

ANTITRUST AND ECONOMIC LIBERTY

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Over the last few years, antitrust plaintiffs have won important victories in cases against digital platforms. They've won important cases involving real estate associations,¹ elite private colleges,² sports leagues,³ pharmaceutical companies,⁴ pork processors,⁵ and health insurers.⁶ In some cases, they have secured record-breaking jury verdicts and redress for harmed individuals.

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1. Verdict Form, *Sitzer v. Nat'l Ass'n of Realtors*, No. 19-cv-00332 (W.D. Mo. Oct. 31, 2023); *see also* Elisabeth Buchwald, *Realtors Found Liable in Conspiracy to Keep Commissions for Home Sales Artificially High*, ABC11 (Nov. 1, 2023), <https://abc11.com/post/national-association-of-realtors-lawsuit-home-sales-commission/13997878/> [<https://perma.cc/5H7Z-32UB>].

2. *See generally* Carbone v. Brown Univ., 621 F. Supp. 3d 878 (N.D. Ill. 2022) (denying motions to dismiss); Order Granting Final Judgment and Order of Dismissal, *Corzo v. Brown Univ.*, No. 22-cv-00125 (N.D. Ill. July 20, 2024).

3. *Tennessee v. Nat'l Collegiate Athletic Ass'n*, 718 F. Supp. 3d 756 (E.D. Tenn. 2024).

4. Order Granting Final Judgment and Order of Dismissal Approving Direct Purchaser Class Settlement and Dismissing Direct Purchaser Class Claims, *In re Novartis and Par Antitrust Litig.*, No. 18-cv-04361 (S.D.N.Y. July 26, 2023).

5. *See, e.g.*, Long-Form Settlement Agreement Between Consumer Indirect Purchaser Class Plaintiffs and Hormel Foods Corporation and Hormel Foods, LLC, *In re Pork Antitrust Litigation*, No. 18-cv-01776 (D. Minn. Mar. 29, 2024), <https://www.overchargedforpork.com/assets/Docs/Hormel/CIPP-Hormel%20Settlement%20Agreement.pdf> [<https://perma.cc/TE29-XSYW>]; *see also* *Important Documents*, PORK ANTITRUST LITIG., <https://www.overchargedforpork.com/important-documents> [<https://perma.cc/EYA8-JZXZ>] (last visited Mar. 8, 2026).

6. *See generally* Sidibe v. Sutter Health, 103 F.4th 675 (9th Cir. 2024). *See* Mike Scarcella & David Thomas, *U.S. Judge Approves \$2.8 Billion Blue Cross Settlement with Health Providers*, REUTERS (Aug. 19, 2025, at 18:39 ET), <https://www.reuters.com/legal/government/us-judge-approves-28-billion-blue-cross-settlement-with-health-providers-2025-08-19/> [<https://perma.cc/Z6FA-WTGF>].

The U.S. Department of Justice's Antitrust Division has been active too. Last year, a federal court held that Google illegally maintained monopolies in general internet search and related search advertising markets.⁷ That case is about access to the information we see and use to make decisions about how we want to live our lives. It was also the federal government's first significant monopolization trial victory in more than two decades. We completed a second major monopolization trial: the Google digital advertising technology (ad tech) case.⁸ We also filed four other monopolization cases in the smartphone,⁹ live music,¹⁰ housing,¹¹ and debit network industries.¹² And outside of our Sherman Act¹³ § 2 work, we filed suit to halt competitor information exchanges in the agriculture industry that hurt growers and farmers and raise prices at the grocery store,¹⁴ algorithmic collusion in housing rental markets,¹⁵ and unwarranted limits on college athletes' mobility.¹⁶

7. United States v. Google LLC, 747 F. Supp. 3d 1, 187 (D.D.C. 2024).

8. Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies> [https://perma.cc/SHR5-6UP7]; see Press Release, U.S. Dep't of Just., Department of Justice Prevails in Landmark Antitrust Case Against Google (Apr. 25, 2025), <https://www.justice.gov/opa/pr/department-justice-prevails-landmark-antitrust-case-against-google> [https://perma.cc/AXG4-R5D4].

9. Press Release, U.S. Dep't of Just., Justice Department Sues Apple for Monopolizing Smartphone Markets (Mar. 21, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets> [https://perma.cc/82UN-F6DU].

10. Press Release, U.S. Dep't of Just., Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry (May 23, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert> [https://perma.cc/YZ6P-6ZWF].

11. Press Release, U.S. Dep't of Just., Justice Department Sues RealPage for Algorithmic Pricing Scheme That Harms Millions of American Renters (Aug. 23, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters> [https://perma.cc/LAN8-KM28].

12. Press Release, U.S. Dep't of Just., Justice Department Sues Visa for Monopolizing Debit Markets (Sep. 24, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-sues-visa-monopolizing-debit-markets> [https://perma.cc/VR8E-RMDN].

13. 15 U.S.C. §§ 1–7.

14. Press Release, U.S. Dep't of Just., Justice Department Sues Agri Stats for Operating Extensive Information Exchanges Among Meat Processors (Sep. 28, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-sues-agri-stats-operating-extensive-information-exchanges-among-meat> [https://perma.cc/E5SR-8ZVX].

15. Press Release, U.S. Dep't of Just., *supra* note 11; Press Release, U.S. Dep't of Just., Justice Department Sues Six Large Landlords for Algorithmic Pricing Scheme that Harms Millions of American Renters (Jan. 7, 2025), <https://www.justice.gov/archives/opa/pr/justice-department-sues-six-large-landlords-algorithmic-pricing-scheme-harms-millions> [https://perma.cc/G825-9GU5].

16. Press Release, U.S. Dep't of Just., Justice Department Joins Lawsuit Challenging National Collegiate Athletics Association's (NCAA) Transfer Eligibility Rule (Jan. 18, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-joins-lawsuit-challenging-national-collegiate-athletics-associations-ncaa> [https://perma.cc/AJ27-3KAE].

Over the last thirty months, we also have stopped illegal mergers in the airline¹⁷ and book publishing industries,¹⁸ obtained criminal convictions against corporations that fixed school nurses' wages¹⁹ and generic drug prices,²⁰ stood up a task force to root out corporate monopolization and collusion in healthcare,²¹ strengthened interagency cooperation with other federal agencies,²² and vindicated important legal precedents through more than thirty amicus filings in state and federal courts across the country. Several of these filings have helped win path-clearing legal interpretations, including about refusals to deal and franchise no-poach agreements.

We stood up a sustained effort to enforce section 8 of the Clayton Act.²³ More than twenty companies abandoned mergers in the face of serious competition concerns. We have dusted off long-existing but underutilized statutory authorities to protect markets, including the Packers and Stockyards Act²⁴ and certain felony provisions of the Sherman Act.²⁵ We have secured convictions of more than sixty companies and individuals and obtained over \$270 million in criminal fines and penalties. We have returned money to the public coffers in procurement collusion and fraud cases. We have withdrawn outdated guidelines that did not provide appropriate guidance to the public.²⁶

17. Press Release, U.S. Dep't of Just., Justice Department Statements on JetBlue Terminating Acquisition of Spirit Airlines (Mar. 4, 2024), <https://www.justice.gov/archives/opa/pr/justice-department-statements-jetblue-terminating-acquisition-spirit-airlines> [https://perma.cc/E58V-WY2K].

18. Press Release, U.S. Dep't of Just., Justice Department Obtains Permanent Injunction Blocking Penguin Random House's Proposed Acquisition of Simon & Schuster (Oct. 31, 2022), <https://www.justice.gov/archives/opa/pr/justice-department-obtains-permanent-injunction-blocking-penguin-random-house-s-proposed> [https://perma.cc/SY8X-5JWD].

19. Press Release, U.S. Dep't of Just., Health Care Company Pleads Guilty and Is Sentenced for Conspiring to Suppress Wages of School Nurses (Oct. 27, 2022), <https://www.justice.gov/archives/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses> [https://perma.cc/FEG5-XF9P].

20. Press Release, U.S. Dep't of Just., Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy (Aug. 21, 2023), <https://www.justice.gov/archives/opa/pr/major-generic-drug-companies-pay-over-quarter-billion-dollars-resolve-price-fixing-charges> [https://perma.cc/6WM3-ZL6K].

21. Press Release, U.S. Dep't of Just., Assistant Attorney General Jonathan Kanter Announces Task Force on Health Care Monopolies and Collusion (May 9, 2024), <https://www.justice.gov/archives/opa/pr/assistant-attorney-general-jonathan-kanter-announces-task-force-health-care-monopolies-and> [https://perma.cc/CTH6-Q2EL].

22. Press Release, FTC, FTC and Justice Department to Host First Public Strike Force on Unfair and Illegal Pricing Meeting (July 26, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-justice-department-host-first-public-strike-force-unfair-illegal-pricing-meeting> [https://perma.cc/93XB-SNQA].

23. 15 U.S.C. §§ 12–27; *id.* § 19.

24. Ch. 64, 42 Stat. 159 (1921) (codified as amended in scattered sections of 7 U.S.C.).

25. 15 U.S.C. § 2.

26. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Withdraws Outdated Enforcement Policy Statements (Feb. 3, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements> [https://perma.cc/EF9J-Y5X2].

We updated our merger guidelines.²⁷ In October 2024, the wisdom of the 2023 Merger Guidelines was cited approvingly by a federal judge in Manhattan.²⁸

And we have invested in the Antitrust Division itself. We have stood up a Litigation Program, a talented group of first- and second-chair trial lawyers who lead, strategize, and mentor in high-stakes antitrust cases.²⁹ Since 2022, more than 110 civil prosecutors went to the podium and examined trial witnesses; fifty-five did so for the first time. That is just in the civil program. We are training up the next generation of criminal antitrust prosecutors too. We have brought in more economic and technical expertise, including data scientists, technologists, and artificial intelligence experts. We have secured funding to build for the first time state-of-the-art technology infrastructure to help us investigate, litigate, and resolve competition problems across the U.S. economy.

We are busy. And more is under way.

Our enforcement and policy choices follow painstaking, often yearslong investigations of the facts, reviews of market conditions, and careful assessments of the law. They reflect a commitment to studying markets as they are with the best analytical tools we have. They demonstrate a serious commitment to taking care that the laws written by Congress are faithfully executed. This is our constitutional obligation.³⁰

Lately, though, I am increasingly contemplative about why these cases matter—not just to the administration of the antitrust laws, but in the broader context of antitrust ideals and the Justice Department’s unique role in upholding the rights of the American people. I’ve reflected more about what is at stake in our antitrust enforcement and why the principles enshrined in the antitrust laws are worth supporting.

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The U.S. Supreme Court has long recognized that the value “unequivocally laid down” by the antitrust laws is competition.³¹ At the same time, it has recognized that the second- and third-order benefits of vibrant, open, and competitive markets accrue to the benefit of rights and liberties of all kinds, as well as the vitality of our democratic institutions.³²

27. Press Release, U.S. Dep’t of Just., Justice Department and Federal Trade Commission Release 2023 Merger Guidelines (Dec. 18, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines> [<https://perma.cc/2RHB-DRPR>].

28. *FTC v. Tapestry Inc.*, 755 F. Supp. 3d 386, 412 n.3, 458–59 (S.D.N.Y. 2024).

29. *Litigation Program*, U.S. DEP’T OF JUST. (June 11, 2025), <https://www.justice.gov/atr/litigation-program> [<https://perma.cc/3MDV-5GPM>] (noting that the Department of Justice established the Litigation Program in 2023).

30. See U.S. CONST. art. II, § 3, cl. 2.

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

32. *Id.* (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material

In 1972, Justice Thurgood Marshall, writing for the majority in *United States v. Topco Associates, Inc.*,³³ compared the antitrust laws to the Magna Carta, declaring them “as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedoms.”³⁴

I do not think Justice Marshall made this comparison lightly.

He understood more than most the importance—and the transformative power—of the rights protected by these documents. After graduating law school in 1933, Justice Marshall followed in the footsteps of his mentor, Charles Hamilton Houston, the first general counsel of the NAACP, who pioneered the legal groundwork for direct legal challenges to Jim Crow laws.³⁵ At the NAACP, Justice Marshall represented people facing the death penalty.³⁶ He defended the Montgomery Improvement Association, led by Dr. Martin Luther King Jr., when it was sued for organizing a bus boycott in response to the arrest of Rosa Parks.³⁷ He argued dozens of cases before the Supreme Court, including landmark victories in *Shelley v. Kraemer*,³⁸ striking down race-based restrictive housing covenants, and *Brown v. Board of Education*,³⁹ striking down the separate-but-equal doctrine in public education.⁴⁰

So why would Justice Marshall compare the Magna Carta, our Constitution, and the Bill of Rights to antitrust laws?

I suspect he, like many of our national heroes before him, understood that preserving freedom and advancing the rights of Americans of all stripes requires us to protect three planks of our liberties: social, political, and economic rights and opportunities. It is not enough to have one or two. You need all three. And it may well be that economic liberty is a guarantor and backstop for the other two. Let me explain.

Broadly speaking, the political economy of our Constitution enshrines the rule of law and protects our social, political, and economic liberties and opportunities as citizens. Often enough, our loudest disagreements focus on the first two categories. Perhaps that is not surprising in a country where we

progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”).

33. 405 U.S. 596 (1972).

34. *Id.* at 610 (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

35. Charles Hamilton Houston, NAACP, <https://naacp.org/find-resources/history-explain-ed/civil-rights-leaders/charles-hamilton-houston> [<https://perma.cc/2RBX-TE2N>] (last visited Feb. 17, 2026).

36. Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 35, 38 (1994).

37. See, e.g., Letter from Martin Luther King, Jr., to Thurgood Marshall (Feb. 6, 1958), <https://kinginstitute.stanford.edu/king-papers/documents/thurgood-marshall> [<https://perma.cc/2JTC-NYXA>].

38. 334 U.S. 1 (1948).

39. 347 U.S. 483 (1954).

40. See generally *id.*; *Shelley*, 334 U.S. 1.

have shed blood and fought wars to make real the proposition that all people are created equal, and where we strive every day toward our more perfect union.

But what of economic liberty and economic opportunity? I believe economic liberty and the American democracy-of-opportunity tradition are critical to the full participation of citizens in our republic. They are as essential to the promise of America as our social and political rights. They are mutually reinforcing.

Professor Eleanor M. Fox has argued that a thriving democracy, with robust political and social liberties for all, cannot exist without robust economic rights and protections for those rights.⁴¹ Many of our intellectual and national heroes have recognized this as well. Even in the 1960s, figures like Bayard Rustin and Dr. King recognized that the hard-won social and political rights gained through the Civil Rights Act of 1964⁴² would not be fully realized unless they were backstopped by economic rights and liberties.⁴³

I will not hide my thesis. I believe the antitrust laws, which reflect core American ideals, have something to say about the democracy-of-opportunity tradition and economic liberty. And I believe the Justice Department plays a unique role in upholding them.

* * *

Our first federal antitrust law was the Sherman Act of 1890.⁴⁴ Senator John Sherman argued passionately that “monopolies . . . are inconsistent with our form of government” and that “[i]f we would not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life.”⁴⁵

The ideals of his legislation were not new—even in 1890. They trace back to a long common-law tradition that is older than the republic itself. An early seventeenth century case, *Darcy v. Allein*,⁴⁶ declared the Crown’s grant of a monopoly for making playing cards “against the common law.”⁴⁷ Since

41. See generally, e.g., Eleanor M. Fox, *Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both*, 46 LEGAL ISSUES ECON. INTEGRATION 317 (2019).

42. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code).

43. See generally JOSEPH FISHKIN & WILLIAM FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 386–92 (2022).

44. See Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

45. 21 CONG. REC. 2461 (1890) (statement of Sen. John Sherman).

46. *Darcy v. Allein* (*The Case of Monopolies*), (1603) 77 Eng. Rep. 1260 (KB).

47. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 993 (2013) (quoting *The Case of Monopolies*, 77 Eng. Rep. at 1262–63); *Standard Oil Co. v. United States*, 283 U.S. 163, 169 n.2 (1931) (citing *The Case of Monopolies* in recognizing a “general public policy against monopolies”).

1776, my home state of North Carolina’s constitution has declared that monopoly is antithetical to the genius of a free state.⁴⁸

The economic opportunities and liberties protected by the Sherman Act—in particular, protections against monopolies—were important to the founders too. Thomas Jefferson listed a “restriction against monopolies” among the rights that deserved to be enumerated in the Bill of Rights.⁴⁹ After all, England’s grant of monopolies for different products, including tea, may well have set the American Revolution in motion.⁵⁰

The foundations on which the Sherman Act rests are not limited to concerns about contractual restraints, property rights, and industrial relations. They also contemplate individual liberty and concern about distribution of power.⁵¹ Why is this concern for economic opportunity and liberty so important? I come back to my thesis: because efforts to secure social and political rights are at risk if they are not backstopped by economic opportunity—and because antitrust plays an important role in our economic liberty and democracy-of-opportunity tradition.

In his 1935 book, *Black Reconstruction in America*, W.E.B. Du Bois famously argued that a key reason why the Confederacy collapsed—and the institution of slavery with it—was because when Union soldiers arrived in the South, Black Americans “left the plantation[]” and led a “general strike.”⁵² They exercised the most basic economic right that comes with freedom—the freedom to make decisions about one’s own labor.⁵³ The exercise of this economic liberty devastated the Southern economy, and, as Du Bois put it, “furnished . . . 200,000 Federal soldiers.”⁵⁴ This is no doubt resonant for all of us who have helped advance labor competition jurisprudence and protected the rights of organized workers to act collectively without fear of antitrust liability.

After the Civil War, Congress passed a law authorizing the attorney general to supervise and control all government litigation.⁵⁵ The U.S.

48. N.C. CONST., A Declaration of Rights art. XXIII (1776), https://avalon.law.yale.edu/18th_century/nc07.asp [<https://perma.cc/WFG5-L2DJ>]; N.C. CONST. art I, § 34.

49. Calabresi & Leibowitz, *supra* note 47, at 1010 (quoting Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1966)).

50. *Id.* at 1007–08.

51. See Kevin Frazier, *The Concern for Human Flourishing at the Core of Antitrust Law*, THE FEDERALIST SOC’Y (July 19, 2024), <https://fedsoc.org/commentary/fedsoc-blog/the-concern-for-human-flourishing-at-the-core-of-antitrust-law> [<https://perma.cc/3FRK-AN8U>].

52. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 67 (1935).

53. The right to withhold labor has long been recognized in common law and under the antitrust laws. See, e.g., Nat’l Soc. of Pro. Eng’rs v. United States, 435 U.S. 679, 688–89 (1978) (discussing *Mitchel v. Reynolds*, an early eighteenth century case analyzing the legality of a restraint on continuing to practice one’s trade after selling a business).

54. DU BOIS, *supra* note 52, at 67.

55. *Executive Legal Officers*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/executive-legal-officers> [<https://perma.cc/ZF5W-QMK2>] (last visited Feb. 19, 2026).

Department of Justice was established in 1870.⁵⁶ Of the many challenges facing the new department and its first appointed attorney general, one of the more prominent ones was ensuring civil and voting rights for all citizens, including newly emancipated Black Americans.

When Congress passed the Sherman Act two decades later, it was in the face of dominant trusts—including Standard Oil—and increasing consolidation that threatened America. The Sherman Act rested on the constitutional power of our Congress not only to regulate interstate commerce, but to protect all citizens' economic opportunities and liberties. And so the Justice Department, in part through its antitrust powers, took on the role of upholder and guarantor of economic opportunity and liberty for all Americans, as it has done now for more than a century.

Our history teaches that when we do not protect economic opportunity—when we allow concentrated economic power to go unchecked—other rights suffer or disappear entirely. As Du Bois and later Reconstruction historians have argued, this is part of why Reconstruction failed: freed men needed economic independence and the protection of the ballot to make their freedom real.⁵⁷ Instead, freed men were forced into tenant farming and sharecropping.⁵⁸ A century of Jim Crow followed. For all of us who have litigated cases to protect chicken growers from the abuses of big corporate processors, the tyranny of the tournament system, and other forbidden practices under the Packers and Stockyards Act, we know the legacy of these practices today transcends race and has evolved but not disappeared.⁵⁹

Black Americans eventually confronted Jim Crow with boycotts, withdrawing not just their labor but also their economic support for the institutions facilitating segregation. Businesses on the receiving end of these boycotts sued, invoking of all things the antitrust laws. Ultimately, the Supreme Court protected the economic liberty of Black Americans “to bring about political, social, and economic change” through peaceful protest, including boycotts.⁶⁰ From Rosa Parks to Dr. King to Representative John Lewis, these Americans asserted and used their right to economic independence to protect the franchise—the right to vote—among many other rights.

Less well known is the fact that civil rights leaders have long spoken out against monopolies and in favor of protecting economic rights and liberties.

56. Jim Martin, *The Creation of the Department of Justice*, LIBR. OF CONG. (Dec. 4, 2017), <https://blogs.loc.gov/law/2017/12/the-creation-of-the-department-of-justice/> [https://perma.cc/G54Q-ESNP].

57. See generally DU BOIS, *supra* note 52; ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877* (1988).

58. See generally Wesley Allen Riddle, *The Origins of Black Sharecropping*, MISS. Q., Winter 1995–96, at 53.

59. See generally Monica Richmond Gisolfo, *From Crop Lien to Contract Farming: The Roots of Agribusiness in the American South, 1929–1939*, 80 AGRIC. HIST., no. 2, 2026, at 167.

60. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911–12 (1982); see also NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964) (challenging the NAACP's organization of a “refusal to ride on Montgomery's buses in protest against a policy of racial segregation”).

Frederick Douglass called for laws limiting “[e]states too large for the good of society”⁶¹ and criticized the “accumulation [of wealth] in the hands of a few” as “the readiest means by which liberty is overthrown.”⁶² His opposition to these ideas was expressly linked to his opposition to slavery.⁶³ He connected his call for civil rights to economic rights—the right to own property and the right to own your own labor. As Douglass wrote: “What is freedom? It is the right to choose one’s own employment.”⁶⁴ Without that right, “liberty is a mockery.”⁶⁵

When Dr. King led the March on Washington in 1963, where he delivered his famous “I Have a Dream” speech, the march was called the “March on Washington for Jobs and Freedom.” His dream was one of social, political, and economic freedom, which he recognized were inseparable and vital to full citizen participation in our republic. In the years that followed, he called for uniting “social and economic justice into a single package of freedom” for all Americans.⁶⁶ In his final book, *Where Do We Go from Here: Chaos or Community*, he also addressed the market operation of our economy.⁶⁷

Time and time again in our history, we have recognized that economic liberty and the democracy-of-opportunity tradition support human flourishing—that we cannot have social and political liberty without economic liberty. When we failed to protect all these forms of liberty, we often failed to protect any of them.

What does this have to do with antitrust? I think the antitrust laws are, as Justice Marshall recognized, an important tool for preserving and defending economic liberty and thus reinforcing our social and political rights.

Perhaps it is no surprise, then, that antitrust law’s biggest champions have also been champions of political and social rights. Senator John Sherman, among the very first Republicans elected to Congress,⁶⁸ was an opponent of slavery⁶⁹ and a supporter of the Thirteenth, Fourteenth, and Fifteenth

61. Frederick Douglass, *The Land Reformer*, FREDERICK DOUGLASS’ PAPER, Aug. 15, 1856, reprinted in JACOBIN (Feb. 2, 2020), <https://jacobin.com/2020/02/frederick-douglass-accumulation-wealth-land-reformer> [<https://perma.cc/7VG3-8PN5>].

62. Frederick Douglass, *The Accumulation of Wealth*, FREDERICK DOUGLASS’ PAPER, Aug. 15, 1856, reprinted in JACOBIN (Feb. 2, 2020), <https://jacobin.com/2020/02/frederick-douglass-accumulation-wealth-land-reformer> [<https://perma.cc/7VG3-8PN5>].

63. See, e.g., Frederick Douglass, *National Free Soil Convention*, FREDERICK DOUGLASS’ PAPER, Aug. 20, 1852, <https://www.loc.gov/resource/sn84026366/1852-08-20/ed-1/> [<https://perma.cc/9A2L-F3DN>] (“[L]and monopoly is the parent of slavery.”).

64. Frederick Douglass, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society in Boston: What the Black Man Wants (Jan. 26, 1865), <https://frederickdouglasspapersproject.com/s/digitaledition/item/18468> [<https://perma.cc/6CQU-5S74>].

65. *Id.*

66. *MLK’s Forgotten Call for Economic Justice: “Jobs Are Harder to Create Than Voting Rolls”*, NATION (Mar. 14, 1966), <https://www.thenation.com/article/economy/last-steep-ascent/> [<https://perma.cc/YML6-M3YC>].

67. See generally MARTIN LUTHER KING JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY* (1968).

68. JOHN SHERMAN, *RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET* 105 (1865).

69. Steve Luxenberg, *A Fanatic and ‘Negro-Stealer’: One of the Ugliest House Speaker Fights in History*, WASH. POST (Dec. 12, 2018), <https://www.washingtonpost.com/history/20>

Amendments.⁷⁰ Senator George F. Edmunds, one of the primary drafters of the text of the Sherman Act, also drafted and oversaw the passage of the Ku Klux Klan Act.⁷¹ These men recognized the Sherman Act as an extension of this work. For example, Senator Sherman argued that his law against trusts was necessary to preserve “industrial liberty,” which “lies at the foundation of the equality of all rights and privileges.”⁷²

Justice John Marshall Harlan, the lone dissenter in *Plessy v. Ferguson*,⁷³ wrote in the 1911 case *Standard Oil Co. of New Jersey v. United States*:⁷⁴

All who recall the condition of the country in 1890 will remember . . . [t]he nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from . . . the slavery that would result from aggregations of capital in the hands of a few individuals and corporations.⁷⁵

Representative Emanuel Celler, who sponsored the Celler-Kefauver Anti-Merger Act⁷⁶ of 1950 to strengthen merger enforcement, introduced the Civil Rights Act of 1964 in the House.⁷⁷ Senator Philip A. Hart, of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,⁷⁸ was a floor sponsor of the Voting Rights Act of 1965.⁷⁹ Senator Hugh Scott was a strong supporter of the Voting Rights Act, as well as the Civil Rights Act of 1964 and a number of other civil rights laws.⁸⁰ Representative Peter Rodino wrote the majority report for the Civil Rights Act of 1964—as well as other civil

18/12/12/fanatic-negro-stealer-ugliest-speaker-fight-congressional-history/ (on file with the *Fordham Law Review*).

70. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 386–87 (2023) (Jackson, J., dissenting) (“John Sherman defended the proposed Fourteenth Amendment in a manner that encapsulated our Reconstruction Framers’ highest sentiments: ‘We are bound by every obligation, by [Black Americans’] service on the battlefield, by their heroes who are buried in our cause, by their patriotism in the hours that tried our country, we are bound to protect them and all their natural rights.’”).

71. Ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985–1986); see Darrell A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 FORDHAM L. REV. 999, 1037 (2008).

72. 21 CONG. REC. 2457 (1890) (statements of Sen. John Sherman); see also Frazier, *supra* note 51.

73. 163 U.S. 537 (1896).

74. 221 U.S. 1 (1911).

75. *Id.* at 83 (Harlan, J., concurring in part and dissenting in part).

76. Ch. 1184, 64 Stat. 1125 (1950).

77. U.S. DEP’T OF JUST., C.R. DIV., TITLE VI LEGAL MANUAL § II, <https://www.justice.gov/crt/fcs/T6manual2> [<https://perma.cc/T5UN-EPPS>] (last visited Feb. 17, 2026).

78. Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended in scattered sections of 15 U.S.C.).

79. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Richard L. Madden, *Tighter for Civil Rights*, N.Y. TIMES (Dec. 27, 1976), <https://www.nytimes.com/1976/12/27/archives/fighter-for-civil-rights.html> (on file with the *Fordham Law Review*).

80. See generally Michael Merle Fehl, *The Civil Rights Position of Hugh D. Scott in Congress 1941 to 1965* (Aug. 1971) (M.A. thesis, University of Richmond) (on file with the *Fordham Law Review*).

rights laws—and authored Title VII of the Civil Rights Act of 1964.⁸¹ These senators recognized the antitrust laws as an extension of this work too. And so, the original preamble to the Hart-Scott-Rodino Act recognized “competitive enterprise as the best way to protect social, political, and economic freedom.”⁸²

At the same time, the biggest champions of civil rights have also been champions of antitrust laws. The very first Supreme Court case interpreting the scope of the Fourteenth Amendment’s protection for individual liberty involved a challenge to a Louisiana law granting certain butchers a monopoly over their trade.⁸³

Before the Civil Rights Act of 1964, Black Americans used the antitrust laws to challenge segregation. For example, in the early 1960s, groups like the Cook County Physicians’ Association used the Sherman Act to successfully challenge what they alleged was “a tacit conspiracy to exclude Negro physicians from staff appointments.”⁸⁴ After the resolution in that case, the number of Black doctors involved in residency programs in Chicago tripled.⁸⁵ The number of private hospitals willing to treat Black patients increased too.⁸⁶

Curt Flood, a famous baseball player who was a champion of civil rights in his own right, used the antitrust laws to challenge baseball’s reserve system.⁸⁷ While Flood’s lawsuit failed, his fight to end the reserve system was ultimately successful.⁸⁸

In 1961, Dr. King gave a lecture on the case for civil rights legislation at the Southern Baptist Theological Seminary in Louisville, Kentucky. During the lecture, he discussed the “distinction between private property that is purely private and private property that is privately owned but publicly used.”⁸⁹ He argued it was appropriate to impose limits on businesses’ ability to deny access to property that is privately owned but publicly used, citing

81. *The Rodino Archives*, SETON HALL L., <https://law.shu.edu/library/rodino/index.html> [<https://perma.cc/A46L-BNEM>] (last visited Mar. 8, 2026).

82. 94 CONG. REC. 4868 (Mar. 22, 1975) (statement of Sen. Philip A. Hart).

83. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 60 (1872).

84. *See generally* Robert G. Morris, Jr., *The Problems in Securing Hospital Staff Appointments for Negro Physicians in Chicago*, 52 J. NAT’L MED. ASS’N 194, 194–97 (1960).

85. *Chicago Staff Appointments of Negro Physicians*, 57 J. NAT’L MED. ASS’N 514, 514 (1965).

86. *Id.* at 515.

87. *Flood v. Kuhn*, 407 U.S. 258, 261 (1972); *see also* Rocco Constantino, *Curt Flood, Jr.*, BALLNINE (Apr. 15, 2022), <https://ballnine.com/2022/04/15/curt-flood-jr/> [<https://perma.cc/QST7-XFZ5>].

88. *See* Constantino, *supra* note 87. Flood earned the Jackie Robinson Award from the NAACP in 1992 for his civil rights advocacy, including his antitrust lawsuit. *See id.*

89. *Lecture Delivered to Christian Ethics Class at Southern Baptist Theological Seminary and Question and Answer Period*, STANFORD: THE MARTIN LUTHER KING, JR., RSCH. & EDUC. INST. (Apr. 19, 1961), <https://kinginstitute.stanford.edu/king-papers/documents/lecture-delive-red-christian-ethics-class-southern-baptist-theological-seminary> [<https://perma.cc/N5HE-W2ZD>].

the Sherman Act as an example of a law that, in some cases, limits businesses' discretion to deny access.⁹⁰

This colloquy between proponents of antitrust and civil rights is not a coincidence. Time and time again, champions of our civil rights laws looked to the antitrust laws to increase the economic liberty of ordinary Americans while decreasing the power of monopolies. I think it reflects an understanding, perhaps even a consensus, about the mutually reinforcing nature of social, political, and economic liberty for all Americans. And the centrality of antitrust to promote open, vibrant markets that are conducive to work, investment, and innovation. On this telling, we should think harder about calls to subordinate our antitrust and antimonopoly laws purportedly in service of some other professed social and political values.

At some point, the bonds between those fighting for economic rights and liberties and those fighting for social and political rights weakened. Antitrust earned the reputation of being esoteric, technocratic, and lacking participation from those who need it most. For years, many pushed the idea that it required specialized degrees or expensive expertise. I think this loses sight of antitrust's origin story. I also think it underestimates the potential of antitrust and the antimonopoly tradition to help protect our most vital liberties—even if antitrust strictly speaking is not a panacea.

Antitrust is about more than grayed out triangles and regression analyses. People are the objects of the law's solicitude. In our experience, when we put the American people at the center of our stories, when we are faithful to their real experiences of markets and market realities, we are likely to succeed. These successes show the potential of antitrust to help people, to help champion important economic rights and liberties, and to help strengthen economic independence. Let me give you some examples.

Labor. Antitrust can be a tool for prying open economic opportunity—especially in labor markets. Take, for example, the story of Leinani Deslandes, a woman who took on McDonald's for shutting her out of a higher paying job.⁹¹ Ms. Deslandes alleged she started working at McDonald's as a fry cook earning seven dollars an hour.⁹² Then, she worked her way up and trained for a management position.⁹³ But after her employer found out that she was pregnant, it cancelled the training.⁹⁴ When Ms. Deslandes sought a management job at another McDonald's franchise, she couldn't take the job because McDonald's and its franchisees had agreed that they wouldn't hire each other's workers—a classic franchise no-poach agreement.⁹⁵ Ms. Deslandes took her case to court, represented by a plaintiff's lawyer. The Antitrust Division filed an amicus brief supporting

90. *Id.*

91. *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *3 (N.D. Ill. June 25, 2018), *vacated*, 81 F.4th 699 (7th Cir. 2023).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

many of Ms. Deslandes's legal positions.⁹⁶ The U.S. Court of Appeals for the Seventh Circuit held that the conduct of McDonald's may violate the antitrust laws and allowed Ms. Deslandes's lawsuit to proceed.⁹⁷ Agreements like these no-poach agreements between employers and noncompete clauses in employees' contracts deprive American workers of their economic freedom by closing off their alternative employment options and restricting their ability to freely change their jobs.

Housing. Home ownership is another example. In the nineteenth century, Frederick Douglass called for the economic dispersion of land monopolies. "With land limitation," he said, "[s]lavery would be impossible."⁹⁸ He called for "the abrogation of land monopolies" and for opportunities for all people to have a part of the land of this country.⁹⁹ But today, when you try to buy or sell real estate, most people rely on real estate agents who are members of associations that set rules that allow it to wield extraordinary power over the agents, and, ultimately, home buyers and sellers.

Last year, in a private antitrust case, a jury agreed with plaintiffs that there was a conspiracy to artificially inflate commissions, which meant higher prices for home buyers and less money for home sellers.¹⁰⁰ The jury found that these practices cost home sellers in Missouri \$1.8 billion.¹⁰¹ Similar lawsuits are now being brought across the country, challenging these practices and other rules that real estate associations use to block competition and harm consumers.¹⁰²

The Justice Department has filed its own legal challenges to the rules governing home buying and has participated as amici in real estate association cases across the country.¹⁰³

Airlines. Another example is the ability to travel. The importance of guaranteeing the right to travel across state lines was a key part of the Civil Rights Act of 1964.¹⁰⁴ Today, however, interstate and international travel is

96. *See generally* Brief for the United States of America and the Federal Trade Commission as Amici Curiae Supporting Neither Party, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023) (Nos. 22-2333, 22-2334).

97. *See Deslandes*, 81 F.4th at 703–05.

98. Douglass, *supra* note 61.

99. *Id.*

100. Matthew Perlman, *Jury Hits Realtors with \$1.8B Verdict Over Commission Rule*, LAW360 (Oct. 31, 2023), <https://www.law360.com/real-estate-authority/articles/1738923> (on file with the *Fordham Law Review*).

101. *Id.*

102. *See, e.g.*, Class Action Complaint, *Gibson v. Nat'l Ass'n of Realtors*, No. 23-cv-00788 (W.D. Mo. Oct. 31, 2023); *see also New Court Cases Since Burnett v. Nar*, RI REALTORS, <https://www.rirealtors.org/mls/new-court-cases-since-burnett-v-nar/> [<https://perma.cc/W9C-C-H7PG>] (last visited Mar. 16, 2026).

103. *See generally* *Nat'l Ass'n of Realtors v. United States*, 97 F.4th 951 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 1050 (2025); Statement of Interest of the United States, *Burnett v. Nat'l Ass'n of Realtors*, No. 19-cv-00332 (W.D. Mo. Nov. 24, 2024); Statement of Interest on Behalf of the United States of America, *REX—Real Estate Exchange, Inc. v. Zillow Inc.*, No. 21-cv-00312, 2023 WL 5334389 (W.D. Wash. Aug. 18, 2023); Statement of Interest on Behalf of the United States of America, *Sitzer v. Nat'l Ass'n of Realtors*, No. 19-cv-00332 (W.D. Mo. Sep. 30, 2019).

104. 42 U.S.C. § 2000a.

dominated by an airline oligopoly that has rapidly consolidated over decades. Recently, the Antitrust Division reversed that trend by enforcing the law as Congress wrote it. For example, the Antitrust Division successfully blocked a de facto merger between American Airlines and JetBlue.¹⁰⁵ Before that case went to trial in September 2022, JetBlue announced it would also merge with Spirit Airlines.¹⁰⁶ The Justice Department and coalitions of state attorneys general argued that, based on the facts at hand, each merger would violate federal antitrust law and illegally consolidate the airline industry. In both cases, federal courts agreed and enjoined the deals.¹⁰⁷

Digital Platforms. Today, a few powerful digital gatekeepers exert extraordinary influence over our lives—not just in the massive amounts of data they collect about us, but also in the way they control our access to information and people. When these gatekeepers face less competition, we have less power over whose voices these platforms silence and amplify. Recently, a court held that one of these digital gatekeepers, Google, violated the antitrust laws in markets for general search and search advertising.¹⁰⁸ My hope is that this victory will pave the way for more competition and sustained opportunities to innovate, invest, and reap the rewards of markets unfettered by monopoly.

Many of the cases I just mentioned were brought and won by private plaintiffs' lawyers, who sought redress for victims of antitrust violations like Ms. Deslandes. These cases are an extraordinarily important complement to the Justice Department's own efforts to promote competition and protect Americans' economic opportunities. I think they also offer important lessons for antitrust plaintiffs of all kinds.

Speaking from experience, one of the biggest challenges—and opportunities—is explaining how our cases impact people. This is a place where the plaintiffs' bar excelled this year. By necessity, the plaintiffs' bar gave voice to individuals like Ms. Deslandes; it told their stories. In doing

105. See generally *United States v. Am. Airlines Grp.*, 675 F. Supp. 3d 65 (D. Mass. 2023), *aff'd*, 121 F.4th 209 (1st Cir. 2024).

106. JetBlue launched an unsolicited tender offer after Spirit Airlines announced its intent to merge with Frontier Airlines in February 2022. See Press Release, Frontier & Spirit, Frontier Airlines and Spirit Airlines to Combine, Creating America's Most Competitive Ultra-Low Fare Airline (Feb. 7, 2022), https://s204.q4cdn.com/112592003/files/doc_news/2022/02/1/FINAL-Frontier-Spirit-Transaction-Press-Release.pdf [<https://perma.cc/G4XJ-FYGT>]; *Spirit Airlines Board of Directors Reiterates Support for Merger with Frontier Airlines*, SPIRIT (May 2, 2022), <https://ir.spirit.com/news/news-details/2022/Spirit-Airlines-Board-of-Directors-Reiterates-Support-for-Merger-with-Frontier-Airlines/default.aspx> [<https://perma.cc/WM8T-BT8X>]; *Spirit Airlines Board of Directors to Review Unsolicited Tender Offer from JetBlue*, SPIRIT (May 16, 2022), <https://ir.spirit.com/news/news-details/2022/Spirit-Airlines-Board-of-Directors-to-Review-Unsolicited-Tender-Offer-from-JetBlue/default.aspx> [<https://perma.cc/PT8U-R4M4>].

107. See generally *Am. Airlines Grp.*, 675 F. Supp. 3d 65; *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109 (D. Mass. 2024), *appeal dismissed*, No. 24-1092, 2024 WL 3491184 (1st Cir. Mar. 5, 2024).

108. The Associated Press, *Google Loses Massive Antitrust Case Over Its Search Dominance*, NPR (Aug. 5, 2025, at 19:40 ET), <https://www.npr.org/2024/08/05/nx-s1-5064624/google-justice-department-antitrust-search> [<https://perma.cc/2JFN-GCXY>].

so, it helped judges, juries, and the public appreciate that anticompetitive conduct has real-world effects. It showed that lack of competition hurts real people. Losing a promotion. Losing the opportunity to buy a house. Losing out on the ability to start a business. Losing out on the ability to get financial aid at a dream school. These are real harms that were faced by antitrust plaintiffs. Their stories are important. They matter.

Over the last three years, the Antitrust Division has made extraordinary investments in making our work more accessible to people. We have worked harder to get out of Washington, D.C., to hear and elevate different stories—both as part of our casework and our advocacy. Just yesterday, I had the privilege of hearing from community pharmacists in Columbus, Ohio, who have struggled to run their businesses and serve their communities because of pharmacy benefit manager (PBM) abuses. And we have focused on becoming better storytellers in our trial presentation. You can see it in how we have explained what book advances mean to authors and their ability to afford life's necessities.

Another area where we can learn from the plaintiffs' bar is respecting the importance of juries. While our criminal program regularly tries antitrust cases to juries, our civil program has not for many, many years. We have had the good fortune—and opportunity to learn—from the exceptional jurists who have heard our cases. But we owe it to the public to be comfortable giving “We the People” the power to make decisions about how government is wielding the authority entrusted to it—to let citizens make decisions about citizens. The Antitrust Division has attempted to honor that value in its enforcement choices, and I expect those efforts will continue.

At the same time, I think there are important lessons that the plaintiffs' antitrust bar can take from government enforcers. Take remedies, for example. Too often, plaintiffs' lawyers bring important cases only to resolve them with settlements that allow alleged wrongdoers to pay a fine without an injunction or remedy to restore lost competition. Candidly, I am encouraged that this approach has faced increasing questioning from thoughtful judges who have pushed back against these kinds of settlements.¹⁰⁹

* * *

The fight for economic liberty and our democracy-of-opportunity tradition touches every aspect of American life—especially for those most vulnerable to abuses of monopoly power, collusion by corporations, and other violations of the antitrust laws.

I also will leave you with a parting thought. The origins of democracy in this country—including the right to vote—began with the landed elite and their property interests. And since then, the interplay between economic liberty and meaningful civil and social liberty has not waned. We see time and time again in our history the role that economic opportunity plays in

109. See, e.g., Andreas Hale, *UFC, Fighters Close on \$375M Settlement with Judge's Approval*, ESPN (Oct. 22, 2024), https://www.espn.com/mma/story/_/id/41950092/ufc-fighters-close-375m-settlement-judge-approval [<https://perma.cc/79ET-G8VA>].

human flourishing and the idea that we cannot have social, civic, and political progress without economic liberty and opportunity.

For all of us working to uphold these opportunities, we should recognize that, much like our broader set of civil rights, economic opportunity and liberty are not self-executing or self-sustaining. They must be championed and reaffirmed continuously. At the same time, our economic liberties and the democracy-of-opportunity tradition do not exist in isolation. History teaches that the social, political, and economic dimensions of liberty are inseparable and must be defended together.

That is good news. And it's an invitation. It means that antitrust lawyers can contribute to a bigger effort to protect the rights, opportunities, and liberties of all Americans. We can, we should, and we must work together to advance competition and antitrust's democracy-of-opportunity tradition because it is, as Justice Thurgood Marshall said, our economic Bill of Rights. And so it is, it has been, and it will be an indispensable part of the broader struggle for liberty and opportunity.