involved in litigation changed during the Rehnquist Court (1986–2005) and Roberts Court (2005–Present).

In particular, the Rehnquist Court turned against private plaintiffs. Some noteworthy decisions in private cases include the Court further narrowing the use and application of per se rules for a series of market practices;³⁸⁰ requiring plaintiffs to show probability and intent in attempted monopolization claims;³⁸¹ establishing stricter cost standards and requiring a “dangerous probability” of recoupment in predatory pricing complaints;³⁸² narrowing the case for injunctive relief when

440 U.S. 205, 231 (1979) (same); *Nat’l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378, 389–92 (1981) (same); *Union Lab. Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (same); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591, 594–95 (1976) (denying a state action doctrine defense on electricity markets and expanding the application of the antitrust laws to aftermarkets—in this case, the sale of light bulbs to municipal utilities); *Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570–71 (1982) (affirming that associations imposing non-price restrictions can violate the antitrust laws); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (affirming that state bar associations are not immune from antitrust prosecution); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 383 (1985) (expanding federal antitrust jurisdiction by affirming that a state antitrust claim does not preclude a federal claim).

375. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603, 605 (1985) (affirming that a dominant company can be liable for antitrust violations in cases of refusals to deal that cannot be justified by efficiency considerations or another economic rationale).

376. *See Jefferson Cnty. Pharm. Ass’n, Inc., v. Abbott Lab’ys*, 460 U.S. 150, 154 (1983) (affirming that governmental purchases are not exempt from the Robinson–Patman Act).

377. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979).

378. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 477–78 (1982).

379. *See Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222, 223 (1970) (per curiam).

380. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (narrowing the application of per se rule in challenges involving vertical price restraints and requiring a clear agreement on prices for per se vertical prohibition.); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (narrowing the concept of antitrust injury in the case of vertical maximum resale price maintenance to require proof that the maximum prices were predatory in order to cause harm to a competitor, even in a per se conduct); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (reverting decades of precedent to affirm that maximum resale price maintenance should be subject to the rule of reason.); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135–36 (1998) (narrowing the per se rule in case of group boycotts).

381. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (“We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.”).

382. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24 (1993) (affirming that plaintiff alleging predatory pricing must show not only changes in market conditions adverse to its interests, as a threshold matter, but must show on the merits that (1) “the prices complained of are below an appropriate measure of its rival’s costs,” and (2) that the competitor had a “reasonable prospect” or “a dangerous probability of recouping its investment” in the alleged scheme);

private plaintiffs challenge mergers;³⁸³ restricting the ability of private plaintiffs to claim antitrust injury in the case of refusals to deal;³⁸⁴ and restricting the award of treble damages in some types of antitrust litigation.³⁸⁵

The Roberts Court continued to decide private cases against plaintiffs. It exempted sectors and practices from the application of the Sherman and Clayton Acts;³⁸⁶ reversed precedents affirming that patents enabled a presumption that firms have market power in the patented market³⁸⁷ and that minimum resale price maintenance is per se illegal;³⁸⁸ weakened the Robinson–Patman Act as a free-standing source of law;³⁸⁹ and narrowed the types of conduct that may give rise to antitrust harm while raising burdens of proof on plaintiffs.³⁹⁰ On the procedural side, the Court heightened pleading requirements for federal civil cases,³⁹¹ expanded the use of arbitration clauses;³⁹² and increased thresholds for class certification.³⁹³

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 596–97 (1986) (affirming that predatory pricing claims are speculative in nature and requiring a high-burden of proof to affirm a violation).

383. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 (1986) (“We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury.”).

384. *See Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408–09 (2004).

385. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422–23 (1986) (restricting the award of treble damages in private cases involving the ICC because of stare decisis.)

386. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (affirming that joint-ventures can set common prices in exemption of § 1); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007) (exempting investment banks from antitrust enforcement when they act as underwriters).

387. *See Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 42–43 (2006) (overruling *International Salt Co. v. United States*, 332 U.S. 392 (1947), and affirming that patents do not automatically provide market power in the patented market).

388. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and affirming that minimum resale price maintenance should be analyzed under the rule of reason).

389. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169–70 (2006) (affirming that the Robinson–Patman Act does not apply to intra-firm price discrimination).

390. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57, 566 (2007) (establishing that parallel conduct, in the absence of evidence of an explicit agreement, is insufficient to sustain an antitrust action under § 1 of the Sherman Act, and also affirming that dominant companies do not, absent specific requisites, have a duty to deal with their competitors); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 323 (2007) (affirming that the *Brooke Group* standard for predatory pricing also apply to predatory bidding); *Pac. Bell Tel. Co. v. Linkline Commc’ns*, 555 U.S. 438, 449–52 (2009) (affirming that margin-squeeze is not an antitrust offense, and that, in general, companies have no duty to deal at the wholesale level).

391. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring plaintiffs to include enough facts in their complaints to make them plausible (as opposed to possible or conceivable), before they have access to discovery, in order to survive a motion to dismiss).

392. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013) (affirming that a contractual waiver of class arbitration is enforceable even when the individual adjudication of claims has a negative economic value).

393. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34–35 (2013) (requiring private plaintiffs to show a stronger connection between the theory of antitrust harm alleged and the alleged harm to all class members to certify a class).

There are only three noteworthy private wins during Justice William Rehnquist's tenure as Chief Justice: One case affirmed that the Eighth Amendment to the Constitution does not prevent the jury from awarding punitive damages in private antitrust enforcement,³⁹⁴ another expanded the notion of interstate commerce to include boycotts that take place through congressional action,³⁹⁵ and one case expanded private antitrust enforcement in aftermarkets.³⁹⁶ The Roberts Court's only important private plaintiff (partial) win is the 2021 *Alston* decision, where it sided with college athletes against universities' policies on non-cash compensation for academic-related purposes.³⁹⁷

The inverse happens on the public side. The only two noteworthy anti-enforcement examples during the Rehnquist Court were a decision that restricted the ability of states to sue for treble damages under their *parens patriae* powers when the harm is entirely indirect,³⁹⁸ and another narrowing the so-called quick look doctrine to cases where the negative effects of the conduct are "intuitively obvious."³⁹⁹ During the Roberts Court, there are (so far) only three noteworthy public anti-enforcement decisions, and these all occurred after the first Trump presidency. The first required courts to define relevant markets to find antitrust injury while allowing defendants to claim efficiencies on both sides of a single market.⁴⁰⁰ The second prohibited the FTC from directly asking courts to disgorge profits in Section 5 cases.⁴⁰¹ The third allowed defendants to challenge the constitutionality of the FTC's administrative law enforcement system before district courts.⁴⁰² All of these were issued after 2016.

394. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 (1989).

395. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332–33 (1991) (affirming that a group boycott taking place through a congressionally regulated peer review process can lead to antitrust harm if it excludes competitors).

396. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 486 (1992) (denying Kodak's motion for summary judgment and affirming that a jury could find that Kodak had abused its dominant position in one market to exclude competitors in an aftermarket).

397. See *Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 91–93 (2021).

398. See *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 219 (1990) (preventing states from suing under *parens patriae* when the harm to the state was only indirect).

399. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 759, (1999) (affirming that the FTC has jurisdiction over non-profit associations and entities but restricting the quick look doctrine application to cases which where the negative effects of the conduct are "intuitively obvious").

400. See *Ohio vs. Am. Express Co.*, 585 U.S. 529, 543–45 (2018) (requiring well-defined relevant markets as a pre-requisite of findings of antitrust harm and allowing defendants to affirm the existence of a single two-sided market which enables defendants to claim expanded efficiency and welfare gains). For a discussion regarding the many problems with the decision, see generally Caio Mario S. Pereira Neto & Filippo Lancieri, *Towards a Layered Approach to Relevant Markets in Multi-Sided Transaction Platforms*, 83 ANTITRUST L.J. 429 (2020).

401. See *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 82 (2021) (imposing restrictions to the FTC's disgorgement power).

402. See *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180 (2023) (affirming that the constitutionality of the FTC administrative law regime can be challenged before district courts).

In both the Rehnquist and Roberts Courts, however, there are noteworthy public wins. During the Rehnquist Court, the Court expanded the FTC's powers under Section 5 of the FTC Act by restricting the state action doctrine;⁴⁰³ safeguarding the DOJ's civil division access to documents from criminal grand jury investigations when the same lawyers work on both cases;⁴⁰⁴ expanding the powers of state attorneys general to enforce the antitrust laws;⁴⁰⁵ and restricting the potential immunity to the antitrust prosecution of insurance companies.⁴⁰⁶ During the Roberts Court, the Court affirmed the potential illegality of reverse payment settlements and narrowed the potential scope of patents⁴⁰⁷ and restricted the protection granted by the state action doctrine to state healthcare systems⁴⁰⁸ and state regulatory boards.⁴⁰⁹

403. See *FTC v. Super. Ct. Trial Laws. Ass'n*, 493 U.S. 411, 436 (1990) (affirming the per se rule for lawyers boycotts under Section 5 of the FTC Act); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635–36 (1992) (expanding the reach of Section 5 enforcement to insurance markets, while denying state action immunity).

404. See *United States v. John Doe, Inc. I*, 481 U.S. 102, 115–16 (1987) (safeguarding the DOJ civil division's ability to obtain access to documents in grand jury investigations when the same lawyers work on both cases).

405. See *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (allowing states to litigate as indirect purchasers under their *Illinois Brick* repealer statutes); *California v. Am. Stores Co.*, 495 U.S. 271, 285–86 (1990) (allowing states to block mergers and require partial divestiture through injunctive relief under Section 7 of the Clayton Act while the full trial is pending).

406. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 784 (1993) (restricting the immunity granted by the McCarran-Ferguson Act for conspiracy among insurers in both internal and international collusion).

407. See *FTC v. Actavis, Inc.*, 570 U.S. 136, 149 (2013) (affirming that reverse payment settlements can violate the antitrust laws under a rule of reason analysis).

408. See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 235 (2013) (affirming that a Georgia statute that granted general corporate powers to hospital authorities did not immunize them of antitrust scrutiny because there was no clear articulation of the antitrust immunity).

409. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505 (2015) (affirming that state governments must actively supervise organizations if they are to benefit from state action immunity).