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Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions

C. Douglas Floyd*

If we should free ourselves from the miasma of adjectives that have accumulated around the words of § 4, this case would seem to be a paradigm of standing.

—Judge Henry J. Friendly[1]

INTRODUCTION

Section 4 of the Clayton Act authorizes "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages and their costs of suit.[2] In a series of important decisions,[3] the Supreme Court has interpreted section 4 more narrowly than its language would suggest, stating that "there is a point beyond which the wrongdoer should not be held liable,"[4] and "it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property."[5]

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1. Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 297 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

2. 15 U.S.C. § 15 (1994).

3. *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 112-13 (1986); Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters (*AGCC*), 459 U.S. 519, 537 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465, 477-78 (1982); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

4. Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982) (citing Illinois Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting)).

5. *Id.*

In view of the countless "ripples of harm" that antitrust violations may have in the economy, the necessity for some limitation on the literal reach of section 4 is self-evident.[6] The principles that should guide that limitation, however, are less apparent and have not been fully resolved by the Supreme Court. Some lower federal courts have distilled from the Supreme Court's opinions the governing principle that standing under section 4 should be limited, either absolutely or presumptively, to consumers or competitors adversely affected by the defendant's anticompetitive conduct.[7] Even in decisions that have not expressly adopted a consumer or competitor limitation on standing, a plaintiff's status as a nonconsumer and noncompetitor has been a major factor leading to the denial of standing in private antitrust actions.[8] There is, however, a conflict of authority on the issue.[9]

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6. *Id.* at 476-77.

7. For cases limiting standing absolutely to competitors and consumers, see Serfecz v. Jewel Food Stores, 67 F.3d 591, 597 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); Bell v. Dow Chemical Co., 847 F.2d 1179, 1183 (5th Cir. 1988); Eagle v. Star-Kist Foods, Inc., 812 F.2d 538, 540 (9th Cir. 1987); General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 809 (8th Cir. 1987); *In re* Industrial Gas Antitrust Litig. (Bichan), 681 F.2d 514, 515 (7th Cir. 1982), *cert. denied*, Bichan v. Chemetron, 460 U.S. 1016 (1983). For an example of presumptive limitation on standing to consumers or competitors, see SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 44-45 (1st Cir. 1995).

8. *See* International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1328-29 (3d Cir. 1992) (denying standing to a soda ash operator to challenge an export company's immunity under the Webb-Pomerone Act because the terminal operator was neither a consumer nor a competitor in the sale of soda ash), *cert. denied*, 507 U.S. 988 (1993); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1352 (6th Cir. 1989) (denying standing to union automobile transportation employees to challenge an increased handling charge that affected their compensation), *cert. denied*, 495 U.S. 947 (1990); South Dakota v. Kansas City Southern Indus., Inc., 880 F.2d 40, 49 (8th Cir. 1989) (denying standing to state to contest the allegedly monopolistic practices of railroad companies that hindered the construction of a coal pipeline), *cert. denied*, 493 U.S. 1023 (1990); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 152 (9th Cir. 1989) (en banc) (denying standing to a lessor to challenge an alleged conspiracy among lessees and others to suppress the development of geothermal steam); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 98 (3d Cir. 1986) (denying standing to an employee who was fired for refusing to implement a discriminatory price discount to a preferred buyer), *cert. denied*, 479 U.S. 821 (1986); Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1054 (6th Cir. 1986) (denying standing to newspaper employees who alleged a monopolistic conspiracy between rival newspaper owners that affected wage and employment terms); Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 581 (9th Cir. 1986) (holding that motion picture licensing agent fired as part of an agreement between two competing exhibit-

In considering the appropriateness of this restrictive antitrust standing principle, consider the plaintiffs in the following cases:

1. Plaintiffs, the organizers of a trade show promoting direct contacts between producers of cable television programming and local cable television stations, allege that HBO and Showtime, to protect their business of selling programming to the stations, conspired to organize a boycott of the plaintiffs' show.[10]
2. Plaintiffs, "cost consultants" for the buyers of yellow pages advertising, allege that defendant sellers of yellow pages advertising refused to do business with advertisers using the plaintiffs' services in order to prevent the plaintiffs from negotiating reductions of the defendants' monopolistic and discriminatory prices.[11]
3. Plaintiffs, union employees, allege that their employer and their international union conspired to depress wages in the labor market for the purpose of effectuating a primary conspiracy to monopolize the market for the construction of nuclear power plants.[12]
4. Plaintiff, an apple juice distributor, claims that it was terminated by defendant apple juice manufacturer because the plaintiff refused to implement the manufacturer's discriminatory discount for a preferred buyer.[13]

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ing companies to lower prices paid for first-run film rights lacked standing to challenge the agreement); Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir. 1986) (finding that electrical union employees lacked standing to challenge an allegedly monopolistic practice to depress electrician's wages and thereby control the market for constructing nuclear power plants); Henke Enterprise, Inc. v. Hy-Vee Food Stores, Inc., 749 F.2d 488, 490 (8th Cir. 1984) (denying standing to a tenant affected by the grocery store anchor tenant's decision to relocate while refusing to permit another grocery store to become the anchor); Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1088 (6th Cir. 1983) (denying standing to the lessor of commercial property who alleged that the defendant refused to sublease the property for use as a grocery store).

9. *See* Sullivan v. Tagliabue, 25 F.3d 43, 49 (1st Cir. 1994) ("The circuits are split . . . over the question of whether a plaintiff must be either a consumer or competitor in the market harmed by the antitrust violation at issue in order to establish antitrust injury.").

10. *See* Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 291-92 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

11. *See* Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1159-60 (9th Cir. 1991), *cert. denied*, 504 U.S. 913 (1992).

12. *See* Lucas v. Bechtel Corp., 800 F.2d 839, 840-42 (9th Cir. 1986); *see also* Sacramento Valley Chapter of the Nat. Elec. Contractors Assn. v. International Brotherhood of Elec. Workers, 888 F.2d 604, 605-06 (9th Cir. 1989).

13. *See* Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 92-93

5. Plaintiff, manager of the defendant's industrial gas division, claims that he was fired because he refused to participate in an illegal conspiracy among gas producers to fix prices and allocate customers.[14]

Each of these cases involves a direct victim who was not, or at least arguably was not,[15] a consumer or competitor in the markets restrained by the defendants' conduct. In each case, the defendant targeted the intermediary for boycott, termination, or other injury as a means of implementing an allegedly anticompetitive scheme. In each case, a principle limiting standing to consumers or competitors in the markets restrained by the defendants' conduct would deny standing to the plaintiffs.

In the first two cases standing was upheld[16] on the dubious theory that the plaintiff, even though it operated as an agent of the purchasers of advertising, was a "competitor" of the sellers of advertising.[17] In the other three cases standing was denied.[18] However, in the last example, a conflicting and much criticized case would grant standing to the terminated employee.[19]

Is there a principled basis for interpreting the broad language of section 4 of the Clayton Act to permit suit only by consumers or competitors in the markets restrained by the defendant's anti-

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(3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986).

14. *See In re* Industrial Gas Antitrust Litig. (Bichan), 681 F.2d 514, 515 (7th Cir. 1982, *cert. denied*, Bichan v, Chemetron, 460 U.S. 1016 (1983).

15. The *Yellow Pages* court based its decision in part on the questionable assertion that the plaintiff could be viewed as a competitor of GTE in the sale of yellow-pages advertising. *See Yellow Pages Cost Consultants*, 951 F.2d at 1161 (stating plaintiff offered evidence showing their services were considered better than, but not different from GTE's services). *See infra* notes 240-243 and accompanying text (arguing that the *Yellow Pages* court stretched the facts to conclude that plaintiff was a competitor).

16. *See supra* notes 10-11 and accompanying text. (discussing these two cases).

17. *See Yellow Page Cost Consultants*, 951 F.2d at 1161; *see also infra* notes 240-243 and accompanying text (discussing other grounds for recognizing standing beyond the consumer-competitor classification).

18. *See supra* 12-14 notes and accompanying text (discussing these cases).

19. *See* Ostrofe v. H.S. Crocker Co., Inc., 670 F.2d 1378, 1380-81 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985). *But see* Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 96 (listing cases criticizing the *Ostrofe* rationale). In Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376-1377 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1997), a panel of the Ninth Circuit narrowly limited *Ostrofe* to cases in which the employee's participation was "essential" to the implementation of the defendant's anticompetitive scheme.

competitive actions, excluding the direct victims of the defendant's conduct whose injuries were the instrument by which its anticompetitive ends were achieved? Should the standing of some intermediary victims who are targeted as a means of achieving the defendant's anticompetitive objectives be upheld? If so, should the standing of the plaintiffs in all, or only some, of the illustrative cases be recognized? On what ground, if any, can the plaintiffs in the last three cases be distinguished from those in the first two? And if there is no principled distinction, should standing be denied in all or recognized in all?

This Article attempts to provide a framework for answering these questions. Underlying them all is an even more basic inquiry, however, not adequately addressed in previous treatments of the subject. Is it appropriate for the judiciary to screen out private antitrust plaintiffs who fall squarely within the language of section 4 because other plaintiffs, on policy grounds, appear to be "better" antitrust plaintiffs? For example, one modern policy-based approach to antitrust standing that would screen out not only nonconsumer and noncompetitor plaintiffs, but many consumers and competitors as well, draws on the economic theory of "optimal deterrence."[20] Starting from the premise that the sole object of the antitrust laws is to promote the economic concept of allocative efficiency, proponents of this theory have argued that the treble-damages remedy under section 4 of the Clayton Act should be calibrated precisely to limit recovery to the sum of the monopoly overcharge plus the "deadweight" welfare loss resulting from the defendant's violation, divided by the probability that violations of the kind at issue will be detected.[21] From this, the proponents reason that standing in antitrust actions should be limited to plaintiffs whose losses are the result of the monopoly overcharge or deadweight loss inflicted by the defendant.[22] This result is said to be required to prevent "overdeterrence" of

20. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1156 (1982); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1452 (1985).

21. *See* Landes, *supra* note 20, at 656-657; Page, *supra* note 20, at 1455.

22. *See* Easterbrook & Fischel, *supra* note 20, at 1160, 1164; Page, *supra* note 20, at 1457.

antitrust violations and to provide an incentive for defendants to commit "efficient" violations of the antitrust laws.[23]

There are many difficulties in squaring this approach with the intent of the Congress that enacted section 4.[24] Most importantly, in their zeal to restrict the language of section 4, the proponents of the optimal economic deterrence theory seem blind to another very real prospect—underdeterrence. Courts that restrict the universe of potential plaintiffs to those who have felt the ultimate price and output effects of the defendant's anticompetitive scheme often screen out those plaintiffs who were most directly and visibly harmed, who are most aware of their injuries, and who have the greatest ability and incentive to sue. This screen assumes, without any empirical basis, that those who have felt the price-enhancing or output-reducing effects of the defendants' conduct, such as ultimate consumers, will be fully aware of their injuries, and will have suffered injury of sufficient magnitude to cause them to sue.

These assumptions are debatable on empirical grounds.[25] More importantly, they address the wrong issue. In interpreting the language of section 4, the question is not what the economic theory of "optimal deterrence" would suggest, but what Congress intended when it enacted section 4. Such purely policy-based approaches to antitrust standing implicitly assume that Congress, in the broad language of section 4, authorized the courts to define the scope of the treble-damages remedy as a matter of federal common law. If, on the contrary, that premise is rejected and determining the limits of antitrust standing is viewed as a matter of statutory interpretation, as this Article argues it should be, the case for either a consumer-competitor limitation or an "optimal deterrence" limitation on antitrust standing is far more tenuous.

A standing principle turning on traditional proximate cause analysis, which ascribes overriding weight to the directness of the plaintiff's injuries and their importance to the success of the defendant's anticompetitive activities, is most consistent with the language, history, and remedial and deterrent objectives of

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23. *See, e.g.*, Easterbrook & Fischel, *supra* note 20, at 1157 ("An optimal schedule of penalties allows 'efficient violations' to take place, while it deters other violations.").

24. *See infra* Part V (discussing relation of congressional intent and optimal deterrence theory).

25. *See infra* notes 218-220 and accompanying text (giving reasons why groups of plaintiffs may elect not to sue).

section 4 of the Clayton Act.[26] Neither the possible existence of other "consumer-competitor" plaintiffs who hypothetically might have elected to sue (but in fact did not),[27] nor the availability of remedies under tort, contract, or other bodies of law designed to protect different interests[28] provides an adequate basis for denying standing under the antitrust laws to the direct victims of antitrust misconduct.

The reasons advanced here for rejecting a consumer or competitor limitation on antitrust standing also help to resolve other recurring and important antitrust standing questions created by more restrictive approaches. For example, proponents of the "optimal deterrence" theory have argued that, even though they are consumers or competitors in affected markets, neither distributors subjected to an unlawful resale price maintenance scheme nor competitors excluded from the market by an unlawful tying arrangement should have standing to sue because they have not directly felt the price and output effects of the violations alleged.[29] In recent decisions, however, the Supreme Court has continued to recognize the standing of these victims of antitrust misconduct.[30] Under the analysis here, that result is correct. Similarly, the suggested approach explains the weight of authority recognizing the antitrust standing of cartel members who seek to break ranks, and of the targets of takeover bids,[31] despite the contention that they are the beneficiaries rather than the victims of the cartel or the merger.

I. ORIGINS OF THE "CONSUMER OR COMPETITOR" LIMITATION

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGCC*),[32] the Supreme Court's most comprehensive treatment of antitrust standing,

26. *See infra* Part II.

27. *See infra* notes 218-220 and accompanying text (discussing reasons why consumers or competitors might elect not to sue).

28. *See infra* Part II.E (discussing the relevance that the availability of other remedies should have for antitrust standing).

29. *See infra* notes 293-306 and accompanying text (discussing groups of plaintiffs who would be excluded by optimal deterrence theory).

30. *See infra* notes 293-306 and accompanying text (identifying cases in which the Supreme Court has granted standing).

31. *See infra* notes 276-285 and accompanying text.

32. 459 U.S. 519 (1983).

the Court rejected the various "target area," "direct injury," and "zone of interests" formulations[33] previously employed by the courts of appeals in favor of a multifactor balancing approach. In *AGCC*, a union complained that a multiemployer association and some of its members had conspired to damage the union by coercing general contractors, others who let construction contracts, and landowners to enter contracts with non-union firms.[34] The Court concluded that the union lacked standing, primarily because its injuries were indirect and derivative. It stated that standing under section 4 should turn on a number of factors, including: (1) whether the plaintiff's injury is of the type Congress sought to redress; (2) whether the defendant intended to harm the plaintiff; (3) the directness or indirectness of the injury; (4) the existence of other persons more directly injured who are likely to sue; and (5) whether the claim involves speculative harm, duplicative recovery, or a complex apportionment of damages.[35]

The difficulties of application created by the Court's unstructured, case-specific approach to standing under section 4 are discussed below.[36] In considering the development of the emerging tendency to limit standing under section 4 only to consumers or competitors in the markets affected by the defendant's conduct, however, the most salient portion of the Court's opinion was that considering the nature of the union's injury. The Court concluded that the union "was neither a consumer nor a competitor in the market in which trade was restrained."[37] Further, it was not clear that the union's interests would be benefited by enhanced competition, because its goal of enhancing union wages and working conditions might be harmed by free competition among employers striving to reduce costs. Federal law had developed a "broad labor exemption from the antitrust laws" to protect union interests, and also "a

33. The "target area" test asked whether the plaintiff was within the area of the economy endangered by a breakdown of competitive conditions caused by the antitrust violation. The "direct injury" test asked whether the injury suffered was directly linked to the antitrust violation. The "zone of interests" test asked whether the injury was arguably intended to be protected by the antitrust laws. *See id.* at 536 n.33 (counseling lower courts to analyze standing according to the factors outlined in *AGCC* in lieu of resorting to any one of these tests).

34. *See id.* at 522-23.

35. *See id.* at 537-43.

36. *See* discussion *infra* Parts III.A-B.

37. *AGCC*, 459 U.S. at 539.

separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions."[38] Thus, unions "will frequently not be part of the class the Sherman Act was designed to protect . . . ."[39] In *AGCC*, the Court concluded that the union's "labor-market interests" seemed to predominate and consequently held that its injuries were not of the type that the antitrust laws sought to prevent.[40]

A number of courts have considered this passage in *AGCC* as support for restricting antitrust standing to consumers or competitors in the markets restrained by a defendant's conduct.[41] Analyzed in its context, however, it provides only weak support for the conclusion that nonconsumer and noncompetitor intermediaries who are directly injured as a means of implementing an anticompetitive scheme should be denied standing under section 4. In the first place, the Court in *AGCC* declined to adopt any rigid, all-encompassing standing rules, preferring instead to articulate a flexible, case-specific approach. The nature of the plaintiff's injury and the plaintiff's status as a consumer or competitor in the market restrained by the defendant's conduct comprise only two of a number of factors to be balanced by the court in deciding whether the plaintiff's standing should be recognized.[42] Additionally, the Court's discussion of the nature of the union's injury in *AGCC* was only preliminary to the major focus of the opinion, namely that the union lacked standing because its injuries were only indirect and derivative of those suffered by the coerced landowners and general contractors, creating the risk of speculative harm, duplicative recovery, and complex apportionment of damages.[43]

To the extent that the Court's analysis turned on the nature of the union's injury in *AGCC*, moreover, it rested primarily on considerations unique to the labor-antitrust context in which the case arose, and particularly on the Court's conclusion that a separate body of labor law protected the interests of the union, which often would be disserved by the procompetition policies of the antitrust laws. As discussed below,[44] the Court's

38. *Id.* at 539-40.
39. *Id.* at 540.
40. *Id.*
41. *See supra* notes 7-8 (listing courts that have used *AGCC* in this manner).
42. *See AGCC*, 459 U.S. at 536 n.33.
43. *See id.* at 540-44.
44. *See* discussion *infra* Part II.E.

vague discussion of the relevance of the labor laws, as well as its suggestion that employees and unions "frequently" will not be the intended beneficiaries of the antitrust laws, was problematic. It contributed little to the resolution of the standing issue in *AGCC* because it was clear that, if the union's allegations were accepted, the union would have benefited from the elimination of the restraint on the use of union contractors and subcontractors. In any event, the Court's specific focus on these unique considerations applicable to unions and their members has no application to cases in which nonconsumer and noncompetitor plaintiffs are neither unions nor union members.

The Supreme Court's decision in *Blue Shield of Virginia v. McCready*[45] also belies reliance on *AGCC* as support for a consumer-competitor limitation on section 4 standing. In *McCready*, the plaintiff challenged a conspiracy between Blue Shield and an association of psychiatrists to deny reimbursement for treatment by psychologists unless the services were billed through and supervised by a physician.[46] The Court rejected the claim that standing should be limited to the psychologists, who were the targets of the alleged conspiracy. It held that the broad language of section 4 "cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market."[47] The plaintiff had standing because denying reimbursement for the costs of treatment was "the very means by which it is alleged that Blue Shield sought to achieve its illegal ends"; the plaintiff's harm was foreseeable and a "necessary step in effecting the ends of the alleged illegal conspiracy."[48] The Court rejected the argument that the plaintiff lacked standing because she was "not an economic actor in the market that had been restrained."[49] The *McCready* court explicitly stated that section 4 "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[50]

45. 457 U.S. 465 (1982).
46. *See id.* at 468.
47. *Id.* at 479.
48. *Id.*
49. *Id.*
50. *Id.* at 472 (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

Yet the *McCready* plaintiff was a consumer of psychotherapy services. Some courts have relied upon this fact to argue that, despite the Supreme Court's explicit rejection of a rigid "market participant" limitation on standing under section 4, *McCready* is consistent with a general consumer-competitor limitation on standing.[51] This reading of the Court's opinion is tenuous. As Justice Rehnquist pointed out in his *McCready* dissent, McCready made no claim that the defendants' conduct had enhanced price or limited output in the restrained market for psychotherapy services.[52] Therefore, the plaintiff had alleged no "anticompetitive effect upon herself."[53]

If a consumer-competitor limitation on antitrust standing under section 4 is justified, that limitation ultimately must rest on the theory that, because the consumer welfare objectives of the antitrust laws seek to preserve price and output at their competitive levels, only those who directly have felt the price-enhancing or output-restricting effects of the defendant's conduct should have standing. Had the Court applied this logic in *McCready*, the action would have been dismissed because there was no claim that McCready had felt such anticompetitive effects.

The cases reading *AGCC* as support for a consumer or competitor limitation on antitrust standing fail to recognize that the Supreme Court expressly declined to decide that issue in that case. After observing that the union was neither a consumer nor a competitor in the affected market in *AGCC*, the Court stated that "[w]e therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market."[54] Thus, the *AGCC* court reserved decision of the precise issue presented by the illustrative cases above.

Moreover, in *McCready*, the Court affirmatively suggested that a boycotted intermediary who was the means by which the defendants sought to achieve their anticompetitive ends would

51. *See* SAS v. Puerto Rico Tel. Co., 48 F.3d 39, 45-46 (1st Cir. 1995); Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 579 (9th Cir. 1986); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 95 (3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986); Henke Enters., Inc. v. Hy-Vee Food Stores, Inc. 749 F.2d 488, 489 (8th Cir. 1984).

52. *See McCready*, 457 U.S. at 488.

53. *Id.* at 489.

54. *AGCC*, 459 U.S. at 540 n.44.

have standing even though it was not a consumer or competitor in the market restrained. The Court hypothesized a case in which a "group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists."[55] In such a boycott, "the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions."[56]

The strongest support, both on precedential and theoretical grounds, for a consumer or competitor limitation on standing in private antitrust actions comes not from *AGCC*, but from the Court's seminal "antitrust injury" decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[57] There, the Court denied standing to a bowling alley owner who challenged the defendant's acquisition of its competitor under section 7 of the Clayton Act. The plaintiff's theory of recovery was that absent the acquisition, the rival would have gone out of business and the plaintiff would have enjoyed higher profits.[58] The Supreme Court held that the plaintiff was complaining, in effect, that it would be damaged by increased competition, and that such a claim was in direct conflict with the purposes of the Sherman and Clayton Acts to promote competition.[59] The plaintiff had therefore not suffered "antitrust injury," that is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[60] The Court went on to explain:

> [T]he antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration.... The antitrust laws, however, were enacted for 'the protection of competition, not competitors.' It is inimical to the purposes of these laws to award damages for the type of injury claimed here.[61]

In language that bears directly on the issue discussed in this Article, the *Brunswick* Court added that, to constitute antitrust injury, the plaintiff's injury "should reflect the anticom-

55. *McCready*, 457 U.S. at 484 n.21.
56. *Id.*
57. 429 U.S. 477 (1977).
58. *See id.* at 481.
59. *See id.* at 486.
60. *Id.* at 489.
61. *Id.* at 488 (citation omitted) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

petitive effect either of the violation or of anticompetitive acts made possible by the violation."[62]

Read narrowly as a holding that the antitrust laws do not permit a plaintiff to recover damages resulting from continued or increased competition, the holding of *Brunswick* is self-evident. Congress, in seeking to promote free competition by enacting the antitrust laws, could not have meant in section 4 to provide for the recovery of damages resulting from increased competition. Allowing standing in such cases would not only violate Congress's intent, but would be directly contrary to the express language of section 4, which authorizes recovery only for damages which occur "by reason of" an antitrust violation.[63] Damages resulting from increased competition do not occur "by reason of" a violation of the antitrust laws.

The Supreme Court's additional gloss on section 4 in *Brunswick*, to the effect that a plaintiff has suffered "antitrust injury" only if the plaintiff's injury "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," is more problematic.[64] Read literally, this formulation would deny standing to all of the intermediary victims in the illustrative cases on the ground that, as nonconsumers and noncompetitors in the markets restrained by the defendants' conduct, they have not suffered the output-restraining or price-enhancing effects that the defendants sought to achieve, and thus have not felt the "anticompetitive effect" of the violation (or of acts made possible by the violation).

The legitimacy of this interpretation of section 4 is the focus of the balance of this Article. At present it is sufficient to note that, unlike the core *Brunswick* principle denying standing to plaintiffs who seek to recover for damages resulting from increased competition, this broader formulation of the antitrust injury requirement is not obviously compelled by the central procompetition policy of the antitrust laws. In the illustrative cases, the directly targeted victims whose injuries were the means by which the defendants sought to achieve their anticompetitive ends were not seeking to recover damages resulting from competition, but to recover damages they suffered by their elimination as an obstacle to the success of defendants'

62. *Id.* at 489.
63. *See* 15 U.S.C. § 15(a) (1994).
64. *Brunswick*, 429 U.S. at 489.

anticompetitive scheme.[65] Further, unlike the core *Brunswick* principle prohibiting damages resulting from competition itself, this broader view of the "antitrust injury" component of section 4 standing analysis has no foundation in, but is contrary to, the explicit language of section 4. In the illustrative cases, the plaintiffs' injuries occurred "by reason of" a violation of the antitrust laws because those injuries were the means by which the violation was committed.

The Court's most recent decisions considering the concept of "antitrust injury" rest entirely on the core holding of *Brunswick* prohibiting recovery for damages resulting from increased competition. They thus provide no support for a consumer-competitor limitation on standing under section 4. For example, in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[66] the Court held that a meat-packing company could not enjoin a merger of its competitors. The Court held that to the extent the plaintiff alleged that it was threatened with injury as a result of lower, but nonpredatory prices, it was in effect complaining of increased competition resulting from the merger and therefore lacked standing under *Brunswick*. "*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."[67] The Court stated that the plaintiff would have standing if it could allege a legitimate threat of predatory pricing, but that it had failed to raise that claim in the trial court.[68]

In its most recent decision considering the antitrust injury requirement, *Atlantic Richfield Co. v. USA Petroleum Co.*,[69] the Court held that a competing independent distributor lacked standing to challenge an alleged maximum resale price maintenance scheme that ARCO had imposed on its dealers because the distributor was not a dealer whose prices had been restrained. To the extent that the price ceiling resulted in lower but nonpredatory prices, the plaintiff, as in *Brunswick* and *Cargill*, was complaining of increased competition.[70] Although the plaintiff may have lost business as a result, its injuries did

65. *See supra* notes 10-14 and accompanying text.
66. 479 U.S. 104 (1986).
67. *Id.* at 116.
68. *See id.* at 117-19.
69. 495 U.S. 328 (1990).
70. *See id.* at 338.

not "flow from that which makes defendants' acts unlawful" and were not "attributable to [the] anti-competitive aspect of the practice under scrutiny."[71] "Antitrust injury does not arise for purposes of section 4 of the Clayton Act . . . until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct . . . . [I]n the context of pricing practices, only predatory pricing has the requisite anticompetitive effect."[72]

Cargill and *Atlantic Richfield* show that even competitors in the markets restrained by a defendant's anticompetitive conduct lack standing where their injuries are the result of increased rather than reduced competition on the merits. They do not address the standing of nonconsumer and noncompetitor plaintiffs such as those in the illustrative cases, but are consistent with the recognition of standing in such cases. In the intermediary cases, the plaintiffs' injuries do not flow from increased competition, but are the means by which the defendant seeks to achieve its anticompetitive ends. Those injuries can thus be argued to "flow from" and be "attributable to" the unlawful aspect of the practice under scrutiny. The plaintiffs in *Cargill* and *Atlantic Richfield* were not "adversely affected by an *anticompetitive* aspect of the defendant's conduct"[73] because their injuries were not the means by which the defendant sought to achieve its anticompetitive ends. For the same reason, the prevention of the plaintiffs' injuries in the illustrative cases is directly "linked"[74] to the procompetition policy of the antitrust laws, as section 4 requires.

II. THE ABSENCE OF A PRINCIPLED BASIS FOR LIMITING ANTITRUST STANDING TO CONSUMERS OR COMPETITORS IN THE AFFECTED MARKETS

A. STATUTORY TEXT

In recent years, the Supreme Court has stated repeatedly that the starting point in interpreting any statute is the language of the statute itself.[75] Departures from the statutory text

71. *Id.* at 334.
72. *Id.* at 339 (citations omitted).
73. *Id.*
74. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 482 (1982).
75. *See, e.g.*, United States v. Alvarez-Sanchez, 511 U.S. 350, 356 (1994); Freytag v. Commissioner, 501 U.S. 868, 873 (1991); Chevron U.S.A., Inc. v.

are permitted only in cases of ambiguity or where the application of unambiguous statutory language would produce an "absurd result."[76] The Court's emphasis on these principles of statutory interpretation reflects a determination that any other approach would involve an unwarranted danger of judicial encroachment on the legislative sphere, and of giving legal effect to aspects of legislative history never enacted into law.[77]

A consumer-competitor limitation on antitrust standing draws no support from the text of section 4 of the Clayton Act, which broadly provides that "any person" injured by reason of an antitrust violation may recover the damages they have sustained.[78] Indeed, the Supreme Court has observed that "'[o]n its face, § 4 contains little in the way of restrictive language,'"[79] and that a "literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation."[80] Any limit on standing under section 4 must therefore be grounded in a principle other than the "plain meaning" of the statutory text.

B. DELEGATION TO THE JUDICIARY

A judicially created consumer or competitor limitation on the unrestricted language of section 4 could perhaps be justified if Congress, in the Sherman and Clayton Acts, had delegated to the judiciary the power to define those injured in their

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Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

76. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 68-70 (1994); West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 98 (1991); *cf.* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (noting that finding a clear expression of congressional intent ends the process of statutory construction); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1991) (stating that the clear language of a statute ordinarily guides its interpretation); *Freytag*, 501 U.S. 868 at 873 (same).

77. *See Casey*, 499 U.S. at 100-01; Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982); *Estate of Cowart*, 505 U.S. at 475-78.

78. Section 4 of the Clayton Act reads, in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1994).

79. Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)).

80. *AGCC*, 459 U.S. 519, 529 (1983).

business or property "by reason of" a violation of the antitrust laws as a matter of federal common law.[81] Some support for that position might be found in the longstanding recognition that Congress expected the judiciary to flesh out the broad substantive prohibitions of sections 1 and 2 of the Sherman Act in the "common-law tradition."[82] In *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[83] however, the Supreme Court declined to find an analogous delegation to the judiciary to fashion a federal common law of antitrust remedies. Rejecting a claim that it should recognize a right of contribution among antitrust violators in that case, the Court contrasted the relatively undefined substantive prohibitions of the Sherman Act with their detailed and specific remedial provisions.[84] With respect to the latter, "[t]he intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created in Section 7 of the original Act."[85] In the absence of such a delegation, or any other basis for creating antitrust remedies as a matter of federal common law, the role of the judiciary was limited to "identify[ing] the scope of the remedy Congress itself has provided."[86] The Court stated, "'In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.'"[87]

To be sure, the issue in *Texas Industries* and the question here are not identical. The issue in *Texas Industries* was whether the Court should extend the range of private remedies that Congress expressly had provided by permitting a suit for contribution that did not fall even arguably within the lan-

81. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642-43 (1981) (holding that although Congress intended the courts to give meaning to the substantive violations of the Sherman Act, Congress did not delegate to the judiciary the authority to fashion remedies).

82. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

83. 451 U.S. 430 (1981).

84. *See id.* at 644-645.

85. *Id.* at 643-644 (citing C. Douglas Floyd, *Contribution Among Antitrust Violators: A Question of Legal Process*, 1980 BYU. L. REV. 183, 228).

86. 451 U.S. at 646 (citing Floyd, *supra* note 85, at 227-31).

87. *Id.* at 646 (quoting Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 97 (1981)).

guage of section 4. The question at hand is whether the judiciary should limit the sweep of section 4 to less than its literal scope. Nevertheless, the thrust of the Court's analysis in *Texas Industries* is directly on point. Neither section 4 of the Clayton Act nor any other provision of the antitrust laws delegates to the judiciary the power to fashion a federal common law of private remedies for their enforcement. Regardless of policy considerations that might lead a court, acting in its "legislative" capacity in creating federal common law, to limit the private antitrust remedy only to consumers or competitors in the markets affected by the defendants' conduct,[88] the judiciary's proper role is more limited. It is simply, and only, to interpret the scope of the remedy that Congress has provided, drawing on any relevant aids to statutory interpretation, including the language, purpose, and history of the statute, and any relevant background principles of the common law against which Congress may be assumed to have legislated when it passed the Sherman Act in 1890 and the Clayton Act in 1914.

C. BACKGROUND PRINCIPLES OF PROXIMATE CAUSE

Despite its frequent admonition that "[t]he starting point in interpreting a statute is its language,"[89] the Court has sometimes been persuaded to depart from the literal text of a statute. This has occurred when the Court was convinced that Congress acted in light of a well established "background principle" of the common law to which it assumed the courts would adhere in their application of a broadly phrased statutory text.[90]

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88. The appropriateness of such a limitation as a matter of federal common law is hardly self-evident. *Cf.* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 4-9 (1995) (discussing the disagreement among the federal courts of appeals on the question of antitrust standing).

89. Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993); *see supra* note 75 (listing cases holding so).

90. *See* Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 544-50 (1994) (holding that in the absence of express statutory guidance, the proper scope of recovery for negligently inflicted emotional distress under the Federal Employers' Liability Act must be determined by reference to relevant common-law principles); Staples v. United States, 511 U.S. 600, 619 (1994) (ruling that common-law tradition required that scienter be established to convict under the National Firearms Act even though the word "knowingly" was not found in the Act); Astoria Fed. Sav. & Loan Assoc. v. Solimino, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."); Firestone Tire & Rubber Co. v. Bruch, 489 U.S.

In both *Blue Shield of Virginia v. McCready* and *Associated General Contractors of California v. California State Council of Carpenters* (*AGCC*), the Supreme Court explicitly invoked such a background legal principle in reaching the conclusion that section 4's authorization for the recovery of treble damages by "any person injured in his business or property" by reason of an antitrust violation could not be given its literal scope. In *McCready*, the Court observed:

> In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant Section 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of proximate cause.[91]

In *AGCC* the Court elaborated on this idea. It first noted previous decisions suggesting that the section 4 remedy should be liberally interpreted and applied, and that the comprehensive protection of the statute was not limited to consumers, competitors, purchasers, or sellers.[92] The Court then concluded that the debates preceding the 1890 enactment of the Sherman Act made it clear that the remedial as well as the substantive provisions of the statute should be read against their common-law background.[93] "Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the contemporary legal context in which Congress acted when we try to ascertain the intended scope of the private remedy created by Section 7."[94] In particular, in 1890,

> a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation—doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract. Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints compa-

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101, 110-11 (1989) (holding that ERISA must be interpreted against a federal common-law background of trusts); *cf.* Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1721-23 (1996) (justifying use of abstention doctrines because of historic common-law powers of equity); National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 115 S. Ct. 2351, 2354-56 (1995) (concluding that common-law history of federal deference to state tax administration warranted interpreting 28 U.S.C. § 1983 to preclude equitable relief as long as adequate state-law remedies exist).

91. Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982).

92. *See AGCC*, 459 U.S. 519, 529 & n.19 (1983).

93. *See id.* at 531.

94. *Id.* at 532.

rable to well-accepted common-law rules applied in comparable litigation.[95]

In denying standing to the union in *AGCC*, the Court focused particularly on the common-law tort principle denying recovery for injuries that are indirect, consequential, and remote, and therefore not "proximately caused" by the conduct of the defendant.[96] "There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause,' and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages."[97]

The Supreme Court reiterated the relevance of the background principle of proximate cause to antitrust standing analysis in its subsequent RICO[98] decision in *Holmes v. Securities Investor Protection Corp.*[99] The Securities Investor Protection Corporation (SIPC) sought to maintain an action under RICO to recover for funds it had advanced to reimburse customers of brokerages alleged to have been injured by defendants' fraudulent manipulation of securities held by the brokerages. The Court held that the SIPC lacked standing to recover under a subrogation theory for the injuries suffered by the brokerage customers as a result of the insolvency of the brokerages.[100] The Court observed that RICO's provision for a private right of action in favor of "any person injured in his business or property" by a violation of the Act had been modeled after section 4 of the Clayton Act.[101] It noted that in *AGCC*, "we held that a plaintiff's right to sue under Section 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well."[102] It concluded that "among the many shapes this [proximate cause] concept took at common law . . . was a demand for some direct relation between the injury asserted and the injurious conduct alleged."[103] Applying this analysis, the

95. *Id.* at 532-33 (footnotes omitted).

96. *See id.* at 532-534.

97. *Id.* at 535-36 (footnotes omitted).

98. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994).

99. 503 U.S. 258 (1992).

100. *See id.* at 274.

101. *See id.* at 267.

102. *Id.* at 268.

103. *Id.* (citation omitted). The Court observed that direct injury was not the "sole requirement" of Clayton Act standing, which had also been inter-

Court denied RICO standing to the SIPC on its subrogation claims because the injuries to the customers of the brokerages were only derivative of those to the brokerages themselves.[104] Relying explicitly on *AGCC*'s admonition that the tendency of the law was "not to go beyond the first step,"[105] the Court held that "the reasons that supported conforming Clayton Act causation to [that] general tendency apply just as readily to the present facts, underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation" in RICO.[106]

The background proximate-cause principle provides ample support for the federal courts' longstanding rejection of the standing of corporate shareholders, suppliers, and others suffering only indirect and consequential injuries as the result of the "ripples of harm" of an antitrust violation.[107] However, the proximate cause principle provides little or no support for the conclusion that even directly injured parties whose injuries are essential to the success of the defendants' anticompetitive scheme should be denied standing on the ground that they are not consumers or competitors in the markets affected by defendants' antitrust violation, and therefore have not felt the price-enhancing or output-reducing effects of the defendants' conduct. The federal courts frequently have analogized antitrust violations to tortious misconduct[108] and *AGCC*'s invocation of the tort concept of proximate cause as a relevant "background principle" of statutory construction was therefore fully justi-

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preted to require that the plaintiff suffer antitrust injury, but that "it has been one of its central elements." *Id.* at 269 n.15.

104. *See id.* at 271-74.

105. *Id.* at 271.

106. *Id.* at 272.

107. For cases dealing with corporate shareholders and/or creditors, see Vinci v. Waste Management, Inc., 80 F.3d 1372, 1375 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1252 (1996); Peck v. General Motors Corp., 894 F.2d 844, 846-47 (6th Cir. 1990); Rand v. Anacanda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986), *cert. denied*, 479 U.S. 987 (1986). For cases dealing with suppliers, see G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 381 (1995); Arthur S. Langenderfer Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1437-39 (6th Cir. 1990), *cert. denied*, 502 U.S. 899 (1991); South Dakota v. Kansas City S. Indus., 880 F.2d 40, 47-48 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1989). For a case dealing with employees, see Sharp v. United Airlines, Inc., 967 F.2d 404 (10th Cir. 1992), *cert. denied*, 506 U.S. 974 (1992).

108. For earlier cases in which the Court described violations of antitrust laws as "tortious acts," see Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263-64 (1946). *See also* Texas Indus., Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 634 n.5 (1981); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955).

fied. If anything, however, tort concepts of proximate cause would suggest that directly injured parties should have standing to sue unless, as discussed below, there is some specific evidence of Congressional intent to exclude them from the private treble-damages remedy.

Initially, as Justice Marshall pointed out in his dissent in *AGCC*, one should recognize that the tort concept of proximate cause finds its primary relevance in limiting the scope of liability for negligent misconduct.[109] Justice Marshall went on to observe, however, that "[a]lthough many legal battles have been fought over the extent of tort liability for remote consequences of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious conduct was a cause-in-fact of his injuries."[110] Antitrust cases typically involve deliberate acts, not careless or negligent conduct; the intermediary cases are typically ones in which the defendants have intentionally injured a person or entity that is neither a consumer nor a competitor in the markets affected by their conduct in an attempt to achieve their anticompetitive ends.

The primary function of proximate-cause analysis in negligence cases has been to foreclose recovery for injuries to unforeseeable plaintiffs and for unforeseeable risks, or for injuries that are indirect and derivative rather than direct and immediate.[111] These principles cut strongly against the recognition of the union's standing in *AGCC* to recover for the consequential injuries of loss of membership and dues that it allegedly had suffered as a result of the defendants' coercion of landowners and contractors to deal with non-union firms. Neither principle

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109. *See AGCC*, 459 U.S. at 548-49 & n.3 (Marshall, J., dissenting) (citing RESTATEMENT (FIRST) OF TORTS § 279 (1934)); *see also* RESTATEMENT (SECOND) OF TORTS § 435 A (1965) (imposing liability on an intentional tortfeasor regardless of the foreseeability of a particular harm); FOWLER V. HARPER ET AL., THE LAW OF TORTS § 20.5, at 133 n.1 (2d ed. 1986) ("[I]ntended consequences . . . are always proximate."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 293 (5th ed. 1984) ("One area in which it may be especially likely that the 'foreseeability' limitation will be cast aside is that of intentional torts, as to which it has been said often enough that there is more extended liability").

110. *AGCC*, 459 U.S. at 547-48 & n.3; *see also* RESTATEMENT (SECOND) OF TORTS § 870 cmt. L (1979) ("For liability to exist [under an intentional tort], the defendant's conduct must have been the cause in fact of the harm to the plaintiff.").

111. *See* KEETON ET AL., *supra* note 109, § 43, at 284-96; RESTATEMENT (SECOND) OF TORTS § 281 cmts. c, e & f (1965).

suggests that the antitrust laws protect only consumers or competitors in the markets affected by the defendants' conduct, or that the direct and intended victims of antitrust misconduct should be denied standing because they have not directly felt the price or output effects of the violation alleged.

D. LEGISLATIVE INTENT AND THE "ZONE OF INTERESTS" OF THE STATUTORY ENACTMENT

Ultimately, the scope of the private treble-damages remedy presents a question of congressional intent. The language of section 4 itself contains no hint that it was intended to permit suit only by persons injured in their capacities as consumers or competitors in the markets affected by defendants' conduct. Even assuming that the breadth of the statutory language in itself could be thought to create an "ambiguity" or to lead to an "absurd result" justifying resort to the legislative history of Clayton Act section 4 and its statutory predecessor, section 7 of the Sherman Act,[112] that history also fails to provide any basis for limiting standing in private antitrust actions to consumers or competitors in the affected markets. In enacting the Sherman Act, members of Congress repeatedly expressed their concern with the impact of the early trusts on ultimate consumers and competitors.[113] But identification of the ultimate *objectives*

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112. *See supra* notes 75-76 and accompanying text (discussing the Court's approach to statutory interpretation and concern over judicial encroachment).

113. *See* 20 CONG. REC. 1458 (1889) (statement of Sen. James Z. George) (urging passage of a bill that would "put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell"), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 77 (Earl W. Kintner, ed.) (1978) [hereinafter LEGISLATIVE HISTORY OF ANTITRUST LAWS]; 20 CONG. REC. 1457 (1889) (statement of Sen. James K. Jones) ("[Trusts are] an example of evil that has excited the greed and conscienceless rapacity of commercial sharks . . . , preying upon every industry, and by their unholy combinations robbing their victims, [and] the general public . . . ."), *reprinted in* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 76; 21 CONG. REC. 2457 (1890) (statement of Sen. John Sherman) (noting that "[the trust's] governing motive is to increase the profits of the parties composing it") *reprinted in* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 117; 21 CONG. REC. 4100 (1890) (statement of Sen. William E. Mason) ("[T]rusts . . . have destroyed legitimate competition and driven honest men from legitimate business enterprises. We propose now to strike down these 'trusts' . . . ."), *reprinted in* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 318; 21 CONG. REC. 4101 (1890) (statement of Sen. John T. Heard) (noting that the Sherman Act would strike down trusts,

that Congress sought to achieve does not necessarily or logically imply that the *means* Congress adopted to achieve these ends were similarly circumscribed. Nothing in the legislative history suggests that only consumers or competitors should have antitrust standing to the exclusion of others directly injured as an instrument of achieving the defendants' anticompetitive objectives. To the contrary, the overriding tone of the debates was that the private treble-damages remedy was "remedial" in nature and should be construed liberally to achieve not simply compensatory but deterrent objectives.[114]

The language and legislative history of the Clayton Act are not the only potential bases for limiting the scope of section 4. In addition to the background principle of "proximate cause," Congress also acted in light of the longstanding principle that the remedy for a statutory violation should be confined to the class of persons that Congress intended to protect.[115] This principle has found frequent expression in negligence cases, where it has been invoked, sometimes under the guise of "proximate cause" analysis, to limit the scope of liability under the "negligence per se" doctrine. As a leading authority states, "[i]n many cases the evident policy of the legislature is to protect only a limited class of individuals. If so, the plaintiff must bring himself within that class in order to maintain an action based on the statute."[116] The class of intended beneficiaries

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"which control the markets . . . of this country [and] have advanced the cost of such articles to every consumer, and that without rendering the slightest equivalent therefor [sic] these illegal conspiracies against honest trade have stolen untold millions from the people"), *reprinted in* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 320.

114. *See, e.g.*, 21 CONG. REC. 2456 (1890) (statement of Sen. John Sherman) ("[B]eing a remedial statute, [the Sherman Act] would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . ."), *reprinted in* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra* note 113, at 115; *see also* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 127, 165, 167, 177, 178, 212 (various lawmakers discussing the intent of making antitrust laws "vigorous" and expressing concerns that the proposed bill would be too weak). There was little discussion of what is now section 4 of the Clayton Act during the 1914 House debates, other than to note that "any person" harmed because of an antitrust violation would be able to sue. *See* LEGISLATIVE HISTORY OF ANTITRUST LAWS, *supra*, at 1131, 1192.

115. *See* KEETON ET AL., *supra* note 109, § 36, at 224-25 (noting need for a plaintiff to be included within the class of persons protected by a statute); *cf. id.* at 286-90 (discussing limitation of the *Palsgraff* rule to the unforeseeable plaintiff and comparing that rule with the one limiting coverage through statutory construction).

116. *Id.* at 224.

has also proved influential in determining whether the courts should imply a private right of action for a violation of a statute.[117] And, as pointed out below, the same generic inquiry underlies the development of the "zone of interests" formulation of the standing inquiry in cases seeking judicial review of administrative action under the Administrative Procedure Act (APA).[118]

In some sense, this principle is circular, because it seeks to determine those persons that are protected by a statutory remedy by asking what persons the legislature intended to protect. Nevertheless, the inquiry does serve reasonably well as a principle of exclusion in cases where it is clear that the plaintiffs were not an object of legislative concern. If it is clear, for example, that a statute providing for Sunday closings was intended to protect the social interests of the community at large, rather than the safety of any particular class of individuals, an injury resulting from illegal operation on Sunday will not invoke the doctrine of negligence per se.[119] Similarly, the Supreme Court declined to imply a private right of action in favor of a corporate shareholder to enforce a federal statute prohibiting corporate expenditures in presidential election campaigns on the ground that the purpose of the statute was to protect fed-

117. In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court held that four factors were of primary relevance in determining whether a private right of action to enforce a statutory prohibition should be judicially implied: (1) whether the plaintiff is a member of the class for whose benefit the statute was enacted; (2) whether there is any indicia of legislative intent to create or deny a private remedy; (3) whether there is consistency with the underlying purposes of the legislation; and (4) whether the cause of action is one that is relegated to state law. *See id.* at 77-78. In subsequent decisions, the Court has made clear that the ultimate issue is whether Congress intended to create a private right of action, although the *Cort* factors remain relevant as guides to congressional intent. *See* Thompson v. Thompson, 484 U.S. 174, 179 (1988) ("In determining whether to infer a private cause of action from a federal statute, our focal point is Congress intent in enacting the statute."); *see also* Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985); Universities Research Ass'n v. Coutu, 450 U.S. 754, 770 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979). This approach "reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990).

118. *See infra* notes 125-150 and accompanying text (analyzing the APA "zone of interests" standing formula and discussing its application to section 4 of the Clayton Act).

119. *See* KEETON ET AL., *supra* note 109, § 36, at 222-23.

eral elections from corrupt influence, rather than to protect corporate shareholders.[120]

Because the ultimate objective of the Sherman and Clayton Acts was to protect consumers from the price-enhancing and output-reducing effects of anticompetitive behavior, some courts have held that standing should be limited to the affected consumers, or, at the very most, to consumers and excluded competitors. This position, however, takes too narrow a view of the Congressional intent underlying section 4, which was conceived as a broadly remedial measure with important deterrent as well as compensatory objectives. Nothing in the history of section 4 makes it clear that Congress intended to provide no protection to persons directly and intentionally injured by an antitrust defendant as a means of achieving its anticompetitive objectives, such as the trade show organizers in the first illustrative example,[121] or the cost consultants in the second.[122] As a matter of logic and common sense, Congress would have wanted to provide such direct targets and indispensable cogs in an anticompetitive scheme with a private right of action to achieve the deterrent objectives of section 4. As a leading commentator points out, "[t]he class of persons to be protected may of course be a very broad one, extending to all those likely to be injured by the violation[;]"[123] and "[a] broad purpose of maximum protection, found as the basis of the statute, will of course encourage such [a broad] interpretation."[124]

The most explicit consideration of the relevance of this "zone of interests" analysis to RICO and, inferentially, antitrust standing analysis is found in the opinion of Justice Scalia in *Holmes v. Securities Investor Protection Corp.*, previously

120. *See Cort*, 422 U.S. at 81-82; *cf.* California v. Sierra Club, 451 U.S. 287, 294 (1981) (declaring no implied private right of action based on a general statutory prohibition of obstructions on navigable waters of the United States where the statute did not "unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further"); *Universities Research Ass'n*, 450 U.S. at 772 (noting the Court's reluctance to allow a private remedy when Congress "has framed the statute simply as a general prohibition or a command to a federal agency") (quoting Canon v. University of Chicago, 441 U.S. 667, 690-92 (1979)); *Touche & Ross, Co.*, 442 U.S. at 575 (holding that a congressionally created regulatory scheme did not create an implied right of action).

121. *See supra* text accompanying note 10.

122. *See supra* text accompanying note 11.

123. *See* KEETON ET AL., *supra* note 109, § 36, at 224.

124. *Id.* at 227.

discussed[125] Because the Court denied standing in *Holmes* on "proximate cause" grounds, a majority of the Court found it unnecessary to consider the question on which certiorari had been granted. That question was whether RICO standing should be limited to the purchasers and sellers of securities where the underlying "predicate offense" was a violation of section 10(b) of the Securities Exchange Act of 1934, under which the Court had limited the judicially implied private right of action to purchasers and sellers of securities.[126]

Justice Scalia, concurring in the judgment, did address that question. Invoking a "zone of interests" standing test derived from cases interpreting the APA's conferral of standing to challenge agency action on any person "adversely affected or aggrieved,"[127] he concluded that "judicial inference of a zone-of-interests requirement, like judicial inference of a proximate-cause requirement, is a background practice against which Congress legislates."[128]

Applying that test to the RICO private right of action, which as noted was modeled directly on section 4, Justice Scalia declined to limit standing only to purchasers and sellers of securities protected by the underlying section 10(b) implied right of action. In his view, standing under RICO should normally be interpreted in consonance with the standing principles that apply to the underlying predicate offense. However, the case before the Court presented a unique standing issue because the purchaser and seller limitation in private actions under section 10(b) and SEC Rule 10b-5 had been adopted by the Court as an exercise of legislative judgment to limit an implied private right of action that the Court itself had created, "a practice we have since happily abandoned . . . ."[129] By contrast, in the case of RICO (and, a fortiori, Clayton Act section 4 on which its remedial provision was based), Congress expressly created the right of action at issue. Policy considerations such as the difficulty of assessing the merits of nonpurchasers' and sellers' claims and the threat of strike suits "are perhaps among the factors properly taken into account in determining the zone of interests covered by a statute, *but they are surely*

125. 503 U.S. 258 (1992). For a more detailed discussion of this case, see *supra* notes 99-106 and accompanying text.

126. *See id.* at 263-65.

127. *See, e.g.*, Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984).

128. Holmes, 503 U.S. at 287.

129. *Id.* at 289.

not alone enough to restrict standing to purchasers or sellers under a text that contains no hint of such a limitation."[130]

Although the APA's broad "zone of interests" standing formulation arose in a different statutory context, it raises important parallels with the standing inquiry under section 4 of the Clayton Act, as Justice Scalia implicitly recognized. Like the APA's broad authorization for judicial review by any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[131] section 4 of the Clayton Act frames its authorization for private actions in the broadest possible terms, permitting suit by "any person . . . injured in his business or property" by reason of anything prohibited by the antitrust laws.[132] As it has under section 4, the Court, in interpreting the judicial review provisions of the APA, has recognized that Congress could not have intended literally to authorize suit by "any person" whose injury would not have occurred but for the conduct at issue, and has sought to draw a line that is most consistent with congressional intent in enacting the relevant statute.[133] Like the APA, which the Court has held must be interpreted "not grudgingly but as serving a broad remedial purpose,"[134] the history of the private treble-damages remedy makes clear that it was conceived by Congress as a remedial measure that should be liberally construed.[135]

The Supreme Court's decisions interpreting the standing provisions of the APA have concluded that section 702 authorizes judicial review of agency action by any adversely affected party who is within the "zone of interests" sought to be protected by the statute in question.[136] This formulation, however, has not led the Court to confine standing only to those plain-

130. *Id.* (emphasis added).

131. 5 U.S.C. § 702 (1994).

132. 15 U.S.C. § 15 (1994).

133. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987) (discussing use of "zone of interest" test to assess congressional intent).

134. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 156 (1970).

135. *See supra* note 114 (citing congressional support for remedial nature of statute).

136. *See* Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 115 S. Ct. 1278, 1283 (1995); Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517, 523 (1991); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990); *Clarke*, 479 U.S. at 396-97; *Data Processing*, 397 U.S. at 153.

tiffs who were the direct or intended beneficiaries of the statute. For example, in *Clarke v. Securities Industry Ass'n*,[137] the Court held that an association of securities dealers had standing to challenge the Comptroller of the Currency's decision to allow two national banks to offer discount brokerage services at their branch offices and other locations. The Court rejected the Comptroller's argument that the dealers lacked standing because Congress had passed the relevant statute to protect state-chartered banks from competitive inequality rather than to protect competing securities dealers.[138] The Court held that the APA standing requirement that the plaintiff's injuries be "arguably within the zone of interests" of the statute in question did not require that Congress have intended, by its enactment, to benefit the plaintiff's class.[139] Rather, standing was to be denied only

> if the plaintiff's interests are *so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.* The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be-plaintiff.[140]

The Court has consistently reached the same conclusion in cases under the APA. Thus, in *Investment Co. Institute v. Camp*,[141] the Court allowed an organization of competing investment companies to challenge the Comptroller of the Currency's decision to allow national banks to operate mutual investment funds as a violation of the Glass Steagall Act, even though the central purpose of that Act was to protect the banks and their customers from the financial risks and conflicts of interest created by the simultaneous conduct of the banking and securities businesses.[142]

Application of an analogous "zone of interests" standing formulation under section 4 of the Clayton Act would uphold

137. 479 U.S. 388 (1987).

138. *See id.* at 392.

139. *See id.* at 398.

140. *Id.* at 399-400 (emphasis added).

141. 401 U.S. 617 (1971).

142. *See id.* at 629-34 ("In sum, Congress acted to keep commercial banks out of the investment banking business largely because it believed that the promotional incentives of investment banking and the investment banker's pecuniary stake in the success of particular investment opportunities was destructive of prudent and disinterested commercial banking and of public confidence in the commercial banking system.").

the standing of directly injured victims whose damages are the means by which the defendants seek to achieve their anticompetitive ends, whether or not they suffered injuries as consumers or competitors in the markets at issue. So long as the core *Brunswick* principle that plaintiffs not be allowed to recover for damages caused by increased competition is honored, and there is no danger of duplicative recovery, there is, in such cases, no basis for concluding that the interests of the intermediaries "are so marginally related to or inconsistent with the purposes implicit in [section 4] that it cannot reasonably be assumed that Congress intended to permit the suit."[143]

As the Court itself recognized in *Clarke*, "zone of interests" analysis has been invoked in a variety of contexts, such as the judiciary's implication of private rights of action[144] and, in the constitutional sphere, as a "prudential" limitation on the right of review.[145] The Court cautioned, however, that standing analysis developed in one statutory context is not necessarily transferable to another.[146] It explicitly declined to adopt the requirement of *Cort v. Ash* that, for a private right of action to be implied, the plaintiff must at a minimum be shown to be "one of the class for whose especial benefit the statute was enacted."[147]

If *Cort*'s narrower version of "zone of interests" analysis were a more apt analogy than cases decided under the broad standing provisions of the APA, a strong argument could be made that cases limiting standing under section 4 of the Clayton Act only to consumers and competitors in the markets affected by defendants' conduct were correctly decided. The language and history of the Sherman and Clayton Acts do establish that consumers and competitors feeling the adverse price and output effects of the anticompetitive conduct that those statutes condemn were the "especial beneficiaries" of the antitrust laws. As Justice Scalia recognized in *Holmes*, how-

143. Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987).

144. *See Clarke*, 479 U.S. at 396-97; *see also* Holmes v. Security Investor Protection Corp., 503 U.S. 258, 287-90 (1992) (Scalia, J., concurring); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990).

145. *See* Allen v. Wright, 468 U.S. 737, 753-56 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 475 (1982); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 n.6 (1979).

146. *See Clarke*, 479 U.S. at 400 n.16.

147. *Id.* (quoting *Cort*, 422 U.S. at 78).

ever, the implied private right of action analogy is not on point.[148] There, the question is whether the judiciary should create a right of action where Congress has failed to do so, an exercise in judicial lawmaking that could draw legitimacy only from the clearest indication of congressional intent to permit a particular class of persons to sue. That is because, in implying a private right of action, "the central inquiry [is] whether Congress intended to create, either expressly or by implication, a private cause of action."[149] In making that determination, the absence of any congressional intent to confer a special benefit on the class of which plaintiff is a member is usually fatal.[150]

The question under section 4 of the Clayton Act is entirely different. As under the APA, Congress in section 4 explicitly created a private right of action running broadly in favor of any person injured by a violation of the antitrust laws. The question is whether that broad congressional authorization of suit should be limited to less than its literal scope, and, if so, what form that limitation should take. In that setting, as the Court recognized in interpreting the APA in *Clarke*, a judicially imposed limitation of an express congressional authorization of suit is justified only based on some clear indication that permitting review would be "marginally related to or inconsistent with the purposes implicit in the statute."[151] That assumption cannot be made in suits by victims of the kind considered here, who, in terms of the deterrent objectives of section 4, are "very reasonable candidates"[152] to maintain a private action under the antitrust laws.

E. IMPLIED REPEAL BY THE PROVISION OF ANOTHER REMEDY

Cases applying the multifactor *AGCC* balancing test to deny standing to private antitrust plaintiffs have sometimes cited the availability of another, nonantitrust remedy under state or federal law as a basis for their decision.[153] This ten-

148. *See Holmes*, 503 U.S. at 289 (Scalia, J., concurring).

149. Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979).

150. *See supra* note 117 and accompanying text.

151. *Clarke*, 479 U.S. at 399.

152. *Id.* at 403.

153. *See* Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376 (9th Cir. 1996) (finding damages from loss of job not to be within the scope of section 4), *cert. denied*, 117 S. Ct. 1252 (1997). The *Vinci* court implied that breach of contract or labor-related claims were the only appropriate remedies. *See also* SAS v. Puerto Rico Tel. Co., 48 F.3d 39, 46 (1st Cir. 1995) ("[S]upposing an anti-

dency has been particularly strong in cases involving unions or employees targeted for injury as a means of implementing an anticompetitive scheme.[154] *AGCC* provides some support for this approach. In denying the standing of the union to challenge the alleged coercion of landowners and general contractors to channel their business to non-union firms, the Supreme Court noted that the interests of unions frequently are not served by competition in labor markets and that federal law includes

> not only a broad labor exemption from the antitrust laws, but also a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains.[155]

Somewhat contradictorily, however, the Court observed that it had no occasion to decide whether defendants' activities were protected by the statutory and nonstatutory labor exemptions.[156]

Courts denying standing on this basis have not explained why the availability of "another remedy" under a body of law designed to protect different interests should cut against the availability of the private treble-damages remedy to redress injuries under the antitrust laws. In most cases, the "other remedy" available to the plaintiff will be an action under state

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trust violation occurred, . . . [the plaintiff's] remedies . . . lie in contract and the other pertinent nonfederal claims asserted in its complaint."); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1352 (6th Cir. 1989) (ruling that alleged antitrust violation amounted to nothing more than a breach of a labor contract, "a claim that rarely, if ever, would implicate antitrust laws"), *cert. denied*, 495 U.S. 947 (1990); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 98 (3d Cir. 1986) (finding state contract law remedy adequate to redress the wrong of an employee fired for refusing to implement manufacturer's discriminatory pricing to a preferred distributor), *cert. denied*, 479 U.S. 821 (1986); Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 580 n.7 (9th Cir. 1986) (noting tort remedies of interference with prospective business and interference with contract relations would adequately have addressed the alleged antitrust wrong); McDonald v. Johnson & Johnson, 722 F.2d 1370, 1377 (8th Cir. 1983) (holding that alleged conspiracy to suppress pharmaceutical company's market was best resolved through a breach of contract claim), *cert. denied*, 469 U.S. 870 (1984).

154. *See, e.g.*, Sacramento Valley v. International Bhd. of Elec. Workers, 888 F.2d 604, 608-09 (9th Cir. 1989); *Apperson*, 879 F.2d at 1352; *Gregory Mktg. Corp.*, 787 F.2d at 98; Province v. Cleveland Press Publ'g Co., 787 F.2d 1047, 1052-54 (6th Cir. 1986); Lucas v. Bechtel Corp., 800 F.2d 839, 846 (9th Cir. 1986).

155. *AGCC*, 459 U.S. 519, 539-40 (1983).

156. *Id.* at 540 n.43.

tort or contract law. For example, an employee discharged for refusing to implement a defendant's anticompetitive pricing policies might assert claims for breach of the employment agreement, or for wrongful discharge in violation of public policy. But it has long been held that the availability of state tort and contract remedies for conduct that also violates the antitrust laws does not displace the private antitrust remedy provided by section 4,[157] and the pursuit of pendent state tort and contract claims in federal antitrust actions is commonplace.[158]

In many cases, the invocation of "another remedy" in cases denying standing under section 4 is a tautology. Most commonly, the plaintiff is denied standing on the ground that its injuries are only indirect and derivative of those suffered by the direct victims of the defendant's anticompetitive activities, and recognition of plaintiff's standing would therefore be contrary to the background principle of proximate cause against which section 4 must be read. In such cases, the observation that other tort, contract, or labor law remedies may be available to the plaintiffs adds nothing to the analysis of standing under the antitrust laws. The existence of other remedies may suggest or illustrate the derivative nature of the plaintiff's claims, but it does not demonstrate that fact. The objection to relying on the existence of "other remedies" to deny antitrust standing is that it improperly assumes implied preemption of

157. *See, e.g.*, Mulvey v. Samuel Goldwyn Prod., 433 F.2d 1073, 1075 (9th Cir. 1970) ("Successful maintenance of an antitrust suit does not depend upon the availability or nonavailability of a common-law remedy for that wrong."), *cert. denied*, 402 U.S. 923 (1971). However, where the terms of trade at issue have already been fixed by contract, contract law, rather than antitrust law, provides the appropriate remedy for a breach. *See, e.g.*, Orion Pictures Distrib. Corp. v. Syufy Enter., 829 F.2d 946, 949 (9th Cir. 1987). *But see* Z Channel Ltd. Partnership v. Home Box Office, Inc., 931 F.2d 1338, 1344-45 (9th Cir. 1991) (conspiracy to refuse to modify a contract for the future is actionable under the antitrust laws), *cert. denied*, 502 U.S. 1033 (1992).

158. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 486 n.1 (1982) (involving a pendent breach of contract claim); Purgess v. Sharrock, 33 F.3d 134, 139 (2d Cir. 1994) (involving pendent claims for breach of contract, defamation, and tortious interference with prospective economic advantage); U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986 (11th Cir. 1993) (involving a pendent claim for tortious interference with business relations), *cert. denied*, 114 S. Ct. 2710 (1984); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992) (involving a tortious interference with prospective business relationships), *cert. denied*, 507 U.S. 921 (1993); Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991) (involving a pendent breach of contract claim); Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265 (6th Cir. 1989) (involving pendent state-law tort and contract claims), *cert. denied*, 502 U.S. 963 (1991).

the antitrust remedy where none in fact exists and diverts attention from the relevant points of analysis, which are whether the plaintiff's injuries were proximately caused by the defendant's conduct, and whether they are sufficiently linked to the procompetition policies of the antitrust laws.

In cases where the plaintiff's claims do not violate the core *Brunswick* principle precluding recovery for injuries resulting from increased competition, and the plaintiff's injuries are not indirect or derivative, the denial of standing based on the availability of "another remedy" must at bottom rest on the conclusion that the availability of that remedy justifies the inference that Congress did not intend also to protect the plaintiff from competitive injury under section 4. The antitrust remedy would thus be implicitly preempted, and the plaintiff would not fall within the "zone of interests" protected by the antitrust laws.

That conclusion is insupportable as a general proposition. As noted, settled law holds that the antitrust laws supplement general state tort and contract remedies, and are not displaced by them.[159] In effect, a denial of antitrust standing on the basis of "another remedy" in such cases amounts to a species of implied exemption from or partial repeal of the antitrust laws. To be sure, the repeal in such cases affects the remedy of a particular plaintiff, rather than those of all potential plaintiffs as in the typical implied repeal or exemption case. In both instances, however, a court infers from the existence of another applicable body of law an unstated congressional intent to deny an antitrust remedy that otherwise would exist.

The Supreme Court has repeatedly said that, in view of the "fundamental national economic policy" embodied in the antitrust laws, repeals by implication are disfavored.[160] Implied repeal will be found only in the case of "plain repugnancy between the antitrust and regulatory provisions"[161] and "only if necessary to make the [alternative statutory scheme] work, and even then only to the minimum extent necessary."[162]

These observations apply with particular force to the implied repeal of the private treble-damages remedy based on the

159. *See supra* notes 157-158 and accompanying text.

160. *See* Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 218 (1966).

161. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 351 (1963).

162. Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963).

availability of state tort or contract remedies to the plaintiff. Because state rather than federal remedies are at issue, the case for implied repeal is particularly tenuous. There is no necessity to reconcile two arguably inconsistent federal statutory schemes,[163] and states have no power to repeal a federal law. Cases in which the Supreme Court has recognized implied repeals of the antitrust laws have involved alternative *federal regulatory* schemes in which Congress has accorded an agency broad jurisdiction over the conduct at issue, and the agency is empowered to take competitive considerations into account, justifying the conclusion that Congress intended the antitrust laws to be displaced by a special competitive regime.[164] Where the agency lacks jurisdiction, or does not take account of competitive concerns, or where the conduct at issue is viewed as the product of private business judgment, the Court has not found an implied repeal.[165]

State common-law remedies, including remedies for wrongful discharge of employees targeted as a means of implementing an anticompetitive scheme, satisfy none of the ordinary preconditions for implied repeal. No state entity has exercised regulatory authority over the anticompetitive practices at issue, or authorized or approved them after considering their competitive ramifications. The state courts in which such common-law claims typically are heard lack jurisdiction to entertain federal antitrust claims,[166] and resolution of tort and

163. *See, e.g.*, United States v. Borden Co., 308 U.S. 188, 198 (1939) ("[R]epeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.") (citations omitted).

164. *See* Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 691 (1975); United States v. National Ass'n of Securities Dealers, Inc., 422 U.S. 694, 735 (1975); Pan Am. World Airways, Inc. v. United States, 371 U.S. 296, 310 (1963); Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 388-89 (1973).

165. *See* National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378, 390 (1981) ("[A]ntitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity.") (citations omitted); Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973) ("When [commercial] relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.") (citation omitted); *Silver*, 373 U.S. at 357 (finding no implied repeal where agency lacked jurisdiction over practices at issue).

166. *See* Blumestock Bros. Advertising v. Curtis Publ'g, 252 U.S. 436, 441 (1920); Korek v. Pleasure Driveway & Park Dist., 583 F.2d 378, 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); Cream Top Creamery v. Dean Milk

contract issues does not turn on the competitive considerations that inform the application of the federal antitrust laws. Finally, the conduct at issue is the product of purely private decision-making, not regulatory coercion or influence.

The Supreme Court has analyzed cases involving claimed immunity from the federal antitrust laws created by state rather than federal law under the doctrine of *Parker v. Brown*,[167] which held that Congress did not intend the federal antitrust laws to apply to the anticompetitive activities of the sovereign states.[168] As applied to private conduct, the *Parker* doctrine justifies a claim of immunity only if the private anti-competitive conduct at issue is undertaken pursuant to a clearly articulated and affirmatively expressed state policy, and that conduct has been actively supervised by the state itself.[169] The availability of state tort and contract remedies for anticompetitive conduct satisfies neither of these requirements.

Cases in which the "other remedies" rationale has had its primary impact are those involving unions or employees injured in the implementation of an anticompetitive scheme.[170] Two of the illustrations of directly injured nonconsumer and noncompetitor plaintiffs cited at the outset of this Article fall into that category. In each, standing was denied. The denial of standing in *AGCC* also arose in the union context. The Court explicitly referred to the availability of a "separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions" in denying standing to the union in that case.[171]

On the assumption that the existence of "other remedies" under state tort and contract law generally provides no basis for the denial of a section 4 remedy, do special considerations uniquely applicable to the labor field justify the conclusion that plaintiffs possessing state or federal remedies for their injuries under the labor laws should be denied a remedy under section 4? In answering that question, one must first recognize that the "other remedies" available in the typical labor case will not

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Co., 383 F.2d 358, 363 (6th Cir. 1967).

167. 317 U.S. 341 (1943).

168. *See id.* at 350.

169. *See, e.g.*, California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 102-06 (1980).

170. *See supra* note 154.

171. *AGCC*, 459 U.S. 519, 539-40 (1983).

be federal labor law remedies, but state tort or contract theories such as breach of an employment agreement or wrongful discharge in violation of public policy. That was true in two of the leading decisions considering whether an employee discharged for refusing to implement an anticompetitive pricing scheme should have standing under section 4. In both *Ostrofe v. H.S. Crocker Co.*[172] and *In re Industrial Gas Antitrust Litigation (Bichan)*,[173] the employees in question were managers and the courts gave no indication that they were covered by a collective bargaining agreement. The employees' "other remedies," if any, would therefore have been under state common law rather than the federal labor laws. In that setting, it is difficult to see why they should have been denied a section 4 remedy more than any other antitrust plaintiff who possesses additional remedies under state tort and contract law, so long as relief was consistent with normal *Brunswick* and proximate cause limitations.

The critical issue, then, is whether the potential availability of a *federal* labor law remedy to unions and union employees should result in the implied repeal of an otherwise extant section 4 remedy, as the Supreme Court opaquely suggested in *AGCC*.[174] Even in this limited context, however, the case for denying the section 4 remedy is tenuous.

In its most recent discussion of the statutory and nonstatutory labor exemptions, the Supreme Court broadly held that economic conduct permissible for employers or employees as part of the collective bargaining process under the federal labor laws, such as the unilateral post-impasse implementation of previously proposed terms by a multi-employer bargaining unit, is impliedly exempt from the antitrust laws.[175] Even that broad construction of the nonstatutory labor exemption will have no application in the typical labor/antitrust case, however, because the termination or coercion of employees or their unions in an attempt to implement or effectuate an anticompetitive scheme plays no part in legitimate collective bargaining.

This is illustrated by *AGCC* itself, where, despite the Court's reference to the existence of "a broad labor exemption

172. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985).

173. 681 F.2d 514 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983).

174. *See AGCC*, 459 U.S. at 539-40.

175. *See* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2127 (1996).

from the antitrust laws,"[176] the Court found it unnecessary to decide whether the employers' alleged coercive conduct designed to force landowners and general contractors to employ non-union firms fell within the labor exemption.[177] In fact, given the Court's recent clarification of the nonstatutory labor exemption as applicable to employer activities that "gr[o]w out of, and [are] directly related to, the lawful operation of the bargaining process," and its observation that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process,"[178] it is difficult to see how the nonstatutory labor exemption could have any relevance to cases of the kind considered here.

But what of the unfair labor practice jurisdiction of the NLRB? In some instances, anticompetitive conduct directed at a union or its members in an effort to achieve an anticompetitive end in non-labor markets might violate some provision of the Labor Act. In such cases, should the potential availability of "another remedy" under the Labor Act preclude a remedy under section 4, as the Court might be read to have implied in *AGCC*? In its leading nonstatutory labor exemption decision, *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[179] the Supreme Court rejected that claim. *Connell* involved a general contractor's contention that an agreement it had signed with the union prohibiting it from subcontracting with non-union firms violated the antitrust laws. The Court first concluded that the nonstatutory labor exemption was inapplicable because the agreement in question constituted a direct restraint on a business market that was not justified by the need to eliminate competition over wages and working conditions.[180] The Court then rejected the contention that if the clause violated the prohibition on "hot cargo" agreements in section 8(e) of the Labor Act, the remedies provided by the NLRA were exclusive.[181] In fact, rather than finding an implied repeal of the section 4 remedy by the availability of an unfair labor practice remedy, one court of appeals has held that

176. *AGCC*, 459 U.S. at 539 (citations omitted).
177. *See Id.* at 539-40 n.43.
178. *Brown*, 116 S. Ct. at 2127.
179. 421 U.S. 616 (1975).
180. *See id.* at 625.
181. *See id.* at 634.

the existence of a Labor Act violation necessarily vitiates any implied antitrust exemption, thus bringing the antitrust laws into play.[182]

In sum, in cases involving acts directed at nonconsumer and noncompetitor intermediaries as a means of implementing an anticompetitive scheme, the availability of "other remedies" under state tort or contract law, or under the federal labor laws, provides an inadequate basis for the denial of a section 4 remedy that those plaintiffs otherwise would possess.

III. DISTINGUISHING NONCONSUMERS AND NONCOMPETITORS WITH STANDING FROM THOSE WITHOUT

The previous discussion suggests that the denial of antitrust standing to intermediaries who are directly injured as a means of achieving the defendants' anticompetitive objectives finds no basis in the language, history, or purposes of the Clayton and Sherman Acts. Decisions holding or suggesting that such direct victims lack standing, or that only consumers or competitors in the affected markets may sue, are not based on any effort to ascertain Congress's intent in enacting section 4. Rather, they have focused on the freewheeling balancing approach of *AGCC*, which requires courts to weigh and balance seven "factors" in determining whether an antitrust plaintiff should be permitted to sue. The factors identified by the Court in *AGCC* were:

1. whether the plaintiff has suffered the kind of injury that Congress sought to redress—i.e., whether the plaintiff has suffered "antitrust injury";[183]
2. the directness or indirectness of the plaintiff's injury;[184]

182. *See* Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). Other cases hold that a violation of the Labor Act should not be conclusive on the availability of the nonstatutory labor exemption, but none hold that the existence of a Labor Act remedy in itself precludes a private action under section 4, and it is clear that a Labor Act violation cuts against, rather than for, a claim of exemption. *See* Richards v. Neilsen Freight Lines, 810 F.2d 898, 906 (9th Cir. 1987) (finding that a violation of section 158(e) of the Labor Act does not preclude the availability of the nonstatutory labor exemption); Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793, 802 (2d Cir. 1977) ("We do not believe that our prior holding that the clause violated § 8(e) necessarily determines that antitrust [exemption] issue, although it lends support to appellants' position."), *cert. denied*, 434 U.S. 923 (1977).

183. *AGCC*, 459 U.S. at 538.

3. the existence of other plaintiffs more directly injured whose self-interest would motivate them to enforce the antitrust laws;[185]
4. whether the claim rests on a speculative measure of damages;[186]
5. the interest in avoiding duplicative recoveries;[187]
6. avoiding complex apportionment of damages;[188] and
7. defendants' intent to harm the plaintiff.[189]

Unfortunately, the Court in *AGCC* and its other antitrust standing decisions has given only minimal guidance regarding the genesis of these factors, or their interrelationship and relative importance. The court did not "assign specific weight to its factors, individually, collectively or relatively."[190] Although the Court's foray into the antitrust standing field may have been intended to replace the divergent approaches to antitrust standing previously followed by the courts of appeals with a more uniform national approach,[191] it also introduced an element of unprincipled discretion into standing analysis. The unguided "balancing" of *AGCC* factors has had the effect of permitting disguised decisions on the merits by courts hostile to certain types of antitrust claims or plaintiffs. For example, some courts have denied standing to competitors excluded from the market on the ground that no injury to market competition, as opposed to the plaintiff, has been shown,[192] even though ex-

184. *See id.* at 540.
185. *See id.* at 542.
186. *See id.* at 542-43.
187. *See id.* at 543-44.
188. *See id.*
189. *See id.* at 537.
190. *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1166 (3d Cir. 1993); *see also* Sullivan v. Tagliabue, 25 F.3d 43, 46 (1st Cir. 1994) (noting that *AGCC* "gives little guidance as to how to weigh the various factors, and whether the absence of a particular factor would be fatal to standing in every instance").
191. *See AGCC*, 459 U.S. at 536 n.33.
192. *See* Balaklaw v. Lovell, 14 F.3d 793, 801-02 (2d Cir. 1994); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 152 (9th Cir. 1989); Bio-Medical Applications Management Co. v. Dallas Nephrology Assocs., 1995-1 Trade Cas. (CCH) ¶ 70,914 (E.D. Tex. 1995); Purgess v. Sharrock, 1993-2 Trade Cas. (CCH) ¶ 70,349 (S.D.N.Y. 1992); Scara v. Bradley Mem'l Hosp., 1993-2 Trade Cas. (CCH) ¶ 70,353 (E.D. Tenn. 1993). *But see* Levine v. Central Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1545 (11th Cir. 1996) (finding that where no injury to market competition is present, the case should be decided on its merits without delving into an analysis of antitrust standing), *cert. denied*, 117 S. Ct. 75 (1996).

cluded plaintiffs at least presumptively should be proper antitrust plaintiffs and the question of "injury to competition" in a rule of reason case goes to the merits rather than standing.[193] Other courts have used *AGCC's* "directness" and "speculativeness" factors to deny standing on grounds that appear to be disguised decisions on the merits about causation in fact.[194] One court went so far as to deny standing in an output suppression case on the ground that no competitive injury had been shown, even though a majority of the court concluded that the plaintiff had alleged a per se violation of the antitrust laws under which the plaintiff was not required to establish specific competitive injury.[195]

In appraising the standing of nonconsumers and noncompetitors under the antitrust laws, a more focused discussion of the origins, relationship and importance of the *AGCC* standing "factors" is essential.

A. SOME STANDING FACTORS ARE MORE IMPORTANT THAN OTHERS

There is a difference in kind among the various *AGCC* standing factors, and some are more important than others. It is first essential to distinguish those factors identified by the Court that appear to have been based on the background tort-based principle of proximate cause from those that rest on the Court's perception of congressional intent specific to the antitrust laws themselves.

The factor most clearly falling in the latter category is whether the plaintiff's injuries are "of a type that Congress sought to redress in providing a private remedy for violations

193. *See* Harold Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1547-48 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 297 (1996); Metro Indus. Inc. v. Sammi Corp., 82 F.3d 839, 848 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 181 (1996); Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 854 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 170 (1995).

194. *See* Hodges v. WSM, Inc., 26 F.3d 36, 39 (6th Cir. 1994); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994); Sharp v. United Airlines, Inc., 967 F.2d 404, 409 (10th Cir. 1992); Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 868-69 (9th Cir. 1991), *cert. denied*, 506 U.S. 974 (1992); Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1389 (11th Cir. 1990); Bell v. Dow Chem. Co., 847 F.2d 1179, 1183 (5th Cir. 1988).

195. *See* R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 150-53 (9th Cir. 1989). *But see id.* at 153 (Norris, J., dissenting) (finding that standing had not been raised as an issue on appeal).

of the antitrust laws."[196] This "antitrust injury" component, based on the Court's seminal decision in *Brunswick*, is obviously critical to standing analysis. It is self evident that no one should be permitted to recover for damages that Congress did not intend to prevent. *AGCC*, by its listing of multiple factors to be weighed in the balance in resolving the standing inquiry, might be taken to have suggested that the existence of "antitrust injury" is only one factor among others, not determinative in itself. In fact, at least one court of appeals has suggested that this is an open question.[197] The Supreme Court, however, appears to have resolved the issue in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[198] where, discussing the standing of a competitor to challenge a merger of competing firms, the Court stated that the existence of antitrust injury is a "necessary, but not always sufficient" precondition to the recognition of a private plaintiff's standing to sue.[199]

The rule of *Illinois Brick Co. v. Illinois*,[200] precluding recovery of overcharges under a "passing on" theory by plaintiffs who purchase price-fixed goods indirectly through an intermediary rather than directly from the defendants, should also be treated as an absolute rule of exclusion based on policies specific to the antitrust laws, rather than as one factor to be weighed in the balance. It is true that the Court in *Illinois Brick* (and its previous *Hanover Shoe*[201] decision dealing with the corresponding right of a direct purchaser to recover the entire overcharge) relied on common-law principles of proximate cause.[202] However, the *Illinois Brick* result turns on the

196. *AGCC*, 459 U.S. at 538 (quoting *Brunswick*, 429 U.S. at 487-489).

197. *See* Sullivan v. Tagliabue, 25 F.3d 43, 47 n.9 (1st Cir. 1994) (finding that absence of antitrust injury weighs heavily against standing; reserving question whether its absence is determinative); *cf.* Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991) (holding that a plaintiff must have suffered antitrust injury to have standing); South Dakota v. Kansas City S. Indus., 880 F.2d 40, 46 (8th Cir. 1989) (finding that a causal connection between the antitrust violation and the plaintiff's injury is not sufficient to establish standing; plaintiff must have suffered direct antitrust injury in order to have standing), *cert. denied*, 493 U.S. 1023 (1990).

198. 479 U.S. 104 (1986).

199. *Id.* at 110 n.5.

200. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735 (1977).

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

202. *See Illinois Brick*, 431 U.S. at 741 (discussing the remoteness of the indirect purchasers from the defendant); *AGCC*, 459 U.S. at 535-36 & n.33 (noting the struggle of common-law judges in defining "proximate cause" articulately).

Court's determination that Congress, in the antitrust laws, did not intend to allow for duplicative recovery by both direct and indirect purchasers of price-fixed goods for the same overcharge.[203] Where duplicative recovery necessarily would occur if a plaintiff were permitted to sue, standing should be denied, not in some cases, but in all.

The necessity for "complex apportionment of damages" mentioned in *AGCC* is rarely relevant in the cases involving the standing of directly injured intermediaries. It should not, in any event, be viewed as an independent factor entitled to separate weight. The necessity for "complex apportionment" arises only as a means of preventing double recovery of the same damages, in violation of Congress's intent.[204] Thus, to "weigh" the prohibition of duplicative recoveries and the necessity for complex apportionment of damages separately would amount to double counting. If no duplicative recovery of the same damages is likely to occur, complex apportionment of damages is not needed to prevent it, and the "complex apportionment" factor is irrelevant.

The same cannot be said of *AGCC*'s "direct injury" factor, which does have independent significance and weight. The direct injury factor is, however, different in kind from the "antitrust injury" and "duplicative recovery" factors previously discussed. Because the requirement for antitrust injury and the prohibition of duplicative recovery of the same damages rest directly on the Court's perception of congressional intent unique to the antitrust laws, an antitrust plaintiff's failure to satisfy either requirement should serve as an absolute rule of exclusion regardless of the presence or absence of any of the

203. *See Illinois Brick*, 431 U.S. at 729; *see also* Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406, 1414 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1288 (1996); Gulfstream III Assoc., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 439 (3d Cir. 1993); *In re* Insurance Antitrust Litig., 938 F.2d 919, 925-26 (9th Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 509 U.S. 764 (1993); Austin v. Blue Cross & Blue Shield, 903 F.2d 1385, 1392 (11th Cir. 1990); County of Oakland v. City of Detroit, 866 F.2d 839, 848 (6th Cir. 1989); *cf.* California v. ARC Am. Corp., 490 U.S. 93, 100-03 (1989) (holding that state antitrust laws allowing recovery by indirect purchasers are not preempted by the federal antitrust prohibition, enunciated in *Illinois Brick*, against indirect purchaser recovery).

204. For example, in *AGCC*, the Court discussed this factor in the same breath with that of precluding duplicative recoveries, noting that its previous decisions "have stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." 459 U.S. at 543-44.

other *AGCC* factors. By contrast, the "direct injury" factor finds its origins, not in any policy specific to the antitrust laws, but in the background tort principle of proximate cause against which Congress legislated when it enacted the private treble-damages remedy. As the Court noted in *AGCC*, when Congress enacted the Sherman Act in 1890, "a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation—doctrines such as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contact."[205] Congress "simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation."[206]

Because of its common-law origins, the direct injury/proximate cause component of *AGCC* standing analysis necessarily assumes the flexible character of those judge-made rules, which are designed to accommodate myriad circumstances as they present themselves for judicial consideration. The "direct injury" component of standing analysis, therefore, is properly one factor to be "weighed" with others in determining whether standing to challenge a defendant's antitrust violation should extend to the plaintiff.

By contrast, *AGCC*'s "speculative damages" factor should not receive independent weight. Rather, it is a restatement and elaboration of the directness factor. If damages are indirect, they are more likely to be speculative.[207] If a plaintiff has been injured directly by a defendant's antitrust misconduct, speculativeness of damages should not be viewed as an independent basis for denying "standing" under the antitrust laws.[208] Under well-settled rules governing the required certainty of proof of the fact[209] and amount[210] of damages in anti-

205. *Id.* at 532-33 (footnotes omitted).

206. *Id.* at 533.

207. *See, e.g.*, Sullivan, 25 F.3d at 51-52 ("Because the harm to SMC was indirect, and was caused, in part, by independent intervening factors . . . we agree . . . that SMC's damages claims are 'highly speculative,' and are an additional factor weighing against a grant of standing in this case.") (citation omitted).

208. *See, e.g.*, Los Angeles Memorial Coliseum Comm'n v. NFL, 791 F.2d 1356, 1366 (9th Cir. 1986) (holding that damages of football stadium directly harmed by failure to secure tenancy of football team restrained from relocating by NFL territorial allocation rule were not unduly speculative), *cert. denied*, 484 U.S. 826 (1986).

209. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114

trust actions, the speculativeness of plaintiff's damages goes to the viability of the plaintiff's claim on the merits. If a directly injured plaintiff's damages cannot accurately be ascertained, that plaintiff's claims will fail on the merits, not for lack of "standing."

The two most enigmatic of the *AGCC* standing "factors" remain—the defendant's specific "intent" to harm the plaintiff, and "[t]he existence of an identifiable class of [other] persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement."[211] As to intent, the Supreme Court in *AGCC* stated that it was "not a panacea that will enable any complaint to withstand a motion to dismiss."[212] However, the Court did not say what significance that factor has or the weight that it should receive. The lower federal courts generally have given little weight to the factor of intent where the presence of absence of standing was clear on other grounds.[213] For example, where the *Brunswick* and *Illinois Brick* rules requiring "antitrust injury" and prohibiting multiple recovery of the same overcharges are violated, even clear proof of a malicious intent to injure the plaintiff should not confer standing. Conversely, where a presumptively proper antitrust plaintiff such as a directly injured consumer or excluded competitor seeks redress, courts have felt no need to rely on the "intent" factor to uphold standing.[214]

& n.9 (1969); *see also* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572-73 (1990); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 401 (7th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994); National Farmers' Org., Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286, 1293 (8th Cir. 1988), *amended*, 878 F.2d 1118 (8th Cir. 1989); Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088, 1292 (1987); World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1477-79 (10th Cir. 1985), *cert. denied*, 474 U.S. 823 (1986); King & King Enters. v. Champlin Petroleum Co., 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 456 U.S. 1164 (1982).

210. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-68 (1981) (noting that the standard for proof of amount of damages is not unduly rigorous); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-67 (1931); *In re* Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1175 (3d Cir. 1993), *cert. denied*, 510 U.S. 1021 (1994); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1493-98 (8th Cir. 1992); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1161 (7th Cir. 1983); Tire Sales Corp. v. Cities Serv. Oil Co., 637 F.2d 467, 474-75 (7th Cir. 1980).

211. *AGCC*, 459 U.S. at 537 & n.35, 542.

212. *Id.* at 537.

213. *See, e.g.*, R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 146-47 (9th Cir. 1989) (denying standing to plaintiff although plaintiff's allegation of intent was accepted as true).

214. *See In re* Insurance Antitrust Litig., 938 F.2d 919, 925-26 (9th Cir.

The factor of intent to injure the plaintiff therefore appears to have its primary relevance in cases where it is not clear whether the plaintiff's injuries should be viewed as direct or indirect,[215] and in the cases that are the specific focus of this Article, where defendants' anticompetitive scheme is directly aimed at intermediaries who are not (or at least debatably are not) consumers or competitors in the affected markets.[216] The

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1991) (holding that plaintiff's standing was proper on several grounds), *aff'd in part and rev'd in part on other grounds*, 509 U.S. 764 (1993); Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 815 F.2d 270, 278 (3d Cir. 1987) (holding that plaintiff had standing as the "immediate target" of antitrust conduct), *cert. denied*, 484 U.S. 851 (1987); Fishman v. Estate of Wirtz, 807 F.2d 520, 532-38 (7th Cir. 1986) (finding that plaintiff excluded from competition to acquire a natural monopoly had standing; not necessary to demonstrate injury to the welfare of the ultimate consumer in order to have standing; injury to the competitive process is enough); La Salvia v. United Dairymen, 804 F.2d 1113, 1115-16 (9th Cir. 1986) (holding that competitor had standing to challenge alleged monopolization), *cert. denied*, 428 U.S. 928 (1987); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575-77 (6th Cir. 1986) (holding that alleged target of monopolistic practices had standing); Los Angeles Mem'l Coliseum Comm'n v. NFL, 791 F.2d 1356, 1363-65 (9th Cir. 1986) (holding that both football team restrained from relocating and stadium competing for team's tenancy had standing to challenge NFL's territorial restrictions).

215. *See* Sanner v. Board of Trade, 62 F.3d 918, 926-30 (7th Cir. 1995) (holding that sellers of soy beans in cash market had antitrust standing to challenge conspiracy to require liquidation of futures contracts in view of close interrelationship of the markets and intent to depress cash market); In re *Antitrust Litig.*, 938 F.2d at 925-26 (finding that defendants' denial of reinsurance with intent to restrict the kinds of insurance available to consumers of primary insurance supported the consumers' standing); Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial, Inc., 919 F.2d 1517, 1521 (11th Cir. 1990) (denying standing to furniture shop owner to challenge a credit agency's allegedly discriminatory credit lending practices, and noting that the defendant's "anticompetitive intent was directed at the competing . . . [credit agencies], and not at Mr. Furniture"); Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 26 n.4 (D.C. Cir. 1987) ("[W]e read Associated General as saying only that a showing of . . . intent may be required to establish an antitrust violation (and thus necessary to avoid a motion to dismiss . . .), and may help focus the standing analysis.") (citations omitted).

216. *See* Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1162-63 (9th Cir. 1991) (recognizing the standing of independent yellow-pages consulting and purchasing agents to challenge refusal of yellow-pages seller to deal with them, relying in part on fact that "[t]he addition of specific intent to this direct injury also makes antitrust standing appropriate") (citation omitted), *cert. denied*, 504 U.S. 913 (1992); Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 742 (9th Cir. 1984) (finding that sales manager of company who was allegedly forced to resign after refusing to rig prices of lithograph labels had standing to sue under section 4 because "[h]is alleged injury was caused by the boycott, *it was intentionally inflicted*, and it was direct") (emphasis added), *cert. dismissed*, 469 U.S. 1200 (1985); Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 294 (2d Cir. 1983) (upholding standing of trade show organizers to challenge cable operators' al-

question remains, however, what weight the factor should receive, and why it is relevant at all.

The answer lies in the source of this aspect of the *AGCC* standing analysis, which originated not in any consideration of congressional intent unique to the antitrust laws, but, like the factor of directness or remoteness of injury, in the judicially created background principles of tort causation against which Congress legislated when it enacted section 4. Like the factor of directness, the factor of intent is not a rule of absolute exclusion but constitutes part of a flexible balancing approach designed to mark out the appropriate boundaries of the treble-damages remedy on a case-by-case basis. In tort causation analysis, the presence of a specific intent to injure the plaintiff cuts in favor of recognizing standing even where the plaintiff's injuries might be viewed as indirect.[217] Similarly, in antitrust standing analysis, an intent to injure the plaintiff should tip the balance where the plaintiff's standing is otherwise in doubt.

The relevance of "other plaintiffs" who are likely to sue remains shrouded in uncertainty. This factor has been invoked to deny standing in nonconsumer, noncompetitor plaintiff cases on the ground that the injured consumers or competitors themselves may sue to vindicate the public interest in antitrust enforcement.[218] There is, however, some irony in this aspect of

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leged organization of a boycott of the trade show, relying, in part, on fact that "[i]njury to [the plaintiff] Crimpers was the precisely intended consequence of defendants' boycott . . ."), *cert. denied*, 467 U.S. 1252 (1984).

217. *See supra* notes 109-110 and accompanying text (explaining that although proximate cause is usually a limiting principle when determining tort liability, it is assumed for intentional tort cases and the plaintiff need only prove that the conduct was the cause-in-fact of the injury).

218. *See* SAS of Puerto Rico, Inc. v. Puerto Rico Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995) (denying standing to telephone servicing company to challenge telephone company's alleged breach of contract because "if the breach played a part in an antitrust violation, the conduct itself was an antitrust violation because of the anticompetitive threat posed to *other* potential plaintiffs, not [the plaintiff] SAS"); Lucas v. Bechtel Corp., 800 F.2d 839, 844-45 (9th Cir. 1986) (holding that nuclear power plant's competitors were better plaintiffs than labor union to address alleged suppression of wages in the nuclear power plant design and construction market); Gregory Mktg. Corp. v. Wakefern Food Corp., 787 F.2d 92, 97 (3d Cir. 1986) (finding apple juice distributing company's competitors to be better plaintiffs than the apple juice manufacturer's broker to challenge a preferred discount to a distributor, which the broker refused to implement), *cert. denied*, 479 U.S. 821 (1986); *In re* Industrial Gas Antitrust Litig. (Bichan), 681 F.2d 514, 520 (7th Cir. 1982) (finding that the "[language in section 4] implies a standing requirement limiting the statute's applicability to those plaintiffs who are efficient enforcers of the antitrust

the *AGCC* standing analysis. In most cases, the parties denied standing to sue on this ground are those who have actually commenced an action to enforce the antitrust laws, whereas the other hypothetically "likely" private attorneys general have, in reality, elected not to sue. Furthermore, there are substantial reasons to question whether, in the ordinary case, consumers who individually may have suffered small damages, and who may be unable to surmount the *Illinois Brick* indirect purchaser rule, will be aware of their injuries or likely to sue.[219] Directly injured distributors may also be unlikely to sue, either because they have passed on most of the overcharges to ultimate consumers or because they fear jeopardizing their business relationship with the defendant. Similarly, where the defendants' anticompetitive scheme is not aimed at the exclusion of competitors, but rather seeks to enhance prices to the consumer or to facilitate price discrimination to a disfavored purchaser, competitors may well be the beneficiaries of the higher or discriminatory prices, and thus will not have suffered antitrust injury themselves.[220]

In short, there is an air of unreality in rejecting the standing of an antitrust plaintiff who is the direct target and essential instrument of the defendant's anticompetitive scheme and has actually elected to sue in favor of the hypothetical preferred consumer or competitor plaintiff who has not chosen to vindicate the public interest in antitrust enforcement. Of course, denial of standing to the intermediary may be appropriate where there is a significant risk of multiple recovery of the same damages by both the intermediary and a consumer or competitor in the relevant market, in violation of the rule of *Illinois Brick*. However, as discussed below, in most intermediary cases of the kind discussed here, there is no danger of duplicative or multiple recovery of the same damages.

AGCC's "other plaintiff" factor has, in the course of application by the lower federal courts, particularly in the intermediary cases, been detached from its moorings. The Supreme Court's initial reference to the "other plaintiffs" factor in *AGCC*

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laws") (citation omitted), *cert. denied*, 460 U.S. 1016 (1983).

219. *See, e.g.*, Sullivan v. Tagliabue, 25 F.3d 43, 51 & n.12 (1st Cir. 1994) (noting that those most directly affected by antitrust violations are not always the most likely to detect a violation and/or bring suit).

220. *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337 (1990) ("A] competitor may not complain of conspiracies that . . . set minimum prices at *any* level.") (quoting Matsushita Elec. Indus. Corp. v. Zenith Radio Co., 475 U.S. 574, 585 n.8 (1986)).

was not as an independent, stand-alone basis for the denial of standing, but rather as an elaboration on its discussion of the overriding proximate cause consideration of the indirectness of the plaintiffs' injuries in that case. Noting that the coerced landowners and contracting parties were the direct victims of defendants' activities, and that the plaintiff union's injuries were only indirect and derivative,[221] the Court observed that

> [i]f either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and... they would have a right to maintain their own treble damages actions against the defendants.... The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for *allowing a more remote party* such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.[222]

Thus, in its original context, it is clear that the "other plaintiffs" aspect of *AGCC* was focused on the existence of other *more directly injured* plaintiffs who would be likely to vindicate the public interest in antitrust enforcement.[223] It

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221. *AGCC*, 459 U.S. at 540-42.

222. *Id.* at 541-42 (emphasis added).

223. For treatment of the "other plaintiffs" factor in settings involving indirect and derivative injuries, see, for example, GKA Beverage Corp. v. Honickman, 55 F.3d 762, 766-67 (2d Cir. 1995) (denying standing to soft drink distributors claiming that soft drink manufacturer forced bottler out of business), *cert. denied*, 116 S. Ct. 381 (1995); *Tagliabue*, 25 F.3d at 51-52 (denying standing to football stadium lessor to challenge NFL's allegedly monopolistic rules that disallowed sale of football team); International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1329 (3d Cir. 1992) (denying standing to soda-ash terminal operator to challenge practices of soda ash producers because plaintiffs "is neither a producer nor a consumer of soda ash"), *cert. denied*, 507 U.S. 988 (1993); Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc., 919 F.2d 1517, 1520 (11th Cir. 1990) (holding that commercial creditors were more direct plaintiffs than furniture store owner to challenge alleged antitrust violation in providing credit to furniture purchasers), *cert. denied*, 502 U.S. 815 (1991); R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 148 (9th Cir. 1989) (denying standing to lessor of land to challenge lessee's activities that allegedly prevented plaintiff lessor from profiting from steam market); South Dakota v. Kansas City S. Indus., 880 F.2d 40, 46 n.15 (8th Cir. 1988) (denying standing to state to challenge railroad company's allegedly monopolistic activities because consumers of coal and competitors in coal industry had already brought suit against the railroads), *cert. denied*, 493 U.S. 1023 (1990); Adams v. Pan Am. World Airways, Inc., 828 F.2d 24, 29 (D.C. Cir. 1987) (finding that former employees of bankrupt airline lacked standing to challenge anticompetitive practices of competitors of defunct airline partly because superior plaintiffs existed—consumers of

should not be read for the further, and more problematic, proposition that even directly injured victims of an antitrust violation should be denied standing because other potential consumer or competitor plaintiffs also exist whose injuries are arguably "more serious" from the standpoint of antitrust policy.[224] That result would parse and negate the expansive "any person" language of section 4 without any foundation in the background tort principle of proximate cause, or in the rules of absolute exclusion of *Brunswick* and *Illinois Brick*.[225]

In *Yellow Pages Cost Consultants*, the court of appeals, in upholding the standing of the consultants to challenge the defendants' boycott of their services, rejected the argument that, because defendants' ultimate objective was to obtain higher prices from advertisers, the existence of the advertisers as potential "other plaintiffs" should result in the denial of standing to the consultants:

> Such analysis mistakes why we consider the factor of more appropriate antitrust plaintiffs. The factor is not, as the [trial court's] analysis would suggest, an exercise in identifying the select, in the style of a 17th Century Puritan village and its theological musings. It is instead an attempt to ensure antitrust violations will, in fact, be identified and remedied in our own Twentieth Century world of imperfect competition as understood by modern economics.... We refuse to rely on the speculation that some individual advertiser would have lost sufficient money from GTE's refusal to deal with Consultants to provide it with an adequate incentive to bring suit.[226]

In sum, like the factor of speculativeness of damages, the "other plaintiffs" factor of *AGCC* should be read, as it was

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transatlantic air transportation and the defunct airline itself), *cert. denied*, 485 U.S. 934 (1985); Alberta Gas Chems., Ltd. v. E.I. Du Pont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir. 1987) ("Once antitrust injury has been demonstrated by a causal relationship between the harm and the challenged aspect of the alleged violation, *standing analysis is employed to search for the most effective plaintiff* from among those who have suffered loss.") (emphasis added) (citations omitted), *cert. denied*, 486 U.S. 1059 (1988); *cf.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir. 1989) (recognizing standing of target of hostile takeover under section 16 of the Clayton Act because "[t]he target of a proposed takeover has the most immediate interest in preserving its independence as a competitor in the market"), *amended*, 890 F.2d 569 (2d Cir. 1989).

224. Some intermediary cases addressing the "other plaintiffs" factor seem to adopt this problematic approach. *See supra* note 218 and accompanying text.

225. *See, e.g.*, *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1168-69 (3d Cir. 1993) (finding that the existence of other direct victims did not diminish directness of plaintiffs' injuries), *cert. denied*, 510 U.S. 1091 (1994).

226. Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158, 1163-64 (9th Cir. 1991), *cert. denied*, 504 U.S. 913 (1992).

originally conceived, as referring to the existence of other more directly injured plaintiffs who would be likely to vindicate the public interest in antitrust enforcement. It thus represents an elaboration on the basic background principle of proximate cause and should not be invoked to screen out directly injured antitrust plaintiffs in favor of other plaintiffs who hypothetically might sue, but have not done so. So long as the plaintiffs before the court satisfy the requirements of *Illinois Brick* and *Brunswick*, and have been directly injured by the defendant's conduct, the presence of other consumer-competitor plaintiffs who hypothetically might sue should be irrelevant to section 4 standing analysis.

B. DISTINGUISHING INTERMEDIARIES WHOSE INJURIES ARE DIRECT AND INSTRUMENTAL FROM THOSE WHOSE INJURIES ARE DERIVATIVE OR INCIDENTAL

The previous analysis suggests that there is no principled basis of statutory interpretation for excluding intermediaries directly injured by defendants as a means of effectuating an anticompetitive scheme from the section 4 remedy simply because they are not consumers or competitors in the markets restrained by the defendants' conduct, or because they may also possess a remedy under another law. By contrast, where the injuries of nonconsumers and noncompetitors are only derivative of or incidental to those directly inflicted on consumers and competitors in the affected markets, the background tort principle of proximate cause against which section 4 must be read would deny their standing.

Most of the decisions denying section 4 standing to nonconsumer and noncompetitor plaintiffs can be explained on the ground that their injuries were only derivative of those inflicted on consumers and competitors in the affected markets. Thus, in contrast to the ongoing debate about whether takeover targets in merger cases should have standing,[227] the courts

227. *See* Brodley, *supra* note 88, at 78-106. *Compare* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 258 (2d Cir. 1989) (holding that a target firm of a hostile tender offer and its partially owned subsidiary had standing to seek injunctive relief because loss of independence to compete is a type of injury the antitrust laws were meant to prevent), *modified*, 890 F.2d 569 (2d Cir. 1989), *cert. dismissed*, 492 U.S. 939 (1989), *with* Anago, Inc. v. Tecnol Medical Prods., Inc., 976 F.2d 248, 249 (5th Cir. 1992) (denying standing to a target manufacturer subject to takeover because the target failed to show antitrust injury when it alleged loss of independent decision making), *cert. dismissed*, 510 U.S. 985 (1993).

have uniformly held that plaintiffs claiming to have lost an advantageous business relationship that they otherwise would have enjoyed with the acquired or acquiring company lack standing under section 4.[228] Similarly, distributors terminated when their supplier was driven out of business lacked standing,[229] as did the employees of a bankrupt airline.[230] The owner of a hardware store in a shopping center was denied standing to challenge a restriction imposed by the center's former "anchor" grocery store after the its relocation, prohibiting the property from being leased to another grocery store.[231] Truck drivers who hauled General Motors automobiles lacked standing to sue their employers for an alleged conspiracy with General Motors employees to divert revenues on which their compensation was based to an affiliate, because the adverse competitive effects of the violation were in the market for hauling cars.[232] The State of South Dakota lacked standing to challenge the defendant railroads' opposition to the construction of a coal slurry pipeline to which the State was to supply water.[233] A lessor of geothermal property lacked standing to challenge an alleged conspiracy of its lessees to suppress the development of steam on

228. *See* Fischer v. NWA, Inc., 883 F.2d 594, 595 (8th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Alberta Gas Chems. Ltd. v. E.I. Du Pont de Nemours & Co., 826 F.2d 1235, 1236 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499 (9th Cir. 1977); *cf.* G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766 (2d Cir. 1995) (holding that plaintiff did not suffer an antitrust injury when its contract with a supplier was eliminated when the supplier was forced out of business by the defendant because the injury plaintiff suffered was a derivative injury), *cert. denied*, 116 S. Ct. 381 (1995).

229. *See G.K.A. Beverage Corp.*, 55 F.3d at 762.

230. *See* Sharp v. United Airlines, Inc., 967 F.2d 404, 409 (10th Cir. 1992), *cert. denied*, 506 U.S. 974 (1992).

231. *See* Henke Enter., Inc. v. Hy-Vee Food Stores, Inc., 749 F.2d 488 (8th Cir. 1984); *see also* Serfecz v. Jewel Food Stores, 67 F.3d 591, 597 (7th Cir. 1995) (denying standing to shopping mall owner to challenge tenant's alleged conspiracy when the tenant exercised lease options and then left the rented space vacant after moving tenant's store to a competitor's mall), *cert. denied*, 116 S. Ct. 1042 (1996); Southhaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983) (denying standing to a lessor of commercial premises for use only as a retail grocery store when the lessor complained that defendant lessee refused to sublease the premises to a grocery store for the purpose of reducing competition with defendant's other stores).

232. *See* Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1352 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

233. *See* South Dakota v. Kansas City S. Indus., 880 F.2d 40, 49 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990).

his land, decreasing his royalties.[234] A marine terminal operator lacked standing to challenge a cartelization of the international soda ash industry.[235] An owner of a football stadium lacked standing to challenge a restraint on the sale of the stadium's football team tenant, because any denial of refinancing or other injury to the stadium "was indirect, and a consequence of the direct injury inflicted on the Patriot's owner."[236]

These cases, denying standing to suppliers and others suffering indirect or derivative injury as a result of an antitrust violation directly impacting consumers or competitors in the affected market[237] are simply modern applications of the common-law proximate-cause principle. That principle was prevalent long before the Supreme Court's recent attempt to rationalize antitrust standing analysis.

By contrast, where the defendants directly have inflicted injuries on a nonconsumer, noncompetitor plaintiff as "a fulcrum, conduit or market force to injure competitors or participants in the relevant product and geographic markets,"[238] courts (putting aside decisions involving plaintiffs who are unions or employees) generally have upheld the right of the plaintiff to sue under section 4. In the *Crimpers* case, HBO and

234. *See* R. C. Dick Geothermal Corp. v. Thermogenics, Inc., 890 F.2d 139, 1352-53 (9th Cir. 1989) (en banc).

235. *See* International Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1328 (3d Cir. 1992), *cert. denied*, 507 U.S. 988 (1993).

236. Sullivan v. Tagliabue, 25 F.3d 43, 51 (1st Cir. 1994).

237. *See* Arthur S. Langenderfer Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1437-39 (6th Cir. 1990) (denying standing to asphalt producer because the alleged injuries to asphalt paving corporation, its principal customer, were too indirect), *cert. denied*, 502 U.S. 899 (1991); Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1379 (7th Cir. 1987) (stating the general rule that "suppliers of an injured customer may not seek recovery under the antitrust laws" because their injuries are not direct and too remote) (quoting *In re* Industrial Gas Antitrust Litigation (Bichan), 681 F.2d 514, 519-520 (7th Cir. 1982)); Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1362 (5th Cir. 1980) (denying standing to creditor and supplier), *cert. denied*, 450 U.S. 1030 (1981); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 188 (2d Cir. 1970) (denying standing to franchisor of bottlers of carbonated beverages), *cert. denied*, 401 U.S. 923 (1971). *But see* Sullivan v. Tagliabue, 25 F.3d 43, 49 n.10 (1st Cir. 1994) (refusing to adopt automatic rule of exclusion for landlords of directly affected parties); South Carolina Council of Milk Producers Inc. v. Newton, 360 F.2d 414, 418-19 (4th Cir. 1966) (granting standing to producers of raw milk to challenge conspiracy of producer and retailers of processed milk to depress prices), *cert. denied*, 385 U.S. 934 (1966).

238. Southhaven Land Co., Inc., v. Malone & Hyde, Inc., 715 F.2d 1079, 1086 (6th Cir. 1983).

Showtime targeted the plaintiffs' trade show for elimination because, by placing television programmers and local cable stations in direct contact, it threatened the defendants' business of assembling cable programming for sale to the stations. Plaintiffs were in the trade show business, not the cable programming or broadcasting business. Judge Friendly held that the plaintiffs clearly had suffered "antitrust injury" even though they were neither consumers nor competitors in the market for cable programming. The court was

> unconvinced that the victim of a successful boycott designed to support a broad policy of market limitation lacks standing under § 4 simply because the boycottee was not a buyer or a seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants.[239]

A similar issue was present in *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*,[240] where the plaintiffs were "cost consultants" who were employed by the buyers of yellow-pages advertising to attempt to reduce the costs of their advertising. The plaintiffs alleged that in an effort to preserve their monopolistic and discriminatory pricing structure, the defendants refused to do business with advertisers through the consultants. Faced with strong circuit authority that only consumers or competitors in the markets restrained by defendants' conduct have standing under section 4,[241] the court of appeals strained to conclude that the plaintiffs were "competitors" of the defendants on the basis of "sales pitch" documents in which the defendants assured their advertisers that they could provide the same services as the plaintiffs.[242] In fact, however, the plaintiffs were not competitors of the sellers of yellow pages advertising, but were agents of the purchasers of the advertising. A better ground for sustaining the standing of the consultants would have been that they were the "fulcrum or conduit" through which the defendants sought to achieve their anticompetitive ends.[243]

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239. Crimpers Promotions Inc. v. Home Box Office, Inc., 724 F.2d 290, 297 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

240. 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, 504 U.S. 913 (1992).

241. *See supra* notes 7-8 and accompanying text (citing federal appellate cases that have either absolutely or presumptively limited standing to consumers or competitors).

242. *See Yellow Pages Cost Consultants*, 951 F.2d at 1161.

243. *See also* Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1325 (4th Cir. 1995).

In *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*,[244] the court sustained the standing of a nonconsumer, noncompetitor hospital to challenge the defendant's denial of its status as a contracting provider, which placed it at a disadvantage with competing hospitals, even though defendant's conduct was alleged to be aimed at restraining the market for health care financing. The court stated that under *Blue Shield of Virginia v. McCready*,[245] "an antitrust plaintiff need not necessarily be a competitor or consumer" in the restrained markets.[246] The plaintiff had standing because its injuries were an "integral aspect" of the conspiracy to restrain the health care financing market.[247]

As suggested by the previous discussion, the refusal of these cases to limit antitrust standing only to consumers or competitors in the affected markets was correct. Where the defendant directly inflicts an injury on the plaintiff as a means of achieving its anticompetitive ends, there is no violation of the background principle of proximate cause underlying section 4. Because plaintiff's injuries are directly inflicted, there is also no basis for the denial of standing based on the inherent speculativeness of the plaintiff's damages. Of course, if the plaintiff cannot prove its damages with the requisite certainty,[248] its claims should fail, but they should fail on the merits, not for lack of standing.

In such cases, there is also no violation of the core *Brunswick* principle prohibiting recovery of damages resulting from competition itself. Nor, in the typical case, is there any likelihood of duplicative recovery (or complex apportionment) of the same damages, contrary to the *Illinois Brick* rule. The plaintiffs do not seek to recover for all or part of an overcharge paid by consumers in the restrained markets. Rather, they seek recovery for lost profits and other damages that the defendants have inflicted on the intermediaries' businesses in an effort to implement their anticompetitive scheme. The plaintiffs, as the direct victims of defendants' anticompetitive conduct, have suffered the most obvious injuries and have the greatest incentive to sue. Permitting them to do so would further the deterrent

244. 899 F.2d 951 (10th Cir. 1990), *cert. denied*, 497 U.S. 1005 (1990).
245. 457 U.S. 465 (1982).
246. *Reazin*, 899 F.2d at 963.
247. *Id.*
248. *See supra* notes 209-210 and accompanying text.

purpose of section 4. As previously discussed, the existence of other consumer or competitor plaintiffs who hypothetically might sue should not deprive directly injured intermediaries of the standing that they would otherwise possess.[249] Nor can the denial of section 4 standing to the intermediaries in such cases be justified by any supportable view that they are outside the "zone of interests" protected by section 4.[250]

Decisions in the labor field have nevertheless declined to recognize section 4 standing in such cases. For example, in *Lucas v. Bechtel Corp.*,[251] the Ninth Circuit held that union employees lacked standing to challenge an alleged conspiracy between their employer and their international union to depress their wages as a means of monopolizing the market for the construction of nuclear power plants, on the ground that Bechtel's competitors were the direct victims. In *Sacramento Valley v. International Brotherhood of Electrical Workers*,[252] the same court held that the union lacked standing to challenge a conspiracy among members of an electrical contractors association to depress wages below prevailing union levels and drive out employers who contracted with the union, on the ground that it was not clear that the union's interests, which were protected by a separate body of labor law, would be served by increased competition.

Although it is possible that the conduct in question in these cases may have been protected by the nonstatutory labor exemption as currently interpreted by the Supreme Court to encompass the activities of single employers or multiemployer bargaining associations that are permissible under the federal labor laws,[253] the court's decision on the standing point is questionable. Under clear authority, direct employer restraints on the labor market are subject to challenge under the Sherman Act.[254] That being the case, the fact that the restraints are alleged to have been part of a broader anticompetitive scheme directed at restraining product markets should have no bearing on the injured employees' standing to sue.

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249. *See supra* notes 218-226 and accompanying text.

250. See *supra* Part II.D (describing the zone of interest test).

251. 800 F.2d 839 (9th Cir. 1986).

252. 888 F.2d 604 (9th Cir. 1989).

253. *See* Brown v. Pro Football, Inc., 116 S. Ct. 2116, 2127 (1996).

254. *See, e.g.*, Radovich v. NFL, 352 U.S. 445, 452 (1957); Nichols v. Spencer Int'l Press, Inc., 371 F.2d 332 (7th Cir. 1967).

A different issue is presented by cases that do not involve conspiracies to restrain the labor market, but in which employees are terminated for refusing to implement a restraint on the product market. In the leading *Bichan* decision denying standing to an employee who alleged he was terminated as the manager of defendants' industrial gas division because he refused to participate in a conspiracy to fix prices and allocate customers, the Seventh Circuit read *Brunswick* to stand for the proposition that section 4 "protects only those persons injured as consumers or competitors in a defined market."[255] The court stated that it was "convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion . . .,"[256] but it did not explain why employee coercion that is alleged to have been the essential means of implementing an anticompetitive scheme should be deemed to be beyond the area of congressional concern. As previously discussed, the court's rationale confuses the ultimate consumer welfare objectives of the antitrust laws with the remedies that Congress provided to achieve those goals.[257]

The *Bichan* court also expressed concern that recognition of standing in employee coercion cases would result in "overkill" and a "flood" of antitrust litigation, suggesting the possibility of "excessive" deterrence if nonconsumer and noncompetitor plaintiffs were permitted to sue.[258] This, however, was hyperbole. The cases cited at the outset of this section show that most antitrust actions commenced by nonconsumer, noncompetitor plaintiffs have been and will continue to be screened out by the background principle of proximate cause. The *Bichan* court did not explain why recovery for injuries directly inflicted on employee intermediaries as a means of implementing defendant's anticompetitive objectives should be viewed as "overkill." Such cases present no possibility of unbounded and disproportionate treble damages for all of the "ripples of harm" that an antitrust violation might cause in the economy. Rather, they are confined to clearly foreseeable injuries that the defendant directly and intentionally inflicted on the plaintiff in pursuit of its anticompetitive ends.

255. *In re* Industrial Gas Antitrust Litigation (Bichan), 681 F.2d 514, 519-20 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983).

256. *Id.* at 519.

257. *See supra* part II.D.

258. 681 F.2d at 519-20.

Perhaps the court meant to confine its analysis only to intermediary cases involving employees who, it assumed, would be able to recover damages under state wrongful discharge law. Here again, however, the court did not explain why the availability of state tort or contract remedies for wrongful discharge should preclude an antitrust remedy for nonconsumer and noncompetitor plaintiffs, any more than the existence of alternative state tort and contract remedies does in cases involving consumer or competitor plaintiffs.

Although *Bichan* represents the prevailing view in cases involving employees who have been discharged for refusing to implement an anticompetitive scheme,[259] the Ninth Circuit in *Ostrofe v. H.S. Crocker Co.*,[260] reached the opposite conclusion on the ground that "no conspiracy to fix prices or allocate customers [could] be effective without the cooperation of the responsible employees."[261] Discharge of the resisting employees was thus "essential to [the] success of the scheme."[262] On remand for consideration in light of *AGCC*, the court reaffirmed its decision on the ground that Ostrofe's injury was an integral part of the defendant's anticompetitive scheme, and because no one else had as strong an incentive "to vindicate the public interest in antitrust enforcement."[263] *Ostrofe* is clearly the minority view and has since been confined to its facts even in the Ninth Circuit.[264]

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259. *See also* Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209, 212 (6th Cir. 1989) (holding that sales representative terminated for failure to implement vertical price fixing conspiracy lacked standing on the ground, inter alia, that his injuries were only "incidental"), *disapproved on other grounds by* Humphreys v. Bellaine Corp., 966 F.2d 1037, 1042 (6th Cir. 1992); Gallant v. BOC Group, Inc., 886 F. Supp. 202, 208 (D. Mass. 1995) (holding that sales representative terminated for oral and written complaints to supervisor concerning alleged antitrust violations lacked standing to bring a federal antitrust claim against his employer); Thomason v. Mitsubishi Elec. Sales Am., Inc., 701 F. Supp. 1563, 1569-70 (N.D. Ga. 1988) (holding a regional sales manager terminated for failure to enforce illegal price maintenance policies lacked antitrust standing).

260. 670 F.2d 1378 (9th Cir. 1982), *vacated*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985).

261. *Id.* at 1384.

262. *Id.*

263. *Ostrofe*, 740 F.2d at 746 (quoting *AGCC*, 459 U.S. 519, 542 (1983).

264. *See* Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376-77 (9th Cir. 1996) (limiting *Ostrofe* to cases in which the plaintiff's participation is "essential" to the scheme, the dismissal is a "necessary means," and the plaintiff has the best incentive to challenge the violation).

This Article argues that the availability of a section 4 remedy to those directly injured as a means of implementing an anticompetitive scheme should not turn on their status as consumers or competitors in the affected markets, or the existence of other hypothetical plaintiffs or remedies under state law. This, however, does not necessarily mean that *Ostrofe* rather than the weight of authority represented by *Bichan* was correctly decided. The background principle of proximate cause is sufficiently flexible to screen out cases in which the plaintiff's injuries, although arguably "direct" in some sense, were not the essential means by which the defendant sought to achieve its anticompetitive objectives. In such cases, the plaintiff's injuries were a by-product of the defendant's scheme. Therefore, the policies of fairness and deterrence of wrongdoing that inform a flexible standing analysis grounded in proximate cause principles were implicated less strongly.[265]

Perhaps for these reasons, a panel of the Ninth Circuit recently limited *Ostrofe* to cases in which the plaintiff employee's participation was "essential" to effectuate the defendant's anticompetitive objectives.[266] Unlike intermediary cases such as *Crimpers* and *Yellow Pages*, in which the defendant could not have implemented its restraint without injuring the plaintiffs, one could argue that the participation of any particular em-

265. The conclusion that the plaintiff's injuries were only the incidental by-product, rather than the essential instrument of the defendants' scheme, appears to underlie a number of decisions denying standing to agents and brokers who are not consumers or competitors in the markets restrained by the defendants' conduct. Thus, standing was denied to a motion picture licensing agent who claimed that an exhibitor customer had entered into a film allocation agreement with another exhibitor, whose agent had, as a consequence, replaced the plaintiff. *See* Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986). The plaintiff's injury was viewed as only "indirect and derivative." *See id.* at 579. An apple juice distributor that claimed it was terminated for failing to implement a discriminatory discount to a preferred buyer lacked standing. *See* Gregory Mktg Corp. v. Wakefern Food Corp., 787 F.2d 92 (3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986). After arguing that the plaintiff lacked standing because it was neither a consumer nor a competitor in the affected market and its injuries did not reflect the anticompetitive effect of the violation, the court observed that the plaintiff's participation was not essential to carry out the discriminatory pricing scheme, which the defendant could have accomplished without involving a broker. *See id.* at 95-97. The plaintiff's injuries were "incidental." *See id.* at 97. Standing was also denied to a snack food broker that was terminated as part of a plan by the defendant to induce other brokers to relinquish their relationship with competing manufacturers by offering them the plaintiff's business. *See* Bodie-Rickett & Assocs. v. Mars, Inc., 957 F.2d 287, 292 (1992).

266. *See Vinci*, 80 F.3d at 1376-77 (9th Cir. 1996).

ployee is not critical to a business's ability to effectuate a vertical or horizontal price fixing conspiracy. A defendant could alter its job descriptions or its organizational structure to eliminate the involvement of the plaintiff altogether without violating any law. On the other hand, the result in *Ostrofe* could be supported on the ground that the cooperation of *some* employee is always necessary to the implementation of a price-fixing scheme. In many cases, perhaps no other potential plaintiff would have as great or as focused an incentive to enforce the antitrust laws. If no antitrust remedy were available, the employee would have an incentive to remain silent, thus creating the mechanism by which the violation is committed.

As in proximate cause analysis generally, distinguishing cases in which a nonconsumer and noncompetitor plaintiff's injuries are the direct and instrumental means of an antitrust violation from those in which they are the indirect effects or incidental by-products of the violation inevitably will pose difficulties in some cases. Consider, for example, the discharged-employee cases just discussed. Or consider *SAS of Puerto Rico, Inc. v. Puerto Rico Telephone Company*.[267] The plaintiff obtained a contract with the Puerto Rican Telephone Company (PRTC), a subsidiary of the Puerto Rico Telephone Authority, to upgrade PRTC's equipment by installing "intelligent" pay phones that would facilitate long-distance calls and make it easier for callers to select alternative long-distance carriers rather than the predesignated carrier for the phone. The predesignated long distance carrier for almost all of the phones was another subsidiary of the Authority. After the contract was entered, the Authority sold a controlling interest in the long-distance subsidiary to another company. Plaintiff's complaint alleged that, in an attempt to maintain the value of the sale, PRTC breached the plaintiff's contract to provide enhanced pay phone service that would facilitate the selection of alternative carriers.

The First Circuit held that SAS had not suffered antitrust injury because its injuries were only the incidental by-product of those suffered directly by customers and competitors in the allegedly monopolized pay phone and long distance markets.[268] The Court analogized the plaintiff's injury to that suffered by suppliers to the victim of an alleged antitrust violation, who

267. 48 F.3d 39 (1st Cir. 1995).

268. *See id.* at 44-45.

are denied antitrust standing because their injuries are indirect and derivative of those suffered by the victims themselves. In *SAS*, the plaintiff was a supplier of the violator rather than a supplier of the victim, but the same result should obtain. Although PRTC breached its agreement to use SAS as a supplier, "if the breach played a part in an antitrust violation, the conduct itself was an antitrust violation because of the anticompetitive threat posed to *other* potential plaintiffs, not SAS. Like the happenstance supplier to a customer felled by a violation, SAS was coincidentally involved."[269]

The court concluded that the "presumptively proper" plaintiff would be a telephone consumer or a competitor who sought to serve the market. The court added that the "most obvious" reason for conferring standing on a nonconsumer/noncompetitor plaintiff would be that "there may be no first best with the incentive or ability to sue,"[270] but that in *SAS*, directly injured long distance competitors would have ample incentive to challenge the violation alleged. "If there is any other reason for stretching to confer standing in this case on an incidentally connected plaintiff like SAS, it does not occur to us."[271] The court reinforced its conclusion by noting that any injury to the plaintiff was speculative. Even if the antitrust laws imposed a duty on PRTC to upgrade its pay phones, it need not have employed SAS to do the upgrading. Moreover, SAS would have suffered the same injury from the contract breach whether or not an antitrust violation had occurred.[272]

The result in *SAS* was undoubtedly correct. Antitrust courts consistently have recognized that the link between antitrust policy and the failure of suppliers to make profits they would have realized if no violation had occurred is too tenuous to support supplier standing. Arguably, *SAS* presented a somewhat stronger argument for standing than the usual supplier case, because once SAS had received the pay-phone upgrade contract, the breach of that contract was in some sense "necessary" to permit the defendant to maintain the dominance of its long-distance affiliate. However, the nature of a supplier's injuries and their relationship to antitrust policy does not differ materially as between a plaintiff who never ob-

269. *Id.* at 44.
270. *Id.* at 45.
271. *Id.*
272. *See id.* at 44.

tained a beneficial contract that it would otherwise have received and one who obtained such a contract but ultimately failed to reap its rewards.

One may agree with the result in *SAS* without endorsing its broader rationale that nonconsumer and noncompetitor antitrust plaintiffs should never have standing unless the court concludes that there is no consumer or competitor plaintiff with the incentive or ability to sue. There is a material difference, from the standpoint of antitrust policy, between plaintiffs such as those in *Crimpers* and *Yellow Pages* whose injuries are the essential means by which an antitrust violation is accomplished, and plaintiffs such as those in *SAS* whose injuries are an incidental by-product of a violation. In cases falling within the former category, there is no basis in the language, history, or background proximate cause and zone of interests principles informing the interpretation of section 4 for rejecting the plaintiff's standing, even assuming that injured consumers or competitors also may sue. As previously discussed, moreover, the conclusion that other consumer or competitor plaintiffs who have not sued will be more effective antitrust enforcers than the plaintiffs who have actually done so often is entirely speculative.[273]

The approach suggested here, involving, as it does, all of the uncertainties of the "slippery rubric[]"[274] of proximate cause, admittedly presents greater difficulties of application than would a bright line rule excluding all nonconsumer and noncompetitor plaintiffs from the protection of the antitrust laws. When are a plaintiff's injuries more properly viewed as indirect, derivative, or incidental, rather than direct, essential, and instrumental?[275] As illustrated by the persistence of proximate cause analysis in the law of torts generally, however, neither the difficulty of that line drawing process nor the uncertainties it may create in particular cases support its replacement by a categorical principle that would deny standing

273. *See supra* text accompanying notes 218-226.

274. *See SAS*, 48 F.3d at 43.

275. *See* HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 875-76 (6th Cir. 1991) (describing challenge by seller of service contracts for Hewlett-Packard equipment, which it filled using service offered by HP, to HP's termination of its "four hour response" guarantee except for customers who purchased service contracts from HP); General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 798-800 (8th Cir. 1987) (describing pet supply broker terminated by the defendant because it promoted pet supplies that competed with those of the defendant).

to nonconsumers and noncompetitors in all private antitrust actions. Even if a rule limiting antitrust standing to consumers and competitors would be superior as a matter of legislative policy, it is not the rule that Congress adopted in section 4.

IV. IMPLICATIONS FOR OTHER UNRESOLVED STANDING ISSUES

An approach focused on traditional proximate cause concepts also sheds light on several difficult standing issues presented by the suits of market participants who arguably have benefited from the price-enhancing or output-reducing effects of the defendants' conduct. For example, a number of cases have recognized the standing of members of a cartel to sue their co-conspirators for damages and injunctive relief.[276] Based on a narrow reading of *Brunswick*, one could argue that standing should be denied in such cases because the plaintiffs were the beneficiaries of the higher prices and limited output resulting from their participation in the cartel. This argument should be rejected on its own terms, however, because as pointed out in the Second Circuit's decision in the *Volvo* case, "[t]he interests of the cartel as a whole often diverge substantially from the interests of individual members," and, "to the extent a cartel member credibly asserts that it would be better off if it were free to compete . . . we believe that the individual cartel member satisfies the antitrust injury requirement."[277] Thus, a substantial argument can be made that cartel participants would suffer at least prospective injury from the output

276. *See* Board of Regents of the University of Oklahoma v. NCAA, 707 F.2d 1147, 1152 (10th Cir. 1983) (upholding standing of NCAA members to challenge the NCAA's television plan limiting the telecasts of college football games), *aff'd on other grounds*, 468 U.S. 85 (1984); Volvo North Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 68 (2d Cir. 1988) (finding that owners of men's professional tennis events regulated by the MIPTC had standing to challenge restrictions on the events even though they were participants in the MIPTC); *see also* Los Angeles Memorial Coliseum Comm'n. v. NFL, 791 F.2d 1356, 1365 (9th Cir. 1986) (upholding standing of both the Coliseum and the Los Angeles Raiders to recover treble damages against the NFL), *cert. denied*, 484 U.S. 826 (1987); Chicago Prof'l Sports Ltd. Partnership v. NBA, 754 F. Supp. 1336, 1355 (N.D. Ill. 1991) (holding that both team and television station had standing to challenge NBA decision to reduce the number of televised games), *aff'd on other grounds*, 961 F. 2d 667 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992). *But see* Blackburn v. Sweeney, 53 F.3d 825, 830 (7th Cir. 1995) (finding party to illegal territorial allocation barred from seeking injunctive relief and damages).

277. *See Volvo*, 857 F.2d at 67-68.

restraining aspects of the conspiracy entitling them to injunctive relief, even if retrospective damages should be denied. The standing of the would-be cartel breaker should in any event be recognized under the argument advanced here. Restraints on the cartel's participants are the direct and essential means by which the cartel's anticompetitive objectives are achieved. The objection that upholding standing in such cases would allow cartel members to obtain damages based on their inability to sell independently under the "price umbrella" erected by the cartel should be rejected. To the extent that the cartel participants do not bear "substantially equal responsibility" for the violation that would bar recovery under what remains of the in pari delicto defense after *Perma Life Mufflers, Inc. v. International Parts Corp.*,[278] the correct measure of damages in such a case would be the profits that the plaintiff would have realized in an unrestrained market, not those the plaintiff would have realized as a result of the cartel's anticompetitive activities.

The suggested approach would similarly uphold the standing of distributors terminated for failing to adhere to a program of resale price maintenance. In *Local Beauty Supply, Inc. v. Lamaur Inc.*,[279] the Seventh Circuit rejected the standing of such a distributor on the ground that it had not suffered "antitrust injury." The court of appeals reasoned that the plaintiff claimed damages resulting from its inability to undercut the price umbrella erected by the defendant and that the plaintiff should not receive damages for its "inability to continue to profit" from the violation.[280] Under the suggested analysis, the standing of the restrained distributor would be upheld regardless of whether the distributor directly had suffered from the "anticompetitive effect" of the violation, because the restraint on the distributor was the direct and essential means by which the defendant achieved its anticompetitive ends. As in the case of conspirators seeking to break a cartel, however, damages would be limited to any increase in profitability that the plaintiff could have achieved in an unrestrained market, and would not allow the plaintiff to reap the

278. 392 U.S. 134 (1968); *see Blackburn*, 53 F.3d at 829-830 (holding that cartel participant bearing equal responsibility for violation was barred from recovery); *In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1295-1296 (D. Md. 1981) (stating that *Perma Life* does not permit recovery by a plaintiff who bears "substantially equal responsibility" for the violation).

279. 787 F.2d 1197 (7th Cir. 1986).

280. *Id.* at 1202-03.

benefits of the anticompetitive pricing structure maintained by the defendant.[281] The Supreme Court implicitly accepted this argument in *Atlantic Richfield Co. v. USA Petroleum Co.*,[282] where the Court, in rejecting the standing of competitors of a distributor to challenge maximum vertical price fixing, stated that the restrained dealers themselves would be entitled to sue.[283]

Finally, the suggested analysis would recognize the standing of takeover targets to challenge anticompetitive mergers—an issue that has generated much controversy and a conflict of authority in the courts of appeals.[284] A recent analysis persuasively argues that the standing of the target should be recognized on policy grounds, despite the argument that the target ultimately would benefit from the price-enhancing effects of the illegal merger.[285] This Article reaches the same conclusion on the different ground that there is no principled basis on which the language of section 4 can be interpreted to deny standing to the target, whose demise is the essential means by which the defendant seeks to achieve its unlawful objectives.

V. OPTIMAL DETERRENCE THEORY RECONSIDERED

A "consumer-competitor" limitation on antitrust standing ultimately must be grounded on the policy-based standing theory of "optimal" economic deterrence,[286] under which even injured consumers and competitors would be denied standing if they have not directly felt the ultimate price-enhancing or output-restricting effects of the defendant's violation. There is, however, no basis for attributing such a restricted reading—based

281. *See, e.g.*, *Los Angeles Memorial Coliseum*, 791 F.2d at 1366 (concluding that antitrust damages must be offset by any benefit resulting from the violation).

282. 495 U.S. 328 (1990).

283. *See id.* at 345.

284. *Compare* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 259 (2d Cir. 1989) (upholding standing of takeover target), *modified*, 890 F.2d 569 (2d Cir. 1989), *cert. dismissed*, 492 U.S. 939 (1989), *with* Anago, Inc. v. Tecnol Med. Prods., Inc., 976 F.2d 248, 250-51 (5th Cir. 1992) (denying standing), *cert. dismissed*, 510 U.S. 985 (1993).

285. *See* Brodley, *supra* note 88, at 78-106 (concluding that takeover targets should have standing to ensure effective private enforcement despite possible divergence between their private incentives and public goals).

286. *See supra* text accompanying notes 20-23 (discussing "optimal deterrence").

as it is on microeconomic theories developed over half a century after enactment of section 4—to the Congress that enacted the Sherman and Clayton Acts. For example, Congress provided that violations of sections 1 and 2 of the Sherman Act are felonies,[287] and there is no reason to believe that Congress intended that any "optimal" level of felony offenses should take place. Furthermore, section 4 of the Clayton Act provides that the damages award in civil actions for violations of the antitrust laws shall be trebled,[288] a punitive, deterrent-based provision inconsistent with the idea that Congress in 1914 contemplated any precisely calibrated limitation of antitrust damages to the amount deemed "optimal" by modern economic theory. Proponents of the "optimal deterrence" standing theory have attempted to rationalize the treble-damages provision as a rough adjustment for the risk of nondetection,[289] but offer no reason to think that trebling bears any empirical relationship at all to that risk, or that Congress ever thought that it did (or even considered the question) when it enacted section 4.[290]

Yet another difficulty is that the optimal deterrence theory is based on the theory of social cost, under which all real economic costs caused by a particular activity should be taken into account in determining its optimal level.[291] In many cases of the kind considered here, the damages to the intermediary may not precisely reflect the price-enhancing or output-reducing effects of the defendants' conduct, but they are real social costs that should be included in the optimal deterrence calculus. Their losses are directly linked to the anticompetitive effects of the violations, and are not in any way derivative or duplicative of losses suffered by others. Moreover, their injuries are not the unavoidable by-product of a net overall social gain resulting from an expansion of output caused by increased competition by the defendant. Thus, the denial of standing in the

287. *See* 15 U.S.C. §§ 1, 2 (1994).

288. 15 U.S.C. § 15 (1994).

289. *See* Easterbrook & Fischel, *supra* note 20, at 1158 & n.10; Page, *supra* note 20, at 1455.

290. *Cf.* Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 455 (1985) ("None of this tells us whether the right multiplier is 1.5, 3, or 10.").

291. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) ("I propose to start my analysis by examining a case in which most economists would presumably agree that the problem would be solved in a completely satisfactory manner: when the damaging business has to pay for *all damage* caused *and* the pricing system works smoothly . . . .") (first emphasis added).

Brunswick case,[292] where the plaintiff's claimed damages were simply the result of increased competition by the defendant, hardly suggests that intermediaries whose damages are the essential instrument of a defendant's output-restricting conduct should lack standing, or that the costs those injuries reflect should be ignored in any "optimal deterrence" calculus.

The optimal deterrence theory is also difficult to reconcile with a host of settled antitrust doctrines in standing and related areas. For example, it arguably would deny standing to a distributor subjected to maximum or minimum resale price maintenance,[293] notwithstanding the Supreme Court's clear and recent recognition in *Atlantic Richfield Co. v. USA Petroleum Co.*[294] that "[i]f such a scheme causes . . . anticompetitive consequences . . . consumers and the manufacturers' own dealers may bring suit."[295] Similarly, competitors excluded from the market by an illegal tying arrangement would be denied standing, contrary to settled authority,[296] as would the victim of a proven but unsuccessful predatory pricing scheme who manages to survive.[297] And even if this draconian standing hurdle were surmounted, proponents of the theory have argued, in the face of settled authority to the contrary,[298] that

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

293. *See, e.g.*, Page, *supra* note 20, at 1469-1470.

294. 495 U.S. 328 (1990).

295. 495 U.S. at 345.

296. *See, e.g.*, Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991), *cert. denied*, 506 U.S. 903 (1992). The principal Supreme Court private-right-of-action decision considering tying arrangements arose in the context of a suit by an excluded competitor. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 5 (1984).

297. *See* Page, *supra* note 20, at 1475, 1481.

298. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-563 (1931) (allowing recovery of lost profits despite uncertainty as to amount); H.J., Inc. v. IT&T Corp., 867 F.2d 1531, 1549 (8th Cir. 1989) ("[T]he proper measure of damages is the present value of profits lost as a result of . . . [defendant's] improper actions, specifically its predatory pricing."); Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1350-51 (9th Cir. 1985) (recognizing lost profits as proper measure of damages in predatory pricing claim but disallowing such an award because of plaintiff's failure to present sufficient evidence of lost profits); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1166 (7th Cir. 1983) (remanding for partial new trial on the issue of damages because plaintiff inaccurately computed lost profits), *cert. denied*, 464 U.S. 891 (1983); King & King Enter. v. Champlin Petroleum Co., 657 F.2d 1147, 1158 (10th Cir. 1981) (finding that estimated lost profits due to defendant's predatory pricing were a reasonable assessment of antitrust damages), *cert. denied*, 454 U.S. 1164 (1982); Union Carbide & Car-

firms driven from the market by an antitrust violation should not be able to recover their lost profits, because those profits do not precisely reflect the "anticompetitive effect" (i.e., monopolistic prices or the dead weight loss) of the violation.[299]

To a considerable extent, these suggested standing limitations reflect underlying economic hostility to the existence and rationale of the antitrust violations themselves. Criticism of the per se prohibition against resale price maintenance and certain tying arrangements, and to antitrust liability based on predatory pricing theories, has been prevalent among scholars who view the antitrust laws though the lens of allocative efficiency.[300] Even if their position regarding the substantive

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bon Corp. v. Nisley, 300 F.2d 561, 595 (10th Cir. 1962) (acknowledging that lost profits are proper measure of damages and upholding award despite uncertainty as to amount of damages), *cert. dismissed*, 371 U.S. 801 (1962); Northeastern Tel. Co. v. AT&T Co., 651 F.2d 76, 95 & n.30 (2d Cir. 1981) (recognizing that both damages to ongoing concern value and lost profits could be awarded in the same action), *cert. denied*, 455 U.S. 943 (1982).

299. *See, e.g.*, Easterbrook, *supra* note 290, at 462-63.

300. On tying, see Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 35 (1984) (O'Connor, J., concurring) ("The time has therefore come to abandon the *'per se'* label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have."); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 181 (1976) (suggesting the legalization of tie-ins because "there is something seriously wrong about a doctrine under which virtually every combination sale is prima facie an unlawful tie-in that the seller may have to convince a jury is cost justified"); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984) ("As time goes by, fewer and fewer things seem appropriate for per se condemnation."). On predatory pricing, see POSNER, *supra*, at 195-199 (doubting that predatory pricing is an effective method of monopolization, because it is likely to delay, rather than prevent, new entries into the market); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264-65 (1981) (deeming predatory pricing unlikely to succeed in the marketplace and concluding that the predatory pricing cause of action should be eliminated). On resale price fixing, see Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 & n.20 (1981) (arguing that maximum resale price fixing should be allowed, especially in context of exclusive dealer territories); *cf.* Digital Equip. Corp. v. Uniq Digital Tech., Inc., 73 F.3d 756, 761 (7th Cir. 1996) (Easterbrook, J.) (finding superfluous claim that computer manufacturer was engaged in tying by sending operating system with each new computer sold); Israel Travel Advisory Serv., Inc., v. Israel Identity Tours, Inc., 61 F.3d 1250, 1256 (7th Cir. 1995) (Easterbrook, J.) (refusing to find violation under predatory pricing theory when defendant did not have dominant position in land tours market), *cert. denied*, 116 S. Ct. 1847 (1996); United States v. Heffernan, 43 F.3d 1144, 1145-46 (7th Cir. 1994) (Posner, J.) ("These violations—the core per se offenses that no (well, very few) economists believe can be justified—are comprised of 'restrictive agreements among competitors, such as horizontal price-fixing (including bid rigging) and horizontal market-allocation.'") (citation omitted); Hardy v. City Optical, Inc., 39 F.3d 765, 767 (7th Cir. 1994) (Posner, J.) (noting Seventh Circuit's heightened requirement

scope of the antitrust laws is accepted, however, it has to date received only partial endorsement by the Supreme Court.[301] The accepted rationale for the prohibition against resale price fixing—that it "substitut[es] the perhaps erroneous judgment of a seller for the forces of the competitive market [and] may severely intrude upon the ability of buyers to compete and survive in that market,"[302]—remains unaltered and was reaffirmed by the Supreme Court in its most recent decision on the subject.[303] That being the case, it is illogical that a dealer whose discretion has been constrained, and who therefore has suffered the very impact of the practice that has led to its condemnation, should lack "standing" to sue as some proponents of the "optimal deterrence" theory have suggested. Even if this were not obvious from the rationale of the underlying antitrust violation itself, there would be no basis for ascribing such a crabbed view of the broad language of section 4 to the Congress that enacted the Clayton Act in 1914.

Similarly, the accepted rationale for the antitrust prohibition of certain tying arrangements remains that they constrain the competitive freedom of the dealers subjected to them, and unfairly foreclose the ability of sellers of the tied product to compete based on the price and quality of their goods[304]— a rationale unaltered by the Supreme Court's recent refinement and restriction of the scope of the per se rule against tying.[305] Given that rationale, the conclusion that Congress, in enacting

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that a tying agreement is not actionable unless the defendant has substantial market power in the tying product); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1438 (7th Cir. 1986) (Posner, J.) ("[T]he rationale of the per se rule against resale price maintenance, . . . is unclear.") (citations omitted).

301. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (reaffirming the availability of predatory pricing theories under certain circumstances); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 336-39 (1990) (reaffirming the per se prohibition against resale price fixing); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984) (reaffirming the per se prohibition of tying arrangements under certain circumstances).

302. Albrecht v. Herald Co., 390 U.S. 145, 152 (1968).

303. *See Atlantic Richfield*, 495 U.S. at 345.

304. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958). In that case the Court stated:

> They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyersare forced to forego their free choice between competing products.

Id.

305. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984).

section 4, intended to deny standing to competitors who have been unable to sell or buyers who have been unable to choose other goods because of the tie is baseless. And, in predatory pricing cases, the legislative history of the antitrust laws themselves demonstrates beyond any possible question that the victims of alleged predation were the special objects of Congressional concern.[306] Modern doubts about the wisdom of predatory pricing theories hardly suggest that the Congresses that enacted the Sherman and Clayton Acts in 1890 and 1914 subscribed to those doubts, or would have denied the victim of predation standing to recover lost profits because the defendant's predatory scheme ultimately failed.

Finally, while application of traditional proximate cause/direct injury analysis may present difficulties in particular cases, as illustrated by conflict of authority in the discharged-employee cases, courts have long been accustomed to dealing with such problems. The complex analyses that have resulted from attempts to apply the optimal deterrence theory to the gamut of potential violations,[307] and the lack of agreement on proper application of the theory even among its proponents,[308] belie its ease of application. Adoption of the theory

306. *See* 51 CONG. REC. 9069 (1914) (statement of Rep. Edwin Y. Webb) (noting that section 2 of the Clayton Act aimed at preventing price discrimination "if such discriminating sale is made with the purpose or intent to destroy or wrongfully injure the business of a competitor of either such purchaser or seller"), *reprinted in* 2 KINTNER, *supra* note 113, at 1184; 51 CONG. REC. 9260 (1914) (statement of Rep. Daniel J. McGillicuddy) ("It is a fact that to kill competition trusts have often reduced prices below the cost of production. Under the bill which we propose this unfair system of price discrimination will be abolished."), *reprinted in* 2 KINTNER, *supra* note 113, at 1363; 51 CONG. REC. 9265 (1914) (statement of Rep. Dick T. Morgan) (suggesting that predatory pricing was the heart of section 2 of the proposed bill and arguing that coverage should extend beyond predatory pricing), *reprinted in* 2 KINTNER, *supra* note 113, at 1374; 51 CONG. REC. 16316 (1914) (statement of Rep. Edwin Y. Webb) ("[W]hat we have really done and tried to do by this bill is to make unlawful discriminations in prices."), *reprinted in* 3 KINTNER, *supra* note 113, at 2832; *see also*, S. REP. NO. 698, at 43 (1914) (statement of Hon. Charles A. Culberson, Chairman Sen. Judiciary Committee) (noting that section 2 was designed to allow cause of action for anyone injured by price discrimination "with the purpose and intent thereby to destroy or wrongfully injure the business of a competitor"), *reprinted in* 2 KINTNER, *supra* note 113, at 1746.

307. *See, e.g.*, Page, *supra* note 20 (applying "optimal deterrence" rationale to antitrust standing analysis).

308. *Compare* Page, *supra* note 20, at 1495, *with* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 326-27 (1981) (disagreeing on recovery of lost "going concern value" under the

would result in the rejection of established antitrust standing rules,[309] and threaten to convert the preliminary standing inquiry into a battle of economic experts on the implications of modern price and "optimal deterrence" theory. Here again, there is no suggestion that the Congresses that enacted the Sherman and Clayton Acts at the turn of the century had any such refinements in mind. Rather, their intent was for the courts to apply the judicially developed proximate cause concepts with which they were already familiar to screen out plaintiffs whose injuries were incidental, derivative, or remote.

CONCLUSION

A limitation on antitrust standing only to consumers and competitors in the market restrained by the defendant's conduct might be appropriate had Congress delegated authority to the judiciary to develop the scope of the section 4 remedy as a matter of federal common law. As an exercise in the interpretation of section 4, however, it lacks any principled basis. Such a limitation fails to explain decisions that recognize the standing of nonconsumers and noncompetitors to maintain an antitrust challenge where they are the essential fulcrum, conduit, or means by which the defendant seeks to achieve its anticompetitive ends.

Section 4 must be read against the background common-law principle of proximate cause. That principle is focused on the directness or indirectness of the plaintiff's injuries, and the intent with which the defendant acted, not on the plaintiff's status as consumer or competitor in the markets affected by the defendant's conduct. The section 4 remedy also is properly restricted to the "zone of interests" which Congress intended to protect. Here again, however, there is no substantial basis on which to conclude that Congress meant to exclude intermediaries whose injuries are the essential means by which the defendant violates the antitrust laws from the protection of section 4.

The existence of other plaintiffs who might have sued but did not, or the availability of alternative remedies under "other laws" such as the federal labor laws or state common law, should not in themselves preclude the standing of directly injured intermediaries, any more than the existence of other potential plaintiffs or common-law remedies would justify denying

"optimal deterrence" theory).

309. *See supra* text accompanying notes 293-299 (detailing conflicts between "optimal deterrence" theory and established antitrust doctrine).

standing to consumers or competitors in the markets affected by the defendant's conduct. The existence of other plaintiffs or other remedies at the most serves an illustrative function, perhaps suggesting that the plaintiff's injuries are only the indirect result or incidental consequence of the defendant's conduct.

Although most nonmarket participants may lack standing under the background proximate cause principle because their injuries are the indirect, derivative, or incidental result of the defendant's conduct, others whose injuries are the instrument by which the defendant achieves its anticompetitive ends fall clearly within the deterrent objectives of section 4. The recognition of standing in such cases does not violate the core *Brunswick* principle prohibiting recovery of damages from competition itself, nor would it heighten the dangers of duplicative recovery, complex apportionment, or speculative damages that underlie many standing decisions, including *AGCC* itself.

The recognition of antitrust standing for some nonconsumer and noncompetitor plaintiffs, but not for others, inevitably will present greater difficulties of application than a rule of absolute exclusion. Yet courts are accustomed to dealing with such questions in resolving questions of proximate cause. There is no reason why they should be less able to do so in cases involving the species of a statutory tort created by the federal antitrust laws. A more restrictive reading of section 4 can result only from an activist assumption of judicial power to rewrite and circumscribe the antitrust remedy that Congress has provided, in violation of the Supreme Court's many recent admonitions regarding the limits of the judicial role.