ARTICLE

# CLIMATE ACTION'S ANTITRUST PARADOX

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## SUMMARY

**An antitrust paradox lies at the heart of private-sector climate commitments. On the right, state attorneys general have warned that they may challenge these collaborations under antitrust laws. On the left, antitrust enforcers in the Biden Administration asserted that these actions will not receive preferential treatment even if they address societal ills that are not being addressed by governments. This Article asks what antitrust law is willing to consider: if prosocial goals are framed in terms of economic harms, should antitrust law view climate action as violating that standard? It argues that the avoided harms to the economy and consumers from emissions reductions can yield economically cognizable consumer welfare enhancement in the longer term, and that climate action thus is defensible under current antitrust doctrine.**

In a nation and political climate where the dueling political parties rarely align on policy matters, there is at least one contested issue on which a bipartisan coalition appears to agree: climate initiatives do not and will continue not to have a friend in U.S. antitrust law. Republican politicians and conservative-leaning organizations have opened investigations with an eye to filing antitrust lawsuits against private initiatives that target reductions in greenhouse gas emissions.[1] But rather than coming to the defense of climate proponents, Lina Khan—the then-chair of the Federal Trade Commission (FTC) appointed by Democratic President Joseph Biden—warned that "antitrust laws don't permit [the FTC] to turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit."[2]

Although the FTC's statutory mandate demands that antitrust authorities regulate activities that lessen competition "in any line of commerce,"[3] the ultimate goal of government action is to improve human welfare, and the goal of antitrust action is to improve consumer welfare. Yet, the longtime standards by which judges and agency officials evaluate antitrust cases are being rigidly imposed on modern-day issues, such as climate change, even if the net effect of collaboration among firms is to enhance welfare.

The consumer welfare standard—a guiding principle in antitrust analysis—dictates many considerations when scrutinizing a challenged business practice.[4] Under this standard, economists argue and judges reason that promotion of consumer welfare should be the primary goal of antitrust law.[5] The U.S. Supreme Court initiated and has continued to reinforce antitrust law's reliance on the con-

1. *See* Letter from Jonathan Skrmetti, Tennessee Attorney General and Reporter, to Signatories of the Net Zero Financial Service Providers Alliance (Sept. 13, 2023), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-37-letter.pdf [hereinafter Skrmetti Letter]; Lamar Johnson, *22 Republican State Attorneys General Accuse a Financial Services Climate Alliance of Potential Antitrust Violations*, ESG Dive (Sept. 18, 2023), https://www.esgdive.com/news/republican-attorneys-general-accuse-net-zero-financial-service-alliance-antitrust-esg/693910/; Amy Westervelt, *State Attorneys General Join Anti-ESG Effort, Amid Growing Backlash*, Congress.gov (July 2, 2023), https://www.congress.gov/118/meeting/house/117415/documents/HHRG-118-JU05-20240612-SD029-U29.pdf; Press Release, Office of Senator Chuck Grassley, Grassley, Cotton, Colleagues Warn Law Firms About ESG Initiatives (Nov. 4, 2022), https://www.grassley.senate.gov/news/news-releases/grassley-cotton-colleagues-warn-law-firms-about-esg-initiatives; Adam Candeub, *Federal Trade Commission*, *in* Project 2025: Mandate for Leadership 869 (Paul Dans & Steven Groves eds., Heritage Foundation 2023), https://static.project2025.org/2025_MandateForLeadership_CHAPTER-30.pdf.
2. Lina Khan, *ESG Won't Stop the FTC*, Wall St. J. (Dec. 21, 2022), https://www.wsj.com/articles/esg-wont-stop-the-ftc-competition-merger-lina-khan-social-economic-promises-court-11671637135; Mark Brnovich, *ESG May Be an Antitrust Violation*, Wall St. J. (Mar. 6, 2022), https://www.wsj.com/articles/esg-may-be-an-antitrust-violation-climate-activism-energy-prices-401k-retirement-investment-political-agenda-coordinated-influence-11646594807; *see also* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912), stating that Sherman Act violations cannot

   > be evaded by good motives [and that t]he law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results.

3. 15 U.S.C. §18.
4. *See* Fred Ashton, *Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy*, Am. Action F. (Oct. 26, 2022), https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy/; Herbert Hovenkamp, Antitrust's Goals in the Federal Courts 1 (July 1, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4519993 ("In general, antitrust courts (as opposed to secondary literature in both law reviews and economics journals) have focused most heavily on price and output as the criteria for defining the goals of the antitrust laws."); *id.* at 2 ("To date, the term 'consumer welfare' has appeared in seven Supreme Court majority opinions, one concurrence, and three dissents.").
5. *See* Hovenkamp, *supra* note 4, at 2.

sumer welfare standard, by explicitly incorporating economists' two-dimensional concerns into judicial opinions over the past 50 years.[6] When courts scrutinize a defendant's antitrust liability under the consumer welfare standard, consumers' well-being has primarily been assessed through two metrics: product pricing and product output.[7]

The consumer welfare standard undoubtedly has benefits that have warranted its continued dominance in the academic literature and antitrust casebooks.[8] When applied to climate measures, however, a simplistic analysis can easily look at just near-term harms to consumer welfare and overlook much larger long-term benefits. This nearsighted approach is creating an impediment to climate progress, and thus to the long-term success of the economy.

Proponents of antitrust-based attacks on climate efforts argue that these prosocial measures harm consumers through "green premiums" and restricted product output, thus violating the consumer welfare standard.[9] Although it may be true that consumers are negatively affected by climate actions under a short-term analysis of product output and prices, this Article argues that a rigorous application of the social cost of carbon (SCC) demonstrates that climate initiatives will enhance consumers' welfare in the long term.[10] In short, the issue with applying antitrust analysis to climate change is that the consumer welfare standard's nearsightedness ignores the welfare of consumers' future selves, even when widely accepted discount rates are used to account for consumers' welfare in the future.

Some would argue that the solution to this problem is modification or wholesale upheaval of the consumer welfare standard.[11] Incorporating climate-related considerations into an antitrust analysis, however, is a more defensible and feasible approach. This is the case because economic and climatic data identifying longer-term economic harms to consumers and others demonstrate that climate commitments can satisfy even the consumer welfare standard's two-dimensional emphasis.[12]

The antitrust approach followed on both the right and the left is thus either a decision to reject the widely accepted economic implications of climate science,[13] a willingness to subordinate climate-based economic considerations to other economic goals without a rationale for choosing among them,[14] or a willingness to use a disciplinary mental model from economics as a procrustean bed, accepting economic impacts of a certain type and within an unstated time period and rejecting others, even when those longer-term economic impacts and the methodology used for calculating them are widely accepted.[15]

This Article draws on the dominant economic tool for assessing the costs of climate change, the SCC, to demonstrate how a more capacious, accurate consumer welfare standard is necessary for government to perform its underlying goal of social welfare enhancement and for antitrust law to perform its more specific goal of consumer welfare enhancement.[16] Despite the Donald Trump Administration disabling the use of the SCC in federal decisionmaking,[17] the SCC's methodology and accuracy have not been sufficiently undermined to warrant reconsideration of using this accounting metric.

This approach begins with the entrenched consumer welfare standard in antitrust law,[18] and only seeks to modify the standard's framework to include a rational consideration of the actual economic costs of climate change to consumers. More specifically, this refinement of the consumer welfare standard would balance the short-term economic harms to consumers with the longer-term harms, so that consumer welfare may actually be maximized—the ultimate goal of the consumer welfare standard.

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6. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 107-08 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' . . . Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit." (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979))); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 368 (1963) ("Competition among banks exists at every level—price, variety of credit arrangements . . . ."); Ohio v. American Express Co., 585 U.S. 529, 541 (2018) ("Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they 'always or almost always tend to restrict competition and decrease output.'" (quoting Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988))). Although the Supreme Court has used the term "consumer welfare" multiple times, it "has never categorically embraced any particular definition of consumer welfare." Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, 6 Penn Wharton Pub. Pol'y Initiative 1, 2 (2018).
7. *See* Hovenkamp, *supra* note 6, at 2.
8. See *infra* notes in Section I.A.
9. *See* Skrmetti Letter, *supra* note 1; House Committee on the Judiciary, Climate Control: Exposing the Decarbonization Collusion in Environmental, Social, and Governance (ESG) Investing (2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-06-11%20Climate%20Control%20-%20Exposing%20the%20Decarbonization%20Collusion%20in%20Environmental%2C%20Social%2C%20and%20Governance%20(ESG)%20Investing.pdf [hereinafter House Majority Report].
10. *See* Witold Henisz et al., McKinsey & Co., Five Ways That ESG Creates Value (2019), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.ashx.
11. *See, e.g.*, Ilene Knable Gotts, *Back to the Future: Should the "Consumer Welfare" Standard Be Replaced in U.S. M&A Antitrust Enforcement?*, *in* Antitrust Report 1, 1-2 (Rebecca Kirk Fair et al. eds., Mathew Bender & Co., Inc. 2019), https://www.law.berkeley.edu/wp-content/uploads/2019/10/Back-to-the-Future_3562076_1.pdf; William Markham, *The Consumer-Welfare Standard Should Cease to Be the North Star of Antitrust*, 31 Competition: Antitrust & Unfair Competition L. 1 (2021), https://calawyers.org/publications/antitrust-unfair-competition-law/competition-fall-2021-vol-31-no-2-the-consumer-welfare-standard-should-cease-to-be-the-north-star-of-antitrust/ (arguing "federal antitrust law has been undermined by the consumer-welfare standard and related doctrines" and that it is necessary to adopt new doctrines, but "only to revive and faithfully observe the classical common-law prohibitions against restraint of trade and unauthorized monopolies").
12. *See infra* Part II.
13. *See, e.g.*, House Majority Report, *supra* note 9, at 21-22.
14. *See id*.
15. Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism's Democracy Paradox*, 46 Regulation 28, 28-29 (2023/2024), https://www.cato.org/sites/cato.org/files/2024-01/regulation-v46n4-6.pdf (discussing how "the prevailing antitrust regime does not adequately protect laborers and suppliers because it exclusively values 'consumer' welfare").
16. Note that this Article does not suggest the SCC is the only metric that can quantify a climate commitment's procompetitive justification. The SCC was chosen because it has previously been used by the federal government to account—in the present day—for the future effects of greenhouse gas emissions.
17. Unleashing American Energy, 90 Fed. Reg. 8353, 8356 (Jan. 29, 2025).
18. *See infra* Section I.A.

Part I details the inception of the consumer welfare standard and how its dimensions are primarily bounded by product prices and product output, as well as the viewpoints of "Neo-Brandeisians" who argue for reforms to the consumer welfare standard and antitrust doctrine as a whole.[19] Part II uses the economic estimate of climate damages, the SCC, to demonstrate that corporate collaboration to reduce carbon emissions will reduce the costs of climate change in the long run, which will have net positive effects on consumer welfare. To do so, it uses the U.S. airline industry as a case study.

The Article examines the avoided economic burden to the economy if four U.S. airline companies reach their greenhouse gas commitments under the Science Based Targets initiative (SBTi).[20] In performing this calculation, the main aim of Part II is to illustrate that climate change harms can be assessed in the types of economic terms that are often used in an antitrust analysis for purposes of assessing consumer welfare. Part III then advocates for an understanding of the consumer welfare standard viewing allegedly anticompetitive practices through a longer-term lens that accounts for the economic costs of climate change and assesses consumers' welfare in light of those costs. Part IV concludes.

In other words, this Article asks whether antitrust scholars and enforcers are willing to consider true consumer welfare, or a caricature of consumer welfare that ignores quantifiable economic costs of climate change. If climate damages are relayed in economic terms, can the data serve as the foundation for a procompetitive justification situated within the consumer-welfare framework? How far into the future is antitrust law willing to consider climate-induced economic harms to consumers? Can the consumer welfare standard's umbrella of factors be expanded to include economic valuations that reflect climate change realities? The Article looks to answer these questions by presenting a hypothetical that pushes the boundaries of the mental models dominating both sides of antitrust theory and practice regarding climate commitments.

## I. The Consumer Welfare Standard and the Neo-Brandeisians

There are two principal competing schools of thought in antitrust: the Chicago School, which became associated with "consumer welfare," and the Neo-Brandeisians, who focus on concerns inherent to market concentration. These camps argue different perspectives on climate action's viability in antitrust. Both sides' critical and unsympathetic takes on climate mitigation induce chilling effects on collaborative corporate actions that set standards and take other actions to reduce carbon emissions in the face of inadequate international, national, and subnational government action.[21] This part details the key arguments of both sides, and provides examples of how the current mixed messages in antitrust spheres chill climate actions that likely do not, or should not, violate antitrust law.

### A. *The Consumer Welfare Standard*

The Sherman Act—antitrust's founding statute—includes no reference to consumer welfare[22]; in fact, it does not even use the word "consumer." It is important to understand, then, how the consumer welfare standard became so ingrained in modern antitrust doctrines. This economic principle, turned judicial standard, came to prominence largely due to Robert Bork's book *The Antitrust Paradox*.[23] The eventual use of the consumer welfare standard morphed Bork's ideals into the backbone of antitrust analysis.[24]

This section briefly details Bork's argument in *The Antitrust Paradox* and its supporting rationale in the first Supreme Court case to promote the consumer welfare standard. It then examines select antitrust cases to understand the nuanced contours of the consumer welfare standard. Last, it details the most vocal arguments from advocates of the consumer welfare standard and pinpoints some challenges to their assertions, ensuring a clear understanding of this cohort's thinking.

Bork's underlying rationales for the consumer welfare standard have marinated within antitrust law, entrenching these ideals into most analyses performed by courts and antitrust-enforcing agencies. This, however, was not always the case. In fact, more than half of antitrust history in the United States has been in a non-consumer welfare standard era.[25] With close to a century of judicial doctrine preceding the consumer welfare standard's ascension, we might ask which of Bork's arguments revealed that judicial doctrine of the time was ripe for reframing.

As a starting point, Bork presented critical arguments—supported by the economic thinking of the Chicago School—of antitrust law and underlying economic justifications that ultimately led to incorporation of the consumer welfare standard. The primary qualms with antitrust law were the nonexistence of a "workable regime."[26]

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19. *See infra* Section I.B.
20. *See infra* Section II.B.
21. *See infra* Section I.C.
22. 15 U.S.C. §§1-8.
23. *See* Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978).
24. *See infra* Section I.A; Christine S. Wilson, Commissioner, FTC, Luncheon Keynote Address at the George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf ("[B]usiness conduct and mergers are evaluated to determine whether they harm consumers in any relevant market. Generally speaking, if consumers are not harmed, the antitrust agencies do not act.").
25. William Markham, *How the Consumer-Welfare Standard Transformed Classical Antitrust Law*, Law Offs. Wm. Markham (2021), https://www.markhamlawfirm.com/law-articles/how-the-consumer-welfare-standard-transformed-classical-antitrust-law/ ("Classical antitrust was enforced most vigorously from the late 1930s to the mid-1970s. . . . Consumer-welfare jurisprudence was first conceived during the 1960s and was increasingly adopted by the federal courts from the mid-1970s onward, until it eventually became the unquestioned underpinning of American antitrust law . . . .").
26. Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. State L.J. 293, 303 (2019).

Chicago School scholars viewed antitrust as lacking an economic foundation, and thus as an unprincipled discipline that led to unpredictable results.[27] This pursuit of an economic-grounded antitrust doctrine led to Bork and company arguing for this modification to antitrust law. The crux of Bork's argument against antitrust norms was his unyielding resolve to reject alternative theories to antitrust enforcement that did not reinforce notions of efficiency or consumer welfare enhancement.[28]

With consumer welfare being the "sole normative objective" of antitrust enforcement,[29] Bork argued this welfare-maximizing goal was best achieved by striving for economic efficiency.[30] Bork's narrow focus meant noneconomic considerations fell to the wayside, and it paved an open road for economic efficiencies that enhanced consumer welfare.[31] From Bork's viewpoint, efficiencies are critical for driving overall economic welfare, which ultimately transforms into consumer benefits through lower prices, greater output, or better services.[32] This pursuit of economic efficiency allowed business practices that have enhanced productivity or lowered operational costs, even if these practices increased the company's overall market share, to exist within modern U.S. antitrust law.[33]

Courts have taken Bork's argument—that antitrust should shift away from a structuralist-focused analysis of market power—and made consumer prices "the dominant metric for assessing competition."[34] More than 40 years later, plaintiffs and antitrust-enforcing agencies typically rely on consumer prices—in tandem with product output—to exhibit an antitrust injury that impairs consumer welfare.[35] Note the subtle shift here from "consumer welfare" to "consumer prices," which provides a basis for excluding the broader effects on consumers that a government seeking to enhance public welfare would also want to consider.

The Supreme Court first wove explicit references to "consumer welfare" into antitrust doctrines in *Reiter v. Sonotone Corp*. There, the Court introduced Bork's work in antitrust case law when it said, "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[36] It ultimately ruled for the class-action plaintiffs, finding they were injured by the alleged violation because they paid higher prices for personal-use goods as a result of sustaining an injury under §4 of the Clayton Act.[37] Since *Reiter*, the Supreme Court and federal courts alike have relied on consumer-focused factors to determine whether a challenged business practice violates antitrust laws.

Before the Supreme Court incorporated consumer welfare into antitrust law, the Court foreshadowed this shift by analyzing economic impacts on consumers to justify a "rule-of-reason" analysis of vertical restraints on trade, rather than the typical "blanket," or per se, prohibition on this type of business practice. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, the defendant enacted a limitation on franchises in a geographic area to the type of television they could sell. After a dispute with a newly franchised store selling similar televisions, the plaintiff challenged the franchise plan as a per se violation of antitrust law.[38] The Court, overruling a decade of precedent, held that vertical restraints are capable of exhibiting procompetitive justifications, warranting greater flexibility in antitrust law through the rule-of-reason analysis.[39]

The Court reasoned the increased interbrand competition would spur television dealers to invest in promotions and service quality, enhancing consumers' overall product quality.[40] Further, the Court viewed the "certain efficiencies in the distribution" of the televisions as "redeeming virtues" that allowed for more effective competition that indirectly benefited consumers.[41] This case—although not specifically referencing the consumer welfare standard—signified a shift in antitrust law that looked to economic efficiencies benefiting consumers when determining antitrust liability.[42]

27. *See id*. ("The unprincipled, socio-political approach to antitrust law that prevailed through the 1960s led to fundamental questions regarding the actual goals of antitrust law and whether antitrust was, in fact, achieving those goals.").
28. *See* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 Antitrust L.J. 835, 847 (2014) ("The major thesis that Bork sought to advance was that courts should interpret the antitrust laws to protect economic efficiency and to benefit consumers and not to advance other objectives, such as protecting small business, limiting corporate size, or maintaining even inefficient competitors in order to increase rivalry.").
29. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 720 (2017).
30. Crane, *supra* note 28, at 835; *see* Bork, *supra* note 23, at 405 ("The only goal that should guide interpretation of the antitrust laws is the welfare of consumers. . . . In judging consumer welfare, productive efficiency, the single most important factor contributing to that welfare, must be given due weight along with allocative efficiency.").
31. *See* Crane, *supra* note 28, at 847 ("The major thesis that Bork sought to advance was that courts should interpret the antitrust laws to protect economic efficiency and to benefit consumers and not to advance other objectives.").
32. *See* Khan, *supra* note 29, at 720 ("Bork asserted that the sole normative objective of antitrust should be to maximize consumer welfare, best pursued through promoting economic efficiency.").
33. *See* Christian Ahlborn et al., *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49 Antitrust Bull. 287, 289-90 (2004), https://www.justice.gov/archives/atr/antitrust-economics-tying-farewell-se-illegality (detailing how tying arrangements may not necessarily be anticompetitive based on a high level of market power, signaling a broader notion in antitrust thinking that heightened market shares are not inherently violative of antitrust laws).
34. Khan, *supra* note 29, at 720.
35. *See id*. at 721 ("Today, showing antitrust injury requires showing harm to consumer welfare, generally in the form of price increases and output restrictions.").
36. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting Bork, *supra* note 23, at 66)).
37. *Id*. Although the Supreme Court mentioned the consumer welfare "prescription" in its discussion for consumer standing in antitrust actions, the consumer welfare standard has been well expanded to implicate antitrust issues other than consumer standing.
38. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 42-43 (1976).
39. *Id*. at 58 (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)).
40. *Id*. at 51. Interbrand competition refers to the competition between different brands or companies that offer similar products in the same market. Interbrand competition differentiates competitors among one another by making changes in price, product quality, marketing, and customer experience.
41. *Id*. at 54.
42. *See* Amelia Miazad, *Prosocial Antitrust*, 73 Hastings L.J. 1637, 1662 (2022) ("The Supreme Court soon began to focus on 'demonstrable economic effects' and has since increasingly leaned on economic theory to guide its decisions.").

The Supreme Court later wielded the consumer welfare standard through the lens of television rights for college football games. There, universities with prominent football programs challenged a National Collegiate Athletic Association (NCAA) agreement that prohibited television networks and member universities from selling their own broadcast rights.[43] This agreement ultimately limited the number of football games aired on cable networks. This "artificial limit on the quantity of televised football" squarely fell within the antitrust precedent by limiting product output.[44] Additionally, with televised game availability restricted, the NCAA lessened competition in this market and created the possibility for increased consumer prices and fewer choices.[45] The joint harms—reduced output and increased prices—to competition, the market, and ultimately consumers, outweighed the NCAA's arguments that it was maintaining society's "revered tradition of amateurism in college sports."[46]

Unfortunately for the NCAA, it has been repeatedly sidelined by defeats in antitrust lawsuits. A more recent example is *National Collegiate Athletic Ass'n v. Alston*. In this case, the Supreme Court scrutinized the NCAA's restrictions on education-related compensation rules for student athletes.[47] The NCAA imposed tailored limitations to student athletes—such as prohibited compensated internships, limited free academic tutoring, and capped academic achievement scholarship bonuses—that were largely available to non-student athletes.[48] The plaintiffs challenged these sweeping prohibitions by arguing the reduced educational benefits harmed them as consumers in the educational market. The plaintiffs' theory hinged on their access to market-driven benefits such as more choices to educational-related benefits, enhanced quality in their education, and a greater value from their undergraduate degree.[49]

The student athletes argued that if universities were able to compete freely for offered educational benefits, then student athletes, the consumers in this market, would benefit from the unimpeded educational market.[50] The Court, relying on the consumer welfare standard, unanimously held that the NCAA violated the Sherman Act with an unlawful restraint of trade.[51] The Court punted the NCAA's argument that it was maintaining amateurism, because no procompetitive justification was presented that directly tied the education-related restrictions to the preservation of amateur sport.[52] By siding with the student athletes, the Court tethered to the consumer welfare standard the requirement of a clear procompetitive justification for restrictions on market-driven benefits.

The Supreme Court has analyzed business practices promoting social interests to see if they violate the consumer welfare standard and thus antitrust laws because of direct harm to consumers. The defendants in *National Society of Professional Engineers v. United States* established an ethics code that prohibited its members from submitting competitive bids for engineering services.[53] The organization argued that disallowance of competitive prices would shift the engineers' focus on the integrity and quality of a project, and eliminate the society's concerns that engineers would lower their standards to win the bid on a contract.[54] Despite defendant's public-oriented justification, the Supreme Court found this prohibition to be an unreasonable restraint of trade.

The Court found the restriction on competitive bids limited a consumer's choice of engineers and artificially inflated prices for engineering services, which the Court viewed as evidence of direct harm to consumers.[55] The Court said it would not be dissuaded from its holding unless clear evidence showed consumers would be directly protected by the restriction.[56] *Professional Engineers* cemented the Supreme Court's reliance on the consumer welfare standard and the notion that the Court will not include noneconomic considerations in its rule-of-reason analysis unless the defendant can provide clear economic evidence that a challenged restraint directly protects consumers.

Since the Bork arguments first began appearing in antitrust jurisprudence, the consumer welfare standard has unfailingly been the guiding metric for judges. In addition to the cases highlighted in this section, the Supreme Court and lower courts have continued to reinforce antitrust's attachment to the consumer welfare standard.[57] Each fact

43. National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 91-93 (1984).
44. *Id.* at 96.
45. *See id.* at 93-94:

> The television plan protects ticket sales by limiting output—just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.

46. *Id.* at 96.
47. *See* National Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 73 (2021).
48. *Id.* at 84.
49. *Id.* at 86-87.
50. *Id.*
51. *Id.*
52. *Id.* at 101-02. The Court did not entirely dismiss the idea that the NCAA could maintain amateur sport through limitations on collegiate athletes. *Id.* at 102. The Court did reason, however, that these limitations must exhibit clear procompetitive justifications. *Id.*
53. 435 U.S. 679, 682-83 (1978).
54. *Id.* at 685.
55. *Id.* at 695 ("Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace.").
56. *See id.* at 696 ("The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.").
57. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 45 (D.C. Cir. 2001) ("The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."); Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (stating one of antitrust law's "traditional concern[s]" is consumer welfare); Broadcom v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("The primary goal of antitrust law is to maximize consumer welfare by promoting competition among firms."); Ginzburg v. Memorial Healthcare Sys., Inc., 993 F. Supp. 998, 1015 (S.D. Tex. 1997):

> [B]ecause "the purpose of antitrust law is the promotion of consumer welfare," the court must analyze the antitrust injury question from the perspective of the consumer. . . . Thus, in order to show that he suffered an antitrust injury, "an antitrust plaintiff must prove that the challenged conduct affected the prices, quantity or quality of goods or services and not just his own welfare.

pattern in an antitrust matter elicits different considerations under that standard. Although these considerations depict a nuanced and multifaceted standard, the consumer welfare standard can be distilled to one primary focus: near-term economic harm to consumers. This focus on aiming to protect consumers has oriented antitrust doctrines to care less about the overall structural composition of a relevant market when non-pretextual procompetitive justifications benefit consumers.[58]

### B. *Neo-Brandeisians' Advocacy for a Departure From the Consumer Welfare Standard*

Although consumer welfare is the prevailing and judicially recognized principle in antitrust, recently a cohort of scholars and government officials have challenged the dependence on the consumer welfare standard. This school of thinking, the Neo-Brandeisian movement, has increasingly garnered traction in the past two decades. Neo-Brandeisians argue that the original antitrust movement's laudable goals pinpoint weaknesses in antitrust law, and pursuing these goals would bring antitrust law back to its statutory roots based on the Sherman Act's legislative history, which suggests that the goal of the statute was to enhance competition by targeting companies that have gained significant market concentration.[59] This section first details the primary modifications for which they advocate.[60]

The Neo-Brandeisian movement's main qualm with antitrust law is the ability of corporations, particularly the "Big Tech" industry, to amass market concentration under the consumer welfare standard.[61] Rooted in Justice Louis Brandeis' opposition to monopolies and support for economic democracy, the movement argues that solely focusing on consumer welfare ignores market-structure issues, ultimately harming consumers' interest by degrading product quality and stymieing product innovation. The movement views continued reliance on the consumer welfare standard as "overly narrow," and aims "to return antitrust law to its roots by reducing concentrations of corporate power."[62]

Neo-Brandeisians point to antitrust law's prevailing focus on consumer welfare as a step away from the statute's original concerns with concentration of economic power.[63] In correcting the allegedly fallacious reliance on consumer welfare, economic efficiency, and prices, the Neo-Brandeisians urge antitrust law to shift to economic concerns such as market concentration, harm to innovation, economic democracy, wage supports, and reinvigorated enforcement actions.[64] This modification to antitrust law would—in their eyes—revitalize enforcement and rid us of market ills that promulgate modern-day market concentration and that have gone unscathed under the consumer welfare standard's reign.[65]

### C. *Chilling Effect of Antitrust Scrutiny*

Climate advocates face a challenging balancing act. They risk lawsuits by anti-climate groups arguing that consumers' short-term welfare is adversely affected by increased prices and reduced product output, thus violating the longstanding consumer welfare standard.[66] Simultaneously, climate collaborations with dominant market power may attract scrutiny from Neo-Brandeisian-led agencies. Private action trying to curb climate change's havoc has succumbed—at least to a degree—to the chilling effects of the uncertainty of competitor collaboration in the climate sector.[67] This section will analyze instances where threat-

(quoting Reazin v. Blue Cross & Blue Shield of Kan., 899 F.2d 951, 960 (10th Cir. 1990)).

58. *See* Khan, *supra* note 29, at 717-19.
59. *See A Brief Overview of the "New Brandeis" School of Antitrust*, Patterson Belknap LLP (Nov. 8, 2018), https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law.
60. Wright et al., *supra* note 26, at 293.
61. *See* Sheelah Kolhatkar, *Lina Khan's Battle to Rein in Big Tech*, New Yorker (Nov. 29, 2021), https://www.newyorker.com/magazine/2021/12/06/lina-khans-battle-to-rein-in-big-tech.
62. Miazad, *supra* note 42, at 1642.
63. *Id*.
64. *See id*.
65. The efforts of the Neo-Brandeisians have not gone without their own criticisms. Advocates for the current antitrust regime have levied a plethora of criticisms against the movement. Three consistent critiques of the Neo-Brandeisian coalition include its (1) disregard for statutory authority and judicial precedent; (2) politicization of antitrust processes; and (3) hindrance to U.S. technology companies' ability to compete in a global market. *See, e.g.*, Christine S. Wilson, Commissioner, FTC, The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC, Remarks for the American Bar Association Antitrust Law Section's 2021 Fall Forum (Nov. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598399/ftc_2021_fall_forum_wilson_final_the_neo_brandeisian_revolution_unforced_errors_and_the_diminution.pdf (Neo-Brandeisian's aims at upending the consumer welfare standard have been criticized for "[d]isregarding the boundaries imposed by our statutory authority and judicial precedent" in a manner that removes tangible benefits to consumers.).

    *See also* Chuck Stanley, *Antitrust Chief Defends Sticking to Consumer Welfare Focus*, Law360 (June 12, 2018), https://www.law360.com/articles/1053008/antitrust-chief-defends-sticking-to-consumer-welfare-focus ("The consumer welfare standard, said Delrahim, provides the sort of objective criteria necessary to protect the competitive process, product variety, competitive labor markets and address enforcement challenges from digital markets and zero-cost goods, without injecting subjective judgments over social benefits into the process."); Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 Antitrust Bull. 531, 532-34 (2019); Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 Antitrust Bull. 455, 456-67 (2018) (detailing the Neo-Brandeisians' rejection of the Chicago School's philosophy against aggressive antitrust enforcement); Wright et al., *supra* note 26, at 301 ("Antitrust enforcement targeted and condemned procompetitive practices just as often as it did anticompetitive ones. Moreover, distinctions between legal and illegal conduct were often based upon formal distinctions that were irrelevant to the economic function of the conduct . . . ."); *id.* at 313:

    > These decades of applying well-intentioned but misguided goals led to an internally inconsistent and incoherent regime that fostered corporate welfare over consumer welfare. And it led directly to the adoption of the consumer welfare standard. This is a standard that benefits all Americans—who are all consumers—rather than a select group of the chosen corporate interests the socio-political antitrust regime favored.

66. Makan Delrahim, *DOJ Antitrust Division: Popular Ends Should Not Justify Anti-Competitive Collusion*, USA Today (Sept. 12, 2019, 7:31 PM), https://www.usatoday.com/story/opinion/2019/09/12/doj-antitrust-division-popular-ends-dont-justify-collusion-editorials-debates/2306078001/ ("The loftiest of purported motivations do not excuse anti-competitive collusion among rivals. That's long-standing antitrust law.").
67. *See* Miazad, *supra* note 42, at 1643 ("Despite their opposing theories, the benefits of competitor collaboration are almost entirely absent from both sides of this debate.").

ened antitrust lawsuits and rhetoric from leading antitrust officials have chilled climate actions and ultimately undermined initially stated climate goals.[68]

In 2019, four major automakers—Ford, Volkswagen of America, Honda, and BMW—sought to extend California's fuel efficiency standards nationwide despite the Trump Administration's rollback of nationwide standards.[69] The companies announced an agreement with California where they would meet the Golden State's auto emission standards to avoid "a messy patchwork of regulations requiring two separate lineups of vehicles."[70] The four automakers would manufacture vehicle fleets with an average fuel efficiency that exceeds 50 miles per gallon by 2026, which directly conflicted with President Trump's plan to freeze fuel efficiency standards.[71]

Shortly after the automakers' announcement, the U.S. Department of Justice (DOJ) sent letters to these companies to discuss the "formation" of their decision on future fuel efficiency standards.[72] Antitrust-enforcing agencies indicated that antitrust law would not overlook collaborations driven by what they termed condemnable "moral aspirations."[73] These actors pinpointed alleged harm to consumers through higher prices that might arise from the automakers' agreement, warning that these increased prices violated the consumer welfare standard regardless of any social goals.[74]

DOJ eventually dropped its investigation into the automakers' deal.[75] Despite the fact that DOJ's theory that the automakers' agreement with California would limit consumer choice was sparsely supported by evidence, the probe's market ramifications were immediately felt.[76] Although the four automakers did not back out of the agreement with California after the investigation, the automobile industry—in addition, any industry looking to mitigate its own greenhouse gas emissions—received a clear message that commitments to combat climate change will be investigated.[77] This investigation's chilling effect underscored a key consideration for private actors aligning with a state's policies contrary to federal preferences.

A clear example of antitrust law's chilling effect on climate practices is the recent retreat by BlackRock, the world's largest environmental, social, and governance (ESG)-focused asset manager. Multiple actors have scrutinized the global investment giant's climate messaging,[78] although not all have involved antitrust scrutiny.[79] In

68. It should be noted that many practitioners and scholars in the antitrust space note the merit of filed or threatened antitrust lawsuits is low. *See, e.g.*, Miriam S. Wrobel & Selvin Akkus-Clemens, *Navigating ESG Collaborations Under Heightened Antitrust Scrutiny*, Harv. L. Sch. F. on Corp. Governance (Aug. 7, 2024), https://corpgov.law.harvard.edu/2024/08/07/navigating-esg-collaborations-under-heightened-antitrust-scrutiny/:

> Nevertheless, based on our extensive experience in advising both industry associations as well as providing expert competition economics advisory services, we see the antitrust threat to ESG [environmental, social, and governance] collaboration—and thus far, it has only been a threat—as overblown. Indeed, the context of U.S. antitrust regulation and the types of activities that cross legal lines provides a map that should give companies confidence and help them navigate a path forward with productive ESG collaborations.

Damian G. Didden, *Antitrust and ESG*, Harv. L. Sch. F. on Corp. Governance (Jan. 31, 2023), https://corpgov.law.harvard.edu/2023/01/31/antitrust-and-esg/ ("Alternatively, there will be antitrust risk if members of an ESG-driven initiative share competitively sensitive information (e.g., future product or investment plans to ensure compliance with carbon reduction goals) as part of their ESG standard setting work.").

69. Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. Times (Sept. 6, 2019), https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html.

70. *Id*.

71. Juliet Eilperin & Brady Dennis, *Major Automakers Strike Climate Deal With California, Rebuffing Trump on Proposed Mileage Freeze*, Wash. Post (July 25, 2019), https://www.washingtonpost.com/climate-environment/2019/07/25/major-automakers-strike-climate-deal-with-california-rebuffing-trump-proposed-mileage-freeze/; Brady Dennis et al., *Trump Administration to Freeze Fuel-Efficiency Requirements in Move Likely to Spur Legal Battle With States*, Wash. Post (Aug. 2, 2018), https://www.washingtonpost.com/national/health-science/2018/08/01/90c818ac-9125-11e8-8322-b5482bf5e0f5_story.html.

72. David Shepardson, *U.S. Launches Antitrust Probe Into California Automaker Agreement*, Reuters (Sept. 6, 2019), https://www.reuters.com/article/us-autos-emissions/u-s-launches-antitrust-probe-into-california-automaker-agreement-idUSKCN1VR1WG.

73. Delrahim, *supra* note 66; Dailey C. Koga, *Teamwork or Collusion? Changing Antitrust Law to Permit Corporate Action on Climate Change*, 95 Wash. L. Rev. 1989, 2017 (2020):

> Enforcement agencies have viewed agreements involving climate change in the same way as those involving other ethical and social considerations, stressing that the social benefits of the agreements cannot be taken into account as procompetitive justifications. Further, antitrust jurisprudence emphasizes that legislative bodies are better suited to address ethical and moral considerations—not the courts.

(footnote omitted).

74. *See* Koga, *supra* note 73, at 2017; Daniel Sperling, *Trying to Make Sense of Trump's Rollback of Vehicle Standards*, Forbes (Aug. 2, 2018, 1:04 PM), https://www.forbes.com/sites/danielsperling/2018/08/02/trying-to-make-sense-of-trumps-rollback-of-vehicle-standards/ ("The administration doubles down on their flawed cost assessment by contending that vehicle price increases associated with stricter CAFE [Corporate Average Fuel Economy] standards will induce people to hold onto vehicles longer.").

75. Brent Kendall & Timothy Puko, *Justice Department Drops Antitrust Probe of Auto Makers Involved in California Emissions Deal*, Wall St. J. (Feb. 7, 2020, 7:05 PM), https://www.wsj.com/articles/justice-department-drops-antitrust-probe-of-auto-makers-involved-in-california-emissions-deal-11581114207.

76. Paul Balmer, *Colluding to Save the World: How Antitrust Laws Discourage Corporations From Taking Action on Climate Change*, Ecology L.Q. (July 27, 2020), https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/:

> Even though DOJ quietly dropped the investigation in February 2020, the market results of the probe itself were almost immediate and significant. In October 2019, just weeks after the antitrust investigation began, other major automakers joined the Trump Administration as parties in litigation over California's right to set its own vehicle emissions standards . . . .

77. *See id*. ("Despite the naked political motive and the arguably weak legal argument for antitrust enforcement against the four automakers in this case, . . . companies are likely to think twice about making commitments with competitors on any industry standard that could lead to higher consumer prices.").

78. *See* Press Release, House Judiciary Committee, Chairman Jordan Subpoenas BlackRock and State Street in ESG Investigation (Dec. 15, 2023), https://judiciary.house.gov/media/press-releases/chairman-jordan-subpoenas-blackrock-and-state-street-esg-investigation [hereinafter Jordan Press Release]; Letter from Ken Paxton, Texas Attorney General et al., to Larry Fink, Chief Executive Officer, BlackRock (Aug. 4, 2022), https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/BlackRock%20Letter.pdf; Letter from Austin Knudsen, Attorney General of Montana et al., to Asset Managers (Mar. 30, 2023), https://content.govdelivery.com/attachments/MTAG/2023/03/30/file_attachments/2453301/2023-03-30%20Asset%20Manager%20letter%20Press%20FINAL.pdf [hereinafter Attorney General Letter].

79. Anna Hrushka, *Tennessee Sues BlackRock Over "Misleading" ESG Strategy*, ESG Dive (Dec. 19, 2023), https://www.esgdive.com/news/tennessee-sues-

March 2023, 21 Republican attorneys general sent a letter to BlackRock and other asset managers asserting they had violated antitrust laws with their increased ESG investments.[80] These allegations assert that participation in Climate Action 100+ and Net Zero Asset Managers may "unreasonably restrain trade and harm competition" and ultimately consumers.[81]

Beyond state-led challenges to BlackRock's climate commitments, congressional inquiries have raised questions about antitrust liability for these business practices. In December 2022, the U.S. House of Representatives Committee on the Judiciary sent a letter to Climate Action 100+ participants, requesting a detailed list of documents that would inform the committee about goal-setting and communication among Climate Action 100+ participants.[82] A year after this letter's issuance, the House Judiciary Committee subpoenaed BlackRock for documents related to how these companies advanced climate policies.[83]

The House Judiciary Committee's investigation culminated in a report where BlackRock and its peers were labeled a "climate cartel" engaged in collusion focusing on corporate decarbonization.[84] The committee argued this coordination potentially violates antitrust laws by artificially reducing the supply of fossil fuels, which in turn would increase fuel prices for consumers and thus violate the consumer welfare standard.[85] Despite these findings, no enforcement action or lawsuit was filed against BlackRock or other asset managers.

The Judiciary Committee raised suspicions that these climate goals stem from collaborative agreements prioritizing social goals over purely financial goals, allegedly limiting competitive market dynamics.[86] Despite no lawsuit articulating the investigation's liability theory and the Judiciary Committee Democrats refuting the committee's findings and underlying theories,[87] the lingering risk of antitrust scrutiny appears to have frightened BlackRock from further climate messaging and commitments. BlackRock withdrew from Climate Action 100+ and is no longer a signatory to the initiative.[88] Although Climate Action 100+ still has hundreds of committed companies, BlackRock had been one of the largest companies to commit to Climate Action 100+'s goals.[89]

Additionally, BlackRock's latest investment stewardship report omitted any discussion of global warming or "global climate-related scenarios,"[90] which were included in its pre-investigation reports.[91] Despite the company identifying an increasing number of climate-sympathetic stakeholders,[92] BlackRock still adjusted its climate references to language discussing how companies "adapt[ ] to strengthen their financial resilience."[93] As BlackRock retreats from explicit climate commitments, the chilling effect of such commitments' uncertain antitrust footing comes to light. Despite there being no antitrust violation, the once-vocal climate advocate appears to have shifted its communications and collaborative efforts on climate change, leaving concerned stakeholders uncertain about BlackRock's climate-relevant actions.[94]

The challenges levied against the automakers and BlackRock represent the efforts of some elements in the conservative wing of the political spectrum to impede climate-mitigation initiatives. While the anti-climate rhetoric and investigations appear to have chilled these practices, the Neo-Brandeisians have also engaged in chilling rhetoric about the climate community. As noted above, former FTC chair Lina Khan has stated the agency would not be deterred from challenging climate practices if they violate antitrust laws.[95]

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blackrock-esg-strategy-larry-fink/702965/; Press Release, Office of Tennessee Attorney General and Reporter, Tennessee Sues BlackRock in First-of-Its-Kind Consumer Protection Suit Over ESG Considerations (Dec. 18, 2023), https://www.tn.gov/attorneygeneral/news/2023/12/18/pr23-59.html.

80. *See* Attorney General Letter, *supra* note 78, at 1, 12.
81. *Id*. at 6.
82. *See* Lawrence E. Buterman et al., Latham & Watkins LLP, ESG Initiatives Face Increased Pressure From Potential Antitrust Challenges (2023), https://www.lw.com/admin/upload/SiteAttachments/ESG-initiatives-face-increased-pressure-potential-antitrust-challenges.pdf.
83. *See* Jordan Press Release, *supra* note 78.
84. House Majority Report, *supra* note 9, at i ("The Committee has obtained evidence that a 'climate cartel' of left-wing environmental activists and major financial institutions has colluded to force American companies to 'decarbonize' and reach 'net zero.'").
85. *See id*.
86. *See id*.
87. Democratic Staff of the House Committee on the Judiciary, Unsustainable and Unoriginal: How the Republicans Borrowed a Bogus Antitrust Theory to Protect Big Oil (2024), https://democrats-judiciary.house.gov/uploadedfiles/2024.06.11_final_esg_report.pdf.
88. Letter from BlackRock, Inc. to Climate Action 100+ Steering Committee (Feb. 2, 2024), https://www.blackrock.com/corporate/literature/publication/2024-our-participation-in-climate-action-100.pdf:

> [W]e are transferring our participation in Climate Action 100+ to BlackRock International, and BlackRock, Inc. will no longer be a signatory. The money BlackRock manages is not our own—it belongs to our clients—and BlackRock is committed to providing clients around the world with choices to support their unique and varied investment objectives.

Press Release, Climate Action 100+, Climate Action 100+ Reaction to Recent Departures (Feb. 26, 2024), https://www.climateaction100.org/news/climate-action-100-reaction-to-recent-departures/.

89. *See* Press Release, Climate Action 100+, *supra* note 88.
90. Zoya Mirza, *BlackRock Eases on ESG Messaging Amid Increased Scrutiny*, ESG Dive (Jan. 22, 2024), https://www.esgdive.com/news/blackrock-eases-on-esg-messaging-amid-increased-scrutiny/705197/; BlackRock, Inc., Investment Stewardship: Engagement Priorities Summary for Benchmark Policies (2025), https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf; Isla Binnie, *BlackRock's Fink Says He's Stopping Using "Weaponised" Term ESG*, Reuters (June 26, 2023, 4:19 PM), https://www.reuters.com/business/environment/blackrocks-fink-says-hes-stopped-using-weaponised-term-esg-2023-06-26/.
91. *See* Victoria Gaytan & Hilary Novik-Sandberg, *Investment Stewardship Engagement Priorities*, Harv. L. Sch. F. on Corp. Governance (Mar. 31, 2023), https://corpgov.law.harvard.edu/2023/03/31/investment-stewardship-engagement-priorities/.
92. Press Release, BlackRock, BlackRock Announces Agreement to Acquire Global Infrastructure Partners ("GIP")—Creating a World Leading Infrastructure Investment Platform (Jan. 12, 2024), https://s24.q4cdn.com/856567660/files/doc_financials/2023/Q4/BLK-4Q23-Earnings-Release.pdf.
93. BlackRock, Inc., *supra* note 90, at 2; Mirza, *supra* note 90.
94. *See* Silla Brush, *BlackRock Debuts Ad Campaign to Burnish Image As It Faces ESG Scrutiny*, Bloomberg (June 6, 2022, 6:00 AM), https://www.bloomberg.com/news/articles/2022-06-06/blackrock-debuts-ad-campaign-to-burnish-image-amid-esg-scrutiny (detailing BlackRock's new ad campaign that will "emphasize low-cost investment products BlackRock manages as well as $20 billion in investments the firm makes in US roads, bridges and transportation"); *supra* note 90 and accompanying text.
95. Khan, *supra* note 2.

While Neo-Brandeisians never did challenge climate-related practices, "it is safe to say that the New Brandeis movement does *not* support loosening antitrust enforcement to enable green collaborations that would normally be prohibited."[96] The lack of enforcement by Neo-Brandeisians may be an assurance for corporate managers looking to appease stakeholders who are increasingly concerned with the impacts of climate change, but the knowledge that Neo-Brandeisians are primarily concerned with entrenched monopoly power and collusion may still chill implementation of climate practices due to the fear that these practices may garner antitrust scrutiny.

To combat the chilling of climate-mitigation practices—especially considering that, in some jurisdictions, threats of antitrust liability discourage more than half of climate coalitions' participants from implementing climate measures[97]—the uncertainties that surround climate commitments' place in U.S. antitrust law should be answered.

## II. Monetizing Climate Change for Antitrust

The future effects of climate change are no secret. The climatic damages exacerbated by greenhouse gas emissions are occurring on a more frequent basis,[98] providing reminders that climate change is harming Americans in various ways.[99] As political discourse has grown overly polarized in the United States, private companies have taken action to address their own contributions to carbon emissions.[100]

For some, these climate initiatives reflect a change, where corporate firms' singular focus on profit-maximizing purposes for shareholders encompasses broader considerations than traditionally viewed.[101] Many corporate entities have promoted climate-oriented goals to simultaneously maximize profits for shareholders while addressing climate effects and concerns.[102] The effects of this paradigm shift in corporate spaces is evidenced by the growth in investments for climate-oriented initiatives, as seen with projections that ESG-mandated assets could comprise half the managed assets in the United States.[103]

This paradigm shift now focusing on climate mitigation and adaptation measures erects a new, uncertain obstacle for corporate actors: antitrust liability. The uncertainty, rooted in the competing messages of the consumer welfare-focused federal judiciary and climate skepticism of the Trump Administration on the one hand, and long-term prospect of a return to power of the antitrust-enforcing Neo-Brandeisian leaders on the other, leads to the BlackRocks of the world, companies that have economic incentives to respond to the physical and transition risks of climate change but inevitably retract their statements due to fears of political pressure and antitrust liability. Investors and companies continually suffer the effects of antitrust's gray areas as political parties, and their corresponding antitrust schools of thought, jostle for control of the White House every election cycle.

In an age where climate damage can be modeled and monetized, it is time to update antitrust law to reflect the extent to which economists have assessed the monetary costs of climate change.[104] If the Borkian concern was a lack of analytical clarity and principles, the SCC provides clarity regarding the economic costs of climate change, with the open question being how to assess the relationship between the social cost and the consumer cost or welfare effects of climate change.[105] If major airline companies

96. Sandra Marco Colino, *Antitrust's Environmental Footprint: Redefining the Boundaries of Green Antitrust*, 103 N.C. L. Rev. 135, 149 (2025).
97. Matteo Gasparini et al., *When Climate Collaboration Is Treated as An Antitrust Violation*, Harv. Bus. Rev. (Oct. 17, 2022), https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation ("In some jurisdictions, interpretations of current antitrust laws and interpretation generally don't consider socially desirable outcomes, meaning increased prices typically cannot be offset against broader environmental benefits to society. This means collaborating around shared climate goals might be simply illegal."); Simon Holmes, Organisation for Economic Co-operation and Development, Climate Change and Competition Law (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf; Ajay Culhane-Husain, *Reframing Antitrust Law As an Environmental Problem*, Yale Env't Rev. (Nov. 17, 2023), https://environment-review.yale.edu/reframing-antitrust-law-environmental-problem.
98. *See* National Aeronautics and Space Administration, *Extreme Weather and Climate Change*, https://science.nasa.gov/climate-change/extreme-weather/ (last updated Oct. 23, 2024).
99. *See, e.g.*, Erik Kobayashi-Solomon, *California Wildfires Are a Wake-Up Call for Climate Change Adaptation*, Forbes (Jan. 21, 2025, 8:30 AM); Austyn Gaffney & Mira Rojanasakul, *Record Hot Water Is Fueling Hurricane Milton*, N.Y. Times (Oct. 8, 2024), https://www.nytimes.com/2024/10/08/climate/hurricane-milton-ocean-temperature.html; Raymond Zhong, *How Global Warming Made Hurricane Milton More Intense and Destructive*, N.Y. Times (Oct. 11, 2024), https://www.nytimes.com/2024/10/11/climate/milton-climate-change.html; Raymond Zhong, *Global Warming Made Helene More Menacing, Researchers Say*, N.Y. Times (Oct. 10, 2024), https://www.nytimes.com/2024/10/09/climate/hurricane-helene-climate-change.html; Alexa St. John, *Climate Change Boosted Helene's Deadly Rain and Wind and Scientists Say Same Is Likely for Milton*, AP News (Oct. 9, 2024, 9:28 AM), https://apnews.com/article/climate-change-hurricane-helene-science-fatalities-8a0d4f072669fd1d0031a23d7fc4b29c; Denise Chow, *Drought Plagues Majority of Northeast As Dry, Windy Weather Raises Fire Risk*, NBC News (Nov. 7, 2024, 5:25 PM), https://www.nbcnews.com/weather/heat/drought-northeast-fire-risk-rcna178666.
100. Sharon Hannes et al., *The ESG Gap*, 49 B.Y.U. L. Rev. 1137, 1139 (2024) ("There is growing consensus that governments alone cannot promote ESG issues effectively and that commercial companies must take greater responsibility in addressing this challenge."); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?* (Law and Economics Center at George Mason University Scalia Law School, Working Paper No. 22-013, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3942903); Koga, *supra* note 73, at 2012 ("The private sector, on the other hand, has increasingly begun to realize its role in the climate crisis—sometimes even viewing sustainability as a profitable endeavor.").
101. Hannes et al., *supra* note 100, at 1139.
102. *See* Martin Lipton, *Stakeholder Capitalism and ESG As Tools for Sustainable Long-Term Value Creation*, Harv. L. Sch. F. on Corp. Governance (June 11, 2022), https://corpgov.law.harvard.edu/2022/06/11/stakeholder-capitalism-and-esg-as-tools-for-sustainable-long-term-value-creation/; *see also* Leo E. Strine Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 Bus. Law. 397 (2021).
103. *See* Sean Collins & Kristen B. Sullivan, Deloitte, Advancing Environmental, Social, and Governance Investing (2020), https://www2.deloitte.com/content/dam/insights/us/articles/5073_Advancing-ESG-investing/DI_Advancing-ESG-investing_UK.pdf.
104. *See* Koga, *supra* note 73, at 2025 ("Absent a congressional exemption, litigants should frame their sustainability agreements in economic terms to effectively survive antitrust scrutiny. Courts widely agree that non-economic factors cannot be considered in antitrust analysis, but litigants could attempt to frame climate change considerations as economic in nature.").
105. It should be noted that the second Trump Administration has issued an Executive Order that disbanded the Interagency Working Group on the Social Cost of Greenhouse Gases and stated that the SCC is "no longer representative of governmental policy." Unleashing American Energy, 90 Fed. Reg.

agree to implement business practices that reduce carbon emissions to meet the 2 degrees Celsius (°C) target, are consumers worse off with a 15% increase in airline ticket prices if millions of dollars in climate-induced damages are avoided through climate commitments? This part looks to start this conversation, by monetizing the carbon commitments of certain airlines through use of the SCC.

### A. The SCC

The SCC is an economic estimate of damages that result from emitting one additional ton of carbon emissions into the atmosphere.[106] The U.S. government has relied upon the SCC for more than a decade to determine the benefits of mitigating carbon emissions.[107] Before the 2024 presidential election, the Office of Management and Budget mandated that federal agencies incorporate the SCC into cost-benefit analyses for promulgated regulations, making the SCC a "highly influential metric" for climate governance.[108] Further, federal courts have held the federal government must incorporate climate-accounting metrics, such as the SCC, when performing a cost-benefit analysis.[109]

Although this requires agencies to use climate-accounting metrics, the SCC is subject to the political pendulum. During his first Administration, President Trump scaled back the federal government's SCC.[110] On the first day of his second presidential term, President Trump paused the use of the SCC by the federal government.[111] Despite the SCC's current disfavor, the climate metric still maintains value in gauging the future economic effects of greenhouse gas emissions. In a legal field where "the dominance of economics [is] the primary mode of antitrust analysis,"[112] the SCC can still aid defendants by economically contextualizing and justifying climate-oriented business practices.

A myriad of elements and factors are included in the SCC. Some of these elements, such as future carbon dioxide emissions and conversion of environmental impacts into monetary costs, are permeated with uncertainties that require economists to incorporate assumptions into the SCC estimate.[113] To overcome some of these uncertainties, multi-stakeholder groups have traditionally relied upon integrated assessment models (IAMs) to calculate accurate social cost estimates.[114] IAMs are computational models that simulate climate change and its ensuing effects. These models account for the interactions between the global economy, greenhouse gas emissions, and climate systems' responses to human activities.[115]

Academics have exerted significant energy debating the underlying assumptions, statistical models, and climate factors that determine the SCC. This Article does not explore the validity of the assumptions or emphasis on varying factors that led to the SCC's present estimate. Instead, this Article uses the present SCC for its analysis, $190 for each incremental addition of one ton of carbon dioxide into the atmosphere.[116] The $190 reflects two critical developments. First, this value—a recent change to the federal government's previous value—incorporated the most up-to-date climate science in its decisionmaking process.[117] Second, this value represented a more accurate reflection of economists' opinion that the SCC should be well above the previous estimate used by the U.S. federal government, which was $51 for each ton of emitted carbon dioxide, bringing the United States' valuation of the SCC more in line with the valuations of its peer nations.[118]

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8353, 8356 (Jan. 29, 2025). Even though the federal government no longer endorses the SCC, California lawmakers are arguing for continued use of an SCC valued at $190 per metric ton so that climate harms—such as the 2025 Los Angeles wildfires—can be accounted for when greenhouse gases are emitted in the state. *See* Anne C. Mulkern, *Social Cost of Carbon—Axed by Trump—Shapes Calif. Climate Program*, ClimateWire (Feb. 26, 2025, 6:51 AM), https://subscriber.politicopro.com/article/eenews/2025/02/26/social-cost-of-carbon-axed-by-trump-shapes-calif-climate-program-00206105; Independent Emissions Market Advisory Committee, 2024 Annual Report of the Independent Emissions Market Advisory Committee 14 (2025), https://calepa.ca.gov/wp-content/uploads/2025/02/2024-ANNUAL-REPORT-OF-THE-IEMAC.pdf ("To monetize these 'external' climate damages, we use [the U.S. Environmental Protection Agency's (EPA's)] central estimate of the global climate costs per ton of [carbon dioxide equivalent ($CO_2e$)] emissions, $190 per metric ton.").

106. *See* Brian C. Prest et al., *The Social Cost of Carbon: Reaching a New Estimate*, Res. for Future (Sept. 1, 2022), https://www.resources.org/archives/the-social-cost-of-carbon-reaching-a-new-estimate/; U.S. EPA, Supplementary Material for the Regulatory Impact Analysis for the Final Rulemaking, "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review"—EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances 1 (2023), https://www.epa.gov/system/files/documents/2023-12/epa_scghg_2023_report_final.pdf [hereinafter SCC Supplementary Report] ("[The SCC] is a comprehensive metric that . . . changes in net agricultural productivity, human health effects, property damage from increased flood risk, changes in the frequency and severity of natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.").
107. Kevin Rennert et al., *Comprehensive Evidence Implies a Higher Social Cost of $CO_2$*, 610 Nature 687 (2022), https://www.nature.com/articles/s41586-022-05224-9.
108. *Id*. The SCC has been used for a myriad of governmental purposes, including federal tax credits for carbon capture technologies, zero-emissions credits for nuclear power projects in New York, and environmental impact statements. Kevin Rennert et al., Brookings Papers on Economic Activity, The Social Cost of Carbon: Advances in Long-Term Probabilistic Projections of Population, GDP, Emissions, and Discount Rates (2021), https://www.brookings.edu/wp-content/uploads/2021/09/Social-Cost-of-Carbon_Conf-Draft.pdf; Cost of Climate Pollution, *States Using the SC-GHG*, https://costofcarbon.org/states (last visited Mar. 9, 2025).
109. *See, e.g.*, Center for Biological Diversity v. National Highway Transp. Safety Admin., 538 F.3d 1172 (9th Cir. 2008); Zero Zone, Inc. v. U.S. Dep't of Energy, 832 F.3d 654 (7th Cir. 2016); EarthReports, Inc. v. Federal Energy Regul. Comm'n, 828 F.3d 949 (D.C. Cir. 2016).
110. *See* Paul Voosen, *Trump Downplayed the Costs of Carbon Pollution. That's About to Change*, Science (Jan. 22, 2021), https://www.science.org/content/article/trump-downplayed-costs-carbon-pollution-s-about-change.
111. Unleashing American Energy, 90 Fed. Reg. 8353, 8356 (Jan. 29, 2025).
112. Rebecca Haw Allensworth, *Economic Sense and Sensibility:* Matsushita *and the Rise of the Battle of the Experts*, 82 Antitrust L.J. 47, 47 (2018).
113. Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis—Under Executive Order 12866, at 1 (2010), https://www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf.
114. SCC Supplementary Report, *supra* note 106, at 6.
115. *See* National Academies of Sciences, Engineering, and Medicine, Valuing Climate Damages: Updating Estimations of the Social Cost of Carbon Dioxide 40 (2017).
116. *See* SCC Supplementary Report, *supra* note 106, at 101.
117. *Id*. at 101-02.
118. *See id*. at 101; Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here's Why It Matters.*, N.Y. Times (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/climate/social-cost-carbon.html.

### B. Corporate Climate Commitments in the Airline Industry

One question is what business practices airlines would implement that might subject them to potential antitrust scrutiny from state attorneys general or the antitrust-enforcing Neo-Brandeisians. An answer to this query could be the Science Based Targets initiative. Four major U.S. airlines—American Airlines, Delta Air Lines, JetBlue Airways, and United Airlines—have committed to SBTi climate targets, meaning they will establish procedures and usher in business-model changes to reduce their greenhouse gas emissions.[119] These airlines, all committing to reach net-zero carbon emissions, have publicly agreed to achieve these goals by participating in the SBTi. This section will briefly explain what committing to SBTi targets means, and then detail how much each airline intends to reduce greenhouse gas emissions over the chosen time frame.

#### 1. The SBTi

The SBTi is a private-sector initiative that partners with global nongovernmental organizations and works with companies to help them commit to greenhouse gas reduction targets, with the hopes of achieving pre-industrial levels.[120] The organization functions as a governmental agency by setting goals to prevent 2°C warming and guaranteeing that committed companies "show meaningful progress toward the target and publicly report progress annually." Currently, the SBTi has 9,862 companies taking action and 6,408 companies with approved targets.[121]

The SBTi is called "science-based" because companies' prescribed pathways to emissions reductions are determined based on what the latest climate science suggests is necessary to achieve the Paris Agreement's goals.[122] The consistency of ensuring the most up-to-date climate science is validated by continued revisions of the SBTi's climate criteria. In tandem with constant criteria revisions, the SBTi deploys experts to conduct thorough reviews of a company's greenhouse gas commitments by comparing these values with the SBTi's scientific criteria, bolstering the legitimacy of SBTi commitments.[123] The targets set for each company are tailored to its business operations by ensuring that the climate mitigation actions are consistent with the science-based targets. For airline companies, these targets are achieved by incorporating operational changes that target greenhouse gas reductions through use of sustainable aviation fuels and electrifying on-the-ground operations at airports.

#### 2. Airline Data

Focusing on each airline's SBTi commitments, there are striking similarities, but also differences. These similarities and differences are shown in Table 1. First, each airline has set its SBTi targets to its 2019 greenhouse gas emissions as the baseline value and comparison for future reductions. This choice has largely been attributed to 2019 being the last "normal" operation year before the COVID-19 pandemic.[124] Second, each airline has set an interim goal to reduce its greenhouse gas emissions by 45% or 50% before 2050.[125] Despite the interim goals differing among the airlines, all four plan to reach net-zero emissions before or by 2050.[126]

The key difference among each airline's SBTi commitments is the type of carbon emissions the company intends to reduce. By type, the airlines are referring to scope 1, 2, and 3 emissions.[127] Although there are more subtle differences in the emissions metrics used to monitor emissions reductions, as with companies in many other sectors, the airlines have broadly committed to tackling similar emission targets—the only notable outlier of the SBTi-participating airlines is JetBlue Airways.

American Airlines has committed to reducing "well-to-wake" emissions flowing from jet fuel combustion and owned and subcontracted operations.[128] American Airlines has also set goals targeting scope 2 emissions.[129] Delta Air Lines is also targeting "well-to-wake" scope 1 emissions from jet fuels.[130] Differing from American, Delta has committed to mitigating scope 3 emissions, a definition it has modified and expanded to include indirect emissions from "purchased goods and services; capital goods; upstream transportation; [and] well-to-wake [greenhouse gas] emissions from jet fuel from Delta Connection carriers that [it does] not wholly own."[131] United Airlines has also set targets that reduce carbon emissions from well-to-wake jet fuels and scope 2 emissions.[132] Lastly, JetBlue Airways has committed to decreasing well-to-wake scope 1 and 3, rather than scope 2, emissions related to jet fuel combustion.[133]

119. *See* SBTi, *Companies Taking Action*, https://sciencebasedtargets.org/companies-taking-action (last visited Mar. 9, 2025).
120. SBTi, *What Are Science-Based Targets?*, https://sciencebasedtargets.org/how-it-works (last visited Mar. 9, 2025); Michael P. Vandenbergh et al., Private Environmental Governance 176 (2024).
121. Vandenbergh et al., *supra* note 120, at 177; *see* SBTi, *Target Dashboard (BETA)*, https://sciencebasedtargets.org/target-dashboard (last visited Mar. 9, 2025).
122. SBTi, *supra* note 120.
123. Vandenbergh et al., *supra* note 120, at 176-77.
124. *See* Frank Watson, *ICAO Council Adopts 2019 Baseline for Aviation Carbon Offsetting System*, S&P Glob. (July 1, 2020, 1:39 PM), https://www.spglobal.com/commodity-insights/en/news-research/latest-news/coal/070120-icao-council-adopts-2019-baseline-for-aviation-carbon-offsetting-system.
125. *See infra* Table 1.
126. *See id*.
127. Scope 1 emissions are those emitted from a company's own facilities. Vandenbergh et al., *supra* note 120, at 178. Scope 2 emissions are those generated by "off-site electricity and heat." *Id*. Scope 3 emissions come from supply chain emissions. *Id*.
128. *See* SBTi, *supra* note 119 (detailing American Airline's SBTi commitment).
129. American Airlines, Sustainability Report 2023, at 13 (2024) ("Reduce Scope 2 emissions by 40% by 2035 (SBTi-validated target).").
130. *See* SBTi, *supra* note 119 (detailing Delta Air Lines' SBTi commitment); Delta Air Lines, 2023 ESG Report 45, https://esghub.delta.com/content/dam/esg/2023/pdf/Delta-2023-ESG-Report.pdf.
131. Delta Air Lines, *supra* note 130, at 45.
132. *See* SBTi, *supra* note 119 (detailing United Airline's SBTi commitment).
133. Press Release, JetBlue, JetBlue Announces Science-Based Emissions Reduction Target and Strategy to Achieve Net Zero by 2040 (Dec. 6,

**Table 1. U.S. Airline Greenhouse Gas Commitments**

| Airline | Baseline Emissions | Reduction Percentage | Interim Emissions Reduction | Net-Zero Emissions Reduction | Market Share* |
|---|---|---|---|---|---|
| **American Airlines**** | 63,755,000 | 45% | 28,689,750 | 63,755,000 | 17.4% |
| **Delta Air Lines***** | 50,517,638 | 50% | 25,258,819 | 50,517,638 | 17.8% |
| **JetBlue Airways****** | 10,529,685 | 50% | 5,264,842.5 | 10,529,685 | 4.9% |
| **United Airlines******* | 52,085,532 | 50% | 26,042,766 | 52,085,532 | 16.0% |

Note: Emission values are in units of metric tons of carbon dioxide equivalents.

* Peter Gratton, *This Is the Worst Airline for Consumer Complaints*, Investopedia (Oct. 3, 2024), https://www.investopedia.com/ask/answers/011215/airline-industry-oligopoly-state.asp.
** *See* American Airlines, Sustainability Report 2023 (2024), https://s202.q4cdn.com/986123435/files/images/esg/American-Airlines-Sustainability-Report-2023.pdf; American Airlines, *Pathway to Net Zero*, https://news.aa.com/esg/climate-change/pathway-to-net-zero/ (last visited Mar. 9, 2025); American Airlines, Environmental, Social, and Governance Report 2019-2020 (2020), https://www.aa.com/content/images/customer-service/about-us/corporate-governance/aag-esg-report-2019-2020.pdf.
*** Delta Air Lines, Corporate Responsibility Report 2019, https://www.delta.com/content/dam/delta-www/pdfs/crr-2019.pdf; Delta Air Lines, *Our Path to Sustainability*, https://esghub.delta.com/content/esg/en/2023/path-to-sustainability.html (last visited Mar. 9, 2025); Delta Air Lines, 2023 ESG Report, https://esghub.delta.com/content/dam/esg/2023/pdf/Delta-2023-ESG-Report.pdf.
**** *See* Press Release, JetBlue, JetBlue Announces Science-Based Emissions Reduction Target and Strategy to Achieve Net Zero by 2040 (Dec. 6, 2022), https://s202.q4cdn.com/853609783/files/doc_news/2022/12/12-06-2022-160030392.pdf; JetBlue Airways, Environmental Social Governance Report 2019-2020, https://www.jetblue.com/magnoliapublic/dam/ui-assets/p/2019_2020_JetBlue_ESG_Reporting.pdf.
***** *See* United Airlines, 2023 United Airlines Corporate Responsibility Report, https://crreport.united.com/pdfs/United-2023-CR-Report.pdf?dateUpdated=20241217 (2023 report summed scope 1, 2, 3 emissions); United Airlines, 2022 United Airlines Corporate Responsibility Report, https://crreport.united.com/pdfs/United-2022-CR-Report.pdf; United Airlines, *Corporate Responsibility Report*, https://crreport.united.com/environmental-sustainability/roadmap-to-net-zero (last visited Mar. 9, 2025).

### C. *The Airline Industry's Climate Commitments Monetized*

Taking the information from Section II.A and the data from Section II.B, the SCC can be used to monetize the avoided cost of economic harm imposed on the economy by carbon emissions based on the four airline companies' projected greenhouse gas emissions. To do this, the total projected greenhouse gas reductions will be multiplied by the SCC, $190 for each incremental addition of one ton of carbon dioxide into the atmosphere.[134] The calculations for each airline's interim and net-zero reductions can be found in Table 2.

As shown by Table 2, the total committed greenhouse gas reductions equal $16,198,673,725 for interim goals and $33,608,692,450 for net-zero emissions goals when using the SCC. This dollar value means that, if the four SBTi-participating companies achieved their disclosed greenhouse gas commitments, $33,608,692,450 in economic harms caused by climate-induced events will be avoided by 2050. This "societal net benefit of reducing emissions of the [greenhouse gas] by a metric ton" cannot be said to directly benefit consumers.[135] In using the SCC, economists estimate society's avoided harm when reducing carbon emissions.[136]

But this does not mean that economic benefits are unlikely to arise for consumers. The economic boons of emissions reductions will likely not be realized immediately. For this reason, it is challenging to precisely pinpoint the welfare-enhancing effects these climate commitments will have on consumers.

Nevertheless, the inputs and factors of the SCC foreshadow the long-term economic benefits consumers will reap as a result of avoided carbon emissions. For example, consumers would experience (1) fewer climatic weather events that damage property, raise insurance premiums, and harm food production; (2) lower health care costs due to fewer pollution-linked diseases; and (3) more stabilized

**Table 2. Total Monetized Greenhouse Gas Reductions**

| Airline Company | Monetized Avoided Cost of Greenhouse Gas Emissions Interim Reduction (USD) | Monetized Avoided Cost of Greenhouse Gas Emissions Net-Zero Reduction (USD) |
|---|---|---|
| **American Airlines** | $5,451,052,500 | $12,113,450,000 |
| **Delta Air Lines** | $47,991,756,610 | $9,598,351,220 |
| **JetBlue Airways** | $1,000,320,075 | $2,000,640,150 |
| **United Airlines** | $4,948,125,540 | $9,896,251,080 |
| **Total** | $16,198,673,725 | $33,608,692,450 |

2022), https://s202.q4cdn.com/853609783/files/doc_news/2022/12/12-06-2022-160030392.pdf.

134. SCC Supplementary Report, *supra* note 106, at 101.

135. *Id.* at 1.

136. Resources for the Future, *Social Cost of Carbon*, https://www.rff.org/topics/scc/ (last visited Mar. 9, 2025).

energy prices because geopolitics are removed when fossil fuels are not used.[137] Despite needing an economist to provide a precise value on the economic harms of a given person or community due to climate change, the mitigation of climatic effects exhibits the potential for real economic benefits to consumers.

## III. Accounting for the SCC in Antitrust Law

This part showcases the need for a consumer welfare standard that balances short-term and longer-term effects of a scrutinized practice, through the lens of a collaboration among major U.S.-based airlines. It applies the case study to the concerns of the two principal schools of thought in antitrust law. Simply put, if the principal concerns that motivated Bork and the Chicago School were grounded in the need for an analytically sound, principled antitrust analysis, the rationale behind and quantification provided by the SCC arguably address those concerns. Similarly, if the objective of social welfare enhancement rather than of achieving equity by tearing down large organizations truly drives the Neo-Brandeisians, then use of the SCC to determine when corporate activities are likely to be social welfare-enhancing would address their concerns.

The discussion below analyzes the scenario under current antitrust doctrine promoting the consumer welfare standard and the Neo-Brandeisian approach. In doing so, it demonstrates how accounting for the SCC can provide a principled, analytically sound approach that considers the concerns of both schools of thought while including one of the greatest threats to consumer and human welfare in the analysis. Specifically, this use of the SCC as a predictor of long-term economic benefits or avoided harms should be balanced against potential near-term economic harms that are associated with collaborative practices.

The analysis demonstrates that the monetization of climate damages can be squared with the consumer welfare standard, can be used as a procompetitive justification in the rule of reason's burden-shifting framework, and can ameliorate concerns expressed by Neo-Brandeisians, all suggesting that the consumer welfare standard can be reframed to grapple with contemporary issues. Climate change is not a typical market failure that a small set of actors can address. Its widespread and variable effects create a collective action problem that likely requires a response by many invested market actors, rather than one dominant firm, to address. Default suspicion from either antitrust camp only adds to the chilling norms being established in the current political climate. For this reason, an econometrics-based tool that puts climate change and climate commitments into antitrust language alleviates concerns within both schools.

137. *See id.* at 1-3.

### A. *The Airline Collaboration and Potential Lawsuit*

Before analyzing an airline collaboration in relation to the two schools of thought in antitrust, the details of the collaboration must be established. First, rather than American Airlines, Delta Air Lines, JetBlue Airways, and United Airlines each individually committing to SBTi targets and meeting the initiative's requisite criteria, assume the four airlines publicly announced—like the four automakers that partnered with California—that they are aligning with one another in business practice and operation to meet the climate goals set forth by the Paris Agreement. By doing this, the airlines commit to interim climate-reduction goals before 2050 and plan to reach net-zero emissions by 2050.

The announced collaboration discloses chosen business practices to achieve these goals by increasing use of sustainable aviation fuel, reducing use of traditional fossil fuels, and enhancing flight operations and efficiencies. This announced collaboration could increase the near-term price for plane tickets if sustainable aviation fuel is more expensive than traditional jet fuel.[138] Further, while airlines would prefer to not decrease the number of flights or flight routes offered on a given day,[139] it is unclear whether that enhanced efficiency would result in reduced flight options that are redundant or less utilized by consumers, or would increase flight options because of the cost savings arising from other efficiencies.

This Article argues the SCC reveals future procompetitive justifications for climate actions. This argument, however, begs the question "what restraint of trade requires a procompetitive justification?" If the airlines' collaboration was reality, a potential antitrust lawsuit may allege the agreement to reduce carbon emissions is an unreasonable restraint of trade that violates §1 of the Sherman Act. The alleged harm of the fictitious plaintiff's complaint would be the increased airplane ticket prices and the reduced options of flights that result from airlines striving to enhance efficiencies.

Since the collaboration does not constitute a classic form of price-fixing or other markers of a per se violation in antitrust, the rule of reason would be used by the court. In this burden-shifting analysis, the court would first analyze the plaintiff's evidence of alleged anticompetitive conduct. Here, the plaintiff would proffer the increased ticket prices and restricted flight options and operations as an unreasonable restraint of trade.

The plaintiff would simultaneously rely upon the market share of the four airlines, 56.01% of the U.S. airline

138. Valeriya Azarova et al., *Unraveling Willingness to Pay for Sustainable Aviation Fuel*, Rocky Mountain Inst. (Sept. 17, 2024), https://rmi.org/unraveling-willingness-to-pay-for-sustainable-aviation-fuel; Justin Rowlatt, *Will Flights Really Reach Net Zero by 2050—And at What Cost to Passengers?*, BBC (Nov. 28, 2024), https://www.bbc.com/news/articles/c245e726r79o; Bing Xu et al., *Sustainable Commercial Aviation: What Determines Air Travellers' Willingness to Pay More for Sustainable Aviation Fuel?*, 374 J. Cleaner Prod. 1, 2 (2022).

139. *See, e.g.*, American Airlines, *Pathway to Net Zero*, https://news.aa.com/esg/climate-change/pathway-to-net-zero/ (last visited Mar. 9, 2025) (explaining how American Airlines looks to make aircraft more efficient to maintain flight numbers).

market, as evidence that the airlines can raise ticket prices profitably and reduce flight options under the guise of environmental and social concern.[140] With the plaintiff's burden of showing anticompetitive effects likely met, the defendants—here, the airline companies—must provide procompetitive justifications for the challenged practice. This step in the rule of reason's analysis is where this Article argues the consumer welfare standard should be modified.

### B. *Squaring Monetized Climate Damages With the Consumer Welfare Standard*

Table 2 reveals that a collaborative interaction among four major airlines that attempts to achieve their climate commitments would avoid $16,198,673,725 and $33,608,692,450 in economic harm during the interim and by 2050, respectively. To determine antitrust liability under current case law, the post-agreement's effects on consumers must be analyzed through product price and output lenses, with innovativeness and product quality being tangential considerations. If these considerations are implicated in a manner that harms consumers, the defendants have the burden of offering procompetitive justifications that shift the burden back to the plaintiff.[141]

In what way might a judge use the SCC data in an antitrust case? Currently, no federal judge has grappled with using the SCC to explain proffered procompetitive justifications. To succeed, an advocate would need to persuade the court that the economic costs to the consumer of the avoided climate harms exhibit "redeeming virtues" that the consumer welfare standard accepts.[142] Despite this uncertainty, this section argues that Supreme Court precedent and the consumer welfare standard can be squared with the monetization of climate damages to justify collaborative climate commitments.

#### 1. Product Pricing

The first—and frequently argued[143]—harm to consumers to be discussed is the influence of product pricing on the antitrust analysis. Although there is no real-world price increase to analyze, research suggests that a possible scenario in the long term is that price increases may not be realized in the airline industry as it decarbonizes, because of the enhanced efficiencies airlines will incorporate into their operations.[144] While this is entirely possible, judges applying the consumer welfare standard would likely require considerable economic data validating this prediction, especially given the long-term point of view. Accordingly, a price increase resulting from the airlines' pro-climate business practices might be assumed to exist to glean how the airlines would fare in an antitrust lawsuit. The question, then, is whether the use of monetized climate damages can provide an acceptable procompetitive justification.

Increased prices or the possibility for artificial price inflation has been a key concern for federal courts.[145] These fears within antitrust jurisprudence cannot be found in the airline hypothetical. First, there are no price-negotiation restrictions that would limit price competition among climate-oriented airlines, as imposed on universities in *Board of Regents*.[146] No unreasonable, anticompetitive price structure exists because airlines—both committed to carbon reductions and not—have flexibility in maintaining their own prices. Further, even if the airlines' conduct is deemed a combination or conspiracy under the Sherman Act, allegations of collusive conduct are not likely to succeed because the implemented business practices for reducing carbon emissions are not a guise for rising prices or promoting a noneconomic ideal like the NCAA in *Board of Regents*.[147]

Additionally, some would argue that the airline collaboration violates *Professional Engineers* by promoting social interest rather than passing benefits to consumers.[148] Unlike in *Professional Engineers*, however, airline customers still have price and market competition, and the nature of the climate problem is that customers and their descendants will gain the benefits of reduced climate costs. In addition, consumers not only have price and market options between collaborating airline companies, they also have choices of airline companies who have not joined this agreement. In this competitive market environment, consumers are still able to compare ticket prices, enabling them to choose the most cost-effective option in their eyes. This means the artificially high prices posited in *Professional Engineers* are unlikely in this hypothetical, since airlines would still face market and consumer-choice pressures.[149]

The concerns in *Professional Engineers* that lower prices might lead to substandard work cannot as easily be mapped onto the four airlines' agreement. Yes, the airlines would argue a social interest as a procompetitive justification. The distinction with *Professional Engineers* exists, however, because the airlines still prioritize consumer benefits, like affordability (product pricing) and choice (product out-

140. Peter Gratton, *This Is the Worst Airline for Consumer Complaints*, Investopedia (Oct. 3, 2024), https://www.investopedia.com/ask/answers/011215/airline-industry-oligopoly-state.asp.

141. *See* Herbert J. Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 102 (2018):

> The black letter antitrust rule for proof under the rule of reason is easily stated. The plaintiff has the primary burden of alleging and then providing sufficient evidence both that the defendants have sufficient market power to make an anticompetitive restraint plausible and also that they have imposed at least one such restraint.

(internal footnotes omitted).

142. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

143. *See, e.g.*, National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 93-94 (1984); Ohio v. American Express Co., 585 U.S. 529, 547-48 (2018).

144. *See* Khan M.R. Taufique et al., *Revisiting the Promise of Carbon Labelling*, 12 Nature Climate Change 132, 134 (2022); Michael P. Vandenbergh & Daniel J. Metzger, *Private Governance Responses to Climate Change: The Case of Global Civil Aviation*, 30 Fordham Env't L. Rev. 62 (2018).

145. *See* National Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978); *Board of Regents*, 468 U.S. at 95.

146. *See Board of Regents*, 468 U.S. at 91-93.

147. *See id.* at 96.

148. *See National Soc'y of Pro. Eng'rs*, 435 U.S. at 685.

149. *See id.*

put), when arguing its social interest. The challenge is that, for product pricing, the consumer benefit is not likely to occur immediately, since the effects of emissions reductions may take years to realize.[150]

If long-term consumer benefits of the avoided economic harms of carbon emissions are considered in the rule of reason's burden-shifting framework, a court could determine that the consumer welfare standard is likely not violated by short-term price increases. So, despite a defendant airline arguing that social interests provide a procompetitive justification, the consumer welfare standard may still be satisfied when the SCC reduces any speculation to justify the airlines' agreement. Although carbon commitments presented in economic terms can be distinguished from the defendants in *Professional Engineers*, the novelty of judges considering long-term economic harms and weighing them with short-term harm poses a hurdle under the consumer welfare standard.

### 2. Product Output, Quality, and Innovation

In addition to increased consumer prices, the consumer welfare standard contemplates product output, quality, and innovation as measures of consumers' overall welfare. In general, restricted output of a product is an unreasonable restraint.[151] Without a procompetitive justification, consumers' market options are dictated by the product restriction, which suppresses market responsiveness to consumer demand and eventually hinders future product development and quality.[152]

The magnitude of restricted flight routes and operations is not entirely known. The pursuit of enhanced efficiencies may mitigate the need for sweeping reductions of flights in the name of carbon emissions.[153] Conversely, if these enhanced efficiencies do not achieve the stated goals, airlines' only option may be to eliminate flights themselves. Even if the airlines decided that the only way to substantially mitigate their greenhouse gas emissions was fewer flights or seats per flight, the airlines would still compete among one another for product quality and innovation. For the collaboration to be susceptible to antitrust liability, the airlines' agreement would need to expansively control how each airline operated and what they offered in response to their climate commitments. Without restrictions matching the breadth of limitations in *Board of Regents*, it is unlikely that decreased product output would single-handedly subject the airlines to antitrust liability.[154]

In addition, limitations on competition within an industry can have a suppressive effect on product quality and innovation. *Alston*, in extending the consumer welfare standard to labor markets, held the NCAA's limited educational benefits to student athletes impeded their ability to compete among one another, which in turn harmed consumers' welfare.[155] For the airline industry to likely violate antitrust law, the climate agreement would need to be an intrusive command that limits competition among airlines, such as restrictions on offered flight routes and number of flights. Without clear suppression of airlines' ability to compete on offered products, which would enhance product quality and innovation, a plaintiff would likely not be able to succeed under the rule of reason.[156]

Last, despite the airlines' motivations being social interests, there are distinctions in their collaborative business practices from those in *Professional Engineers*. First, the airlines' new business practices provide procompetitive justifications tailored to the challenged business practices: greenhouse gas reductions and other pro-climate measures directly implicate the economic and operational concerns climate change imposes on airline operations and airline customers. Although there may be limitations imposed on near-term output, opportunities still exist for the airlines to experience the pressure of market responsiveness since consumers are not deprived of market choices, both among climate-committing airlines and between the groups of airlines that have committed and those that have not committed to greenhouse gas reductions.[157] This more tailored restriction will likely not violate the consumer welfare standard, or at least not in a manner where the defendant cannot satisfy its burden within the rule-of-reason framework.

These considerations all support judges broadening the rule of reason's, and in turn the consumer welfare standard's, purview to include climate econometrics. Although the rule of reason is called a framework, it need not be incredibly rigid. While a completely amorphous framework would defeat the purpose of antitrust law, the Supreme Court has forthrightly stated that the "whole point of the rule of reason" is to provide "an enquiry meet for the case, looking to the circumstances, details, and *logic of a restraint*."[158] Thus, more nuanced criteria must be factored into a consumer-welfare analysis, even if funneled through the lens of product prices and product output.

## C. Alleviating Neo-Brandeisian Concerns

Although the consumer welfare standard continues to be the dominant principle in antitrust law, Neo-Brandeisian concerns prompt climate proponents to consider how to navigate enforcement actions reflecting this perspective. For Neo-Brandeisians, the critical view of the consumer welfare standard—its narrow focus that allows big corporations to amass large market concentration—still applies to business practices that emphasize climate mitigation, regardless of any prosocial values being offered.[159] This

150. *See id.*
151. *See id.* at 695.
152. *See Board of Regents*, 468 U.S. at 93-94.
153. *See, e.g.*, American Airlines, *supra* note 139 (explaining how American Airlines looks to make aircraft more efficient to maintain flight numbers).
154. *Board of Regents*, 468 U.S. at 93-94.
155. *See* National Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 73 (2021).
156. *See id.* at 101-02.
157. *Contra* National Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978).
158. *Alston*, 594 U.S. at 97; California Dental Ass'n v. Federal Trade Comm'n, 526 U.S. 756, 770 (1999) (emphasis added).
159. *See* Khan, *supra* note 2.

school of thought, in tandem with the Chicago School, fosters uncertainty, deterring climate-action business practices over concerns about potential antitrust liability.[160] Although the Neo-Brandeisian movement generally emphasizes the dangers of concentrated market power, this movement's potential inability to see climate commitments as a structural boon to a market highlights how they too miss the mark in their endeavor to upend antitrust.

Neo-Brandeisians largely view concentrated market power as the sign of a monopoly that could "substantially lessen competition," an economic ill statutorily disliked.[161] To that end, this movement is wary of any set of market actors who commit to a business practice that may use their climate goals as a cover for collusion, and reject consideration of the economic and other benefits arising from collaborations among firms, even if those collaborations address serious economic threats such as climate change. This focus on market concentration could remove levels of economic analysis that have been baked into antitrust doctrine and the consumer welfare standard, and ultimately rejects new economic analytical tools that account for current and future harms.[162]

Although this Article does not argue that the consumer welfare standard is a perfect measure for antitrust liability, emphasizing structural concerns of a market—as Neo-Brandeisians do—devalues market actors who collectively address a market failure in a manner that increases consumer welfare while still ultimately enhancing competition. This attention to market concentration may ignore procompetitive justifications, rooted in economic valuation,[163] and instead insert factors that decrease predictability of a lawsuit, which degrades the legitimacy of an antitrust violation.[164] The unknown of how a climate proponent's procompetitive justification—such as monetized climate change damages—may shift the evidentiary burden in an antitrust lawsuit unnecessarily hinders private entities from fully pursuing climate-related goals, due to the chilling effects of Neo-Brandeisian arguments.

That said, this critique of Neo-Brandeisian antitrust applied to climate-focused business practices does not argue that antitrust-enforcing agencies should ignore collaborative acts among market participants in a highly concentrated market. Rather, once the likelihood of competition suppression or the imposition of anticompetitive effects is shown to be nonexistent or unlikely, antitrust-enforcing agencies should backpedal chilling rhetoric that tempers the speed at which climate initiatives tackle carbon emissions, and should account for the economic and social benefits of reducing climate harm.

This is especially true when leaders within this antitrust revolution argue that there are no recognized environmental and social exemptions, as seen in European counterparts' antitrust and competition laws.[165] Although an exemption of this type is not necessarily needed and no enforcement action has been initiated against climate-mitigating companies during the short tenures of Neo-Brandeisian control over antitrust-focused agencies, a level of hostility to climate action appears to span the political spectrum.[166]

### D. *Asking Antitrust to Be Forward-Thinking*

This Article has proffered an argument for antitrust law to consider accounting for the cost of carbon when assessing a climate initiative's potential antitrust liability. By analyzing judicial precedent and varying economic philosophies, it has attempted to show that antitrust can consider monetized climate damages in assessing whether a climate-oriented commitment violates the consumer welfare standard, antitrust laws, doctrines, and competing theories.

That said, it should be noted that, even if courts are willing to consider monetized climate damages, the use of the SCC does not grant unreasonable climate actions free rein while other anticompetitive practices are hemmed in by antitrust laws. The principle proposed here requires balancing a climate initiative's short-term harms with its predicted long-term economic benefits. If the government or private plaintiff in an antitrust action cannot demonstrate that the future benefits do not outweigh the short-term costs, the defendant company thus satisfies the consumer welfare standard.

This section details factors federal judges and litigators representing climate-committing companies should consider in the wake of climate change and in the use of econometrics to quantify the harm imposed on the economy and consumers. While these changes do require judges to expand antitrust law and doctrines,[167] these modifications

160. *See supra* Section I.C; *see also* Denise Hearn et al., Columbia Center on Sustainable Investment & Sabin Center for Climate Change Law, Antitrust and Sustainability: A Landscape Analysis 21 (2023), https://ccsi.columbia.edu/sites/default/files/content/docs/Antitrust-Sustainability-Landscape-Analysis.pdf ("Both Trump and Biden Administration antitrust enforcers have stated, or signaled, that there are no particular exemptions from antitrust law for environmental, social, and governance (ESG) considerations.").

161. 15 U.S.C. §18.

162. *See A Brief Overview of the "New Brandeis" School of Antitrust*, *supra* note 59.

163. *See id.*

164. *See* Wilson, *supra* note 65, at 5.

165. *See* Sara Dewey & Abby Husselbee, Harvard Law School Environmental and Energy Law Program, A Note on Corporate Climate Alliances and Legal Risk 7-9 (2023), https://eelp.law.harvard.edu/wp-content/uploads/2024/09/Climate-Alliances-and-Antitrust-Risk-Note-188.pdf; Aurora Luoma et al., *Antitrust and Sustainability: EU, UK, and US Take Divergent Enforcement Approaches*, Skadden Arps Slate Meagher & Flom LLP (Nov. 10, 2023), https://www.skadden.com/insights/publications/2023/11/antitrust-and-sustainability; Didden, *supra* note 68 ("Antitrust enforcers are correct that there is no antitrust exemption for activities related to ESG matters; however, this is far from tantamount to saying that any multi-firm matter wholly or partly informed by ESG goals are violations [sic].").

166. Khan, *supra* note 2; *see* Colino, *supra* note 96, at 149 ("[Khan] has expressly ruled out the consideration of environmental, social, and corporate governance ('ESG') factors to redeem anticompetitive mergers, stating that antitrust enforcers cannot allow 'reduced competition in one market in exchange for some *unrelated* commitment or benefit in another.'" (quoting Khan, *supra* note 2)).

167. The proposed broadening of the consumer welfare standard does not address all questions in the pursuit of climate justice. This Article's proposal—like the predominant views of the consumer welfare standard—views consumers as being the same with one another. Questions of whether dis-

to the doctrine do not seek to make wholesale changes to antitrust law—rather, these expansions look to bring antitrust law and the consumer welfare standard into the age of climate change and widen the "narrow focus on consumer welfare [that] impedes prosocial collaboration."[168]

Climate change is largely portrayed as a threat to social welfare. While this view is undoubtedly accurate, this social bent on climate change does not eliminate the economic and market effects of carbon emissions. When the postmortem of a climate change-induced disaster occurs, the human toll is not the only evaluation to assess climate change's havoc; economic harms are also routinely reported to fully depict the climate harms.[169] Because of this, most antitrust concerns levied against climate-mitigation efforts reveal a glaring disconnect between the economic and non-economic arguments for antitrust liability. When critics' radars home in on business practices that restrain carbon-intensive or unsustainable operations, reminiscent of the social-interest concerns in *Professional Engineers*, their skepticism about the goals and effects of these business practices begs the question of how antitrust doctrines can preempt unwarranted and chilling scrutiny.

For this reason, federal judges should enable litigants to account for economic metrics like the SCC to assess the procompetitive justifications of climate initiatives. In using this data, decisionmakers will have greater contextualization regarding the motivations for the implementation of climate commitments, which will enable the economic justifications to overshadow the social interests—rather than the reverse.[170] Although econometrics-based theories do not immunize climate-oriented business practices, the insertion of arguments in economic terms—not just political and social values—more closely aligns climate proponents with the language of antitrust law.

Federal courts have "felt relatively free to revise [their] legal analysis as economic understanding evolves," suggesting the use of the SCC may be considered in antitrust cases.[171] For this reason, litigators should rely upon climate change-related econometrics to reveal the breadth of research and support into monetizing climate harms, so federal judges can situate climate economics within the consumer welfare standard.

Antitrust law should also be more open to considering longer-term effects of businesses' mitigation efforts when responding to climate change. The benefits of curbing carbon emissions are neither immediately realized nor fully understood.[172] As a result, these future benefits are readily ignored by climate challengers because they emphasize the short-term price increases or supply limitations.[173] Although short-term product prices may increase or certain product supplies may be limited due to climate commitments, a holistic assessment of consumer economic welfare would likely show that any short-term ramifications of removing climate change's negative externalities can be overcome if antitrust doctrines extended their scope of analysis.

This extension of antitrust scrutiny does not inherently contravene the consumer welfare standard's ideals. The rule of reason would still require a defendant to show that procompetitive justifications exist to survive an antitrust lawsuit.[174] In fact, Bork's view that economic efficiencies are a way to protect consumer welfare is certainly no more direct than using the SCC to account for climate change's long-term effects. This suggests Bork would be willing to incorporate the SCC into an antitrust analysis.[175] For a situation like climate change that poses both present and future implications for a company's and industry's economic survival, antitrust continues to hamstring climate commitments by not enabling the entire picture of climate change to be considered.

The ultimate reframing of the consumer welfare standard calls for judicial considerations to expand the range of factors traditionally considered under the doctrine.[176] The consumer welfare standard primarily focuses on product prices, output, innovation, and quality. These considerations have guided courts in determining whether a procompetitive justification is tailored to an identified goal or whether it is merely pretextual.[177] In the face of climate change, however, these metrics in their current framing do not always accurately reflect the positives of pursuing climate commitments; in fact, the variables in the consumer-welfare analysis can stymie progress in the climate space—or at least throw uncertainty into the analysis.[178]

crepancies in consumers' welfare due to varying geographic locations—such as differences between a resident in coastal Florida versus those in the Arizona deserts, or even generational differences resulting from climate change-induced damage—should be considered in the consumer welfare standard's analysis as factors to explore after the uptake of the expanded consumer welfare standard.

168. Miazad, *supra* note 42, at 1644.

169. *See, e.g.*, Oxera, The Economic Cost of Extreme Weather Events (2024), https://iccwbo.org/wp-content/uploads/sites/3/2024/11/2024-ICC-Oxera-The-economic-cost-of-extreme-weather-events.pdf; Monica Danielle, *AccuWeather Estimates More Than $250 Billion in Damages and Economic Loss From LA Wildfires*, AccuWeather (Jan. 16, 2025, 8:28 AM), https://www.accuweather.com/en/weather-news/accuweather-estimates-more-than-250-billion-in-damages-and-economic-loss-from-la-wildfires/1733821.

170. *See* Miazad, *supra* note 42, at 1666 ("The automakers' collaboration on fuel efficiency standards is not just noble; it reflects a recognition that their industry is threatened by climate change."); Culhane-Husain, *supra* note 97:

> While [the automakers'] probe has been criticized as politically motivated, Miazad argues that it underscores the disconnect between economic and non-economic goals in antitrust law. The automakers' collaboration reflects a recognition that the auto industry is threatened by climate change with heightened physical risks, changing consumer preferences, and supply chain disruption. Addressing this risk is an economic decision that is needed to maintain profitability.

171. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015).

172. Gasparini et al., *supra* note 97.

173. *See* House Majority Report, *supra* note 9, at ii-iii:

> Based upon the evidence obtained by the Committee, the members of the climate cartel are colluding toward a common goal: the "decarbonization" of American industry, which necessarily reduces output and increases prices for American consumers. . . . The climate cartel seeks to "keep fossil fuels in the ground," raising prices and reducing output for American consumers.

174. *See* Bork, *supra* note 23, at 66.

175. *See id.*

176. It should be noted that this is the most ambitious of the three proposed modifications of the consumer welfare standard, but this ambition should not deter a needed change to a chilling aspect of antitrust law.

177. *See supra* Section I.A.

178. *See supra* Section I.C.

Climate change implicates myriad factors that harm consumers, strain global food supplies, increase disease transmission, and fracture geopolitics, to name a few.[179] If these factors were incorporated within a court's analysis of procompetitive justifications for allegedly anticompetitive behavior, a court would likely dismiss these arguments for having no basis in antitrust doctrine. Now, however, if a federal judge is willing to consider these factors, monetized through metrics like the SCC, a judge would be more capable of incorporating these atypical considerations in a consumer-welfare framework. Although it is for judges to decide whether the consumer welfare standard should encompass additional metrics, the underlying principle of this reframing should guide judges when analyzing antitrust matters, and this can be accomplished through SCC accounting when comporting with the consumer welfare standard and valuing the risk of chilling procompetitive activities.

## IV. Conclusion

In this era of political polarization, government gridlock, and the swinging pendulum of presidential administrations, collaborative actions by firms in the private sector are necessary to reduce the risks of climate change. Climate commitments have gained traction within various industries and have contributed to climate mitigation and adaptation measures. These operational changes, however, often require collaboration among competitors to have substantial effects on global carbon emissions. This need to collaborate has situated climate-mitigation efforts in a perverse political climate where antitrust law is either wielded or threatened to be used.

Although any antitrust lawsuit would require a compelling evidentiary record to result in liability, the uncertainty that emanates from the consumer welfare standard induces a chilling effect on major climate proponents. Because of this, climate economic data—like the SCC—are important options to show that avoided carbon emissions generate avoided economic harm to the economy and consumers. This data will reveal that carbon-mitigation business practices are not just pursuing social interests; they are looking to solve economic and market issues as well.

The novelty of using climate economics should not deter arguments grounded in this data or impede a judge from considering the economics. By monetizing climate damages, climate proponents can square their business practices within antitrust's dueling camps and mitigate antitrust's chilling effect in a warming climate.

179. *See* U.S. EPA, *Climate Change Impacts on Agriculture and Food Supply*, https://www.epa.gov/climateimpacts/climate-change-impacts-agriculture-and-food-supply (last updated Feb. 6, 2025); Nadine A. Yehya, *Experts Warn Climate Change Will Fuel Spread of Infectious Diseases*, UC Davis Health (Mar. 20, 2024), https://health.ucdavis.edu/news/headlines/experts-warn-climate-change-will-fuel-spread-of-infectious-diseases-/2024/03; Tim Bosch et al., *Climate Change Is Affecting Geopolitics—Not Just the Other Way Around*, German Council Foreign Rels. (Feb. 2025), https://dgap.org/system/files/article_pdfs/18_Memo_Geopolitics.pdf.