REBUILDING *ILLINOIS BRICK*: A FUNCTIONALIST APPROACH TO THE INDIRECT PURCHASER RULE

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ABSTRACT

The landmark case of Illinois Brick Co. v. Illinois, *which denied standing to indirect purchasers to sue antitrust violators, has been subjected to steady and widespread criticism since it was decided in 1977. Despite three decades of dissatisfaction, however, debate over indirect purchaser standing has failed to generate satisfying solutions that meet the objectives of antitrust law and reflect its underlying principles. We attribute the lack of creative alternatives to an undue emphasis on legal formalism, fostered both by the Supreme Court's elaboration of the indirect purchaser rule and the doctrine's failure to recognize the pervasiveness of multilayer supply chains. In this Article, we argue for a return to functionalist antitrust objectives. We review the development of the doctrine, explain its descent into formalism, identify its significant shortcomings, and offer a comprehensive framework that addresses the*

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difficult problem of antitrust standing. Building off that framework, and drawing on lessons from securities law, we propose a mechanism that opens antitrust suits to indirect purchasers, consolidates multiple claims into a single proceeding, and designates a presumptive lead plaintiff. Such a mechanism will enhance the impact of underenforced antitrust laws, restore compensation to injured parties, and reduce the administrative and agency costs of parallel litigation.

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I. INTRODUCTION

Ever since the Supreme Court ruled thirty years ago in *Illinois Brick Co. v. Illinois*[1] that indirect purchasers may not bring private actions against antitrust violators in federal court,[2] the "indirect purchaser doctrine" has been subject to widespread and steady criticism. Critics of the rule regularly highlight its denial of compensation to the parties most

1. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

2. The rule applies to private causes of action brought under section 4 of the Clayton Act, 15 U.S.C. § 15 (2000). *Ill. Brick. Co.*, 431 U.S. at 728–29.

injured by antitrust violations, its effective amnesty to violators, and the growing rift between the justifications for the rule and the protracted effects of its application.[3] In recent years, dissatisfaction with *Illinois Brick* (and, to a lesser extent, its predecessor *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[4]) has reached a boiling point, with disaffected plaintiffs, courts, and policymakers demanding that Congress intervene. These demands culminated in April 2007 when the Antitrust Modernization Commission ("AMC"), established by Congress to propose reforms to antitrust law, recommended a legislative repeal of both *Hanover Shoe* and *Illinois Brick*.[5]

Despite the renewed attention from policymakers and academics, the current debate over proposed reforms to the indirect purchaser doctrine suffers from a poverty of satisfying solutions. After several decades of sparring over the relative merits of the foundational decisions that established the rule—with one commentator remarking on the "near religious fervor" of the debate[6]—viewpoints have become ossified and the debate has grown stale. Proposed reforms have been largely limited to two choices: whether to overturn *Illinois Brick* and *Hanover Shoe*, and whether to preempt state laws that permit indirect purchaser actions.[7] The AMC's proposed reforms reflect the rigidity of this debate, offering only the familiar critiques of the indirect purchaser problem without widening discussion or developing innovative alternatives. Regrettably absent from this policy debate is a comprehensive approach that advances the functionalist principles of modern antitrust law within the structured realities of the modern economy. Since much of the *Illinois Brick* saga—the doctrine's development and the subsequent debate it prompted—is a story of misplaced emphasis on legal formalism, a return to functionalism may provide innovative and useful alternatives.

This Article offers a comprehensive functionalist approach to the problem of indirect purchaser standing. Part II traces the origins of the

3. *See infra* Part III.

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

5. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 18 (2007), *available at* http://www.amc.gov/report_recommendation/amc_final_report.pdf [hereinafter AMC REPORT AND RECOMMENDATIONS]. The AMC was created by Congress to evaluate, and if appropriate, recommend changes to the antitrust laws. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11052–11053, 116 Stat. 1856. The AMC proceedings are discussed in Part II.D.

6. Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 3 (2004).

7. The full range of proposed solutions is discussed in Part II.D.

current rule, demonstrates how an "unhappy chronology"[8] and an unnecessarily dogmatic adherence to stare decisis gave rise to the indirect purchaser rule, and outlines the history of the limited, and unfortunately fruitless, debate over alternative solutions. Part III describes the shortcomings of the rule—its denial of compensation to antitrust victims, its failure to advance the paramount objective of deterrence, and its exacerbation of complexity in litigation—while identifying the functional objectives that should serve as the basis for antitrust rules of standing. It concludes that antitrust standing rules, just like antitrust substantive rules, should pursue the well-recognized goals of deterrence, compensation, and judicial efficiency, while recognizing the realities of negative-value lawsuits and the agency costs of attorney-driven class actions.

Part IV then applies these foundational objectives to offer a new framework to the indirect purchaser problem. Our approach begins by understanding the policy challenge as an effort to craft standing rules governing an upstream antitrust violator that produces goods that descend into a multilayered distribution chain. The essence of the challenge is to manage litigation that might arise from a single anticompetitive act that subsequently injures multiple parties. Borrowing from the experiences of private securities litigation and mass torts, we craft a proposal for a consolidated action that permits joinder by injured parties throughout the supply chain. We further propose a lead plaintiff provision that rewards the detection of antitrust violations while placing the consolidated action under the control of those who would represent the injured parties and manage the proceeding effectively. We believe this solution enhances deterrence by expanding incentives to detect antitrust violations and sue violators, increases compensation to injured parties, and reduces the severe cost and complexity of parallel and multijurisdictional litigation.

II. THE RISE OF THE INDIRECT PURCHASER RULE

Often referred to as the *Illinois Brick* rule, the indirect purchaser rule is actually the product of two separate Supreme Court decisions that wrestle with the problems associated with a multiparty supply chain. The first allows a direct purchaser to recover the full amount of an illegal overcharge regardless of whether that cost is passed on to downstream buyers.[9] The second denies standing to downstream buyers regardless of

8. Ill. Brick Co. v. Illinois, 431 U.S. 720, 765 (1977) (Blackmun, J., dissenting).

9. *Hanover Shoe*, 392 U.S. at 489.

how much of the overcharge was passed on to them.[10] The chronology of the case law is critical to understanding how a rigid bar on indirect purchaser suits came about and why it has proven such a difficult mistake to correct.

A. *HANOVER SHOE*

The doctrine began with *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[11] United Shoe was found to have illegally monopolized the market for shoe-manufacturing equipment by, among other practices, forcing shoe manufacturers to lease—rather than buy—its best equipment.[12] Hanover Shoe, a shoe manufacturer and lessee of United Shoe's equipment, sued under section 4 of the Clayton Act, which provides a private cause of action for trebled damages to parties "injured" by antitrust violations.[13] In its defense, United Shoe argued that any overcharge paid by Hanover Shoe did not amount to injury under section 4 because Hanover Shoe had passed on the cost to its customers in the form of higher downstream prices.[14]

The district court rejected United Shoe's "passing on"[15] defense, reasoning that Hanover Shoe's "injury occurred when it was charged too much for the machinery" and that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step" and exonerate a defendant because of "remote consequences."[16] In an opinion by Justice

10. *Ill. Brick Co.*, 431 U.S. at 746–47.

11. *Hanover Shoe*, 392 U.S. at 481.

12. *Id.* at 483. United Shoe was found to have violated the antitrust laws in separate proceedings in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953). Under section 5 of the Clayton Act, that case established prima facie evidence of an antitrust violation actionable by injured private parties under section 4 of that Act. *Hanover Shoe*, 392 U.S. at 484–87.

13. Section 4 of the Clayton Act provides in pertinent part:

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

15 U.S.C. § 15(a) (2000).

14. *Hanover Shoe*, 392 U.S. at 487–88. United Shoe argued that if Hanover Shoe "had bought machines at lower prices, [it] would have charged less and made no more profit than it made by leasing." *Id.* at 488.

15. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 185 F. Supp. 826, 830 (M.D. Pa. 1960).

16. *Id.* at 829–30 (quoting S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)). The Third Circuit twice endorsed the district court's rejection of the pass-on defense, first in affirming the decision in the separate trial, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 281 F.2d 481, 481 (3d Cir. 1960) (finding the lower court's reasoning "thoroughly convincing"), and a second time on appeal from the main trial, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 377 F.2d 776, 782

Byron White, an undivided Supreme Court agreed,[17] ruling that an injury under section 4 is suffered whenever an illegally high price is paid, regardless of the buyer's subsequent actions.[18] The Court thus held that a plaintiff's recoupment of economic harm does not limit a defendant's liability in a section 4 claim.[19]

The Court's conclusion relied on two functional objectives: avoidance of litigation complexity and deterrence.[20] The Court stated that even if a pass-on defense were allowed, it would be hopelessly difficult to apply.[21] Calculation of a pass-on would depend on "virtually unascertainable" elements such as other inputs in pricing decisions, the effect of higher prices on sales volume, and the effect of changes in output on marginal cost.[22] Deterrence would suffer as well, the Court reasoned, because a pass-on defense would reduce the potential recovery to direct purchasers and therefore reduce their incentive to sue.[23] It would also fragment potential recovery among numerous indirect purchasers, each of which "would have only a tiny stake in a lawsuit and little interest in attempting a class action."[24] The Court did leave open an exception for "cost-plus" contracts, in which indirect purchasers buy a fixed quantity at a fixed

(3d Cir. 1967), *aff'd in part*, 392 U.S. 481, 488 (1967).

17. The Court was undivided in rejecting the pass-on defense, though Justice White was joined by only six other justices. Justice Marshall did not participate in the decision and Justice Stewart's lone dissent did not reach the Court's conclusion on pass-on. *See Hanover Shoe*, 392 U.S. at 510–13 (Stewart, J., dissenting).

18. *Id.* at 489 (majority opinion).

19. *Id.* at 490, 490–91 n.8 ("'As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss.'" (quoting *S. Pac. Co.*, 245 U.S. at 533–34)).

20. Though the Court's analysis begins with a reference to proximate cause, that reasoning does not drive the opinion. Rather, the Court's initial use of tort causation language is best seen as defining the scope of recoverable injury in terms of the harm that was caused by the antitrust violation. This is consistent with the Court's references to language in the Clayton Act regarding "injur[y]" to "property" lost by the plaintiff. *Id.* at 488–89 (quoting section 4 of the Clayton Act, 15 U.S.C. § 15 (2000)). Indeed, if proximate cause really did require that damages calculations "not . . . go beyond the first step," *id.* at 490 n.8, then there would be no room for a cost-plus contract exception, *see infra* notes 25–26 and accompanying text.

21. *Hanover Shoe*, 392 U.S. at 493 (noting as to causation, "there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued").

22. *Id.*

23. *Id.* at 494.

24. *Id.* (voicing the concern that "those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them"). The Court's deterrence reasoning did not, however, extend to the disincentivizing effect of increased litigation costs from the complex calculation of pass-on or the incentive-enhancing effect of allocating recovery for more injury than was actually sustained. These arguments appear later in the *Illinois Brick* decision. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 745–46 (1977).

markup,[25] but this exception illustrates the rule. The Court reasoned that since under such contracts it is "easy to prove that [the direct purchaser] has not been damaged," the motivation behind rejecting the pass-on defense—a fear of complexity—is undermined.[26] In short, both the rule and its limitations highlight that the decision to grant relief for passed-on injury was founded upon a pragmatic and functional rationale.

B. *ILLINOIS BRICK*

Cracks in *Hanover Shoe*'s foundation appeared nine years later when the Court divided over a critical question begged by *Hanover Shoe*: whether downstream buyers may sue for overcharges passed on to them. In *Illinois Brick Co. v. Illinois*,[27] indirect purchasers of concrete blocks sued the manufacturer even though they had purchased the blocks through contractors and other resellers.[28] As the Court explained, "[t]he only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution."[29]

Speaking for a 6-3 majority, Justice White—author of the *Hanover Shoe* decision nine years earlier—denied standing to the indirect purchasers.[30] From beginning to end, the *Illinois Brick* opinion was wrapped tightly with *Hanover Shoe*.[31] Justice White's two-step analysis

25. *Hanover Shoe*, 392 U.S. at 494.

26. *Id.* The exception suggests that avoiding complexity was more important to the *Hanover Shoe* Court than deterrence. Indeed, deterrence would be just as affected by fragmentation of potential recovery among indirect purchasers with a cost-plus contract as without. This analysis of *Hanover Shoe* appears in *Illinois Brick*. *Ill. Brick Co.*, 431 U.S. at 733 n.13. Significantly, the nonexclusive wording of the exception—"We recognize that there might be situations—for instance, . . . a pre-existing 'cost-plus' contract . . . ."—indicates the Court anticipated future exceptions as cases arose where functional considerations would not be advanced by application of the rule. *Hanover Shoe*, 392 U.S. at 494. An additional exception for a defense where the alleged violator's sale price was the same as that required by law, *id.*, sheds little light on the reasons for denying the pass-on defense, but instead goes to actual cause.

27. *Ill. Brick Co.*, 431 U.S. at 720.

28. *Id.* at 726.

29. *Id.* at 727.

30. *Id.* at 721, 736. Though the *Hanover Shoe* Court was undivided on the question of a pass-on defense, *see supra* note 17, the *Illinois Brick* Court split 6-3 on the question of indirect purchaser standing.

31. *See Ill. Brick Co.*, 431 U.S. at 723–26. The first line of the opinion is a citation to *Hanover Shoe*. *Id.* at 723–24. The second paragraph recites complexity and deterrence rationales for the *Hanover Shoe* decision; the third paragraph characterizes the legal issue as being the same one decided in *Hanover Shoe*, casting plaintiff's claim of pass-on injury as the mirror image of the *Hanover Shoe* defendant's claim of a pass-on defense. *Id.* at 724–26 ("In this case we once again confront the question

first established a rule of symmetry: "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants."[32] In other words, if a pass-on defense is not available to combat a suit from a direct purchaser, a pass-on justification may not be available to a downstream plaintiff. Denying the pass-on defense while permitting the indirect purchaser's suit, Justice White reasoned, threatened "a serious risk of multiple liability for defendants . . . ."[33]

Having thus limited itself to two options—"either we must overrule *Hanover Shoe* . . . or we must preclude [the indirect purchasers] from seeking to recover on their pass-on theory"[34]—the Court let stare decisis do the remaining work.[35] Turning to *Hanover Shoe*, the Court retraced the basis for that opinion and satisfied itself that it had reached the correct conclusion. Again emphasizing the danger of potential complexity in calculating pass-on damages, the Court reasoned that "[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."[36] And in highlighting the centrality of deterring future antitrust violations, the Court affirmed its conclusion in

whether the overcharged direct purchaser should be deemed . . . to have suffered the full injury . . . .").

32. *Id.* at 728 (introducing the two-step analysis).

33. *Id.* at 730. The Court relied on *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), for the proposition that the Court had already declined to "open the door to duplicative recoveries . . . ." *Ill. Brick Co.*, 431 U.S. at 731 (quoting *Standard Oil Co.*, 405 U.S. at 264). The dissent was similarly concerned with multiple liabilities, though it argued that procedural mechanisms, already in wide use in lower courts, were adequate to facilitate allocation of damages among direct and indirect purchasers. *Id.* at 761–64 (Brennan, J., dissenting). The majority found these procedures inadequate, holding that even a risk of "a little slopover on the shoulders of the wrongdoers" was unacceptable and merited a per se ban on pass-on. *Id.* at 731 n.11 (majority opinion) (quoting Transcript of Oral Argument at 58, *Ill. Brick Co.*, 431 U.S. 720 (No. 76-404)).

34. *Id.* at 736.

35. The Court noted that stare decisis is particularly important in cases of statutory interpretation where Congress is free to amend the law, declaring in a footnote that "[s]hould Congress disagree with this result, it may, of course, amend the section to change it." *Id.* at 735 n.14. The dissent jumped on this comment, noting that Congress *did* recently express its view that indirect purchasers had standing. *Id.* at 756–58 (Brennan, J., dissenting). The Hart-Scott-Rodino Antitrust Improvements Act of 1976, passed one year earlier, granted state attorneys general standing to sue as *parens patriae* on behalf of their states' citizens. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383. Because consumers are generally indirect purchasers, the dissent reasoned that Congress must have assumed that indirect purchasers had standing to sue. *Ill. Brick Co.*, 431 U.S. at 756–58 (Brennan, J., dissenting).

36. *Ill. Brick Co.*, 431 U.S. at 737. The Court also expressed its concern that procedural devices, such as joinder, would be inadequate to handle the complexity of pass-on cases and might even add irresolvable complexity themselves. *Id.* at 740–41 (presenting a parade of horribles regarding the difficulty of indirect purchaser suits).

Hanover Shoe that dividing potential recovery among tiers of indirect purchasers would unacceptably dilute the incentive to sue.[37]

The three dissenters voiced concern that the *Illinois Brick* result abandoned another functional concern: compensating injured parties.[38] Justice Brennan, in a vigorous dissent that was joined by Justices Blackmun and Marshall, protested that barring suits from indirect purchasers would cause consumers to ultimately bear the harm from antitrust injuries with no available avenue for relief.[39] The *Illinois Brick* approach, he argued, forced a trade-off between ensuring compensation and enhancing deterrence,[40] and "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[41] Indeed, Justice White agreed that compensation was a functional objective of the Clayton Act, but the majority was "unwilling to carry the compensation principle to its logical extreme" if it impaired deterrence.[42]

37. *Id.* at 734–35 ("[A]ntitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers . . . .").

38. *Id.* at 748–49 (Brennan, J., dissenting) (noting both the compensation and deterrence objectives of Congress).

39. *Id.* at 749, 764 ("[I]n many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers . . . pass on the bulk of their increased costs to consumers farther along the chain of distribution.").

40. *See id.* at 751–53.

41. *Id.* at 760. Though the core disagreement between the *Illinois Brick* majority and dissent involves a foundational dispute over the principal motivations underlying antitrust law, the majority's opting for deterrence over compensation is consistent with the Court's other rulings in antitrust cases. For example, in *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 315 (1978), the Supreme Court ruled that foreign antitrust plaintiffs are entitled to treble damages because ruling otherwise would dilute private enforcement. The Court conceded in *Pfizer* that "Congress' foremost concern in passing the antitrust laws was the protection of Americans," but pursuing American interests meant deterring conduct that harmed the American market rather than construing standing rules so that compensation was reserved to American parties. *Id.* at 314.

42. *Ill. Brick Co.*, 720 U.S. at 746–47. The Court acknowledged that recoveries in antitrust suits "often have failed to compensate the individuals on behalf of whom the suits have been brought," *id.* at 747 n.31, and that Congress "recognize[d] that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery." *Id.* (quoting H.R. REP. NO. 94-499, at 16 (1975)).

Justice Brennan's dissent also took aim at a second functional objective—avoidance of complexity in damages calculations and fear of duplicative recovery. Brennan rejected the majority's assertion that avoiding complexity was, in itself, a reason to reject pass-on in all cases, noting that "[d]ifficulty of ascertainment is no longer confused with right of recovery," *id.* at 756 (Brennan, J., dissenting) (quoting Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265–66 (1946)), and that "[r]easoned estimation is required in all antitrust cases," *id.* at 759.

Brennan also attacked the majority's affection for symmetry. He argued that "[d]espite the superficial appeal of the argument that *Hanover Shoe* should be applied 'consistently' . . . there are sound reasons for treating offensive and defensive passing-on cases differently," and that *Hanover Shoe* "certainly did not imply that an indirect purchaser would not also have [standing]." *Id.* at 753. He charged the majority with mischaracterizing the *Hanover Shoe* ruling, which he viewed as having

C. A DIVIDED COURT AND A PER SE RULE

As much as consistency with *Hanover Shoe* was a motivation behind the *Illinois Brick* outcome, it was also a great source of disagreement. In a separate dissent, Justice Blackmun lamented "an unhappy chronology" that bound *Illinois Brick* to *Hanover Shoe*, musing that "[i]f [*Hanover Shoe*] had not preceded this case . . . I am positive that the Court today would [grant standing]."[43]

Recent scholarship on *Illinois Brick* suggests that Justice Blackmun was correct.[44] An examination of the archives of Justices Blackmun and Powell revealed that when the Justices first discussed *Illinois Brick* at conference, six Justices were in favor of granting standing to indirect purchasers, and only after intense lobbying by Justice White did he obtain a six-vote majority.[45] The papers reveal that the swing Justices were motivated by stare decisis, remaining consistent with *Hanover Shoe*, and by a desire to apply standing rules "even-handed[ly]" to both plaintiffs and defendants.[46] These two concerns were reflected in the structure of the majority opinion itself, which cast the issue, first, as whether to apply the rule equally to plaintiffs and defendants and, second, whether to uphold *Hanover Shoe*.[47] Indeed, the outcome's sensitivity to chronology extends to other antitrust standing cases as well. Roger Blair and Jeffrey Harrison have argued that *Illinois Brick* would have been unnecessary had it followed, rather than preceded, antitrust cases in which the Supreme Court just a few years later established other rules of antitrust standing.[48]

evaluated a choice between "overcompensat[ing] the plaintiff, . . . or . . . allowing [the violator] to retain a portion of his ill-gotten overcharges" and opting to risk overcompensation. *Id.* at 752.

43. *Id.* at 765 (Blackmun, J., dissenting) (citation omitted).

44. *See* Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 576–605 (2005).

45. *Id.* at 596–97. The six justices who initially favored granting standing included Justices Burger, Brennan, Blackmun, Stewart, Powell, and Stevens, with Justices Rehnquist, White and possibly Marshall opposing standing. *Id.* at 596. Justice White's lobbying won the votes of Chief Justice Burger and Justices Stewart, Powell, and Stevens, with Justice Marshall switching sides to oppose White. *Id.* at 597.

46. *Id.* at 601–02 & n.284 (arguing that Justice Powell was swayed in part by Justice Rehnquist's argument that plaintiffs and defendants be "treated in an even-handed manner").

47. *Ill. Brick Co.*, 431 U.S. at 723–29.

48. Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 42 (1999) (calling the *Illinois Brick* decision "obsolete"). For a discussion of the leading cases, see *infra* notes 65–68 and accompanying text. Similarly, some commentators speculate that if *Illinois Brick* had preceded *Hanover Shoe* and come out differently, then *Hanover Shoe* itself might also have come out differently. *See, e.g.*, AMC REPORT AND RECOMMENDATIONS, *supra* note 5, at 438 (separate statement of Commissioner Donald G. Kempf, Jr.). Indeed, if the Court could have pointed to a firmly established possibility of subsequent indirect

The Supreme Court's actions in subsequent cases were also quite important (and have not been adequately recognized) in shaping the nature of the current indirect purchaser rule. The Court for some time appeared uncommitted to the indirect purchaser rule, and the Court's fissures exposed in *Illinois Brick* played out in subsequent cases. Just five years after *Illinois Brick*, the Court placed limits on the reach of the indirect purchaser rule in *Blue Shield of Virginia v. McCready* and granted standing to an indirectly injured HMO plan-holder.[49] In *McCready*, an HMO refused to reimburse a patient for mental health services that were provided by a psychologist rather than a psychiatrist. The patient sued, alleging that the HMO policy was a product of an illegal conspiracy among psychiatrists. The Court permitted the patient's action against the psychiatrists to move forward even though the patient had contracted only with (and was denied payment by) her HMO.[50]

The 5-4 opinion revealed the fault lines and the Court's lack of confidence in the indirect purchaser rule. The majority opinion was authored by Justice Brennan and was joined by Justices Marshall and Blackmun (the other two *Illinois Brick* dissenters), Justice Powell (a swing vote in *Illinois Brick*) and Justice White (the author of *Hanover Shoe* and *Illinois Brick*). The fragile majority refused to administer an inflexible application of *Illinois Brick* and instead carefully recast that precedent in functional terms, declaring that it was designed primarily to avoid duplicative recovery.[51] Because there was no risk of duplicative recovery in McCready's case (there was no threat that the direct purchaser—the HMO—would seek its own redress), the Court held that *Illinois Brick* did not bar recovery.[52] Indeed, Justice Brennan emphasized that the private cause of action created by section 4 of the Clayton Act has "broad remedial and deterrent objectives" and, therefore, standing should be presumed absent a "statutory policy suggesting a contrary conclusion in a particular factual setting . . . ."[53]

This limitation of *Illinois Brick*, however, was short-lived. Eight years

purchaser suits, it might not have been as concerned with the antideterrent effect of a pass-on defense.

49. Blue Shield of Va. v. McCready, 457 U.S. 465, 485 (1982).

50. *Id.*

51. *See id.* at 474 (noting that the *Illinois Brick* Court "found unacceptable the risk of duplicative recovery . . .").

52. *Id.* at 474–75.

53. *Id.* at 473. The Court goes on to address the question of multiple liability by noting that although the *Illinois Brick* Court "found unacceptable the risk of duplicative recovery," there was no such risk here because the psychologists, having been paid by McCready, could never recover from the HMO. *Id.* at 474–75.

later a new 5-4 majority replaced the tempered, functionally-oriented rule in *McCready* with a much more restrictive and inflexible rule in *Kansas v. UtiliCorp United Inc.*[54] The *UtiliCorp* majority, which consisted of all the remaining *McCready* dissenters (Chief Justice Rehnquist and Justices Stevens and O'Connor), plus the Court's two newcomers (Justices Scalia and Kennedy), denied standing to consumers who paid inflated prices for natural gas through an intermediary public utility.[55] Even though the utility passed on the overcharge from natural gas suppliers to consumers pursuant to a fixed markup that was set by regulators, the Supreme Court refused to apply the cost-plus contract exception that was explicit in both *Hanover Shoe* and *Illinois Brick*.[56] The Court reasoned that the utility suffered a "potential injury" since the suppliers' overcharge may have prevented the utility from receiving a rate increase based on factors other than supply costs, and calculating an apportionment of that injury to "indirect purchasers" would introduce "the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid."[57] The dissent, written by Justice White and joined by the dwindling *McCready* majority (Justices Brennan, Blackmun, and Marshall), disagreed that the injury calculations involved significant complexity or any risk of multiple liability.[58] Distinguishing the competitive and uncertain concrete block market in *Illinois Brick* from a "highly regulated market where utilities possess[] natural monopolies" in *UtiliCorp*,[59] the dissenters argued that "[n]one of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case."[60] Justice White closed his dissent lamenting that the majority's "rigid and expansive holding" misinterpreted his *Illinois Brick* opinion and did nothing to "promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims."[61]

Justice White's characterization of the Court's holding as "rigid and expansive" has proven to be correct. Even though the majority disparaged a flexible approach for the possibility that it could lead to difficult calculations, its ruling did not rest on a degree of anticipated complexity. To the contrary, *UtiliCorp* affirmatively enshrined the indirect purchaser

54. Kansas v. UtiliCorp United, Inc., 497 U.S. 199 (1990).
55. *Id.* at 204, 219.
56. *Id.* at 209–10.
57. *Id.* at 210.
58. *Id.* at 223–24 (White, J., dissenting).
59. *Id.* at 220.
60. *Id.* at 225.
61. *Id.* at 225–26.

rule as a categorical bright-line rule that is immune to functionally motivated recalibrations. The *UtiliCorp* Court was resolute in putting an end to quibbling over the contours of the rule: "[E]ven assuming that any economic assumptions underlying the . . . rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions."[62] The Court has not spoken since on the indirect purchaser rule, leaving this categorical version as current law.

The unqualified nature of the current indirect purchaser rule places it at odds with the general body of current antitrust law. Modern antitrust, reflecting the influence of the so-called Chicago School, eschews inflexible formalist rulings that rest on categorical distinctions and instead favors a functionalist approach designed to maximize social welfare.[63] As economic understanding and awareness of market conditions have improved, and as alternative scenarios arise within different market conditions, courts have adapted antitrust law to account for and adjust to the different applications. This trend has eliminated many per se rules in favor of evaluative rules of reason, and has shifted away from adherence to legal category and stare decisis and instead explicitly pursues functional objectives.[64]

Not only is the formalism of the post-*UtiliCorp* indirect purchaser rule at odds with the trend and purpose of antitrust law generally, but it is also an outlier from other rules that determine antitrust standing, all of which rest heavily on welfarist considerations. In *Associated General Contractors*

62. *Id.* at 217 (majority opinion).

63. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978) ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.").

64. As the Supreme Court explained in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977),

> *Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, *see* Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Assocs., Inc., 405 U.S. 596, 609–10 (1972), but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

The trend continued last spring in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007), which overturned the longstanding rule that vertical price agreements were per se illegal. The Court stated that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.* at 2713 (quoting *Continental T.V., Inc.*, 433 U.S. at 58–59).

of California, Inc. v. California State Council of Carpenters, the Court denied standing to a labor union seeking recovery from a trade association that had allegedly coerced third parties to deal with nonunion suppliers.[65] In rejecting a literal interpretation of standing under the Clayton Act, the Court adopted a functionalist approach that looked to a host of factors such as the nature of the injury, the causal relationship between the violation and the injury, the directness or indirectness of the injury, whether the plaintiff is of a class of economic actors that Congress meant to protect, and whether denying recovery to a given class of plaintiffs is likely to result in underdetection of violations.[66] Similarly, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Court cited functional considerations to deny standing to a plaintiff who challenged a proposed merger that would prevent a competitor from going bankrupt.[67] The Court acknowledged that the merger might violate antitrust laws, but denied standing because the type of harm—decreased profits from *increased* competition—was "inimical to the purposes" of antitrust law.[68] The categorical nature of the indirect purchaser rule is in tension with these other rules of standing that, like the rest of modern antitrust law, are both flexibly constructed and applied with an eye toward the ultimate objectives behind the law.[69]

In sum, the survival and contours of the *Illinois Brick* rule can only be described as surprising. Creation of the rule depended on a particular chronology, in which four swing justices were convinced to adhere to an

65. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 520–22 (1983) (describing a "multiemployer collective bargaining agreement" whose participants were alleged to have encouraged members and third parties not to deal with labor unions, including plaintiff).

66. *Id.* at 536–42 (emphasizing that no single factor is dispositive and that, in this area, it is "virtually impossible to announce a black-letter rule that will dictate the result in every case").

67. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 484–88 (1977) (describing plaintiff's alleged damage as that profit it would have gained had its smaller local competitors gone bankrupt, rather than having been acquired by the defendant).

68. *Id.* at 488. The Court emphasized the required nexus between the harm sought to be avoided and the activity at issue. *Id.* at 484–89.

69. Some lower courts have resisted the categorical nature of the indirect purchaser rule, avoiding its rigid application and instead applying the functionalist approach in *Associated General Contractors* and other private enforcement standing cases. For example, in *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), the Seventh Circuit permitted purchasers of copper to bring suit against parties who illegally conspired to fix prices in the copper futures market. Even though the defendants did not sell copper, and thus the plaintiffs were not direct purchasers, the conspiracy inflated copper prices and directly harmed the plaintiffs. *Id.* at 477, 480–81. To preempt the floodgates of claims from other users of copper, the court applied the *Associated General Contractors* remoteness test, *see supra* notes 65–66 and accompanying text, to distinguish between directly harmed copper buyers and more remotely injured parties, *Sumitomo*, 306 F.3d at 484–95. *Sumitomo*—a situation in which there were no direct purchasers—illustrates both the limits of the *Illinois Brick* categorical approach and the utility of antitrust's more functional standing rules.

earlier ruling. It has persisted through two conflicting 5-4 decisions that articulate very different approaches to antitrust standing. Yet despite this ambivalent past and shaky foundation, we are left with an inflexible and sweeping categorical rule that is in tension with the tenor of modern antitrust law. With this background, it is no surprise that even though the doctrine's critics inside the Court were relegated to the minority, critics outside the Court have remained vocal and resolute, doggedly reciting the rule's many significant shortcomings and determinedly assembling a legitimate case for reform.

D. LIMITED DEBATE AND LIMITED OPTIONS

The fierce debate between commentators has mirrored the sharp divisions on the Court. Opposition to *Illinois Brick* was so great and so immediate that, just months after the decision, Congress began considering proposals to overturn that decision.[70] Initial efforts at legislative reform failed, however, and dissatisfaction with the indirect purchaser rule translated instead into periodic efforts by assorted interest groups to prompt policymakers to review and reevaluate antitrust rules of standing. Many such reevaluations have taken place over the past thirty years, but the history is marked by few innovative proposals and instead has housed a repetitious and dichotomous debate.

Early congressional interest in repealing *Illinois Brick* prompted the American Bar Association ("ABA") to constitute a task force in 1978 to evaluate legislative alternatives.[71] Internal disagreements within the task force led to separate majority and minority reports, forecasting a deep and enduring split over how best to handle the indirect purchaser problem.[72] The 1978 task force report is nonetheless a thoughtful contribution. Though the majority and minority took different routes, both grounded their proposals on functional concerns for deterrence, compensation, and, primarily, avoidance of complexity in calculating pass-on damages.[73] The majority believed that measuring pass-on damages would be impossible, and suggested mandatory consolidation of actions in a single forum—

70. *See* Josef D. Cooper & David L. Foster, *Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning* Illinois Brick Co. v. Illinois, 46 ANTITRUST L.J. 1137, 1141–42 (1978).

71. *See id.* at 1141 ("[T]he Task Force did not assess the desirability of a legislative reversal . . . but rather proceeded on the assumption that such legislation . . . would be passed.").

72. *See id.* at 1156–57, 1171.

73. *See id.* at 1144–45, 1164–70.

including an "opt-in" requirement—to prevent multiple liability.[74] The minority argued instead that greater participation should come under the traditional class action rule, which provides only for opting out of the class.[75]

This debate surrounding the first foray into legislative reform seemed promising in that the ABA reports looked past repeal and toward different functional approaches, but the failure of the early attempts to repeal *Illinois Brick* quickly hobbled the debate. Reform efforts were rekindled in 1983, but already the movement had lost its luster. Unlike the early efforts, the 1983 debate did not engage the principal question of how to craft indirect purchaser standing. Instead, it took a much narrower scope, contemplating a limited repeal of *Illinois Brick* that would allow indirect purchaser suits to be brought exclusively by state attorneys general on a *parens patriae* theory.[76] That proposal was vigorously criticized by a second ABA task force largely because it failed to address the functional and complexity concerns raised by *Illinois Brick*.[77]

At around the same time, academic commentators weighed in on *Illinois Brick*. William Landes and Richard Posner defended the *Illinois Brick* doctrine in a 1979 article that argued that vesting standing in direct purchasers alone would improve the enforcement of antitrust laws.[78] Landes and Posner reasoned that because direct purchasers had more contact with antitrust violators, they had better information than indirect purchasers; thus, they were more likely to discover antitrust violations, would encounter fewer costs in detecting and alleging violations, and would therefore serve as more accurate and less costly private policemen.[79]

74. *Id.* at 1144, 1148–49. The minority generally agreed, but would have expanded the consolidation mechanism to include antitrust generally, rather than just to indirect purchaser actions, as the majority had proposed. *Id.* at 1159.

75. *Compare id.* at 1151–52 (emphasizing the efficiency from the preclusive effect of an exclusive opt-in procedure), *with id.* at 1164–67 (voicing concern that, because many indirect purchasers lack sophistication and suffer little harm, an opt-in requirement would operate as a "trojan horse" that would keep the class of plaintiffs small).

76. Richard G. Schneider et al., *Legislative Issues and Judicial Developments: Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify* Illinois Brick, 52 ANTITRUST L.J. 841, 849–52 (1983).

77. *Id.* at 841.

78. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 634–35 (1979).

79. *Id.* at 609 ("The remote purchaser may not know that a price increase to him is attributable to a price increase by a remote supplier, and even if he does know, he will find it difficult to discover the reasons for the remote supplier's price increase."). Landes and Posner further argue that indirect purchasers are still as fully compensated under *Illinois Brick* because they additionally receive the

Other commentators disagreed. Robert Harris and Lawrence Sullivan, writing that same year, argued that direct purchasers would pass on most overcharges to subsequent buyers and thus would have little reason to pursue violators.[80] Indeed, rather than race to uncover violations, direct purchasers would be reluctant to disrupt important supplier relationships, and thus would be far less reliable policemen than indirect purchasers.[81]

Such dichotomous arguments—the debate over whether direct purchasers would enforce the antitrust laws better, or worse, than indirect purchasers—became the paradigmatic arguments for subsequent discussion over the indirect purchaser rule. Commentators and interest groups became increasingly split on this threshold question, and the early debates set the archetypical arguments for and against the indirect purchaser rule. Just as each camp began to dig in, a 5-4 majority of the Supreme Court took a hard line in *UtiliCorp*, rejecting a broader discussion of functional considerations in favor of a rigid per se rule. The Court's decision eliminated the possibility of an evolving indirect purchaser rule and, as a result, the academic debate congealed around—and remained stuck at—a binary policy choice of whether or not to repeal both *Illinois Brick* and *Hanover Shoe*.

In spite of the failure at the national level to reform *Illinois Brick*, the political backlash against the decision was widespread and quite effective in prompting responses in state legislatures. Opposition to *Illinois Brick* convinced several states to grant indirect purchasers a cause of action to enforce state competition laws.[82] These so-called "*Illinois Brick* repealer

benefits from any recovery by an antitrust suit brought by direct purchasers since the recovery from any such suit would be factored into the prices a direct purchaser charges. *Id.* at 605. Critics have called this argument "quite implausible." Gregory J. Werden & Marius Schwartz, Illinois Brick *and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 638 (1984) (asserting, in conjunction with fellow commentators, that "*Illinois Brick* runs counter to the goal of compensation").

80. Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 351–52 (1979).

81. Landes and Posner responded directly to this point by arguing that "any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages." William M. Landes & Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274, 1278 (1980). For an analysis that *Illinois Brick* enhanced deterrence primarily by reducing litigations costs, see Werden & Schwartz, *supra* note 79, at 652–53, 667.

82. For an overview of the legislative response to *Illinois Brick* at the federal and state levels, see Cavanagh, *supra* note 6, at 23–29. For a detailed description of the so-called state repealers, see Daniel R. Karon, *"Your Honor, Tear Down that* Illinois Brick *Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351 (2004).

statutes,"[83] in addition to enabling parallel litigation in state and federal courts (and thus creating a tremendous degree of litigation complexity),[84] also introduced an additional formal dimension to the debate. In 1989, the Supreme Court in *California v. ARC America Corp.* upheld indirect purchaser recovery under these state repealer statutes, ruling that they were not preempted by federal antitrust law.[85] This prompted a second question in the *Illinois Brick* debate over whether Congress should supercede the state rules and establish a national standard.

The debate over indirect purchaser standing thus evolved, though only slightly, into two inquiries: whether to repeal *Illinois Brick* and whether to preempt state repealer statutes. But the legal formality of these questions belied the growing procedural complexity of multijurisdictional and parallel litigation produced from state indirect purchaser actions, which began to impose severe administrative costs under the still-unreformed rule.[86] One year after *ARC America*, another ABA task force returned to the question of indirect purchaser standing to evaluate the implications of the repealer statutes.[87] This report, however, swept through the familiar terrain and summarized what was by then conventional wisdom. The task force report reiterated the well-known deficiencies of the *Illinois Brick* rule—increased litigation complexity, heightened risk of multiple liability, and the omnipresent complexity in calculating pass-on injury—and how those problems were exacerbated by the advent of state indirect purchaser actions.[88] The task force then outlined an overview of potential reforms, including retaining the status quo, preempting state actions, and allowing federal indirect purchaser actions.[89] Thus, the 1990 task force report interpreted the rise of repealer statutes to merely offer one additional reform possibility—whether federal law should perhaps preempt state law—rather than as evidence that the *Illinois Brick* rule was not working or as an opportunity to revisit the complex problem of indirect purchaser standing.

83. *Id.* at 1371.

84. *See infra* Part III.C.

85. California v. ARC Am. Corp., 490 U.S. 93, 105–06 (1989) ("The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are preempted by federal law.").

86. *See, e.g.*, Cavanagh, *supra* note 6, at 30–31.

87. Michael F. Brockmeyer et al., ARC America *Task Force Report: Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC America Corp., 59 ANTITRUST L.J. 271, 273–74 (1990).

88. *Id.* at 282–83.

89. *Id.* at 288–304. The task force also discussed the possibility of attempting to harmonize state repealer statutes to create a uniform standard. *Id.* at 296–97.

The latest iteration of the debate is the Antitrust Modernization Commission's recent report to Congress.[90] The AMC was charged with proposing reforms to antitrust laws generally, but it devoted a significant share of its time and resources to the problem of indirect purchaser standing.[91] Unfortunately, rather than encouraging an innovative and overarching approach to the indirect purchaser rule, the views aired at the AMC's hearings largely rehashed the well-worn arguments in the thirty-year-old debate. Plaintiff attorneys and others favoring repeal of *Illinois Brick* continued to argue along the same lines as Harris and Sullivan: federal indirect purchaser actions would improve the effectiveness of federal antitrust laws and policy and, to the extent plaintiffs would prefer to litigate in a federal forum, availability of a federal cause of action would largely obviate the need to preempt state laws.[92] Defense attorneys and other panelists in favor of the current regime argued along the lines Posner and Landes first sketched out: that deterrence would suffer if potential direct purchaser recovery were reduced.[93] To address the problem of state indirect purchaser actions, the proposals echoed those offered just after the *ARC America* decision nearly two decades earlier, ranging from outright preemption of state repealers to allowing indirect purchaser actions only by state attorneys general.[94] But the threshold matter throughout the AMC's deliberations focused on the familiar dichotomous question of whether or not to keep the current indirect purchaser rule, with procedural innovations

90. AMC REPORT AND RECOMMENDATIONS, *supra* note 5.

91. *See id*. at 265–78. Indeed, *Illinois Brick* was at the top of a list of topics proposed to the AMC by the ABA. *See* Richard J. Wallis, *Report of the Section of Antitrust Law of the ABA to the AMC*, 2004 A.B.A. SEC. ANTITRUST L. REP. 2, *available at* http://www.amc.gov/comments/abaantitrust sec.pdf (last visited Oct. 25, 2007). The proposed reforms in this area are among the most substantial recommendations in the AMC's report. *See* AMC REPORT AND RECOMMENDATIONS, *supra* note 5, at 18.

92. *See* discussion *infra* Part III.B. *Compare* ANTITRUST MODERNIZATION COMM'N, TRANSCRIPT OF INDIRECT PURCHASER HEARINGS 107–10, 168–69 (2005), *available at* http://www.amc.gov/commission_hearings/pdf/050627_Indirect_Purchaser_Transcript_reform.pdf [hereinafter TRANSCRIPT OF INDIRECT PURCHASER HEARINGS] (statements of Michael L. Denger, Senior Antitrust Partner, Gibson, Dunn & Crutcher LLP and Andrew I. Gavil, Professor of Law, Howard University Law School) (asserting that most overcharges are passed on, limiting incentives for direct purchasers to sue), *with* Harris & Sullivan, *supra* note 80, at 290–94 (arguing that in the long run all overcharges are passed on). The modern commentators were also able to cite anecdotally cases where direct purchasers were slow to bring claims despite recoverable injury under *Hanover Shoe*. TRANSCRIPT OF INDIRECT PURCHASER HEARINGS, *supra*, at 17–18, 24–25 (statements of H. Laddie Montague, Jr., Chairman of Antitrust Dep't, Berger & Montague, P.C. and Mark J. Bennett, Att'y Gen. of Hawaii).

93. TRANSCRIPT OF INDIRECT PURCHASER HEARINGS, *supra* note 92, at 18 (statement of H. Laddie Montague, Jr., Chairman of Antitrust Dep't, Berger & Montague, P.C.).

94. AMC REPORT AND RECOMMENDATIONS, *supra* note 5, at 4 (reviewing discarded alternatives to preemption).

relegated to secondary consideration.

Ultimately, the AMC's proposals fell safely within the bounds of previously articulated reform efforts. The Commission recommended overruling *Illinois Brick* and *Hanover Shoe* in order to allow indirect purchaser recovery and to prevent multiple liability.[95] Further, the Commission recommended removal, consolidation, and class certification mechanisms to encourage actions arising from the same violation to be litigated in the same forum.[96] Not surprisingly, the AMC proposals were immediately greeted by the same criticisms leveled at previous reform efforts. The American Antitrust Institute, for example, warned in its public comments on the AMC proposal that the AMC's recommendation to repeal *Hanover Shoe* would "eviscerate" antitrust deterrence by reducing direct purchaser recoveries.[97] This reflects the common perception that strengthening the hands of indirect purchasers necessarily weakens the hands of direct purchasers.

Congress is now considering the AMC's proposal, and it is unclear how much traction, if any, the recommendations will have. The camps both favoring and opposing the *Illinois Brick* doctrine are, and always have been, well-organized, and the prospects of reform are uncertain at best. The predictable debate does, however, offer Congress a useful opportunity to entertain new proposals, which have been surprisingly lacking despite the issue's importance and the attention it has received. The time is ripe for a renewed approach to the problem that reflects the foundational objectives of antitrust and offers creative additions to the menu of available policy

95. *Id.* at 267.

96. *Id.* The AMC's recommendation to repeal *Illinois Brick* was not, however, a foregone conclusion: there was substantial disagreement among the commissioners, with several writing separate commentary explaining their positions. The final votes in the AMC on whether to repeal *Illinois Brick* and *Hanover Shoe* was 12 to 3, with several more suggesting their view was driven not by concern for indirect purchasers, but rather the logistical problems posed by state indirect purchase recovery statutes. *See id.* at 266.

97. *See* WORKING GROUP ON CIVIL REMEDIES, AMERICAN ANTITRUST INST., COMMENTS TO THE ANTITRUST MODERNIZATION COMMISSION BY THE AMERICAN ANTITRUST INSTITUTE'S WORKING GROUP ON CIVIL REMEDIES CONCERNING THE AMC'S PROPOSAL REGARDING DIRECT & INDIRECT PURCHASER ACTIONS 3 (2007), *available at* http://www.antitrustinstitute.org/Archives/amc071.ashx. The American Antitrust Institute supports indirect purchaser recovery in theory, but it disapproves of the AMC's flat reversal of *Illinois Brick* and *Hanover Shoe*. *See* Letter from Albert A. Foer, President, American Antitrust Inst., to the Honorable Patrick J. Leahey, Chairman, Senate Judiciary Comm. et al. 3 (Apr. 30, 2007), *available at* http://www.antitrustinstitute.org/Archives/amc072.ashx ("We praise the AMC for urging this expansion of the Illinois Brick repealer principle . . . however, it appears to us that under the AMC proposal, this theoretical expansion will be much more than offset by the decimation of the direct purchaser recovery, with the result that there will be less deterrence . . . .").

options.[98]

III. FUNCTIONAL OBJECTIVES AND DYSFUNCTIONAL OUTCOMES OF THE INDIRECT PURCHASER RULE

As the indirect purchaser rule has drifted from a pragmatic and functionally responsive doctrine to an inflexible and categorical decree, it has proven increasingly inadequate in facilitating private enforcement of the antitrust laws. This inadequacy is measured by the doctrine's failure to advance three key functional objectives of antitrust law: compensation, deterrence, and economical litigation. *Hanover Shoe* and *Illinois Brick* were meant to squarely address the latter two and explicitly jettisoned the first, but the doctrine has failed to advance even the functional objectives it was designed to achieve. The doctrine instead has been criticized for preventing, not promoting, antitrust enforcement, and the growth of indirect purchaser actions in state court has spawned parallel litigation that has created more, not less, complexity. A good part of these undesirable consequences—and the general failure of the *Illinois Brick* doctrine—can be attributed to the growth of multiparty supply chains that are now a mainstay of globalized commerce. Standing rules should therefore be reconstituted according to both the structural realities of the global marketplace and the enduring functional objectives of antitrust.

98. Europe is also struggling over indirect purchaser standing, but the debate is still in its infancy. A 2004 comparative study of European competition law, in which antitrust experts in each European country were surveyed regarding private antitrust enforcement in their home country, reported that almost no cases had addressed either the standing of indirect purchasers or the availability of a pass-on defense. *See* DENIS WAELBROECK, DONALD SLATER & GIL EVEN-SHOSHAN, STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 77–79 (2004), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf. The closest parallel to the political wrangling in the United States was a failed legislative proposal in Germany that would have enacted a rule against the pass-on defense. *Id.* at 79. Interestingly, those experts generally concluded both that a pass-on defense was appropriate (as long as the burden of proof fell on the defendant) and that indirect purchasers should have standing to sue (as long as they could establish causation). *Id.* at 111.

The debate in Europe, however, is likely to pick up steam as the European Commission is increasingly seeking mechanisms to encourage private enforcement of its competition laws. In December 2005, the European Commission published a "Green Paper" designed to improve and facilitate private enforcement of EC competition law, and it identified the pass-on defense and indirect purchaser standing as important issues to address. *See* COMM'N OF THE EUROPEAN CMTYS., GREEN PAPER: DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES 3, 7–8 (2005), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf. One European commentator has declared the problem of passing-on in indirect purchaser actions to be "probably the *central* problem of private antitrust enforcement." Friedrich Wenzel Bulst, *Private Antitrust Enforcement at a Roundabout*, 7 EUR. BUS. ORG. L. REV. 725, 732 (2006) (emphasis in original).

A. ABANDONING COMPENSATION

At the heart of the debate between the majority and dissent in *Illinois Brick* was the primacy of deterrence over compensation. The dissent objected to a rule that gave no recourse to injured parties, while the majority persisted that standing rules must incentivize direct purchasers to enforce the antitrust laws.[99] But this debate was structured by the perception that *Hanover Shoe* caused these objectives to be irreconcilable, with the majority concluding that deterrence trumped the otherwise admirable goal of compensation.[100] In fact, denying standing to injured parties is in plain conflict with the intended effect of the Clayton Act, and the Supreme Court's preference for deterrence does not eliminate the importance of compensation. Despite the doctrine's ossification into an absolute rule that precludes the possibility of either optimizing the compensation-deterrence trade-off or balancing them on a case-by-case basis, compensation remains a desirable objective.

As a threshold matter, there is little doubt that compensation of injured parties is both an express congressional motivation underlying private antitrust enforcement and a valid functional objective of antitrust. In enacting the Clayton Act, Congress articulated its intention to ensure "justice to every man . . . and giv[e] the injured party ample damages for the wrong suffered."[101] Such a commitment to compensation certainly is consistent with normative approaches to the law. Corrective justice theories emphasize the role that liability plays in rectifying the injustice that one party imposes on another and affirm that compensation to injured parties is central to remedying the injustice.[102] Further, even the earliest utilitarian theories of law view compensation of injured parties as a form of social insurance that increases every individual's expected utility, regardless of ex ante risk.[103]

99. *Compare* Ill. Brick Co. v. Illinois, 431 U.S. 720, 749 (1977) (Brennan, J., dissenting) (stressing compensation as a functional objective), *with id.* at 745 (majority opinion) (emphasizing the need to decrease costs and concentrate benefits of bringing a treble-damages action to facilitate antitrust enforcement).

100. *See id.* at 746–47.

101. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) ("The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered.'") (alterations in original) (quoting 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb)).

102. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 317–18 (1992). Corrective justice theory finds its origins in Aristotle's writings. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 116–25 (Hugh Tredennick ed., J.A.K. Thomson trans., Penguin Books 2004) (1953).

103. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 94–96 (Mark DeWolfe Howe ed.,

By granting standing only to direct purchasers, the *Illinois Brick* doctrine is in clear tension with these principles. First, precluding recourse to indirect purchasers means that justice is not delivered "to every man," and as the dissent in *Illinois Brick* observed, direct purchasers' ability to pass on illegal overcharges means that the ultimate harm falls *only* on the parties who have no recourse, whereas compensation goes to parties who experience little or no harm.[104] Thus, the doctrine causes antitrust to provide social insurance to the wrong party, such that even when antitrust violators are appropriately punished, damages are allocated contrary to what the social optimum would dictate.[105]

This was all known by the *Illinois Brick* majority, and the Court struck a calculated bargain by trading compensation for deterrence. But that bargain might be unraveling as the economy tends toward increasingly complex, decentralized, and international supply relationships. The problem that the Court encountered, and the problem that complicates simultaneous pursuit of compensation and deterrence, is the rise of the multilayered supply chain. There is little tension between the two objectives in a two-party producer-consumer transaction, in which the party that purchases directly from an antitrust violator is also the consumer—in this simplistic setting (and only in this setting) the direct purchaser is the ultimate victim of an illegal overcharge. But this two-party model is becoming increasingly uncommon.[106] The decision in *Illinois Brick* to sacrifice compensation for deterrence would be more justifiable if such a sacrifice were only occasional, but as multilevel supply chains become more the rule than the exception—and the exposure of indirect purchasers to passed-on antitrust injury grows accordingly—the indirect purchaser rule increasingly operates to undermine compensation.

It is not clear that the *Illinois Brick* Court knew how categorically it was denying compensation to injured parties, but the permanence of multilayered supply chains—coupled with the enduring importance of

Harvard Univ. Press 1967) (1881). For a more contemporary utilitarian approach in tort law, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

104. *See Ill. Brick Co.*, 431 U.S. at 764 (Brennan, J., dissenting).

105. Landes and Posner suggest that indirect purchasers receive equivalent compensation from antitrust violators since the gains from direct purchasers who bring victorious suits are passed down, just as overcharges are passed down, *see* Landes & Posner, *supra* note 78, but this argument has been called "quite implausible," *see* Werden & Schwartz, *supra* note 79, at 638.

106. *See, e.g.*, COMMODITY CHAINS AND GLOBAL CAPITALISM (Gary Gereffi & Miguel Korzeniewicz eds., 1994) (illustrating the rise of global commodity chains and the spread of multilevel, international production networks); THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2d ed. 2006).

compensation as a policy objective—demands pursuit of standing rules that do more to compensate the injured. Equally significant, the debate within the *Illinois Brick* opinion can be interpreted as an agreement that both compensating victims and deterring violations are core objectives for antitrust law; thus, the dispute between the majority and dissent is obviated if standing rules pursue both compensation and deterrence. A comprehensive approach to reforming standing rules offers that possibility.

B. INADEQUATE DETERRENCE

The indirect purchaser rule's abandonment of compensation in favor of deterrence might be more palatable if it, in fact, enhanced deterrence. Unfortunately, the converse appears to be true, and antitrust violators currently appear to be underdeterred.

The *Illinois Brick* Court appropriately recognized deterrence as a key functional objective of private enforcement and an express purpose of the Clayton Act. The Act's provisions creating private causes of action underscore the congressional view that both private and government actions are needed to adequately police antitrust violators.[107] Moreover, the Clayton Act's adoption of a treble damages remedy is designed to go beyond mere compensation and to enhance the deterrent and punitive effect of private enforcement.[108] Not surprisingly, deterrence through private

107. For a discussion of the legislative history of the private enforcement provision of the Clayton Act, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) ("The House debates following the conference committee report . . . indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law." (citing 51 CONG. REC. 16274–75 (statement of Rep. Webb), 16317–19 (statement of Rep. Floyd))). The documents referenced in *Brunswick* can be found in 2–3 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (Earl W. Kintner ed., 1978).

108. *See* sources cited *supra* note 107. Others have viewed treble damages as an attempt to approximate an optimal sanction. *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 653 (1983). Landes proposes that an optimal fine for an antitrust violation would be the economic harm resulting from that antitrust violation divided by the probability of the violator being held accountable. *Id.* at 657. Modeled from tort theory, the formula intends to force the violator to internalize the societal costs of the antitrust violation, with the trebling of damages compensating for the uncertain probability that the violation will be detected. *Id.* at 676. Landes suggests that this would mean that violations would only occur when the efficiency gains of the conduct outweigh the now-internalized cost to society. *Id.* at 653. One problem with this approach, however, is it neglects that antitrust law is supposed to punish *only* socially undesirable, that is, welfare-reducing, conduct. Thus, if substantive antitrust law was properly applied, violations would be limited to conduct that reduces total surplus, and "efficient violations" would not be violations at all. Perhaps, from a functional perspective, overdeterrence (that is, deterring socially desirable conduct) is impossible, except to the extent that excessive fines for violations may increase bankruptcy risk and its attendant social costs. But if there is a cost to administering or imposing high fines, and there otherwise is a reason to make fines as low as possible while still deterring all potential violations, then the Landes

enforcement fits well with normative theories of tort that emphasize punishment of wrongdoing.[109] As a functional matter, empowering private actors, who enjoy certain informational advantages and often bring greater numbers and resources than public law enforcement can alone, enhances the likelihood of detecting violations.[110]

The initial debate over how effectively *Illinois Brick* would facilitate private antitrust enforcement included sharply contrasting views. Early ABA task forces included both those who heralded direct purchasers as the primary engines for antitrust enforcement and those who thought indirect purchasers were required for effective enforcement.[111] Academic commentators who weighed in also represented both views, with Landes and Posner offering arguments that squarely contrasted those of Harris and Sullivan.[112] But most of this early debate rested on theoretical and untested assertions. Proponents of the rule reasoned that direct purchasers had superior information and incentives, and thus were more likely to discover

formula makes sense.

109. Private enforcement was a critical element of Aristotle's conception of rectificatory or corrective justice. ARISTOTLE, *supra* note 102, at bk. V, ch. 4. For corrective justice theorists who embrace the Aristotelian approach for role of private enforcement in tort law, see Jules L. Coleman, *The Morality of Strict Liability*, 18 WM. & MARY L. REV. 259 (1976); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972). For a summary of contemporary corrective justice theories, see Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449–50 (1992) (outlining "annulment" and "obligation of reparation" theories of corrective justice).

110. The informational advantage enjoyed by private actors relates to Friedrich Hayek's famous championing of market mechanisms, in which individuals utilize their decentralized knowledge through spontaneous action. *See* Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). Many contemporary economists employ this same logic. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 578–79 (2004) (observing that the optimal structure of law relies, in large part, on private enforcement due to informational advantages enjoyed by private parties). In practice, this rationale is mitigated somewhat since many private antitrust enforcement actions emerge not from private discovery of an antitrust violation but instead follow a public investigation and criminal prosecution for the same conduct. *See, e.g.*, John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 222 n.16 (1983) (describing a "legion" of "tag-along" private antitrust actions which followed government prosecutions); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 5 (2000) (noting that "[t]he chance of successful private litigation rises dramatically when government litigation paves the way").

An equally important rationale behind private antitrust enforcement rests on Oliver Williamson's more general point (coined the problem of "selective intervention") that public institutions cannot replicate the incentives of private parties. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985). We might expect the incentives of public enforcers to be insufficiently acute to muster adequate policing and deterrence of antitrust violations.

111. *See supra* notes 71–75 and accompanying text.

112. *See supra* notes 78–81 and accompanying text.

and police antitrust violations. Opponents argued that direct purchasers would pass on most overcharges to subsequent buyers and thus would have little reason to pursue violators and disrupt important supplier relationships.[113] Both sides presented plausible, but unproven, arguments.

Recent scholarship has been more empirically grounded, and most results suggest that denying standing to indirect purchasers has severely hindered antitrust enforcement. Herbert Hovenkamp has cited the recent Microsoft antitrust litigation as an illustration in which direct purchasers avoided bringing suit against a powerful supplier and instead opted to pass on antitrust injury to end consumers.[114] Contrary to the Landes-Posner view in which direct purchasers launch antitrust suits when they reasonably expect the suit to be successful, Hovenkamp suggests that direct purchasers of Microsoft software understand that interrupting their lucrative relationships with Microsoft might jeopardize their access to future Microsoft products.[115] The AMC hearings have uncovered similar instances where direct purchasers failed to pursue potential antitrust violations and where indirect purchasers instead were the first to bring suit.[116]

Some scholars have further argued that the indirect purchaser rule not only fails to deter antitrust violations, but in fact also encourages additional antitrust violations. Because illegal cartels and monopolists can share rents with direct purchasers without explicitly including them in an illegal conspiracy (and threaten to boycott those who bring suit) antitrust violators can manipulate the incentives of the only parties who have standing. Such arrangements, dubbed "Illinois Walls" because they put illegal conduct effectively beyond the reach of private antitrust enforcement, exploit the weakness in the indirect purchaser rule and facilitate tacit cooperation between antitrust violators and direct purchasers that is virtually impossible to punish.[117] Recent scholarship has shown that such tacit collusion could be supported effectively in a variety of distribution mechanisms, including

113. *See supra* note 81.

114. Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003) (reviewing RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001)).

115. *Id*.

116. Memorandum from the Antitrust Modernization Comm'n Staff to the Antitrust Modernization Comm'n Comm'rs 12–13 (May 4, 2006), *available at* http://www.amc.gov/pdf/meetings/CivRem-IndP_DiscMemo060504-fin.pdf (summarizing testimony before the Commission).

117. Maarten Pieter Schinkel, Jan Tuinstra & Jakob Rüggeberg, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion* (Amsterdam Ctr. for Law & Econ., Working Paper No. 2005-02, 2005), *available at* http://ssrn.com/abstract=730384. The authors argue that antitrust violators could reach tacit agreements with direct purchasers to discourage lawsuits, such as through output volume manipulation. *Id.* at 6.

the manipulation of sales volume to allow direct purchasers to share in the profit from the resulting scarcity.[118] Anecdotal evidence further supports this theory, as direct purchasers were important contributors to several recent high-profile illegal cartels.[119]

Furthermore, removing indirect purchasers from the pool of potential plaintiffs directly dilutes antitrust enforcement. Since optimal enforcement is a function of both the penalty assessed to violators and the probability that violations will be detected, precluding suits from available plaintiffs necessarily reduces the probability of detection.[120] Additional private enforcers might not be necessary if the Clayton Act's implied likelihood of detection—one in three—were not so optimistic.[121] To the contrary, estimates of cartel detection rates run as low as 10 to 20 percent.[122]

118. *Id.* at 9–13. *See also* Maarten Pieter Schinkel & Jan Tuinstra, Illinois Walls in Alternative Market Structures (May 2005) (unpublished manuscript, *available at* http://ssrn.com/abstract=729843) (demonstrating how Illinois Walls are robust enough to thrive in a variety of market arrangements).

119. Those examples include the *Brand Name Prescription Drugs* litigation involving cooperative conduct between manufacturers and wholesalers, *see In re* Brand Name Prescription Drugs Antitrust Litigation, Nos. 94 C 897, MDL 997, 1994 WL 663590 (N.D. Ill. Nov. 18, 1994), cartelization of the lysine and citric acid markets by Archer Daniels Midland Company and others, as well as the *Microsoft* case. Schinkel et al., *supra* note 117, at 28–31.

120. A logical extension of the informational advantages enjoyed by private enforcers is that these advantages increase as the number of private enforcers rises. *See supra* note 110. *See also* Landes, *supra* note 108, at 657. The true antecedents of this law and economics approach to calculating optimal sanctions lies in Gary Becker's work on criminal law. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

121. *See infra* note 122. This theory is true if one accepts that a particular antitrust violation has an "optimal fine." An optimal fine for an antitrust violation—drawing from theories of optimal punishment for torts—would be the consequent economic harm divided by the probability the violator will be held accountable. *See* Landes, *supra* note 108, at 657. Accordingly, any fine below the optimal amount translates into underdeterrence (the situation in which we currently find ourselves) and any greater amount translates into overdeterrence. The problem with this approach, however, arises in the situation of supposed overdeterrence. Tort theory lends itself to the possibility of overdeterrence because excessive tort penalties might deter socially efficient behavior (behavior in which a tortfeasor's benefits exceed the injury to a victim). But antitrust violations, by definition, are socially inefficient—if certain economic conduct is deemed to increase surplus, even if it injures identifiable parties in the marketplace, then it is not a violation of the Sherman Act. In the antitrust context, the problem of overdeterrence can only arise if meritless suits are successfully brought, a problem that effective judging can solve. Regardless of one's view of whether antitrust violations have an optimal fine, by all accounts it appears that the primary enforcement problem in antitrust is that of underdeterrence.

122. There is considerable uncertainty in the detection rate for cartels. *See, e.g.*, Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 458 ("The number of cartels prosecuted annually could represent ten percent of all cartels operating today or ninety percent—nobody knows."). Stucke cites former Assistant Attorney General Douglas Ginsburg as estimating that "antitrust enforcers detected no more than ten percent of all cartels," *id.* at 457 n.35 (citing *Sentencing Options: Hearing Before the United States Sentencing Commission* (1986), *in* UNITED STATES SENTENCING COMMISSION: UNPUBLISHED PUBLIC HEARINGS 1986 4, at 15 (1988)), and an Organization for Economic Cooperation and Development ("OECD") estimate of "one in six or seven," *id.* (citing COMPETITION COMM., ORG. FOR ECON. COOPERATION & DEV., REPORT ON THE NATURE

Additionally, defendants found to be culpable are paying far less than the treble damages envisioned by the Clayton Act, and instead are paying closer to single damages.[123]

With these structural problems preventing adequate antitrust policing, it comes as no surprise that the empirical evidence suggests that international cartels are underpoliced. Recent studies indicate that cartels are able to exact average overcharges that far exceed fines imposed.[124] Moreover, contrary to some beliefs that cartel behavior is inherently unstable, studies of several long-term cartels indicate that those cartels over time grew *more* stable, became more sophisticated in self-monitoring and escaping detection, and imposed average overcharges that increased with the life of the cartel.[125] Cartel activity has apparently increased in recent years, and some scholars similarly estimate that monopolization is inadequately deterred.[126] But this sort of illegal behavior is sensitive to enforcement efforts, as recent empirical studies suggest that cartel overcharges are lower in high-enforcement regimes.[127]

In sum, *Illinois Brick* reflected the Supreme Court's conviction that antitrust sanctions and standing rules should be designed to deter anticompetitive conduct, even at the expense of lost compensation for injured parties. But in reality, the indirect purchaser rule has instead contributed to underpolicing of antitrust violators and facilitated evasion of antitrust enforcement.

AND IMPACT OF HARD CORE CARTELS AND SANCTIONS AGAINST CARTELS UNDER NATIONAL COMPETITION LAWS 3, 13 (2002), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf).

123. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 117–18 (1993).

124. John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 522–23, 545–46 (2005).

125. Yuliya Bolotova, Cartel Overcharges: An Empirical Analysis 22, 44 (Sept. 15, 2006) (unpublished manuscript, *available at* http://ssrn.com/abstract=931211).

126. *See* Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 479–80 (2000) ("Reductions in tariff barriers and the evolution of genuinely global markets in many industries have helped create the conditions for the apparent increase in international cartel activity to its highest level in decades."). Daniel Karon has also noted that many market participants prefer to fix prices and await weak enforcement. Daniel R. Karon, *Price Fixing, Market Allocation and Bid Rigging Conspiracies: How to Counsel Your Clients to Detect Violations and Inform You of Potential Claims*, 25 AM. J. TRIAL. ADVOC. 241, 255 (2001).

127. Bolotova, *supra* note 125, at 38.

C. INCREASED COMPLEXITY

The Supreme Court expressed concern over unwieldy litigation complexity in virtually every indirect purchaser case. The *Illinois Brick* Court, for example, was deeply concerned about the complexity in calculating pass-on charges and allocating damages among the multiple victims injured by a single antitrust violation.[128] It was largely this aversion to complexity that compelled the *Illinois Brick* Court to seek a rule against indirect purchaser standing, and the Court echoed this concern in *McCready*[129] and *UtiliCorp*.[130] The aversion to complexity has been justified by a motivation to preserve judicial resources, as well as a concern that additional complexity would increase the risk of "duplicative recoveries"[131] and "discourage vigorous enforcement" by private parties.[132]

It is likely, however, that the Court overstated the difficulty that indirect purchaser suits would bring. Only two years after *Illinois Brick*, Harris and Sullivan argued that although "adjudication to trace a particular overcharge down its particular chain is a daunting one," the task in many

128. Ill. Brick Co. v. Illinois, 431 U.S. 720, 737 (1977) (suggesting that indirect purchaser suits would "add whole new dimensions of complexity").

129. Blue Shield of Va. v. McCready, 457 U.S. 465, 475 n.11 (1982) ("[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.").

130. Kansas v. UtiliCorp United Inc., 497 U.S. 199, 208 (1990) ("The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.").

131. *Ill. Brick Co.*, 431 U.S. at 730–31. Hostility to multiple recoveries was an underlying premise of the *Illinois Brick* decision. *Id.* at 731 ("[W]e are unwilling to 'open the door to duplicative recoveries.'") (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)). It is unclear, however, where the Court found the authority to prohibit multiple liability, and this is curious since all successful plaintiffs recover a multiple of their injury in the form of treble damages. The assertion in *Standard Oil Co.* about duplicative recoveries was made without analysis and without citation to a supporting authority. The Supreme Court has nonetheless reiterated in subsequent rulings that any standing rule should build off the premise that no antitrust violator should be punished twice for the same violation. *UtiliCorp*, 497 U.S. at 212 ("The *Illinois Brick* rule also serves to eliminate multiple recoveries."); *McCready*, 457 U.S. at 474 (confirming with precedent that a risk of duplicative recovery was "unacceptable") (citing *Ill. Brick Co.*, 431 U.S. at 730–31).

Ultimately, there is a functional justification for prohibiting duplicative liability. Duplicative liability within the modern, multilayered supply chain would provide a nearly endless number of plaintiffs with claims that could push nearly any defendant into bankruptcy. But this justification has no implications for limiting recovery for individual plaintiffs. Indeed, deterrence may be enhanced if additional damages are awarded to any given plaintiff—perhaps one who discovers the violation, is first to bring suit, or who undertakes the role of lead plaintiff. As much as a functional approach counsels against imposing duplicative liability against a given defendant, it likewise counsels in favor of flexibility in awarding multiple recovery to individual plaintiffs.

132. *McCready*, 457 U.S. at 475 n.11.

cases might be simplified by applying institutional assumptions and theoretical analysis.[133] More recently, Hovenkamp summarized an assortment of proven methods to calculate passed-on overcharges, none of which required an analysis materially more complex than other determinations routinely required in antitrust litigation. For example, pass-on damages can be measured by the "yardstick" method, which looks to the prevailing price in a geographic market that is similar (but not cartelized), or by the "before-and-after" method, that looks to pre- or post-cartel prices in the same market.[134] Both methods are routinely applied in antitrust cases, including those by direct purchasers.[135] Therefore, far from presenting an unmanageable level of complexity to antitrust enforcement, damages calculations from indirect purchaser suits would appear to fall well within the magnitude of complexity regularly tolerated in antitrust law.

In any event, antitrust litigation is already—and inevitably—rife with complex determinations.[136] Even the most fundamental tasks of antitrust adjudication, such as determining the relevant market, routinely require costly data collection, rigorous empirical estimations of prices and cross-elasticities, and expensive expert testimony. The calculation of damages in

133. Harris & Sullivan, *supra* note 80, at 272–73. Responding to claims by Posner and Landes, *supra* note 78, at 615–21, that pass-on calculations would involve a complex analysis of supply and demand elasticities, Harris and Sullivan argued that such complexity would arise only in a short-run analysis and that "[b]ecause in the long run supply is likely to be perfectly elastic . . . an estimate of elasticity of demand will rarely be required . . . ." Harris & Sullivan, *supra* note 80, at 294 n.61a.

134. Hovenkamp, *supra* note 114, at 940–41. The yardstick method is described in HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 17.5b1, at 660–61 (2d ed. 1999) (explaining that "[a]djustments must probably be made for differences in taxes and regulatory fees, costs of transportation, and different wage and salary rates. However, if these differences can be isolated and quantified, an expert economist or accountant should be able to produce a 'reconstructed' price that would have prevailed in the cartelized market if it had the same level of competition as exists in the yardstick market"). For a description of the before-and-after method, see *id.* § 17.5b2, at 661–66. Other scholars have developed alternative methods to isolate and quantify the antitrust harm that falls upon a direct purchaser even after some damages are passed-on to subsequent buyers. *See, e.g.*, Frank Verboven & Theon van Dijk, Cartel Damages Claims and the Passing-on Defense (May 2007) (Working Paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=%201024469) (deriving a method, relying on relatively easy-to-observe variables, of estimating the antitrust harms both to direct purchasers and to social welfare, including the damages resulting from lost output).

135. *See, e.g.*, Group Health Plan, Inc. v. Philip Morris USA, Inc., 344 F.3d 753, 761–62 (8th Cir. 2003) (applying the yardstick method); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 793–94 (6th Cir. 2002) (applying regression analysis, before-and-after, and yardstick methods); *In re* Microcrystalline Cellulose Antitrust Litig., 221 F.R.D. 428, 430 (E.D. Pa. 2004) (accepting before-and-after method); *In re* Indep. Serv. Orgs. Antitrust Litig., 964 F. Supp. 1454 (D. Kan. 1997) (accepting before-and-after method).

136. This was well-recognized by the *Illinois Brick* dissenters. *See supra* note 42; *Ill. Brick Co.*, 431 U.S. at 759 (Brennan, J., dissenting) ("Reasoned estimation is required in all antitrust cases.").

indirect purchaser actions would merely join a long list of determinations that already make antitrust enforcement complex, with which courts and litigants have managed reasonably well.[137] Moreover, state courts have exhibited a capacity to handle suits from indirect purchasers and to calculate pass-on damages under *Illinois Brick* repealer statutes—federal courts should be able to do the same.

Far more significant is that *Illinois Brick* has substantially increased, not decreased, complexity in antitrust litigation. The *Illinois Brick* repealer statutes have enabled indirect purchasers to pursue claims that are foreclosed in federal court, thus spawning parallel state litigation and creating a confusing mosaic of antitrust litigation.[138] These parallel actions subject defendants to multiple and simultaneous litigation, force state courts to entertain duplicative suits, and introduce legal confusion over issues of jurisdiction and preemption.[139] This complexity is arguably far above whatever might be introduced by pass-on calculations. One antitrust scholar decried the current situation as a "logistical nightmare,"[140] and another demanded, at the very least, some harmonization between federal

137. A notable exception has been recent cases reviewing challenges to proposed hospital mergers. In this area of antitrust enforcement, courts have exhibited significant difficulty managing the complex determinations and have received substantial scrutiny from several commentators. *See, e.g.*, Jennifer R. Conners, *A Critical Misdiagnosis: How Courts Underestimate the Anticompetitive Implications of Hospital Mergers*, 91 CAL. L. REV. 543, 562–70 (2003) (describing how courts have erred, inter alia, in defining product markets, defining geographic markets, and in underestimating market power); Thomas L. Greaney, *Night Landings on an Aircraft Carrier: Hospital Mergers and Antitrust Law*, 23 AM. J.L. & MED. 191, 192 (1997) ("[C]ourts deciding hospital merger cases are asked to make exceedingly fine-tuned appraisals of complex economic relationships . . . . Like pilots landing at night aboard an aircraft carrier, courts are aiming for a target that is small, shifting and poorly illuminated."). *See also* Cory S. Capps et al., *Antitrust Policy and Hospital Mergers: Recommendations for a New Approach*, 47 ANTITRUST BULL. 677 (2002) (critiquing the methods used by courts in hospital merger cases); Peter J. Hammer, *Questioning Traditional Antitrust Presumptions: Price and Non-Price Competition in Hospital Markets*, 32 U. MICH. J.L. REFORM 727 (1999) (discussing the difficulties courts encounter when attempting to apply traditional antitrust principles to hospital mergers); James Langenfeld & Wenqing Li, *Critical Loss Analysis in Evaluating Mergers*, 46 ANTITRUST BULL. 299 (2001) (noting errors courts have made using a critical loss analysis in merger cases); Gregory J. Werden, *The Limited Relevance of Patient Migration Data in Market Delineation for Hospital Merger Cases*, 8 J. HEALTH ECON. 363 (1989) (illustrating the limited utility of patient migration date in antitrust analysis); Matthew Reiffer, Note, *Antitrust Implications in Nonprofit Hospital Mergers*, 27 J. LEGIS. 187 (2001) (recognizing complexity of hospital mergers with respect to antitrust). *See generally* Barak D. Richman, *Antitrust and Nonprofit Hospital Mergers: A Return to Basics* (Duke Law Sch. Sci., Tech. & Innovation Research Paper Series, Paper No. 15, 2007), *available at* http://ssrn.com/abstract=975152.

138. *See supra* notes 82–85 and accompanying text.

139. *See* Cavanagh, *supra* note 6, at 27–31, 33–34, 41.

140. *Id.* at 30 ("This proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact with cases pending in federal court has created a logistical nightmare for the courts.").

and state laws.[141] The disarray caused by partially overlapping state and federal law in this area was a central justification for the AMC's reform recommendations.[142]

The lesson from the history of the indirect purchaser doctrine is not that the law should avoid engaging in complex calculations altogether—to the contrary, the rule of reason and merger analysis embrace complexity. A better approach to reducing complexity and administrative costs is to improve procedural mechanisms. A system that could consolidate suits arising from a common antitrust violation would avoid the parallel and duplicative litigation, jurisdictional confusion, and nonuniformities in the law that currently plague antitrust actions. Even though such consolidation might increase the complexity of individual proceedings, it would make significant strides toward conserving valuable judicial and litigation resources.

IV. A NEW APPROACH

The heart of the indirect purchaser problem is actually one that is familiar to other areas of law. A single act—in this case, an antitrust violation—causes harm to a long chain of parties, all of whom can claim injuries of varying amounts.[143] The policy challenge—dictated by the normative objectives of antitrust law—is to impose the appropriate penalty

141. *See* Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860, 863 (2001) ("[T]he artificial division of cases that now flows from *Illinois Brick* imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies. Ample ground should exist, therefore, to construct a consensus for procedural reform directed at facilitating more efficient treatment of substantively overlapping cases filed contemporaneously in multiple jurisdictions, state and federal.").

142. *See* ANTITRUST MODERNIZATION COMM'N, SUMMARY OF INDIRECT PURCHASER HEARINGS 1 (2005), *available at* http://www.abanet.org/antitrust/at-links/pdf/at-mod/indirectpurchaserhearings.pdf ("Almost all of the speakers . . . viewed the current situation as entailing needlessly heavy costs and burdens on the defendants."). Illustrating the complexity, though without appreciating the irony, is the ABA's *Indirect Purchaser Litigation Handbook*, a nearly 400-page volume that describes how attorneys can initiate indirect purchaser suits and the unique litigation challenges they might encounter. Special attention is given to jurisdiction, choice of law, discovery, and class action proceedings, whereas only one chapter discusses the challenges of damage calculation. *See generally* ABA, INDIRECT PURCHASER LITIGATION HANDBOOK (2007).

143. This might be described as the mirror situation of a multiparty tort, in which responsibility for harm done to a plaintiff must be allocated to multiple defendants. A popular solution to the problem of joint tortfeasors is joint and several liability, in which a prevailing plaintiff recovers the full amount of injury from any tortfeasor while the defendants allocate damages among themselves through separate proceedings. *See* Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427 (1993); Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989). Our proposal harnesses the wisdom of this approach and applies it to the antitrust context.

on the antitrust violator so as to achieve adequate deterrence, allocate the penalty across the injured parties to satisfy the aims of compensation, and manage the proceedings to minimize administrative costs. The solution offered in *Illinois Brick* is to grant standing to only one party out of the many injured parties, and to assign to that party both the responsibility for identifying and pursuing the antitrust violation as well as the privilege of collecting treble damages.[144] For the many reasons detailed above, this model has proven to be inadequate: it has failed to deter violations, does not compensate injured parties, and has resulted in substantial administrative complexity.[145]

We offer a policy solution that improves the status quo along all three normative criteria. Our proposed mechanism would consolidate the claims of all injured parties into a single proceeding, designate a lead plaintiff, and then allocate damages to participating parties. It opens standing to include indirect purchasers, thus increasing the number of potential plaintiffs and securing compensation for all injured parties. In this respect we endorse the AMC's recommendation to repeal *Illinois Brick* and *Hanover Shoe*. Yet our proposal also secures certain rewards to parties who bring suit, and thus instills strong incentives to detect and punish antitrust violations. In this sense it shares similarities to proposals advanced by the American Antitrust Institute and other groups critical of the AMC's recommendations. In this part, we describe the elements of our proposal, illustrating how it would be implemented and documenting the influence from lessons learned in parallel areas of the law.

A. BEYOND *ILLINOIS BRICK* REPEAL: CREATING A SINGLE, MANDATORY CAUSE OF ACTION

With multiparty supply chains becoming the rule more than the exception in the modern economy, any antitrust violation is likely to cause harm, in varying degrees, to multiple parties. This problem arises in several areas of law. For example, mass torts involve a single tortfeasor and multiple victims; violations of securities laws injure many stockholders, each of whom have claims of different sizes; and bankruptcies involve many parties that have claims of competing magnitude and priority against a single entity.

The one commonality that emerges from each of these areas of law is the desirability of consolidating all of the plaintiffs' claims, and all issues

144. *See supra* Part II.B.
145. *See supra* Part III.

that require litigation, into one proceeding. Mass torts are widely recognized to pose substantial administrative challenges, with many parties, common issues, and different claims, and the rise of the class action reflects the widely held belief that there is significant value to consolidating multiple tort claims.[146] Bankruptcy law also offers a framework in which potential claimants are required to join a single consolidated proceeding, or otherwise forfeit any potential recovery. And securities law offers derivative lawsuits and securities class actions as mechanisms to consolidate multiple claims into unified actions, a process that has been affirmed under the Private Securities Litigation Reform Act ("PSLRA").[147] These benefits transfer easily into the antitrust arena, and the Supreme Court clearly saw the merits of consolidation when it decided *Hanover Shoe* and *Illinois Brick*. By preventing indirect purchasers from bringing suit and permitting the direct purchaser to sue for amounts that exceeded its losses, the Court's combined rulings effectively consolidated all claims within the direct purchaser's suit. The AMC, even though it advocates repealing *Illinois Brick*, also finds consolidation appealing and has recommended devising mechanisms to transfer state claims to federal court.[148]

Consolidation thus has a very strong appeal, but without an effective procedural framework, it may be vulnerable to the threat that a single party can opt out of a consolidated hearing, bring a stand-alone suit, and undermine many of the benefits consolidation is designed to achieve. This problem has received significant scholarly attention, particularly in the mass tort context, and some scholars have proposed "mandatory" consolidated actions in which class members would be prohibited from bringing parallel suits.[149] This approach lends itself particularly well to antitrust. The logic motivating mandatory consolidated actions is to place priority on deterrence and ex ante expected compensation rather than strategic litigation and competitive rent seeking, even if the latter strategies yield greater compensation for individual parties. Since antitrust has always placed exceptional weight on social welfare arguments—such as deterrence and minimizing complexity—a mandatory consolidated action is a natural

146. It goes without saying that the class action remains a point of contention and criticism. Reform efforts, however, have not rejected the value of consolidation, but instead try to filter out claims that have little legal or factual support. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

147. Private Securities Litigation Reform Act of 1995 § 27, 15 U.S.C. § 77z-1 (2000).

148. *See* AMC REPORT AND RECOMMENDATIONS, *supra* note 5, at 18.

149. *See, e.g.*, CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 89–90 (2003).

fit.

We therefore propose reforming the Clayton Act to provide for a single consolidated action against antitrust violators that allows all injured parties—direct and indirect—to join in the same suit. Either a direct or an indirect purchaser may initiate the antitrust action, after which other parties claiming injury may join. No other action, however, may be brought against the defendant for the same illegal conduct, and all parallel state causes of action would be preempted.[150] This approach would expand compensation to all parties, including indirect purchasers, that claim and demonstrate injury. Additionally, litigation complexity and its associated administrative costs would be substantially reduced by eliminating parallel litigation and forcing all causes of action into one federal suit.[151]

The greatest gains, however, would be in enhancing deterrence, where the greatest improvement is needed. The pool of potential plaintiffs would expand substantially, thereby increasing the probability that an antitrust violation would be detected and punished.[152] Also, a mandatory consolidated action would facilitate the consolidation of all injured parties, thereby ensuring that damages reflect to the extent possible the total economic injury caused by a violator's unlawful conduct. It would also disrupt collusion between violators and direct purchasers, since a suit may

150. Although federal preemption of state law is always a politically sensitive matter, preemption of state indirect purchaser causes of action should be politically palatable so long as it is accompanied by a grant of indirect purchaser recovery at the federal level. Indeed, the impetus for the so-called *Illinois Brick* repealer statutes was to provide compensation to indirect purchasers. *See supra* notes 82–84 and accompanying text.

151. We propose a new consolidation mechanism, in part, because even if *Illinois Brick* were overturned, the methods currently provided by the Federal Rules of Civil Procedure to combine claims of multiple plaintiffs against a common defendant (under Rules 23 and 19) would fail to consolidate the claims of direct and indirect purchasers. Certification for class actions under Rule 23, for example, would likely fail for lack of a common question of fact because the plaintiffs at different levels of the distribution chain present different causal mechanisms of injury. The repeated failures of tobacco plaintiffs to certify classes highlight this issue. *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127, 135 (3d Cir. 1998) (decertifying class where causation of tobacco-related injury varied among plaintiff smokers); *id.* at 143–44 n.19 (collecting cases). At the same time, joinder under Rule 19 is infeasible with large numbers of parties, such as one could expect from cases involving indirect purchaser pools that include end-users.

152. A common criticism of consolidated actions is that their size and potential payoff for plaintiffs might fuel a flood of meritless suits, and some might fear a similar flood from our proposal (especially when combined with repealing *Illinois Brick*'s ban on indirect purchaser suits). We emphasize that courts would still have to apply the antitrust standing rules, such as the remoteness test articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). *See supra* note 65 and accompanying text. The Seventh Circuit demonstrated in *Loeb Industries, Inc. v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), how, even after sidestepping *Illinois Brick*, courts may nevertheless deny standing on remoteness grounds. *See supra* note 69.

be initiated by indirect purchasers and direct purchasers must decide immediately whether to join the action. In short, this consolidated proceeding would both bring down the Illinois Walls and elevate fines to the level required to deter future violations.

B. LEARNING FROM THE PSLRA: DESIGNATING A LEAD PLAINTIFF

A consolidated proceeding presents two questions: how to encourage the initiation of the litigation, and who ultimately controls the litigation for the diverse collection of injured plaintiffs. The first question is especially critical for antitrust actions, where the propensity to detect and pursue an antitrust violation is central to deterring misconduct, and the second question becomes critical if claims are organized into a mandatory consolidated action. There might be some appeal to offering the entirety of treble damages to the first party—whether a direct or indirect purchaser—to identify a violation and bring suit. Though this would leave many injured parties uncompensated, it would heighten deterrence by steepening the incentives to detect violations, and it translates into a single action without the need for complex calculations. This proposal would amount to a "race to the courthouse," and is akin to the current *Illinois Brick* rule but without imposing restrictions on the identity of the plaintiff or presuming who the optimal plaintiff is. It would grant standing not categorically to the direct purchaser but to whoever first sues an alleged antitrust violator.[153] The question of control over a consolidated action might be handled similarly, where the first to initiate the suit would enjoy control over negotiations, litigation strategy, and ultimately attorneys' fees.

The problems of managing a multiplaintiff proceeding are well-known in securities law, and addressing those issues was a key motivation behind the PSLRA.[154] The race-to-the-courthouse problem arises when plaintiffs'

153. This is parallel to a "bonus system" for securities suits, in which the first plaintiff receives a reward meant to compensate costs of bringing the suit and to counteract the free-rider problem caused by class certification, collateral estoppel, and any other mechanism that would allow later parties to benefit from the first-mover's expenses. *See, e.g.*, Van Vranken v. Atlantic Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995) (holding incentive awards to class representatives as falling within the court's discretion, and outlining the factors for consideration). *See generally* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006) (justifying incentive awards as compensation for the additional risks and costs borne by class representatives).

154. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, (codified as amended at 15 U.S.C. § 77z-1 (2000)). *See* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 337–38 (1996) (explaining that one of the three prime motivations behind the Act was reforming securities class actions to better serve the interest of investors, rather than attorneys). *See also* H.R. REP.

lawyers scramble to take charge of the class action in order to claim the accompanying fees, and though they may instill optimal incentives, they tend to generate neither optimal behaviors nor optimal plaintiffs. Courts are flooded with meritless claims, which attorneys are motivated to file before they can properly evaluate the virtues of a suit.[155] Moreover, often the attorneys fortuitous enough to have arrived first may not be effective managers of the case, and the clients they represent (who must represent the class) may be unsophisticated or lack sufficient financial motivation to monitor their attorneys and push for an outcome that maximizes value to the class, rather than just to counsel.[156]

The deterrent effect of private enforcement of the antitrust laws can be enhanced by anticipating the inefficiencies of multiplaintiff litigation. Effective deterrence is possible only when plaintiffs can win—not just file—antitrust actions, and a first-to-file system opens the possibility to poorly-skilled but speedy plaintiffs filing actions, losing the case, and then precluding claims from other injured parties. Placing such a premium on speed—tempting the fleet with an enormous reward for a victorious suit—would also induce false or poorly conceived claims, thus hindering and deterring procompetitive and otherwise legal conduct. Finally, there are social gains from granting a claim to a plaintiff who is capable of handling the complexities of a case and whose incentives are aligned with social preferences. This is particularly important during the settlement process,

NO. 104-369, at 31–35 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730–34 (describing the importance of measures enacted to better manage litigation, including a method for determining the "most adequate plaintiff").

155. Avery, *supra* note 154, at 375. *See also* H.R. REP. NO. 104-369, at 33 (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 730, 732 ("Most often speed has replaced diligence in drafting complaints."); John F. Olson, David C. Mahaffey & Brian E. Casey, *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101, 1104–07 (1996) (providing a brief history of the "race to the courthouse" tradition and its impact upon drafting PSLRA and describing frequency of hastily drafted and error-ridden complaints filed within days of a stock price drop and "professional plaintiffs" essentially on standby).

156. *See* H.R. REP. NO. 104-369, at 32–33 (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 730 ("Floor debate in the Senate highlighted that many of the 'world's unluckiest investors' repeatedly appear as lead plaintiffs in securities class action lawsuits. . . . Lead plaintiffs are not entitled to a bounty for their services. Individuals who are motivated by the payment of a bounty or bonus should not be permitted to serve as lead plaintiffs. These individuals do not adequately represent other shareholders—in many cases the 'lead plaintiff' has not even read the complaint."). The conflicts of interest between counsel predisposed to accepting a settlement that is low but that adequately provides for fees, rather than a settlement that maximizes value for the plaintiff was well known to proponents of the PSLRA. Avery, *supra* note 154, at 372. The PSLRA deals with these by requiring that plaintiffs certify having reviewed and authorized the complaint, as well as recite that they did not purchase a security solely at the direction of their lawyer. *See* 15 U.S.C. § 77z-1(a)(2); Avery, *supra* note 154, at 375.

where most of these cases are resolved and where the danger is greatest for unsupervised attorneys to pursue resolutions that do not serve their clients' interests.[157]

These observations, in part, compelled Congress to replace the race to the courthouse that governed most securities class actions with a "lead plaintiff provision" in the PSLRA.[158] The lead plaintiff provision provides a mechanism in which the court can select one plaintiff to lead securities class actions. Following the filing of a securities class action, notice must be given to alert all potential class members of the filed complaint, and all purported members are permitted to join the action.[159] Within sixty days after notice is given, any class member may move the court to serve as the lead plaintiff, and the court is charged with selecting a plaintiff to direct the claim and lead the class.[160] Though the PSLRA contains a presumption that the plaintiff with the greatest economic stake in the action will be named the lead plaintiff, the court enjoys discretion to appoint another lead plaintiff upon proof that the presumptive lead plaintiff will not adequately represent or protect the interests of the class.[161]

As part of our mandatory consolidated action, we propose a lead plaintiff provision modeled on the similar provision in the PSLRA. Following the initiation of an antitrust suit and after appropriate notice is given, other parties claiming injury may join, after which the action becomes closed.[162] At this point, the court will entertain requests by the

157. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 525–26 (1991) (describing one study which found that less than 5 percent of the securities litigations pending in 1987 ever went to trial, and a smaller study which found that 83 percent of securities cases filed in Dallas federal district court settled). *See also* Mukesh Bajaj, Sumon C. Mazumdar & Atulya Sarin, Securities Class Action Settlements: An Empirical Analysis 9 (Nov. 17, 2000) (Working Paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=258027).

Identifying an optimal plaintiff—one that can manage complex litigation and has incentives aligned with social preferences—is especially important in antitrust cases, where many antitrust actions follow an inquiry by the Department of Justice or the Federal Trade Commission. If private actions follow government investigations, rather than playing leading roles in detecting and punishing anticompetitive conduct, then the motives behind rewarding the swift are entirely undermined. For these reasons, it is wise to incorporate discretion in the selection of the plaintiff, rather than leaving it to a race.

158. *See* Private Securities Litigation Reform Act of 1995 § 27(a)(3)(B)(ii), 15 U.S.C. § 77z-1. *See also* H.R. REP. NO. 104-369, at 32–35 (Conf. Rep.) (addressing the problems of "professional plaintiffs" and other class control concerns).

159. Private Securities Litigation Reform Act of 1995 § 27(a)(3)(A)(i).

160. *Id.*; *Id.* § 27(a)(3)(B).

161. *Id.* § 27(a)(3)(B)(iii).

162. This mechanism would also be available for a private class action following a suit by the government. Since private claims often follow government antitrust victories, a mandatory class action would organize the claims and administer a settlement more swiftly and efficiently than the morass of

suing parties to lead the action and will designate a lead plaintiff.[163] The court's designation would be directed by two guiding principles: first, a presumption in favor of the party who initiated the suit, and second, a presumption in favor of the party claiming the greatest damages. The first presumption is designed to enhance the incentives for potential plaintiffs to bring suit, and the second presumption (modeled after the PSLRA) is designed to identify the party best capable of handling the litigation and representing the preferences of the joined plaintiffs.[164] The court would be instructed to balance these two, potentially competing, presumptions while maintaining the same discretion that is afforded to courts under the PSLRA.[165] Such a balance is a necessary product of trying to design an efficiently administered proceeding that incentivizes the initiation of suits—with the prospect of control, attorneys' fees, and perhaps additional compensation—while avoiding a destructive race to the courthouse.

Enabling the court to appoint a lead plaintiff would also establish a responsible monitor for the antitrust action. The lead plaintiff would be required to take due care in articulating the theory of the claim, which not only assists the court but also increases the likelihood of the plaintiffs' success, and thus the effectiveness of deterring other anticompetitive conduct. The lead plaintiff would also be firmly positioned to guide the settlement process, which is where most antitrust claims are effectively resolved, and this consideration could play a large part in determining who will become the lead plaintiff. Although several elements of the PSLRA have received mixed reviews in its first ten years, there is good evidence that the lead plaintiffs in securities cases, which tend to be institutional

parallel and competing suits that now follow a government conviction.

163. Our proposal also permits the possibility of allowing subclasses of plaintiffs to each have its own counsel and lead subplaintiff.

164. A distinction should be drawn between weighing the relative magnitude of claims as part of a balancing to determine the lead plaintiff at the start of litigation and the more precise allocation of damages that would come after a successful prosecution of a private enforcement action. In the first stage, the judge weighs a non-dispositive factor and selects who among several plaintiffs should serve as the lead plaintiff, a decision that would fall within that judge's discretion. A more rigorous allocation would be required for the subsequent allocation of damages.

165. These presumptions are not dispositive (that is, they are merely presumptions), and in selecting a lead plaintiff, the presiding judge maintains discretion to consider the many other factors that judges currently enjoy in selecting a lead plaintiff for PSLRA actions. Those considerations might include the quality of a potential lead plaintiff's counsel, the representativeness of that plaintiff for the other parties, and the likelihood of reaching a reasonable settlement. Like selections of lead plaintiffs under the PSLRA, these selections would eschew a formulaic approach and instead adopt a case-by-case balancing of these factors that can reward a plaintiff's initiative while also taking stock of potential plaintiffs' relative motivations and resources going forward.

investors, have managed to generate higher settlement values and negotiate better fee structures with law firms, thereby reducing agency costs.[166]

C. ALLOCATING DAMAGES

The third, and final, element in our proposal would come at the end of the litigation or settlement. After a lead plaintiff is assigned to manage the mandatory consolidated action, and after that lead plaintiff has either reached an overall settlement with the defendant or received a judgment following trial, a third proceeding will allocate the total sum of damages among the separate parties.

This proceeding would engage in the very calculations that the *Illinois Brick* and *Hanover Shoe* Courts feared were wrought with complexity. Although there should be no illusions that this would be a simple determination, it should not be an excessively difficult task. As was discussed above, recent scholarship allays concerns that courts are ill-prepared to conduct this determination.[167] Calculating demand elasticity, which intimidated the *Illinois Brick* Court, would not be routinely required to compute the pass-on determinations,[168] and Hovenkamp has proposed a variety of effective methods, such as yardstick determinations, to assess passed-on overcharges that involve no demanding calculations.[169] Courts have proven capable of making these calculations in other antitrust cases,[170] and so this final determination should be no more difficult.

V. CONCLUSION

The *Illinois Brick* doctrine has proven to be an inadequate solution to a problem that is growing in severity, and the upcoming thirtieth anniversary of the *Illinois Brick* decision has served as a battle cry for reform. Despite a growing consensus for reform to the doctrine, however, the debate has been constrained by an undue emphasis on legal formalism and has failed to generate innovative solutions. Our approach returns to the rudiments of antitrust. We both base our critique of the current doctrine and

166. Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1505–06 (2006) (citations omitted); James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1624 (2006) (finding that institutional investors increase the value of resulting settlements when serving as lead plaintiffs).

167. *See supra* Part III.C.

168. *See* Harris & Sullivan, *supra* note 80, at 337–38.

169. HOVENKAMP, *supra* note 134, § 17.5b1–2.

170. *See* cases cited *supra* note 135.

develop our proposed reform on antitrust's core functional objectives. Meaningful reform of the indirect purchaser rule requires a comprehensive approach that begins with these principles and strives for innovative solutions.

We model the problem of antitrust standing as a challenge to organize the antitrust claims of multiple parties within a single distribution chain. This approach directly confronts the pervasiveness of multilayer supply chains and the reality that most antitrust violations impose varying injuries on multiple downstream parties. This type of challenge is not materially different from similar problems encountered in administering mass torts or violations of securities law, and we borrow from the experiences in those related areas of law to craft a solution. We ultimately propose a three-part administrative mechanism to replace the current *Illinois Brick* doctrine: a mandatory consolidated action, a court-appointed lead plaintiff, and an administrative hearing to allocate damages. We recognize that this approach is substantially different from proposals generated by the policy community thus far, but we hope it is greeted as a constructive contribution that will become part of a larger search for innovative and comprehensive approaches to rewriting antitrust rules of standing.