"*ILLINOIS BRICK*-BREAKER" FOR SALE IN THE APP STORE: *APPLE V. PEPPER* AND THE NEED FOR A NEW ANTITRUST STANDING DOCTRINE

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I. INTRODUCTION

As the tech economy has boomed through the first two decades of the twenty-first century, a select few firms have come to dominate the space.[1] In response, heightened antitrust scrutiny of big tech companies and major digital platforms is slowly but surely on the rise and will likely continue ramping up in the foreseeable future.[2] However, existing antitrust doctrine "incompletely capture[s]" the economic structure of these platforms, presenting courts with a unique challenge.[3]

The inadequacy of existing precedent was on clear display in May of 2019, when the Supreme Court decided *Apple Inc. v. Pepper*.[4] The case involved Apple's allegedly anticompetitive behavior in the administration of its App Store, a digital marketplace that is the only place where Apple consumers can purchase apps for their Apple devices. The plaintiffs, a group of iPhone

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1. *See* Farhad Manjoo, *Tech's 'Frightful 5' Will Dominate Digital Life for Foreseeable Future*, N.Y. TIMES (Jan. 20, 2016), https://www.nytimes.com/2016/01/21/technology/techs-frightful-5-will-dominate-digital-life-for-foreseeable-future.html; *see also* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712–13 (2016) (noting that as of 2013, Amazon "sold more than its next twelve online competitors combined").

2. *See* Brent Kennedy, *Justice Department to Open Broad, New Antitrust Review of Big Tech Companies*, WALL ST. J. (July 23, 2019, 5:34 PM), https://www.wsj.com/articles/justice-department-to-open-broad-new-antitrust-review-of-big-tech-companies-11563914235; *see also* Tony Romm, *Amazon could face heightened antitrust scrutiny under a new agreement between U.S. regulators*, WASH. POST (June 1, 2019), https://www.washingtonpost.com/technology/2019/06/02/amazon-could-face-heightened-antitrust-scrutiny-under-new-agreement-between-us-regulators/ (reporting that the FTC and the Department of Justice were entering into the type of agreement to divvy up competition oversight of large tech companies that "typically presages more serious antitrust scrutiny"); Cecilia Kang, David Streitfeld & Annie Karni, *Antitrust Troubles Snowball for Tech Giants as Lawmakers Join In*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/technology/facebook-ftc-antitrust.html.

3. Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine After* Ohio v. Amex *and the* Apple v. Pepper *Decision That Should Have Been*, 98 NEB. L. REV. 425, 440 (2019).

4. 139 S. Ct. 1514 (2019).

owners, alleged that Apple abused its monopoly power over the iPhone apps market in the App Store by charging app developers a thirty-percent commission on each app they sell.[5] This in turn, the plaintiffs alleged, forced consumers to pay higher prices than they would have in a competitive market.[6]

The App Store is an example of a two-sided marketplace. It acts as an intermediary selling "different products to different groups of consumers."[7] To the app developers, it provides a marketplace to sell their apps to iPhone users. On the other side, the App Store sells the apps to the iPhone users. Two-sided markets are by no means a new phenomenon: credit card networks that cater to both merchants on one side and cardholding purchasers on the other are a prime example of a market in which consumers and sellers meet on a platform.[8] However, two-sided markets are increasingly common in the modern economy, particularly in the tech sector with the rise of digital platforms.

The crucial feature of two-sided marketplaces is that effects on one side of the market impact users on the other side.[9] Indeed, the demands of platform participants are interdependent.[10] Participants on one side of the marketplace rely on the participation of the users on the other side.[11] Take Uber and Lyft as examples. Riders' demand for the platforms depends on active participation by drivers on the other side, and vice versa.[12] This phenomenon, in which consumers on one side of a platform benefit from increased use by the consumers on the other side, is called an "indirect network effect."[13] The rideshare platforms' attractiveness to riders depends on the riders' ability to request rides from their specific location on short notice, which requires widespread availability of drivers.[14] Riders will only value the service if they can trust that their trip will be accepted by a driver in a reasonably short time frame,

5. Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).

6. *Id.*

7. ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, RETHINKING ANTITRUST TOOLS FOR MULTI-SIDED PLATFORMS 10 (2018), *available at* www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm.

8. *See id.*; Michael Katz & Jonathan Sallet, *Multisided Platforms and Antitrust Enforcement*, 127 YALE L.J. 2142, 2143 (2018); Erik Hovenkamp, *Platform Antitrust*, J. CORP. L. 713, 714 (2019).

9. David S. Evans & Richard Schmalensee, *Markets with Two-Sided Platforms, in* 1 ISSUES IN COMPETITION L. & POL'Y 667, 667 (2008).

10. Hovenkamp, *supra* note 8, at 720.

11. *Id.*

12. *See id.*

13. Evans & Schmalensee, *supra* note 9, at 671.

14. *See* Hovenkamp, *supra* note 8, at 720.

and drivers will only find offering their services worthwhile if there is a steady stream of riders taking trips.[15]

In the antitrust context, the interdependence of two-sided marketplaces adds a degree of complexity to conventional economic analyses of pricing and competition.[16] Substantive antitrust doctrines have evolved to account for these types of phenomena; for example, by developing the "rule of reason" analysis.[17] However, more procedural doctrines, such as the standing analysis, have been much slower to evolve, leaving courts with anachronistic tools for evaluating modern business structures and practices. This tension came to a head in *Apple v. Pepper*.

In light of the increasing ubiquity of digital platforms and the heightened antitrust scrutiny they continue to attract, it is imperative that courts have the appropriate tools to analyze these types of marketplaces. In this Note, I argue that the *Illinois Brick* indirect purchaser rule, applied in *Apple v. Pepper*, is a poor tool for analyzing antitrust standing in two-sided marketplaces and that the Court missed a critical opportunity to dispense with it and instead adopt a test better suited to the nuances of two-sided marketplaces.[18] I then consider an alternative test that I argue would reach the same correct outcome, but based on reasoning that better suits two-sided marketplaces like the App Store.

In Part II, I provide the necessary background information for considering *Apple v. Pepper*. I first provide an overview of the core goals of antitrust law and the relevant statutes implicated in the decision. I then summarize *Hanover Shoe* and *Illinois Brick*, two antitrust cases that lay the foundation for the indirect purchaser rule at issue in *Apple v. Pepper*. In Part III, I outline the procedural history of *Apple v. Pepper* and summarize the majority and dissenting opinions. In Part IV, I discuss why *Illinois Brick* does not serve two-sided marketplaces. Finally, I evaluate an alternative test courts might use to analyze standing issues and consider how *Apple v. Pepper* might have been decided using this test.

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15. *See id.*

16. *Id.* at 719.

17. In the rule of reason analysis, courts evaluate countervailing pro- and anticompetitive effects incrementally through a multi-stage burden-shifting framework. For an overview of the rule of reason analysis and its application in practice, see Hovenkamp, *supra* note 8, at 744.

18. I express no opinion about whether *Illinois Brick*'s indirect purchaser rule remains a useful tool for analyzing other types of marketplaces, such as those with vertical distribution chains.

II. BACKGROUND

A. THE FEDERAL ANTITRUST LAWS & PRIVATE ENFORCEMENT

The federal antitrust laws aim to "maximize consumer welfare" by encouraging competitive behavior between firms while allowing them to reap benefits that may come from "internal or jointly created production efficiencies."[19] In short, they encourage competition and collaboration and forbid collusion.

The Sherman Act of 1890 and the Clayton Act of 1914 are the primary vehicles for promoting these goals. The Sherman Act sets forth "general prohibitions" on "trade restraints and monopolization."[20] Over time, the Sherman Act has been "interpreted to condemn only *unreasonable* restraints of trade."[21] A few decades later, Congress passed the Clayton Act to specifically prohibit certain categories of conduct, including price discrimination, tying, exclusive dealing arrangements, and mergers by acquisition, which would substantially lessen competition in the industry or "tend to create a monopoly."[22]

The Sherman Act and the Clayton Act comprise a two-pronged enforcement regime to promote competition, with private enforcement supplementing "inevitably selective" public enforcement.[23] Indeed, the Clayton Act empowers "any person" injured in their business or property by "anything forbidden in the antitrust laws" to sue and recover "threefold [] damages."[24] The treble damages provision generates a "powerful financial incentive" to both detect violations of the antitrust law and prosecute violators in the court system.[25] Without the possibility of increased damages, injured parties may not find it worthwhile to proceed through the complex litigation process.[26] Similarly, if damages were fixed at the amount of the overcharge, it would often be profitable for defendant firms to continually violate the

19. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application 100a (4th ed. 2013–2018).

20. *Id.* at 301b3.

21. *Id.* (emphasis added); *see also* Ass'n. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 531 (1983) (citing Nat'l Society of Professional Engineers v. U.S., 435 U.S. 679, 687–88 (1978)) (noting that "restraint is the very essence of every contract" and if the Sherman Act were read literally, it would "outlaw the entire body of private contract law").

22. Areeda & Hovenkamp, *supra* note 19, at 301b1.

23. *Id.* at 330b.

24. 15 U.S.C. § 15(a) (1914).

25. Areeda & Hovenkamp, *supra* note 19, at 330b.

26. *See id.*

antitrust laws since, at worst, they would merely have to pay back their ill-gotten gains if they were ever caught.[27]

Just as courts have developed the substantive aspects of federal antitrust law over time, they have similarly grappled with the procedural issue of who has standing to privately enforce the antitrust laws.

B. CASE LAW: *HANOVER SHOE* & *ILLINOIS BRICK*

Two particular cases lay the groundwork for the current federal antitrust standing doctrine, which is at the heart of the dispute in *Apple v. Pepper*. In the case, the Court was faced with the question of whether the plaintiffs were "direct purchasers," and thus had standing to sue under the 1977 Supreme Court decision *Illinois Brick Co. v. Illinois*.[28] *Illinois Brick*, in turn, interpreted the applicability of a rule decided in a previous case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[29]

1. *Hanover Shoe*

In *Hanover Shoe*, the defendant, United, produced shoe-making machinery, which it leased to shoe manufacturers, including the plaintiff Hanover Shoe.[30] Hanover Shoe brought suit against United, alleging that United's monopoly over the shoe-making equipment allowed it to lease out the equipment at inflated prices.[31] Hanover Shoe sought to recover the amount of the overcharge, or the difference between what it paid United and what it would have paid in a competitive market where United could not have inflated the prices.[32]

In its defense, United argued that Hanover suffered "no legally cognizable injury" because it "passed on" the overcharge to its consumers by increasing the price of its shoes.[33] The Supreme Court rejected this defense, finding that Hanover Shoe made out its prima facie case of injury and damage by showing that it had paid a price that was "illegally high" and demonstrating "the amount of the overcharge."[34] Hanover remained "equally entitled to damages" regardless of whether it absorbed the overcharge or opted to pass the overcharge on to its own customers in the form of higher shoe prices.[35]

27. *Id.*
28. *See* 431 U.S. 720 (1977).
29. 392 U.S. 481 (1968).
30. *Id.* at 481.
31. *Id.* at 483.
32. *Id.* at 484.
33. *Id.* at 487, 494.
34. *Id.* at 489.
35. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968).

The Court justified its decision by alluding to the administrability concerns that would befall courts if defendants were able to rely on a "pass-on" defense.[36] In particular, the Court noted that a successful pass-on theory of defense would require "a convincing showing of . . . . virtually unascertainable figures," such as whether Hanover Shoe would have raised prices even absent the overcharge.[37] Moreover, if such a defense were available, the Court feared that defendants would "frequently" invoke it to avoid potential treble-damage liability and that this would lead to overly drawn out and complex proceedings involving "massive evidence and complicated theories."[38]

2. Illinois Brick

Illinois Brick broadened the restriction on the pass-on theory, holding that it should apply equally to plaintiffs and defendants.[39] In *Illinois Brick*, the State of Illinois attempted to sue a group of concrete brick manufacturing companies for allegedly engaging in a conspiracy to fix the prices of concrete blocks.[40] However, Illinois did not purchase the blocks directly from Illinois Brick or the other manufacturing companies. Instead, the manufacturers sold the bricks to masonry contractors who used them to build masonry structures.[41] The masonry contractors then sold the structures to general contractors, who incorporated them into entire buildings.[42] The State of Illinois, as the end-consumer in the chain, then bought those buildings from the general contractors.[43] The concrete blocks had passed through "two separate levels" of the distribution chain before reaching the State of Illinois.[44] Nevertheless, Illinois alleged that it overpaid for the buildings by more than $3 million because of Illinois Brick's price-fixing conspiracy at the top of the chain.[45]

In deciding the case, the Supreme Court extended the logic of *Hanover Shoe*, holding that if defendants could not use a "pass-on" theory of defense, Illinois as a plaintiff could not seek to recover an anticompetitive overcharge that was "passed on" to it by an intermediary in the supply chain.[46] This meant that only *direct* purchasers—those who actually purchase the goods directly from

36. *Id.* at 493.
37. *Id.*
38. *Id.*
39. Ill. Brick Co. v. Ill., 431 U.S. 720, 728 (1977).
40. *Id.* at 726–27.
41. Ill. Brick Co. v. Ill., 431 U.S. 720, 727 (1977).
42. *Id.*
43. *Id.* at 726.
44. *Id.*
45. *Id.* at 727.
46. *Id.* at 728.

the alleged antitrust violator—can seek treble damages for antitrust violations, while *indirect* purchasers—those more than one step removed from the antitrust violator in the supply chain—cannot bring such an action.

Three particular policy rationales motivated the *Illinois Brick* Court to disallow all indirect purchaser suits. First, the Court feared that allowing indirect purchaser suits would expose firms to "serious risk of multiple liability."[47] Allowing an offensive pass-on theory of recovery presumes that the direct purchaser can seek full recovery for the overcharge. However, *Hanover Shoe* would prevent the defendant from "using that presumption against the other plaintiff."[48] Such a result would mean that "overlapping recoveries are certain to result," since multiple plaintiffs could each seek the full amount of the overcharge, even if they had passed the overcharge directly on to their own consumers.[49] This could potentially be devastating for a firm given that each antitrust plaintiff would be empowered to seek treble damages.[50]

Second, the Court reasoned that a regime that only allowed the direct purchaser to pursue treble damages would better incentivize vigorous private enforcement of the antitrust laws, as opposed to a rule which allowed all injured parties to sue.[51] Not only would this regime permit direct purchasers to "recover the full amount of the overcharge," even if they had passed it on to their consumers, it would also spare direct purchasers "the burden of litigating the intricacies of pass-on,"[52] thus potentially making them more likely to come forward with their claims.

Third, the Court echoed *Hanover Shoe*'s administrability concern that pass-on theories of recovery would "injec[t] extremely complex issues into the case."[53] The Court considered the complexity to be a problem unto itself but also feared it might create uncertainty as to how to apportion overcharges at different levels of a distribution chain, which would "further reduce the incentive to sue."[54] In foreclosing the possibility of complicated damages calculations by forbidding indirect purchaser suits, the Court hoped to promote efficient administration of the antitrust laws. For these reasons, *Illinois Brick* created a *per se* bar against indirect purchaser suits.

A simple illustration of the state of the law under *Illinois Brick* may be helpful at this point. In a hypothetical marketplace, Manufacturer A has a

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47. Ill. Brick Co. v. Ill., 431 U.S. 720, 730 (1977).
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 745–46.
52. *Id.*
53. Ill. Brick Co. v. Ill., 431 U.S. 720, 745 (1977).
54. *Id.*

monopoly on the production of shoelaces. It produces shoelaces and sells them to Distributor B at a price of $15, though in a competitive marketplace it would only charge $10. Manufacturer A is thus collecting a monopoly rent of $5. Distributor B incorporates the shoelaces into pairs of shoes, which it sells to Consumer C. In a competitive marketplace, Distributor B would charge $25 for the shoes and would be able to sell fifty pairs, but to account for the $5 overcharge on shoelaces imposed by Manufacturer A, Distributor B must now charge $30. At this price, it can only sell forty pairs, reducing its total revenue from $1,250 (in a competitive market, charging $25 for fifty pairs of shoes) to $1,200. In this scenario, Consumer C is overpaying for shoes by $5 because of Manufacturer A's anticompetitive conduct, but Consumer C cannot sue Manufacturer A to recover the overcharge because it is not a direct purchaser. Nor can Consumer C sue Distributor B, because Distributor B is not a monopolist. Distributor B, the direct purchaser, has passed on the overcharge to Consumer C. However, Distributor B can sue Manufacturer A to recover the lost profits it suffers as a result of Manufacturer A's prices. Moreover, the Clayton Act empowers Distributor B to seek treble damages for its injury, meaning it can seek $150 in damages from Manufacturer A.

In sum, classification as an indirect purchaser is fatal for plaintiffs seeking to recover an overcharge passed on to them from an intermediary in a standard vertical distribution chain.

III. *APPLE V. PEPPER*

A. CASE BACKGROUND AND PROCEDURAL HISTORY

Apple v. Pepper revisits the direct versus indirect purchaser distinction, in light of a twenty-first century twist: the Apple App Store. The App Store is the only place where iPhone users can legally purchase apps for their Apple devices.[55] Independent app developers, and not Apple, create the vast majority of apps available on the App Store.[56] In *Apple v. Pepper*, consumers who purchased iPhone apps from the App Store sued Apple, claiming that it abused its monopoly over the sale of iPhone apps to overcharge consumers.[57]

The plaintiffs' suit may first seem to be directed at the wrong defendant, since technically it is the app developers and not Apple that set the prices of the apps. However, Apple requires that the price of all apps end in ".99."[58] This requirement has led to a phenomenon in which most app prices "cluster"

55. Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).
56. *Id.*
57. *Id.*
58. *Id.* at 1528 (Gorsuch, J., dissenting).

at $0.99.[59] The requirement also restricts app developers' ability to increase the price of a $0.99 app, since the only option would be to effectively double the price to $1.99. In addition to the price requirement, Apple requires that developers pay a $99 annual fee to list their apps for sale on the App Store.[60]

Consumers purchase the apps from Apple, which takes a thirty-percent commission and passes the sale proceeds on to the app developer.[61] The lawsuit centered on this thirty-percent commission, which the plaintiffs alleged was an abuse of Apple's monopoly power because it forced consumers to pay prices higher than what they would have otherwise paid in a competitive market for the same apps.[62]

In its defense, Apple alleged that iPhone users did not have standing to bring the suit because the app *developers*, and not Apple, set the price of the apps.[63] Even if the consumers technically gave their money to Apple, Apple contended that it acted only as an intermediary in the transaction, and consumers were not directly purchasing the apps from Apple.[64] To the extent that the consumers were paying any overcharge, Apple argued that it was the app developers who had chosen to pass the overcharge onto the consumers, and thus the consumers should not have standing to sue Apple.[65]

The trial court granted Apple's motion to dismiss on the grounds that any injury the plaintiffs suffered was an "indirect effect resulting from the software developers' own costs."[66] The Ninth Circuit reversed, emphasizing that even if app developers were responsible for setting the price, consumers did in fact purchase their apps directly from Apple, which passed on the proceeds of the sale to the developers, less the thirty-percent commission.[67]

B. CASE SUMMARY

Justice Brett Kavanaugh, writing for a narrow 5-4 majority, affirmed the Ninth Circuit's interpretation of *Illinois Brick*—a consumer cannot sue an alleged monopolist who is "two or more steps removed from the consumer in

59. *Id.*
60. *Id.* at 1519.
61. *Id.*
62. *Apple, Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).
63. *Id.*
64. *Id.*
65. *Id.* at 1521–22.
66. *In re* Apple iPhone Antitrust Litig., 2013 WL 6253147, at *6 (N.D. Cal., Dec. 2, 2013), *rev'd*, 846 F.3d 313, 325 (9th Cir. 2017), *aff'd sub nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).
67. *In re* Apple iPhone Antitrust Litig., 846 F.3d at 324–25, *aff'd sub nom.* Apple v. Pepper, 139 S. Ct. at 1525.

a vertical distribution chain."[68] However, applying that rule to this case would not bar the consumer plaintiffs' suit, because they purchased apps directly from Apple.[69] Moreover, the Court was persuaded by the broad language of the Clayton Act, which empowers "any person who shall be injured in his business or property" by a violation of the antitrust laws to sue the defendant "and [] recover threefold the damages" suffered.[70]

The majority also criticized Apple's proposed alternative construction of the direct versus indirect purchaser distinction: instead of considering from whom the consumers purchased the apps, Apple would have the inquiry focus on who sets the price.[71] Apple argued that even if the consumers purchased the apps from Apple, it merely acted as an intermediary to facilitate the transaction between the developers and the consumers. Since the developers are responsible for the price of the app, Apple argued that the developers should be the ones that the consumers sue for anticompetitive pricing behavior.

The Court dismissed Apple's theory as "not persuasive economically or legally" and laid out two examples of different pricing models to illustrate this point.[72] In one, a traditional markup pricing model, an allegedly monopolistic retailer could purchase a product from a manufacturer for $6, sell it for $10, and make a $4 profit as a result. In a commission-pricing model, a retailer can agree to sell a manufacturer's product on its behalf at $10 and take a forty-percent commission, returning $6 to the manufacturer. Both scenarios produce economically identical results: the retailer makes $4, the manufacturer makes $6, and the consumer pays $10.[73] And yet, Apple's "who set the price" theory would allow the consumer to sue the monopolistic retailer in the former markup-pricing model but preclude a suit in the latter commission-pricing model, since there the manufacturer set the price.[74]

68. Apple v. Pepper, 139 S. Ct. at 1519–20.

69. *Id.* at 1521.

70. *Id.* at 1520; 15 U.S.C. § 15(a).

71. Apple v. Pepper, 139 S. Ct. at 1522.

72. *Id.*

73. Justice Kavanaugh's reasoning has been criticized on this point, as it "erroneously suggests that ad valorem royalties [such as the thirty-percent commission here] are economically equivalent to linear prices." Bruce H. Kobayashi & Joshua D. Wright, *What's Next in* Apple Inc. v. Pepper*? The Indirect-Purchaser Rule and the Economics of Pass-Through*, CATO SUPREME COURT REV. 249, 262 (2019). In fact, when faced with an ad valorem royalty, the app developer would lower gross prices in order to maximize total revenue, leading to lower prices, higher output, higher consumer welfare, and higher joint profits for the app developers and Apple. For more, see *id.* at 261–67.

74. Apple v. Pepper, 139 S. Ct. at 1522.

Justice Kavanaugh dismissed Apple's theory as serving only to "gerrymander Apple out of this and similar lawsuits."[75] He further observed that, if accepted, the theory would "provide a roadmap" for monopolistic retailers to adopt pricing models so as to "evade antitrust claims by consumers and [] thwart effective antitrust enforcement."[76] An inquiry focused on the pricing model would elevate form over substance in the majority's view, whereas the current indirect purchaser rule properly allows consumers to sue when a "retailer's unlawful monopolistic conduct" caused them to pay "higher-than-competitive" prices.[77]

Apple further raised concerns that allowing iPhone users to sue would burden the courts with overly complex damages calculations.[78] Justice Kavanaugh dismissed this concern as well, noting that "*Illinois Brick* [was] not a get-out-of-court-free card for monopolistic retailers to play" whenever faced with the possibility of complicated damages calculations.[79] Antitrust cases often require expert testimony and deal with difficult-to-compute damages, but *Illinois Brick* "surely did not wipe out consumer antitrust suits against monopolistic retailers."[80]

Finally, the majority responded to Apple's concerns that the Court's ruling could leave it vulnerable to lawsuits from both the "downstream" consumers and "upstream" app developers, a scenario that the *Illinois Brick* Court explicitly tried to prevent, according to Apple.[81] The majority disagreed with Apple that this scenario would result in "conflicting claims to a common fund" because the consumers and app developers would be seeking damages for different types of anticompetitive behavior.[82] The consumers would seek to recover the full amount of the unlawful overcharge they paid directly to Apple.[83] Since there is no distribution chain in this scenario, there would be no need to trace the overcharge back to the original purchaser; the consumers are the initial and only purchaser of the good, and thus bear the entire amount of the alleged overcharge.[84]

The developers, on the other hand, would seek to recover the lost profits they suffered because they increased the price of the app to account for the

75. *Id.* at 1522–23.
76. Apple v. Pepper, 139 S. Ct. at 1523.
77. *Id.*
78. *Id.* at 1524.
79. *Id.*
80. *See id.*
81. *Id.* at 1523.
82. Apple v. Pepper, 139 S. Ct. at 1525.
83. *Id.*
84. *See id.*

overcharge (in other words, they "passed on" the overcharge).[85] In a competitive market, the argument goes, the price of their product would be lower, and they would be able to sell more apps for greater total profit. The majority pointed out that it would hardly be unusual for a retailer in a similar case to face claims from multiple classes of plaintiffs in cases where, as here, an intermediary is an alleged monopolist to consumers on one end and an alleged monopsonist[86] to manufacturers on the other. Though both the consumers and app developers could sue, their suits "would rely on fundamentally different theories of harm," and thus the rationale from *Illinois Brick* would not bar either.[87]

In dissent, Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, argued that because the thirty-percent commission Apple charged initially fell on the developers, the commission can only cause injury to the plaintiffs if the developers "are able and choose to pass on the overcharge" by increasing the price of the apps.[88] In the dissent's view, this made the case "just the sort of pass-on theory that *Illinois Brick* forbids," meaning that iPhone users were plainly barred from bringing suit.[89] However, Justice Gorsuch expressed doubt that the developers were even capable of passing the overcharge on to the consumers given Apple's $0.99 price requirement.[90] This requirement restrains the app developers from increasing the price just enough to recoup the thirty-percent commission, since a developer who set the price of her app at $0.99 would have no choice but to increase it to $1.99 at a minimum (which would also "doubl[e] the commission in the process"[91]).

Though I agree with the outcome the majority reaches, I argue that *Illinois Brick*'s indirect purchaser rule does not support the majority's conclusion. Indeed, Justice Gorsuch makes a more persuasive argument that the proper application of *Illinois Brick* would preclude iPhone users from bringing suit for the simple reason that the thirty-percent commission initially falls on app

85. *See id.*

86. A "monopolist" is generally understood to have a monopoly over the market in which it sells, while a "monopsonist" has a monopoly "in the market in which it buys." AREEDA & HOVENKAMP, *supra* note 19, at 1478c, n. 24. Applying both terms here, Apple is a monopolist toward its consumers, since they cannot purchase or otherwise obtain apps for their iPhones from any firm besides Apple. On the other hand, Apple acts as a monopsonist toward app developers, since it is the only consumer of their iPhone app developing services.

87. *See* Apple v. Pepper, 139 S. Ct. at 1525.

88. *Id.* at 1528 (Gorsuch, J., dissenting).

89. *See id.* at 1527.

90. *Id.* at 1528.

91. *Id.*

developers.[92] iPhone users are only injured if the developers pass the overcharge on to them.[93]

Despite my view that the majority used a faulty approach, I agree with the majority's conclusion that iPhone users *should* have standing to sue Apple because, as the end-consumers, they bear the full brunt of the alleged overcharge.[94] However, in order to reach this outcome, the majority distorted *Illinois Brick*, even if nominally affirming it. First, by stating that any ambiguity in the precedent should be resolved in the direction of the statutory text, Justice Kavanaugh severely undermined the *Illinois Brick* test, which purposefully restricted the broad language of the Clayton Act.[95] Moreover, Justice Kavanaugh cast doubt on the *Illinois Brick* policy rationale of allowing only the direct purchaser to recover treble damages in order to incentivize private enforcement.[96] He also gave little credence to administrability concerns about the difficulty of apportioning damages among multiple parties.[97]

As a result, the majority opinion in *Apple v. Pepper* effectively lays the groundwork "for a subsequent case overturning *Illinois Brick*," despite superficially hewing to its precedent.[98] This raises the question: would courts be better off without *Illinois Brick*? If it were overturned, what tools might they use in its place?

IV. UPDATING ANTITRUST STANDING ANALYSIS FOR TWO-SIDED MARKETPLACES

A. WHO NEEDS *ILLINOIS BRICK* ANYWAY?

The viability of *Illinois Brick* forty years after its passage is increasingly being called into question. Indeed, thirty-one states filed an amicus brief in *Apple v. Pepper* calling on the Court to explicitly overturn *Illinois Brick* since the

92. *Apple v. Pepper*, 139 S. Ct. at 1528.

93. *Id.* at 1525 (majority opinion).

94. I express no opinion whether Apple's thirty-percent commission does in fact cause the plaintiffs to pay a higher-than-competitive price for apps. I argue only that iPhone users should have standing to bring the suit.

95. Matthew Perlman, *DOJ Antitrust Deputy Blasts Supreme Court's Apple Ruling*, LAW360 (Sept. 26, 2019, 6:35 PM), https://www.law360.com/articles/1203203/doj-antitrust-deputy-blasts-supreme-court-s-apple-ruling.

96. *See* Apple v. Pepper, 139 S. Ct. at 1525.

97. *See id.*

98. Perlman, *supra* note 95; *see also* Jeffrey L. Harrison, After Forty Years of Antitrust Revision and Apple v. Pepper, What Now Illinois Brick? 1, 5 (July 8, 2019) (manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413197 (observing that "both the majority and the dissent make arguments that seem to undermine the holding in *Illinois Brick*").

"predictions and policy concerns" undergirding the case "have been undermined by subsequent experience and events."[99] The Court declined to do so, and it instead "nominally []affirmed" *Illinois Brick* in this case.[100] I argue that this was a mistake and that the Court should have explicitly overruled *Illinois Brick*'s application to two-sided marketplaces. In this Part, I first argue that *Illinois Brick*'s indirect purchaser rule has outlived any usefulness it had with respect to two-sided marketplaces. Then, I proceed to consider an alternative test courts should adopt to analyze antitrust standing in cases dealing with two-sided marketplaces.

1. Illinois Brick*'s Indirect Purchaser Rule Does Not Fit Two-Sided Marketplaces*

Illinois Brick was decided based on a traditional resale model in which a straight line can be drawn from the manufacturer, through successive intermediary purchasers, to the final "indirect purchasing consumer."[101] Each entity in the vertical distribution chain purchased the goods from the entity above it, incorporated those goods into its own product, and resold the new product to the entity below it in the chain. To determine the direct purchaser in such a distribution chain, one need only look at the entity one production level up.

The lower courts have struggled to apply *Illinois Brick*'s bright-line rule to modern tech platforms where the identity of the direct purchaser is not so simple.[102] For example, in its App Store, Apple essentially acts as an intermediary licensing agent. By listing an app developer's app for sale in the App Store, Apple gives iPhone users the license to install the app on their devices.[103] Consumers in this model are technically the first to pay money to another party (here, Apple), thus laying the groundwork for their argument that they are direct purchasers from Apple. However, Apple does not directly impose the thirty-percent commission at the point of purchase. Rather, the commission falls on app developers and is subtracted from any profits they generate on each app sale.[104]

99. Brief for Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) 2018 WL 4808836, at *2.

100. *See* Perlman, *supra* note 95.

101. Brief for Texas, *supra* note 99, at *26; AREEDA & HOVENKAMP, *supra* note 19, at 346j.

102. *See* Seth E. Miller, *Seeing Over the Brick Wall: Limiting the* Illinois Brick *Indirect Purchaser Rule and Looking at Antitrust Standing in* Campos v. Ticketmaster Corp. *Through a New Lens*, 32 FLA. ST. U.L. REV. 197, 208–16 (2004).

103. Brief for Texas, *supra* note 99, at *26.

104. Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).

In a case with a similar economic business model, *Campos v. Ticketmaster Corp.*, ticket-purchaser plaintiffs sued an event ticket distributor for charging service fees that they alleged were higher than would have been sustainable in a competitive market.[105] According to the plaintiffs, Ticketmaster entered into exclusive contracts with "almost every promoter of concerts in the United States."[106] This gave it "ironclad control" over ticket distribution services for concerts at major venues in America, which allowed it to impose service fees that were supracompetitive—higher than what would be expected in a competitive marketplace—on the consumer plaintiffs.[107]

The Eighth Circuit held that the plaintiffs were indirect purchasers under *Illinois Brick* and thus lacked standing to bring suit.[108] The court found the fact that the plaintiffs could not obtain ticket delivery services in a competitive market was "simply the consequence of the antecedent inability of venues to do so."[109] Essentially, the court held that the consumers were not direct purchasers because, in an "antecedent transaction," the venues purchased ticket distribution services from Ticketmaster first.[110] Under that logic, any injury suffered by plaintiffs was derivative of the venues' purchase.[111]

The dissent sharply criticized the majority's test.[112] It first pointed out that "antecedent transaction" was not a term from any cited antitrust scholarship, but rather, was created by the majority.[113] Moreover, it noted that a "mere 'antecedent transaction' will not turn all purchasers of a monopolized product into indirect purchasers" without the passing on of monopoly costs from the direct purchaser to the indirect purchaser.[114] The dissent argued this condition was not satisfied since Ticketmaster provided ticket distribution services directly to concertgoers, as opposed to a model in which the venues purchased a product that they would then sell to concertgoers.[115]

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105. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168 (8th Cir. 1998).

106. *Id.* at 1169.

107. *See id.*

108. *Id.* at 1171. Curiously, neither the majority nor dissent in Apple v. Pepper mentioned the *Ticketmaster* case, despite the similarities between the two cases and the fact that Apple v. Pepper reaches the opposite conclusion—effectively overruling *Ticketmaster*. *See* Herbert Hovenkamp, Apple v. Pepper*: Rationalizing Antitrust's Indirect Purchaser Rule*, 120 COLUM. L. REV. F. 14, 18 (2020).

109. *Ticketmaster*, 140 F.3d at 1171.

110. *See id.*

111. *See id.*

112. *Id.* at 1174 (Arnold, J., dissenting).

113. *Id.*

114. *Id.*

115. *Id.*

Despite bearing the entirety of any monopoly overcharge, the *Ticketmaster* concertgoers were found to be indirect purchasers and their suit was dismissed for lack of standing.[116] Interestingly, when the Supreme Court confronted a strikingly similar economic business model in *Apple v. Pepper*, it reached the opposite conclusion.

Indeed, the difficulty of applying *Illinois Brick*'s indirect purchaser rule came to a head with the core disagreements between the majority and dissent in *Apple v. Pepper*. In his reasoning, Justice Kavanaugh argued that Apple's proposed rule would "elevate form . . . . over substance" by focusing on the "precise arrangement between manufacturers or suppliers and retailers" instead of whether or not the consumer is "paying a higher price because of the monopolistic retailer's actions."[117] However, Justice Gorsuch leveled a similar criticism at the majority by arguing that allowing iPhone users to sue in this case distorts *Illinois Brick*, taking it from a "rule of proximate cause and economic reality" to a "formalistic rule of contractual privity."[118] Additionally, both opinions express concern that the other's rule creates simple loopholes for potential antitrust violators to exploit; for example, by simply restructuring their pricing models.[119]

This tension between the two opinions only serves to underscore what a poor tool *Illinois Brick* is for deciding who should have standing in two-sided markets, which are not simple vertical distribution chains. *Illinois Brick* assumes verticality, where only one purchaser can be said to be the "direct" purchaser from the antitrust violator. But the App Store is not a vertical distribution chain, since both the app developers, who are themselves a consumer of Apple on one end of the marketplace, and Apple itself contribute to the prices that the consumers ultimately pay.[120]

Thus, while Apple is the intermediary from which the consumers technically purchase the product directly, the allegedly anticompetitive commission is not immediately borne by the consumers. Plaintiffs can "be injured *only* if the developers . . . . pass on the overcharge to them."[121] Since

115. *Id.* at 1171 (majority opinion).

117. *Apple, Inc. v. Pepper*, 139 S. Ct. at 1523.

118. *See id.* at 1526 (Gorsuch, J., dissenting).

119. *See id.* at 1523 (majority opinion) ("Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement. . . . . . [R]estructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers . . . . . ."); *see also id.* at 1530 (Gorsuch, J., dissenting) ("To evade the Court's test, all Apple must do is amend its contracts.").

120. *Id.* at 1521 (majority opinion).

121. *Id.* at 1528 (Gorsuch, J., dissenting).

the commission first falls on the app developers, who could then pass it on to the consumers, the case presents a classic "pass-on" theory of recovery that is strictly disallowed by *Illinois Brick*'s bright-line rule.[122]

As such, Justice Gorsuch made a more persuasive argument that a straightforward application of *Illinois Brick* would have found that the plaintiffs here lacked standing to sue. The *Illinois Brick* Court designed the indirect purchaser rule to operate in a traditional, "familiar" business model with "strong temporal and course-of-commerce separation" between the different entities in the chain: the producer at the top, the distributor in the middle, and the consumer at the bottom.[123] "[T]oday's marketing arrangements were likely unforeseeable" to the *Illinois Brick* Court.[124] The decision failed to anticipate a marketplace like the App Store in which the party that sets the price, and controls whether or not an overcharge is passed on to its subsequent consumers, is not the party that directly sells the product to the purchaser. This makes the *Illinois Brick* indirect purchaser rule very difficult to apply to contemporary two-sided platforms and thus, a poor tool for assessing whether a plaintiff has standing to sue for an antitrust violation in these types of marketplaces.

2. *The* Illinois Brick *Administrability Concerns No Longer Apply*

Moreover, the administrability concerns that led the *Illinois Brick* Court to its decision are no longer valid. First, it is worth noting that *Illinois Brick* was highly controversial at the time of its deciding and continues to be so.[125] The

122. Justice Gorsuch points out that Apple's sole pricing requirement—that the price of an app ends in ".99"—may actually make it extremely difficult for an app developer to "pass on" the overcharge of Apple's thirty-percent commission fee. *See* Apple v. Pepper, 139 S. Ct. at 1528 ("[A] developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission."). For example, an app developer who wanted to increase the price of an app currently priced at $0.99 in order to recoup some or all of the thirty-percent commission would have no choice but to double the price to $1.99 in order to keep it listed in the App Store. But if all competitor apps remained priced at $0.99, the app developer risks pricing herself out of the market by doing so. However, this scenario assumes that the price ending in $0.99 does not already capture (if not over capture) the commission. For example, absent Apple's pricing requirement, if an app developer would otherwise price an app at $0.76 and wanted to pass on the full thirty-percent commission to its purchasers, it would raise the price to $0.99. Thus, any app that would be priced at less than $0.76 if not for Apple's $0.99 pricing requirement is more than recovering the thirty-percent commission by being forced to price its app at $0.99.

123. Manne & Stout, *supra* note 3, at 439.

124. Harrison, *supra* note 98, at 3.

125. *See* Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 3 n.8 (2004) (noting that opinions about *Illinois Brick* are so unyielding that "panelists speaking at the ABA Antitrust Section's annual Antitrust Remedies Forum in

Court imposed a limitation on recovery of damages that was plainly inconsistent with the broad language of the antitrust damages statute.[126] Furthermore, critics of the indirect purchase rule have argued that it perpetuates an "anti-consumer" antitrust system in which offending firms are under-deterred from violating the law.[127]

In *Illinois Brick*'s wake, dozens of states enacted "*Illinois Brick* repealer statutes," explicitly permitting indirect purchaser suits.[128] As a result of these statutes, federal courts have developed "decades" of experience analyzing indirect purchaser suits.[129] These cases can be seen as an experimental test run to determine if the administrability concerns that preoccupied the *Illinois Brick* Court ever came to pass. In short, they did not.

First, in barring indirect purchasers from recovering in antitrust suits, the Court intended to mitigate the "serious risk of multiple liability for defendants" that could arise if both indirect *and* direct purchasers were able to recover for all or part of an overcharge passed on.[130] However, antitrust commentators have noted that after decades of indirect purchaser suits under state law regimes, the risk of duplicative recovery remains a "theoretical problem" only. Indeed, in testimony the Antitrust Modernization Committee heard, as it prepared its 2007 Final Report and Recommendations, none of the witnesses to testify could "identify a single instance of 'unfair or multiple recovery.' "[131]

Additionally, allowing these suits in federal court may actually further diminish the risk of multiple recovery under federal law, since "related actions in various districts can be consolidated for class certification" under the Class Action Fairness Act.[132] For example, one potential case of duplicative recovery was foreclosed when private litigation followed the FTC's case against Mylan Labs.[133] There, the defendants successfully argued that the settlement that the

spring 2003 in Washington, D.C. agreed not to discuss" the decision); *see also* Hovenkamp, *infra* note 108, at 14.

126. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U.S.C. § 15(a).

127. *See* Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167, 171–72 (2009).

128. Cavanagh, *supra* note 125, at 2 n.4.

129. *See id.* at 2; *see also* Brief for Texas, *supra* note 99, at *4; *California v. ARC America Corp*, 490 U.S. 93, 100 (1989) (holding that *Illinois Brick* does not preempt these state statutes that authorize indirect purchaser suits, or bar federal courts from hearing state law indirect purchaser claims).

130. *Ill. Brick v. Ill*, 431 U.S. 720, 730 (1977).

131. Gavil, *supra* note 127, at 192 n.76.

132. Brief for Texas, *supra* note 99, at *20.

133. Gavil, *supra* note 127, at 192 n.76.

FTC obtained "precluded later certification of a class of direct purchasers on the ground that duplicative recovery would result."[134]

It is worth noting on this point that the existing *Illinois Brick* rule arguably facilitates duplicative recovery when actions are simultaneously brought under federal antitrust laws and state antitrust laws.[135] In this scenario, defendants can be forced to compensate direct purchasers for the full overcharge amount as federal law damages, in addition to making a "duplicate payment" to indirect purchasers for their recovery under state law.[136]

Second, the *Illinois Brick* Court was concerned that authorizing indirect purchaser suits would "transform treble damages actions into massive efforts to apportion the recovery" among all injured plaintiffs that might have absorbed some portion of the overcharge.[137] Any attempt to appropriately allocate the overcharge would "add whole new dimensions of complexity" to the calculation of damages in antitrust suits, threatening to "seriously undermine their effectiveness" as a tool of deterrence.[138] Putting aside the fact that federal courts already face the difficulty of apportioning damages when state law indirect purchaser suits find their way into federal courts, advancements in economic theory and technology have made apportioning damages among multiple parties significantly easier.[139]

Further, courts have come to rely on relatively simple econometric methods to calculate damages when an overcharge exists. Indeed, neither of the two most common approaches, the "before and after" method and the "yardstick" method, actually "compute [any] pass-on at all."[140] The yardstick method simply compares the price that plaintiffs paid after the "monopolization or price-fixing activity" to that paid by "similarly situated persons" prior to the activity.[141] This method aims to capture a plaintiff's actual economic condition by comparing it to "what its condition would have been 'but for' the unlawful behavior of the defendant[]."[142] The latter "yardstick" method aims to identify a firm that is comparable in all important respects to the plaintiff, ideally a "clone or an identical twin" to the plaintiff.[143] The

134. *Id.*
135. *See* AREEDA & HOVENKAMP, *supra* note 19, at 346a.
136. *See id.*
137. *Ill. Brick v. Ill*, 431 U.S. 720, 737 (1977).
138. *Id.*
139. Gavil, *supra* note 127, at 190.
140. *Id.*
141. *Id.*; Brief of Antitrust Scholars as Amici Curiae in Support of Respondents, Apple v. Pepper, 139. S. Ct. 1514 (2019) (No. 17-204) 2018 WL 4773103, at *27.
142. AREEDA & HOVENKAMP, *supra* note 19, at 392e.
143. *Id.* at 392f.

comparable firm's economic performance in the market is used to estimate what the plaintiff's performance would have been "but for" the violation.[144]

A "broad consensus in the literature" supports the notion that these methods are "fully capable" of apportioning damages between multiple parties, despite not calculating the pass-on in a case.[145] This suggests that calculating damages for indirect purchasers "is not as difficult as the Supreme Court believed" when it decided *Illinois Brick*.[146]

In sum, the administrability concerns that the *Illinois Brick* Court foresaw in allowing indirect purchaser suits have not come to pass. These concerns are no longer viable reasons for continuing to adhere to *Illinois Brick*'s bright-line rule.

3. Illinois Brick *Does Not Promote Effective Private Enforcement of the Antitrust Laws*

Illinois Brick's policy of vesting the entirety of the recoverable treble damages in just the direct purchaser no longer serves its own goals of promoting vigorous private enforcement of the antitrust laws. The Illinois Brick Court acknowledged that this policy could not guarantee full private enforcement.[147] Still, it suggested that "on balance" the aims of antitrust law were "better served by holding direct purchasers to be injured to the full extent of the overcharge" they paid rather than trying to "apportion the overcharge among all that may have absorbed a part of it."[148] However, decades of decisions since Illinois Brick demonstrate that a bar on indirect purchaser suits hinders rather than helps to promote antitrust's core goals of deterring potential violators and compensating victims.

First, barring indirect purchaser suits limits deterrence, since the party that is the direct purchaser will often lack an incentive to sue. For example, under Justice Gorsuch's application of *Illinois Brick*, the app developers are "the parties who are directly injured" by the allegedly monopolistic commission that Apple collects.[149] However, suppliers, such as the app developers, will often forego bringing suit over anticompetitive behavior perpetrated by a monopolistic retailer either because they are "beholden to the monopolist to distribute their product[s]" or because "they may [stand to] benefit from the

144. *Id.*

145. Brief of Antitrust Scholars, *supra* note 141, at *28; AREEDA & HOVENKAMP, *supra* note 19, at 346a.

146. *Id.*

147. Ill. Brick Co. v. Ill., 431 U.S. 720, 746 (1977).

148. *Id.*

149. Apple v. Pepper, 139 S. Ct. at 1528.

monopoly."[150] Indeed, the app developers may share in Apple's monopoly rent profits, thus benefitting directly from its anticompetitive conduct.[151] For example, Apple's requirement that app prices end in ".99" may actually allow app developers to charge higher prices than they would in a competitive market.[152] Thus, even if the commission constitutes a monopoly rent that Apple collects, app developers would be unlikely to sue for this since they benefit from Apple's anticompetitive conduct in other ways.

Second, *Illinois Brick*'s indirect purchaser rule created a scheme that inevitably undercompensates actual victims. The Court solely vested damages in direct purchasers, even though direct purchasers will often pass on any overcharge that suppliers impose on them and thus suffer no actual injury. This rule elevates direct purchasers "to a preferred position as private attorneys general" at the expense of the "indirect purchasers who may have been actually injured by antitrust violations."[153] Nevertheless, the *Illinois Brick* rule denies the indirect purchasers recovery.[154] The Court reasoned that a rule which allowed indirect purchasers to pursue damages claims would "simply deplet[e] the overall recovery in litigation over pass-on issues," since most indirect purchasers would have such small damages in a suit that "only a small fraction" would "come forward to collect" them.[155]

In other words, to prevent direct purchasers from receiving fewer damages, the Court barred the actually injured end-consumers from pursuing damages because they would be unlikely to collect them anyway. Meanwhile, the direct purchasers may seek the full amount of the overcharge "even if this exceed[s] the actual harm suffered by that purchaser."[156] This necessarily

150. *See* Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No 17-204) 2013 WL 4846924, at *2; *see also* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 351–52 (1979) (arguing that the risk of being cut off entirely from a supplier might deter a direct purchaser from suing even where it absorbs a significant part of an overcharge).

151. *See* Miller, *supra* note 102, at 223 (noting that the analogous concert venues in *Ticketmaster* "receive part of the monopoly overcharge" that Ticketmaster extracted, "in exchange for granting [] Ticketmaster the exclusive right to distribute" event tickets).

152. Transcript of Oral Argument at 58, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

153. *See Illinois Brick*, 431 U.S. at 746.

154. *See id.* at 747.

155. *Id.*

156. Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 1 (1999).

creates a scheme of liability which "greatly overcompensates intermediaries and greatly undercompensate[s] consumers."[157]

Further, court decisions following *Illinois Brick* have dramatically limited direct purchasers' ability to recover, further reducing the likelihood that victims are efficiently compensated for their injuries. Broadly, scholars have observed the general erosion of "per se rules" in antitrust law.[158] Instead, there has been a broad push for more antitrust cases to be assessed under the more defense-friendly "rule of reason."[159] Under the rule of reason, the plaintiff has the initial burden of "demonstrating that the defendant's action was anticompetitive."[160] If the plaintiff meets its initial burden, the burden shifts to the defendant to provide sufficient evidence that the action had a "procompetitive effect[]"; the plaintiff can then demonstrate that the defendant could have achieved the same pro-competitive effects through alternative, "less restrictive methods."[161] At that point, the court balances the pro- and anticompetitive effects to determine which side prevails.[162] The balancing inquiry has resulted in courts dismissing the vast majority of rule of reason cases at the motion to dismiss phase.[163] Indeed, in a study conducted of all rule of reason cases decided between 1977 and 2009, almost ninety-seven percent were dismissed after the pleadings alone.[164]

Several recent cases in particular have dampened an antitrust plaintiff's likelihood of success in court. *Bell Atlantic v. Twombly*[165] imposed a higher "plausibility" pleading burden on antitrust plaintiffs. Later, in *American Express v. Italian Colors Restaurant*,[166] the Court held that potential antitrust defendants could use arbitration clauses in standard-form contracts to ban antitrust class actions.[167] This requires plaintiffs to individually arbitrate their antitrust disputes, which rarely makes economic sense because the dollars at stake in each individual case are unlikely to outweigh the substantial costs of pursuing the claim in arbitration. Moreover, this "deprive[s] overcharged direct

157. AREEDA & HOVENKAMP, *supra* note 19, at 346k.

158. *See* Harrison, *supra* note 98, at 27.

159. *Id.* at 29–32.

160. *Id.* at 32.

161. *Id.*

162. *Id.*

163. *Id.*

164. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009).

165. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

166. American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 239 (2013).

167. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2116 (2015).

purchaser[s] of the tools [of] antitrust law," making private enforcement less effective and less likely.[168]

Additionally, in its term prior to *Apple v. Pepper*, the Supreme Court heard a significant antitrust case that might have even further decreased an antitrust plaintiff's likelihood of success: *Ohio v. American Express* ("*Amex*").[169] *Amex* held that anticompetitive conduct in a two-sided marketplace, that is analyzed as one market, is not forbidden where its pro-competitive effects outweigh its anticompetitive effects.[170] The impact of *Amex* is merely speculative at this point, since lower courts are in the early stages of interpreting the rule. However, critics have characterized the decision as a "huge blow" to antitrust enforcement that will make it easier for dominant tech firms to "abuse their market power with impunity."[171] The general trend set into motion by *Amex* and its predecessor cases suggests the odds are increasingly stacked against plaintiffs in antitrust suits.

The policy rationales that motivated the *Illinois Brick* decision no longer justify adherence to its harsh and arbitrary restriction against recovery for indirect purchasers, and the Court should have explicitly overruled it in *Apple v. Pepper*. First, *Illinois Brick* makes a distinction between direct and indirect purchasers that assumes a vertical distribution chain that makes it a bad fit for application to two-sided marketplaces. Second, the administrability concerns of allowing indirect purchaser suits never came to pass. Finally, *Illinois Brick*'s policy of vesting treble damages solely in the direct purchaser arguably leads to an under-enforcement of the antitrust laws. This is even further complicated by the recent trend toward more defendant-friendly standards of analysis in antitrust cases.

B. ONE POSSIBLE WAY FORWARD WITHOUT *ILLINOIS BRICK*

If the Court were to overturn *Illinois Brick*, what should the antitrust standing analysis look like? Any "optimal" solution to the rule would be one

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168. *See id.*

169. Ohio v. American Express, 138 S. Ct. 2274, 2280 (2018). The case has no connection to *American Express v. Italian Colors*.

170. *Id.* at 2280.

171. Lina Khan, *The Supreme Court just quietly gutted antitrust law*, VOX (July 3, 2018, 9:40 AM), https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony; *see also* Manne & Stout, *supra* note 3, at 455 ("[W]hereas alleging a two-sided market may make it easier for plaintiffs to demonstrate standing, *Amex*'s requirement that net harm be demonstrated across interrelated sets of users makes it more difficult for plaintiffs to make out a prima facie case."); Hovenkamp, *supra* note 8, at 752 ("The *AmEx III* decision acts to increase the plaintiff's burden of production in making a prima facie case . . . . There are no potential defendants who would not benefit from this.").

that sidesteps the unnecessary difficulty of computing complicated pass-on damages, avoids duplicative recoveries, and "satisfies the statutory language" of the Clayton Act, which provides for damages to be recovered broadly by any person injured by something forbidden in the antitrust laws.[172] A test which meets these criteria would allow the so-called direct purchaser (here, the app developers, since the commission falls on them first) to seek damages for any lost profits resulting from the higher price they were forced to charge.[173] The test would also allow "end-use consumers," who are not in a position to pass on any overcharges, to pursue recovery of the full overcharge they paid.[174]

Importantly, overturning *Illinois Brick* would not have to upend decades of antitrust standing doctrine. Any test which replaced *Illinois Brick* could rely on the same basic policy principles that undergirded that decision but could offer a "more sophisticated" approach that could "better comport with more complex and nuanced economic analysis."[175]

1. AGC *Remoteness Test*

As different approaches continue to develop in the scholarly antitrust literature, the "remoteness" test for antitrust standing articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* ("*AGC*") has emerged as a strong candidate to replace *Illinois Brick*'s indirect purchaser rule.[176]

a) Case Summary

In AGC, the Court considered a dispute between a group of construction worker unions and the Associated General Contractors of California ("Associated"), a membership corporation of building and construction contractors.[177] The unions brought suit against Associated for conspiring to "weaken the collective-bargaining relationship" the unions struck with the signatory employers through coercion, which allegedly amounted to an unlawful restraint of trade under the Sherman Act.[178]

To evaluate whether the unions had standing to bring these claims, the Court in AGC articulated a two-step test. The first step requires a plaintiff to demonstrate an antitrust injury, meaning that the plaintiff must demonstrate

172. AREEDA & HOVENKAMP, *supra* note 19, at 346a; 15 U.S.C. § 15(a).

173. *See* Herbert Hovenkamp, Apple v. Pepper*: Rationalizing Antitrust's Indirect Purchaser Rule*, 120 COLUM. L. REV. F. 14, 18 (2020).

174. AREEDA & HOVENKAMP, *supra* note 19, at 346a; *see also id.*

175. Manne & Stout, *supra* note 3, at 435.

176. 459 U.S. 519, 537–38 (1983).

177. *Id.* at 521.

178. *AGC*, 459 U.S. at 522 (1983).

they suffered a harm "that the antitrust statute was intended to forestall."[179] If the plaintiff convincingly pleads an antitrust injury, the court then balances several factors against one another. Principally, the court considers the "directness or indirectness" of the injury,[180] the existence of plaintiffs whose "self-interest would normally motivate them" to sue for antitrust violations,[181] and whether the complexity of the trial would exceed "judicially manageable limits."[182]

In the case of AGC, the Court first determined that plaintiffs did not meet the initial "antitrust injury" threshold.[183] It found that the alleged anticompetitive conduct that the contractors engaged in did not threaten the "economic freedom of [the market] participants" that the Sherman Act was enacted to protect.[184] The Court found that since the unions aimed to enhance the earnings of its membership, they might in fact be harmed by enhanced competition in the market, which may encourage employers to reduce costs to compete with rival firms.[185] Moreover, the Court noted that a distinct body of federal labor law had developed to "protect and encourage" the various activities of labor unions.[186] This would tend to shift similar disputes from the scope of the Sherman Act toward the purview of the relevant labor laws, constituting another reason that the Sherman Act was not designed to protect against the unions' alleged injury.[187]

Despite the plaintiffs' failure to meet this threshold inquiry, the Court proceeded to analyze the other factors. It first determined that the indirectness of the unions' injury was a factor weighing against a finding of standing.[188] The Court identified several "vaguely defined links" in the chain of causation between the unions' alleged injury and the alleged restraint of trade in the construction subcontracting market.[189] The unions primarily argued that the defendants coerced landowners to divert business away from the unions' employees and instead toward nonunion contractors.[190] The Court determined that any injury this caused the unions was an "indirect result" of the harm

179. *Id.* at 540.
180. *Id.*
181. *Id.* at 542.
182. *Id.* at 543.
183. *Id.* at 538.
184. *Id.*
185. *AGC*, 459 U.S. at 538 (1983).
186. *Id.* at 540.
187. *Id.*
188. *Id.*
189. *Id.*
190. *See id.* at 540–41.

suffered by the "immediate victims" of the defendants' alleged coercion.[191] The Court further reasoned that the more immediate victims would likely have their own interest in pursuing claims against the defendants, which also weighed against the plaintiffs' argument.[192]

Finally, the Court determined that it would be unduly burdensome to the court system to identify and apportion damages among the "directly victimized" parties and the "indirectly affected employees and union entities."[193] It also worried that given the widespread pool of potential victims, the defendants faced a serious risk of duplicative damages.[194] Given the already speculative and indirect nature of the unions' injuries, the Court held that the complexity of the damages calculation and the potential for duplicative recovery weighed heavily against a finding that the unions had standing.[195]

b) Evaluating the *AGC* Test

One clear benefit of the AGC Test is that it provides courts with a flexible framework for analyzing standing in antitrust cases. It can just as easily be applied to traditional business arrangements, such as the union dispute in AGC,[196] and to more cutting-edge "marketing arrangements," increasingly common amongst digital tech platforms.[197] Instead of articulating a bright-line rule that is only responsive to a narrow subset of business arrangements, the AGC Test allows courts to consider a handful of pertinent factors. This is unlike Illinois Brick's "blunt-edged test" which, in cases like Apple v. Pepper, over-emphasizes formalities like contractual privity.[198] This comes at the expense of the economic reality of the transaction, in which the end-consumer who bears the brunt of an overcharge is unable to pass it on or recover the damage in court.[199]

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191. *AGC*, 459 U.S. at 541 (1983).

192. *See id.* at 545.

193. *Id.*

194. *Id.*

195. *Id.*

196. *See* Harrison, *supra* note 98, at 3. Notably, the nature of the claim in *AGC* was very different from that of *Illinois Brick* and *Apple v. Pepper*. The facts did not deal with the distribution of a product down a supply chain. The Court did not have to grapple with whether the plaintiffs were direct purchasers, since they did not purchase anything, and the indirect purchaser rule did not apply to bar the plaintiffs' claims. Still, the Court considered the plaintiff union's injury to be rather indirect, since they were not the immediate victims of the allegedly coercive conduct employed by Associated. Instead, Associated allegedly coerced third parties into contracting with non-union contractors. *See AGC*, 459 U.S. at 540–41.

197. *See* Harrison, *supra* note 98, at 3.

198. Brief for Texas, *supra* note 99, at *35.

199. Hovenkamp, *supra* note 108, at 18.

In contrast, a balancing inquiry like the AGC Test might better capture the nuances of a two-sided marketplace while still allowing a court to be mindful of the concerns expressed in Illinois Brick, to the extent they remain relevant. For example, if a plaintiff alleges an injury with too tenuous of a connection to the alleged anticompetitive conduct, a court would have the flexibility to consider this "indirectness" as simply a factor that cuts against the plaintiff's claim.[200] In a case where a plaintiff has otherwise met its burden of pleading anticompetitive conduct, a court may nevertheless allow the plaintiff's claim to go forward if it determines that no other party exists that is able or sufficiently motivated to bring the claim.[201] Alternatively, where a plaintiff's injury is too indirect and a court is concerned that the facts of a particular case might expose a firm to a high risk of duplicative recovery, the court could dismiss the action for lack of standing.

However, the AGC Test is not without flaws. In particular, the first and second factors seem to consider the same issue from different angles, and they should arguably be collapsed into one if the test were to be widely adopted. Evaluating the indirectness of a potential plaintiff's injury necessarily requires consideration of whether someone else is better placed to sue, since what makes the plaintiff's injury indirect is that it derives from a more direct harm suffered by another party.[202] Where a potential plaintiff's injury is found to be indirect, there will always be another potential plaintiff with a more direct injury, since the directness inquiry is inherently relative.[203] If the AGC Test were in fact adopted as a replacement for Illinois Brick, courts should articulate a more analytically clear approach for applying the test.

Still, the AGC Test would allow a court to consider the policy rationales undergirding the Illinois Brick decision individually on a case-by-case basis, instead of sweeping them into a single per se bar against lawsuits brought by certain types of participants in a marketplace. This is particularly beneficial when it becomes clear that certain policy rationales for the bar on indirect purchaser suits are overstated, such as the Illinois Brick Court's concern that the complexity of calculating pass-on damages in indirect purchaser suits will inevitably overwhelm the court system.[204] Furthermore, the AGC Test would give courts the flexibility to respond to changes in the economic structure of

200. *See AGC*, 459 U.S. at 540.

201. *See id.* at 545.

202. *See id.* at 541 (finding it "obvious" that the Union's alleged injuries were "only an indirect result" of harm suffered by other parties).

203. *See id.* (noting that the "immediate victims" of the alleged coercion are the parties who suffered a direct injury, as opposed to the Union).

204. Gavil, *supra* note 127, at 190; *see also* AREEDA & HOVENKAMP, *supra* note 19, at 346a.

firms and marketplaces, which the indirect purchaser rule does not allow courts to do.

Of course, bright-line rules have their advantages. Even if the administrability concerns of Illinois Brick were overstated,[205] having a per se bar on indirect purchaser suits is certainly easier for courts to administer than a multi-factor balancing inquiry which tries to account for the full picture of an alleged antitrust violation. Still, rules excluding indirect purchaser suits under federal antitrust law will likely do little to conserve courts' resources because federal courts already face the possibility of hearing indirect purchaser suits under state law.[206]

If the Court were to adopt the AGC Test for analyzing standing, it would have to clarify the confusing relationship that currently exists between Illinois Brick and AGC. Currently, most courts seem to view Illinois Brick as standing for the proposition that "the step-by-step analysis of AGC can be dispensed with" when the plaintiff is an indirect purchaser and that the Illinois Brick per se bar should apply instead.[207] Since the two tests would often reach opposite outcomes on the same set of facts, with Illinois Brick flatly prohibiting indirect purchasers from bringing suit, and AGC merely counting indirect purchaser status as a factor weighing against the plaintiff,[208] the Court would likely need to explicitly overrule Illinois Brick's application to two-sided marketplaces in order to adopt the AGC Test.

c) Apple v. Pepper Under the AGC Test

Had the Court instead applied the AGC Test to Apple v. Pepper, it likely would have reached the same outcome. At the first step of the analysis, a court would have considered whether the federal antitrust laws were enacted to protect against the particular violation the plaintiffs alleged.[209] The Sherman Act was enacted specifically to "assure customers the benefits of price competition," which plaintiffs could easily allege are lacking in the App Store given that Apple has no direct competitors who sell iPhone apps.[210] Indeed, the "monopoly overcharge" which allegedly injured the iPhone users is of the type of competition-stifling harm that the antitrust laws were enacted specifically to prevent.[211] Of course, the antitrust injury threshold question

205. *See supra* Section IV.A.2.
206. *See id.*
207. Blair & Harrison, *supra* note 156, at 17; *see also* Miller, *supra* note 102, at 220.
208. Blair & Harrison, *supra* note 156, at 26.
209. *See AGC*, 459 U.S. at 538.
210. *See id.*
211. *See* Miller, *supra* note 102, at 209 n.101.

would not be dispositive of the merits of the actual claim, and Apple could still defeat these allegations at later stages in the litigation.

Moving to the next step of the AGC analysis, the Court would weigh several factors, beginning with the directness of the injury. It is likely that this factor would have cut against the plaintiffs for the reasons that Justice Gorsuch laid out in the dissent.[212] If the plaintiff iPhone users were harmed by Apple's commission, the app developers must have passed the commission on to them, since the commission fell on the developers first.[213] In that way, the iPhone users were one step removed from the overcharge, and the injury would not be considered "direct." However, under the AGC Test, indirectly suffering an injury is not a per se bar against recovery; it is merely a factor that weighs against it.

The remaining factors would likely have cut in the iPhone users' favor. For instance, there were not "more direct victims of the alleged conspiracy" whose own self-interest might have motivated them to sue.[214] The only potential option was the app developers, who arguably had an incentive not to sue.[215] Not only would they have faced the risk of their supplier relationship with Apple souring, but they also likely benefitted if Apple engaged in anticompetitive conduct because they shared a portion of the monopoly overcharge.[216]

Finally, the potential complexity of a trial would have also likely cut in the plaintiffs' favor. Bruce Kobayashi argues that the pass-through analysis in Apple v. Pepper is "neither complex nor speculative."[217] This is for two main reasons: first, the costs that the developers incur to make and update the apps are "largely fixed with respect to output," making the marginal cost of producing, distributing, and maintaining another "copy" of the app zero.[218] Second, Kobayashi argues that the effect of Apple's thirty-percent commission—an "ad valorem royalty" as opposed to a "unit royalt[y]"[219]—on the optimal price of an app is zero.[220] In the absence of any commission collected by Apple, the app developers will set the price of the app to maximize

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212. Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1528 (2019) (Gorsuch, J., dissenting).

213. *Id.*

214. *See AGC*, 459 U.S. at 542–45.

215. *See supra* Section IV.A.3.

216. *See supra* Section IV.A.3.

217. Kobayashi & Wright, *supra* note 73, at 261.

218. *See id.* at 261–62.

219. An ad valorem royalty is a tax based on a fixed percentage of the value of a product, while a unit royalty is a tax in a fixed amount per product sold. *See id.* at 254.

220. *Id.* at 262.

total revenue.[221] However, Kobayashi argues that the app developers, when faced with Apple's thirty-percent commission, will lower the gross price of the app to the same level as in the absence of the commission in order to maximize total revenue by increasing the costs of apps sold.[222]

Though the plaintiffs would certainly introduce contrary economic evidence to counter the Kobayashi argument, the simplicity of Kobayashi's models and the standard nature of the dispute do not suggest that the evidence that either side presents would exceed "judicially manageable limits" beyond what is typical of antitrust cases.[223] Thus, the complexity factor would likely have favored the plaintiffs. Under this application of the AGC Test factors, it is likely that the Court would have found that the iPhone users, even if they were indirect purchasers, had standing to sue Apple.

V. CONCLUSION

Not only does Illinois Brick's indirect purchaser rule contradict the plain text of the Clayton Act, but the outdated policy rationales motivating the decision no longer justify continued adherence to its arbitrary restriction. Apple v. Pepper is a prime example of how Illinois Brick has outlived its usefulness in application to two-sided markets, an increasingly common feature in the modern economy. The AGC Remoteness Test is just one example of a potential alternative to the indirect purchaser rule that would allow courts to analyze standing in light of the unique features of two-sided marketplaces. In light of the heightened antitrust scrutiny of major digital platforms, courts should be prepared with the proper tools for analyzing standing issues in two-sided marketplace antitrust cases.

221. *See id.*

222. *See id.* at 266.

223. *See* Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 543 (1983).