
Clayton Antitrust Act and Sherman Antitrust Act — Antitrust Trade and Regulation — Antitrust Standing — Apple Inc. v. Pepper

Antitrust standing doctrine has remained in uneasy repose since the Court's decision in *Illinois Brick Co. v. Illinois*,¹ over four decades ago.² Under *Illinois Brick*, standing to sue for violation of federal antitrust law had been reserved exclusively to those parties who purchased directly from price-setting monopolists.³ Indirect purchasers, who transacted with these direct purchasers rather than with the monopolist itself, had no standing, even if the direct purchaser "passed on" the full cost of the monopolistic overcharge in the form of higher prices.⁴ The Court prohibited these pass-through arguments because it judged itself ill-suited to efficiently determine what parts of an overcharge are passed on at any given stage in the chain of distribution.⁵ The Court also worried that allowing pass-through arguments would undermine deterrence, as indirect purchasers, who could not sue as effectively as direct purchasers, would be able to claim a portion of what would previously have gone to direct purchasers in a successful suit.⁶ Despite "fire-storm[s]" of public controversy,⁷ *Illinois Brick* still stands.

Last Term, in *Apple Inc. v. Pepper*,⁸ however, the Supreme Court held that app purchasers could sue Apple for an allegedly anticompetitive commission it charged to app developers, who set the prices that app purchasers paid.⁹ In *Apple*, traditional concerns of efficiency and deterrence¹⁰ were eclipsed by a strong focus on victim compensation. Viewed from this perspective, *Apple* signals a willingness to revisit the foundations of *Illinois Brick* and sets the stage for its overruling.

¹ 431 U.S. 720 (1977).

² *Illinois Brick* was a manufacturer and distributor of concrete blocks; *Illinois Brick* sold these blocks to masonry contractors; and the masonry contractors sold them to general contractors, who, finally, used them to construct buildings for the State of Illinois. *Id.* at 726.

³ *Id.* at 734–36. The Court held that the State of Illinois had no standing to sue *Illinois Brick* because it was too far too removed from *Illinois Brick* in the chain of distribution. *Id.* at 732–36.

⁴ *Id.* at 730.

⁵ *Id.* at 746–47.

⁶ *Id.*

⁷ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 365 (1991).

⁸ 139 S. Ct. 1514 (2019).

⁹ *Id.* at 1518–19.

¹⁰ *See, e.g., Illinois Brick*, 431 U.S. at 732, 746; *Hanover Shoe, Inc. v. United Shoe Machin. Corp.*, 392 U.S. 481, 492–94 (1968).

Every year, owners of iPhones collectively download billions of apps worldwide.¹¹ These apps are available to owners of the iPhone exclusively through Apple's App Store.¹² They are rapidly becoming an integral part of Apple's business model.¹³ The overwhelming majority of these apps are created by third-party developers.¹⁴ In exchange for access to the App Store, third-party developers pay Apple a \$99 annual membership fee and agree to allow Apple to keep a 30% commission on all sales of their apps through the Store.¹⁵ The sale price itself is determined by app developers, the only constraint being that the price end in 99 cents.¹⁶ The plaintiffs in this legal action were a class of app purchasers, claiming that Apple's 30% commission fee was "supracompetitive," possible only because Apple had monopolized the "market for distributing software applications that can be downloaded on the iPhone," with the result that consumers "paid more for their iPhone apps than they would have paid in a competitive market."¹⁷ Under section 4 of the Clayton Act, plaintiffs sought treble damages.¹⁸ Apple filed a motion to dismiss, arguing that the plaintiffs lacked standing because they did not qualify as direct purchasers.¹⁹

The district court granted Apple's motion to dismiss.²⁰ Writing for the court, Judge Rogers held that the plaintiffs lacked standing under *Illinois Brick*.²¹ The court began by reasoning that, under *Illinois Brick*, the plaintiffs' status as direct or indirect purchasers is generally dispositive: direct purchasers, the first purchasers in the distribution chain, may sue, whereas indirect purchasers, who bear any overcharges direct purchasers pass on through higher prices, may not.²² Applying these definitions, the court found that the plaintiffs failed to qualify as direct purchasers because Apple's 30% commission fee was "borne by

¹¹ Mansoor Iqbal, *App Download and Usage Statistics (2019)*, BUS. OF APPS (last updated Aug. 7, 2019), <https://www.businessofapps.com/data/app-statistics/> [https://perma.cc/QP4R-QNYS].

¹² Jefferson Graham, *Imagine Apple's App Store with No Walled Garden*, USA TODAY (May 14, 2019, 3:33 PM), <https://www.usatoday.com/story/tech/talkingtech/2019/05/14/what-if-apple-ios-store-had-lower-prices-more-competition/3667008002/> [https://perma.cc/4XVF-7738].

¹³ See Prachi Bhardwaj & Shayanne Gal, *The App Store Has Made Apple at Least \$40 Billion in Revenue Since It Was Created 10 Years Ago Today*, BUS. INSIDER (July 10, 2018, 4:44 PM), <https://www.businessinsider.com/app-store-apple-40-billion-dollars-revenue-ten-years-charts-2018-7> [https://perma.cc/ZC74-W3Q2].

¹⁴ Iqbal, *supra* note 11.

¹⁵ *Apple*, 139 S. Ct. at 1519.

¹⁶ *Id.*

¹⁷ *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714, 2013 WL 6253147, at *1–2 (N.D. Cal. Dec. 2, 2013) (quoting the Second Amended Complaint).

¹⁸ See *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 320 (2017).

¹⁹ *Apple*, 139 S. Ct. at 1521–22.

²⁰ *Apple iPhone Antitrust Litig.*, 2013 WL 6253147, at *1.

²¹ *Id.* at *6.

²² *Id.* at *3.

the developers” and paid to Apple “from their own proceeds.”²³ Apple’s conduct did not “equate to price fixing” with respect to the plaintiffs,²⁴ because the developers, not Apple, had “set[] the price [consumers] directly paid.”²⁵ The court refused to “speculate” as to the price at which Apple would have sold apps in the absence of a commission fee.²⁶ Such speculation, the court feared, would have mired it in overly technical proceedings regarding “developers’ pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return.”²⁷ For these reasons, the court concluded that plaintiffs lacked standing.²⁸

The Ninth Circuit Court of Appeals reversed and remanded.²⁹ Writing for the panel, Judge Fletcher³⁰ held that the plaintiffs were, in fact, direct purchasers with standing to sue under *Illinois Brick*.³¹ The court rejected the notion that its standing analysis should turn on “who determines the ultimate price paid by the buyer of an iPhone app,” on whether Apple received its payment in the form of a markup or a commission, or “on the fact that Plaintiffs pay the App Store.”³² Instead, the court treated Apple’s position in the distribution chain as determinative: “[I]f Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.”³³ Having found that Apple sold apps directly to the plaintiffs through the App Store, the court concluded that the plaintiffs did have standing.³⁴

The Supreme Court affirmed.³⁵ Writing for the Court, Justice Kavanaugh³⁶ held that plaintiffs had standing because they purchased their apps directly from Apple.³⁷ The Court rejected Apple’s price-setting rule for reasons of statutory interpretation and economic policy. The Court noted: “Section 4 of the Clayton Act . . . provides that ‘any person who shall be injured in his business or property by reason of

²³ *Id.* at *6.

²⁴ *Id.*

²⁵ *Id.* (quoting *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 753 (9th Cir. 2012)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 325 (9th Cir. 2017).

³⁰ Judge Fletcher was joined by Judges Tashima and Gettleman, who was sitting by designation.

³¹ *Apple iPhone Antitrust Litig.*, 846 F.3d at 315.

³² *Id.* at 324.

³³ *Id.* at 322. The court identified *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990), as precedential foundation for this interpretation.

³⁴ *Id.* at 324.

³⁵ *Apple*, 139 S. Ct. at 1519.

³⁶ Justice Kavanaugh was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

³⁷ *Apple*, 139 S. Ct. at 1519.

anything forbidden in the antitrust laws may sue . . . the defendant.”³⁸ Emphasizing the breadth of the terms “any person” and “injured,” the Court found the statutory language expansive enough to “readily cover[] consumers” in plaintiffs’ position.³⁹ As for precedent, the Court interpreted *Illinois Brick* as “establish[ing] a bright-line rule”⁴⁰ — “if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator.”⁴¹ For the Court, the application of this rule was likewise straightforward — because “[t]he iPhone owners pay the alleged overcharge directly to Apple,” no intermediaries intervene between monopolist and consumer, removing any obstacle to consumer standing.⁴² Finally, the Court rejected Apple’s price-setting rule as an elevation of form over substance that would “gerrymander Apple out of this and similar lawsuits.”⁴³ The Court found that under a price-setting rule, Apple would escape liability for conduct economically indistinguishable from what — in the markup context — is presently recognized as paradigmatically anticompetitive behavior.⁴⁴

The Court also defended its holding in terms of the three primary goals underlying *Illinois Brick*: “(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages.”⁴⁵ As for improving enforcement, the Court stated that depriving consumers of standing “makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.”⁴⁶ The Court then forcefully rejected the notion that damages calculations would be significantly more complex than those the Court routinely performs in “retailer markup case[s].”⁴⁷ Finally, the Court dismissed worries about duplicative damages as founded upon a misconception about the economic relations between Apple, developers, and consumers.⁴⁸ Apple can be understood as a “bottleneck monopolist [and] monopsonist.”⁴⁹ As such, consumers and developers would sue Apple under distinct “theories of harm,” with no risk of duplicative damages.⁵⁰

³⁸ *Id.* at 1520 (quoting ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a) (2012))).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1521.

⁴² *Id.*

⁴³ *Id.* at 1522–23.

⁴⁴ *Id.* at 1523–24.

⁴⁵ *Id.* at 1524.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1524–25.

⁴⁹ *Id.* at 1525.

⁵⁰ *Id.*

Justice Gorsuch dissented.⁵¹ He balked at the majority's "bright-line rule" interpretation of *Illinois Brick*,⁵² on the grounds that it "replace[d] a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity."⁵³ The dissent read *Illinois Brick* through the lens of *Hanover Shoe v. United Shoe Machinery Corp.*⁵⁴ In *Hanover Shoe*, a distributor of shoes sued the monopolist manufacturer of vital shoe-making machinery.⁵⁵ To limit its damages, the monopolist argued that the distributor had passed off a portion of its overcharges to consumers, and so had itself borne only some of the injury.⁵⁶ The *Hanover Shoe* Court rejected this argument, the *Apple* dissent argued, to avoid "the sort of problems traditional principles of proximate cause were designed to avoid": "nearly insuperable" questions about an intermediate entity's capacity to pass on overcharges.⁵⁷ For the dissent, *Illinois Brick* was merely "the other side of the coin," a precedent that applied the same proximate-cause principles to offensive claims as *Hanover Shoe* had applied to defensive ones.⁵⁸

Applying this understanding, the dissent found that because "[p]laintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control," their theory of harm relied upon "exactly the kind of 'pass-on theory' *Illinois Brick* rejected."⁵⁹ By treating formal relationships as fundamental, the dissent argued, the majority courted the exact problems that *Illinois Brick* had solved.⁶⁰ Because "Apple charged only one commission on each sale," Justice Gorsuch wrote, separate suits from consumers and developers would necessarily expose Apple to liability for duplicative damages.⁶¹ Determining what share of these damages belong to which party would require burdensome pass-through calculations.⁶² Furthermore, Justice Gorsuch continued, reducing *Illinois Brick* to a bright-line rule counterproductively privileges form over substance: Apple could simply restructure its business so that consumers are in privity with app developers instead.⁶³ The dissent, therefore, chastised the Court for trading an "intelligible, principled, [and]

⁵¹ *Id.* (Gorsuch, J., dissenting). Justice Gorsuch was joined by Chief Justice Roberts and Justices Thomas and Alito.

⁵² *See id.* at 1521 (majority opinion).

⁵³ *Id.* at 1526 (Gorsuch, J., dissenting).

⁵⁴ 392 U.S. 481 (1968).

⁵⁵ *Id.* at 483–84.

⁵⁶ *Id.* at 487–88.

⁵⁷ *Apple*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

⁵⁸ *Id.* at 1526–27.

⁵⁹ *Id.* at 1528.

⁶⁰ *Id.* at 1529–30.

⁶¹ *Id.* at 1529 n.3.

⁶² *Id.* at 1529.

⁶³ *Id.* at 1529–30.

administrable” rule for one that was “artificial,” less administrable, and, ultimately, less capable of restraining anticompetitive conduct.⁶⁴

Because the contours of antitrust law are underdetermined by the open-ended language of the Sherman Antitrust Act,⁶⁵ each antitrust-standing case represents a judicial effort to imbue the statutory scheme with greater specificity, in ways that rest upon judgments about the goals of antitrust law writ large.⁶⁶ These ends include compensation for victims, disgorgement of ill-gotten gains — jointly, corrective justice — deterrence, and judicial economy. In *Hanover Shoe*, the Court signaled a strong policy preference for judicial efficiency and deterrence over corrective justice. *Illinois Brick* reaffirmed this preference. The *Apple* majority, however, overturned this paradigm by reweighting the aforementioned policy values in favor of victim compensation. In so doing, the Court affirmed the letter of past precedent while striking at its spirit, priming antitrust jurisprudence for an eventual overruling of *Illinois Brick*.

In deciding antitrust standing cases, the Court has shown itself cognizant of three goals: deterrence, judicial economy, and corrective justice.⁶⁷ Corrective justice, briefly stated, obtains when “liability rectifies the injustice inflicted by one person on another.”⁶⁸ When one party wrongly appropriates what belongs to another, corrective justice “re-establishes the initial equality by depriving one party of the gain and restoring it to the other party.”⁶⁹ In the antitrust context, when a consumer pays an illegally high price for a good, she is being deprived of what lawfully belongs to her in the amount of the overcharge she pays. Justice is restored when the monopolist returns its supracompetitive overcharge to the consumer.⁷⁰ From the beginning of the antitrust standing line of cases, the Court described itself as crafting a standing jurisprudence under conditions of scarcity — under real-world constraints, it is impossible to realize all three goals of antitrust maximally. Rational plans must account for the relative worth of each goal and for the costs of achieving more of one goal in terms of another.

⁶⁴ *Id.* at 1531.

⁶⁵ 15 U.S.C. § 1 (2012).

⁶⁶ See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662–63 (1982); C. Paul Rogers III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611, 631 (1977).

⁶⁷ See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746–47 (1977).

⁶⁸ Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (interpreting the concept as first developed by Aristotle in the *Nicomachean Ethics*); see also Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U. L. REV. 741, 743–45 (2000).

⁶⁹ Weinrib, *supra* note 68, at 349; see also Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 n.7 (1986).

⁷⁰ See Robertson, *supra* note 68, at 756.

The Court's holding in *Hanover Shoe* compromised corrective justice to promote judicial efficiency and deterrence. There, the Court stated that the need to deter efficiently barred monopolist defendants from asserting pass-through defenses.⁷¹ Without pass-through analysis, however, it is practically impossible to know how much of the overcharge the consumer-plaintiff has absorbed as injury.⁷² A prohibition on pass-through defenses, then, inflates the damages successful plaintiffs receive. This willingness to award successful plaintiffs more than they deserved violates corrective justice. Caught in this dilemma, the *Hanover Shoe* Court chose efficiency and deterrence over corrective justice.⁷³

In *Illinois Brick*, the Court reaffirmed *Hanover Shoe*'s willingness to sacrifice corrective justice for deterrence and judicial efficiency. As *Hanover Shoe* barred defensive pass-through arguments, *Illinois Brick* barred their offensive use.⁷⁴ If, therefore, *Hanover Shoe* compromised corrective justice by providing "middlemen" plaintiffs with too much, *Illinois Brick* compromised it by providing the ultimate consumers with too little — in fact, with nothing.⁷⁵ As Professors Daniel Berger and Roger Bernstein write: "[*Illinois Brick*] seemed to swing the pendulum . . . the Court sacrificed compensation . . . at the altar of . . . countervailing policies."⁷⁶

Yet applying the principles of *Hanover Shoe* to reach a parallel conclusion on the facts of *Illinois Brick* was not logically necessary,⁷⁷ but rather a consequence of value-laden commitments. By prohibiting pass-through defenses, the Court in *Hanover Shoe* ensured that antitrust violators would keep less than they deserved, and that victims would receive more than they deserved. This arrangement violates corrective justice vis-à-vis the wrongdoer, because a defendant unable to assert pass-through defenses will be liable to the first purchaser for the full amount of the overcharge and then again to every subsequent overcharged purchaser.

⁷¹ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492–94 (1968).

⁷² See 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, 615–21 (1979).

⁷³ For competing views on the tension between deterrence and compensatory justice, compare Landes & Posner, *supra* note 72, with Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979).

⁷⁴ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 724–26, 735 (1977).

⁷⁵ See Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375, 389–90 (1997); see also Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 575–613 (2005) (reviewing internal deliberation of Justices).

⁷⁶ Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 872 (1977).

⁷⁷ See Thomas W. Dunfee, *Privity in Antitrust: Illinois Brick v. Illinois*, 16 AM. BUS. L.J. 107, 111–12 (1978).

Adding *Illinois Brick* to *Hanover Shoe* did not restore corrective justice; it merely changed the type of violation. By prohibiting pass-through offenses, the Court eliminated a source of double damages liability. The Court provided this protection to wrongdoers, however, through a standing rule that ensured many victims would receive less than they deserved. While the balance under *Hanover Shoe* alone tipped too far against wrongdoers, then, the balance under *Hanover Shoe* cum *Illinois Brick* tipped too far against victims.

These two ways of failing to achieve corrective justice are qualitatively different, and reasonable people with divergent normative commitments could disagree on which was worse, and by how much. If, for example, one believed that undercompensating victims were a graver evil than exposing monopolist wrongdoers to excessive damages, by such a margin as to render the gains to deterrence and efficiency inadequate, then one could affirm *Hanover Shoe* while repudiating the addition of *Illinois Brick*.⁷⁸ *Hanover Shoe* entails *Illinois Brick* only on the controversial premise that the gains to efficiency and deterrence compensate for the moral gap, if any, between a regime that errs on the side of monopolist wrongdoers and one that errs on the side of consumer victims.⁷⁹ This premise is normative, not analytic.

Justice Brennan's *Illinois Brick* dissent represented an alternative vision of antitrust values, according to which corrective justice, and specifically victim compensation, dominates judicial efficiency and deterrence.⁸⁰ It is a vision reproduced — at times with uncanny accuracy — by Justice Kavanaugh. Though the Court, before *Illinois Brick*, had never previously relied on a close reading of the Clayton Act, Justice Brennan interrogated the statutory text first.⁸¹ He attended especially to its “any person who shall be injured” language, and found therein the right for all, and “especially for consumers,” to seek a “remedy” for antitrust-related injuries.⁸² Justice Kavanaugh began the same way and drew the same conclusions from the same statutory language.⁸³ He then forged further along the same path, by stating that the text's remedial focus should be a hermeneutic for interpreting ambiguous precedent,⁸⁴ an advance that would no doubt have pleased the author of the *Illinois Brick* dissent.

⁷⁸ One can imagine a Rawlsian “maximin” argument for this position. See JOHN RAWLS, A THEORY OF JUSTICE 130–152 (rev. ed. 1999).

⁷⁹ Cf. Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 43–44 (2004).

⁸⁰ See Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 77 (2007).

⁸¹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 748 (1977) (Brennan, J., dissenting).

⁸² *Id.* at 748, 754.

⁸³ See *Apple*, 139 S. Ct. at 1520.

⁸⁴ *Id.* at 1522.

The next step in Justice Brennan's dissent searched out the policies underlying the text. Here, he emphasized the "effectiveness of the treble-damages action" and the need to "prevent[] wrongdoers from retaining the spoils of their misdeeds," and argued that these policies are best served by indirect-purchaser standing.⁸⁵ Justice Kavanaugh agreed, writing that denying indirect-purchaser standing would "directly contradict the longstanding goal of effective private enforcement and consumer protection."⁸⁶ Both dismissed with equal brevity long-standing arguments that allowing indirect purchasers to sue actually cuts sharply against deterrence.⁸⁷

Even more notable is the accord with which the two Justices disposed of the critique that allowing indirect purchasers to sue would render damages calculations impossibly complex. Justice Brennan wrote simply that such "may be said of almost all antitrust cases."⁸⁸ Justice Kavanaugh, with the same terseness, echoed this reply: a complex damages calculation "is hardly unusual in antitrust cases."⁸⁹ Neither pointed to any economic or mathematical tools that might render such calculations manageable, where they were previously beyond the Court's ken.⁹⁰

Finally, both rejected worries about multiple liability in short order. Although Justice Brennan's rationale was more procedure-based⁹¹ and Justice Kavanaugh's was more conceptual,⁹² both dismissed the concern without probing much into technical detail. Both thereby suggested that multiple liability is a secondary concern.

In this way, *Apple* signaled a reweighting of the policy goals of antitrust law, on a scale already drawn up in the *Illinois Brick* dissent. Although the Court claimed to be moving in lockstep with *Illinois Brick*, the Court's altered preferences regarding the contours of antitrust law are revealed in the lack of rigor with which the *Apple* majority engaged contrary policy arguments. The Court met each of the *Apple* dissent's policy arguments at a high level of generality rather than at the close-cropped level of technical detail.⁹³ In so doing, the majority also evoked the *Illinois Brick* dissent. This approach suggests that the Court did not so much decisively refute each counterargument as it simply

⁸⁵ *Illinois Brick*, 431 U.S. at 753 (Brennan, J., dissenting).

⁸⁶ *Apple*, 139 S. Ct. at 1524.

⁸⁷ See *id.*; *Illinois Brick*, 431 U.S. at 753 (Brennan, J., dissenting).

⁸⁸ *Illinois Brick*, 431 U.S. at 758 (Brennan, J., dissenting).

⁸⁹ *Apple*, 139 S. Ct. at 1524.

⁹⁰ This reticence was not for lack of colorable candidates. See Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 26–30, *Apple*, 139 S. Ct. 1514 (No. 17–204).

⁹¹ See *Illinois Brick*, 431 U.S. at 761 (Brennan, J., dissenting).

⁹² See *Apple*, 139 S. Ct. at 1525.

⁹³ On Justice Kavanaugh's part, this reticence is not for lack of subtle and favorable arguments in the scholarship fully at the Court's disposal. See, e.g., Adam Thimmesch, *Beyond Treble Damages: Hanover Shoe and Direct Purchaser Suits After Comes v. Microsoft Corp.*, 90 IOWA L. REV. 1649, 1667 (2005).

reweighted the competing policy considerations in favor of victim compensation.

Given the prevalence of state-level *Illinois Brick* repealers, the advent of *parens patriae*, and the increasing sophistication of economic methods suitable for pass-through calculations, this reorientation of fundamental values signals the unraveling of *Illinois Brick*. The ascendancy of a procompensation framing of antitrust standing inclines toward the express allowance of offensive pass-through arguments. This inclination is more likely to become manifest than in the past given practical developments since *Illinois Brick*.⁹⁴ Far from settling the debate over antitrust standing, the Court's holding in *Illinois Brick* provoked a public controversy that included no less than a “decade of congressional hearings.”⁹⁵ One consequence was states’ enactment of *Illinois Brick* repealers — statutes meant to override the precedent for state courts.⁹⁶ In the face of an extensive record of state court adjudications, it becomes increasingly implausible for federal courts to insist the necessary damages calculations pose insuperable difficulties.⁹⁷ Development of more sophisticated economic instruments is also believed to provide much improved prospects for damages calculations.⁹⁸ Second, state Attorneys General’s capacity to bring a suit on behalf of numerous aggrieved consumers under *parens patriae* is just the sort of procedural device that would alleviate concerns that insufficient consolidation of claims would vitiate deterrence.⁹⁹

Justice Kavanaugh did not mention any of these developments explicitly in his *Apple* opinion, instead portraying the Court’s reasoning as furthering the primary goals underlying *Illinois Brick*. However, a closer analysis of the opinion reveals a reweighting of traditional antitrust values more closely aligned with Justice Brennan’s dissent in *Illinois Brick*. This inversion of values in *Apple*, together with the developments in legislation and economic models since 1977, underscores the present fragility of *Illinois Brick*.

⁹⁴ See generally Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (2001).

⁹⁵ See generally Eskridge, *supra* note 7, at 365.

⁹⁶ See Davis, *supra* note 75, at 375–76.

⁹⁷ See Brief of Antitrust Scholars, *supra* note 90, at 26–30.

⁹⁸ *Id.*

⁹⁹ See Davis, *supra* note 75, at 385 n.46.