

Administrative Relief and Private Rights of Action under the Antitrust Laws

Richard A. Epstein

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By

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One of the perennial analytic difficulties arises in connection with choosing the appropriate choice of remedies for established violations of any given body of substantive law. The choice of remedies does not deal with simple dichotomous choices, but rather with the suite of remedies that should be combined in any given case. The failure to observe the importance of mixing and matching remedies has to be stressed at the outset. The most common analytical framework to analyze this problem is that proposed by Guido Calabresi and Douglas Melamed, which is to create a dichotomy between property rights, which are protected with injunction relief, and a liability rule that offers only damage as compensation for some wrong.¹ That position is vulnerable in my view to the decisive objective that it treats damage and injunctions as though they are polar opposites by forcing one of two unacceptable positions—either enjoin and have a fierce holdout problem or permit and have a huge externality problem.² The key in all these cases is to get off the corner by using marginalist principles, which allows for mixing and matching of remedies. Start at either end, and then move toward the other pole in well measured steps, seeking to balance the inconveniences as one goes. The choice of which path really matters, because ideally the initial choice should be made at that pole which is thought on average to be closest to the general equilibrium position, which in most cases, especially those which involve the threat of repeated deliberate wrongs,³ will be in favor of injunctive relief, which in turn case be limited in a variety of ways. It is possible to defer the injunction, to limit it for some period of time, to impose it on a

* The Laurence A Tisch Professor of Law, The New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, the Hoover Foundation, the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, The University of Chicago. This draft has been prepared for the Gray Center Program on Antitrust Law and the Administrative State to e held on May 5, 2022. It is at this stage so tentative that no one, but no one, has looked at it. So, reader beware.

¹ Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability*, 85 HARV. L. REV. 1089 (1972).

² Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493 (2018).

³ Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091 (1997).

set of conditions, or to have periodic reviews to take into account changed circumstances. That injunction in turn can be married with different damage remedies that can “clean up” for the common shortfall in protection that injunctive relief provides. There is no fixed guidelines for making these adjustments, which is why the legal system constantly refers to the “sound discretion” that is vested in the trial judge to deal with these remedial questions of mixing and matching.⁴ Indeed, as Doug Rendelman further notes, it is often supposed that the level of judicial discretion has to go all the way down, to take into account unanticipated circumstances that can question any general legal rule as has been articulated by great figures from Aristotle in the *Nicomachean Ethics*⁵, and Blackstone in his commentaries.⁶ In my view the basic legal rules on legal entitlements do not often raise questions that require some equitable adjustments,⁷ but that these problems typically arise when some particular person deviates from the initial set of norms which in turn requires everyone else to the unenviable task whereby they have to make “reasonable adjustments” to deal with the initial deviation, where the word reasonableness cannot be replaced with any more definite term, and thus invites the type of adjustments that could not be foreseen to be fully accounted for by any legislative or judicial rule.⁸ Thus it is often the case that a given defense (self-defense) may provide only partial protection which then requires remedial adjustment in fashioning the remedy for this particular belief.

⁴ See, e.g., Doug Rendelman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L. J. 1397 (2015).

⁵ ARISTOTLE, *NICOMACHEAN ETHICS* 172 (J.E.C. Weldon trans., Macmillan 1912) (c. 384 B.C.E.).

Whenever then the terms of the law are general, but the particular case is an exception to the general law, it is right, where the legislator's rule is inadequate or erroneous in virtue of its generality, to rectify the defect which the legislator himself, if he were present, would admit, and had he known it, would have rectified in legislating.

⁶ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 61 (Oxford, Clarendon Press 2009) (1765): “Since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.”

⁷ Richard A. Epstein, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

⁸ Richard A. Epstein, *Rules and Reasons, Public and Private: On the Use and Limits of Simple Rules 25 Years Later*, 55 EUR. J. L & ECON. 363 (2021).

My basic thesis is that this framework is well-nigh universal so that it applies with equal force across *all* legal subject matter areas. There are, to be sure, differences in the relative frequency of different remedial patterns across different areas, just as there are likely to be differences within given areas of law. It is also the case that the notion of sound discretion means that two different decisions may clash with each other, but still fall within the area of sound discretion which means that appellate review of these decisions are likely to be more deferential than the review that is given to answers to questions of law decided below, which are virtually always subject to de novo review, given the yes/no answers that are much more likely to occur in these contexts. The same set of difficulties carries over to the selection of antitrust remedies. Accordingly, it is useful to see how these two systems interact elsewhere in an effort to help find the proper mix under the antitrust laws. In section I, therefore, I shall look at the some of the various permutations that arise in the context of ordinary tort actions for physical injuries or property damage, after which I shall examine in section II how these arguments carry over to the antitrust laws. The inquiry here shares the general characteristic of the great divide between the establishment of a violation and the selection of a remedy for its occurrence.

PART II. THE BASIC PROBLEM IN A TORT CONTEXT. The problems of liability law often start in a state of nature in which there is no antecedent set of property rights, but it rarely remains in that condition. But it is helpful to see how the situation plays out before any property rights regime is put into place. Thus, in the state of nature the only set of property rights that can be examined are those that individuals have in themselves, which for these purposes include the exclusive right to their own bodies and through that right to the exclusive use and disposition of their labors. As a matter of abstract principle, these rights could include the right to do whatever one pleases, whatever the consequences. But that form of personal license has never been accepted as a durable norm for individual behavior, because it leads to the war of all against all, which no one can win, given that some short term alliance among the weak could easily topple the strong when they are isolated or asleep.⁹ Hence the common trope, accepted on all sides is that there must be a mutual renunciation of the use of force even in the state of nature, so that as a matter of common consent—a devilish conception—aggression operates as a violation of some basic norm which commands a high level of compliance even if there is no enforcement mechanism in place.

⁹ The obvious reference is to Thomas Hobbes, *LEVIATHAN* ch. 14(1651), the war of all against all, *bellum omnium contra omnes*)

The first body of law to emerge, in response to this admitted peril is the law of trespass (*vi et armis*). The law of trespass to the person thus begins with that simple command that force should never be applied to the person or property of another. The same basic intuition dominates in all Roman law systems under the Lex Aquilia, with its simple prohibition of the killing of a slave or herd animal and carries through to the common law of trespass that prevents the deliberate application of force (however executed) against the person or property of another. But the simple command then yields to complications about whether someone is entitled to use force in order to stave off the threatened force of another.¹⁰ Similarly with land, entry into the property of another creates the *prima facie* case of liability, but the remedy chosen will depend on such factors as to whether the entrance was deliberate or accidental, whether monetary damages are sought or available; whether some kind of injunctive relief should be made available; and whether the particular dispute gives rise only to issues that involve two particular parties or whether there are implications that stretch out across other places and other times; whether the defendant has some justifications that can be offered for the conduct in question. The effort to deal with these matters gives rise to a bewildering set of options whose outlines are difficult to trace in any particular case. But even though it is not possible to identify a unique set of remedies that carries over to all situations. Thus, at root there will necessarily arise a wide range of variations that often survive the close analysis.

The general logic of the social contract is an effort to make sure of uniform compliance with these rules, which then requires some method to bind the dissenters who either generally or in particular case want to deviate from this basic norm, by finding some way to drive out those individuals who are intent on its violation. Hence there are two stages of social improvement. The first is the tacit agreement, and the second is the emergence of the social norm, which in turn is enforced by the simple rules of trespass against either person or property through some general public mechanism, which then operates in two different dimensions. The first is the authorization of the private right action for the discrete individual harm, and the second is the creation of some alternative set of sanctions, often enforced by public officials against individuals who by attempt or conspiracy seek to undermine that basis prohibition against the use of force. Thus, the overlap between public and private enforcement is built into the ground floor in the formation of any

¹⁰ See, e.g., *Tuberville v. Savage*, 86 Eng. Rep. 684 (K.B. 1669); *Courvoisier v. Raymond*, 47 P. 284 (Colo. 1896).

political body, so that the real challenge is to develop a coordination mechanism between them, which usually takes the form that the tort law gives protection against completed aggression while the criminal law takes on conspiracies, attempts, aiding and abetting and the like.

The state of affairs described thus sets out the most minimal conditions for public order because it does not articulate any clear system of either public or private property rights, both of which have been built into the law from the earliest times.¹¹ The exclusive possession of land, with the concomitant rights to develop or to alienate are necessary to make productive uses of natural resources. But correspondingly transportation and communication grids are needed to transfer people, goods, and (information) from one location to another. These were from the earliest times a form of common property to which all have access and in which, as a first approximation, none could acquire exclusive rights. The same two-part applies here as to the rules designed to preserve the natural integrity of the person. Thus, with respect to private property, the owner has redress against others that take it over—by protection against encroachment on the one side and the award of damages for completed harms on the other side. And the state forms a general protective web to deal with either threatened or diffuse harms, for which private rights are ineffective, given that the cost of protection are so high that separate individual actions are not in a position to provide any kind of effective relief, so that state action funded by tax revenues takes the place to offer some combination of injunctive relief and fines to back up the private system.

Thus, the basic structure here was well articulated long ago by the important public nuisance case of 1536, whose basic approach to the coordination problem remains the dominant approach today.¹² In that case the defendants had created a public nuisance of a most ordinary kind, by blocking traffic along a public highway. This plaintiff sued because the blockage prevented him from reaching his close. The Chief Justice Baldwin took the position that to allow any individual plaintiff to sue would open the floodgates to countless other individuals, so that the defendant “will be punished a hundred times on the same case.” Hence, he thought that the only proper remedy was to bring his complaint to the Court of Leet, a special baronial court. But Fitzherbert, J. took the contrary position, shared by two other judges, and he sought to close the floodgates by limiting the private right of action to those individuals who have suffered a “special

¹¹ See Justinian, *INSTITUTES*, Book II, Title 1 (describing public and private rights).

¹² *Anon.*, Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1536)

hurt,” above and beyond that suffered by others. His initial illustration was of someone who at night (to negate contributory negligence) who fell into a ditch dug by the defendant along the way. Subsequently, a second move was added to say that second form of special damages—albeit not as severe as the first—to be denied entrance into his close. At this point the basic structure becomes clear: special damages give rise to a distinctive private action, while general damages give rise to a quasi-criminal proceeding that results in a fine.¹³

There are difficulties with this neat dichotomy that reassert themselves in the context of general antitrust actions. Suppose one individual suffers damages of 100 while everyone else suffers damages of 1. Now the distinction holds, but now let the number of parties interest shrink and the damage per party increase, and the line between the two cases becomes blurrier, so that what should be done with a street closing that interferes with the business of dozens of people on a busy street, far greater than the harm suffered by someone on a nearby street to which traffic is diverted, resulting in a lesser degree of harm. So clear distinctions give rise to hard cases, which is no reason to abandon the principle, given that most cases fall away from the tipping point, so that this particular distinction has sufficient legs that it articulates nearly 500 years later a constitutional principle in eminent domain cases under the Fifth Amendment where the special and general damages are imposed on government agents for their interference with property rights of access, which was the situation in *Richards v. Washington Terminal Company*,¹⁴ where the special damages came from the emission “by the volumes of dense black or gray smoke, and also by dust and direct, cinders and gases,” emitted from the train, concluding that “under the Fifth Amendment . . . the legislature may legalize what otherwise would be a public nuisance, [but] it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.”¹⁵

That same position was taken by Chief Justice Holt in yet another Anonymous case nearly 200 years later, where he wrote quite simply: “[F]or wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the

¹³ “Criminal”, because it is collective and brought by the state. “Quasi” because the traditional mens rea requirements do not apply to these actions only make sense if the liability is the same in both public and private cases.

¹⁴ 233 U.S. 546 (1914).

¹⁵ Id at 553.

advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity. . . ,¹⁶ where the last phrase is intended to state that an injunction against some future harm as issued in a Court of Equity falls short because it does not cover interim harms—yet another position that has a constitutional translation where at least in principle an illegal zoning ordinance is not remedied by a ruling that enjoins its future enforcement but does nothing to remedy the interim losses.¹⁷

Yet at the same time, that some decisions sought to give constitutional standing to the two-fold system of relief, a second trend has cut in exactly the opposite direction. Thus, the rule announced by Lord Holt is often interpreted as a presumption that can be overridden by explicit legislation intention that denies the existence of a private right of action based upon the general legislative rule. In particular, the canonical statement of this rule is found in *Cort v. Ash* where the basic proposition is stated as follows:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the classes for whose *especial* benefit the statute was enacted,” . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?¹⁸

So, the cross currents run as follows: the special damage provision survives as the initial cut, but it falls if the second factor kicks in when the Congress states that there should be no private right of action. The third factor then makes perfectly good sense, because the use of a private right

¹⁶ *Anon.*, 87 Eng. Rep. 791 (K.B. 1703).

¹⁷ The California Supreme Court had held in *Agins v. City of Tiburon*, 598 P.2d 25 (1979) that the only remedy for an illegal zoning action was for its removal. The proposition was rejected in *First English Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1982). The recoveries under the *First English* doctrine have been few and far between.

¹⁸ *Cort v. Ash*, 422 U.S. 66, 78 (1975)

of action that is at cross purposes with the stated public goal should in general be rejected. And it does make good sense particularly in those cases where the private suit for a public nuisance is brought in the form of a class action that seeks recovery for a large number of private parties, none of which have suffered special damages, as was the case in *American Electric Power Co. v. Connecticut*¹⁹ held that *federal* private rights of action were blocked under the view that the space for regulation was occupied by the Clean Air Act. That was a form of federal-federal preemption which left open—gratuitously in my view²⁰—and has spawned ingenious attempts to try to bring public nuisance like actions against upstream suppliers of petroleum products, where the chains of causation are longer, to avoid *AEP*. Yet in another parallel development, the Supreme Court again show its hostility to private rights of actions even for special harms in *City of Milwaukee v. Illinois*,²¹ where the Court refused to allow a private cause of action for nuisance, even when special occurred, which again deviated without reason from the pattern first developed in the 1536 public nuisance cases.²²

II. THE FRAMEWORK AS APPLIED TO ANTITRUST CASES. As noted earlier, the central thesis here is that the complex rules that apply to the mixing and matching remedies is in a strong sense trans-substantive in so far as they apply to legal regimes whose underlying content is wholly disparate from each other. That is evident in two ways here. First the movement from ordinary tort to antitrust could be regarded as something of a leap—at least until it is recognized that the early common law origins of antitrust law on such issues as predation²³ and cartelization and the collective refusal to deal,²⁴ were dealt with under the general tort law, where there was a constant tension between the effort to tease out the implications of certain practices for market efficiency,

¹⁹ 564 U.S. 410 (2011).

²⁰ Richard A. Epstein, *Beware of Prods and Pleas: A Defense of the Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L. J. ONLINE 317 (2011), <http://yalelawjournal.org/2011/12/06/epstein.html>

²¹ 451 U.S. 304 (1981).

²² Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, 102 NORTHWESTERN U.L. REV. 551 (2008).

²³ See *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598 (1889), *aff'd* 1892] A.C. 25 (predation).

²⁴ *Allen v. Flood*, [1898] A.C. 1; *Quinn v. Leathem*, [1901] A.C. 495, both with collective refusals to deal

on the one side, and to plumb the meaning of the term “malice” as it relates to economic affairs on the other.²⁵ It should therefore be no surprise that many of the issues that started out life as tort cases have been transmuted into statutory antitrust cases with the passage of first the Sherman Act in 1890 and then the Clayton Act of 1914, which successfully expanded the scope of potential liability. In order to see how the progress works I think that it is best to go in stages, and to start with the simplest of regimes in which the only relief sought is that of an injunction, and usually a pretty simple injunction at that. Thereafter, we can start to see how the remedial complications make the system more complicated by looking at the Illinois Brick line of cases under the so-called “direct purchaser” rule which itself gets mixed up with the complicated distributional challenges that arise in a full range of other contexts. Thereafter, the question then pivots quite naturally to dealing with the way in which it is possible to marry monetary impositions against an antitrust defendant whether in the form of fines or class action damages.

THE NAKED INJUNCTION. In dealing with antitrust as with other forms of injury, one key question is whether it makes sense to seek solely some form of injunctive relief. Here the great advantage of this particular rule is that it simplifies litigation and enforcement and thus allow for the more prompt decision on whether some relief should be granted. The problem in most case is always complicated because (wholly without regard to the substantive law of the case) there is the problem of deciding whether to issue some kind of preliminary injunction before the case is finally determined. The standard formulation of the doctrine (in a case of environmental harm) is *Winter v. Natural Resources Defense Council*,²⁶ which articulates the rule as follows:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

As articulated in this case, it appears as though the entire matter is one that seeks to adjust for uncertainty in the case of conflicting interests. In *Winter*, the NDRC sought prevent the naval from conducting certain maneuvers in a sensitive maritime location where it was alleged that the physical activities of the Navy could compromise the environment. The Court held that there were

²⁵ For discussion, see Richard A. Epstein, *Intentional Harms*, 4 J. Legal Stud. 391 440 (1975) (tracing developments in both England and the United States.)

²⁶ 555 U.S. 7 (2008)

strong interests on both sides of this equation, given the need of the Navy to use this location and refused to allow the remedy.

The question then arises as to who this translates into a simpler case in which the only question on the table is whether the defendant has engaged in some illegal form of price fixing behavior, for now the only trade-off asks whether the delay in an injunction only setting allows a defendant to escape liability for wrongful sorts of conduct. Here it is far from certain which way the balance of equities should go. Impose the restriction too late, and overcharges will persist, without the possibility of add-on damages. Impose it too soon, and competitive player can be hit with extra losses. In many cases, it is difficult to decide which of the two harms is the worse, and so the usual principles of civil cases under conditions of uncertainty should apply. Given the absence of damages, the relative probabilities should control in these cases, which leads to a certain indeterminacy, to say the least, in the outcome. But the initial advantage of this approach is that it allows for the entire case to be teed up sooner, so that the final judgment can be obtained earlier than it can in those cases where the matter of final recovery is necessarily delayed until the damage issues, which themselves in these cases can be quite difficult to determine. It is also the case that this approach has a further advantage in that it allows for questions of law about the reach and scope of the Sherman or Clayton Act be addressed in a cleaner fashion, which should aid in the long-term clarification of the law.

In some cases, this problem takes care of itself, given the relationship between the industry and the government. Thus in *United States v. Appalachian Coals*,²⁷ it was brought to the attention of the FTC by the defendants themselves that they were trying to organize a common and exclusive selling facility in order to combat the “deplorable” conditions in the market for coal in the local region, where members of the operation constituted about 54 percent of the relevant market, which owing to the high cost of transportation for coal was only a subset of the national market. The question of the timing of injunctive relief was obviated in this case by the decision of the Defendants to hold off on the operation of their scheme until the FTC (and the courts) had the opportunity to review the facility. It looks as if this facility has little if any advantage in the mechanics of selling so that the only possible rationale for its existence is to increase the price of coal, but cutting the total amount sold in ways that run in tension with the Sherman and Clayton Act. The Defendants offered a wide range of defenses summarized as follows:

²⁷ 1 F. Supp. 339 (W.D. Va. 1932).

It is argued in defense of such agencies that their purpose is not to restrain trade but to promote it; that they undertake not to limit the production of any producer but to sell his production; that they will eliminate wasteful and ruinous practices such as the dumping of no-bill coal and pyramiding; that they will reduce selling costs; that they will promote more efficient and correct grading; that they will conduct scientific investigation which will result in the more efficient and more extensive use of coal; that they will be able to carry on, and will carry on, more effective advertising and selling campaigns; that they will be better able to meet the competition of petroleum, natural gas, and water power; and that they will furnish as among themselves more intelligent and more effective competition—competition based upon an intelligent view of market conditions and not upon the necessities of the individual producers. With respect to the elimination of competition, it is said that only the cut-throat price competition among the individual members will be eliminated, and that there will remain competition between different grades of coal and competition among the members even as to price, as the various producers will bring pressure upon the organization to fix prices at which their coal can be moved. It is said, also, that the agency will be powerless to fix the market price of coal because of the competition of other selling agencies and of outside producers, who control a substantial part of the actual output and a larger part of the productive capacity of the district.²⁸

The advantage of this procedural posture is that it sets up an excellent forum in which the defenses so advanced can be adjudicated in orderly fashion, before the new project is undertaken. The disadvantage is that if the scheme is ultimately pronounced as legal, it imposes some social loss. The District Court (three appellate judges) took the hard-line approach that the key operation of this group was to set prices and to limit output, such that the want of control over the entire market did not preclude them from having a negative price on the system.

The decision is certainly in line with modern antitrust theory, but the answer to these same questions received a different answer in the United States Supreme Court differed on the scope of the relevant market when the case was heard on appeal in *Appalachian Coals, Inc. v United States*,²⁹ which held that under a rule of reason standard the finding below was premature insofar as it broadened the scope of the geographical market, by noting that the majority of the coal that was marketed by the cooperative association was marketed in nearby regions where the competition for sales was otherwise intense, so that under a rule of reason the government was not able to establish an adverse effect upon the market solely because they were able to eliminate competition among themselves,³⁰ and it detailed a number of practices whereby members of the

²⁸ Id at 341-342.

²⁹ 288 U.S. 344 (1933).

³⁰ Id at 360.

group were able to dispose of the coal (like pyramiding where the same coal was sold more than once. It therefore held that the claim for relief was at best premature but allowed further actions to be brought down the road if necessary.

On this timing issue, the response here is that the association could engage in those practices without having to set prices. In this regard one sensible approach is to partition the various activities and to allow the particular practices thought to eliminate duplication and waste to go forward without allowing the limited price fixing to remain. It has been persuasively argued, that it is a mistake in antitrust law to try to estimate or to compensate prices changes of an uncertain amount.³¹ Rather it is enough to prohibit the exclusionary or collusive practices in order to procure a major simplification of the antitrust laws by concentrating on the injunctive relief, and one might add by being attentive to the same element that applies to various injunctions elsewhere, namely to condition and limit the injunction in ways that spares efficient practices while going after collusive ones. The loss of damages could be regarded as something as a plus, given that the delay in termination is coupled with what might become an excessive award of damages. So, while I prefer the District Court version of the case, this slimmed down remedial function seems to work well enough that it should not be automatically displaced.

The same FTC approach for a cease-and-desist order, effectively an injunction only was also applied in the well-known antitrust case of *Fashion Originators Guild of America v. FTC*³² in which the demand for injunctive relief also permitted the isolation of an important point of principle. FOGA was a trade association whose members marketed various dress designs on a broad scale. At that time these items were not protected in any form against copying by what FOGA and its members term “style piracy” whereby rival manufactures who made similar knock off designs by copying at lower costs the dresses and other garments which then they sold in competition with the plaintiffs. This price fixing arrangement was in fact quite limited, as the parties in question did not deviate from the usual competitive norms on any issue before them, except to counteract the systematic pirating that took place. Hence, the case was far removed from the ordinary price-fixing arrangement that the parties go to great length to conceal from the government. There was, moreover, at the time neither copyright nor patent protection against these

³¹ Daniel Francis, *Making Sense of Monopolization: Antitrust and the Digital Economy*, 84 ANTITRUST LAW JOURNAL (2022).

³² 312 U.S. 457 (1941).

actions by unlicensed competitors. But by the same token the usual rationale for both copyright and patent protection was to make sure that the labor that one-party puts into the creation of some protected article will serve the identical function as the guild members desired. So that there is at the least no easy inference that the welfare consequences of this transaction are the same as to those which are found in the garden-variety cartel.

Nonetheless, Justice Black refused to entertain any of these complications when he wrote:

Nor can the unlawful combination be justified upon the argument that systematic copying of dress designs is itself tortious or should now be declared so by us. In the first place, whether or not given conduct is tortious is a question of state law, under our decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). In the second place, even if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law. And for these same reasons, the principles declared in *International New Service v. Associated Press*, 248 U.S. 215 (1918) cannot serve to legalize petitioners' unlawful combination. The decision below is accordingly affirmed.

On the first point, *Erie* (which was decided only after *INS*) stands for the proposition that in diversity cases there is no such thing as federal common law, so that the federal courts have to follow established state law or their best guess as to what that state law would provide. *FOGA* introduces a variation on that fundamental theme for now the question of state law arises as a possible defense to a federal action for a cease-and-desist order. But even though the case does not arise under diversity jurisdiction, the same principle ought to apply so that it would be incumbent on the government to figure out how to deal with the state law question, which is of genuine difficulty here because, although the guild had its business headquarters in New York City, its individual members spanned the entire country, so that it could be argued that the sales actions that were taken in individual states had to be governed by the law of that state, and not by the general principles of common law that controlled implicitly in *INS*. But either way it is not an easy question to decide whether the federal antitrust law should preempt the local state law on these issues if in fact the state law prohibited this form of copying, or, somewhat harder, the best guess of the Supreme Court is that it would so bar these kinds of activities. Given that the federal interest in cartel suppression is surely attenuated in this case, the state law claims could be regarded as more cogent in this area given that tort law protection could, arguably, be thought to increase overall output, itself an objective under the federal law.

The decision in *INS* indeed to demonstrate striking parallels to what happened in *FOGA*, when that earlier case developed a new common law tort of misappropriation that was also applicable to material that was not subject to copyright protection held that Associated Press.³³ In *INS*, the AP was the collector of news from the western front in World War I could prevent the INS from taking information off its bulletin boards and sending it off to its various members on the West Coast who could use it in their own publications to allow its members to compete effectively with the AP members.³⁴ In addressing that situation, Pitney, J., in line with the position taken above on structured injunctions, held that a tailored form of injunctive relief was appropriate, such that the direct competitors of one company could not use information intended for its customers for its own purposes for the length of the news cycle or one day. That position rested on the common agricultural metaphor that only those who sow should reap, and it was couched in the odd language of “quasi-property” whereby the rights were not exclusive against the world, but only against direct competitors, precisely because the AP had no property rights in the news as such.³⁵

The decision has been much attacked since it came down on the ground that matters of this sort should be better decided by legislation than common law principles, which in fact had been

³³ Justice Pitney wrote:

But [in contrast to the copyright protection afforded a “literary production” the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress ‘to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries’ ([Const. art. 1, § 8, par. 8](#)), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

³⁴ Id at 263, (Brandeis, J. dissenting).

³⁵ Again, Justice Pitney wrote:

It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Id. at 241-42,

adopted by Brandeis, J. in his dissent who noted (as Pitney conceded) that these cases went beyond the traditional case of unfair competition because it not allege that the defendant's had breach of contract or trust,³⁶ let alone be protected, after publication as a trade secret.³⁷ He thus opted favor of legislature with this flourish:

A Legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied.³⁸

But at this point Justice Brandeis gives away the game when he first concedes that the case itself involved an “obvious injustice,” without mentioning what greater evil would follow from the carefully tailored relief ordered by Pitney. Nonetheless, the sheer intellectual power of the Brandeis defense left its mark. Indeed, one of Brandeis's great champions was none other than Learned Hand (who wrote the Second Circuit decision in *FOGA* affirmed by Justice Black).³⁹ In *Cheney Bros. v. Doris Silk Co.*, Hand voiced his long-term antipathy for the supposedly freewheeling jurisprudence in *INS*. But that position is itself subject in my view to substantial criticism.⁴⁰ The key point is that the pattern that Pitney had described in *INS* had been scrupulously followed in the industry, where the common practice was that no firm could lift stories from the bulletin boards that its rivals had prepared for their own customers, but they could decide to undertake own investigations based on information gleaned from those same bulletin boards. The practices were reciprocal and thus to the long-term mutual advantages to all players, so that it should not have been regarded as an illegal contract in restraint of trade even if it had been voluntarily agreed to by all the players in this space.

³⁶ Id. at 251-52.

³⁷ Id. at 256.

³⁸ Id at 264.

³⁹ 114 F.2d 80 (2nd Cir. 1940), Hand, J. held that the common law protection was lost upon publication which meant that it was entirely useless.

⁴⁰ See, Richard A Epstein, *International News Service v. Associated Press: Custom and Law As Sources of Property Rights in News*, 78 VA. L. REV. 85 (1992).

The only reason why there was a deviation in *INS* was that the INS papers were kept from the front by British authorities who accused them of having pro-German sympathies. It was instructive that the INS did not engage in that kind of pirating whenever it had full access to primary sources, which indicates just how powerful the standard practice was. It is hard for anyone to come up with a strong reason as to why the property rights scheme created by Justice Pitney (himself a master of equity) had any efficiency gap. His solution was manifestly superior to the solution proposed by Justice Holmes in dissent that the INS should be required to label that it received its material from the AP bulletin boards so that its customers did not think that it had done their own work. But that solution in turn might have exactly the wrong effect. The attribution could be treated by readers that the information so provided has the blessing of the AP, so that INS customers could rest assured of its accuracy even if they knew of INS's trouble gaining access to the Western Front.

Indeed note this irony: Holmes thought that the only applicable prohibition were those associated with the use of force and fraud, while Pitney took a more capacious (and classical liberal) point of view on the question, by allowing alterations of libertarian rights that promise to create a Pareto improvement over the common law rules on force and fraud—which is precisely the kind of justification that supports the invocation of the antitrust laws more generally, given that market cartelization involves neither force nor fraud, at least when courts are prepared to enforce contracts in restraint of trade as if they were just like any other contract, which has long not been the case.⁴¹ It is therefore wrong to say that the level of institutional incompetence is a good reason to hold back on the creation of these rights, when that objection turns out to be inapplicable here.

The lesson for *FOGA* should follow the same lines, given that the misappropriation of labor is as much an operative force in *FOGA* as it is in *INS*. As in *INS*, the deviation from the antitrust laws was grounded in a principled effort to cabin in suspect copying behavior, so that no one could claim that the defendants had formed a garden variety cartel which sought to reduce output and raise costs. The same rationale is at work in a different context in *FOGA*. The harder question

⁴¹ See, *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711), widely regarded as one of the foundational cases of the modern rule of reason. For my detailed analysis of the case, see Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & LIBERTY 21 (2021); to which there was this response from Eric Posner, who now has taken a special position in the Biden Administration, Eric Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. LIBERTY 388 (2022), followed by this rejoinder, Richard A. Epstein, *Antitrust Overreach in Labor Markets: A Response to Eric Posner*, 15 N.Y.U. J.L. & LIBERTY (2022).

here is whether judges can conjure up a tidy solution such as that found in *INS*. The troubles here are surely greater because there is the evident risk that the comprehensive ban on copying could sweep too wide, especially if it covered knockoffs from the original that were not exact duplicates, so that it becomes a fair question of whether the effort to protect some kind of derivative work would constitute a barrier to entry. And sure enough, it was again Learned Hand who sought, correctly in my view, to place a limitation on the ability of producers of plays to limit the scope of these derivative works when he held in *Nichols v. Universal Pictures Corp.*⁴², that the author of the hit play *Abie's Irish Rose* could not block the defendant's production of the *Cohens and the Kellys*, because both stories were about the marriage by an Irish man to a Jewish woman when the two families are feuding. The problem of interreligious conflicts is sufficiently broad that the person who writes one hit play on that subject is in no position to block a similar conception. The connection has to be far closer, such as when the use of a standard format by one successful show is taken over by another, who substitutes in different characters in the same basic structure, as understood by practicing members of the trade.

So, the question here is whether a general injunction should either be too broad when its denial could be too narrow. In my (tentative) view, better to issue the injunction and then rely on legislation to narrow the gap. The opposite position was in fact taken so that Copyright Act of 1976 put together this inelegant compromise that offers protection to "Pictorial, graphic, and sculptural works" which

include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.⁴³

The use of the time-honored distinction between the artistic components on the one side, and the mechanical or utilitarian works on the other is an effort to police the line between the protection of the creative elements and the undue protection of common structural elements that of necessity has to be incorporated into all such works. This compromise represents a major step

⁴² 45 F.2d 119 (2nd Cir. 1930)

⁴³ 17 U.S.C. § 101.

backwards from the protection sought in *Doris Silk*, so that it took the recent Supreme Court decision in *Star Athletica L. L.C. v. Varsity Brands, Inc.*,⁴⁴ to decide whether some 200 copyright registrations for various lines of chevrons and colorful shapes, which the Supreme Court held (rightly in my view) that these various insignias satisfied a test whereby

a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work — either on its own or fixed in some other tangible medium of expression — if it were imagined separately from the useful article into which it is incorporated.⁴⁵

Yet there is still the question of first principle as to whether this statutory protection still allows for too much copying, a point that depends on far more detailed examinations of industry standards and practices that can be undertaken here on which there is, naturally, a fair bit of disagreement.⁴⁶

INJUNCTIVE RELIEF PLUS DAMAGES, RESTITUTION AND OTHER REMEDIES. The previous discussion does not address the situation where it turns out that injunctive relief in and of itself does not seem complete. That could be for two reasons. First, there were completed wrongs that cannot be addressed by any form of injunctive relief. Second, the relief could be awarded but does not have sufficient reach to offer direct compensation to persons who are found to be victims in some sense of the harm in question, which raises the issue of indirect purchasers considered in the next section. At this point, there is a complete disjunction between two approaches. The first question is whether the FTC should be authorized to seek fines to cover the social losses that in a proper case are not caught by an injunction. The second question is whether, either as a complement or a substitute class action damages should be awarded to fill the gap.

This first issue was addressed obliquely in *AMG Capital Management, LLC v. FTC*,⁴⁷ in which the defendants were a group of payday lenders whose high-interest loans were said to violate

⁴⁴ 137 S.Ct. 1002 (2017).

⁴⁵ *Id.* at

⁴⁶ Compare C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009) (favoring protection against “close copying of fashion designs”), with Kal Raustiala & Christopher Sprigman, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) for some estimate of the sophisticated arguments on both sides of the debate.

⁴⁷ 141 S.Ct. 1341 (2021).

the Federal Trade Commission Act, which in so many words says that the Commission shall have the power to issue “**(b) Temporary restraining orders; preliminary injunctions.**”⁴⁸ At no point in that section are the words “fines” or “damages” ever mentioned, which as a matter of statutory construction means that it is a step too far to insist that some inherent FTC authority authorizes these additional remedies, which is why Justice Breyer rejected the government claim for a unanimous court, which reversed a decision by the Ninth Circuit, *FTC v. AMG Capital Management, LLC*,⁴⁹ which had awarded in the exercise of its discretion a restitution award of some \$1.27 billion dollars. That decision was solely based on prior cases in the Ninth Circuit,⁵⁰ so in a concurrence to his own opinion, O’Scannlain made the straight textualist argument that nothing in Section 53(b) justified the earlier decisions that gave additional discretion to lower court judges, as the FTC routinely sought.⁵¹ The point seems so obviously correct, and an open invitation for certiorari. Indeed, the Supreme Court in slapping down the FTC regarded this as an easy case:

It is highly unlikely that Congress would have enacted provisions expressly authorizing *conditioned* and *limited* monetary relief if the Act, via § 13(b), had already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations. Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its traditional § 5 administrative proceedings.⁵²

The descriptive conclusion is not worth debating.⁵³

The normative question still needs a response. On this question, the Supreme Court explicitly disclaimed any such normative argument.⁵⁴ Current legislation allows for actions for

⁴⁸ 15 U.S.C. § 53(b).

⁴⁹ 910 F.3d 417 (9th Cir. 2018).

⁵⁰ *Id.* at 426.

⁵¹ *AMG*, 141 S.Ct. 1347.

⁵² *Id.* at 1349.

⁵³ Justice Breyer fortified his case by noting that the various statutory reforms to the FTC Act allowed damage awards in various circumstances elsewhere, which makes it far harder to assume that there was some inadvertent omission in Section 53(b). *AMG*, 141 S.Ct. at 1347, and 1349, where he notes that the awards of damages elsewhere are hedged in with other limitations.

⁵⁴ *Id.* at 1347.

civil penalties for defendants that violate claims for injunctive relief.⁵⁵ But that provision does not begin to address the normative question of whether such fines or damages should be allowed in the first instance. That issue was addressed in some detail in Beales & Muris, *Striking the Proper Balance: Redress Under Section 13(B) of the FTC ACT*,⁵⁶ which chronicles a set of ambitious overreach by the FTC which justified some limitations on its powers, including Section 57b, that provides that once it has been for multiple forms of relief that following a cease-and-desist order when a reasonable person would have known that the conduct in question was “dishonest and fraudulent” “may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.”

Given the aggressive stance that the FTC took in AMG and its past practices, it seems that keeping to this balance is needed to prevent excessive government power, even at the cost of allowing some issues to fall through the cracks. One modest suggestion *might* be made is to give FTC might be given some power to impose fines proportionate to harm which goes direct into the treasury and avoids the widespread remedial provisions that are found when Section 19 is brought into play, but subject to some kind of maximum cap. How this should be organized requires more information that can be provided here and should be approached today with especial caution given the imperial ambitions of the current FTC, whose recent request for information shows every sign of pushing the antitrust law beyond its proper bounds.⁵⁷

But the related question is whether some class action should be allowed in cases like this by private parties to fill the gap. Here there are real obstacles as well because of the large number of procedural hurdles that have to be crossed, which means that the costs of administration increase

⁵⁵ 15 U.S.C. § 45 (l).

⁵⁶ 79 Antitrust L. J. 1 (2013).

⁵⁷ For my critique, see Richard A. Epstein Comments on the FTC and DOJ Request for Information with Proposals to strengthen Enforcement Against Illegal Mergers, April 2022 (with thirteen signatories). The gist of the argument here is that there is no a priori reason to believe that stronger remedies are needed, especially when private parties sensitive to antitrust concerns often draft their agreements to avoid antitrust challenges—e.g., for aggressive claims of market foreclosure, that point to a need to *reduce* antitrust enforcement. Exhibit A is the Illumina Grail Merger, discussed at pages 4-6. See also, Rachel Chiu, *The FTC's Innovation Obstructionism*, NAT. REV. (Mar. 2, 2022), <https://www.nationalreview.com/2022/03/the-ftcs-innovation-obstructionism/>.

while the possibility of error in dealing with these matters is severe. A warning alert in these cases is found in the Supreme Court's recent foray into the area in *TransUnion LLC v. Ramirez*,⁵⁸ which involved the effort to bring a class action for individuals who claimed that their privacy had been invaded and their reputations harmed when on the basis of the Reports issued by the Defendant the Department of the Treasury had put their names as "potential terrorists." Some of these names had been disseminated to third parties (a form of defamation) and others had not. The Supreme Court held that the former group had standing, but the latter group did not. But the calculation of damages in these cases for which liability was allowed was set at \$984.22 for statutory damages, coupled with punitive damages of \$6,353.08 in punitive damages, later reduced to \$3,936.08. Those numbers for punitive damages seem large, and the entire question of actual damages is hard to pinpoint, given that some harm was surely caused. The question therefore is whether it is worth the candle to go through these various hoops. In the antitrust area, the damages are for financial loss so that the standing issues drop out of the case, leaving only the hugely complicated question of trying to figure out the appropriate measure of damages to be awarded to members of the class. It is too late in the day to argue that these cases are just wrong, even if it is possible to insist that fines (but not by this FTC) are appropriate. It therefore seems sensible see if there is some way in which to truncate the damage inquiry so as to reduce the number and complexity of actual plaintiffs. And the antitrust laws are responsive to that issue in its treatment of liability up and down the chain of distribution in a wide array of potential price-fixing arrangements.

DIRECT AND INDIRECT PURCHASERS. The question of proper remedial design also arises in connection with antitrust claims that arise from different individuals up and down the chain of distribution, which includes, manufacturers, distributors, retailers and others. The central problem in these cases in these cases is the lawsuits that can brought at by or against individuals at each level in the chain of distribution. As with other problems, this issue is not unique to antitrust law. Indeed, some of the major expansions in product liability law involved just the question of suits up and down the chain. The early cases were very heavily influenced by the privity limitation that assumed that the only person who could sue for a product injury was the direct buyer from a direct seller.⁵⁹ That position was quickly subjected to several exceptions that were summarized in *Huset*

⁵⁸ 1451 S.Ct. 2190 (2021)

⁵⁹ See, e.g., *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842):

v. J.I. Case Threshing Machine Co.,⁶⁰ But the articulation of a general rule that allowed as “remote” buyer to sue a manufacturer was only developed in *MacPherson v. Buick Motor Co.*,⁶¹ in which the general action for negligence was allowed by a product purchaser against the manufacturer, and even here the direct action against a manufacturer of a defective component was only allowed some years later in *Smith v. Peerless Glass Co.*⁶². And the full range of issues only became apparent in the 1960s when in rapid succession, actions were allowed by bystanders against parties in the chain of distribution,⁶³ and against retailers and other parties in the chain of distribution, including retailers.⁶⁴ The moment these actions are allowed up and down the chain of distribution, it invites further litigation in order to sort out their respective contributions, which could be simplified by following the privity limitations that has generally be cast aside.

The argument in this case is that physical injuries often make it appropriate to move up the chain to the manufacturer who is at the heart of the enterprise. Hence the law of product liability adopted different rules whereby the contractual limitations had far greater grip in those cases that involved only financial

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.

⁶⁰ 120 F. 865, 866-871 (8th Cir. 1903):

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. . . .

The second exception is that an owner’s act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner’s premises may form the basis of an action against the owner. . . .

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not.

⁶¹ 111 N.E. 1050 (N.Y. 1916). For an excellent critique of that decision, see James Henderson, *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in *Tort Stories* 45-46 (Rabin & Sugarman eds., 2003).

⁶² 181 N.E. 576 (N.Y. 1932)

⁶³ *Elmore v. Am. Motors Corp.*, 451 P.2d 84 (Cal. 1969); *Codling v. Paglia*, 298 N.E.2d 622 (N.Y. 1973); Dix Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 TENN. L. REV. 1 (1970).

⁶⁴ *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171-172 (Cal. 1964).

losses, where both the privity limitation and any contractual limitations on recovery for warranties are in generally respected.⁶⁵ Antitrust cases in general involve actions to recovery for the financial loss attribute to monopoly practices, and one of the major problem is to limit the proliferation of additional actions that do nothing to advance general deterrence even if they create multiple causes of action that add to administrative costs and confusion. The leading case on this subject was the Supreme Court's 1977 decision in *Illinois Brick Co. v. Illinois*⁶⁶ in which the chain of distribution went as follows: The defendant Illinois Brick was the manufacturer of concrete blocks that it in turn sold to masonry contractors who in turn passed these bricks on to general contractors who used them in projects that they undertook for the state of Illinois. There were four steps in the chain, and *Illinois* claimed that the overcharges that resulted from a conspiracy of which the defendant was a member had passed the extra costs down the chain to the state which was therefore entitled to sue for its loss, leapfrogging over the two intermediate defendants.

The decision in the case denied the plaintiff should be allowed to bring this action, on the ground that it did not count as a party "injured in his business or property" as that phrase is used under Section 4 of the Clayton Act. The decision built on the earlier case in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*⁶⁷ which had held that the direct purchaser from the defendant could not reduce or eliminate its charges on the ground that the plaintiff had been able to recoup all or part of its loss from its downstream purchase. One obvious concern was that the added complications of figuring on the downstream set off would only complicate the overall matter, and reduce the effectiveness of the direct action, by seeking to determine the downstream costs.⁶⁸ *Illinois Brick* thus emerged as a necessary corollary to the earlier decision by holding that only the direct purchaser could maintain an action for the full amount, for otherwise the defendant would be subject to a double recovery—once each from the direct purchaser and from the ultimate purchaser. In effect these two cases held that the direct purchaser and only the direct purchaser was allowed to maintain the cost of action.

At one level it seems clear that any system of divided recovery will increase administrative costs without adding any additional deterrence, given that the sum of the two portions equals the hold. But it is of course possible to say that there should be only a single recovery, but that it should belong to the ultimate purchaser who may well have borne the bulk of the loss. Put otherwise, who can choose between *which*

⁶⁵ See *Seely v. White Motors Co.*, 403 P.2d, 145, 151 (Cal: 1965): In general, a manufacturer "cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumers' demands."

⁶⁶ 431 U.S. 720 (1977).

⁶⁷ 392 U.S. 481 (1968).

⁶⁸ *Id.* at 492-93.

plaintiff—the first or the last— should recover the entire damages when the total amount is the same in both cases?

But back of that judgment lies an implicit assumption that there is exactly one party at the first and fourth stages. But that need not be the case. As so often happens in antitrust law, the basic proposition that allows only the direct purchaser to sue for all damages derives from an earlier rate regulation case, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*,⁶⁹ where the lumber company was successful in obtaining from the railroad a recovery for excess rates that had been charged for hardwood lumber.

The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events.⁷⁰

The result is surely correct, but the reasoning is at best incomplete. The case rests on a narrow theory of causation that assumes that the last wrongdoer is the only culpable party so that the law does not concern itself with further events. But that precise point was rejected in the context of physical injuries just two years before in *MacPherson v. Buick*, so why accept it here?⁷¹ The answer in my view lies in the use of the “purchasers”—plural— as part of the Holmes decision. Without question *Darnell-Taenzer* was one purchaser that sold its lumber to a large number of parties further down the chain of distribution. It is not clear how many resales took place or how many further sales were completed with respect to any given load of lumber. Now going downstream creates further difficulties of the proliferation of actions that is far more likely in financial cases than it is in physical injury cases where there is a single tort plaintiff. The point becomes clear by looking at *Adams v. Mills*, which Justice Brandeis applied *Darnell-Taenzer*, involved 174,000 shippers who

⁶⁹ 245 U. S. 531 (1918), cited in *Hanover Shoe*, 392 U.S. at 490.

⁷⁰ 285 U.S. 397, XXX (1932)

⁷¹ For further discussion, see Richard A. Epstein, *Regulatory Enforcement Under New York’s Martin Act From Financial Fraud to Global Warming*, N.Y.U. J. L. & Business, 805. 857-60 (2018).

would have had to divide an overcharge award in favor of their commission salesman of \$140,001.25, which works out to be about \$0.80 per shipper—wholly infeasible.⁷²

It thus appears that the pyramidal structure in most distribution chains boosts the case for the *Illinois Brick* rule on simple transaction costs grounds. But in the modern age of internet sales the patterns of sale and distribution become much more diffuse, so that the downward progression in the distribution chain that was observed in the product liability cases of the 1960s need no longer hold. Thus *Apple, Inc. v Pepper*,⁷³ the plaintiff sued Apple for its monopolization of the market for smart phone apps. These apps were created typically by independent developers and sold through the Apple store. Apple and its app developers have divided control over the sales in question. Thus, the app maker sets the price of the app but then pays Apple a \$99 membership and 30 percent commission on each sale. The question in the case was whether the *Illinois Brick* rule applied to protect Apple. The five-member majority (Kavanaugh, writing for himself and Roberts, Breyer, Kagan, and Sotomayor) did not treat the case as a challenge to *Illinois Brick*,⁷⁴ but solely as a question of its application to this novel set of facts. Who turns out to be the seller of the goods to these consumers? Apple or the APP developer. At this point, there is a deep disagreement over the characterization of the underlying facts in the case.

Hence, the decision to limit recovery to the first purchaser and to ignore everyone else starts to make sense as a way to prune out the number of actions. It will not work in all cases, but in general it is hardly likely that there are more parties at the top link of the chain of distribution than there are further down, which means that carrying over the rule from rate making cases will usually turn out to be a good idea. Hence it argues that Apple was the seller of the good even though the upstream supplier to Apple set the product price:

In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct.⁷⁵

In the majority's view, the *Illinois Brick* rule should not be displaced when the retailer sells goods at a price set by the developer, which would only undercut the bright line rule that gives *Illinois*

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⁷³ 139 S.Ct. 1514 (2019)

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⁷⁵ Id at

Brick its intellectual endurance. But the dissent written by Justice Neil Gorsuch treats the retailer as the seller who is caught by the rule under *Illinois Brick*.

The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it.⁷⁶

So, who's right? At some high level of abstraction, it really does not matter because the overall recovery should be the same in both cases. But practically, it makes all the difference in the world. A consumer suit against Apple has a very different resonance than a developer suit against Apple, which companies would be loath to bring, given the possibility of retaliation by Apple. Yet it is hard to know how to disentangle the mess. *Illinois Brick* itself contained unproblematic distribution chains that could not be altered to minimize exposure to the antitrust law. But with internet sales it takes little imagination to see that Apple could buy the products from the developers and reduce overall payment to avoid the need to charge any 30 percent commission. Or it could do as it did here. It seems very dicey as antitrust policy to make the focus of the antitrust law dependent on the conscious manipulation of the law of sale to decide who is or is not a direct purchaser.

The best that can be done is to start with the description that are used in this and in similar other cases, in which the most common view is that the sale is by the owner of the products not the developer of the site. Right now that rule creates serious uneasiness with cases in which Amazon, most notably, offers a platform for the sale of products, some of which prove seriously defective, but which the seller in question cannot be found—overseas, insolvent—so that Amazon, which does seek in part to police its website becomes the default defendant, at least in the eyes of some.⁷⁷ Indeed, at the very least, it should fall on Amazon to make sure that there is a domestic location where suit could be brought against foreign firms that wish to do business in the United States.

Nonetheless, the financial losses associated with this problem do not present those problems. It is a straight question of damages, and perhaps some form of injunctive relief, which the Court in

⁷⁶ Id. at 1527-28

⁷⁷ For the most recent account of this problem, see Moira Weigel, *In Amazon We Trust. Should We?* THE N.Y. TIMES, SUNDAY REVIEW, at 4, April 24, 2022, which leads with the story of a purchaser of remote with a lithium battery, which was swallowed by an infant who suffered permanent damage to the esophagus, for which the seller could never be found.

Pepper did not explicitly address,⁷⁸ but which was raised by the dissent.⁷⁹ In principle it is correct to say that injunctive relief is appropriate where actual damages are not subject to calculation. But the fuller inquiry should ask at a minimum something about the estimated level of harm in these cases, lest powerful relief be given against minor losses. It is also the case here that any form of injunctive relief could not sensibly claim that the Apple commission should be reduced to zero, so that it then becomes incumbent to ask just what that level should be, and to inquire further whether that percentage should be adjusted at some subsequent time to take into account the rise or fall of competition, the product mix in question (i.e. smaller commissions for larger goods) and other factors that are not apparent to outsiders but which may be salient to people who live within the area. The case here is not like the situations in either *INS* or *FOGA* where the award of injunctive relief does not depend on any calculation of damages, but only on the validity of the arguments in favor of the defendant practices in both cases.

IFFY CONCLUSION. In my view it should come as no surprise that the overall discussion of administrative and private remedies in the antitrust law should be in such an unsatisfactory state. It seems clear that the class of antitrust wrong is large even if it is not infinite, so that some remedies are needed to fulfill its statutory promise. But remedies are exercises in uncertainty where two forms of error—excessive and lax enforcement—are endemic to the area. The sensible approach is to start with simple remedies, often injunctions, which can then be modified in various ways by delaying their enforcement or subjecting them to conditions. It is also possible to increase the range of discretion by allowing restitution or damage awards in order to fill the gaps in the earlier set of remedy. In my view, the stronger the case for substantive liability, the more powerful the various enforcement tools. But correlatively the deeper the underlying theory, the more caution should be applied to the remedial side. I have therefore gone through the basic problem in both tort and antitrust laws in an effort to see how these principles intermesh. The final tentative judgment is to be pretty solid with injunctions and cautious with issuing supplemental monetary relief. But this

⁷⁸ *Apple v. Pepper*, 1520-21 note 1.

⁷⁹ The dissent was more pointed on the issue.

For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante*, at 1520 - 1521, n. 1. Under our normal rule of construction, a plaintiff who's not proximately harmed by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 135, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (although a plaintiff that “cannot quantify its losses with sufficient certainty to recover damages ... may still be entitled to injunctive relief,” the requirement of proximate causation “must be met in every case”).

judgment is contingent given that the antitrust space is hardly uniform, and the form of administrative relief can vary from person to person and from administration to administration. Hence the question that is open today is likely to be open for a good long time to come.