Rebuilding Illinois Bricks: A Functionalist Approach to the Indirect Purchaser Rule

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ABSTRACT

The indirect purchaser rule, established three decades ago in Illinois Brick v. Illinois, has generated sufficiently steady and widespread criticism that Congress’s Antitrust Modernization Commission is now considering possible reforms. The debate over reforms, however, has been constrained by an undue emphasis on legal formalism and has failed to generate innovative alternatives. We review the development of the doctrine, identify its significant shortcomings, and articulate the functional objectives that antitrust rules of standing should pursue. Building off these objectives, which constitute the foundations of antitrust law, and incorporating some lessons from securities law, we propose a mechanism that opens antitrust suits to indirect purchasers, consolidates the multiple claims, and designates a presumptive lead plaintiff.

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

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I. INTRODUCTION

Ever since the Supreme Court ruled thirty years ago in *Illinois Brick v. Illinois* that indirect purchasers may not bring private actions against antitrust violators in federal court, the "indirect purchaser doctrine" has been subject to widespread and steady criticism. Critics of the rule regularly highlight its denial of compensation to the parties most injured by antitrust violations, its granting amnesty to violators since parties with exclusive standing are often unlikely to sue, and the hypocrisy that underlies its justifications. In recent years, dissatisfaction with *Illinois Brick* (and, though to a lesser extent, its predecessor *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* ) has reached a boiling point, with disaffected plaintiffs, courts, and policymakers demanding Congress to intervene. Accordingly, the Antitrust Modernization Commission, established to consider legislative reforms to antitrust law, has taken up the question of indirect purchaser standing.

Despite policymakers and academics having revisited the indirect purchaser doctrine, the current debate suffers from a poverty of satisfying solutions. Commentators regularly spar over

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3 See infra Part III.
the relative merits of the foundational decisions of the rule— with one remarking on the “near religious fervor” of the debate— but their viewpoints have become ossified and the debate has grown stale. The universe of proposed reforms has been largely limited to the binary choices of whether to overturn *Illinois Brick* and *Hanover Shoe*, and whether to preempt state laws that permit indirect purchaser actions. Although functional considerations are regularly invoked to argue the relative merits of each of these options, there has been little effort to develop a comprehensive understanding and solution to the problem of standing when goods produced by an upstream antitrust violator descend into a multi-layered distribution chain. There is great need for just such a functional framework because much of the *Illinois Brick* saga— its doctrines’ development and the subsequent debate it prompted— is a story of misplaced emphasis on legal formalism.

This article offers a comprehensive approach to the problem of indirect purchaser standing that, without paying deference to past mistakes or current rules, applies the functional objectives of antitrust law. Part II traces the origins of the current rule and demonstrates how an “unhappy chronology” and an unnecessarily dogmatic adherence to *stare decisis* gave rise to the indirect purchaser rule. Part III describes the shortcomings of the rule—its failure to advance the paramount objective of deterrence, its exacerbation of complexity in litigation, and its denial of compensation to antitrust victims—and the limited, and unfortunately fruitless, debate over alternative solutions. Part IV

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7 The full range of proposed solutions is discussed in Part III.
8 *Illinois Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).
identifies the central priorities of antitrust law and identifies the markers of an optimal rule of standing. This includes not only the well-recognized goals of deterrence, compensation, and judicial efficiency, but also the risks of frivolous lawsuits and agency costs of attorney-driven class actions. In Part V, we apply these objectives to offer a new framework to the indirect purchaser problem. Borrowing heavily from the experiences of private securities litigation and bankruptcy law, we craft a proposal for a lead plaintiff provision that rewards the detection of antitrust violations, places control of litigation in the hands of parties with the incentives to manage it optimally, and allows injured parties throughout the supply chain to join in the suit. We believe this solution enhances deterrence by extending incentives to detect antitrust violations and sue violators, increases both compensation to injured parties and penalties to violators such that fines are sufficient to deter antitrust violations, avoids the cost and complexity of parallel and multi-jurisdictional litigation, and prevents frivolous lawsuits and agency costs.

II. THE RISE OF THE INDIRECT PURCHASER RULE

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

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

A. \textit{Hanover Shoe}

The story begins with the case of \textit{Hanover Shoe, Inc. v. United Shoe Machinery Corp.}\textsuperscript{11} United Shoe was found to have illegally monopolized the market for shoe-manufacturing equipment by, among other practices, forcing shoe manufacturers to lease—rather than buy—its best equipment.\textsuperscript{12} Hanover, a shoe manufacturer, sued under Section 4 of the Clayton Act, which provides a private cause of action for trebled damages to parties “injured” from antitrust violations.\textsuperscript{13} In its defense, United argued that any overcharge paid by Hanover did not amount to injury

\begin{enumerate}
\item \textit{Illinois Brick}, 431 U.S. at 746-47.
\item 392 U.S. 481 (1968).
\item United Shoe was found to have violated the antitrust laws in separate proceedings in \textit{United States v. United Shoe Machinery Corp.}, 110 F.Supp. 295 (D. Mass. 1953). Under § 5 of the Clayton Act, that case established prima facie evidence of an antitrust violation actionable by injured private parties under § 4 of that Act. \textit{Hanover Shoe}, 392 U.S. at 486-87.
\item Section 4 of the Clayton Act provides in pertinent part:

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

\end{enumerate}
under Section 4 because Hanover had passed-on the cost to its customers in the form of higher downstream prices.\textsuperscript{14}

The district court rejected United’s “pass-on” defense, reasoning that “Hanover’s injury was complete when it paid the excessive rentals” and that “the general tendency of the law, in regard to damages at least, is not to go beyond the first step and exonerate a defendant by reason of remote consequences.”\textsuperscript{15} In an opinion by Justice Byron White, an undivided Supreme Court agreed,\textsuperscript{16} ruling that an injury under Section 4 is suffered whenever an illegally high price is paid, regardless of the buyer’s subsequent actions.\textsuperscript{17} The Court thus held that a plaintiff’s subsequent actions to mitigate economic harm could not later be used by as a defense to a Section 4 claim.\textsuperscript{18}

To reach this conclusion, the Court relied on two functional objectives: avoidance of litigation complexity and deterrence.\textsuperscript{19}

\textsuperscript{14} Hanover Shoe, 392 U.S. at 488. United Shoe argued that if Hanover Shoe “had bought machines at lower prices, [it] would have charged less and made no more profit than it made by leasing.” \textit{Id.}

\textsuperscript{15} \textit{Id.} at 488 n.6 (quoting the district court opinion, 185 F.Supp. 826, 829 (D.C.M.D. Pa. 1960) (quoting Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.W. 531, 533 (1918))

\textsuperscript{16} The Court was undivided in rejecting the pass-on defense. Though Justice White was joined by only six other justices, Justice Marshall did not participate in the decision and Justice Stewart's lone dissent did not disputing the Court’s conclusion on pass-on.

\textsuperscript{17} \textit{Id.} at 489.

\textsuperscript{18} \textit{Id.} at 490 n.8 (“As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss.” (quoting Southern Pacific, 245 U.S. at 533-34)).

\textsuperscript{19} Though the Court’s analysis begins with reference to proximate cause, that reasoning does not drive the opinion. Rather, the Court’s initial use of tort
The Court stated that even if a pass-on defense were allowed, it would be hopelessly difficult to apply.\textsuperscript{20} Calculation of a pass-on would depend on “virtually unascertainable” elements such as other inputs in pricing decisions, the affect of higher prices on sales volume, and the affect of changes in output on marginal cost.\textsuperscript{21} Deterrence would suffer as well, the Court reasoned, because a pass-on defense would reduce the potential recovery to direct purchasers and therefore reduce their the incentive to sue. It would also fragment potential recovery among numerous indirect purchasers, each of which “would have only a tiny stake in a lawsuit and little interest in attempting a class action.”\textsuperscript{22} The functionalist bona fides of the decision are confirmed by the one exception the Court left for so-called “cost-plus” contracts.\textsuperscript{23} In granting standing to indirect purchasers of these contracts, in causation language is best seen as defining the scope of recoverable injury in terms of the harm that was caused by the antitrust violation (this is consistent with references to statutory language referencing “injury” to “property” lost by the plaintiff, 392 U.S. at 488-89). Indeed, if proximate cause really did require that damages calculations “not go beyond the first step,” \textit{id.} at 490 n.8, then there would be no room for a cost-plus contract exception, see \textit{infra} notes 23–24 and accompanying text.\textsuperscript{20} \textit{Id.} at 493 (noting as to causation, “there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.”)\textsuperscript{21} \textit{Id.} \textsuperscript{22} \textit{Id.} at 494 (voicing the concern that “those who violate the antitrust laws . . . would retain the fruits of their illegality because no one was available who would bring suit against them.”). The Court’s deterrence reasoning did not, however, extend to the disincentivizing effect of increased litigation costs from complex calculation of pass-on or the incentive-enhancing effect of allocating recovery for more injury than was actually sustained. These arguments appear later in the \textit{Illinois Brick} decision.\textsuperscript{23} \textit{Hanover Shoe}, 392 U.S. at 494.
which a direct purchaser resells a product at a fixed mark-up, the Court explained that where it is “easy to prove that [the plaintiff] was not damaged,” applying the rule designed to avoid complexity is unnecessary. 24

B. *Illinois Brick*

Cracks in *Hanover Shoe*’s foundation appeared nine years later when the Court divided on a critical question begged by *Hanover Shoe*: whether downstream buyers may sue for overcharges passed-on to them. In *Illinois Brick Co. v. Illinois*, 25 indirect purchasers of concrete bricks sued the manufacturer even though they had purchased the bricks through contractors and other resellers. 26 As the Court explained, “[t]he only way in which the antitrust violation alleged could have injured respondents is if all or part of the overcharge was passed on by the masonry and general contractors to respondents, rather than being absorbed at the first two levels of distribution.” 27

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24 *Id.* The exception suggests that avoiding complexity was more important to the *Hanover Shoe* Court than deterrence. Indeed, deterrence would be just as affected by fragmentation of potential recovery among indirect purchasers with a cost-plus contract as without. This analysis of *Hanover Shoe* appears in *Illinois Brick*. 431 U.S. 733 n.2. Significantly, the non-exclusive wording of the exception—“We recognize that there might be situations—for instance, pre-existing cost-plus contracts”—indicates the Court anticipated future exceptions as cases arose where functional considerations would not be advanced by application of the rule. *Hanover Shoe*, 392 U.S. at 494. An additional exception for a defense where the sale price was, *id.*, sheds little light on the reasons for denying the pass-on defense, but instead goes to actual cause.


26 *Id.* at 727.

27 *Id.*
Speaking for a 6-3 majority, Justice White – the author of the *Hanover Shoe* decision nine years earlier – denied standing to the indirect purchasers. From beginning to end, the *Illinois Brick* opinion was wrapped tightly with *Hanover Shoe*. Justice White’s “two step analysis” began with requiring a symmetric rule that “whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants.” In other words, if a pass-on defense is not available to combat a suit from a direct purchaser, a pass-on justification may not be available to a downstream plaintiff. Denying the pass-on defense while permitting the indirect purchaser’s suit, Justice White reasoned, threatened “a serious risk of multiple liability for defendants.”

28 Though the *Hanover Shoe* Court was undivided on the question of a pass-on defense, the *Illinois Brick* Court split 6-3 on the question of indirect purchaser standing.

29 See id. at 723-26. The first line of the opinion is a citation to *Hanover Shoe*. The second paragraph recites complexity and deterrence rationales for the *Hanover Shoe* decision and the third characterizes the legal issue as being the same one decided in *Hanover Shoe*, casting plaintiff’s claim of pass-on injury as the mirror image of the *Hanover Shoe* defendant’s claim of a pass-on defense. *Id.* at 726 (“In this case we once again confront the question of whether the overcharged direct purchaser should be deemed . . . to have suffered the full injury . . . .”).

30 *Id.* at 728-29 (introducing the “two step” analysis).

31 *Id.* at 730-31 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972) for the proposition that the Court had already declined to “open the door to duplicative recoveries.”) The dissent was similarly concerned with multiple liabilities, though it argued that procedural mechanisms, already in wide use in lower courts, were adequate to facilitate allocation of damages among direct and indirect purchasers. The majority found these procedures inadequate, holding that even a risk of “a little slopover on the shoulders of the wrongdoer” was unacceptable and merited a per se ban on pass-on. *Id.* at 731 n.11 (quoting Tr. of Oral arg. 58).
Having thus limited itself to two options—“either we must overrule *Hanover Shoe* . . . or we must preclude [the indirect purchasers] from seeking to recover on their pass-on theory”—the Court let *stare decisis* do the remaining work. 32 Turning to *Hanover Shoe*, the Court retraced the basis for that opinion and satisfied itself that it had reached the correct conclusion. Again emphasizing the danger of potential complexity in calculating pass-on damages, the Court reasoned that “[h]owever appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.” 34 And in highlighting the centrality deterring future antitrust violations, the Court affirmed its conclusion in *Hanover Shoe* that dividing potential recovery among tiers of indirect purchasers would unacceptably dilute the incentive to sue. 35

32 *Id.* at 736.

33 The Court noted that *stare decisis* is particularly important in cases of statutory interpretation where Congress is free to amend the law, and the Court declared in a footnote that “[s]hould Congress disagree with this result, it may, of course, amend the section to change it.” *Id.* at 735 n.14. The dissent jumped on this comment, noting that Congress did recently express its view that indirect purchasers had standing. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, passed one year earlier, granted state attorneys general standing to sue as *parens patriae* on behalf of their states’ citizens. Because consumers are generally indirect purchasers, the dissent reasoned that Congress must have assumed that indirect purchasers had standing to sue.

34 *Id.* at 737. The Court also expressed its concern that procedural devices, such as joinder, would be inadequate to handle the complexity of pass-on cases and might even add irresolvable complexity themselves. *Id.* at 740-41 (presenting a parade of horribles about how tricky indirect purchaser suits would be).

35 *Id.* at 735 (“[A]ntitrust laws will be more effectively enforced by concentrating the full recovery [with direct purchasers.]”).
The three dissenters voiced concern that the *Illinois Brick* result abandoned another functional concern: compensating injured parties. Justice Brennan, joined by Justices Blackmun and Marshall in a vigorous dissent, protested that barring suits from indirect purchasers would cause consumers to ultimately bear the harm from antitrust injuries while having no avenue available for relief. The *Illinois Brick* approach, he argued, forced a trade-off between ensuring compensation and enhancing deterrence, and “from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation.” Indeed, Justice White agreed that compensation was a functional objective of the Clayton Act, but the majority was “unwilling to carry the compensation principle to its logical extreme” if it impaired deterrence.

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36 *Id.* at 749 (Brennan, J., dissenting) (noting both the compensation and deterrence objectives of Congress).
37 *Id.* at 754-55.
38 *Id.* at 760.
39 Though the core disagreement between the *Illinois Brick* majority and dissent involves a foundational dispute over the principle motivations underlying antitrust law, the majority’s opting for deterrence over compensation is consistent with the Court’s other rulings in antitrust cases. For example, in *Pfizer, Inc. v. Government of India* the Supreme Court ruled that foreign antitrust plaintiffs are entitled to treble damages because ruling otherwise would dilute private enforcement. 434 U.S. 308 (1978). The court conceded in *Pfizer* that “Congress” foremost concern in passing the antitrust laws was the protection of Americans,” but pursuing American interests meant deterring conduct that harmed the American market rather than construing standing rules so that compensation was reserved to American parties. *Id.* at 314-15.
40 *Id.* at 746. The Court acknowledged that recoveries in antitrust suits “often have failed to compensate the individuals on behalf of whom the suits have been brought,” and that Congress “recognize[d] that rarely, if ever, will all potential
C. A Divided Court and a Per Se Rule

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

Recent scholarship on Illinois Brick by Andrew Gavil suggests that Justice Blackmun was correct. Having examined claimants actually come forward to secure their share of the recovery.” 431 U.S. at 747 n.31 (citing H.R. Rep. No. 94-499, p.16 (1975).

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

Brennan also attacked the majority’s affection for symmetry. He argued that “[d]espite the superficial appeal of the argument that Hanover Shoe should be applied ‘consistently’ . . . there are sound reasons for treating offensive and defensive passing-on cases differently,” and that Hanover Shoe “certainly did not imply that an indirect purchaser would not also have [standing].” Id. at 752-53. He charged the majority with mischaracterizing the Hanover Shoe ruling, which he viewed as having evaluated a choice between “overcompensat[ing] the plaintiff, or . . . allowing [the violator] to retain a portion of his ill-gotten overcharges” and opting to risk overcompensation. Id. at 752.

the papers of Justices Blackmun, Brennan, Marshall, and Powell, Gavil observed that when the justices first discussed *Illinois Brick* at conference, six justices were in favor or granting standing to indirect purchasers, and only after intense lobbying by Justice White did he obtain a six-vote majority. 44 The papers reveal that the swing justices were motivated by *stare decisis*, remaining consistent with *Hanover Shoe*, and by a desire to apply standing rules “even-handedly” to both plaintiffs and defendants. 45 These two concerns were reflected in the structure of the majority opinion itself, which cast the issue, first, as whether to apply the rule equally to plaintiffs and defendants and, second, whether to uphold *Hanover Shoe*. Indeed, the outcome’s sensitivity to chronology extends to other antitrust standing cases as well. Roger Blair and Jeffrey Harrison have argued that *Illinois Brick* would have been unnecessary had it followed, rather than preceded, antitrust cases in which the Supreme Court just a few years later established other rules of antitrust standing. 46

The Supreme Court’s actions in subsequent cases were also quite important (and have not been adequately recognized) in shaping the nature of the current-day indirect purchaser rule. The


45 Professor Gavil notes that Justice Powell was swayed in part by Justice Rehnquist’s argument that plaintiffs and defendants be “treated in an even-handed manner.” Gavil, *supra* note 44, at 602.

Court itself for some time appeared uncommitted to the indirect purchaser rule articulated in the *Illinois Brick*, and the fissures exposed in that decision played out in later decisions that apply the indirect purchaser rule. Only five years after issuing *Illinois Brick*, the court placed limits on the reach of the indirect purchaser rule in *Blue Shield of Virginia v. McCready*\(^{47}\) and granted standing to an indirectly injured HMO plan-holder. McCready, after her HMO refused to cover her mental health services because they were provided by a psychologist rather than a psychiatrist, alleged that her HMO’s reimbursement rules were a product of an illegal conspiracy between psychiatrists. The Court permitted McCready to bring suit against the psychiatrists even though she contracted directly with (and was denied payment by) her HMO.

The 5-4 opinion revealed the fault lines and the Court’s lack of confidence in the indirect purchaser rule. The majority opinion was authored by Justice Brennan and was joined by Justices Marshall and Blackmun (the other two *Illinois Brick* dissenters), Justice Powell (a swing vote in *Illinois Brick*) and Justice White (the *Hanover Shoe-Illinois Brick* author). The fragile majority refused to administer an inflexible application of *Illinois Brick* and instead carefully recast that precedent in functional terms, declaring that it was designed primarily to avoid duplicative recovery.\(^{48}\) Because there was no risk of duplicative recovery in McCready’s case (there was no threat of the direct purchaser – the HMO – seeking its own redress), the Court held that *Illinois Brick* did not bar recovery.\(^{49}\) Indeed, Justice Brennan


\(^{48}\) *Id.* at 474 (noting that the *Illinois Brick* Court “found unacceptable the risk of duplicative recovery.”)

\(^{49}\) *Id.* at 474-75.
emphasized that the private cause of action created by Section 4 of the Clayton Act has “broad remedial and deterrent objectives” and, therefore, standing should be presumed absent a “statutory policy suggesting a contrary conclusion in a particular factual setting.”

However, this limitation of *Illinois Brick* was short lived. A new 5-4 majority, eight years later, replaced the tempered, functionally-oriented rule *McCready* with a much more restrictive and inflexible rule in *Kansas v. Utilicorp United Inc.* The *Utilicorp* majority, which consisted of all the remaining *McCready* dissenters (Justices Rehnquist, Stevens, and O’Connor), plus the Court’s two newcomers (Justices Scalia and Kennedy), denied standing to consumers who paid inflated prices for natural gas through an intermediary public utility. Even though the utility passed on the overcharge to consumers according to a fixed markup from natural gas suppliers, the Supreme Court refused to apply the cost-plus contract exception that was explicit in both *Hanover Shoe* and *Illinois Brick*. The Court reasoned that the utility suffered a “potential injury” since it could have petitioned for a change in rates, and calculation of that injury would introduce “the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.” The dissent, written by Justice White and joined by the dwindling *McCready* majority (Justices Brennan, Blackmun, and Marshall), disagreed that the injury calculations involved

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50 Id. at 473. The Court goes on to address the question of multiple liability by noting that although the *Illinois Brick* Court “found unacceptable the risk of duplicative recovery,” there was no such risk here because the psychologists, having been paid by McCready, could never recovery from the HMO. *Id.* at 474.
52 *Id.*
53 *Utilicorp*, 497 U.S. at 210.
significant complexity or any risk of multiple liability. Distinguishing the competitive and uncertain concrete brick market in *Illinois Brick* to the “highly regulated market where utilities possess[] natural monopolies” in *Utilicorp*, the dissenters argued that “[n]one of the concerns that caused us to bar the indirect purchaser’s suit in Illinois Brick exist in this case.”

Importantly, the majority’s ruling did not rest on a degree of anticipated complexity. To the contrary, *Utilicorp* affirmatively enshrined the indirect purchaser rule as a categorical bright-line rule that is immune to calibrations to functional analysis. The *Utilicorp* Court was resolute in putting an end to quibbling over the contours of the rule: “[E]ven assuming that any economic assumptions underlying the [rule] might be disproved in a specific case, we think it unwarranted and counterproductive exercise to litigate a series of exceptions.” The Court has not spoken since on the indirect purchaser rule, leaving this categorical version of the indirect purchaser rule as current law.

The unqualified nature of the indirect purchaser rule puts it at odds with the general body of current antitrust law. Modern antitrust, following the dictates of the so-called Chicago School, eschews formalist inflexible rulings that rest on categorical distinctions and instead favor of a functionalist approach designed to maximize social welfare. As economic understanding and awareness of market conditions improves, and as alternative

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54 See id. at 224-26.
55 Id. at 217.
56 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978) (“The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”).
scenarios arise within different market conditions, courts have adapted antitrust law to account for and adjust to the different applications. The steady shift away from blind adherence to *stare decisis* and towards adapting functional objectives is demonstrated by a trend that eschews per se rules in favor of rules of reason.57

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

“Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.”

The trend appears poised to continue in the current term of the Supreme Court where the issue of the per se rule against vertical resale price maintenance is up for reconsideration. See PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 Fed. Appx. 464 (5th Cir. 2006), *cert. granted sub nom.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S.Ct. 763 (U.S. Dec. 7, 2006) (No. 06-480) (argued Mar. 26, 2007) (addressing the question presented of “whether vertical minimum resale price maintenance agreements should be deemed per se illegal under Section 1 of the Sherman Act,
Not only is the formalism of the indirect purchaser rule at odds with the trend and purpose of antitrust law generally, it is even an outlier from other rules to determine antitrust standing doctrine, all of which rest heavily on functional considerations. In *Associated General Contractors of California v. California State Council of Carpenters*, the Court denied standing to a labor union that sought recovery from a trade association that had allegedly coerced third parties to deal with non-union suppliers.58 Rejecting a literal interpretation of standing under the Clayton Act, the Court adopted a functionalist approach that looked to a host of factors such as nature of the injury, the causal relationship between the violation and the injury, the directness or indirectness of the injury, whether the plaintiff is of a class of economic actors that Congress meant to protect, and whether denying recovery to a given class of plaintiffs is likely to result in under-detection of violations.59 Similarly, in *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, the Court cited functional considerations to deny standing to a plaintiff that challenged a proposed merger that would prevent a competitor from going bankrupt.60 The Court ignored that the merger might violate antitrust laws and denied standing because the type harm – decreased profits from increased competition – was “inimical to the purposes” of antitrust law.61 The categorical, per se nature of the indirect purchaser rule is in tension with these other rules of standing that, like the rest of modern antitrust, are both flexibly constructed and applied with an eye towards the ultimate objectives behind the law.

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59 Id. at 537–542.
61 Id. at 484–88.
In sum, the survival and the contours of the *Illinois Brick* rule can only be described as surprising. The rule attributes its majority support to a particular chronology, where four swing justices were convinced to adhere to an earlier ruling. It has persisted through two conflicting 5-4 decisions that articulate very different approaches to antitrust standing. And, despite this ambivalent past and shaky foundation, it ultimately has produced an inflexible and sweeping *per se* rule. With this background, it is no surprise that even though the doctrine’s critics inside the Court were relegated to the minority, critics outside the Court have remained vocal and resolute, nor is it surprising that critics correctly observe that the rule has many significant shortcomings, and that they have assembled a legitimate case for reform.

### III. SHORTCOMINGS OF THE INDIRECT PURCHASER RULE AND THE CURRENT DEBATE

As the indirect purchaser rule has drifted from a doctrine that is responsive to pragmatic concerns and functional objectives to one that is categorically and inflexibly applied, it has proven increasingly inadequate in facilitating private enforcement of the antitrust laws under Section 4 the Clayton Act. Although *Hanover Shoe* and *Illinois Brick* were both intended to improve the effectiveness of such suits by avoiding litigation complexity and enhancing deterrence, the resulting rule has failed to advance either goal.

#### A. Complexity Has *Increased* Under the Rule

From the beginning, commentators were skeptical of the Court’s assertion that calculating pass-on and allocating damages between multiple subsequent purchasers would prove too unwieldy and complex. Only two years after the decision was handed down,
Robert Harris and Lawrence Sullivan argued that although “adjudication to trace a particular overcharge down its particular chain is a daunting one,” the task in many cases might be simplified by applying institutional assumptions and theoretical analysis. 62 Herbert Hovencamp more recently summarized an assortment of proven methods to calculate passed-on overcharges, none of which required an analysis materially more complex than other determinations routinely required in antitrust litigation. For example, pass-on damages can be measured by the “yardstick” method, which looks to the prevailing price in geographic market that is similar (but not cartelized), or by the “before-and-after” method, that looks to pre- or post-cartel prices in the same

Both methods are routinely applied in antitrust cases, including those by direct purchasers. In any event, this debate over the difficulty to calculate pass-on damages has become entirely irrelevant because indirect purchasers are permitted to sue antitrust violators under many state statutes. These statutes, enacted in response to Illinois Brick and called “Illinois Brick repealers,” were passed as part of a broader political backlash against Illinois Brick that included several unsuccessful attempts to amend federal antitrust laws to restore indirect purchaser standing. These statutes, and the cases brought under them, illustrate that the difficulties in calculating pass-on damages have become entirely irrelevant.

63 Herbert Hovenkamp, Book Review, The Rationalization of Antitrust by Richard A Posner, 116 HARV. L. REV. 917 (2003). The yardstick method is described in Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice § 17.5b1 (2d ed. 1999) (explaining that “[a]djustments must probably be made for differences in taxes and regulatory fees, costs of transportation, and different wage and salary rates. However, if these differences can be isolated and quantified, an expert economist or accountant should be able to produce a ‘reconstructed’ price that would have prevailed in the cartelized market if it had the same level of competition as exists in the yardstick market.”). The before-and-after method is described at id. § 17.5b2.


65 For a survey of the legislative response to Illinois Brick at the federal and state levels, see Cavanagh, supra note 6, at 48. For a detailed description of the so-called state repealers, see Daniel R. Karon, “Your Honor, Tear Down that Illinois Brick Wall!” The National Movement Toward Indirect Purchaser Standing and Consumer Justice, 30 WM. MITCHELL L. REV. 1351 (2004).
damages have not hamstrung state courts, and since the burden of proving damages rests on the plaintiff, successful suits reveal that the complexity obstacles are not impossible to overcome. The Supreme Court has found no objection to these state statutes, ruling that indirect purchaser recovery under state competition law is not preempted by *Illinois Brick*.\(^{66}\)

Now enacted in thirty states,\(^{67}\) *Illinois Brick* repealer statutes create a confusing mosaic of antitrust standing law. The asymmetry between federal and state rules is compounded by variation across states, giving rise to far more procedural complexity than what the *Illinois Brick* Court had originally hoped to avoid by denying indirect purchaser standing. In addition, antitrust actions arising out the same basic violation are regularly filed simultaneously in state and federal court, resulting in parallel trials and duplicative litigation, and inter-state differences bring unnecessary importance to venue and jurisdictional limitations. One antitrust scholar decried the current situation as a “logistical nightmare,”\(^{68}\) and another demanded, at the very least, some harmonization between federal and state laws.\(^{69}\) The added and

\(^{66}\) California v. ARC America Corp., 490 U.S. 93, 105-06 (1989) (holding that federal law did not preempt state law from providing recovery to indirect purchasers). Justice White wrote for a unanimous Court.

\(^{67}\) Cavanaugh, supra note 6, at 2 n.4.

\(^{68}\) Cavanagh, supra note 6, at 30 (“This proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact with cases pending in federal court has created a logistical nightmare for the courts.”).

\(^{69}\) Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860, 863 (2001) (“[T]he artificial division of cases that now flows from Illinois Brick imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies. Ample ground should exist, therefore, to construct a consensus for procedural reform directed at facilitating
unnecessary procedural complexity has figured prominently in the ongoing consideration of alternatives to the indirect purchaser rule at the Antitrust Modernization Commission.  

B. Deterrence Remains Elusive

Perhaps more problematic, the indirect purchaser rule has also contributed to an antitrust regime that has inadequately deterred anticompetitive conduct. The Illinois Brick doctrine has been faulted for permitting cartels and illegal monopolists to proliferate.

Illinois Brick was initially praised in some quarters for its effect on deterrence. William Landes and Richard Posner defended the decision by reasoning that because direct purchasers had more contact with antitrust violators, they had better information and thus encountered fewer costs in detecting when violations occurred. Therefore, they were more likely to discover antitrust violations and bring suit and were better private policemen than indirect purchasers are. Even if direct purchasers passed on an illegal overcharge to indirect purchasers, permitting more efficient treatment of substantively overlapping cases filed contemporaneously in multiple jurisdictions, state and federal.

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70 SUMMARY OF INDIRECT PURCHASER HEARINGS, supra note 5, at 1 (“Almost all of the speakers . . . viewed the current situation as entailing needlessly heavy costs and burdens on the defendants.”).
71 William M. Landes and Richard A. Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Law? An Economic Analysis of the Rule in Illinois Brick, 46 U. CHI. L. REV. 602, 609 (1979) (“The remote purchaser may now know that a price increase to him is attributable to a price increase by a remote supplier, and even if he does know, he will find it difficult to discover the reasons for the remote supplier’s price increase.”).
direct purchasers to recover the full amount would deter anticompetitive conduct better than granting standing to indirect purchasers.\textsuperscript{72}

But most commentators disagreed. Robert Harris and Lawrence Sullivan, writing that same year, argued that direct purchasers would have little reason to sue antitrust violators. They reasoned that since direct purchasers would pass on most overcharges to subsequent buyers, in the long run direct purchasers would suffer little harm from antitrust violations and thus would have little reason to pursue violators.\textsuperscript{73} To the contrary, direct purchasers would be reluctant to disrupt important supplier relationships.\textsuperscript{74} Recent experiences lend support to this view. Herbert Hovenkamp has cited the recent Microsoft antitrust litigation as an illustration in which direct purchasers feared bringing suit against a powerful supplier and instead opted to pass

\textsuperscript{72} Posner and Landes argue that indirect purchaser already receive the benefit of any potential recovery under an alternative rule because the value of potential recovery by direct purchasers under \textit{Illinois Brick} is already factored into pricing. \textit{Id.} at 605.

Critics have called this analysis “quite implausible.” Gregory J. Werden and Marius Schwartz, \textit{Illinois Brick and the Deterrence of Antitrust Violations—An Economic Analysis}, 35 HASTINGS L.J. 629, 638 (1984) (“[W]e must also agree with Professors Harris and Sullivan that \textit{Illinois Brick} runs counter to the goal of compensation.”).

\textsuperscript{73} Harris and Sullivan, \textit{supra} note 62, at 352.

\textsuperscript{74} Posner and Landes responded directly to this point by arguing that “any forbearance by the direct purchaser to sue will be compensated. The supplier must pay something to bind the direct purchaser to him and this payment is, functionally, a form of antitrust damages.” William M. Landes and Richard A. Posner, \textit{The Economics of Passing On: A Reply to Harris and Sullivan}, 128 U. Pa. L. Rev. 1274, 1278 (1984). For an analysis that \textit{Illinois Brick} enhanced deterrence primarily by reducing litigations costs, see Werden and Schwartz, \textit{supra} note 74, at 667.
on antitrust injury to end consumers. Contrary to the Landes and Posner view, in which direct purchasers would launch antitrust suits if they reasonably expected the suit to be successful, direct purchasers of Microsoft software understood that interrupting their lucrative relationship with Microsoft would end future access to Microsoft products, equipment upgrades, and the growing information technology market. The Antitrust Modernization Commission hearings have uncovered many similar instances in which direct purchasers overlooked potential antitrust violations, and indirect purchasers instead were the first parties to bring suit.

Some scholars have further argued that the indirect purchaser rule not only fails to detect antitrust violations, but in fact encourages additional antitrust violations. Because illegal cartels and monopolists can easily share rents with direct purchasers without explicitly including them in an illegal conspiracy, these antitrust violators can effectively pay off the only parties who have standing to bring suit. Dubbed “Illinois Walls” because it puts illegal conduct effectively beyond the reach of antitrust enforcers, the indirect purchaser rule thus facilitates tacit cooperation between antitrust violators and direct purchasers in ways that would be virtually impossible to punish. For example,

76 Id.
cartels might manipulate volume in order to allow direct purchasers to share in the profit from the resulting scarcity, and indeed it is not difficult to predict the market characteristics in which Illinois Walls would prevent antitrust policing.\textsuperscript{79} In several recent high-profile instances of illegal cartels, direct purchasers were conspicuously absent from the legal action.\textsuperscript{80}

Moreover, even if direct purchasers are eager to bring suit against antitrust violators, it is not clear that their suits will inflict penalties that will be sufficient to deter violations. The orthodox view, drawing from tort theory, defines an optimal fine for an antitrust violation as the consequent economic harm divided by the probability the violator will be held accountable, with any lesser fine permitting violations to remain profitable in expectation.\textsuperscript{81}

With only direct purchasers able to bring suit, however, the probability of an antitrust violation being detected is necessarily less than if indirect purchasers also had incentives to investigate

\textsuperscript{79} Id.; see also Maarten Pieter Schinkel and Jan Tuinstray, \textit{Illinois Walls in Alternative Market Structures} (May 2005), available at http://ssrn.com/abstract=729843 (follow links to download) (demonstrating how Illinois Walls are robust enough to thrive in a variety of market arrangements).

\textsuperscript{80} Those examples include the \textit{Brand Name Prescription Drugs} litigation involving cooperative conduct between manufacturers and wholesalers, cartelization of the lysine and citric acid markets by Archer Daniels Midland Co. and others, and the Microsoft case. Schinkel, et. at., supra note 76, at 28-31.

\textsuperscript{81} This is the formula proposed by Professor Landes. William M. Landes, \textit{Optimal Sanctions for Antitrust Violations}, 50 U. CHI. L. REV. 652, 653 (1983).
wrongdoing. The need for additional private enforcers would not be necessary if the Clayton Act’s implied likelihood of detection—one in three—were not so optimistic. To the contrary, estimates of cartel detection rates run as low as ten to twenty percent. \(^{82}\) Perhaps less excusable, defendants found to be culpable are paying far less than the treble damages envisioned by the Clayton Act, and instead are paying closer to single damages. \(^{83}\)

With these structural problems preventing adequate antitrust policing, it comes as no surprise that the vast majority of empirical evidence suggests that international cartels are severely under-policed. Studies by John M. Connor indicate that cartels are able to exact average overcharges that far exceed fines imposed. \(^{84}\) Moreover, contrary to some beliefs that cartel behavior is

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inherently unstable, studies of several long-term cartels indicate that those cartels over time grew more stable, became more sophisticated in self-monitoring and escaping detection, and imposed average overcharges that increased with the life of the cartel. In cartel activity has apparently increased in recent years, and some scholars similarly estimate that monopolization is inadequately deterred. In sum, the indirect purchaser rule has contributed significantly to the under-policing of antitrust violators, and perhaps might facilitate additional violations.

C. The Limits of the Current Debate

Given the severe problems of the indirect purchaser rule – the doctrine now regularly receives complaints from would-be plaintiffs denied standing, from defendants faced with parallel lawsuits, and from courts charged with managing unnecessarily complex litigation – it is additionally disappointing that proposed solutions are also inadequate. To be sure, vocal demands for reform have rekindled a determined political impetus to seek alternatives, which in turn has generated a healthy debate over the relative merits of rules enshrined in the Illinois Brick and Hanover Shoe decisions, but the debate has failed to produce creative solutions.

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86 Daniel R. Karon has also noted that many market participants prefer to fix prices and await weak enforcement. Daniel R. Karon, Price Fixing, Market Allocation and Bid Rigging Conspiracies: How to Counsel Your Clients to Detect Violations and Inform You of Potential Claims, 25 AM. J. TRIAL. ADVOC. 241, 255 (2001);
Partly to blame for the ossified debate is the development of the rule itself. Both the \textit{Hanover Shoe} and \textit{Illinois Brick} decisions anticipated that situations would arise where the functional objectives of the rule would be ill served by its rigid application. Unfortunately, although shaping exceptions around functional objectives might have enhanced the efficiency of the indirect purchaser rule in the context of complex distribution systems, that potentially fruitful path towards a flexible and functionally responsive rule was foreclosed by the categorical analysis in \textit{Utilicorp}.\footnote{\textit{Kansas v. Utilicorp United, Inc.}, 497 U.S. 199, 217 (1990) (“[E]ven assuming that any economic assumptions underlying the [rule] might be disproved in a specific case, we think it unwarranted and counterproductive exercise to litigate a series of exceptions.”).} Since the enshrinement of a categorical standing rule, there is little room in the debate for incremental reform, and the debate has pitted entrenched interests advancing well-worn and intractable positions.

To a large extent and perhaps predictably, the evolution in the debate has lagged behind developments in the case law. A year after \textit{Illinois Brick} was handed down, the American Bar Association assumed that decision would be legislatively overruled and commented on the narrow question of how to avoid multiple liability from indirect purchaser suits.\footnote{\textit{Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning Illinois Brick Co. v. Illinois} (Josef D. Cooper and David L. Foster, chairs), 46 \textit{Antitrust L.J.} 1137, 1144 (1978) (proposing that indirect and direct purchaser actions be consolidated to avoid duplicative liability).} By 1983, when initial efforts at legislative reform had failed, an ABA task force came out strongly opposed to reform, adopting the reasoning of \textit{Illinois Brick}.
Brick that diluted recovery and litigation complexity would harm deterrence. 89

The debate remained stalled over the either-or question of whether to allow federal indirect purchaser suits until the Court itself addressed whether state indirect purchaser suits were preempted by Illinois Brick in California v. ARC America Corp. 90 In response, the ABA’s consideration of potential reforms expanded (slightly) beyond merely whether to overturn Illinois Brick to include whether to preempt state indirect purchaser actions and various procedural mechanism to promote case consolidation. 91

Since then, the debate has barely advanced beyond these few alternatives. Commentators have continued to grapple with the problems of multi-jurisdictional litigation and some have keenly observed the increasing gap between the functional goals articulated in Illinois Brick and the reality of the modern indirect purchaser rule, 92 and dissatisfaction with the current state of affairs have made indirect purchaser standing arguably the most polemic area of antitrust law. The Antitrust Modernization Commission, whose charge is to examine potential reforms for antitrust law

92 Too numerous for a single citation, more recent academic commentary on the problems of indirect purchaser standing includes scholarship by Professors Gavil, supra note 43, Cavanaugh, supra note 6, and Karon, supra note 86.
generally, has appeared to devote more resources to the problem of indirect purchaser standing than to any other problem. The primacy of this issue is further evident from its appearing first among the issues recommended to the AMC for consideration by the ABA Section on Antitrust Law. Notably, the ABA’s recitation of the relevant issues largely echoed those already identified fourteen years earlier in its 1990 report on ARC America – whether to preempt state law, whether to repeal Illinois Brick, and how procedural mechanism might promote case consolidation.

The current hub of debate of course remains at the Antitrust Modernization Commission, and suggested reforms are likely to emerge from that bipartisan body. The near-unanimity of opinion in favor of legislative reform in this area was demonstrated during the AMC proceedings in 2005 where representatives from the plaintiff and defense bars, as well as states, came out in support of

In a vote on preliminary proposals by the twelve AMC commissioners, ten called for *Illinois Brick* to be overturned.97

Unfortunately, the growth in political impetus for reform has not been matched by growth in the available policy alternatives.98 Rather than start from functional considerations and craft an ideal rule, commentators are still fighting yesterday’s battles. The intractability of the current problem is not a failure to prove whether indirect purchasers make efficient plaintiffs in private antitrust enforcement or even whether preemption would cure the growing problem of complexity. Both are important debates, but neither has successfully provoked change in the law. The time is ripe for a new and expanded functional approach.

96 SUMMARY OF INDIRECT PURCHASER HEARINGS, *supra* note 5, at 1–2.
97 ANTITRUST MODERNIZATION COMMISSION, SUPPLEMENTAL CIVIL REMEDIES-INDIRECT PURCHASER DISCUSSION OUTLINE (July 20, 2006), available at http://www.amc.gov/pdf/meetings/CivRem-IndPSupplOutline060720circ.pdf. The vote also showed five commissioners in favor a statutory provision allowing removal of state indirect purchaser actions, with another five in favor of that measure as an alternative to outright preemption of state indirect purchaser claims. *Id.*
98 Following initial hearings, the AMC issued a call for public comments on various reform proposals that included only the same few alternatives: preemption of state laws, legislative repeal of *Illinois Brick* and *Hanover Shoe*, and procedural mechanisms to facilitate consolidation. Request for Public Comment, 71 Fed. Reg. 34,590-91 (June 15, 2006). The call for commentary also suggested trifurcating trials to enhance procedural efficiency. *Id.*
IV. REEVALUATING FUNCTIONAL OBJECTIVES

Given a rare opportunity for comprehensive reform, antitrust policymakers should look beyond the decades-old debate and instead pursue innovative solutions that reflect the functional objectives of antitrust law. Those functional objectives of antitrust have been recognized since Hanover Shoe and Illinois Brick were decided: deterring antitrust violations, compensating victims of illegal overcharges, minimizing the administrative costs of doing so, and avoiding multiple liability. Each of these objectives were articulated in both decisions, and theoretically they remain at the forefront of antitrust standing policy, but the Court conceded in Illinois Brick that it had to choose among them, rather than pursue them all, and subsequent debate has also been constrained to choosing between competing objectives. Since the legal and policy debates have unfortunately failed to revisit the core objectives of antitrust standing rules, it is useful and necessary to highlight and reevaluate those functional objectives and identify the markers of an optimal solution.

A. Optimizing Deterrence and Compensation

The heart of the debate between the majority and dissent in Illinois Brick was over the primacy of deterrence versus compensation. The dissent objected to a rule that gave no recourse to injured parties, while the majority conceded that deterring future violations trumped bending the rule towards compensatory objectives. But the debate was structured by the perception that

99 Compare Illinois Brick v. Illinois, 431 U.S. 720, 749 (1977) (Brennan, J., dissenting) (stressing compensation as a functional objective), with id. at 760 (“[F]rom the deterrence standpoint, it is irrelevant to whom damages are paid.”).
Hanover Shoe caused these objectives to be irreconcilable. In fact, the debate could be interpreted as an agreement that both deterring violations and compensating victims are core objectives for antitrust law, and an optimal solution would pursue both.

There is little dispute that both of these objectives belong in the core of antitrust law. As an historical matter, Congress passed the Clayton Act with deterrence objectives squarely in mind. In providing for private causes of action, the Act expressly conceded that both private and government actions would be needed to adequately police antitrust violators. This conforms with most normative theories of tort law, which establish that punishing wrongdoing and deterring future misbehavior advance social welfare, and there is consensus in the economic literature on punishment and deterrence that private enforcement can substantially enhance deterrence objectives. Private parties have informational advantages over public law enforcers, thus enhancing the likelihood of detecting violations.  

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100 For a discussion of the legislative history of the private enforcement provision of the Clayton Act, see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (“The House debates following the conference committee report […] indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law” (citing 51 Cong. Rec. at 16274-75 (remarks of Rep. Webb), 16317-19 (Rep. Floyd)). The documents referenced Brunswick can be found in 2–3 The Legislative History of the Federal Antitrust Laws and Related Statutes (E. Kintner ed. 1978).

101 See, e.g., ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 320–22 (4th ed. 2004) (illustrating that tort law can and should be designed to minimize the social costs of accidents).

are also certainly greater in number than government officials, and as a general matter, the greater the number of policemen, the higher the probability of detecting wrongdoing. Thus private causes of action promote enforcement and deterrence objectives. Also, the level of punishment should be – and is – tailored to the objectives of deterrence. The provision of treble damages is testament to achieving adequate deterrence through private enforcement, and it has been argued that the damages awarded by the Clayton Act are an approximation of the “optimal fine” that ideally deters antitrust violations.\textsuperscript{103}

\textsuperscript{103} See William M. Landes, \textit{Optimal Sanctions for Antitrust Violations}, 50 U. Chi. L. Rev. 652, 653 (1983). Professor Landes proposes that an optimal fine for an antitrust violation would be the economic harm resulting from that antitrust violation divided by the probability of the violator being held accountable. Modeled from tort theory, the formula intends to force the violator to internalize the societal costs of the antitrust violation, with the trebling of damages compensating for the less-than-certain probability that the violation will be detected. Landes suggests that this would mean that violations would only occur when the efficiency gains of the conduct outweigh the now-internalized cost to society. One problem with this approach, however, is it neglects that antitrust law is supposed to punish \textit{only} socially undesirable, i.e. welfare-reducing, conduct. Thus, if substantive antitrust law were properly applied, violations would be limited to conduct that reduces total surplus, and “efficient violations” would not be violations at all. Perhaps, from a functional perspective, over-deterrence (i.e. deterring socially desirable conduct) is impossible, except to the extent that excessive fines for violations may increase bankruptcy risk and its attendant social costs. But if there is a cost to administering or imposing high fines, and there otherwise is a reason to make fines as low as possible while still deterring all potential violations, then the Landes formula makes sense.
However, the Clayton Act was also clearly designed to give compensation to parties harmed by unfair competition.\textsuperscript{104} Normatively, compensation is also a desirable objective. Corrective justice theories emphasize the role that liability plays in rectifying the injustice that one party imposes on another, and that compensation to the injured party is central in remedying the injustice.\textsuperscript{105} And utilitarian theories state that compensating injured parties provides a form of social insurance, thus increasing each individual’s expected utility regardless in spite of the ex-ante risk of suffering harm.\textsuperscript{106}

The problem encountered in both \textit{Hanover Shoe} and \textit{Illinois Brick}, and the problem that complicates simultaneous pursuit of compensation and deterrence, is the multi-leveled supply chain. In a simple two-party transaction, in which the buyer is the one who suffers the harm from an antitrust violation, there is little tension between the two objectives. But this simplistic production chain is becoming increasingly uncommon in the globalized

\textsuperscript{104} See \textit{Brunswick}, 429 U.S. at 486 n.10 ("The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as ‘open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered’") (citing 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb); 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-17, 9466-67, 9487-95.).

\textsuperscript{105} See, e.g., JULES COLEMAN, RISKS AND WRONGS (1992). Corrective Justice theory finds its origins in Aristotle’s writings, see NICOMACHEAN ETHICS, V, 2-5, at 1130a14-1133b28.

\textsuperscript{106} See, e.g., SHAVELL, supra note 102, at 258; CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW WORK: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 14-16 (2003).
and perhaps this gives greater urgency – if the objectives of compensation and deterrence were only rarely in tension, then the *Illinois Brick* favoring one over the other is more palatable since it would mean that compensation is only occasionally sacrificed. But in a globalized world, the multi-level supply chain is the rule much more than the exception, causing the indirect purchaser rule to substantially marginalize pursuing the compensation objective in antitrust law.

If compensation is a desirable goal for antitrust, then the frequency of multilayered supply chains is a strong incentive to seek a mechanism that will adequately compensate parties injured by anticompetitive conduct without sufficiently deterring illegal conduct. In other words, policymakers should be compelled to think outside the constraints the Court thought were imposed by *Hanover Shoe*.

B. Avoiding Complexity: The Problem of Parallel Litigation

The Court in *Illinois Brick* and its progeny also agree that minimizing the complexity of litigation is an important goal.

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107 See, e.g., GARY GEREFFI & MIGUEL KORZENIEWICZ (EDS), COMMODITY CHAINS AND GLOBAL CAPITALISM (1993) (illustrating the rise of “global commodity chains” and the spread of multi-level, international production networks).

The *Illinois Brick* Court was particularly concerned about the requisite complexity in calculating pass-on charges and allocating the damages caused by a single monopoly mark-up. To be sure, complex legal determinations add to the costs of litigation, which imposes social costs while making enforcement more difficult, and in fact, antitrust is rife with issues that are costly to litigate. Determining the relevant market, for example, routinely requires the costly collection of data, rigorous empirical estimations of prices and cross-elasticities, and expensive expert testimony. Calculating the allocations of a passed-on overcharge would join a long list of costly antitrust determinations, and though the pass-on calculation in that respect is far from unique, and avoiding that calculation would by no means remove complexity from antitrust litigation, it is reasonable for the Court to try to avoid making such calculations so long as it does not increase other costs.

However, there are other and more severe issues that invoke concerns over complexity. Specifically, litigation complexity is exponentially increased when it progresses through parallel proceedings. While the indirect purchaser rule might make individual suits easier to litigate by avoiding the pass-on calculation, the proliferation of repealer statues in some, but not all, states has created substantial institutional complexity. The repealer statutes subjects defendants to multiple suits in both federal and state courts, force state courts to entertain duplicative and unnecessary antitrust suits, and introduce legal confusion over issues of jurisdiction and preemption.\(^{109}\) Parallel litigation of this sort is far more costly and wasteful of litigants’ and judicial resources than a consolidated proceeding.

\(^{109}\) *See supra* Part III.A.
As a normative matter, reducing complexity – and thereby decreasing the costs of antitrust enforcement – is undoubtedly a desirable objective. Models proposing socially optimal systems of tort regulation routinely make efforts to reduce administrative costs (so long as reducing complexity does not mitigate the effectiveness of enforcement),\(^{110}\) and devising a system that can consolidate suits that allege a common antitrust violation would make significant strides towards conserving valuable judicial and litigation resources. The current system that compels parallel litigation, causes jurisdictional confusion, and introduces non-uniformities in the law is far less desirable. Reducing complexity therefore would be served far more by consolidating litigation than by than avoiding complex calculations.

C. Avoiding Multiple Liability

Ever since *Illinois Brick*, the Supreme Court has remained steadfast in its commitment to avoid multiple liability for defendants. As was noted above, hostility to multiple recoveries was an underlying premise of the *Illinois Brick* decision. After correctly noting that a “one-sided application of *Hanover Shoe* substantially increases the possibility of … multiple liability [and] overlapping recoveries,” the Court swiftly concluded that it was “unwilling to open the door to duplicative recoveries.”\(^{111}\) Even the dissenters agreed and expressed similar concern for multiple liability, and disagreed with the majority only in arguing that procedural mechanisms that were already in wide use in lower

\(^{110}\) COOTER & ULEN, *supra* note 101 at 342–44.

\(^{111}\) *Illinois Brick*, at 730-31 (citations and quotations omitted).
courts were adequate to prevent duplicative recovery. The Court in subsequent rulings reiterated that any standing rule should build off the premise that no antitrust violator should be punished twice for the same violation.

Curiously, it is unclear where the Court found the authority to prohibit multiple liability, especially since all successful plaintiffs recover a multiple of their injury, in the form of treble damages. In *Illinois Brick*, the Court drew its prohibition of multiple liability from a similar assertion it made in *Hawaii v. Standard Oil Co.*, in which it refused to “open the door to duplicative recoveries,” but even that assertion was made without analysis or citation to a supporting authority. Perhaps the Court implicitly invoked the well-established principles of res judicata or even proportionality in damages awards, but given

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112 *Id.* at 761 (Brennan, J., dissenting). The majority found these procedures inadequate, holding that even a risk of “a little slopover on the shoulders of the wrongdoer” was unacceptable and merited a per se ban on pass-on. *Id.* at 731 n.11 (quoting Tr. of Oral arg. 58).

113 *E.g.*, Kansas v. Utilicorp United, Inc., 497 U.S. 199, 212 (1990) (“The *Illinois Brick* rule also serves to eliminate multiple recoveries.”); Blue Shield of Va. v. McCready, 457 U.S. 465, 474 (1982) (acknowledging precedent that a risk of duplicative recovery was “unacceptable”). Note that state repealer statutes provide only for single recovery between direct and indirect purchasers. See, *e.g.*, Karon, *supra* note 65, at 1371 (discussing state law cases dealing with the double recovery problem).


115 *Id.* The undesirability to multiple recoveries might rest on the well-established principles of double jeopardy and res judicata. Nonetheless, given the difficulty of the *Hanover Shoe-Illinois Brick* doctrine, a more developed argument against multiple recoveries is probably in order.

116 The seemingly self-evident proposition that a defendant ought not to be subjected to duplicative liability suffers from a surprising lack of reliable authority. For example, at oral arguments in the oft-cited punitive damages case
the difficulty of the *Hanover Shoe-Illinois Brick* doctrine, and the assumption that certain injured parties would be without recourse, the Court’s rejection of multiple recovery without analysis demands a better explanation.

Perhaps a firmer justification rests on a statutory interpretation of section 4 of the Clayton Act, which permits antitrust plaintiffs to seek treble damages. \(^\text{117}\) This grant of treble damages has been read as a ceiling to recovery. For example, Judge Frank Easterbrook in *Paper Systems Inc. v. Nippon Paper Industries Co.* noted approvingly that if the Supreme Court in *Illinois Brick* had permitted both direct and indirect purchasers to bring antitrust actions, then “the total recovery would have exceeded the treble damages provided by the Sherman Act.” \(^\text{118}\) But, in fact, the Clayton Act’s awarding of reasonable attorney’s fees means that the total recovery always exceeds treble damages, and in some cases attorneys fees boost the total recovery far

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\(^\text{117}\) *State Farm Mutual Auto Insurance, Co. v. Campbell,* 538 U.S. 408 (2003), Professor Laurence Tribe suggested that defendants would be protected from duplicative liability by “under some double jeopardylike doctrine.” When Justice Stevens pressed for authority to support that assertion, Professor Tribe laughingly admitted, “I just made it up.” Linda Greenhouse, *Court Ponders Limits of Punitive Damages,* N.Y. TIMES, A36 (Dec. 12, 2002).

\(^\text{118}\) Section 4 of the Clayton Act reads, provides in full:

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


\(^\text{118}\) 281 F.3d 629, 633 (7th Cir. 2002)
beyond the trebling of damages. One colorful example is the United States Football League’s successful (by some standards) antitrust suit against the National Football League in 1986.\textsuperscript{119} A jury declared that the NFL was an illegal monopoly and had willfully acquired and maintained monopoly status through predatory tactics, but it determined that the damage imposed on the USFL was a mere $1. That measure of damage, after being trebled and incurring post-judgment interest, amounted to $3.76, yet the USFL also collected approximately $5.5 million in costs.\textsuperscript{120}

Moreover, there might be good reason to allow for multiple recovery. Considerations of complexity would endorse permitting both direct and indirect purchasers alike to sue for the full amount. It would dismiss the need to distinguish between direct and indirect purchasers, which – as \textit{McCready} illustrated – can be complicated when transactions facilitated by insurers and other intervening parties. It also would obviate the core of the \textit{Illinois Brick} Court’s concern, which was the difficulty of determining who ultimately bears the harm from an antitrust violation. Finally, and most important, granting standing to multiple parties, and incentivizing each to sue for the full amount of economic harm (trebled, plus attorneys’ fees) would be the swiftest way to solve the problem of under-deterrence.

Nonetheless, despite these considerations, and even though neither Supreme Court precedents nor a coherent statutory interpretation convincingly prohibit multiple recovery, there are

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good reasons to endorse the Supreme Court’s unarticulated hesitation to open the floodgates to duplicative liability. Such a plaintiff-friendly rule would invite an endless string of heavy claims that would sharply increase the likelihood of bankruptcies for antitrust violators, which would impose social costs. In fact, an endless string of suits would be a likely result, since a hypothetical cartel of farm equipment manufacturers could lead to suits from farmers, agricultural distributors, food retailers, cereal producers, dog food manufacturers, and consumers, among others. It would be hard to justify administering a complex bankruptcy proceeding with these assorted claimants in the name of resolving under-deterrence, reducing complexity, or pursuing other objectives. Thus, the Supreme Court was correct to prohibit duplicative recovery. Antitrust standing rules should be organized so that a violator’s total liability is limited to the (trebled) amount of an illegal overcharge.

V. Alternatives, and a Proposal

We conclude from the previous section that an optimal rule of antitrust standing would enhance deterrence against violations, provide compensation to injured parties, minimize administrative complexity, and prevent duplicative liability. Given the current doctrine’s poor record – one laced with inadequate deterrence,

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121 Bankruptcy imposes substantial social costs. See Douglas G. Baird, The Uneasy Case for Corporate Reorganizations, 15 J. LEG. STUD. 127,133 (1986); Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 YALE L.J. 857, 862 (1982). Further, an increase in antitrust liability of this sort might also promote the use of protective corporations and would increase agency costs.
unnecessary complexity, and severe failures in compensating victims of antitrust violations – there is substantial room for improvement on most of these criteria. However, the academic literature and current policy debate have reflected the formalist legal analysis that shaped the current doctrine, focusing chiefly on preempts state laws and reversing *Illinois Brick*.\(^{122}\) It is quite likely that most of the current reform proposals would improve the current doctrine, but maintaining focus on antitrust’s underlying objectives while exploring innovative solutions could lead to vastly improved proposals. After reviewing the leading proposals, we offer a creative proposal that has gone unconsidered in current debates: a lead plaintiff provision modeled after the Private Securities Litigation Reform Act of 1995 (“PSLRA”).\(^{123}\) This proposal shows fidelity to the objectives of antitrust law, incorporates lessons from neighboring fields of law, and infuses some innovative thinking into the important search for improved antitrust standing rules.

A. Preempting State Law Under *Illinois Brick*: Direct versus Indirect, redux

To combat the rise of unnecessary litigation complexity, one simple proposal before the Antitrust Modernization Commission is to preempt state *Illinois Brick* repealer statutes and prevent indirect purchasers from bringing suit in either state or

\(^{122}\) *See supra* Part III.C.

This reform plan offers an easy resolution to mounting costly and unnecessary jurisdictional disputes, parallel trials, and legal uncertainties. It also reflects an endorsement and expansion of the Illinois Brick decision.

Of course, this proposal also is vulnerable to many of the criticisms that have been lobbed at the Illinois Brick decision. Though it avoids both parallel litigation and the complexities of determining pass-on calculations, it fails to address the current rule’s substantial inadequacies in improving deterrence or providing compensation to injured parties. In fact, by precluding indirect purchasers from bringing suit in state courts and eroding the threat of suit to antitrust violators, this proposal would fare worse than the current rule on both deterrence and compensation measures.

This proposal also highlights many of the problems that were inherent in the logic behind Illinois Brick. Constrained by refusing to permit multiple liability, the Court in Illinois Brick felt forced to choose between either granting standing to the direct purchaser, who allegedly suffered no harm, or to the consumer, who suffered the entire harm. The deterrence rationale for the rule rests on the increased incentive to bring suit due to concentrated recovery and an assumption that direct purchaser have superior information about violations.\footnote{125}
It is important to evaluate this justification carefully. First, it is highly disputable that that direct purchasers necessarily have better information about potential violations. In many cases, some indirect purchasers of a monopolized product may also be direct purchasers of other products and may even have more extensive dealings with the violator. Also, indirect purchasers may be more likely to shop between multiple brands and have a more comprehensive perspective on a product market, whereas direct purchasers might be mere turnkeys that resell products without modification and at a fixed markup. Counterexamples in which the indirect purchaser has better information than the direct purchaser are thus not difficult to imagine. Second, the rise of the class action increases the possible recovery for consumers and indirect purchasers, thus steepening their incentives to pursue antitrust violations. Some defenders of *Illinois Brick* argue that direct purchasers usually purchase greater volumes from alleged antitrust violators, thus have a greater potential recovery and therefore greater incentive to detect and violations and bring suit. However, the rise of class actions enable downstream purchasers to aggregate claims that would otherwise be fragmented and obtain recoveries that significantly incentivize indirect purchasers to pursue antitrust violations. Finally, indirect purchasers might be even more inclined to bring suit since direct purchasers – who may receive some of the rents associated with an illegal monopoly or cartel without being a convictable co-

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also worth emphasizing that many business arrangements are more complex than the simplifying distinction between direct and indirect purchasers would suggest, as *McCready* illustrated. See * supra* notes 47–50 and accompanying text.


127 Then Justice Rehnquist marveled at the value of antitrust class actions, see U.S. v. Maryland.
conspirator – may remain understandably hesitant to disrupt their source of supply.\textsuperscript{128}

At the very least, it is an empirical question as to who among direct and indirect purchasers are best suited and most inclined to bring suit, and the likely truth is that it is a non-generalizable matter, i.e., that some supply chains position direct purchasers as the superior private enforcer whereas in others it the indirect purchasers. Accordingly, a simplistic model that forces a selection between direct and indirect purchasers – as the question in \textit{Illinois Brick} did and as most commentators continue to do – is unfit to generate a rule that, as a general matter, adequately polices antitrust violators. For these reasons, the rigid dichotomous choice to grant standing to only one member of the supply chain stands on shaky – yet wildly expansive and categorical – logic. A superior alternative is to adopt a rule that adjusts to the qualities and uniqueness of different supply chains and that does not preclude the potential plaintiffs best positioned to identify and pursue antitrust violators.

B. \textbf{Repealing \textit{Illinois Brick}: Each According to Its Harm}

Another, more popular, proposal before the Antitrust Modernization Commission is to overrule \textit{Illinois Brick} and grant standing to indirect purchasers in federal court.\textsuperscript{129} This proposal – which has been suggested in conjunction with either preempting

\textsuperscript{128} This insight, voiced early on in the debate, see, \textit{e.g.}, Harris and Sullivan, \textit{supra} note 62; Hovenkamp, \textit{supra} note 63, is central to the dubbing of “Illinois Walls,” see Shinkel, et. al. \textit{supra} note 78.

\textsuperscript{129} \textbf{CIVIL REMEDIES-INDIRECT PURCHASERS DISCUSSION MEMORANDUM, supra} note 77, at 23.
state law or requiring the transfer of certain state actions into federal court – amounts to permitting each party along the supply chain to sue the antitrust violator for the (trebled) economic harm that each party suffered.

For many of the reasons commentators dislike the indirect purchaser rule, they find this alternative appealing. It provides compensation to many parties injured by violations, and it likely would promote deterrence by introducing indirect purchasers as potential antitrust plaintiffs. These benefits are counterweighed against the additional complexity the new rule would introduce. Divvying up the individual harms suffered is certainly a difficult matter, and this is exactly the complex calculation that the Court in *Illinois Brick* tried to avoid. It is an even more daunting task given the complexity of modern production chains, in which producers (and antitrust violators) sit atop supply networks with many indirect purchasers. Still, as we describe above, however complex calculating incremental mark-ups and associated damages would be, it should not involve more complexity than sophisticated pricing models can handle, and it likely requires even less complexity than other required determinations in an antitrust case. Ceteris paribus, it would be preferable to avoid complicated and easily disputable calculations such as these, but given the other deficiencies of barring indirect purchasers from

130 *Id.* at 25.
132 See * supra* Part III.B.
133 See, e.g., Karon, *supra* note 65, at 1372 (reporting that a state court, in ruling on an antitrust case, concluded that “history indicated that courts can manage complex indirect purchaser recovery in antitrust cases, and neither the court nor defendants could cite cases involving unresolvable complexity”).
bringing suit, these complexities alone do not amount to compelling reasons to stick with the *Illinois Brick* doctrine.

Still, this alternative leaves much to be desired. For example, there is good reason to think that it would not adequately deter antitrust violations. If the supply chain involves many fragmented buyers, with each buyer experiencing relatively little economic harm from the illegal overcharge, those injured by the overcharge will have little incentive to bring suit. One solution to this problem of diluted incentives would be to aggregate the claims of many individuals through the use of class actions. This, however, invites other problems, since the use of class actions to lead suits on behalf of diffusely interested parties has drawn heavy criticism. Securities class actions, for example, have been heavily criticized for empowering class action attorneys at the expense of the shareholders they represent as well as social welfare.\(^{134}\) Moreover, the class action process suffers from a host of now-familiar administrative difficulties, including parties resisting class certification and threatening to extort the settlement process. In short, if deterrence is a primary goal, and under-deterrence is currently the primary problem, then the class action cannot be relied upon to offer adequate deterrence within a reasonably efficient procedure. Consequently, this “divvying” model appears to be an inadequate solution.

\(^{134}\) See Stephen J. Choi & Robert B. Thompson, *Private Securities Litigation Reform Act: Securities Litigation and its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1490 (2006) (noting that in securities class actions, plaintiffs’ attorneys had incentives to pursue claims that were not optimal for corporations, shareholders, and the marketplace, and that settlement was often independent of the merits).
Having rejected the current rule, the logic underpinning the current rule, and leading alternatives to the current rule, we now present a creative and unexplored proposal.

C. Identifying a Lead Plaintiff

The heart of the indirect purchaser problem is actually one that is familiar to other areas of law. A single act – in this case, an antitrust violation – causes harm to a long chain of parties, each of whom can claim injury of varying amounts. The administrative task is to determine the total amount of harm the violation caused and to allocate that total harm across the injured parties. The solution offered in Illinois Brick is to select one plaintiff out of the many injured parties and assign both the responsibility for identifying and pursuing the antitrust violation and the privilege of collecting treble damages. The challenge to improve antitrust standing rules is to spread to more potential plaintiffs the opportunity to sue without diluting the incentives for any particular party, to expand the privilege of collecting damages to more of the injured parties, and to do so while minimizing the administrative costs of complex and parallel proceedings.

135 This might be described as the mirror situation of a multi-party tort, in which responsibility for harm done to a plaintiff must be allocated to multiple defendants. A popular solution to the problem of joint tortfeasors is joint and several liability, in which the plaintiff recovers the full amount of injury from any tortfeasor while the defendants allocate damages among themselves through separate proceedings. See Richard L. Revesz & Lewis A. Kornhauser, Sharing Damages Among Multiple Tortfeasors, 98 Yale L. J. 831 (1989); Richard L. Revesz & Lewis A. Kornhauser, Settlements Under Joint and Several Liability, 68 N.Y.U. L. Rev. 427-492 (1993).
One solution to minimizing complexity and litigation costs is to consolidate the claims of multiple plaintiffs into a single proceeding. The Supreme Court clearly saw the merits to consolidation by foreclosing indirect purchasers from bringing suit and effectively combining all claims within the direct purchaser’s suit. The Antitrust Modernization Commission also has found some appeal to consolidation, which explains both its consideration of preempting state law and its devising mechanisms to transfer state claims to federal court.136 But other areas of law encounter this problem regularly. Bankruptcy law offers a framework in which payments are allocated across different parties and illustrates the benefits of consolidating competing claims in a single proceeding. An even closer parallel is in securities law, when an act of corporate wrongdoing inflicts harm on multiple shareholders. Securities class actions, as well as actions under the recently enacted PSLRA, constitute efforts to consolidate the claims of many injured parties within a single proceeding. Consolidation understandably has a very strong appeal.

Under a consolidated proceeding, the question becomes who initiates the litigation and who ultimately controls the litigation for the diverse collection of injured plaintiffs. The first of these questions is especially critical for antitrust actions, where the propensity to detect and pursue an antitrust violation is central to deterring misconduct adequately. There might be some appeal to offering the entirety of treble damages to the first party – whether a direct or indirect purchaser – to identify a violation and bring suit. Though this would leave many injured parties uncompensated, it would heighten deterrence by steepening the

136 See CIVIL REMEDIES-INDIRECT PURCHASERS DISCUSSION MEMORANDUM, supra note 77, at 21-25.
incentives to detect violations, and it translate into a single action without the need for complex calculations. This proposal would be akin to the current *Illinois Brick* rule without imposing restrictions on the identity of the plaintiff or making any presumptions as to who the optimal plaintiff is. It would grant standing not categorically to the direct purchaser but to whomever first sues an alleged antitrust violator.\(^{137}\)

However, one of the important lessons from securities law is that as much as races to the courthouse instill optimal incentives, they tend not to produce optimal plaintiffs. Effective deterrence is possible only when plaintiffs can win, not just file, antitrust actions, and a first-to-file system opens the possibility to poorly-skilled but speedy plaintiffs filing actions, losing the case, and then precluding claims from other injured parties. Placing such a premium on speed – tempting the fleet with an enormous reward for a victorious suit – would also induce false or poorly conceived claims, thus hindering and deterring pro-competitive and otherwise legal conduct. Finally, there are social gains from granting a claim to a plaintiff who is capable of handling the complexities of a case and whose incentives are aligned with social preferences. This is particularly important during the settlement process, where most of these cases are resolved and where the danger is greatest for unsupervised attorneys to pursue resolutions that do not serve their clients’ interests.\(^{138}\)

\(^{137}\) This is parallel to a “bonus system” for securities suits, in which the first plaintiff receives a reward meant to compensate costs of bringing the suit and to counteract the free-rider problem caused by class certification, collateral estoppel, and any other mechanism that would allow later parties to benefit from the first-mover's expenses.

\(^{138}\) Identifying an optimal plaintiff – one that can manage complex litigation and has incentives aligned with social preferences – is especially important in
These observations, in part, compelled Congress to replace the race-to-the-courthouse that governed most securities class actions with a “lead plaintiff provision” in the PSLRA. The lead plaintiff provision provides a mechanism in which the court can select a lead plaintiff to lead securities class actions. Following the filing of a securities class action, the PSLRA opens the courthouse doors for sixty days to other claimants who might want to bring the suit. After sixty days have lapsed, the court is charged with selecting a lead plaintiff to direct the claim. Though the PLSRA contains a presumption that the plaintiff with the greatest economic stake in the action will be named the lead plaintiff, the court enjoys discretion to find the plaintiff who will best administer the action.

We propose resolving the problem of antitrust standing by adopting a system that opens antitrust suits to all injured parties but consolidates all claims and selects a lead plaintiff, as is done in the lead plaintiff provision of the PSLRA, to lead the unified litigation. After an antitrust suit has been brought by either the government or a private party, the court would open its doors to plaintiffs of all stripes. After receiving private claims, akin to requests to direct antitrust cases, where many antitrust actions follow an inquiry by the Department of Justice or the Federal Trade Commission. If private actions follow government investigations, rather than playing leading roles in detecting and punishing anticompetitive conduct, then the motives behind rewarding the swift are entirely undermined. For these reasons, it is wise to incorporate discretion, rather than leaving it to a race, in the selection of the plaintiff.

140 Id. at § 27(a)(3)(A).
141 Id. at § 27(a)(3)(B).
142 Id. at § 27(a)(3)(B)(iii).
the private action, the court will appoint a lead plaintiff who it believes will best administer the claim. Like the PSLRA, it would be appropriate to give a presumption towards the party who can claim the largest harm since that party’s incentives are most aligned with the consumers. Unlike the PSLRA, however, it should also give a strong presumption towards the party who first filed the suit. Though there would not be a determinative race to the courthouse, this would appropriately incentivize parties – with the prospect of control, attorneys fees, and perhaps additional compensation – to seek and pursue antitrust violations.

Enabling the court to appoint a lead plaintiff would establish a responsible monitor for the antitrust action. The lead plaintiff would take due care in articulating the theory of the claim, which not only is of great use to the court but also will increase the likelihood of the plaintiff’s success, and thus the effectiveness of deterring other anticompetitive conduct. The lead plaintiff is also firmly positioned to guide the settlement process, which is where most antitrust claims are effectively handled, and this consideration could play a large part in determining who becomes the lead plaintiff. Finally, since the lead plaintiff will win its assignment because it has significant dealings with the alleged violator, it is appropriately incentivized to extract payment from the violator without inflicting excessive harm. The plaintiff will push to maximize compensation – and thus punish the anticompetitive conduct – without demanding bankruptcy and all its associated social costs. Although several elements of the PSLRA have produced mixed reviews in its first ten years, there is good evidence that the lead plaintiffs in securities cases, which tend to be institutional investors, have managed to generate higher
settlement values and negotiate better deals with law firms, thereby reducing agency costs. 143

A statutory amendment to the Clayton Act that opens antitrust actions to both direct and indirect purchasers, consolidates all claims in a single action, and provides for a lead plaintiff would significantly advance the antitrust objectives that are ill served by the current standing rules. Such a reform package, by inviting indirect purchasers to bring suit against antitrust violators, expands the pool of potential plaintiffs, thus increasing the likelihood that antitrust violations will be detected and pursued in litigation. It solves the problem of “Illinois Walls” by refusing to rely on direct purchasers who often refuse to disrupt valuable relations with antitrust violators. The attraction of being the lead plaintiff additionally heightens incentives to detect illegal anticompetitive conduct. This reform plan also delivers compensation to any injured party who elects to join the litigation, thus extending relief to many parties who are denied under Illinois Brick, and it consolidates the litigation within a single proceeding, thus avoiding parallel litigation and even enabling the many plaintiffs to coordinate negotiations over the total recovery and thus relieve courts from making the complex calculations the Supreme Court feared. In short, this plan improves deterrence, expands compensation, reduces complexity, and appropriately and efficiently punishes antitrust violators.

VI. CONCLUSION

The *Illinois Brick* doctrine has proven to be an inadequate solution to a problem that is growing in severity, and the upcoming thirtieth anniversary of the *Illinois Brick* decision has been a battle cry for reform. However, despite a growing consensus for reform to the doctrine, the debate has been constrained by an undue emphasis on legal formalism and has failed to generate innovative solutions. Reforming the indirect purchaser rule requires a comprehensive approach that begins with the functional objectives of antitrust law. We provide that comprehensive approach, and we offer a proposal that both advances the foundational principles of antitrust and is responsive to lessons learned in related areas of law.