Antitrust Remedy Wars Episode I: Illinois Brick From Inside the Supreme Court

Andrew I. Gavil
ARTICLES

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ILLINOIS BRICK FROM INSIDE THE
SUPREME COURT

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INTRODUCTION

Few questions in antitrust law have proven to be as challenging as whether "indirect purchasers" should be authorized to seek damages for antitrust violations. Despite the seemingly unqualified language of Section 4 of the Clayton Act, which creates a treble damage private right of action for "any person" injured in her business or property by virtue of an antitrust violation, indirect purchasers have been barred from

† Professor of Law, Howard University School of Law. An earlier version of this Article was presented as the 2005 Lewis Bernstein Memorial Lecture at St. John's University School of Law on November 17, 2004. I would like to express my appreciation to Professor Edward Cavanagh for the invitation to present the lecture as part of the Bernstein series. I first presented some of the material contained in this Article, along with other case studies of the Supreme Court papers of Justices Lewis F. Powell, Jr. and Thurgood Marshall, with Professor William E. Kovacic at the Annual Luncheon of the Spring Meeting of the Antitrust Section of the American Bar Association in Washington, D.C. on April 2, 2003. I would especially like to thank Professor Kovacic for our many discussions of the significance of the papers to a better understanding of the process of antitrust decision making in the Supreme Court. Appreciation also is in order for Ms. Eileen Santos of the Howard University School of Law Library and Mr. John Jacobs, the archivist of the Lewis F. Powell, Jr. Papers at the Washington & Lee University School of Law Library, whose collective assistance has been invaluable, and the staff of the Manuscript Division at the Library of Congress, Washington, D.C. Finally, I am indebted to my research assistant, Ms. Josephine N. Harriott.

Section 4 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States... without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a) (2000).
seeking damages in federal court since the Supreme Court's 1977
decision in *Illinois Brick Co. v. Illinois.* At the same time, many
such indirect purchasers, often consumers, have been authorized
to seek the very relief barred in federal court under analogous
but more expansive state antitrust laws. The Supreme Court
specifically endorsed this dual-remedial scheme when, in *California v. ARC America Corp.,* it rejected arguments that
*Illinois Brick* effectively preempted broader state antitrust
remedies.

*Illinois Brick* was animated by the Court's belief that
permitting indirect purchasers to sue would be inconsistent with
its earlier decision in *Hanover Shoe, Inc. v. United Shoe
Machinery Corp.,* would diminish the incentives for private
parties to file suit in federal court, would subject defendants to
multiple damages, and would mire the court in complex battles
over the apportionment of damages among various classes of
plaintiffs at different levels of the product distribution chain. In
short, the Court believed it would make for bad antitrust
remedial policy.

In its larger context, *Illinois Brick* also reflected a developing
and significant shift in the antitrust priorities of the Court; one
that found profound expression in the Court's 1976–77 term.
Whereas contemporaneous decisions like *Continental T.V., Inc. v.
GTE Sylvania Inc.* sought to rein in the substantive prohibitions
of the antitrust laws, which had come to depend in large part on
the invocation of per se rules of illegality, *Illinois Brick* and
*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* focused on

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4 See id. at 101–06. For a more comprehensive discussion of the development of
the federal-state remedial split, see generally Andrew I. Gavil, *Federal Judicial
Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser
5 392 U.S. 481 (1968). In *Hanover Shoe,* the Supreme Court barred a firm found
to have violated the anti-monopolization provisions of Section 2 of the Sherman Act
from asserting a "passing on defense," i.e., from arguing that the plaintiffs, direct
purchasers of shoe machinery, had passed on all overcharges they may have paid to
their own customers. *Id.* at 489. For a more complete discussion of *Hanover Shoe*
and its impact on the Court's deliberations in *Illinois Brick,* see infra Part II.B.
6 433 U.S. 36, 59 (1977) (holding that a location restriction imposed by a
supplier on its authorized dealers should be judged under the rule of reason
standard, not a per se rule).
7 429 U.S. 477, 489 (1977) (establishing requirement that private plaintiffs
demonstrate "antitrust injury").
restricting access to the Clayton Act's private treble damage right of action. Collectively, this trilogy of cases trumpeted a more sweeping message from the Court that today seems clear: antitrust laws had been interpreted too harshly and the private treble damage action had perhaps been used too expansively. Ironically however, Illinois Brick and ARC America together created a more vexing set of problems than those Illinois Brick sought to avert.

In this Article, I will examine the available papers of the Supreme Court justices from this critical period in the evolution of modern antitrust law and policy. To set the stage, Part I contrasts the state of antitrust in 1975 with that of 1990, emphasizing the fundamental shift that commenced at the Court in the late 1970s; a shift that was not at all limited to the new members of the Court—the four Nixon appointees, Chief Justice Warren Burger, Associate Justices Blackmun, Powell and Rehnquist, and Justice Stevens, appointed by President Ford. Indeed, Justice White, who had been on the Court since being appointed by President Kennedy in 1962, proved to be a key player with respect to indirect purchaser issues, authoring the majority opinions in Hanover Shoe, Illinois Brick, and ARC America. Justice Marshall, a Johnson appointee, authored the majority opinion in Brunswick.

After a brief overview of what I call the "Illinois Brick quartet" in Part II, Part III will consider the available papers of the Justices who sat on the Court at the time of Illinois Brick: Justices Blackmun, Brennan, Marshall, and Powell. These papers illuminate all phases of consideration of the case, from the treatment of the petition for a writ of certiorari, to the evaluation of the merits of the case by the clerks and the Justices, and the

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10 Brunswick, 429 U.S. at 478.

11 The "quartet" is comprised of Hanover Shoe, Illinois Brick, ARC America, and Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990). For a discussion on the quartet, see infra Part II.
evolution of the Court’s majority and dissenting opinions. Perhaps the most striking discovery is that the initial conference vote in *Illinois Brick* was to affirm, upholding the right of indirect purchasers to sue.\(^\text{12}\) Within a week’s time however, five Justices changed their votes.\(^\text{13}\) Seemingly influenced by the leadership and arguments of Justice White and others, the Court’s initial 6-3 vote to affirm was transformed into a 6-3 vote to reverse, and a new majority coalesced.\(^\text{14}\)

Although the papers of the various Justices vary greatly in detail, they do suggest that in *Illinois Brick* several factors were of particular importance in reaching the Court’s result. Clearly, a major change in the make-up of the Court and a change of judicial attitude toward antitrust and business was a significant factor. The import of that change was obscured to some degree owing to the common leadership of Justice White in drafting the majority decisions in both *Hanover Shoe* and *Illinois Brick*. Nevertheless, philosophically, the two cases are difficult to reconcile and it seems highly unlikely that the full *Hanover Shoe* Court would have decided *Illinois Brick* the same way. Leadership within and without the Court also influenced the outcome in *Illinois Brick*, with Justice White and a noted commentator playing important roles in shaping the arguments that ultimately prevailed. Other factors were also in evidence, such as the role of the clerks, of the Solicitor General, who appeared as an amicus, and of the broader readiness of the Court to strike out in a new direction in antitrust.

Part IV concludes with some observations about what the Justices’ papers on *Illinois Brick* reveal about the process of


\(^{13}\) See Powell Merits Conference Notes, supra note 12.

\(^{14}\) See Memorandum from Lewis F. Powell, Jr., Associate Justice, United States Supreme Court to the Conference of Supreme Court Justices, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 31, 1977) [hereinafter Justice Powell Memo to the Conference] (unpublished document on file in Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188) (expressing his willingness to change his vote from affirm to reverse based on the position outlined at the first conference by Justice White, and soliciting other Justices to do the same).
change at the Supreme Court relative to other decisions of the time, particularly *Sylvania*. It also looks at judicial developments subsequent to *Illinois Brick*, which suggest that the Court's continuing support for the reasoning of the case eroded over time. Finally, I pose a question that bears upon our understanding of *Illinois Brick*, but more broadly on the institutional role that the Supreme Court plays in establishing national competition policy: what are the sources of the Court's economic ideas, and what institutional filters exist to ensure that the Court embraces sound economic reasoning when it formulates that policy?

I. ANTITRUST IN A TIME OF CHANGE

A. Bench-Marking Antitrust: From 1975 to 1990

The antitrust counselor of 1975 faced a discouraging task in advising clients of the antitrust risks of various kinds of competitively sensitive conduct. Rigid per se rules abounded for horizontal price-fixing, vertical price fixing, tying, group boycotts, and vertical non-price restraints. Joint ventures were also subject to significant risk, and standards for horizontal mergers were highly restrictive. In addition, single

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15 For a discussion on *Sylvania* and the Justice Powell Papers, see generally *Sylvania* and the Powell Papers, supra note 8.


21 See, e.g., United States v. Topco Associates, Inc., 405 U.S. 596, 610–12 (1972) (stating that division of markets by a group of independent retailers who formed a cooperative association was per se unlawful).

firm conduct was subject to restrictive standards, especially for predatory pricing.\textsuperscript{23}

To address concerns that the palette of cases developed by the Court was too restrictive and hence over-deterring legitimate competitive conduct, two avenues were open to the Court: (1) adjusting the substantive prohibitions that had developed through decades of case law; and (2) constraining the private right of action. The 1976–77 term of the Court embraced both approaches and proved to be a significant turning point in the evolution of antitrust law. During that term the Court decided \textit{Sylvania}, which overturned the per se rule against vertical, intrabrand non-price restraints,\textsuperscript{24} and in \textit{Brunswick} and \textit{Illinois Brick} the Court looked to standing concepts to limit the private right of action.\textsuperscript{25} Both \textit{Sylvania} and \textit{Brunswick} shared a common theme: antitrust must be tethered to clear theories of competitive harm. All three decisions also shared another broad theme: the antitrust weapon must be wielded more cautiously.

Looking beyond the specific holdings of these three cases, they also signaled the emergence of what we now recognize as modern antitrust economics. "Modern antitrust economics" is not merely a set of rules about conduct, but a methodology for deriving those rules that considers such factors as the consequences of false positives and negatives and the competence of courts and juries to reach judgments in complex matters of economic regulation.\textsuperscript{26} It also has a debatable political component, one that yields varying presumptions about the intentions and inclinations of firms, especially dominant ones, and the efficacy of government regulation of business.

\textsuperscript{23} See, e.g., Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 692–98 (1967) (declaring that sales by a single firm in one area at prices below those charged in other areas was sufficient to warrant trial on allegations of predatory pricing).


The emergence of this new paradigm transformed antitrust law. By 1990, the precedent available to that same counselor presented a more nuanced and in many ways a more encouraging set of possibilities for assessing risk. The possibilities for defending mergers were reinvigorated by the Court, \(^{27}\) and by the government’s ground-breaking Merger Guidelines. \(^{28}\) Vertical non-price restraints had been liberated from the per se rule, \(^{29}\) and although the per se rule against vertical minimum resale price maintenance (“RPM”) formally remained, the standards for proving an RPM conspiracy were substantially elevated. \(^{30}\) In a series of decisions, the Court imposed more stringent statutory standing requirements on private antitrust plaintiffs, including Illinois Brick’s virtual ban on indirect purchaser suits. \(^{31}\)

The government’s 1982 Merger Guidelines were especially significant as a signal that antitrust analysis was moving out of its “categorization” phase and into a more conceptual one, where core economic concepts—market power, entry, and efficiency—were more uniformly determinative of the outcome of antitrust analysis. This was also reflected in the cases, which progressively moved away from bright line rules based on case categorization towards more economically grounded analysis.

\(^{27}\) See United States v. Gen. Dynamics Corp., 415 U.S. 486, 497–98 (1974) (merging firms successfully rebutted inference that merger would be anticompetitive by demonstrating that market shares were not indicative of long term prospects for exercising market power).


\(^{29}\) See Sylvania, 433 U.S. at 58–59 (vertical non-price restraints subject to analysis under rule of reason, overruling Schwinn).


Although the per se rules against certain kinds of horizontal agreements formally remained, the Court demonstrated a clear willingness to reconsider quick invocation of the per se label where there was reason to believe the conduct had significant justifications. The Court also introduced market power screens to limit expansive use of the tying and group boycott monikers, and appeared to distinguish between collusive and exclusionary group boycotts, preserving a clear per se rule only for the former. The analysis of predatory pricing also underwent a substantial increase in the plaintiff's burden of proof, and no doubt was left in monopolization law that exclusionary or predatory conduct was a necessary element of the offense. In short, antitrust analysis moved away from a kind of

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32 See Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356–57 (1982) (agreement as to maximum fee schedule by independent physicians was per se unlawful price fixing); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980) (agreement among rivals to restrict credit terms to customers was per se unlawful price fixing).

33 See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100–01 (1984) (joint television rights agreement among rival college football teams that restricted output of televised college football games was not per se unlawful); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 20–24 (1979) (use of blanket license by rival composers through ASCAP did not constitute per se unlawful price fixing).

34 See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18 (1984) (tying per se unlawful, but only upon showing of market power in the tying product). In a concurring opinion, four of the Justices expressed their view that the per se rule against tying should be abandoned. See id. at 32, 35 (O'Connor, J., concurring) ("The time has come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have.").


36 Compare Nu. Wholesale Stationers, 472 U.S. at 297–98 (exclusionary group boycott only per se unlawful when cooperative possesses market power), with Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434–36 (1990) (per se liability rule for collusive boycotting upheld). For a more comprehensive discussion of the distinction between exclusionary and collusive boycotts, see Kenneth L. Glazer, Concerted Refusals to Deal Under Section 1 of the Sherman Act, 70 ANTITRUST L.J. 1 (2002).


38 Compare Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 497–98 (cases prior to Hanover Shoe displayed "no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under [Section] 2 upon a
simplistic formalism, towards a far more economically driven, and more complex, system of conceptually interrelated rules that imposed substantially greater burdens of proof on antitrust plaintiffs, public and private.  

B. Changes in the Court

This sea change of direction at the Court was not the result of any single factor but of the confluence of many political, historical, and intellectual factors. There can be no doubt, however, that a critical factor was the change in the make-up of the Supreme Court itself.

Of the nine justices sitting on the Court in 1967, only four remained in 1977, when the Court took up *Illinois Brick*, *Sylvania*, and *Brunswick*.  


40 For a more extensive discussion, see generally Gavil, *Sylvania and the Powell Papers*, supra note 8.


Although the four remaining Justices did not always find themselves in dissent in antitrust cases, they often did, and the newer Justices, although they did not always prevail, were almost invariably in the majority when the Court struck out in new directions.

By today's political standards, however, it is hard to

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characterize the views of the new majority block on the Court as ideologically extreme. They did not openly embrace a specific view of economics and advocate it consistently. They were more traditional “conservatives” from another time. Grounded as business counselors, they were largely skeptical of government restraints on business and more trusting of the intentions of private firms and of the power of markets. They were not trained adherents of the Chicago School of Antitrust; but rather, Chicago School and other economic criticisms of antitrust seem to have resonated with them as intuitively correct, and they invoked Chicago School literature in support of their decisions, although not exclusively. An important consequence of the confluence of their elevation to the Court with the presence of a well developed body of critical economic commentary, therefore, was their effort to better integrate antitrust law with economic analysis. Relatively few of the significant ground breaking decisions of the time remain controversial today—perhaps evidence that antitrust was indeed in need of a mid-course correction at the time, and surely a tribute to the practical brand of economic analysis that it spawned. Illinois Brick, however, is a notable exception.

II. THE ILLINOIS BRICK QUARTET

A. Visualizing the Indirect Purchaser and the Problem of “Pass-On”

One of modern antitrust law’s most urgent concerns is the exercise of “market power,” defined by the Supreme Court as the power to profitably raise or maintain price above some competitive market benchmark. The increment above that

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47 See Gavil, Sylvania and the Powell Papers, supra note 8, at 12, 13 n.33.
49 See, e.g., U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, Horizontal Merger Guidelines, supra note 28, at 2 (“The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”).
50 See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.,
competitive benchmark price is suggestive of market power, and the actual price charged can be viewed as an “overcharge” when compared to the competitive baseline. The overcharge associated with the exercise of market power is perhaps the most concrete of recognized “antitrust injuries,” and is often the focal point of damage calculations in private treble damage actions brought by purchasers (direct and indirect) from the antitrust offender, especially in cases of alleged price fixing or monopoly maintenance.

Market power—or its extreme version, “monopoly power”—can be exercised by a group of colluding rival firms, as with a horizontal merger or cartel, or it can be the product of exclusionary conduct by a single firm. In the latter case, the exclusionary conduct facilitates the exercise of market power by impairing or limiting competition from rival firms. Although as a general matter the firm or firms exercising market power can only collect one overcharge—from the first or “direct” purchaser. All or part of that overcharge may be passed on by the direct purchaser to subsequent purchasers, depending upon the direct purchaser’s ability to itself exercise some degree of market power, and the ability of any subsequent purchaser to do the same. Hence, portions of the overcharge could be paid by more than one “customer” depending upon the product and how it is sold.

For example, if the overcharge from the original seller, a cartel participant, to the direct purchaser is $1.00, but the direct purchaser is able to increase its price to the first indirect purchaser by $.50, the direct purchaser has only suffered half of the damage, and the first indirect purchaser the other half. Of course, if the product is resold by the indirect purchaser, the next buyer—also an indirect purchaser, albeit once more removed—might also find itself paying part of the overcharge. It is easy to see how this fact of distribution could pose a significant problem of proof. Determining the amount of the initial overcharge may itself be tricky business, because it requires some basis for estimating the competitive benchmark. Trickier still may be the problem of allocating the overcharge to different levels of purchasers, direct and indirect to increasing degrees.

468 U.S. 85, 109 n.38 (1984) (“Market power is the ability to raise prices above those that would be charged in a competitive market.”).
It is important to realize that serious indirect purchaser issues do not arise in simple bilateral purchase and sale transactions, where a single seller deals with a single purchaser who is the end-user of the product. Allocating overcharges only becomes an issue when it becomes necessary to ascertain the transmutation of the overcharge from the direct purchaser to others. Ascertaining the amount of pass-on can arise in two situations, although many variations can arise. First, allocation problems could arise with a simple product that is distributed through multiple levels before reaching a final consumer. There the question will be how much of the overcharge is passed on at each level of distribution to the subsequent indirect purchaser. Second, allocating overcharges can also be necessary when a product or service is typically sold as a component of a larger product, either in a single transaction or in a multiple level one—like the concrete blocks in *Illinois Brick*. In such cases, it may be more difficult to ascertain the degree to which the overcharge was in fact passed on as an element of the price for the larger product into which the component was incorporated.

If the overcharge is the damage caused by the illegal exercise of market power, the compensation question becomes “Who can recover it?” in whole or part. From the point of view of deterrence, who recovers it may be less important than simply assuring that it is recovered by someone.

Allocation of the overcharge is not, strictly speaking, a question of liability, but one of damages. Moreover, determining whether it is possible to trace overcharges accurately is a distinct question from whether, as a matter of antitrust policy, it will be wise to do so. As we will see, in some circumstances, answering the question “Should indirect purchasers be permitted to sue?” can pit the deterrence function of treble damages against the compensation function. One consequence of barring the recovery of indirect damages, for example, is to concentrate the incentive to sue in the hands of direct purchasers, which may increase the incidence of suits, and, hence, deterrence. But it may also result in windfall recoveries to direct purchasers who passed on the overcharge, and no compensation whatsoever for the indirect purchasers who were the true victims of the illegal overcharge. Moreover, if the right to sue is limited to direct purchasers, and the direct purchasers decide not to exercise that right, there will be no compensation to anyone, and greatly diminished
deterrence. On the other hand, granting indirect purchasers rights in the name of compensation could diminish the incentive of direct purchasers to sue, which in turn might undermine the deterrence goal of the private right of action.

_Hanover Shoe_ and _Illinois Brick_ dealt with two permutations of the overcharge allocation problem. In _Hanover Shoe_, the issue was whether a defendant found guilty of monopolization under Section 2 of the Sherman Act could defend itself against claims by the direct purchaser of its product by arguing that the direct purchaser "passed on" virtually all of the alleged overcharge to its customers—that the direct purchaser suffered no injury. It is often referred to therefore as a case involving "defensive pass-on." In _Illinois Brick_, the Court addressed the flip side of the question, "offensive pass-on"—whether indirect purchasers claiming pass-on by the direct purchasers can sue to recover the portion of the overcharge they paid.

B. Hanover Shoe

_Hanover Shoe_ was a follow-on to the United States' famed prosecution of the United Shoe Machinery Corporation for monopolization. The case hinged primarily on United Shoe's

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51 In _Illinois Brick_, the Court stated that "Hanover Shoe does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge." 431 U.S. 720, 746 (1977) (emphasis added). Even if that were true of the prohibition of defensive pass-on in _Hanover Shoe_, it was not necessarily true of offensive pass-on, which specifically enables compensation. By precluding a defense of pass-on, _Hanover Shoe_ eliminated the possibility that an antitrust wrongdoer could in effect avoid liability on a compensation "technicality." "Who sued?" was less important to the Court than what the offender had done. More importantly, there was and remains no support for the Court's presumption that "often most" of the overcharge will be borne by the direct purchaser. Pass-on may or may not occur in any given case. Under _Illinois Brick_, single products simply sold through minimal levels of distribution are lumped together and treated the same as component products sold through many. See id. at 735. Such a "one size fits all" per se rule is arguably ill-fitting to the broad range of possible circumstances.


53 See _Ill. Brick_, 431 U.S. at 726.

54 See United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954). For a thorough account of the district court proceedings before Judge Charles Wyzanski, see CARL KAYSEN, UNITED STATES V. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTITRUST CASE (1956). Kaysen, a trained economist, served as Wyzanski's clerk during his handling of the case. It is noteworthy that the original decree against United Shoe Machinery was limited to conduct restrictions, but it reserved the right to
distribution practices with respect to its shoe producing machinery, especially its lease only policies.\textsuperscript{55} Hanover Shoe was a direct purchaser of that machinery.

The principal issue in \textit{Hanover Shoe} concerned United Shoe's assertion of a "pass-on" defense.\textsuperscript{56} United Shoe argued that, because Hanover Shoe had passed on any increased cost from United Shoe—any "monopolistic overcharges"—to its own customers, shoe distributors, Hanover Shoe had not been injured by United Shoe's conduct.\textsuperscript{57} In a majority opinion authored by Justice Byron R. White, the Court rejected use of the pass-on defense.\textsuperscript{58} It offered three policy reasons in support of that conclusion: first, calculating pass-on would "normally prove insurmountable,"\textsuperscript{59} second, permitting the defense would significantly eviscerate the incentive of direct purchasers to bring suit for antitrust violations, which itself would substantially undermine the deterrent value of the private right of action;\textsuperscript{60} and third, permitting a pass-on defense would allow offenders to retain the "fruits of their illegality," since few direct purchasers would bring suit against them.\textsuperscript{61} Moreover, it held that a direct purchaser was entitled to a presumption of damages equal to the overcharge.\textsuperscript{62} The Court also noted that there might be exceptions to both the assumption of difficult apportionment and revisit the possibility of structural relief—particularly divestiture—if, after the decree's ten year term, the government could demonstrate that conduct relief had failed to produce a more competitive market. \textit{United Shoe}, 110 F. Supp at 354. The end of the ten year term of the decree roughly coincided with \textit{Hanover Shoe}. Indeed, approximately one month before the Court decided \textit{Hanover Shoe}, it specifically authorized the lower courts to proceed to consider divestiture against the defendant in the government's case. \textit{See United States v. United Shoe Mach. Corp.}, 391 U.S. 244, 250–51 (1968).

\textsuperscript{55} \textit{See United Shoe Mach. Corp.}, 110 F. Supp. at 297–98, 314–25, 340–44, 349–50 (discussing the importance of United Shoe's lease-only policy to its power over the market).

\textsuperscript{56} \textit{See Hanover Shoe}, 392 U.S. at 487–88.

\textsuperscript{57} \textit{See id.}

\textsuperscript{58} \textit{See id.} at 488.

\textsuperscript{59} \textit{See id.} at 493. The Court went on to argue that "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." \textit{Id.}

\textsuperscript{60} \textit{See id.} at 494.

\textsuperscript{61} \textit{See id.}

\textsuperscript{62} \textit{See id.} ("Our conclusion is that \textit{Hanover} proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense.") (emphasis added).
the presumption that direct purchasers suffered damages equal to the overcharge:

We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing “cost-plus” contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.63

C. Illinois Brick

The State of Illinois initiated Illinois Brick to recover for what the State believed was its share of derivative overcharges incurred in its capacity as a consumer of construction services that included raw materials supplied by Illinois Brick and others.64 The case was a follow-on action to civil and criminal cases that the Department of Justice brought against Illinois Brick and a group of its rivals, who were collectively charged with the fixing the price of concrete blocks. The district court granted partial summary judgment to the defendants and held that the State lacked standing to pursue its claims.65 The Court of Appeals reversed.66 It did not concur with the district court’s standing analysis. More importantly, in the court’s view no per se rule barring all indirect purchasers from seeking to prove pass-on offensively was warranted.67 Recovery should be permitted, it concluded, provided pass-on could be proven.68

In granting Illinois Brick’s petition for a writ of certiorari, the Supreme Court faced two significant issues of timing, both of

63 Id.
65 According to the Supreme Court, the district court did not rely on Hanover Shoe, but on its own view of standing, reasoning that Illinois “lacked standing to sue for an overcharge on one product—concrete block—that was incorporated by the masonry and general contractors into an entirely new and different product—a building.” Id. at 728 n.7.
67 See id. at 1166–67 (concluding that a plaintiff, including an indirect purchaser, should recover if he or she demonstrates injury under the Clayton Act).
68 See id. at 1165.
which evoked important questions about the Court as an institution. First, the Court had rejected the pass-on defense nine years earlier, in *Hanover Shoe*. 69 Hence, *Illinois Brick* squarely presented the Court with a test of its commitment to *stare decisis*: to what degree should the Court's judgments about pass-on in *Hanover Shoe* dictate the outcome in *Illinois Brick*? Second, the Seventh Circuit had delivered its opinion in *Illinois Brick* on June 22, 1976. 70 By that time, Congress was already considering amendments to the federal antitrust laws that would expand the rights of States, acting as *parens patriae*, to bring suit under the federal antitrust laws on behalf of their citizens. The petition for a writ of certiorari was filed on September 17, 1976—shortly before the Hart-Scott-Rodino Antitrust Improvements Act of 1976 72 became law on September 30, 1976. The Act amended the Clayton Act, specifically authorizing the States to sue on behalf of their citizens under the antitrust laws as *parens patriae*. 73 By their nature, *parens patriae* suits are often brought on behalf of consumers, who are indirect purchasers. There was some significant legislative history to indicate that at least some members of Congress believed that indirect purchasers generally had the right to sue despite *Hanover Shoe* and that the legislation did not create any new liabilities. 74 The Court would have to grapple with the significance of both *Hanover Shoe* and the new Act. 75

The Supreme Court reversed in a 6-3 decision authored by

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70 See *Ampress Brick*, 536 F.2d at 1163.


73 The relevant provision was incorporated into the Clayton Act as Section 4(c), and includes a proviso excluding from the amount recoverable "any amount of monetary relief . . . which duplicates amounts which have been awarded for the same injury . . . ." 15 U.S.C. § 15c(a)(1) (2000).

74 See *infra* notes 215-27 and accompanying text.

75 As is discussed more fully below, the Court concluded that the legislative history was inapposite, and that no special deference was owed "[t]he views expressed by particular legislators as to the meaning of" Section 4. Ill. Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977).
Justice Byron R. White. As a preliminary matter, the Court addressed “symmetry,” the notion that defensive and offensive pass-on must be treated alike. If the Court were to adhere to the principle of symmetry, the Court would have to decide between overruling Hanover Shoe or reversing the Court of Appeals. The three dissenting Justices rejected the symmetry principle, arguing that deterrence could best be served by retaining Hanover Shoe’s bar to defensive pass-on, but permitting indirect purchasers to sue.

The majority disagreed with this approach, and offered two principal and several subsidiary reasons for doing so. First, it argued that “allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants.” Second, it further argued that “the reasoning of Hanover Shoe regarding the difficult evidentiary issues associated with apportionment would be equally applicable to offensive pass-on as they had been to defensive pass-on.

The Court also rejected the view that Hanover Shoe’s concern with deterrence would be best served by permitting indirect purchasers to sue. Hanover Shoe rested “on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.” It also paid homage to stare decisis, and further reasoned that “[p]ermitting the use of pass-on theories . . . essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge . . . .”

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76 See Ill. Brick, 431 U.S. at 723, 728, 748.
77 According to the Court, Illinois had conceded the point, but asked that Hanover Shoe be confined to its facts: a case of “overcharges for capital goods used to manufacture new products.” Id. at 729.
78 See id. at 760 (Brennan, J., dissenting). Justice Brennan argued for an exception whenever both direct and indirect purchasers were parties to the same action. Id. at 753 (Brennan, J., dissenting).
79 See id. at 730.
80 See id. at 731.
81 See id. at 731–32.
82 See id. at 746.
83 Id. at 735.
84 See id. at 736–37.
85 Id. at 737. The Court appeared to dismiss the efficacy of existing procedural
The Court also questioned the capacity of economics itself to deliver, as promised, reliable theories to establish both the overcharge and apportionment.\textsuperscript{86}

In a final section of its opinion, the Court conceded that Section 4 of the Clayton Act was designed to serve two functions—deterrence and compensation—and that a rule barring indirect purchasers would concentrate all compensation in the hands of direct purchasers.\textsuperscript{87} The majority explained, however, that a symmetrical application of \textit{Hanover Shoe} would indeed serve both goals.\textsuperscript{88} The Court pointed out that deterrence would be served because "it is irrelevant to whom damages are paid, so long as some one redresses the violation."\textsuperscript{89} Additionally, because the Court assumed that "the direct purchaser absorbs at least some and often most of the overcharge,"\textsuperscript{90} compensation would be served by concentrating recovery in its hands.\textsuperscript{91} Therefore, allocating damages to indirect purchasers could dilute compensation, and diminish the incentive of direct purchasers to sue which, in turn, would dilute the deterrence value of the treble damage remedy.

The Court noted two exceptions to its virtual per se rule against pass-on. First, as the Court had observed in \textit{Hanover Shoe}, there might be situations where the direct and indirect purchaser had contractually agreed to pass-on by using a "cost-plus" pricing formula.\textsuperscript{92} A second exception might be in order when the indirect purchaser owns or controls the direct purchaser, in essence making it the direct purchaser.\textsuperscript{93}

\begin{flushleft}
\textsuperscript{86} \textit{Id.} at 741-44.  \\
\textsuperscript{87} See \textit{id.} at 746.  \\
\textsuperscript{88} See \textit{id.} at 746-47.  \\
\textsuperscript{89} \textit{Id.} at 746 (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting)).  \\
\textsuperscript{90} \textit{Id.} (emphasis added).  \\
\textsuperscript{91} See \textit{id.}  \\
\textsuperscript{92} See \textit{id.} at 732 n.12, 735-36; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).  \\
\textsuperscript{93} See Ill. Brick, 431 U.S. at 736 n.16 ("Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer."); see also California v. ARC Am. Corp., 490 U.S. 93, 97 n.2 (1989) (noting Illinois Brick's two exceptions).
\end{flushleft}
D. From Illinois Brick to ARC America and Beyond

At the time Illinois Brick was briefed and argued, a number of states already had authorized indirect purchasers to sue, but the potential significance of that fact was simply not addressed either in Hanover Shoe or in Illinois Brick. It would take more than a decade and a rash of legislative responses at the state level for the complete significance of state indirect purchaser rights to become apparent to the Court.

The growing tension between Illinois Brick and State “Illinois Brick repealers” climaxed in 1989, when the Court decided California v. ARC America Corp. ARC America involved allegations of nationwide price fixing in the cement industry. The States of Alabama, Arizona, California, and Minnesota commenced suit in federal court under both federal and state antitrust laws seeking to recover as indirect purchasers on their own behalf and as representatives of classes of other governmental entities in their respective States. The States' actions were transferred and consolidated for pretrial proceedings with the claims of many other plaintiffs, including direct purchasers. When the claims were all settled, the question became whether payments from the settlement fund should be disbursed to the States in their capacities as indirect purchasers. Under federal law, as established by Illinois Brick, the answer was clearly “No.” But the States asserted their indirect

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94 This fact was noted by the Court in ARC America, stating that “[n]either case contains any discussion of state law or of the relevant standards for pre-emption of state law.” 490 U.S. at 102.
95 In response to Illinois Brick, in 1981 the State of Illinois amended its own statute to expressly authorize recovery by indirect purchasers:
   No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. Provided further that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act.
740 ILL. COMP. STAT. ANN. 10/7(2) (1993). According to one survey, nineteen states, Puerto Rico and the District of Columbia adopted Illinois Brick repealers of one kind or another in the years immediately following the decision. See Kevin J. O’Connor, Is the Illinois Brick Wall Crumbling?, 15-SUM. ANTITRUST 34, 34–35 & n.5 (2001). Today, more than half the States recognize indirect purchaser rights in some fashion. Id.
96 See ARC Am., 490 U.S. at 97.
purchaser rights under contrary state laws.97 The issue before the Court, therefore, was preemption. The States appealed the lower courts' decision that Illinois Brick—as an interpretation of the purposes and objectives of Congress in adopting Section 4 of the Clayton Act—preempted contrary state laws, which purported to authorize indirect purchasers to sue under state antitrust laws.98 In a unanimous opinion99 authored by Justice Byron R. White—the author of the majority opinions in Hanover Shoe and Illinois Brick—the Court reversed.

In the Court's view, State "Illinois Brick repealers" did not satisfy any of the three traditional bases for federal preemption: (1) express, (2) implied by virtue of a Congressional decision to occupy a field, or (3) implied due to actual conflict between state and federal law.100 Illinois Brick was an interpretation of Section 4 of the Clayton Act by the Court, and Congress had never expressly preempted state indirect purchaser statutes.101 Neither, in the Court's view, did the repealers actually conflict with Illinois Brick.102 Although the States had reached a judgment about indirect purchaser rights that was at odds with the Court’s judgment in Illinois Brick, recognition of those rights would not make compliance with both federal and state law impossible or “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”103 Finally, the Court emphasized the “presumption against finding pre-emption of state law in areas traditionally regulated by the States,” which included antitrust and related laws.104

The consequence of Illinois Brick and ARC America was one

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97 The preceding facts are summarized from the Court’s opinion. See id. at 96–99.
98 See id. at 99–100. The Court explained that “[t]he issue before us is whether this rule limiting recoveries under the Sherman Act [the rule of Illinois Brick] also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action.” Id. at 100.
99 Justices Stevens and O'Connor took no part in the consideration of the case. See id. at 94.
100 See id. at 100–01.
101 See id. at 101–03.
102 See id. at 103.
103 Id. at 101 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). For the Court's complete analysis of this critical point, see id. at 103–06.
104 Id. at 101 (“Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States.”) (footnote omitted).
that could not have been fully appreciated by the Court in 1977: multi-forum, multi-jurisdiction, complementary, but separate litigation.\textsuperscript{105} Today, direct purchasers file in federal courts; indirect purchasers file in state courts. Defendants in federal courts typically seek and often secure pre-trial transfer and consolidation pursuant to federal provisions for multi-district litigation. In contrast, defendants in state court indirect purchaser actions have limited ability to remove the cases to federal court,\textsuperscript{106} and hence little power to seek transfer and consolidation with related federal court direct purchaser litigation. Neither can they seek state-to-state transfer. Ironically, the situation is in many ways worse than the one the Court sought to avoid in \textit{Illinois Brick} itself. If indirect purchaser suits had been permitted in federal court, then direct and indirect purchaser cases could have been more readily combined, and the problems of overcharge allocation minimized through coordination. The threat of multiple and inconsistent recoveries is far greater with the separation that now prevails.\textsuperscript{107}

\textsuperscript{105} As one commentator—the Assistant Attorney General who headed the Antitrust Division and represented the federal government before the Supreme Court in \textit{Illinois Brick}—has put it: “That is the great irony of \textit{Illinois Brick}—where a conservative decision led to a populist political reaction that has produced duplicative litigation and recoveries on a scale that the Supreme Court majority could scarcely have imagined in the first place.” Donald I. Baker, \textit{Federalism and Futility: Hitting the Potholes on the Illinois Brick Road}, 17-FALL ANTITRUST 14, 15 (2002).

\textsuperscript{106} That ability has probably been enhanced to some degree by the recently passed Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 12 (2005).

\textsuperscript{107} For a more comprehensive discussion of the litigation management issues created by \textit{Illinois Brick} and \textit{ARC America} together, see Gavil, supra note 4, at 881–901, and Andrew I. Gavil, Remarks Before the Antitrust Modernization Commission: Panel II: State Indirect Purchaser Actions: Proposals for Reform (June 27, 2005), available at http://www.amc.gov/commission_hearings/pdf/Gavil_Statement_corrected_6.27.05_version_with_app.pdf.
III. ILLINOIS BRICK FROM INSIDE THE COURT

A. The Currently Available Supreme Court Papers

More than a quarter century has passed since Illinois Brick, and today the papers of four of the Justices then sitting on the Court are publicly available. The papers of all of the dissenting Justices—Brennan, Marshall, and Blackmun—are available in the Manuscript Division of the Library of Congress. Of the majority, only Justice Powell’s papers are open, but they are quite comprehensive and revealing. Hence, the available papers provide an arguably fair sampling of both sides of the internal debate at the Court, and permit some significant study and preliminary observations about the institutional process that produced the decision.

Nevertheless, some caution is in order given the partial sampling that is available. The majority opinion was authored by Justice White, who was joined by Chief Justice Burger, as well as Justices Rehnquist, Powell, Stewart, and Stevens. Of course, Justice Stevens remains on the Court, so his papers are unavailable, and the papers of Justices Stewart and Chief Justice Burger remain restricted. If there is a potentially critical missing link in the story, it is likely the work of Justice Byron R. White, who authored the majority opinions in all three critical decisions—Hanover Shoe, Illinois Brick, and ARC America, as well as a significant dissent in Kansas v. Utilicorp United, Inc.

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108 The Tarlton Law Library at the University of Texas School of Law has assembled a very useful online tool for research into the papers of former justices of the Supreme Court. It indexes all of the Justices for whom papers are available and provides links to relevant online catalogues. See Supreme Court Justices Finding Aids, http://tarlton.law.utexas.edu/vlibrary/spct/justices.html (last visited Sept. 15, 2005).

109 The papers of Justice Lewis F. Powell, Jr. are available to the public at his alma mater, Washington & Lee University School of Law.

110 Justice Stewart’s papers are housed at Yale University and are currently closed. See Historical Publications from the Federal Judicial Center, http://www.fjc.gov/servlet/tGetMan?jid=2294 (last visited Sept. 15, 2005). Chief Justice Burger’s papers are housed at his alma mater, the College of William & Mary, and are closed until 2026. See Historical Publications from the Federal Judicial Center, http://www.fjc.gov/servlet/tGetMan?jid=319 (last visited Sept. 15, 2005). Chief Justice Rehnquist died this past summer, and it is not yet clear what arrangements he made for the disposition of his Supreme Court papers.

111 497 U.S. 199, 219–26 (1990) (White, J., dissenting). Justice White was joined in his Utilicorp dissent by the three Illinois Brick dissenters, Justices Brennan, Marshall, and Blackmun. For a discussion of Utilicorp, see infra Part IV.B.
Although an extensive catalogue of his papers is available online, access to the papers themselves remains restricted until 2012, a decade after his death in April 2002.112

B. Illinois Brick's Path to the Supreme Court

The available papers disclose a significant amount of detail about the Court's deliberations in Illinois Brick. Four factors are of particular interest: (1) the internal discussion of the case's cert-worthiness; (2) the Court's consideration of Congress' passage in 1976 of the Hart-Scott-Rodino Antitrust Improvements Act; (3) the shifting vote in the case, which changed from affirm to reverse owing largely to Justice White's emergence as a leader for the view that indirect purchasers should largely be barred from federal court; and (4) the lessons of what was in essence a raw, but perhaps not fully informed, policy debate within the Court.

1. The Uncertainty of Certiorari

The clerk's initial certiorari pool memorandum appeared to oppose granting the petition of the manufacturers. The clerk wrote “[t]here is no square conflict at the circuit level,” and the “clear trend in the circuits supports” the Court of Appeals' decision below to permit indirect purchasers to sue.113 He further reasoned that although “[t]here may at some point be a genuine problem of double liability ... it is clear that petitioners have not yet been subjected to double liability.”114 He concluded, suggesting that “[r]eview of [the claim of double liability] might

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112 See Byron R. White Papers, http://www.loc.gov/rr/mss/text/whitebr.html (last visited Sept. 15, 2005). The Index reveals that files exist for Hanover Shoe (Box I: 124 – 4 folders), Illinois Brick (Box I: 383 – 2 folders), ARC America (Box II: 114), and Utilicorp (Box II: 139).

113 Preliminary Memorandum to Justice Harry A. Blackmun, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (Oct. 26, 1976), at 3 [hereinafter Preliminary Memorandum to Justice Blackmun] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252). For an online register of Justice Blackmun's papers, see The Harry A. Blackmun Papers, (Nov. 16, 2004), http://www.loc.gov/rr/mss/blackmun. The clerk noted, however, that there was some scholarly commentary to the contrary. See Preliminary Memorandum to Justice Blackmun, supra, at 3 (citing Milton Handler & Michael D. Blechman, Antitrust and the Consumer Interest: The Fallacy of Pares Patriae and A Suggested New Approach, 85 YALE L.J. 626 (1976)).

114 Preliminary Memorandum to Justice Blackmun, supra note 113, at 4.
be more appropriate later, if respondents prevail on remand and if the [district court] and [court of appeals] then prove unable to apportion damages so as to avoid this hazard.\textsuperscript{115}

Justice Blackmun's version of the certiorari pool memorandum includes an October 29, 1976 hand-written note from one of his own clerks, who asserted "I would Grant."\textsuperscript{116} In his view, the case raised "an important unresolved issue in antitrust law."\textsuperscript{117} He criticized the rationale of the Seventh Circuit, arguing that a contrary approach "limiting recovery to direct purchasers would promote certainty and encourage enforcement of the antitrust laws by those most likely to know of violations."\textsuperscript{118} Additionally, he embraced the "symmetry" position: "It also seems fair to me that offensive and defensive use of the 'passing-on' argument be treated comparably."\textsuperscript{119} While conceding that there was "no clear conflict," he concluded that he was "sufficiently disturbed" by the Seventh Circuit's "approach to regard the matter as worthy of this Court's consideration."\textsuperscript{120}

Consistent with his vote to grant the writ, Justice Powell's hand-written notes on his copy of the same certiorari pool memorandum suggest that he took an immediate interest in the case.\textsuperscript{121} On the face of the memorandum he noted that "Resp. claimed 'indirect' injury, + [the Seventh Circuit] sustained standing to sue—despite lack of privity and risk of double recovery."\textsuperscript{122} Nevertheless, he also acknowledged that "no conflict [existed] at the Circuit level, but some" was present at the district court level.\textsuperscript{123} "We could await outcome of trial" he noted; however, "[p]roof of damages not easy."\textsuperscript{124}

But several aspects of the Court of Appeals' decision seemed

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{122} Id. at 1.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
to give Powell real concern. He underscored many of the clerk's references to *Illinois Brick*'s contentions, and wrote "yes" in the margin next to one reference to "a substantial risk of double recovery." and again next to his own clerk's hand-written notation that the Seventh Circuit's result "actually contradicts *Hanover Shoe*." The clerk concluded, "I lean toward a grant." So did Justice Powell.

According to Justice Powell's records, in the end Justices Stevens, Powell, White, and Stewart provided the necessary four votes to grant the petition. Justices Rehnquist, Marshall, and Brennan, as well as Chief Justice Burger, voted against the petition. His notes do not indicate which way Justice Blackmun voted.

2. The Clerks' Initial and Complementary Impressions on the Merits

From the four available files, only Justice Blackmun's and Justice Powell's include the original merits memoranda prepared by the Justices' clerks in *Illinois Brick*. Both memoranda are comprehensive and illuminating with respect to how the case was initially received in chambers. On March 19, 1977, one of Justice Blackmun's clerks submitted his Bench Memo to the Justice on the *Illinois Brick* appeal. The clerk divided the first section of

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125 Id. at 2.
126 Id. at 5.
127 Id.
129 See id.
130 See id. Justice Powell hand-wrote "Join 3" next to Justice Blackmun's name on the certiorari vote form, which may indicate that he, too, voted in favor of granting the petition. Id.
131 As appears to have been the case in *Sylvania*, the work of the Justices' law clerks was a significant factor contributing to the outcomes of some of the critical antitrust cases of this time period. See Gavil, *Sylvania* and the Powell Papers, supra note 8, at 12 (discussing the role of clerks, especially in presenting economic analysis to Justice Powell); Kovacic, *supra* note 8, at 95, 102, 111–13 (discussing the role of clerks in shaping a justice’s vote as revealed by the Marshall Papers).
132 See Bench Memo from Richard Meserve, Justice Blackmun's Clerk, to Harry A. Blackmun, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (Mar.19, 1977) [hereinafter Bench Memo to Justice Blackmun] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).
his discussion into four parts, coinciding with what he viewed as
the four main issues in the case: (1) "Evidentiary Display,"—the
difficulty of demonstrating the degree to which overcharges have
been shared by firms or individuals at different levels of a
distribution chain; (2) "Deterrence;" (3) "Compensation;" and (4)
"Double Recovery."\textsuperscript{133}

\textbf{a. Evidentiary Display}

The clerk opened forthrightly:

It is of course true that the economic models of markets
demonstrate that an increase of price at one level of the
manufacturing process may influence the prices charged to
purchasers in the successive stages.... Thus the economic
model shows that an antitrust violation at one level can impose
harm on both direct and indirect purchasers.\textsuperscript{134}

Nevertheless, the clerk noted, \textit{Hanover Shoe} was concerned
about the "complicated evidentiary display that would be
necessary to show how much of the overcharge had been passed
on"\textsuperscript{135}—a factor that could be relevant whether the issue was
defensive pass-on as in \textit{Hanover Shoe}, or offensive pass-on as in
\textit{Illinois Brick}.\textsuperscript{136} He concluded, therefore, that "this prong of the
justification for the result in \textit{Hanover Shoe} favors the petrs."\textsuperscript{137}

He noted, however, that there are three responses to the
"complicated evidentiary display" justification.\textsuperscript{138} First, citing
\textit{Perkins v. Standard Oil Co. of California},\textsuperscript{139} he noted that price
discrimination cases have traced the effects of favored pricing
through multiple levels of disfavored purchasers.\textsuperscript{140} In \textit{Perkins},
the "evidentiary problem was not viewed as insuperable."\textsuperscript{141}
Second, citing the Solicitor General's Brief, Blackmun's clerk
pointed out that "numerous courts" since \textit{Hanover Shoe}, "have

\textsuperscript{133} \textit{See id.} at 1--6.

\textsuperscript{134} \textit{Id.} at 1.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{See id.} at 2 ("The problems associated with the 'massive evidence and
complicated theories' are the same whether the passing-on problem is considered as
a defense, or is considered as part of the plaintiff's case." (quoting \textit{Hanover Shoe,

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{See id.}

\textsuperscript{139} 395 U.S. 642 (1969).

\textsuperscript{139} \textit{See Bench Memo to Justice Blackmun, supra} note 132, at 2 (citing \textit{Perkins v.
Standard Oil Co. of Cal.}, 395 U.S. 642 (1969)).

\textsuperscript{141} \textit{See id.}
not shirked from confronting the difficult evidentiary problems that suits by indirect purchasers present.” And finally, he observed that the instant case may not present the kind of difficult evidentiary problem that the Court sought to avoid in *Hanover Shoe*.  

b. Deterrence

The clerk explains that another “prong” of *Hanover Shoe* was the Court’s belief that permitting defensive pass-on might undermine the deterrence function of the private right of action. Permitting defensive pass-on would leave indirect purchasers, such as consumers, with “such a tiny stake” in initiating an action that they would have “little incentive” to do so.  

The clerk concludes that *Hanover Shoe*’s concern for deterrence “would urge the indirect purchasers be allowed to pursue their antitrust claims.”  

Citing *In re Western Liquid Asphalt Cases (Alaska v. Standard Oil Co. of California)*, he pointed out that direct purchasers may be “reluctant to sue” for several reasons. First, they may well be dependent “on the violator for supplies.” Second, they may have in fact “earned a percentage profit on the overcharge.” And finally, they might hesitate to sue “because there might be some interdependence between the violator and his direct purchasers.” He reasons that, because direct purchasers may have little reason to sue, indirect purchasers must be allowed to sue. If direct purchasers are not willing to sue and indirect purchasers are not allowed to sue, private antitrust actions will have little deterrent effect.

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142 See id. (citing Brief for the United States as Amicus Curiae at 20 n.14, Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (No. 76-404)).
143 See id.
144 See id. at 3.
145 Id.
146 487 F.2d 191 (9th Cir. 1973).
147 See Bench Memo to Justice Blackmun, supra note 132, at 3 (citing *In re W. Liquid Asphalt Cases*, 487 F.2d at 198).
148 See id.
149 See id.
150 See id.
151 See id. He also added the following footnote: “As a general rule, it would seem that increasing the number of eligible plaintiffs increases the deterrent effect of the treble damage action on a potential violator.” *Id.* at n.4.
c. Compensation

The clerk opens this portion of his memorandum with the assertion that "[o]f course, one purpose of the [Section] 4 suit is to assure compensation to injured victims of an antitrust violation."\textsuperscript{152} He notes that *Hanover Shoe* "did not explicitly mention" compensation,\textsuperscript{153} but offers the following interpretation to support the view that *Hanover* nevertheless was concerned about assuring adequate compensation: "[T]he Court's discussion of the difficult evidentiary problems could be read at least in part as a recognition that the passing-on defense might be used to complicate law suits and to defeat bona fide claims."\textsuperscript{154} As the Court recognized that the passing-on defense could be used to defeat bona fide claims, it must have recognized that defeating bona fide claims prevented compensation.

Perhaps this view reflected an intuitive recognition on the clerk's part that if one focuses on the burden of proving damages, *Hanover Shoe* is essentially a pro-plaintiff decision. If the Court had approved a pass-on defense, defendants would have likely raised it in situations where any possibility—no matter how small—existed for pass-on. Plaintiffs, who presumably would continue to bear the burden of proving damages, would have had to prove not only the overcharge, but the portion of the overcharge that they incurred. By so raising the burden of proof for plaintiffs, a contrary result in *Hanover Shoe* might well have discouraged some from filing, and hence undermined the goal of compensation just as it would the goal of deterrence. Another way to think of this is that the goals of compensation and deterrence are not in tension; they are in fact aligned. The more effective the antitrust system is at facilitating compensation, the more effective it will also be at deterring violations.

In addition, quoting Section 4 of the Clayton Act, the clerk pointed out what is perhaps the most glaring obstacle to a rule barring indirect purchasers from suit: the fact that "[t]he statute makes no mention of a distinction between direct and indirect purchasers."\textsuperscript{155} Indeed, he reiterates, "the indirect purchaser may on occasion be forced to bear all the harm from the

\textsuperscript{152} *Id.* at 3.
\textsuperscript{153} *Id.* at 3–4.
\textsuperscript{154} *Id.* at 4.
\textsuperscript{155} *Id.*
violation.” Referring to the then prevalent “target area” test of antitrust standing, he added “[a]llowing recovery for harm of this type is in the main stream of antitrust law.” He noted that “[t]he case is quite unlike the difficult target-area problems that arise, for example, when the employees or the landlord of an injured business attempt to bring suit for an antitrust violation.” The clerk therefore concludes that “[a]gain this aspect of the antitrust laws favors the position of the resps.”

d. Double Recovery

Although Blackmun’s clerk initially notes that the threat of double recovery is an “aspect of the problem [that] favors the petrs.,” he also observes that “[t]here are ways to avoid multiple recovery,” and questions whether the threat is real in this particular case.

The clerk’s subsequent discussion of methods of diminishing the possibility of multiple recovery remains relevant to contemporary discussions. He first notes that “[o]ne obvious solution would be to overrule Hanover.” Apparently viewing that as unlikely, he moves on to a “slightly more palatable response,”—reliance on procedural mechanisms for allocating recoveries among direct and indirect purchasers. Citing to the Solicitor General’s brief, he mentions interpleader, transfer, and consolidation as possibilities. Of course, those options would have remained viable had the Court permitted indirect purchaser suits to continue in federal courts. Ironically, by instead banning them, Illinois Brick drove more consumer minded states to authorize the suits, which in turn magnified the complexity and multiple recovery fears expressed by the majority. More fundamentally, the clerk openly questioned the likelihood of multiple recoveries:

It may also be significant that the petrs do not cite any cases in which more than a single recovery has occurred. The short

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156 Id.
157 Id.
158 Id.
159 Id.
160 Id. at 5.
161 Id.
162 Id.
163 Id. (citing Brief for the United States as Amicus Curiae at 23–28, Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (No. 76-404)).
statute of limitations (4 years) and the extended nature of
antitrust litigation makes it somewhat unlikely that one suit
will be finished before a second timely suit is commenced.
Discovery by the indirect purchaser as to the pricing policies of
those above him on the chain of distribution would serve to alert
those above and cause them to bring suit. Thus consolidation
and allocation will in the normal course seem possible, and
make multiple recovery unlikely.\(^\text{164}\)

He concludes:

I doubt that \textit{Hanover Shoe} should be read to foreclose the
possibility of allocation. Part of the rationale in the case was
that the violator would retain some of ‘the fruits of [his]
illegality.’ Obviously, although this rationale bars the reduction
of a single full recovery, it does not bar the allocation of that
recovery.\(^\text{165}\)

In the second section of the memorandum, Blackmun’s clerk
went on to discuss the historical setting of \textit{Hanover Shoe} and the
potential uniqueness of \textit{Illinois Brick}. He noted to Justice
Blackmun that “[t]he overwhelming majority of the cases since
\textit{Hanover Shoe} have allowed indirect purchasers to sue”\(^\text{166}\) and
that, “with one notable exception,” the “commentators . . . have
favored allowing indirect purchasers to recover damages.”\(^\text{167}\) The
exception was an article by Handler and Blechman,\(^\text{168}\) which
clearly influenced the majority.\(^\text{169}\)

In the final portion of this section of his memorandum, the
clerk also considers whether \textit{Illinois Brick} falls within the “cost-
plus” exception carved out in \textit{Hanover Shoe}.\(^\text{170}\) While conceding

\(^\text{164}\) Id. A handwritten “X” appears in the margin beside the first sentence of this
paragraph, ostensibly to point out the lack of case examples of multiple recoveries,
perhaps an indication that Blackmun also viewed the point as significant. \textit{See id.}

\(^\text{165}\) Id. at 5–6 (quoting \textit{Hanover Shoe, Inc. v. United Shoe Mach. Corp.}, \textit{392 U.S.}
481, 496 (1968)) (citation omitted) (alterations in original).

\(^\text{166}\) Id. at 6. Among those decisions was \textit{Armco Steel Corp. v. North Dakota}, \textit{376 F.2d 206}
(8th Cir. 1967), a case highlighted by the clerk because Blackmun himself
had served on the panel. The clerk argued that “the case bears a strong factual
resemblance to the instant one.” \textit{See Bench Memo to Justice Blackmun, supra note}
132, at 6.

\(^\text{167}\) Id.

\(^\text{168}\) \textit{See Milton Handler & Michael D. Blechman, Antitrust and the Consumer
Interest: The Fallacy of \textit{Parens Patriae} and A Suggested New Approach}, \textit{85 Yale L.J.}
626 (1976).

(1977). The article was also acknowledged by the dissent. \textit{See id. at 754 n.10 (Brennan, J.,
dissenting).}

\(^\text{170}\) \textit{392 U.S. 481, 494} (1968) (“We recognize that there might be situations—for
that there was no cost plus contract between the building contractors and concrete block suppliers, he highlights the States' argument that the bidding process used was analogous to cost-plus because it included the full cost of the blocks.\textsuperscript{171} He concludes, therefore, that "[i]f the case falls within the Hanover Shoe exception, then there is no inconsistency in allowing indirect purchasers to recover: there would be equality of treatment for both offensive and defensive use of the passing-on phenomenon."\textsuperscript{172} In the alternative, the clerk reiterated his view that the "evidence [the States] will marshal to show how harm was passed along will not be particularly complicated."\textsuperscript{173}

Of the four major points discussed, Blackmun's clerk thus clearly viewed two—compensation and deterrence—as favoring the respondent states. He conceded that the petitioners had in theory raised valid points with respect to the remaining issues—evidentiary problems and the threat of multiple recovery—but was not persuaded that they would in this case prove to be the significant impediments petitioners urged. His overarching conclusion was unequivocal: "I think the bottom line in this case is quite easy: resps should prevail."\textsuperscript{174} Yet he recognized that "the precise rationale for [the] decision... may divide the Court."\textsuperscript{175} He offered Blackmun several choices: (1) view Illinois Brick as falling within the Hanover Shoe exception, a result that would effectively postpone deciding whether the offensive use of pass-on should generally be permitted; (2) permit "asymmetry,"—authorize offensive use of pass-on but retain Hanover Shoe's prohibition of defensive use; or (3) overrule Hanover Shoe, thus permitting both offensive and defensive pass-on.\textsuperscript{176}

Justice Blackmun's clerk explicitly endorsed the second option—permitting asymmetry—the option that Justice Blackmun himself ultimately chose. He argued that asymmetry would "further the deterrence and compensatory rationales of the

\textsuperscript{171} See Bench Memo to Justice Blackmun, supra note 132, at 7.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 8.
\textsuperscript{175} Id.
\textsuperscript{176} See id.
antitrust laws." He conceded that the approach "would undercut to some extent the evidentiary prong of Hanover Shoe," but argued that "that prong is not altogether persuasive in any event in a case like the present." As to the threat of multiple recoveries, he simply observed that the problem "would remain and have to be resolved."

Powell's clerk similarly organized his merits memorandum to Justice Powell, suggesting that the presentation of the issues mirrored the factors considered by the Court in Hanover Shoe. On some points, however, his analysis contrasts with that of Blackmun's clerk, and he set forth five separate options for resolving the case.

e. The Nature of the Evidence

Noting that "[j]t is a rare case in which as a matter of the laws of economics the amount of a price increase of an input at one stage of distribution is passed on in full to the next stage in the chain," Powell's clerk initially appeared to express greater concern than did Justice Blackmun's clerk about the difficulty of accurately calculating passed on overcharges. This was an issue from Hanover Shoe, he asserted, that "is equally applicable to the [passing-on] offense." However, like Blackmun's clerk, he pointed out that "the lower courts have apparently not had much trouble with the evidentiary problem," and, referring to the position taken in the Solicitor General's brief, noted that "a large number of courts have allowed offensive use of passing on."

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177 Id.
178 Id.
179 Id. In a brief final paragraph, the clerk highlights to Justice Blackmun that three amicus briefs have been filed in the case, all in support of the respondent States. The clerk found the Solicitor General's brief the most useful, however, citing it several times in his memo and remarking at the end: "I recommend that you direct more attention to the brief of the SG than the briefs of the other amici." Id. at 9.
181 Id.
182 Id. at 4–5 (citing Brief for the United States as Amicus Curiae at 20, Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (No. 76-404)).
f. The Need for Deterrence

Justice Powell's clerk found it difficult to identify a clear position dictated by deterrence. He first noted *Hanover Shoe's* assumption that deterrence would be best served by concentrating the right of action in the hands of direct purchasers and diminished by permitting a pass-on defense, largely because consumers would likely have too small a stake to attempt a treble damage class action. But he paused, declaring: "I don't know how to apply that factor to the instant case." He wrestled with the issue:

On the one hand, the more potential plaintiffs, the greater the deterrent function. On the other hand, one can argue that the deterrence rationale of *Hanover Shoe* was undermined with the passage of the Hart-Scott-Rodino bill. Consumers, through their state attorneys-general, now have an effective way to express their stake in the action." For the clerk, Hart-Scott-Rodino ("HSR") clearly affected the remedial mix, but the question was "how so?" He appeared to see two possibilities: either it undermined deterrence, or it undermined the deterrence rationale of *Hanover Shoe*. If *Hanover Shoe* was correct in its assumption that the prospect of having to allocate and share overcharges would undermine the incentive of various groups to sue, then Congress may have inadvertently diminished the incentive of direct purchasers to sue by authorizing *parens patriae* actions by the States and hence undermined deterrence. On the other hand, if by authorizing *parens patriae* suits Congress enhanced deterrence, the deterrence rationale of *Hanover Shoe* may have been incorrect—the Court may have been wrong in its assumption that restricting enforcement to direct purchasers would maximize deterrence. As the clerk earlier pointed out in his memo, however, there is some legislative history to suggest that during the consideration of the HSR amendments Congress appeared to assume that indirect purchasers could sue on their

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183 See id. at 5.
184 Id.
185 Id. As is discussed at greater length below, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which became law on September 30, 1976, authorized State attorneys general to sue as *parens patriae* on behalf of their citizens for antitrust violations. See infra notes 216–19 and accompanying text.
Hence, the likeliest reading of its intentions was that the rationale of Hanover Shoe would not apply to offensive pass-on and would not undermine deterrence. Quite the opposite, Congress appeared to be endorsing the clerk's first assumption: the broader are private rights of action, the greater is deterrence.

g. Compensation for Injury

Powell's clerk's comments on compensation are in accord with those of Justice Blackmun's clerk and are straightforward: the compensation function of the federal antitrust laws "would suggest allowing offensive passing on to assure compensation to those who are injured further down the chain of distribution."187

h. Double or Multiple Recovery

Like Blackmun's clerk, Powell's clerk saw multiple recovery as a genuine threat if offensive pass-on was permitted, but he wondered whether "multiple recovery" was a real or just a hypothetical threat.188 On the other hand, he questioned whether the fact that "no one has yet pointed us to an instance of multiple recovery . . . may well be because these cases are often settled, and for all we know settlements (when added up) exceed the actual monetary violation trebled."189 He also was more skeptical than was Blackmun's clerk of the Solicitor General's view that there were procedural avenues available for managing related cases so as to diminish the threat.190

In the end, Powell's clerk reached much the same conclusion as did Blackmun's—the Court should permit offensive pass-on and somehow address fears of multiple recovery if they in fact surface.191 But he saw more options for the Court—five in all.192 Like Blackmun's clerk, he considered the facts of Illinois Brick sufficiently analogous to cost-plus contracts to permit the Court to hold that Illinois Brick fell within the exception to Hanover Shoe.193 One advantage to that approach was that the Court

186 See Bobtail Bench Memo to Justice Powell, supra note 180, at 2.
187 Id. at 5.
188 See id. at 6.
189 Id.
190 See id.; see also Bench Memo to Justice Blackmun, supra note 132, at 5.
191 See Bobtail Bench Memo to Justice Powell, supra note 180, at 9; see also Bench Memo to Justice Blackmun, supra note 132, at 8.
192 See Bobtail Bench Memo to Justice Powell, supra note 180, at 6–8.
193 See id. at 6; see also Bench Memo to Justice Blackmun, supra note 132, at 8.
could avoid definitively ruling on the permissibility of offensive pass-on. The clerk, however, rejected the approach: "To me this is not an acceptable option. We did not take the case to apply an exception mentioned in Hanover, and we ought to decide the general issue once and for all."

The clerk’s second option—closest to the ultimate view of the majority—was to establish offensive and defensive symmetry: "The Court could conclude that there can be no offensive use of passing on except when there is room for a defensive use of passing on within the exception noted by Hanover Shoe." In his view, one virtue of the approach was that "there is no problem of multiple recovery." But he appeared to equivocate in considering the ability of the approach to produce adequate deterrence: "The deterrence function will be served solely by the direct purchaser, which may or may not be effective." Nevertheless, the clerk advised Justice Powell that "[t]his would have been my preferred disposition of the case given Hanover Shoe." "But," he argued, "the recent enactment of the Hart-Scott-Rodino bill complicates the matter for me." "To go with this approach guts the basic thrust of this recent congressional enactment, and contradicts what Congress obviously thinks to be the current state of antitrust law. I consider this option unacceptable."

Also like Blackmun’s clerk, Powell’s clerk considered overruling Hanover Shoe, his “Option C.” Overruling Hanover Shoe would also maintain symmetry between defensive and offensive pass-on, but would do so by permitting rather than barring both. Interestingly, the clerk again saw the recently passed HSR Act as significant to the issue: "To overrule Hanover (a 9 year old 7-1 decision), we could simply say that the concern

194 See Bobtail Bench Memo to Justice Powell, supra note 180, at 6. Although these are not cost plus contracts, the bricks are discrete elements and there is no severe evidentiary problem. This would enable the Court to avoid the passing on issue. . . . As to the permissibility of offensive passing on in the normal Hanover case, we can wait for another day.

Id.

195 Id.

196 Id.

197 Id. at 7.

198 Id.

199 Id.

200 Id.

201 Id.
expressed in that case about deterrence has now been eliminated by the new federal statute—consumers will sue through the state attorneys-general.”

He went on to describe what he viewed as the likely effects of overruling *Hanover Shoe:*

> It saves the basic thrust of the new statute. It to some extent eliminates multiple recoveries. I say to some extent because calculations in various suits may add up to more than the monetary value of the violation trebled; this is so because the calculations on damages are not going to be all that precise. The deterrent function is served by all subsequent purchasers, and effectively so under the parens patriae bill. But there is what may be an incredibly complex evidentiary issue in all these cases—exactly how much was passed on.

“Option D,” the approach ultimately endorsed by Powell’s clerk, was to embrace asymmetry—to retain *Hanover Shoe’s* prohibition of defensive pass-on, but permit offensive pass-on. “This option,” he wrote, “maintains the thrust of the new federal statute” and “allows the deterrence function to be served by all purchasers in the chain.” Powell’s clerk was nevertheless concerned about the prospect of multiple recoveries: “If under this option the Court does not limit damages to the amount actually suffered by each plaintiff, there is an incredible risk of multiple recoveries.”

The clerk’s final option, “Option E,” was what he described as a “modified *Hanover* approach, along the lines suggested by the state of Illinois at oral argument.” This option would opt for a flexible as opposed to a fixed rule for pass-on that would depend upon the complexity of the evidentiary problem. The more complex the challenge of allocating damages, the less likely pass-on would be permitted. The less complex, the more it would be permitted. The clerk expressed some concern that such a case-by-case approach could be effective.

The clerk concluded his discussion of these five options with an expression of frustration and a tentative endorsement of Option D—”asymmetry”:

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202 *Id.*
203 *Id.*
204 *See id.* at 8.
205 *Id.*
206 *Id.*
207 *Id.*
208 *See id.*
This is one big mess. My present inclination would be to go with option D, where the greatest risk is that of multiple recovery. There are some present—though not entirely effective—methods to handle that problem. I’d leave the rest of the problem to be solved by Congress. If it really is costly for these firms, you can be sure they will let Congress know about it.\(^{209}\)

3. Prologue: The Court and the Congress

The Seventh Circuit delivered its opinion in *Illinois Brick* on June 22, 1976.\(^{210}\) By that time, Congress was already considering amendments to the federal antitrust laws that would expand the rights of states, acting as *parens patriae*, to bring suit under the federal antitrust laws on behalf of their citizens. The petition for a writ of certiorari was filed on September 17, 1976—shortly before the Hart-Scott-Rodino Antitrust Improvements Act of 1976 became law on September 30, 1976. The Act amended the Clayton Act to specifically authorize States to sue on behalf of their citizens under the antitrust laws as *parens patriae*.\(^{211}\)

The passage of the Act was not addressed by the parties in any of the briefs on the merits, but it was discussed by the United States as Amicus,\(^{212}\) as well as the forty-seven Amici States.\(^{213}\) It also was the subject of a focused exchange of footnotes between the majority and dissents.\(^{214}\)

That exchange first developed within the Court. In a memorandum dated March 23, 1977, the same day the case was

\(^{209}\) *Id.* at 9. Powell responded with a hand-written note expressing his skepticism with respect to the clerk’s last point—that firms will have Congress as an option: “Getting relief from Congress by [corporations] guilty of anti-trust violations is unlikely!” *Id.*


\(^{211}\) The relevant provision was incorporated into the Clayton Act as Section 4(c) and includes a proviso excluding from the amount recoverable “any amount of monetary relief... which duplicates amounts which have been awarded for the same injury . . . .” 15 U.S.C. § 15c(a) (2000).


\(^{214}\) *Compare* *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 733 n.14, 747 n.31 with *Ill. Brick*, 431 U.S. at 765 n.24 (Brennan J., dissenting) and *Ill. Brick*, 431 U.S. at 766 (Blackmun J., dissenting) (providing differing views on whether under Section 4 of the Clayton Act, Congress eliminated obstacles to compensating indirect purchasers bringing suit under Section 4).
argued before the Court, one of Justice Powell’s clerks submitted his Bench Memo to Justice Powell. In a preliminary section he discussed the significance of two “important background items”—Hanover Shoe and the Hart-Scott-Rodino Antitrust Improvements Act, especially title III of the Act, which authorized parens patriae suits by the States. Quoting the House Report, Powell’s clerk asserted: “The important aspect of this legislation is that Congress appears to have assumed that consumers presently have standing to file an anti-trust cause of action for anti-trust violations occurring at any stage of the distribution process.” Indeed, he states, “[t]he whole thrust of the Act depends on the assumption that consumers, if they had an economic incentive to sue, would have standing on the anti-trust cause of action via offensive passing on.” Referring in particular to the meaning of footnote 4 of the House Report—later debated by the majority and dissent—he unequivocally states: “I can see only one way to read that footnote: the Congress today approves of offensive passing on.”

The issue for the clerk thus became whether and to what degree the present intentions of Congress have relevance to the interpretation of a Congressional Act—in this instance the Clayton Act of 1914—adopted by a previous Congress. The clerk forthrightly answers the question: “Technically speaking, the present views of Congress are not relevant.” Nevertheless, he argues that “as a matter of practical adjudication, I would give considerable weight to the present view of Congress in this very recent enactment.” He concluded: “Realistically, if the Court comes out against offensive passing on, the Hart-Scott-Rodino Act is nullified to a large extent. That would make me hesitate to decide the case in that fashion.”

The same day Powell’s clerk transmitted his Bench Memo to Justice Powell, one of Justice Blackmun’s clerks sent Justice Blackmun a one-page memorandum discussing the possible significance of the Act. A copy of the House Report was

215 See Bobtail Bench Memo to Justice Powell, supra note 180, at 1.
216 See id. at 1–3
217 Id. at 2 (quoting H.R. Rep. No. 94-499 (1975)).
218 Id.
219 Id. at 3.
220 Id.
221 Id.
222 Id.
attached. The memorandum had been prompted by a communication from Justice Powell's clerk, who had brought the passage of the HSR Act to the attention of Blackmun's clerk. In his brief memorandum, Blackmun's clerk stated that "[t]he Act bears on the case in two ways." The memorandum goes on to state:

First, if Illinois Brick is decided so as to foreclose recovery by those other than the direct purchaser from an antitrust violator, then the purpose of the Act will be largely undercut. I suspect that consumers seldom deal directly with those in a market position to effect an antitrust violation.

Second, the House Report... clearly indicates that Congress intended for consumers to be able to recover "regardless of the level in the chain of distribution at which the violation occurs." The Report discusses Hanover Shoe and indicates Congress' understanding that it applies only to defensive use of the passing-on phenomenon. Indeed, the report indicates that the Act creates no new substantive liability. Congress felt there was a need for parens patriae actions by state attorney generals because “[w]here... wholesalers and retailers have passed on all or most of the cost of a violation to the consumer... adequate enforcement mechanisms [of the antitrust laws] do not exist.”

The memorandum and accompanying legislative history certainly appears to have had an impact on Justice Blackmun,

\[\text{Vol. 79:553} \]
who joined Justice Brennan's dissent, but also filed his own, in part on the ground that the Court was ignoring Congress’ contemporary intentions.\textsuperscript{227}

More broadly, the relevance of the HSR Act prompted some pointed discussion at Conference, and later a sharp battle of footnotes between the majority and the dissenters, which is itself further reflected in the Justices’ papers.\textsuperscript{228}

4. Pre-Conference and Oral Argument

Justices Powell and Blackmun both prepared and retained notes both before and during the oral argument, which was conducted on March 23, 1977. On a one-page, hand-written document dated March 20, 1977, Blackmun outlined the issues in the case and his reactions to them. One of the main points Blackmun made in his separate dissent was already evident in these notes. With reference to \textit{Hanover Shoe}, he wrote “[t]his case [should have] come first.”\textsuperscript{229} He elaborated on the point in his dissent:

I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If \textit{Hanover Shoe} . . . had not preceded this case, and were not “on the books,” I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.\textsuperscript{230}

Blackmun also appeared concerned about the impact of antitrust violations on parties further down the line of

\begin{footnotes}

\textsuperscript{228} See supra note 214 and accompanying text, and infra notes 234, 261, 270 and accompanying text.

\textsuperscript{229} Harry A. Blackmun, Associate Justice, United States Supreme Court, Hand-Written Pre-Argument Notes, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 20, 1977) [hereinafter Blackmun Pre-Argument Notes] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).

\textsuperscript{230} Ill. Brick, 431 U.S. at 765 (Blackmun, J., dissenting). An earlier handwritten but undated draft of this paragraph appears on a single page of his notes. See Harry A. Blackmun, Associate Justice, United States Supreme Court, Hand Written Draft Notes of Dissenting Opinion, Ill. Brick Co. v. Illinois (No. 76-404) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).
\end{footnotes}
distribution than the direct purchaser. "If he [the indirect purchaser] is ultimate, as here, he has [the] real injury."231 In addition, he expressed skepticism about the alleged threat of multiple recovery, writing: "Multiple recovery sounds good, but ... No case."232 He also appeared to question whether the threat of multiple recoveries was in fact substantial, given the allocation of damages among the injured and the "spoils" received by the offender.233 His notes conclude: "Clearly I favor [the] ultimately injured ... Hart-Rodino confirms."234

Blackmun took few notes during the oral argument. There are less than a half-page of hand-written notes, most of which were recorded in connection with the presentation by Donald Baker, the then Assistant Attorney General in charge of the Antitrust Division.235 He expressed some disagreement with the position taken by the respondent States, seeming to suggest that unless only one level of plaintiff is in court, it would be inappropriate not to "cut back on recovery from [the] wrongdoer."236 "The issue," he wrote "is one of proximate cause."237

Justice Powell’s hand-written notes from oral argument also survive.238 The first page briefly outlines the positions of the parties, starting with "Merits not before us. Only Q is 'standing' to sue."239 At the end of the page he observes "Danger of double recovery" and "SG [Solicitor General] supports standing."240 These notes appear to have been made just prior to the

231 Blackmun Pre-Argument Notes, supra note 229 (emphasis in original).
232 Id.
233 See id.
234 Id.
235 Blackmun had the habit of briefly noting some physical characteristics of the lawyers arguing before him, perhaps as a memory device. Of the head of the Antitrust Division he scribbled: "slender[,] glasses[,] high voice." See Harry A. Blackmun, Associate Justice, United States Supreme Court, Oral Argument Notes, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 23, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252). See also LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 105 (2005) (describing the practice and offering other examples).
236 Id.
237 Id.
239 Id. at 1.
240 Id.
commencement of the argument, which is more specifically noted on the second and third pages, and reveal little beyond Powell's perceptions of the arguments of the parties.

Although Powell took few notes in connection with the petitioners' presentation, he devoted most of the second two pages of his pre-conference notes to the arguments of the respondents, including a half-page on the arguments of the Solicitor General. Although he noted Illinois' argument that "Construction industry is close to 'cost-plus' situation," as well as its argument that in such an industry there "can't be multiple recovery in this case," Powell also wrote "why?" in parenthesis, perhaps indicating that in his view the argument that multiple recovery was so obviously not a concern under the facts of the case had not been adequately supported. Of the respondents' arguments, he also noted a few lines later that "like building blocks... the price increased [sic] is usually passed on & amt. is ascertainable" and "[a]rgues no problems of proof." He also noted on the following page that the respondents had conceded that "there should be no double recovery. Cases should turn [on] ability of a [plaintiff] to prove that it was damaged." In a final half page, Powell summarized his perceptions of the Solicitor General's arguments, noting the "[e]mphasis on policy considerations," the "analogy to tort law," and his belief that "Hanover does not hold that first purchaser [sic] always recover full overcharge."

Perhaps more revealing are Justice Powell's March 24 post-argument, pre-conference notes, which were also handwritten and contained on a single page. His frustration seems evident from the first line—one set apart from the rest—which reads: "[N]o satisfactory general rule." After summarizing both Hanover Shoe, and the position of Illinois Brick Co., in two

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241 See id. at 2. In addition to a sentence noting the procedural posture of the case, Powell wrote only "Nothing helpful beyond briefs." See id.
242 See id.
243 Id.
244 Id. at 3.
245 Id.
247 Id.
subsequent paragraphs, Powell's notes conclude with a final paragraph, next to which he wrote, "[t]his is my view." The final paragraph then proceeds:

The problems are those of proof & double recovery. I would adopt no per se rule—either for 'offensive' or 'defensive' use. As counsel for State & SG [Solicitor General] recognized, 'concrete blocks' present a different situation from a component of a complex product (e.g. chrome in an aircraft engine).

Whereas Justice Blackmun's views remained constant, Justice Powell's did not.

5. Justice White Emerges as the Leader of a Shifting Majority (With Some Help from Justice Stewart)

The Court met at conference on March 25, 1977, two days after the oral arguments in Illinois Brick, to take its initial vote. Justice Powell's detailed conference notes reveal just how close a call the case really was. The result of the initial vote was 6-3 in favor of affirming the Seventh Circuit's conclusion that indirect purchasers should not be barred, per se, from initiating suit. The majority consisted of Chief Justice Burger, and Justices Brennan, Stewart, Powell, Stevens, and Blackmun. Only Justices White, Rehnquist, and, possibly, Justice Marshall, initially voted to reverse. Within a week, however, the majority had completely shifted. Justice Powell's Conference Notes reveal that the Court convened again on April 1, 1977, following the exchange of a...
flurry of memoranda among the Justices.254 The result was the emergence of a new majority behind Justice White, who had argued for reversal during the first conference, and had persuaded Chief Justice Burger, as well as Justices Stewart, Powell, and Stevens, to change their votes from affirm to reverse.255 Justice Marshall realigned himself with Justices Brennan and Blackmun in dissent.256

The conference notes of both Justices Powell and Blackmun strongly suggest that Justice White, who nine years earlier had also authored the Court’s opinion in *Hanover Shoe*,257 played a pivotal role in persuading a majority of the Justices to alter their first votes and support reversal. Justice Powell’s conference notes are detailed and cover both the initial conference, conducted on March 25, 1977, as well as the second conference, conducted a week later on April 1, 1977.258 According to Powell’s notes, at the March 25 conference, White made six points that later supplied the infrastructure of the majority opinion:259

*Hanover Shoe* did enumerate [a] *per se* rule. Showing a “pass-thru” is extremely difficult—except in [a] cost-plus situation. If [we] don’t have [a] *per se* rule, anti-trust litigation will be even more complex, protracted & speculative.

“Can’t agree with a different rule for ‘offense’ use from ‘defense’ use.”

“Leg. history of *Hart-Rodino* does mention a [Ninth Circuit Court of Appeals] case that support’s P.S.’s [Potter Stewart’s] view”260

254 See Powell Merits Conference Notes, supra note 12, at 1 (“We reconsidered this at Conference on 4/1/77.”). He also color coded his notes in blue and red ink so that the content of the discussions, and the change of votes at both conferences, would be clear. At the top of the first page he wrote: “New votes in Red.” See id.

255 See id. at 1–3 (demonstrating that each of these Justices’ second vote on the merits changed, from affirm, to reverse, thus making a new majority when also considering Rehnquist’s vote to reverse).

256 See id. at 1–2 (indicating that Justice Marshall, after some discussion, decided to affirm, as had Brennan and Blackmun from the start).

257 See supra note 9 and accompanying text.

258 See Powell Merits Conference Notes, supra note 12 (indicating both the initial vote, taken on March 25, and the second vote, taken on April 1, for all nine Justices, as well as detailing the rationale of most of the Justices).

259 See id. at 2 (referencing six ideas under Justice White’s name as well as in the margins). Powell signaled that these were points made at the first conference by recording them in blue ink. As already noted, comments from the second conference were recorded in red ink. See supra note 254.

260 Id.
The sixth and final point was written in the margin to the left of the other five, and stated: "Would not let gov't have it 'both ways.'" Powell's notes also indicate several additional points that White added at the second conference: "Byron cited Western Paving Co. (consumer case)—lasted 10 yrs. See Milton Handler's article. Gov't brief is misleading. Congress, in its recent legislation, did intend to allow consumer suits. Thus, Congress may well change a Reversal [sic] of this case. Byron would never allow [passing-on] in a construction case."

At that point, however, there were but three votes for reversal—White, Rehnquist, and possibly Marshall. The Chief Justice appears to have been conflicted. According to Powell's notes he at first passed, then indicated an inclination to affirm, then "passed again in view of doubt expressed by P.S. [Potter Stewart], LFP [Lewis F. Powell] & J.P.S. [John Paul Stevens]." Brennan appears to have been a consistent vote to affirm, but, interestingly, neither Blackmun nor Powell made any notes of his views at the conference.

Both Justices Blackmun and Powell took more extensive notes of Justice Stewart's comments. Stewart initially voted to

261 Id. The final reference to not letting the government have it "both ways" reflects White's rejection of the Solicitor General's argument that Hanover Shoe's prohibition of defensive pass-on could be reconciled with a rule permitting offensive pass-on by relying on the rationale that maximum deterrence would result from precluding defendants from raising a pass-on defense, but permitting injured indirect purchasers to sue. See Brief for the United States as Amicus Curiae, supra note 212, at 17–21 ("Allowing recovery by indirect purchasers not only provides deterrence but also serves the goal of compensating those who suffered loss.").

262 Powell Merits Conference Notes, supra note 12, at 2. See also Blackmun Merits Conference Notes, supra note 253, at 1 (highlighting the points argued by Justice White).

263 In his notes of the March 25 conference, Powell wrote next to Justice Rehnquist's name: "Reverse or could join P.S. & L.F.P." Powell Merits Conference Notes, supra note 12, at 3. He continued: "Hanover Shoe is flat per se rule. Byron is right as to holding. Agrees with me [Powell] that per se rule in this area is unfortunate, but there must be no double standard. Must go both ways." Id.

264 In his notes of the March 25th conference, Powell wrote next to Marshall's name, simply, "Reverse ???" Id. at 2. Blackmun's notes state: "— ?? Dilemma. Only 1st purchaser can get it—try to get it out of him." Blackmun Merits Conference Notes, supra note 253, at 2.

265 Powell Merits Conference Notes, supra note 12, at 1.

266 Blackmun marked Brennan's name with a "+," indicating his vote to affirm. See Blackmun Merits Conference Notes, supra note 253, at 1. Powell wrote only "Affirm" next to Brennan's name. See Powell Merits Conference Notes, supra note 12, at 1.

267 See Blackmun Merits Conference Notes, supra note 253, at 1 (noting
affirm, but appears to have had some reservations. He was especially concerned about the seemingly per se status of Hanover Shoe's rule against pass-on, and the impact of the Hart-Scott-Rodino amendments on the Court's approach to indirect purchasers. Of Stewart's views, Powell wrote at the first conference: "[i]f Hanover Shoe is a per se rule, it follows logically (subject to exceptions) that Petr. is right. This is put in doubt by [the] Hart-Rodino Act...." Stewart nevertheless seems to have been focused on finding a way to accommodate Hart-Scott-Rodino by softening the per se ban on pass-on. Similarly, it appears that Justice Stevens was initially inclined to affirm, but only by finding a way to modify Hanover Shoe.

approximately fourteen lines of comment regarding Justice Stewart's thought process while noting nothing of Justice Brennan's rationale; Powell Merits Conference Notes, supra note 12, at 1. Justice Stewart had dissented in Hanover Shoe, but not with regard to the Court's rejection of the pass-on defense. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 510–13 (1968) (Stewart, J., dissenting). In fact, it appears from his remarks at the conference on Illinois Brick that he agreed with the decision in Hanover Shoe regarding defensive use of pass-on. See Powell Merits Conference Notes, supra note 12, at 1 ("On its facts, Hanover Shoe was right—but should not be read as per se."). Stewart's Hanover Shoe dissent took issue with what he viewed as the majority's unnecessarily broad reading of the judgment and decree in United Shoe, and, consequently, its broad application of Section 5 of the Clayton Act. See Hanover Shoe, 392 U.S. at 510–13 (Stewart, J., dissenting) ("I think that the [United Shoe] judgment did not have the broad effect the Court attributes to it today."). Id. at 511. Particularly, he questioned whether the Court in United Shoe had, in fact, found United Shoe's "lease only" practice to be specifically unlawful—a presumption on which Hanover Shoe relied in bringing suit. See id. at 512 ("I can find nothing in Judge Wydzanski's written opinion . . . to suggest that he found United's lease-only practice, as such, to be a violation of the antitrust laws or illegal in any way.").

268 See Powell Merits Conference Notes, supra note 12, at 1.

269 Id.; see also Blackmun Merits Conference Notes, supra note 253, at 1.

270 See Powell Merits Conference Notes, supra note 12, at 1 ("Would read Hanover Shoe less expansively—i.e. not as a per se rule—and apply same principle both to defensive and offensive situations."). According to Powell, Stewart further felt that: "On its facts, Hanover Shoe was right—but should not be read as per se. Hart-Rodino can be read as viewing Hanover Shoe liberally—not per se rule." Id. In a final note at the bottom of the next page, Powell also wrote: "Byron says Potter would over-rule H/Shoe in part. Potter says if one must read H/Shoe as Byron reads it, then Byron is right. H/Shoe must apply both ways." Id. at 2; see also Blackmun Merits Conference Notes, supra note 253, at 1 ("Read [Hanover Shoe] less expansively & as no per se rule.").

271 See Powell Merits Conference Notes, supra note 12, at 3 ("Should not have double standard. But can cut back on Hanover Shoe."). Stevens appears to have added, somewhat to the contrary: "Could stick to per se rule in Hanover Shoe case. Where it is clear that price of ultimate commodity is affected . . . should allow ultimate purchaser to sue . . . . Measure of damages is important . . . ." Id. Stevens
Powell's notes on Blackmun's views both confirm Blackmun's inclination to affirm from the start, and reveal that he was persuaded from the beginning that Illinois Brick would have been an easy case to affirm if it had preceded Hanover Shoe.\footnote{See id. at 2 ("This case should have come first. If so this would be easy to affirm. Ultimate purchaser has a real injury. He may have 'right over' against first purchaser.")} Blackmun also questioned the likelihood of double recovery.\footnote{See id. ("Double recovery unlikely.").}

Justice Powell also recorded some of his own thoughts at the conference,\footnote{See Powell Merits Conference Notes, supra note 12, at 3. Blackmun did not take any notes of his own views at the conference. See Blackmun Merits Conference Notes, supra note 253 (failing to reference even his own name on his note sheet); GREENHOUSE, supra note 235.} noting his initial inclination to affirm, and his concerns as well: "Affirm? (Subject [sic] to whether it can be written [without] overruling H/Shoe. Agree with Potter all the way. If can apply H/Shoe both ways, I'll join Byron."\footnote{Powell Merits Conference Notes, supra note 12, at 3. Blackmun's notes also suggest that Powell voiced his general dislike of per se rules: "Does not like per se rules, esp. in this situ[ation]." Blackmun Merits Conference Notes, supra note 253, at 2.}

Justice Stewart may have sparked the Court's change in momentum when, on March 29, 1977, he circulated a one-page memorandum to the conference offering to change his initial vote to affirm, and throw his support behind the position White advocated at the first conference.\footnote{See Memorandum from Potter Stewart, Associate Justice, United States Supreme Court to the Conference of Supreme Court Justices, Ill. Brick Co. v. Illinois (76-404) (Mar. 29, 1977) [hereinafter Justice Stewart Memo to the Conference] (unpublished memorandum, on file as part of the Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 252).} After reiterating his initial vote, and noting White's contrary position,\footnote{See id.} Stewart openly offered to change his position if four others were willing to do the same:

If Hanover Shoe is to be read as establishing a \textit{per se} general
rule that a producer cannot assert a "pass on" defense to a price fixing suit brought against him by his immediate customers, then I think the judgment in the present case must be reversed. If there are four others who read Hanover Shoe in that way and who agree that such a reading requires reversal of the present case, I am prepared to join them. In my opinion, this would be the most clear-cut and rational disposition of the case, and would have the further advantage of eliminating much future litigation as to what products and services are within, and which without, the rule of a more flexible Hanover Shoe rule.278

Justice Rehnquist quickly followed with a brief memorandum of his own in which he confirmed that his "first preference vote expressed at Conference [sic] . . . was in accord with Byron [White]."279 However, he did express a willingness to consider Stewart's approach, or any other approach, so long as it addressed his "principal concern"—"that plaintiffs and defendants [be] treated in an even handed manner on the issue of damages."280

In separate memoranda circulated a day later on March 30, 1977, both Blackmun and Brennan reiterated their inclination to affirm.281 But on the thirty-first, Powell, while expressing some reservations,282 offered to "join an opinion for the Court

276 Id. (emphasis added). In the margin next to the sentence italicized here, Justice Blackmun wrote, "not for me." Id.

277 Memorandum from William H. Rehnquist, Associate Justice, United States Supreme Court to the Conference of Supreme Court Justices, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 29, 1977) (unpublished memorandum, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188).

278 Id. Rehnquist wrote: "I feel I could . . . subscribe to the general approach suggested in Potter's memorandum of March 29, although I would want to see it written out before signing on the dotted line." Id. After voicing his concern about the "even handed" treatment of plaintiffs and defendants, he concluded: "I would not at this time rule out some other approach which achieved that end." Id.

279 Memorandum from Harry A. Blackmun, Associate Justice, United States Supreme Court to Potter Stewart, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 30, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252) ("This is in response to your circulation of March 29. I am still inclined to adhere to my vote to affirm."); Memorandum from William J. Brennan, Jr., Associate Justice, United States Supreme Court to Potter Stewart, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 30, 1977) ("In response to your circulation of March 29, I too am still inclined to adhere to my vote to affirm.") (unpublished document, on file as part of the William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Box I: 424).

280 See Justice Powell Memo to the Conference, supra note 14. Powell's four
reversing...on the theory that the Hanover Shoe doctrine applies "both ways." 283 He thus embraced the "symmetry" concept, which appeared to be motivated at least in part by a perception of even-handedness. 284

Powell's change of view, however, was not motivated solely by a preference for symmetry. In addition, he remarked that "[t]here is certainly a good deal to Byron's view that proof of damages in these cases, absent a per se rule, will be protracted and speculative—with opportunities for unjust results. The lawyers frequently will benefit to a greater extent than the litigants." 285 He concluded: "In short, my first vote now is for reversal in accord with the view expressed by Byron." 286 But recognizing that a majority favoring reversal had yet to take shape, he also expressed a willingness to compromise: "If a Court is not available for this view, I would confine Hanover Shoe to its facts (i.e., to the type of product there involved), and apply as a general rule the same principles of proof for both offensive and defensive use." 287

There were now four votes for reversal—White, Stewart, Rehnquist, and Powell—one day before the second Conference. At that point, Justice Brennan circulated a fairly detailed four page Memorandum to the Conference, by which he likely hoped to stem the tide of defections and secure an affirmance. 288

paragraphs in his one page memorandum are revealing in a number of ways. In the opening paragraph, he confirms his "tentative vote" to affirm at the first Conference, "provided an opinion for the Court could be written that substantially limits Hanover Shoe to its facts." Id. He continued, expressing his concerns about Hanover Shoe, but also about the Court's ability to effectively limit it: "I am not enthusiastic about per se rules, especially where the factual situations are susceptible of such wide variation. Given Hanover Shoe, I recognize that writing such an opinion—even if there were a Court supporting it—would not be easy." Id.

283 Id.

284 See id. "I agree with Bill Rehnquist," he wrote, "that a primary objective should be to assure that plaintiffs and defendants 'are treated in an even-handed manner on the issue of damages.'" Id. (quoting Memorandum from Justice William H. Rehnquist, Associate Justice, United States Supreme Court to the Conference of Supreme Court Justices, Ill. Brick Co. v. Illinois (No. 76-404) (Mar. 29, 1977) (unpublished memorandum, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188)). He also conveyed that he had "noted Potter's memorandum to the Conference." Id.

285 Id.

286 Id.

287 Id.

288 See Memorandum from William J. Brennan, Jr., Associate Justice, United States Supreme Court to the Conference of Supreme Court Justices, Ill. Brick Co. v.
Brennan's memorandum opens by identifying what he viewed as the purposes of the treble damage remedy under Section 4 of the Clayton Act, "to compensate the victims of antitrust violations (the damage feature) and to provide an incentive to the injured private party to sue the violator (the trebling feature)." He also alluded to the role of deterrence:

By not allowing injured indirect purchasers to prove and recover damages, we would, in many instances, frustrate both objectives. The courthouse doors would be closed to the real victims of the illegal conduct in instances where the direct purchaser was successful in passing on the bulk of its increased costs, while the direct purchaser, who had suffered little injury, if any, would be entitled to recover a windfall. In addition, as the Government points out in its Brief Amicus Curiae at 13, direct purchasers may have little incentive to sue to the extent that they are able to continue passing on their increased costs to others and value their relationship with the violator.

Justice Brennan then turned to Hanover Shoe—where he had voted in the majority—arguing that "[t]hese considerations were not present in Hanover Shoe." This was an attack on the "symmetry" point, which appeared to be gaining momentum within the Court. Symmetry was not warranted, he argued, because the pass-on issue in the two cases was not the same.
Brennan came at the issue in a number of ways. First, he pointed out that in *Hanover Shoe* only the direct purchasers sued, and that hence “[t]he issue was . . . whether the wrongdoer could escape liability altogether by claiming that the plaintiff had passed on all or part of the illegal overcharge.” He further argued that due to the complex leasing arrangement at issue there, calculating pass-on would have been especially difficult. With the indirect purchasers absent and the pass-on difficult to ascertain, he argued, “[t]he only persons with a stake sufficient to justify seeking judicial relief were direct purchasers.” Quoting from the Solicitor General’s Brief, he argued that “[t]o allow a passing on defense in that case would have been to allow the violator of the antitrust laws to retain the spoils of his misdeeds.” He concluded the point:

This seems to me altogether different from the proposition advanced by the petitioners in this case that indirect purchasers are barred from recovering for their injuries even if they can demonstrate that illegal overcharges were passed on to them, and I for one never thought that *Hanover Shoe* addressed this question.

Brennan next turned to the “literal language of Section 4” and the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act, arguing that both supported indirect purchaser rights to sue. “To extend *Hanover Shoe* to prevent indirect purchasers from recovering for their injuries,” he argued, “thus would substantially undermine the new Act while it is still warm from the presses.” In the final paragraph of his memorandum, Justice Brennan took aim at the argument that apportionment would be too complex in all cases and that hence antitrust cases would become unmanageable if indirect purchasers were permitted to sue. In response, he argued:

I can perceive no difference between antitrust cases and other

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293 *Id.* at 2.
294 *See id.*
295 *Id.*
296 *Id.* at 2 (quoting Brief for the United States as Amicus Curiae at 5–6, Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (No. 76-404)).
297 *Id.* at 2–3.
298 *See id.* at 3. Justice Blackmun put a check mark in the left hand margin of his copy of the Memorandum next to Brennan’s quotation of Section 4. *See Justice Blackmun Copy of Brennan Memo to the Conference, supra* note 288, at 3.
cases which typically involve ... multiple parties, e.g., products liability suits. Moreover, I am aware of no other area of the law in which we have allowed the spectre of potential difficulties of proof respecting the amount of damages to prevent an admittedly injured party from having even the opportunity to prove the extent of its injuries—this in the face of a statute that purports to give a right to any person injured by a violation of the antitrust laws to recover damages. Surely the party most injured should be permitted to recover.300

Despite Justice Brennan's efforts, and the change of vote by Justice Marshall, when the tally was done on April 1, the vote was now 6-3 to reverse.301 His four page memorandum to the Conference of a day earlier became the framework for his dissenting opinion.302 Led by Justice White, who authored the majority opinion, the Court had reversed itself in a week's time.303

6. Evolution of the Opinions

On May 20, 1977, Justice White circulated his first draft of the majority opinion.304 Not surprisingly, it was received quite

300 Id. (emphasis in original).
301 See supra notes 254–56 and accompanying text.
302 On April 5, 1977, Brennan formally wrote to Blackmun volunteering to undertake the drafting of the dissent. Memorandum from William J. Brennan, Jr., Associate Justice, United States Supreme Court to Harry A. Blackmun, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (76-404) (Apr. 5, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252) (“I note that you, Thurgood and I are in dissent.... I'll be happy to undertake that dissent.”).
303 See supra notes 254–56 and accompanying text.
304 Ultimately, White produced a total of three drafts before finalizing his opinion. See Byron R. White, Associate Justice, United States Supreme Court, First Draft of Opinion of the Court, Ill. Brick Co. v. Illinois (76-404) (May 20, 1977) [hereinafter First Draft of Opinion of the Court] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252); Byron R. White, Associate Justice, United States Supreme Court, Third Draft of Opinion of the Court, Ill. Brick Co. v. Illinois (76-404) (June 8, 1977) [hereinafter Third Draft of Opinion of the Court] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252) (the files contain copies of White’s first and third draft, as well as a mark-up version of the first draft). Copies of White’s Second Draft Opinion are available in the files of both Justice Brennan and Justice Marshall. See Byron R. White, Associate Justice, United States Supreme Court, Second Draft of Opinion of the Court, Ill. Brick Co. v. Illinois (76-404) (June 7, 1977) [hereinafter Second Draft of Opinion of the Court] (unpublished document, on file with Thurgood Marshall Papers, Manuscript Division, Library of Congress, Box 192). For an online register of the Marshall Papers, see Thurgood Marshall Papers (June 2, 2004),
differently in the chambers of Justices Blackmun and Powell, who at that point appear to have been committed to opposing resolutions of the case. On May 21, one of Blackmun's clerk's wrote: "Justice White has circulated an opinion that seems very vulnerable to me." In contrast, on May 23, Powell wrote to White: "You have written a most convincing opinion that I am happy to join." That same day, Justice Brennan formally advised Justice White that in response to his first draft of the majority opinion he would circulate a dissent.


Memorandum from Richard Meserve, Justice Blackmun's Clerk to Harry A. Blackmun, Associate Justice, United States Supreme Court, Illinois Brick Co. v. Illinois (No. 76-404) (May 21, 1977). The clerk added: "You originally voted the other way and I see no reason for you to reconsider your vote. Should you wish a longer memo on the difficulties with Justice White's draft, however, I of course will be happy to prepare one." Id. Going one-step further he volunteered to undertake the drafting of a dissent: "If you would like me to draft a dissent in this case, I would welcome the opportunity." See id.

Memorandum from Lewis F. Powell, Jr., Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 23, 1977) (unsigned) (unpublished document, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188). The other members of the majority quickly concurred. See Memorandum from Warren A. Burger, Chief Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (June 1, 1977) (unpublished document, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188) ("I join."); Memorandum from William H. Rehnquist, Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 23, 1977) (unpublished document, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188) ("Please join me."); Memorandum from Potter Stewart, Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 24, 1977) (unpublished document, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188) ("I am glad to join the opinion you have written for the Court."); Memorandum from John Paul Stevens, Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 31, 1977) (unpublished document, on file with the Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188) ("Please join me.").

Memorandum from William J. Brennan, Jr., Associate Justice, United States Supreme Court, to Justice Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 23, 1977) (unpublished document, on file as part of the William J. Brennan, Jr. Papers, Manuscript Division, Library of Congress, Box I: 424) ("In due course I shall circulate a dissent in [this case].").
Less than a week later, Justice Brennan circulated his initial draft dissent. Although Justice Blackmun joined that dissent, offering a variety of edits, he also expressed his intention to draft his own separate dissent, which was circulated five days


309 Blackmun appears to have reviewed White’s May 20, 1977 draft majority opinion and Brennan’s May 26, 1977 draft dissenting opinion with care. There are a few minor comments as to substance in each, as well as check marks in the margins throughout—perhaps indicating points that he viewed as especially important—in addition to noting typographical errors, citations, and word usage. See Byron R. White, Associate Justice, United States Supreme Court, First Draft of Opinion of the Court, Justice Blackmun Copy, Ill. Brick Co. v. Illinois (76-404) (May 20, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252); William J. Brennan, Jr., Associate Justice, United States Supreme Court, First Draft of Dissenting Opinion, Justice Blackmun Copy, Ill. Brick Co. v. Illinois (No. 76-404) (May 20, 1977) [hereinafter Justice Blackmun Copy of Brennan Dissent, First Draft] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252). At the top of the first page of Brennan’s initial draft dissent, Blackmun hand wrote “good opinion—join.” Id.

Blackmun had a particular pet peeve concerning the use of the word “viability,” which Brennan used twice in his first draft dissenting opinion. See GREENHOUSE, supra note 235, at 238 (describing Justice Blackmun’s continuing crusade against the use of the word “viable.”). Blackmun singled them out with “x” marks in the margins. Justice Blackmun Copy of Brennan Dissent, First Draft, supra. At the bottom of his May 30 letter to Brennan there is a “note to WJB only” which states: “Henry Putzel and I have a blood oath to fight ‘parameter’ and ‘viability.’ Do you think the latter word could be replaced with something of greater integrity where it appears in the 9th line on page 3 and in the 6th line from the bottom on page 6?" Memorandum from Harry A. Blackmun, Associate Justice, United States Supreme Court to William J. Brennan, Jr., Associate Justice, United States Supreme Court, Ill. Brick v. Illinois (No. 76-404) (May 30, 1977) [hereinafter Justice Blackmun Memo to Justice Brennan] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252). Brennan accepted the suggestion, substituting “effectiveness” in its place. See Ill. Brick Co. v. Illinois, 431 U.S. 720, 750 (1977) (Brennan, J., dissenting) (“it is essential to the public interest to preserve the effectiveness of the private treble-damages action”) (emphasis added); see also id. at 753 (“the same policies of insuring the continued effectiveness of the treble damages action”) (emphasis added).

310 Blackmun formally wrote to Brennan on May 30, asking that he be joined in
later on May 31.311

Between May 31 and June 8 when the final opinions were released, there were a number of exchanges among the Justices concerning various aspects of the opinions, which in turn prompted the preparation and circulation of the second and third drafts of the majority and dissenting opinions. Some minor edits to the majority opinion concerned White's treatment of stare decisis.312 Some text was deleted in favor of additional footnotes providing more specific examples of the breadth of possible indirect and direct purchaser actions.313 Footnote 27 was added

Brennan's dissent, but also expressing his interest in writing separately. Justice Blackmun Memo to Justice Brennan, supra note 309 ("Please join me in your fine dissenting opinion. I may write separately a brief sentence or two.").

311 Harry A. Blackmun, Associate Justice, United States Supreme Court, First Draft of Dissenting Opinion, Ill. Brick Co. v. Illinois (No. 76-404) (May 31, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).

312 Powell asked White to make his language on stare decisis a bit less "emphatic." See Memorandum from Lewis F. Powell, Jr., Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (May 23, 1977) (unpublished document, on file in Lewis F. Powell, Jr. Archives, Washington & Lee University School of Law Library, Series 10.6, Box 43:188). Those changes are first evident in a mark-up of a page of the first draft that Powell retained. See Byron R. White, Associate Justice, United States Supreme Court, First Draft of Opinion of the Court, Justice Powell Copy, Illinois Brick Co. v. Illinois (76-404) (May 20, 1977), at 13 (with hand written notes from Justices Powell and White). Where White had first written that considerations of stare decisis "are to be given particularly strong weight," Powell suggested "weigh heavily." Id. In the second sentence of the paragraph, White had written "this strong presumption" and Powell suggested that "strong" be deleted. Id. Later in that same sentence White had written that the presumption created by stare decisis "would be a compelling reason for reaffirming" Hanover Shoe's view of Section 4, Powell suggested simply that it would "support our reaffirmance." Id. Powell's hand written notation indicating "Byron agreed to make these changes at my request" appears at the top of the page. At the bottom appears a notation from White indicating that he has made the changes to "take the edge off" of his first draft, "at least a little." Id. These changes were incorporated into White's "Second Draft," which was circulated on June 7. See Second Draft of Opinion of the Court, supra note 304, at 13–14. The alterations also appear in the final version of the opening paragraph of Section III of the majority opinion. See Ill. Brick, 431 U.S. at 736.

313 These changes are reflected both in an undated mark-up of selected pages of the first draft opinion that appears in Justice Blackmun's files. See Byron R. White, Associate Justice, United States Supreme Court, First Draft of Opinion of the Court, Justice Blackmun Copy, Undated Mark-Up of Selected Pages, Ill. Brick Co. v. Illinois (76-404) (May 20, 1977) [hereinafter Justice Blackmun Copy of First Draft of Opinion of the Court, Undated Mark-Up of Selected Pages] (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252). In addition, the changes are shown in White's
to respond specifically to Justice Brennan's arguments regarding the relative difficulty of calculating pass-on in various contexts.\textsuperscript{314} White also inserted an additional sentence emphasizing the relationship between the uncertainties created by permitting apportionment of damages and the incentive of direct purchasers to sue.\textsuperscript{315}

An especially intriguing edit was made to the Court's discussion of the compensation purposes of Section 4. White's original language was deleted in favor of alternative wording that arguably altered the main thrust of the passage by placing less emphasis on the principal of compensation. The first half of the original paragraph read as follows:

Section 4 has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality." The treble-damage action is also designed to compensate victims of antitrust violations for their injuries. It may be argued that, in elevating direct purchasers to a preferred position as private attorneys general, the \textit{Hanover Shoe} rule sacrifices this purpose of compensating victims for their injuries. Of course, \textit{Hanover Shoe} does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge.\textsuperscript{316}

It was replaced by the final language:

It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the \textit{Hanover Shoe} rule denies recovery to those indirect purchasers who may have been

\begin{footnotesize}
\footnote{Second Draft opinion, see Second Draft of Opinion of the Court, supra note 304, at 17 nn.23–24, and in the final opinion. \textit{Ill. Brick}, 431 U.S. at 740–41 & nn.23–24. \textsuperscript{314} See Justice Blackmun Copy of First Draft of Opinion of the Court, Undated Mark-Up of Selected Pages, supra note 313; Second Draft of Opinion of the Court, \textit{supra} note 304, at 19-20 & n.27. \textsuperscript{315} The inserted sentence was added to the second draft and reads: "Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue." See Justice Blackmun Copy of First Draft of Opinion of the Court, Undated Mark-Up of Selected Pages, supra note 313; Second Draft of Opinion of the Court, \textit{supra} note 304, at 22; \textit{see also Ill. Brick}, 431 U.S. at 745. \textsuperscript{316} Justice Blackmun Copy of First Draft of Opinion of the Court, Undated Mark-Up of Selected Pages, supra note 313, at 22 (quoting \textit{Hanover Shoe, Inc. v. United Shoe Mach. Corp.}, 392 U.S. 481, 494 (1968)).

In the margin of his copy of the first draft opinion, Blackmun wrote "precisely" next to the second sentence of this paragraph—"The treble damage action is also designed to compensate victims of antitrust violations for injuries." \textit{First Draft of Opinion of the Court}, \textit{supra} note 304, at 22.}
\end{footnotesize}
actually injured by antitrust violations. Of course, as MR. JUSTICE BRENNAN points out in dissent, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation. But [Section] 4 has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," it is also designed to compensate victims of antitrust violations for their injuries. Hanover Shoe does further the goal of compensation to the extent that the direct purchaser absorbs at least some and often most of the overcharge. In view of the considerations supporting the Hanover Shoe rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution..." especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues.317

The revised version arguably de-emphasizes any criticism of Hanover Shoe on compensation grounds, deleting the sentence "the Hanover Shoe rule sacrifices this purpose of compensating victims for their injuries."318 Instead, it seeks to bolster the compensation credentials of Hanover Shoe by presuming that the direct purchaser "absorbs at least some and often most of the overcharge,"319 an at best debatable proposition. More importantly, the new passage implicitly rejects the idea that maximum deterrence and maximum compensation could be secured by having asymmetrical rules. Indeed, it appears to assume that there is but one rule—the "rule" of Hanover Shoe.

The two dissenting opinions prompted a number of edits specifically directed at the significance of the Hart-Scott-Rodino Act. The edits related to the Hart-Scott-Rodino Act in the majority opinion most directly affected two footnotes—footnote 14, a version of which was included in White's initial May 20 draft, and footnote 31, which was later added. The first, second, and fourth and last paragraphs of footnote 14 of the final majority opinion are almost identical to the original footnote as


318 See supra note 317 and accompanying text.

319 See supra note 318 and accompanying text.
The third paragraph, in contrast, was inserted in reaction to what White perceived to be the common thrust of Justice Brennan's and Justice Blackman's initial dissenting opinions, that the legislative history of the Hart-Scott-Rodino Act was directly relevant to the Court's interpretation of Section 4, even though Section 4 and its predecessor, Section 7 of the Sherman Act, had been adopted by previous Congresses.\textsuperscript{321} The added paragraph was inserted as a response to that assertion, which in White's view both Brennan\textsuperscript{322} and Blackmun\textsuperscript{323} appeared to be making. The inserted paragraph specifically rejected the notion that current Congressional intentions are relevant to the interpretation of Congress' intentions in 1890 and 1914 when the predecessors of Section 4 were adopted.\textsuperscript{324}

\textsuperscript{320} An interesting edit was made to the final paragraph. In White's original draft, the first sentence of that paragraph read: "While we do not lightly disagree with the reading of Hanover Shoe urged by a coordinate branch of government . . . ." First Draft of Opinion of the Court, supra note 304, at 11 n.14 (emphasis added). The revision deleted "coordinate branch of government," substituting "these legislators," an obvious effort to denigrate the significance of references in the legislative history to Hanover Shoe. See Second Draft of Opinion of the Court, supra note 304, at 11 n.14. The change is also indicative of a more limited view of the general value of legislative history, one that has been more openly espoused in recent years by other members of the Court. Compare Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997) with Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. CAL. L. REV. 845 (1991).

\textsuperscript{321} See Justice Blackmun Copy of First Draft of Opinion of the Court, Undated Mark-Up of Selected Pages, supra note 313. These changes were incorporated into the "2nd Draft" of the opinion, which was circulated on June 7, 1977. See Second Draft of Opinion of the Court, supra note 304, at 11 n.14.

\textsuperscript{322} Compare Ill. Brick, 431 U.S. at 756–58, 764 n.23 (Brennan, J., dissenting) with Ill. Brick, 431 U.S. at 733–34 n.14, 747 n.31.

\textsuperscript{323} On June 6, 1977, Blackmun wrote to White:

Dear Byron:

Many thanks for your advance notice of the changes proposed for your opinion in this case. I am making one change in my short dissent, namely, that the third sentence in the third paragraph is changed to read: "The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' understanding of the Acts."

Memorandum from Harry A. Blackmun, Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (June 6, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).

\textsuperscript{324} The third paragraph of footnote 14 of White's Second Draft began with: "We thus cannot agree with MR. JUSTICE BLACKMUN that the 1976 legislation 'tells us all that is needed as to Congressional understanding' in enacting [Section] 4 of the
But there was an important distinction in the grounds being asserted by Justices Brennan and Blackmun to justify deference to current Congressional intentions, one that was further explicited in an exchange between Justices Blackmun and White. Whereas Brennan argued that present day legislative intentions were directly relevant to the interpretation of the enactments of prior Congresses, Blackmun was making a more subtle, political point.

Blackmun's clerk wrote to Blackmun on June 8, a day before the final opinion had been set for release, urging him to further respond to White. "In my view," he wrote, "Justice White misuses the thrust of your comment which is that Congress' present understanding of the Acts is clear." He continued, "My inclination might be to let the issue slide, but we could insert 'present' in our text to force White to adapt." Blackmun was not suggesting, as Brennan was, that present day legislative history literally binds the Court in its interpretation of a prior Act. Rather, he was arguing that as an institutional matter it would be unwise for the Court to simply ignore current Congressional views and invite possible reversal of its decision. Blackmun promptly drafted an additional letter to White:

This will confirm the message we gave to John Spiegel [White's clerk] this morning to the effect that I am inserting the word "present" in the 5th line from the bottom of my short dissent. This will be just before the word "understanding." This will affect, I believe, that portion of footnote 14 on page 11 of your recirculation of June 7.

Although White responded to Blackmun's edit by dropping the specific reference to Justice Blackmun at the start of the inserted paragraph, he largely sidestepped the distinction

Clayton Act in 1914 or the predecessor section of the Sherman Act in 1890." It then turned to "[t]he cases cited by MR. JUSTICE BRENNAN . . ." See Second Draft of Opinion of the Court, supra note 304, at 11 n.14 (quoting Draft of Justice Blackmun Dissent, Ill. Brick Co. v. Illinois (No. 76-404)).

325 Memorandum from Richard Meserve, Justice Blackmun's Clerk, to Harry A. Blackmun, Associate Justice, United States Supreme Court, Ill. Brick Co. v. Illinois (No. 76-404) (June 8, 1977) (unpublished document, on file as part of the Papers of Harry A. Blackmun in Library of Congress, Manuscript Division, Box 252).

326 Id.

327 Memorandum from Harry A. Blackmun, Associate Justice, United States Supreme Court to Byron R. White, Associate Justice, United States Supreme Court, Illinois Brick Co. v. Illinois (No. 76-404) (June 8, 1977).

drawn by Blackmun in two ways. First, the substitute opening language lumped together the point being made by Blackmun with that of Brennan.\textsuperscript{329} Second, the footnote closed with the dismissive statement:

While we do not lightly disagree with the reading of Hanover Shoe urged by these legislators, we think the construction of [Section] 4 adopted in that decision cannot be applied for the exclusive benefit of plaintiffs. \textit{Should Congress disagree with this result, it may, of course, amend the section to change it.} But it has not done so in the recent parens patriae legislation.\textsuperscript{330}

This was precisely the kind of flippant dismissal of Congress that Blackmun disdained and sought to avoid.

After three draft majority opinions and three draft dissents, the Court's final opinions were released on June 9, 1977.

\textbf{IV. THE ILLINOIS BRICK PAPERS IN PERSPECTIVE}

\textbf{A. Sylvania and Illinois Brick: Two Case Studies in the Process of Antitrust Evolution}

In my earlier study of Justice Lewis Powell's papers in Sylvania,\textsuperscript{331} I identified eight factors that appeared to have influenced the outcome of that pivotal case: (1) the make-up of the Court; (2) the advocacy of a single Justice, in that case Justice Powell; (3) doubtful doctrine—the shaky foundations of the Court's decision a decade earlier in Arnold, Schwinn; (4) a body of academic criticism of Schwinn; (5) a quality amicus brief that lent the Court some of its most critical intellectual raw material; (6) the Justice's law clerk, who appeared to have played a significant role in developing the Justice's and ultimately the Court's views; (7) the clerk's antitrust law professor, who was influential in forming the clerk's views; and (8) what I referred to as the "harmony of the spheres"—the confluence of all of these factors.\textsuperscript{332}

\textsuperscript{329} The final language reads: "We thus cannot agree with the dissenters that the legislative history of the 1976 Antitrust Improvements Act is dispositive as to the interpretation of [Section] 4 of the Clayton Act, enacted in 1914, or the predecessor section of the Sherman Act, enacted in 1890 . . . ." \textit{Ill. Brick}, 431 U.S. at 733–34 n.14.

\textsuperscript{330} \textit{Ill. Brick}, 431 U.S. at 733–34 n.14 (emphasis added).

\textsuperscript{331} See Gavil, Sylvania and the Powell Papers, supra note 8.

\textsuperscript{332} Id. at 8–12.
The *Illinois Brick* papers are drawn from a wider sampling of the Court, but nevertheless suggest that some particular factors were significant in moving the Court to reverse in *Illinois Brick* and bar indirect purchasers from suing. The make-up of the Court was clearly a factor, although a complex one. Simply put, *Hanover Shoe* and *Illinois Brick* were decided by two vastly different Courts.\(^{333}\)

As noted above, only four of the Justices who participated in *Hanover Shoe* remained on the Court in 1977 when *Illinois Brick* was decided, and they split 2-2. Justice White, who had been appointed to the Court some fifteen years earlier by President Kennedy, and who had authored the Court’s opinion in *Hanover Shoe*, wrote the majority decision in *Illinois Brick*. He was joined by Justice Stewart, who dissented in *Hanover Shoe*, but not on the merits of the indirect purchaser issue. Justices Brennan and Marshall, who both joined the majority in *Hanover Shoe*, dissented. Of the Justices who joined the Court in the intervening years, only Justice Blackmun ultimately dissented in *Illinois Brick*—Chief Justice Burger, and Justices Powell, Rehnquist, and Stevens all voted to bar indirect purchasers from suing.

It is difficult to imagine, however, that the case would have been decided the same way had the Court in 1977 been the same as it was in 1968. A major factor motivating the Court to preclude offensive pass-on in *Illinois Brick* was the idea that plaintiffs and defendants had to be treated alike. The argument is prevalent in the papers of the Justices as well as in the decision itself. A majority of the Court concluded that for reasons of fairness, and doctrinal consistency, *Hanover Shoe* would have to apply “both ways.”

But *Hanover Shoe* and *Illinois Brick* are strange bedfellows indeed. *Hanover Shoe* was a product of the same Court that

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\(^{333}\) In the decade that transpired from 1967 to 1977, the Supreme Court had been transformed. Gone were Chief Justice Earl Warren, as well as Justices Douglas, Black, Harlan, and Fortas. Taking their places on the Court were Chief Justice Warren Burger, and Justices Blackmun, Powell, Rehnquist, and Stevens. When *Illinois Brick* was decided, only Justices White, Stewart, Brennan, and Marshall remained from the Court that decided *Hanover Shoe*. White drafted the majority opinion in both, but Brennan and Marshall, who had joined him in *Hanover Shoe*, dissented in *Illinois Brick* and were joined by Justice Blackmun. Stewart, who had dissented in *Hanover Shoe*, joined White in *Illinois Brick*. See supra Part I.B and accompanying text.
decided United States v. Arnold, Schwinn & Co.,\textsuperscript{334} and Albrecht v. Herald Co.,\textsuperscript{336} two decisions that were products of the Warren Court’s avowed support for expansive antitrust doctrine.\textsuperscript{336} Today, they are widely recognized as unduly restrictive and have since been overruled. In contrast, Illinois Brick was a product of the Court that decided Brunswick and Sylvania, two decisions that have stood for a generation as cornerstones of modern antitrust thinking.

Moreover, philosophically, the two cases are in truth irreconcilable. Hanover Shoe was a decidedly “pro-plaintiff” decision, animated by the twin aims of maximizing deterrence and minimizing the possibility that guilty antitrust defenders could escape liability and retain the fruits of their unlawful activity. Illinois Brick was a decidedly “pro-defense” decision, concerned about the undue threat of treble damage exposure to businesses and the administration of the treble damage remedy. Very arguably, Illinois Brick reflected just as profound a shift in philosophy as did Sylvania, even though it extended, rather than overruled Hanover Shoe.\textsuperscript{337} That shift was obscured by the “symmetry” argument that found favor with the Court, and by Justice White’s common leadership in the two cases. In truth, they couldn’t have been any more asymmetrical, and the result in Illinois Brick was certainly not compelled by Hanover Shoe, as the Court maintained.

True symmetry between Illinois Brick and Hanover Shoe would have required greater deference to the rights of consumers and greater concern for compensation, retaining indirect purchaser rights, even if indirect purchasers were subjected to

\begin{itemize}
\item \textsuperscript{334} 388 U.S. 365 (1967) (supplier’s vertical non-price restrictions on bicycle dealers were per se unlawful), overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
\item \textsuperscript{335} 390 U.S. 145 (1968) (maximum resale price maintenance per se unlawful), overruled by State Oil Co. v. Khan, 522 U.S. 3 (1997).
\item \textsuperscript{336} For a contemporaneous critique, see generally Thomas E. Kauper, The “Warren Court” and the Antitrust Laws: Of Economics, Populism, and Cynicism, 67 Mich. L. Rev. 325 (1969). The incompatibility of Hanover Shoe with a bar on indirect purchasers was also asserted by the Solicitor General. To bar indirect purchasers in order to achieve symmetry with Hanover Shoe, he argued, “turns Hanover Shoe on its head by converting the argument that difficulties of proof should not be allowed to stymie recovery, as in Hanover Shoe, into the argument that difficulties of proof must stymie recovery, as in the instant case.” Brief of the United States as Amicus Curiae, supra note 212, at 17.
\item \textsuperscript{337} Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).
\end{itemize}
strict standards of proof. In truth, the use of pass-on as a defense, and the use of pass-on by plaintiffs, serve vastly different purposes from the point of view of both compensation and deterrence. Permitting offensive pass-on, but precluding defensive pass-on, would have, in fact, been more consistent than treating both alike, and that remains arguably true today.

A second factor that quite clearly influenced the outcome in *Illinois Brick* was advocacy, perhaps "leadership" from within the Court. Just as Justice Powell took the lead in *Sylvania*, it appears that Justice White did so in *Illinois Brick*. The papers of the Justices indicate that he articulated what became the core of the majority's reasoning very early on, and that it clearly had an impact on the rest of the Court. Less clear is the degree to which he, himself, was active in pressing his views outside of the Conference. Much of the available record evidences activity by the other Justices in pressing for a second Conference and a consequent change of position, but none by White. Hence, *Illinois Brick*, perhaps, is more an illustration of collaborative consensus building within the Court than simple advocacy by a single Justice, as appeared to be the case in *Sylvania*.

Academic commentary also seems to have had its impact on the Court. As noted, the clerks surveyed the literature, and found it generally to favor the retention of indirect purchaser rights, with one exception: an article by Professor Milton Handler and Michael Blechman. The article was referenced by more than one of the clerks, and in the Court's majority and dissenting opinions. Handler, then a Professor emeritus at Columbia University, was a very significant and well respected antitrust scholar. He had clerked for the Supreme Court, was involved in the drafting of the *Trenton Potteries* decision in 1927, and later authored what was the first published antitrust casebook in 1937, a book that survives to today in subsequent editions. As was true in *Sylvania*, the relevant

338 See supra notes 113, 168 and accompanying text.
339 See Ill. Brick, 431 U.S. at 728 n.7, 740 n.23, 741 n.24. The article was also acknowledged by the dissent. See Ill. Brick, 431 U.S. at 753-54 n.10 (Brennan, J., dissenting).
341 See id. at 1258 (stating that he worked on a casebook that was published in 1937).
342 MILTON HANDLER ET. AL, CASES AND MATERIALS ON TRADE REGULATION (4th
published scholarship of the time was a subject of thoughtful discussion at the Court. But in contrast to *Sylvania*, the Court majority embraced the minority view from the commentary, not the prevailing one.

Other relevant and influential factors are also evident in the papers. As in *Sylvania*, the clerks were deeply engaged in formulating the views of their respective Justices, and the amicus brief of the Solicitor General was noted and discussed by the clerks and the Court. And as in *Sylvania*, all of the relevant factors together amplified the possibility that the Court would strike out in a new and more measured direction.

B. Epilogue: ARC America and Kansas v. Utilicorp

One intangible factor that comes across strongly in the *Illinois Brick* papers is the Court majority's self confidence in the policy choices it was making at the time. But as confident as the Court majority appeared to be in *Illinois Brick*, there is evidence that with the passage of time it began to waiver in that certainty.

*ARC America* can reasonably be read as a significant retreat from *Illinois Brick* and a reassertion of some of the principal themes of *Hanover Shoe*. This is especially true in the Court's discussion of preemption, particularly the defendant's argument that state repealers were inconsistent with and would undermine the policies of *Illinois Brick*. Remarkably, the Court declared that state *Illinois Brick* repealers "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."

Pointedly, the Court continued: "The Court of Appeals concluded, however, that such laws are inconsistent with...

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343 See supra note 131 and accompanying text.

344 See supra note 179 and accompanying text, and infra note 354 and accompanying text.


346 One immediate indication of this is that the remaining dissenters from *Illinois Brick*, Justices Marshall and Blackmun, joined the majority in *ARC America*. See California v. ARC Am. Corp., 490 U.S. 93, 94 (1989).

347 See id. at 101–02.

348 Id. at 102. In support of the proposition, the Court cited *Illinois Brick* and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, a decision authored by Justice Marshall, who had dissented in *Illinois Brick*. 
and stand as an obstacle to effectuating the congressional purposes and policies identified in *Hanover Shoe* and *Illinois Brick*. In this respect, the Court of Appeals has misunderstood both *Hanover Shoe* and *Illinois Brick*. The Court continued, were simply efforts to interpret Section 4 of the Clayton Act, not sweeping pronouncements of antitrust remedial policy. Hence the states were free to define their own policies differently, and that included making different assumptions about incentives to sue and the threat of multiple liability.

Yet there is an undeniable air of retreat in *ARC America*. The discussion of the Court in *Illinois Brick* was not so nuanced as to be tied specifically to interpreting Section 4. The arguments regarding indirect purchaser rights were broadly conceived and the reasoning and language of the final opinion unequivocal.

There is also some evidence in the Papers of Justice Blackmun that is consistent with an awareness of retreat. As noted above, the Court’s opinion in *ARC America* was unanimous, save for two recused Justices. Justices Scalia and Kennedy, who joined the majority, appear to have expressed some concerns about the impact of the Court’s opinion on *Illinois Brick*. In his conference notes from *ARC America*, Justice Blackmun recorded that Justice Scalia was “n[ot] happy” and wondered whether the Court would “let indirect purchasers... recover if Ill. Brick had gone t[he] other way.”

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349 *ARC Am.*, 490 U.S. at 102 (footnote omitted). The footnote to this passage decidedly retreated from any narrow reading of *Illinois Brick*’s exceptions:

In one respect, the Court of Appeals was overly narrow in its description of the congressional purposes identified in *Illinois Brick*. In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them.

Id. at 102 n.6 (emphasis added).

350 See id. at 102–05.

nullity."  

Justice Blackmun's clerk also expressed the concern that permitting state indirect purchaser claims would undermine *Illinois Brick*, but concluded, as ultimately did the Court, that the conflict did not warrant preemption. Noting the three objectives of federal antitrust law as set forth in *Hanover Shoe* and *Illinois Brick*: "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damage actions; and (3) avoiding multiple liability for defendants," the clerk observed:

State indirect purchaser statutes interfere with these objectives, either by curtailing a direct purchaser's right to sue for the full overcharge (thereby interfering with objective (2)), or by permitting indirect purchasers to bring damage claims in addition to those brought by direct purchasers (thereby interfering with objectives (1) and (3)).

The clerk rejected the approach outlined by the appellant-states, however, which more directly attacked the foundations of *Illinois Brick*:

I do not think it fair to say, as [appellants] argue, that those interests were purely creatures of this Court's imagination, not at all tied to this Court's reading of Congressional intent. So to say is, to my mind, tantamount to saying *Illinois Brick* was wrongly decided, which is not a safe basis on which to rest here. But the preference for simplicity was no more in *Illinois Brick* than a thumb on the scale, tipping the Court towards one of two plausible readings of the federal statute. I do not think there is

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352 Id.

353 Expressly agreeing with the position taken by the Solicitor General, she concluded that "[a]lthough I think there is some conflict between state policy and federal policy as set forth in *Illinois Brick*, I don't think that the conflict rises to the level required for implication of an intent to preempt state antitrust law in this area." See Memorandum from Deborah C. Malamud, Justice Blackmun's Clerk, to Harry A. Blackmun, Associate Justice, United States Supreme Court, California v. ARC Am. Corp. (No. 87-1862) (Feb. 15, 1989), at 15 (unpublished document, available in The Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 526). As was true in *Illinois Brick*, the Solicitor General's brief thus appears to have had some impact and was discussed at some length by the clerk. See id. at 6–8. Contrasting the Solicitor General's brief with that of the Appellant-States, which it supported, the clerk notes that although "[m]uch here is duplicative...it is better stated and is not as predicated on the argument that *Illinois Brick* was wrong." Id. at 6. Of the brief filed by thirty-five States and the District of Columbia, she noted only that it "[a]dds nothing." Id. at 8.

354 Id. at 2–3.
any need to elevate the preferences identified in *Illinois Brick* to the status of fundamental elements of federal antitrust policy, elements which must be protected by a finding that state statutes which place other interests first are preempted.\(^{355}\)

She went on, however, to discuss in detail that “serious conflicts” were likely to arise absent preemption.\(^{356}\)

Finally, there are the notes of Justice Blackmun prepared prior to oral argument, which took place on February 27, 1989. Blackmun appeared to agree with the analysis set forth by his clerk, noting that there are “some risks here—multiple liability—complexity—decreased incentives” and that “[i]ncentives for direct purchaser may be reduced,” but he did not regard federal treble damages “as setting an absolute ceiling.”\(^{357}\) He concluded, “I [would] say no preemption & let lower [courts] work out & [allocate] . . . [therefore] I generally agree [with the] SG.”\(^{358}\)

Perhaps more starkly than *ARC America*, a year later in *Kansas v. Utilicorp*,\(^{359}\) a significant shift in the Court took place. In dissent, Justice White led the *Illinois Brick* dissenters, Justices Brennan, Marshall, and Blackmun, in an effort to establish some constraints on the scope of *Illinois Brick*. In *Illinois Brick*, Justice Powell and other members of the Court

\(^{355}\) *Id.* at 15–16. Justice Blackmun appears to have hand-written a check mark in the margin next to the sentence “[s]o to say is, to my mind, tantamount to saying *Illinois Brick* was wrongly decided, which is not a safe basis on which to rest here.” *See id.* at 15.

\(^{356}\) *Id.* at 16–19. One interesting observation concerns the issue of multiple liability. On that point, the clerk observed that the Appellants are “disingenuous.” She continued:

> The argument that there is no reason to fear duplicative recovery if the direct purchaser’s federal recovery ‘represents the portion of the overcharge it actually incurs’ misses the boat: under federal law, the direct purchaser is deemed to ‘incur’ the entire overcharge. [Appellants’] position is flawed to the extent that it relies on the notion that there is ‘something left’ of a single recovery which can safely be allocated to the indirect purchaser.

*Id.* at 18 (quoting Brief of Appellant States, California v. ARC America Corp., 490 U.S. 93 (1989) (No. 87-1862), at 33). She reasoned, however, that “the SG is correct that the federal antitrust laws cannot be read as setting treble damages as the absolute ceiling on damages for conduct which violates the federal antitrust laws, where the additional recovery arises out of violation of the antitrust laws of another sovereign.” *Id.* at 17–18.

\(^{357}\) Harry A. Blackmun, Associate Justice, United States Supreme Court, Pre-Argument Handwritten Notes, California v. ARC Am. Corp. (No. 87-1862) (Feb. 19, 1989) (unpublished document, available in The Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 526).

\(^{358}\) *Id.*

had expressed particular reservations about the risks of embracing any per se rule against indirect purchasers. Like all per se rules, it posed the risk of over-inclusion and, in this instance, under-compensation and under-deterrence. Justice White gave public voice to that concern in *Utilicorp.*, noting Section 4's “expansive remedial purpose” and openly conceding a point pressed to no avail by the *Illinois Brick* dissenters—that its language “does not distinguish between classes of customers . . .” He went on to describe *Illinois Brick* as an “exception” that should not be “extend[ed]” in cases where it could undermine the “twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.” These are revealing arguments coming from the author of the majority opinions in *Hanover Shoe, Illinois Brick*, and *ARC America*.

**CONCLUSION**

The papers of the Justices in *Illinois Brick* are illuminating in a number of ways. First and foremost, they reveal the internal process that led to the decision in *Illinois Brick*, itself, a case that has spawned nearly three decades of debate over the rights of indirect purchasers. We can observe the Justices and clerks at work, undertaking to sort through the arguments of the parties, as well as the influence of outside commentators and amici. Also evident is the critical importance of the Justices’ interest in the issues posed by a given case and possibly their inclinations towards leadership. As was true of Justice Powell’s role in *Sylvania*, Justice White, and to some degree Justice Stewart, played a pivotal role in framing up the issues and crafting the eventual majority opinion in *Illinois Brick*.

Perhaps the most significant revelation, however—and potentially the most worthy of continued attention and debate—is the commanding role played by the economic intuitions of the Justices and their seeming discretion to indulge those intuitions. At the time *Illinois Brick* was decided, American antitrust law was just beginning a period of accelerated evolution at the hands of the Court. Owing in large part to the common law malleability

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360 See supra notes 247–49 and accompanying text.
362 Id. at 226.
of the Sherman Act,\textsuperscript{364} the Court as an institution exercised extraordinary discretion in re-defining the content of antitrust law. What then were the sources of economic ideas that were flowing to the Court? What approach did the Justices take to assimilating those ideas and translating them into antitrust law? And perhaps most importantly—what institutional checks, if any, exist to temper the Justices' choice of economic assumptions and models?

In \textit{Sylvania}, Justice Powell drew upon what appeared to be a groundswell of commentary and experience critical of the Court's decision a decade earlier in \textit{Arnold, Schwinn}.

He also turned to a clerk who was well versed in that commentary, owing at least in part to his own education at the feet of one of its masters.\textsuperscript{366} Yet although the core of that commentary reflected a particular school of thought, it was also clear that a broader consensus had formed among the commentators, and the Court's citations to authority reflected that fact.\textsuperscript{367} Few today would still question the wisdom of \textit{Sylvania} and the Court's decision to overrule \textit{Arnold, Schwinn}.

The same cannot be said of \textit{Illinois Brick}. The Court majority embraced a minority view from the commentary and elected to ignore the speculative nature of some of the petitioners' seemingly most powerful arguments—that direct purchasers in fact typically suffered the brunt of overcharge injuries and would therefore sue, that indirect purchaser rights would lead to per se unmanageable apportionment issues, and that multiple liability for defendants was a genuine threat. Moreover, although the Court articulated the question before it as one of statutory interpretation, and later insisted on that view in \textit{ARC America}, the language of Section 4 was itself unambiguous and all-encompassing, and no original Clayton Act legislative history was cited to support the Court's decision to ban indirect purchaser actions despite that language.\textsuperscript{368}

\textsuperscript{364} \textit{See}, \textit{e.g.}, \textit{State Oil Co. v. Khan}, 522 U.S. 3, 20–21 (1997) ("Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.'" (quoting \textit{National Soc. of Professional Engineers v. United States}, 435 U.S. 679, 688 (1978))).

\textsuperscript{365} \textit{See} Gavil, \textit{Sylvania and the Powell Papers}, \textit{supra} note 8, at 10–11.

\textsuperscript{366} \textit{See} id. at 12.


\textsuperscript{368} Although strictly speaking that "common law" tradition was confined to the Sherman Act, the Court has approached questions under the Clayton Act, especially
fact embarking upon a *sui generis* policy debate.

Although *Hanover Shoe, Illinois Brick,* and *ARC America* all have their critics and supporters today, few continue to defend the system that the three cases produced. Perhaps surprisingly, there appears to be a growing consensus that the divided federal-state remedial scheme established by these cases is broken and needs to be fixed, and that a fix will have to come from Congress.\(^{369}\)

To acknowledge that the collective consequences of the Court's work in this area may require legislative correction is to recognize that the Court can make mistakes in endorsing economic ideas, that it can take a very long time to undo those mistakes, and that institutionally, only the Congress is in a position to do so if the Court declines to reverse course.

If one accepts the premise that *Hanover Shoe, Illinois Brick* and *ARC America* represent failed policy and hence failed economic analysis by the Court, the question remains: why was the Court misled? Based on the currently available papers of the Justices there is no clear answer to this very important question. In the end, there was no specific support for Justice White's position—it just seemed well-reasoned to the members of the majority. As Justice Blackmun pointed out, there were no reported cases of multiple liability and the lower courts that had rejected the notion that *Hanover Shoe* would equally bar offensive and defensive pass-on did not appear to be having a major problem with apportionment.\(^{370}\)

These facts were raised by the parties and the government, but seemingly dismissed by the majority.

In the end, it appears that the majority—especially Justice White—relied on its own intuitions more so than any specific source. Was the Court simply indifferent to the lack of factual bases for its critical assumptions? Did it really believe, as Justice White suggested, that if Congress didn't approve of its economic reasoning it could simply alter course? Here the current absence of access to Justice White's papers may be

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369 This was evident during the recent hearings conducted on *Illinois Brick* by the Antitrust Modernization Commission. See Antitrust Modernization Comm'n, Commission Documents, http://www.amc.gov/commission_hearings/indirect_purchaser.htm (last visited Sept. 15, 2005).

370 See supra notes 231–34 and accompanying text.
especially important. Given the pivotal role he seems to have played in the case, it would be informative to know how he became so convinced of the correctness of his assumptions.

If indeed the Court relied primarily on its intuitions—and those intuitions led it astray—then perhaps the Papers illuminate an institutional flaw in the thought processes of the Court. Perhaps in areas such as government regulation of business, the Court should demand more of itself, and the parties before it, than mere reliance on intuitions. Perhaps parties, too, should be more aggressive in highlighting the presence or absence of factual bases for key economic assumptions, although that may not overcome the Court's seeming inclination to endorse economic reasoning on its own. \[371\] In that, the *Illinois Brick* papers may also present an important lesson for the Court itself: when venturing into assumptions informed by little more than intuitions—about economics and the conduct of litigation—perhaps the most important judicial intuitions should be humility and self-restraint.

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