

## ANTITRUST STANDING: CONGRESS RESPONDS TO *ILLINOIS BRICK*

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Broad private enforcement traditionally has been viewed as a key to the effectiveness of the antitrust laws. But judicially tailored notions of standing have always been at odds with this underlying enforcement policy, and the resulting antitrust standing doctrines, therefore, have become particularly twisted and confusing. Part of the problem has been the Supreme Court's reluctance to enter the field—leaving it to the lower federal courts to develop the bulk of the doctrine<sup>1</sup> with no shortage of inconsistency. When the Court has entered the picture, as it did last term in *Illinois Brick Co. v. Illinois*,<sup>2</sup> it has not appreciably cleared the analytical waters.<sup>3</sup>

Despite the doctrinal confusion, the Court's message to ultimate consumers is now unmistakable: Do not look to the federal antitrust laws when you are forced to pay prices inflated by remote antitrust violators. But Congress and the lower federal courts have been proceeding down quite a different road—one with fewer procedural barriers to consumer antitrust recovery.<sup>4</sup> One year before *Illinois Brick*, Congress passed the

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1. There are a few notable exceptions; the validity of the passing-on doctrine and the propriety of *parens patriae* suits have both received the Court's recent, if unfruitful, attention. See text accompanying notes 38-55 & 107-14 *infra*.

2. 431 U.S. 720 (1977).

3. The principal thesis of this article is that the *Illinois Brick* Court, in attempting to reach a result contrary to the clear intent of Congress, see note 4 *infra*, misapplied two fundamental standing notions: injury in fact and proximity. See text accompanying notes 144-53 *infra*.

4. The tête à tête between the Court and Congress over the question of ultimate consumer antitrust standing has turned into a fascinating institutional subplot quite apart from the substantive issues involved. It also raises some serious questions about the fundamental efficiency of these two branches of government when dealing with open-ended legislation like the Sherman and Clayton Acts.

The Court's ventures into uncharted territory of antitrust standing, most notably in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and more recently in *Illinois Brick*, have followed a tight script. First, the Court pays institutional homage to the intent of Congress. Next, it explores that intent, which is often expressed by recent legislation, and dismisses it as not dispositive of the issues at hand. Finally, the Court reaches a result contrary to the basic legislative objectives and

Hart-Scott-Rodino Antitrust Procedures Improvements Act,<sup>5</sup> which purports to bypass certain standing difficulties by sanctioning state parens patriae suits.<sup>6</sup> And the courts of appeals, particularly the Sixth Circuit, have adopted increasingly liberal concepts of proximity, which all but eliminate it as a standing barrier.<sup>7</sup>

Senate Bill 1874,<sup>8</sup> currently on the floor, would sweep away great portions of this inter-branch development and would essentially restore the law of antitrust standing to its pre-1960 condition. Although this solution has the attractive feature of eliminating many of the inconsistencies that have developed over the years, it poses serious due process and separation of powers problems<sup>9</sup> and even more serious enforcement problems.<sup>10</sup> Accordingly, this article will assess the impact of S. 1874 in light of the history and development of standing notions in antitrust law.

## I. A PRE-ILLINOIS BRICK HISTORY OF ANTITRUST STANDING

From the beginning the antitrust laws contemplated private enforce-

makes a parting salute to Congress by inviting them to change the announced rule. A criticism of this melodrama formed the theme of Justice Blackmun's dissent in *Illinois Brick*:

I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), . . . had not preceded this case, and were it 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 the conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

. . . . The Hart-Scott-Rodino Antitrust Improvements Act of 1976 tells us all that is needed as to Congress' present understanding of the Acts. Nevertheless, we must now await still another statute which, as the Court acknowledges, . . . the Congress may adopt. One regrets that it takes so long and so much repetitious effort to achieve, and have this Court recognize, the obvious congressional aim.

431 U.S. at 765-66. Justice Blackmun's prediction of a statute in response to *Illinois Brick* is close to realization. S. 1874, which left the Judiciary Committee in May 1978 and at this writing is before the full Senate, purports to overrule *Illinois Brick*. See text accompanying notes 163-78 *infra*.

5. Pub. L. No. 94-435, §§ 4C-4H, 90 Stat. 1383 (1976) (amending 15 U.S.C. §§ 15c-15n (1976)).

6. See text accompanying notes 129-34 *infra*.

7. See *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975) (discussed in text accompanying notes 79-90 *infra*).

8. S. 1874, 95th Cong., 2d Sess. §§ 3-5 (1978) (discussed in text accompanying notes 163-78 *infra*).

9. See text accompanying notes 170-77 *infra*.

10. See text accompanying note 178 *infra*.

ment. Section 7 of the original Sherman Act<sup>11</sup> gave private citizens the right to sue for treble damages. Since section 7 was applicable only to violations of the Sherman Act, it was superseded in 1914 by section 4 of the Clayton Act,<sup>12</sup> which extended the private right of action.<sup>13</sup> There is no explicit limitation in the language of section 4: “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . .”<sup>14</sup> Despite this rather unqualified language, the federal courts soon began to weave various standing requirements into the fabric of section 4.

There are traditional constitutional and nonconstitutional reasons for this judicial limiting. The constitutional justification is embodied in Article III: Federal courts have jurisdiction only when faced with a “case or controversy.”<sup>15</sup> Beyond that, practical nonconstitutional considerations of judicial efficiency dictate that courts place some proximity limitations on prospective antitrust plaintiffs.<sup>16</sup>

There are also some justifications for limiting section 4 that are peculiar to the nature of the private treble damage action. The risk of multiplicity of suits is particularly great; not only do anticompetitive actions reverberate throughout the economy giving rise to an unlimited number of potential plaintiffs, but those plaintiffs can join the civil bandwagon after the government has proved a criminal violation.<sup>17</sup> There also seems to be a judicial hesitancy to punish minor antitrust

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11. Ch. 647, § 7, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 15 (1976)).

12. Ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (1976)).

13. *Id.*

14. *Id.* Some commentators have even suggested that the drafters of the original treble damages provision intended that there be no standing limitation to private recovery. See Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 812 n.9 (1977).

15. U.S. CONST. art. III, § 2.

16. See Pollack, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 9 (1966).

17. This bandwagon effect is made possible by § 5(i) of the Clayton Act, 15 U.S.C. § 16(i) (1976), under which the statute of limitations on private actions is tolled by a government proceeding, either civil or criminal.

Two recent cases may have the effect of diminishing the bandwagon phenomenon. In *United States v. U.S. Gypsum Co.*, 98 S. Ct. 2864 (1978), the Court held that criminal convictions under the Sherman Act require a showing that the defendant acted knowingly. If this means fewer criminal convictions, then private antitrust plaintiffs will have fewer bandwagons on which to jump. In *Greyhound Corp. v. Mount Hood Stages, Inc.*, 98 S. Ct. 2370 (1978), the Court gave a restrictive interpretation to the term “proceeding” under § 5(i), holding that the statute of limitations was not tolled when the federal government intervened in ICC proceedings.

offenses by awarding treble damages to remote plaintiffs. These constitutional and nonconstitutional considerations have given rise to a number of traditional standing limitations.

A. *"Any Person" and "Anything Forbidden in the Antitrust Laws"*

The initial interpretation of section 4's reference to "any person" suffering any injury by reason of "anything forbidden in the antitrust laws" illustrates the contradiction that plagues the doctrine of antitrust standing. Courts gave very different meanings to the two "anys." "Any person" has been given its usual meaning; it includes natural and corporate plaintiffs.<sup>18</sup> But the courts of appeals were divided over whether "anything forbidden in the antitrust laws" included merger violations under section 7 of the Clayton Act. The Eighth Circuit originally took the position that a plaintiff making a section 7 challenge to a proposed merger lacked standing because he could not show present injury in fact.<sup>19</sup> However, it soon retreated from that position.<sup>20</sup> Last term, the Supreme Court settled the matter by holding that section 7 merger violations are actionable under section 4.<sup>21</sup>

B. *Injury in Fact*

Section 4 requires that the private plaintiff "be injured."<sup>22</sup> The courts have faced three issues related to this requirement: (1) Does section 4 contemplate purely private injury, or must some "public" injury also be shown? (2) What kinds of injuries are actionable? and (3) Is a middleman who passes on losses "injured"?

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18. *But see* United States v. Cooper Corp., 302 U.S. 600, 606-14 (1940), in which the Supreme Court held that the United States is not a "person" within the meaning of the original § 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 209 (1890). In 1955 Congress added § 4A to the Clayton Act to avoid the *Cooper* problem. "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor . . . without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit." Pub. L. No. 137, 69 Stat. 282 (1955) (codified in 15 U.S.C. § 15a (1976)). Recently, the Court decided that a foreign nation is a "person" entitled to sue under § 4, *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), though *S. 1874* would also overrule this decision. See note 163 *infra*.

19. *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 728 n.3 (8th Cir. 1964). See also *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963). For a discussion of the requirement of injury in fact, see text accompanying notes 22-61 *infra*.

20. *Carlson Co. v. Sperry & Hutchinson Co.*, 507 F.2d 95 (8th Cir. 1974).

21. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (discussed in note 90 *infra*).

22. See text accompanying note 14 *supra*.

### 1. *Purely Private Injury*

Initially, courts interpreted section 4 to require a showing of public and private injury. For example, in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*,<sup>23</sup> the Fifth Circuit dismissed a private action, stating that “[t]he very foundation of the right of a private suitor to [treble damages] is the violation of public rights protected by the Act . . . .”<sup>24</sup>

It is now clear, however, after *Klor's v. Broadway Hale Stores*,<sup>25</sup> that a purely private loss is actionable under section 4. Thus in *Radiant Burners v. People's Gas, Light & Coke Co.*,<sup>26</sup> the Court held that a complaint—which alleged that defendant gas company refused to supply gas to burners manufactured by plaintiff—stated a claim even though it alleged only private injury.<sup>27</sup>

### 2. *Kind of Injury*

Section 4 requires that the injury be suffered “in [plaintiff’s] business or property.”<sup>28</sup> Courts have held that “business or property” includes the activity of a not-for-profit corporation.<sup>29</sup> But an employee’s loss of wages or termination is not a loss in his “business or property”<sup>30</sup> unless the employment itself is a commercial enterprise. Thus, sales supervisors<sup>31</sup> and commission salesmen<sup>32</sup> have been held to suffer a loss in “business or property” when they allege antitrust violations caused

23. 214 F.2d 891 (5th Cir. 1954).

24. *Id.* at 893.

25. 359 U.S. 207 (1959). Justice Black stated:

[Defendant’s illegal combination] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

*Id.* at 213 (footnote omitted).

26. 364 U.S. 656 (1961) (per curiam).

27. The Court reversed the Seventh Circuit Court of Appeals, which had held that plaintiff failed to state a claim because it “fail[ed] to establish that there has been any appreciable lessening in the sale [of the burners] or that the public has been deprived of a product of overall superiority.” *Id.* at 659 (quoting *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 273 F.2d 196, 200 (7th Cir. 1960)).

28. See text accompanying note 14 *supra*.

29. See, e.g., *Friends of Animals, Inc. v. American Veterinary Med. Ass’n*, 310 F. Supp. 1016 (S.D.N.Y. 1970) (private treble damage action allowed even though plaintiff was a not-for-profit animal protection agency).

30. *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 730 (10th Cir.), *cert. denied*, 411 U.S. 921 (1973).

31. *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967).

32. *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942). *But see* *Quinonez v. National Ass’n of Sec. Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976).

their terminations. Subject to this exception, however, employees do not suffer losses within the meaning of section 4.

At first, the requirement that the loss be "in" business or property caused problems when the plaintiff claimed the violation prevented him from entering the field. For example, in *Duff v. Kansas City Star Corp.*,<sup>33</sup> the Eighth Circuit held that a private plaintiff who claimed defendant's monopolization prevented his entry into the newspaper publishing business lacked standing to sue. He could not allege injury "in" any business because he was not yet engaged in business. Although the Eighth Circuit apparently still takes this position,<sup>34</sup> courts that have recently considered the matter have rejected it.<sup>35</sup> This does not mean that plaintiffs can allege any conceivable future injury. Instead, the issue becomes one of assessing the likelihood that plaintiff would have entered the field: Was the plaintiff "ready and able" to enter into competition? If the plaintiff can demonstrate adequate experience, financing, and contractual commitments, his claim will state an injury "in" business or property.<sup>36</sup>

The "ready and able" test poses some procedural problems. First, there is the question of certainty of application: How should courts balance these factors when assessing plaintiff's likelihood of entry? They have not faced the very close situations where, for example, plaintiff has neither experience nor contractual obligations, but does have considerable financial backing. Second, even if the standard could be readily applied, how will a court make its findings of fact about experience, commitments, and financial support? The "ready and able" inquiry speaks to plaintiff's standing and is made before the presentation of any evidence. If a preliminary hearing is held on this question, who will have the burden of proof? Courts embracing the "ready and able"

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33. 299 F.2d 320 (8th Cir. 1962).

34. See, e.g., *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 973, 977-78 (8th Cir. 1976); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 387 (8th Cir.) (the fact of injury must be shown "with a fair degree of certainty"), cert. denied, 419 U.S. 836 (1974).

35. See, e.g., *Quinonez v. National Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824 (5th Cir. 1976) (professional security consultant's loss of future employment); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir. 1966) (investor's lost profits resulting from exclusion from gas refining industry), cert. denied, 385 U.S. 991 (1967).

36. In *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir. 1966), cert. denied, 385 U.S. 991 (1967), plaintiff alleged defendants' conspiracies kept him from acquiring his own gas plant, but the court found that plaintiff had no experience in the refining industry, had no financial backing, and had made no investment in equipment. It therefore affirmed the district court's dismissal.

test have not yet faced these issues.<sup>37</sup>

### 3. *The Passing-On Doctrine*

The most interesting injury in fact question is whether a middleman, who alleges that his seller's anticompetitive conduct has inflated the price of goods that he later sold to his customers, suffers an injury under section 4. From 1890 to 1960 the unanimous answer was "no."<sup>38</sup> A plaintiff in this situation did not suffer an injury; indeed to award treble damages would be to award him four-fold—he would recover three times from the defendant and once from his buyers. The Supreme Court reached this conclusion in *Keogh v. Chicago & Northwestern Railway*,<sup>39</sup> where a manufacturer complained that he was injured by a supplier's anticompetitive rate structure. Justice Brandeis, writing for a unanimous Court, affirmed judgment for the defendant: "[N]o court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates. . . . [Rather] the benefit might have gone to his customers."<sup>40</sup> *Keogh* was significant because it presumed that a reasonable middleman would pass on all price increases. The Court found it unnecessary to inquire whether the middleman in fact passed-on the increase to his customers.

Before 1960 the lower federal courts uniformly applied this so-called passing-on doctrine. In the *Oil Jobbers Cases*,<sup>41</sup> for example, there were allegations that defendants conspired to raise the jobber price of gasoline throughout the midwest. Plaintiffs were jobbers who bought gasoline from defendants and resold it to service stations at a price that included a fixed profit margin. Because plaintiffs passed-on the wholesale increases to their buyers, the Seventh and Eighth Circuits held they could not claim injury under section 4.<sup>42</sup>

The difficulty with the *Keogh* passing-on doctrine was that it pre-

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37. See *id.* See also *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 487 (5th Cir. 1967).

38. See Pollack, *supra* note 16, at 23.

39. 260 U.S. 156 (1922).

40. *Id.* at 165.

41. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *Clark Oil Co. v. Phillips Petroleum Co.*, 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Leonard v. Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (W.D. Wis.), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942).

42. The passing-on doctrine has also been recognized in Robinson-Patman price discrimination contexts. See *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

vented middlemen from showing they were in fact injured. Even if they can pass on increases to their buyers, they may suffer a loss in relative market share or be squeezed from the market.<sup>43</sup> Sellers may not usually intend to drive their distributors out of business, but it is certainly a possibility, particularly when manufacturers are attempting to vertically integrate.

In 1960 the Third Circuit, in *Hanover Shoe, Inc. v. United Shoe Machine Corp.*,<sup>44</sup> questioned the validity of the *Keogh* presumption, though it substituted an equally invalid presumption. Plaintiff alleged that defendants had monopolized the manufacture of shoe-making equipment. Plaintiff rented its machines from defendant, claiming injury from monopolistic rental fees. Defendant relied on *Keogh* and asserted plaintiff could show no injury in fact because it could pass-on any losses to its customers. The district court disagreed. Without mentioning *Keogh*, it distinguished the *Oil Jobber Cases* on the ground that the middlemen in those cases only resold and did not, as here, use the product for their own manufacture.<sup>45</sup>

The Supreme Court affirmed the judgment,<sup>46</sup> but declined to embrace a consumer-middleman distinction.<sup>47</sup> The Court determined it would be impossible to allocate the portion of the plaintiff's price that represented increased costs.<sup>48</sup> In other words, while *Keogh* assumed middlemen always passed-on, the Supreme Court in *Hanover Shoe* assumed defendants could never prove it except where it was clear they had passed-on the entire amount of the increased costs, *e.g.*, in costs-plus situations.<sup>49</sup> Justice White summarized the majority's rejection of the passing-on defense:

We hold that the buyer is . . . entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high and

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43. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 757 n.13 (1977); note 156 *infra*.

44. 185 F. Supp. 826 (M.D. Pa.), *aff'd per curiam*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960).

45. *Id.* at 831.

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

47. The logic of this distinction seems futile, but it has nevertheless remained a favorite in the Third Circuit. For example, in *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1962), the plaintiffs were wholesalers and brokers who used defendant-auction company's services. Though the plaintiffs "consumed" defendant's services, the Third Circuit nevertheless characterized them as "middlemen" and permitted the passing-on defense.

48. 392 U.S. at 484.

49. *Id.*



his profits would be greater were his costs lower.<sup>50</sup>

The Court distinguished *Keogh* in a rather conclusory manner by characterizing its passing-on language as dictum.<sup>51</sup> In any event, and despite its curious origins, the courts of appeals have uniformly followed *Hanover Shoe* in its basic rejection of the passing-on defense.<sup>52</sup>

*Hanover Shoe* has recently had adverse implications for the ultimate consumer.<sup>53</sup> The Third Circuit's underlying rationale was that the passing-on doctrine posed insurmountable problems in proving whether and to what extent middlemen passed on price increases. The same problems face any ultimate consumer seeking section 4 redress against a defendant high in the supply chain. Initially, this application of *Hanover Shoe* did not cause much concern because remoteness usually barred the ultimate consumer anyway.<sup>54</sup> But as courts relaxed the proximity requirement,<sup>55</sup> otherwise hopeful consumers began to consider whether *Hanover Shoe* would rear its head as a bar.

It did just that in 1970 in the *Plumbing Fixtures Cases*.<sup>56</sup> Plaintiffs represented a class of ultimate consumers who had purchased homes containing plumbing fixtures manufactured by defendants. The price of the homes included the price of the fixtures. Plaintiffs sued under section 4, alleging that defendants had conspired to raise the price of their plumbing fixtures.<sup>57</sup> Citing *Hanover Shoe* for the proposition that courts generally are incapable of tracing the price of goods through a long chain of supply, the district court denied standing.<sup>58</sup> The same problems that permitted the *Hanover Shoe* plaintiffs to sue were now used to deny consumer plaintiffs their day in court. The *Plumbing Fix-*

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50. *Id.* at 489.

51. *Id.* at 491 n.8.

52. The most celebrated application of the *Hanover Shoe* doctrine occurred in the Electrical Cases of the mid-1960's, which were decided after the district court opinion in *Hanover Shoe* but before the Supreme Court affirmance. *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); *Public Utils. Dist. No. 1 v. General Elec. Co.*, 230 F. Supp. 744 (W.D. Wash. 1964); *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y.), *appeal denied*, 337 F.2d 844 (2d Cir. 1964); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 225 F. Supp. 332 (N.D. Ill. 1963), *aff'd*, 335 F.2d 203 (7th Cir. 1964).

53. *See* 392 U.S. at 484 (discussion of problems to be faced by ultimate consumers if passing-on doctrine allowed).

54. *See* text accompanying notes 67-73 *infra*.

55. *See* text accompanying notes 74-76 *infra*.

56. *Philadelphia Hous. Auth. v. American Radiator & Std. Sanitary Corp.*, 323 F. Supp. 381 (E.D. Pa. 1970); *Philadelphia Hous. Auth. v. American Radiator & Std. Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd per curiam*, 438 F.2d 1187 (3d Cir. 1971) (also cited as *Mangano*).

57. 323 F. Supp. at 382.

58. *Id.* at 385.

tures Cases generated much criticism,<sup>59</sup> and the courts of appeals soon divided.<sup>60</sup> The Supreme Court resolved the question in *Illinois Brick*,<sup>61</sup> holding that indirect purchasers could not sue under section 4.

### C. Proximity

It is not enough for a private plaintiff to assert that a defendant's anticompetitive behavior has, in fact, caused him injury. Courts have required a showing that the injury and the anticompetitive act be sufficiently proximate. Unlike the other section 4 standing requirements, there is no specific statutory language supporting the proximity requirement. This, coupled with the Supreme Court never having decided a case involving the proximity requirement,<sup>62</sup> has made for an active but contradictory case law development.<sup>63</sup>

Courts have taken three basic approaches to proximity. Initially, they used traditional notions of privity to require that section 4 plaintiffs be in direct contractual contact with defendants. Later, some courts recognized the needs of indirect purchasers and competitors and took a broader "target area" approach.<sup>64</sup> Finally, in 1975 the Sixth Circuit went a step beyond the broadest limits of "target area" and adopted a "zone of interests" test,<sup>65</sup> which, as we shall see, all but elimi-

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59. See, e.g., Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Shoe Doctrine*, 72 COLUM. L. REV. 394 (1972); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976 (1975).

60. Compare the Plumbing Fixtures Cases, *supra* note 56, with *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), and *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). This conflict among the circuits was hardly widespread. Only the Ninth Circuit, the Plumbing Fixtures Cases court, permitted the unqualified offensive application of the passing-on doctrine. Even those courts that accepted the basic thesis of the Plumbing Fixtures Cases held that plaintiffs who buy from middlemen, who in turn buy directly from the antitrust violator, are not barred by *Hanover Shoe* because the problem of showing a one-step pass-on is considerably less than the problem of demonstrating that an uncompetitive price has filtered down through many levels of supply. See *City of Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971). This notion of tying the offensive use of *Hanover Shoe* to considerations of proximity is important to an understanding of *Illinois Brick*. See text accompanying notes 144-53 *infra*.

61. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). See text accompanying notes 134-43 *infra*.

62. But see note 90 *infra*.

63. The *Illinois Brick* Court took advantage of the open-ended nature of this proximity inquiry. See notes 144-53 *infra*.

64. See, e.g., *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977); *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977).

65. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975).

nates the proximity requirement.<sup>66</sup>

### 1. *Directness*

In *Loeb v. Eastman Kodak Co.*,<sup>67</sup> plaintiff, a shareholder in a photochemical corporation, which competed with defendant, alleged that defendant's unlawful conspiracies drove the corporation out of business, causing him great financial loss.<sup>68</sup> The court held that the plaintiff was "too remote" to sue for treble damages; only those in strict privity with antitrust defendants had a civil remedy.<sup>69</sup> This limitation had widespread effects: no longer could shareholders, patent licensees, or creditors assert that defendants' anticompetitive conduct injured their corporation, licensor, or debtor.<sup>70</sup>

This strict proximity requirement has often frustrated the purposes of the antitrust laws. For example, in *Al Barnett & Sons, Inc. v. Outboard Marine Corp.*,<sup>71</sup> representatives of a class of distributors of general marine products brought suit against manufacturers of general marine products and outboard motors, alleging defendants had illegally tied the sale of motors to the sale of marine equipment. The court suggested in dictum that it would mechanically apply the directness test and concluded that because the parties were not in a direct contractual relationship plaintiffs probably lacked standing.<sup>72</sup> But it is clear that the Sherman Act was meant to provide a remedy for the plaintiff in *Barnett*. Tying arrangements not only injure the tied buyer, but also hurt competitors in the tied product.<sup>73</sup> To require any more "direct-

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66. See text accompanying notes 77-90.

67. 183 F. 704 (3d Cir. 1910).

68. *Id.* at 706.

69. *Id.* at 709.

70. The directness approach does not even permit shareholders to press their antitrust claims in the form of derivative suits unless they can show that the directors were "personally involved in the wrongdoing." *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *Landy v. FDIC*, 486 F.2d 139, 149 (3d Cir. 1973), *cert. denied*, 416 U.S. 960 (1974).

71. 64 F.R.D. 43 (D. Del. 1974).

72. The district court held that plaintiffs' motion for certification of the class action should be dismissed because of Rule 23 infirmities. But one of the issues under Rule 23 is whether the representative can adequately and fairly protect the interests of the class, and the court expressed concern that the representatives lacked standing:

There is substantial doubt at this stage of the case whether the plaintiffs can further satisfy Rule 23(a) which requires them fairly and adequately to protect the interests of the class because under the law of this Circuit it now appears uncertain whether the representative plaintiffs have standing to sue . . . .

*Id.* at 51.

73. Indeed, the primary reason for prohibiting tie-ins is to prevent a monopolist in one prod-

ness" in these situations would all but eliminate private enforcement.

Before *Hanover Shoe*, a strict requirement of privity would have eliminated private enforcement in virtually every other antitrust area as well. Whenever there were multilevel economies, violators were insulated from middlemen by the passing-on doctrine and from ultimate consumers by *Loeb's* directness requirement.

## 2. Target Area

A few circuits, notably the Second and Ninth, responded to the pre-*Hanover Shoe* situation by relaxing the strict privity requirement. The Ninth Circuit coined the term "target area" for this purpose in *Karseal Corp. v. Richfield Oil Corp.*<sup>74</sup> In *Karseal*, plaintiff, who manufactured car polish and sold it to service stations, sued a producer who sponsored but did not manufacture the polish. Plaintiff alleged that defendant contracted with service stations to provide its petroleum products in exchange for the stations' promise to deal exclusively in the sponsored polish.

Under the *Loeb* "directness" approach only the service stations that entered into the contracts could sue. But the Ninth Circuit gave greater deference to the remedial purposes of the antitrust laws. It adopted a target approach which asks whether plaintiff is: (1) within the area of the economy endangered by the breach of competitive conditions, and (2) within the target area of the defendant's illegal practice.<sup>75</sup> Apparently, the first question concerns the general target area contemplated by the legislation; the second concerns the sub-area generated by the defendant's specific conduct. After setting up this form of analysis, the *Karseal* court found that the plaintiffs, as foreclosed competitors, had standing.

The target area test raises several questions. For example, how does the general inquiry under (1) differ from the specific inquiry under (2)? Does the second inquiry require an assessment of foreseeability? Must the defendant have foreseen that his anticompetitive behavior would injure the plaintiff? The Ninth Circuit apparently says "yes," but the Second Circuit has rejected any notion of foreseeability in defining the

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uct from extending his power to another product. See generally *Bowman, Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957).

74. 221 F.2d 358 (9th Cir. 1955). See *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); *Standard Oil Co. of Cal. v. Perkins*, 396 F.2d 809 (9th Cir. 1968).

75. 221 F.2d at 365.

target area.<sup>76</sup> If foreseeability is irrelevant, it is difficult to see what the second question adds to the first. In that case, the target area is not a limitation at all because virtually all anticompetitive behavior generates ripples of injury. On the other hand, a strict foreseeability requirement would significantly reduce the effectiveness of private enforcement.

### 3. *Zone of Interests*

Until 1975 all of the circuits relied on either the *Loeb* directness test<sup>77</sup> or the broader target area test.<sup>78</sup> In *Malamud v. Sinclair Oil Corp.*,<sup>79</sup> however, the Sixth Circuit purported to adopt a third approach, rejecting the traditional tests as "demand[ing] too much from plaintiffs at the pleading stage of the case."<sup>80</sup> The facts in *Malamud* are peculiar; the case sounds more like a contract action than an antitrust action. Plaintiffs were the sole shareholders of a petroleum distributing company (Malco) and of three real estate companies also named as plaintiffs. In 1965 Malco executed a contract with defendant which provided that Malco would buy its supplies from Sinclair for three years and Sinclair would financially assist the real estate firms in acquiring new service stations. Malco began purchasing its supplies from Sinclair, but Sinclair soon refused to finance some proposed real estate purchases. So in 1966 Malco signed a supply agreement with Texaco, but because Sinclair refused to terminate its agreement, Malco continued to deal with them until the contract expired. Upon its termination, Malco sued Sinclair, claiming Sinclair's initial refusal to finance the real estate purchases and its ultimate refusal to terminate the contract violated section 1 of the Sherman Act. Plaintiffs claimed their injury

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76. Compare *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), with *Productive Inventions, Inc. v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956).

77. See, e.g., *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir. 1973); *Kauffman v. Dreyfus Fund*, 434 F.2d 727 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).

78. See, e.g., *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966); *Sandidge v. Rogers*, 256 F.2d 269 (7th Cir. 1958).

79. 521 F.2d 1142 (6th Cir. 1975).

80. *Id.* at 1149.

was lost profits from the unacquired service stations.<sup>81</sup>

The district court relied on the Sixth Circuit's prior adoption of the *Loeb* directness test<sup>82</sup> and denied standing to all plaintiffs except the real estate companies. The court—addressing only the standing of the real estate companies—rejected the “direct” and “target” tests as going too far beyond the Article III case or controversy minimum.<sup>83</sup> Instead, it applied the “zone of interests” test that the Supreme Court had enunciated in an administrative law context in *Association of Data Processing Service Organizations v. Camp*:<sup>84</sup> “[W]hether the interest sought to be protected by the claimant is arguably within the zone of interests to be protected by the statute . . . .”<sup>85</sup> The court found the real estate companies were seeking to protect their interest in “the expansion of their business”<sup>86</sup> and concluded that this was arguably within the zone of interests protected by the Sherman Act. It therefore affirmed the real estate companies’ standing.

*Malamud* raises a number of difficult doctrinal and practical problems. First, the zone of interests approach is even less of a test than the target area approach. The Sherman and Clayton Acts take such wide-angle aims at the problems of antitrust that it would seem to be impossible to tie any meaningful standing requirement to general notions of statutory purpose. Indeed, the *Malamud* court itself balked

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81. *Id.* at 1143-45.

82. *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

83. 521 F.2d at 1149-50. The court noted:

[T]he principal function of the [standing] doctrine is as a device to eliminate those plaintiffs who are jurisdictionally barred by Article III from maintaining a suit. . . . The courts have used [the two traditional] standing doctrines in order to arrest some antitrust litigation at an early stage. As we see it, however, by using either approach, a court is enabled to make a determination on the *merits* of a *claim* under the guise of assessing the *standing* of the *claimant*.

*Id.* (emphasis in original)

84. 397 U.S. 150 (1970). Plaintiffs in *Data Processing* were computer service organizations who sought to challenge a ruling by the Comptroller of the Currency which permitted national banks to make their data processing services available to customers. The district court dismissed the action for lack of standing, 279 F. Supp. 675 (D. Minn. 1968), and the Eighth Circuit affirmed, 406 F.2d 837 (8th Cir. 1969). The Supreme Court reversed, holding that the interests plaintiffs sought to protect were “arguably within the zone of interests to be protected or regulated” by the relevant statute. 397 U.S. at 153. In adopting this test, the Court rejected the so-called “legal interest” test of *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1938), on the ground that the “legal interest” test was actually an inquiry into the merits. 397 U.S. at 153.

85. 521 F.2d at 1151 (quoting *Data Processing*, 397 U.S. at 153).

86. *Id.*

at requiring anything more than the constitutional minimum.<sup>87</sup>

Second, it is difficult to justify the application of *Data Processing* to antitrust plaintiffs. One of the reasons for using a broad test of standing in administrative law is that increasing the number of private watchdogs may enhance the integrity of federal regulatory programs.<sup>88</sup> Section 4, however, reverses the roles; plaintiffs stand in the shoes of the government in attempting to control private activity.

Finally, the application of the zone of interests test to administrative agencies is distinguishable because it is used only when the agency is capable of giving the relief sought.<sup>89</sup> A similar limitation would not affect standing under section 4 because courts are always capable of granting the monetary relief sought by antitrust plaintiffs. Despite these practical and theoretical problems, *Malamud* represents a significant movement away from restrictive interpretations of proximity, a movement Congress has attempted to duplicate.<sup>90</sup>

## II. THE INITIAL CONGRESSIONAL RESPONSE: FLUID CLASS ACTIONS AND PARENS PATRIAE

### The development of judicially imposed restraints on the reach of sec-

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87. The court explained that the injury in fact requirement meets the Article III minimum and complained that further nonconstitutional limitations based on concepts of judicial restraint have caused a great deal of confusion. *Id.* at 1149.

88. See generally Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

89. See Warth v. Seldin, 422 U.S. 490 (1975). See also Simon v. Eastern Kentucky Welfare Rts. Org., 426 U.S. 26 (1976), noted in 48 U. COLO. L. REV. 95 (1976).

90. The Supreme Court recently gave a strong indication that it will adopt a target area approach to the problem of proximity. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), it vacated a judgment based on plaintiff's claim that defendant had violated the antimerger provisions of the Clayton Act. Defendant, the nation's largest manufacturer and operator of bowling alleys, acquired a number of bowling centers which competed with plaintiffs' bowling establishments. Plaintiff brought a private treble damage action under § 4, claiming that defendant's acquisition might substantially lessen competition in violation of § 7 of the Clayton Act. 15 U.S.C. § 18 (1976). The Court held that in a treble damages action under § 4, plaintiff must prove actual injury despite the fact that § 7 is aimed at curbing hypothetical future restraints as well as established ones. In describing those injuries actionable under § 4, the Court said:

For plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

429 U.S. at 489 (emphasis in original). This resembles the Ninth Circuit's target area test. See text accompanying notes 74-76 *supra*. However, it is far from clear what this apparent adoption of the target area test means after *Illinois Brick*. See text accompanying notes 144-53 *infra*.

tion 4 can be viewed as a series of responses to the realization that ultimate consumers bear the real antitrust losses in a complex economy. Those courts that raised standing barriers were certainly concerned that the claims of numerous consumers would overwhelm the federal judiciary. Thus on the injury in fact question these courts used what had originally been the consumers' shield—the passing-on doctrine—as a sword to combat the feared march of consumers.<sup>91</sup> On the other hand, those courts that had been more sympathetic and less fearful of the consuming public extended standing by relaxing the proximity requirement.<sup>92</sup>

These two standing issues—injury in fact and proximity—pose different problems for the consumer. As *Malamud* demonstrated, requirements of proximity need not be taken too seriously by a court that wants to reach the merits. The injury in fact requirement, however, can be a real barrier. Decisions based on this requirement are moored to Article III of the Constitution, and neither judicial embellishment nor congressional intervention can appreciably slacken the line.

Thus one should view congressional attempts to make inroads on the traditional standing requirements with two questions in mind: Is the proposed change constitutional? And is it effective in relaxing standing barriers? Changes in the injury in fact requirement will almost always be unconstitutional, but at least before *Illinois Brick* the outlook for legislative reform of the proximity requirement was bright, and Congress accepted the challenge.

#### A. *Fluid Class Actions*

When Congress amended Rule 23<sup>93</sup> in 1966 to provide that members of a class need not be specifically identified, fluid class actions appeared to be the hope of the consumer antitrust plaintiff. A rash of section 4 actions soon were filed on behalf of very large fluid classes: 1.5 million bread buyers in Philadelphia,<sup>94</sup> 20-40 million buyers of General Motors cars nationwide,<sup>95</sup> and even all persons in the United States who breathe air.<sup>96</sup>

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91. See text accompanying notes 56-58 *supra*.

92. See text accompanying notes 74-90 *supra*.

93. FED. R. CIV. P. 23.

94. *Hackett v. General Host Corp.*, 1972 Trade Cas. ¶ 73,879 (E.D. Pa. 1970), *appeal dismissed*, 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

95. *Boches v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973).

96. *In re Motor Vehicle Air Pollution Control Equip.*, 52 F.R.D. 398 (C.D. Cal. 1970), *aff'd in part and rev'd in part*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973).



For several reasons, Rule 23 was not the consumer panacea that many had hoped it would be; none of the fluid class antitrust actions filed in the early 1970's ever reached the merits.<sup>97</sup> The principal reason was that Rule 23 does not alleviate any standing problems; the class representative and the underlying class members must still jump the injury in fact and proximity hurdles.<sup>98</sup> Of course, the major advantage of the fluid class action was that it bypassed some of the major practical litigation problems, *e.g.*, an individual plaintiff suffering a fifty-cent overcharge has little incentive to take his case to a federal court, but the representative of millions of plaintiffs alleging a multimillion dollar injury would not hesitate to sue.

Even the practical purposes of the Rule 23 amendments have been frustrated. The prospect of handling a class containing millions of members has forced some courts to refuse certification on the ground of unmanageability.<sup>99</sup> Finally, *Eisen v. Carlisle & Jacquelin*<sup>100</sup>—which interpreted Rule 23 to require individual notice to all identifiable class members—all but halted the use of the fluid consumer class action.

### B. *Parens Patriae*

Frustrated consumer antitrust plaintiffs, attempting to avoid the shortcomings of the fluid class action, began to examine the idea that a state, as *parens patriae*, could sue under section 4 and recover treble damages on behalf of its injured citizens. In this way, the state could offensively use the pass-on doctrine, which the lower federal courts and later the Supreme Court in *Illinois Brick* prohibited of individual plaintiffs.

Of course, a state may itself suffer an antitrust injury and, if it meets the traditional standing requirements, can sue under section 4 like any other plaintiff. So, for example, Iowa could allege that asphalt distributors, with whom it contracted for state highway projects, illegally combined to fix prices.<sup>101</sup>

The more difficult question is whether a state, as *parens patriae*, can

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97. See Handler & Blechmann, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626, 628 & n.14 (1976) (quoting *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018-19 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974)).

98. See *In re Motor Vehicle Air Pollution Control Equip.*, 481 F.2d 122 (9th Cir. 1973).

99. See, *e.g.*, *Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656 (N.D. Cal. 1976); *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443 (M.D. Ga. 1975), *appeal dismissed*, 557 F.2d 1218 (5th Cir. 1977).

100. 417 U.S. 156 (1974).

101. *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd*, 409 F.2d 1239 (8th Cir. 1969).

sue on behalf of its injured citizens. The original English concept of *parens patriae* was limited to the royal prerogative of kings to take custody and act on behalf of orphans, mental incompetents, and charities.<sup>102</sup> This notion expanded in the United States where the royal prerogative passed to the states, which could sue on behalf of their injured citizens.<sup>103</sup> Although it is clear such actions are generally cognizable in the federal courts, the more particular question in antitrust is whether they are permitted by section 4.<sup>104</sup>

Commentators tend to distinguish antitrust *parens patriae* suits alleging injury to a state's citizens from those alleging injury to a state's general economy.<sup>105</sup> But these two species of *parens patriae* actions seem indistinguishable: injury to a state's general economy is the aggregate of injuries suffered by its individual citizens. At best, the difference is one of degree: when enough individuals are injured, the general economy of the state suffers.<sup>106</sup>

The first Supreme Court case to consider the question of *parens patriae* recovery under the antitrust laws was *Georgia v. Pennsylvania Railway Co.*,<sup>107</sup> in which Georgia alleged that the railroads had conspired to restrict trade in the South by favoring the Northern states. Georgia sought treble damages and injunctive relief on the ground that the conspiracy severely damaged its economy. The only issue the Court faced, however, was Georgia's claim for equitable relief; it held that Georgia could properly state a claim for an injunction as *parens patriae* for its injured citizens.

The Supreme Court did not answer the question left open by

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102. For an excellent treatment of the common law history of *parens patriae*, see Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895 (1976). See also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-58 (1972); Malina & Blechmann, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193 (1970).

103. *Louisiana v. Texas*, 176 U.S. 1 (1900).

104. The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act. Hence, Hawaii's claim cannot be resolved simply by reference to any general principles governing *parens patriae* actions.  
*Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 (1972).

105. See Handler & Blechmann, *supra* note 97; Malina & Blechmann, *supra* note 102.

106. The Supreme Court seemed to lay this distinction to rest in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972): "A large and ultimately indeterminable part of the injury to the 'general economy' as it is measured by economists, is no more than a reflection of injuries to the 'business or property' of consumers . . . ."

107. 324 U.S. 439 (1945).

*Georgia*—whether a state can recover damages for antitrust injuries to its citizens—until 1972. In *Hawaii v. Standard Oil Co.*,<sup>108</sup> Hawaii brought an action against four oil companies, alleging that they combined to restrain trade in the sale, marketing, and distribution of petroleum products in Hawaii and monopolized and attempted to monopolize that trade. Hawaii's complaint contained three counts: First, it sued in its own proprietary capacity for overcharges on petroleum sold to the state itself; second, it sued in its capacity as *parens patriae* for general injury to the state's economy;<sup>109</sup> and finally, it sued as a representative of the class of all overcharged petroleum buyers in the state. Hawaii sought injunctive and monetary relief under each count.

The oil companies moved to dismiss the *parens patriae* and class action counts. Typically, the district court dismissed the class action as unmanageable.<sup>110</sup> The court, however, had more trouble with the *parens patriae* count and decided to certify the matter to the Ninth Circuit.<sup>111</sup> The Ninth Circuit dismissed the *parens patriae* count,<sup>112</sup> and Hawaii appealed to the Supreme Court.

The Court recognized that *Georgia* was inapplicable because it involved only injunctive relief. Unlike section 4, section 16 of the Clayton Act (which provides for injunctive relief) does not require that the injuries suffered be "in business or property."<sup>113</sup> The Court found this difference significant. Until Congress makes it clear that injury to a state's general economy is an injury to its "business or property," the Court would not permit *parens patriae* suits on that basis. It was reluctant to give section 4 the full reach that *Georgia* gave section 16 because of "the problem of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State."<sup>114</sup>

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108. 405 U.S. 251 (1972).

109. Hawaii's original *parens patriae* claim made no specific mention of the state's economy, but rather emphasized the injury to its citizens. *Id.* at 254. The amendment of Hawaii's complaint to specifically allege an injury to its general economy illustrates the force of the injury-to-citizens/injury-to-general economy distinction.

110. See *Hawaii v. Standard Oil Co.*, 301 F. Supp. 982 (D. Hawaii 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972); text accompanying note 99 *supra*.

111. 28 U.S.C. § 1292(b) (1970).

112. *Hawaii v. Standard Oil Co.*, 431 F.2d 1282 (1970).

113. See notes 28-37 *supra* and accompanying text.

114. 405 U.S. at 264. In his dissent, Justice Douglas indicates that when individual injury is not capable of being separated from injury to the general economy, individual recovery can simply be barred by the *parens patriae* recovery of the state. *Id.* at 266 (Douglas, J., dissenting). This

The *Hawaii* Court invited Congress to extend the "business or property" requirement of section 4 to injuries to a state's general economy.<sup>115</sup> Congress seemed to accept the invitation in 1976 by passing the Hart-Scott-Rodino Antitrust Procedures Improvements Act.<sup>116</sup> Title III of the Act, entitled "Parens Patriae," added six sections to section 4. Section 4(c) permits

[a]ny attorney general of a State [to] bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injuries sustained by such natural persons to their property by reason of any violation of the Sherman Act.<sup>117</sup>

The Act addresses the fears of double recovery, which the *Hawaii* Court expressed, by excluding from the parens patriae recovery any amount that "duplicates amounts which have been awarded for the same injury . . . ."<sup>118</sup> To deal with possible due process problems in precluding duplicative individual recovery, the Act includes a notification procedure which allows individual citizens to "opt out" of the

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solution to the majority's double recovery concerns, however, poses serious due process problems. See text accompanying notes 121-24 *infra*.

115. The Ninth Circuit extended a similar invitation in *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973), though the basis for the rejection of parens patriae in *Frito-Lay* was quite different than in *Hawaii*. The Ninth Circuit viewed California's common law parens patriae recovery as an unwarranted attempt to undermine the class action rules:

The state is looking beyond recovery for injuries to its citizens to its own ultimate acquisition of the recoveries obtained. That acquisition, it asserts, will serve a valid public service by providing the injured citizens with the closest equivalent of the recovery which, individually, is beyond their reach.

This may be a worthy state aim, but in our judgment it is not the type of state action taken to afford the sort of benefit that the common-law concept of *parens patriae* contemplates. The means for conferring such a benefit, based as they are on management and acquisition of the property of others, free from the safeguards which legislation and rule have thrown up around both guardianships and class actions, constitutes state action of a sort that does not fit the common-law concept.

*Id.* at 776 (footnotes omitted). The court's concern, of course, was that uncontrolled parens patriae recovery would vitiate Rule 23's carefully tailored guarantees of due process. These due process issues became the primary focus of the new legislation, and perhaps this explains why the House Report on the Act mentions *Frito-Lay* but not *Hawaii*. See H.R. REP. No. 499, 94th Cong., 1st Sess. 8 (1975). As to whether the Act successfully ameliorates these due process concerns, see text accompanying notes 120-24 *infra*.

116. Pub. L. No. 94-435, § 4C-4H, 90 Stat. 1383 (1976) (amending 15 U.S.C. §§ 15c-15n (1976)).

117. *Id.* § 4C(a)(1), 90 Stat. 1394 (1976). One commentator has suggested that the Act's use of the doctrine of parens patriae may be historically inaccurate. See Curtis, *supra* note 102, arguing that recovery of damages under the Act ignores the fact that the device of parens patriae grew out of the development of the doctrine of the quasi-sovereign, a doctrine historically limited to injunctive relief.

118. Pub. L. No. 94-435, § 4C(a)(1)(a), 90 Stat. 1394 (1976).

parens patriae action and thereby preserve their individual claims.<sup>119</sup>

Despite widespread optimism that the Act would be the consumer antitrust cure-all,<sup>120</sup> some serious difficulties threaten to dampen its effect. First, the Act's notification procedures pose serious due process problems. To make the parens patriae alternative a viable one, Congress made it clear that notice by publication is presumptively valid.<sup>121</sup> But it is difficult to see how this constructive notice satisfies due process when *Eisen v. Carlisle & Jacquelin*<sup>122</sup> struck down an almost identical procedure under Rule 23. At least one commentator has suggested that Congress overcame the *Eisen* problem by enacting section 4C(b)(1), which directs courts to require further notice if due process so dictates.<sup>123</sup> This, however, only passes the due process buck, and while the Act may thus be constitutional on its face, it could never be constitutionally applied in an effective, widespread manner if individual notice is the rule and not the exception.<sup>124</sup>

The Act has generated nonconstitutional criticisms as well. The concentration of so much enforcement power in the hands of fifty state attorneys general poses a serious risk of abuse by politically appetitive state officials.<sup>125</sup> Although the Act incorporates several safeguards, their effectiveness is doubtful. A court may award attorney's fees to

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119. *Id.* § 4C(b)(1), 90 Stat. 1394 (1976).

120. *See, e.g.,* Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 HARV. J. LEGIS. 328 (1977); Note, *The Proposed Antitrust Parens Patriae Act: Overdue Antitrust Relief for Ultimate Consumers*, 45 U. CINN. L. REV. 219 (1976); Note, *Parens Patriae: An Effective Consumer Remedy in Antitrust*, 16 WASHBURN L.J. 135 (1976).

121. Pub. L. No. 94-435, § 4C(b)(1), 90 Stat. 1394 (1976).

122. 417 U.S. 156 (1974). *See* Handler & Blechmann, *supra* note 97, at 668. *See also* Note, *Parens Patriae in Antitrust: A Blessing for the Consumer or an Affront to the Fourteenth Amendment?*, 2 HASTINGS CONST. L.Q. 1127 (1974).

123. Pub. L. No. 94-435, § 4C(b)(1), 90 Stat. 1394 (1976).

124. It has been argued that because *Eisen* was based on a construction of Rule 23, it could not be applied to invalidate the Act's notice by publication. *See* Comment, *supra* note 120, at 341-42. However, nothing in *Eisen* indicates that the general matrix within which the case was decided could be so easily avoided by adopting identical procedures with a different name.

There have also been suggestions that the Act violates the appointments clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2, by giving state officials the power to enforce the federal antitrust laws. *See* Handler & Blechmann, *supra* note 97, at 668. *Buckley v. Valeo*, 424 U.S. 1 (1976), has added force to this argument. In *Buckley*, the Court held the Federal Election Campaign Act violated the appointments clause by giving a congressionally appointed commission enforcement powers.

125. Commentators have also criticized the Act on the ground that it reduces the primary benefit of having a private remedy—200 million private citizens to enforce the antitrust laws—to 50 state attorneys general. Handler & Blechmann, *supra* note 97, at 670-71. Whether this numerical reduction in the antitrust police force is offset by the new officers' expertise and dedication remains to be seen.

prevailing defendants,<sup>126</sup> and in such cases a state may revoke the applicability of the Act if it feels its attorney general is proceeding in bad faith.<sup>127</sup> Both of these deterrents to political abuse depend on the almost impossible showing of bad faith, and the revocation procedure may only serve to inject more state politics into the enforcement scheme. The Act also prohibits state attorneys general from hiring outside counsel on a contingent fee basis.<sup>128</sup> Although this provision may have the advantage of encouraging the development of specialized state antitrust divisions, it has little to do with discouraging political abuses within those divisions.

While commentators discussed these due process and political abuse issues,<sup>129</sup> a more fundamental question arose over the Act's basic effectiveness. The *parens patriae* suit, like the fluid class action, may do nothing to cure any underlying standing infirmities. Its value, like the class action, may be limited to pretrial practicalities because it appears settled that a state can sue as *parens patriae* on behalf of its injured citizens only when those individuals would otherwise have standing to sue on their own behalf.<sup>130</sup> This raises two questions: Does the Act eliminate standing requirements for the underlying consumers? And if so, does Congress have the power to eliminate them?

The *Hawaii* Court characterized the difficulty of *parens patriae* suits for injury to a state's general economy as a failure to state an injury "to its 'business or property.'" <sup>131</sup> By authorizing such suits, the Act implicitly solves any "business or property" problems. And because this re-

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126. Pub. L. No. 94-435, § 4C(d)(2), 90 Stat. 1394 (1976).

127. *Id.* § 4H, 90 Stat. 1396 (1976).

128. *Id.* § 4B(1)(A), 90 Stat. 1396 (1976). Other contingent fee arrangements are subject to court approval. *Id.* § 4B(1)(B), 90 Stat. 1396 (1976). Perhaps these concerns over political abuse have been exaggerated. After all, the states are presumed capable of handling their own antitrust laws. See Comment, *supra* note 120, at 348 n.80. But see Note, *Colorado Antitrust Law: Untied and Drifting*, 48 U. COLO. L. REV. 215 (1977). On the other hand, when we surrender the bulk of federal enforcement to the states, are we not justified in requiring stronger guarantees of political neutrality? This raises the converse of the "overzealous attorney general" issue. One of the reasons we have a federal judiciary is the belief that a federal system will be less subject to the ebb and flow of local politics. That, after all, is the traditional justification for federal diversity jurisdiction. See Frank, *Historical Basis of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948). This is particularly compelling in antitrust law, where local lines between economics and politics are often so hazy. If we are to have the two systems, and then surrender virtually all federal enforcement to the states, at least we can ask for additional statutory safeguards against the winds of local politics.

129. See Handler & Blechmann, *supra* note 97.

130. *Id.* at 651-52.

131. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972).

quirement is a nonconstitutional one based on considerations of judicial restraint, Congress has the power to broaden its meaning.

Similarly, because the requirement of proximity has been a great barrier to consumer recovery under section 4, one could interpret the Act to eliminate this requirement for consumers represented by a state as *parens patriae*. Again, Congress has the power to eliminate the non-constitutional requirement of proximity. Any objections based on the separation of powers question—whether Congress can force the courts to ignore their own prudential doctrines—were probably laid to rest by the *Hawaii* Court's invitation to Congress to do just that.<sup>132</sup> But what about the *Hanover Shoe* problem?<sup>133</sup> Whether Congress can constitutionally avoid the *Plumbing Fixtures* result depends on whether the offensive pass-on doctrine is based on notions of injury in fact or on considerations of proximity.<sup>134</sup> The Supreme Court soon had the opportunity to answer this question.

### III. THE JUDICIAL RETORT: *ILLINOIS BRICK*

In 1974 the State of Illinois and approximately seven hundred local governments sued various Chicago-area concrete block manufacturers alleging they had conspired to fix prices in violation of section 1. The manufacturers sold the blocks to masonry contractors who used them to build various concrete structures. The masonry contractors in turn sold the structures to general contractors who incorporated them into buildings sold to the plaintiffs.

The district court granted defendants' motion for summary judgment on the ground that the pass-on doctrine barred plaintiffs, as twice-removed remote consumers, from recovery.<sup>135</sup> The Seventh Circuit reversed,<sup>136</sup> holding that the plaintiffs could recover treble damages if they could prove the illegal overcharges were passed on to them. The Court granted certiorari,<sup>137</sup> and the issue of whether *Hanover Shoe* could be applied offensively—an issue dividing the courts of appeals

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132. *Id.* at 262.

133. See text accompanying notes 44-61 *supra*.

134. If consumers are barred because they cannot show injury in fact, they cannot seek redress in federal court because they do not present a "case or controversy," U.S. CONST. art. III, § 2, and because Congress cannot constitutionally provide relief that descends below this limit.

135. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461 (1976). The district court made it clear that the basis of its holding was that plaintiffs were unable, as a matter of law, to show injury in fact. *Id.* at 468.

136. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976).

137. 431 U.S. 720 (1977).

for seven years<sup>138</sup>—finally became the object of the Supreme Court's attention.

Justice White adopted the approach taken by the Ninth Circuit in the *Plumbing Fixtures Cases*,<sup>139</sup> holding that the plaintiffs could not use the passing-on doctrine offensively. He weaved this holding on the loom of an uncomplicated syllogism: (1) If *Hanover Shoe* prevents an antitrust defendant from using passing-on as a shield, it should also prevent an antitrust plaintiff from using it as a sword;<sup>140</sup> (2) *Hanover Shoe* will not be overruled; and (3) therefore passing-on cannot be used offensively.

In support of the conclusion that passing-on must apply equally to defendants and plaintiffs, Justice White first pointed to the risks of multiple liability that an asymmetric application would create:

Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.<sup>141</sup>

In addition, he relied on the argument that the same proof problems that formed the basis of the *Hanover Shoe* rule are present in an offensive context.<sup>142</sup>

138. See text accompanying notes 54-55 & 60 *supra*.

139. See text accompanying notes 56-60 *supra*.

140. Plaintiffs conceded this first proposition:

The parties in this case agree that however § 4 is construed with respect to the pass-on issue, the rule should apply equally to plaintiffs and defendants—that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use the pass-on defense in a suit by a direct purchaser.

431 U.S. at 729. By relying exclusively on the symmetry theory, plaintiffs surrendered what was probably their strongest argument; *i.e.*, they should be allowed to recover regardless of the defensive pass-on bar. See text accompanying notes 148-50 *infra*. Nevertheless, because the amici and Justice Brennan in his dissent took the asymmetric position, and because the majority thus felt the need to respond, what seems to be a serious tactical error probably did not affect the Court's treatment of the issues. One wonders, nevertheless, why plaintiffs chose to cast their lot with the overruling of *Hanover Shoe*, particularly with the weight of *stare decisis* against them. See note 52 *supra*.

141. 431 U.S. at 730.

142. This perception that the attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate and reduce the effectiveness of already protracted treble-damages proceedings applies with no less force to the assertion of pass-on theories by plaintiffs than it does to the assertion by defendants.

*Id.* at 732.



Justice White vigorously reaffirmed the assumptions underlying *Hanover Shoe*,<sup>143</sup> and because none of the four dissenting justices seriously questioned these assumptions in a defensive context, they will not be reexamined here. It is more fruitful to examine the notion that *Hanover Shoe* must be applied consistently to plaintiffs and defendants, a notion which is indicative of the current direction of the Court's antitrust policy.

#### A. *Doctrinal Schizophrenia*

One might have expected *Illinois Brick* to answer the question whether passing-on is a doctrine of injury in fact or proximity.<sup>144</sup> Instead the majority opinion demonstrates an extraordinary ambivalence towards this critical issue. On the one hand, everything in the text of the opinion speaks the language of injury in fact. *Hanover Shoe* was an injury in fact case, and the primary rationale in *Illinois Brick* is that the same considerations precluding defensive passing-on preclude offensive passing-on:

In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge; but the issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser and in which the antitrust defendants rely on *Hanover Shoe's* rejection of the pass-on theory.<sup>145</sup>

On the other hand, the phrase "offensive passing-on" actually embodies all of the considerations formerly associated with the proximity inquiry.<sup>146</sup> There is no question but that the State of Illinois suffered injury; the only question is by whose hand. This is the converse of the *Hanover Shoe* situation. In defensive passing-on, there is no question but that the defendant violated the antitrust laws; the only question is whether he injured the complaining plaintiff. Justice White made a weak reference to this distinction in a footnote:

Because we find *Hanover Shoe* dispositive here, we do not address the

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143. "In considering whether to cut back or abandon the Hanover Shoe rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Id.* at 736. Neither dissenting opinion was based on the proposition that *Hanover Shoe* should be overruled. *Id.* at 747 (Brennan, J., dissenting); *Id.* at 765 (Blackmun, J., dissenting).

144. See text accompanying notes 91-92 *supra*.

145. 431 U.S. at 726.

146. See text accompanying notes 62-90 *supra*.

standing issue, except to note, as did the Court of Appeals below, . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.<sup>147</sup>

This footnote puts the theoretical underpinnings of the case in even more doubt: How can the Court say that *Hanover Shoe* is dispositive and that it is not addressing the standing issue? Essentially, the majority forces the round peg of defensive passing-on and injury in fact into the square hole of offensive passing-on and proximity.

As discussed above, the injury in fact requirement is a rather low hurdle, which is constitutionally limited to a narrow range, while the proximity requirement is quite variable, being based primarily on considerations of judicial economy.<sup>148</sup> *Hanover Shoe* represents the Supreme Court's judgment that even the inflexibility of the injury in fact requirement must give way to efforts aimed at maximizing the private enforcement of the Sherman Act. If these enforcement considerations were strong enough to overcome the strict requirement of injury in fact, they should be strong enough to overcome objections based on proximity.<sup>149</sup> By applying *Hanover Shoe* in a mechanically symmetric manner, the *Illinois Brick* majority turns this enforcement policy on its head and reaches a result that, instead of maximizing private enforcement, might well destroy it.<sup>150</sup>

Perhaps even more importantly, the Court's failure to distinguish the two standing issues allows it to ignore the entire line of lower federal cases dealing with proximity.<sup>151</sup> Without mentioning a single case, the

147. 431 U.S. at 728 n.7.

148. See text accompanying notes 90-92 *supra*.

149. This argument was the central theme in Justice Brennan's dissent:

This frustration of the congressional scheme is in no way mandated by *Hanover Shoe*. . . . To the contrary, the same considerations that *Hanover Shoe* held required rejection of the defendant's argument there, that because plaintiff had passed on cost increases to consumers in the form of higher prices defendant should be relieved of liability—especially the consideration that it is essential to the public interest to preserve the effectiveness of the private treble damage action—requires affirmation of the decision below construing § 4 to authorize respondents' suit.

431 U.S. at 749-50 (citation omitted).

150. For a discussion of the adverse effects on the private enforcement mechanism that *Illinois Brick* may generate, see text accompanying notes 154-62 *infra*.

151. See text accompanying notes 62-90 *infra*. Justice Brennan refers to some of these cases. 431 U.S. at 760. Unfortunately, he too demonstrates ambivalence toward the proposition that the issue before him is one of proximity. His reference to the proximity cases is by way of analogy: "But if the broad language of § 4 means anything, surely it must render the defendant liable to those within the defendant's chain of distribution. It would indeed be 'paradoxical to deny recov-

Court succeeds in overruling every decision adopting either the target area<sup>152</sup> or zone of interests<sup>153</sup> approach to proximity. The development of this area—a development whose unmistakable trend had been toward an increasingly liberalized proximity requirement—has thus been abruptly and rather unceremoniously halted.

### B. *Enforcement Nightmares*

*Illinois Brick* portends much more than mere theoretical confusion at esoteric heights. The decision will all but eliminate private enforcement, and the most likely candidates to fill the void are neither the states, the antitrust division of the Justice Department, nor the FTC, but instead a new and more vigorous strain of antitrust violators.

The post-*Illinois Brick* antitrust defendant need no longer fear the principal object of his Sherman Act violations—the ultimate consumer. Only direct purchasers hold the sword of the private treble damage action. This means that as the economy becomes more complex, thus broadening the impact of a single antitrust violation, the risk of facing a treble damage action decreases because the “direct purchasers” will be middlemen reluctant to sue their suppliers.<sup>154</sup> This new breed of plaintiff is not only tame but also scarce. Where once the “ancillary force of private investigators”<sup>155</sup> consisted of millions of consumers in the larger industries, it now may boast only a handful of direct buyers.

The Court was willing to take the risk of reducing and even extinguishing private enforcement in an effort to avoid problems of proof and multiple liability. It is true that proving an offensive pass-on is at least as difficult<sup>156</sup> as proving a defensive one. But these proof

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ery to the ultimate consumer while permitting the middleman a windfall recovery.’” *Id.* at 761 (Brennan, J., dissenting).

152. See text accompanying notes 74-76 *supra*.

153. See text accompanying notes 77-90 *supra*.

154. See 431 U.S. at 764 n.23 (Brennan, J., dissenting). Of course, the possibility of a treble damages recovery might be so attractive that even the most loyal and dependent buyer might desert his supplier. But even if this were a factor in some post-*Illinois Brick* cases, it is an even greater factor when the plaintiff is an indirect consumer. Indeed, one function of treble damages is to encourage a greater number of plaintiffs to sue even though their individual claims might be negligible. Some have argued that the direct purchaser, because of an expertise not shared by the remote consumer, is in the better position to detect antitrust violations. See S. REP. NO. 866, 95th Cong., 2d Sess. 3 (1978) (testimony of R. Posner).

155. See *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D.N.J. 1940) (describing the enforcement resource that potential treble damage plaintiffs represent).

156. Consumer plaintiffs are likely to be several steps removed from their manufacturing defendants, but in a *Hanover Shoe* situation there is only a single step between defendant and his direct purchaser. Naturally, as the distance over which the pass-on is to be traced increases, so do

problems are just that—proof problems—and the possibility of a lack of evidence should not, at the first stages of a lawsuit, preclude the presentation of that evidence.<sup>157</sup> This is particularly true in an offensive context, where the importance of private enforcement should discourage early dismissals.<sup>158</sup> Moreover, the passing-on inquiry, while certainly difficult, is no more difficult than a host of other determinations that courts must make in antitrust cases.

It is also true that an asymmetric application of passing-on would create serious risks of multiple liability. When a manufacturer is sued by direct and indirect purchasers, *Hanover Shoe* prevents him from proving that the direct purchasers passed on the overcharges. Recovery by the indirect purchasers would therefore subject him to multiple liability. In a complex economy, this multiple recovery problem is a legitimate concern.

As the *Illinois Brick* dissent points out,<sup>159</sup> there are a number of procedural devices that courts could employ to reduce the risk of multiple liability.<sup>160</sup> However, even with the full panoply of these safeguards, courts cannot completely eliminate the risk.<sup>161</sup> The question is whether the reduced risks of multiple liability outweigh the importance of the private treble damage action.<sup>162</sup>

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the proof problems. Justice White recognized one sense in which offensive pass-on is more easily proved than defensive pass-on. A *Hanover Shoe* plaintiff may be injured by reduced volume even if he is able to pass-on the entire amount of the overcharge to his purchasers. This lost volume aspect of his injury is not present in the offensive pass-on situation. See 431 U.S. at 757 n.13.

157. [S]tanding is a preliminary determination ordinarily to be evaluated upon the allegations of the complaint. As a result, a party may make sufficient allegations to demonstrate the necessary standing to sue but fail to prove his case on the merits . . . . While we are in sympathy with the policy of limiting the breadth of Section 4, by whatever theory, we are equally mindful of the Supreme Court's admonition that summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . . ."

Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975) (quoting Poller v. Columbia Broadcasting Sys., Inc., 468 U.S. 464, 473 (1962)) (citations omitted).

158. See text accompanying notes 149-50 *supra*.

159. See 431 U.S. at 761 (Brennan, J., dissenting).

160. Separate cases filed by direct and indirect purchasers could be consolidated under a number of provisions for interdistrict transfer. See 28 U.S.C. §§ 1404(a), (b), & 1407 (1976). Statutory interpleader might also be appropriate under certain circumstances. See 28 U.S.C. § 1335 (1976); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

161. "As the Court says, no procedure currently exists which can eliminate the possibility [of multiple recovery] entirely . . . ." 431 U.S. at 761 (Brennan, J., dissenting). The difficulty arises when, after one suit has proceeded to judgment, others follow based on the same violation. *Id.* at 738-39.

162. Justice White disagreed with proponents of the offensive use of passing-on who "ulti-

There are good reasons to believe that the risk is acceptable. First, as mentioned above, the risk is reducible, though the amount of that reduction is certainly subject to debate. More importantly, the question is not whether a particular defendant should be saddled six-fold so that a particular plaintiff can recover. The question is whether antitrust wrongdoers as a group should bear the risk of multiple liability in order to preserve the system of private enforcement.

Regardless of one's ultimate judgment about the procedural costs of offensive passing-on, *Illinois Brick* unquestionably obfuscates the inquiry. Perhaps the Court is correct in its assessment that the risks of multiple liability outweigh the loss in enforcement value, but its analysis is neither logically pleasing nor historically accurate.

#### IV. THE CONGRESSIONAL POSTSCRIPT

In May 1978 the Senate Judiciary Committee reported S. 1874, which purports to overrule both *Hanover Shoe* and *Illinois Brick*. The bill, however, raises serious separation of powers and due process questions and nonconstitutional enforcement considerations.<sup>163</sup>

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mately fall back on the argument that it is better for the defendant to pay six-fold or more damages than for an injured party to go uncompensated." *Id.* at 738 n.11.

163. The bill also overrules *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), discussed in note 18 *supra*. Predictably, the plaintiff's bar has objected to the overruling of *Hanover Shoe*, and the defendant's bar has objected to the overruling of *Illinois Brick*. See S. REP. No. 866, 95th Cong., 2d Sess. 20-37 (1978). The following are the three principal sections of the bill:

Section 3. The Clayton Act is amended by inserting immediately after section 4H the following new section:

Sec. 4I(1). In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with defendant shall not bar or otherwise limit recovery.

(2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under sections 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

Section 4. The amendment made by this Act shall apply to any action commenced under sections 4, 4A, or 4C(a)(1) of the Clayton Act which was pending on June 9, 1977, or filed thereafter.

Section 5. Section 4 of the Clayton Act is amended by adding at the end of that section the following new language:

Provided, *however*, that suits under this section brought by foreign sovereign governments, departments or agencies thereof, shall be limited to actual damages: And *provided further*, that no foreign sovereign may maintain an action in any court of the United States under this section unless the Attorney General of the United States, within one hundred and twenty days after the commencement of the action has certified to the relevant court, or a relevant court otherwise finds that—

(1) the United States is entitled to sue in its own name and on its own behalf on a civil claim in the courts of such foreign sovereigns; and (2) such foreign sovereign by its laws prohibits restrictive trade practices.

The sections overruling *Hanover Shoe* and *Illinois Brick* provide:

(1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant, shall not bar or otherwise limit recovery.

(2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damages claim, the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.<sup>164</sup>

With respect to the general separation of powers question, these sections are probably constitutional. There is no problem with overruling *Illinois Brick*; the Court invited Congress to do so.<sup>165</sup> Congress probably has the constitutional power to overrule *Hanover Shoe* as well, though this may depend on how one characterizes the nature of standing. To the extent that the standing inquiry is a constitutional one, necessary for compliance with Article III, its scope is for the Court, not for Congress to determine. Thus had *Hanover Shoe* gone the other way, Congress would probably be unable to overrule it.<sup>166</sup> But standing is also a tool for the courts to regulate their dockets, though, in the case of antitrust, this should be done with an eye toward consistency with statutory purpose. While judicial restraint is certainly within the courts' province, Congress must have a voice in determining the purposes and reach of its own statutes.

When Congress passes laws like the Sherman or Clayton Acts, which essentially delegate to the federal courts the duty to decide what is competitively unreasonable, it should be able to later restrict that discretion. Any other result would mean that Congress has the power to do the greater—pass comprehensive antitrust legislation—but not the lesser—place limits on its broad antitrust legislation.<sup>167</sup> The separation

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The amendment made by this section shall apply to any action which is pending on the date of enactment of this act or which is commenced on or after such date of enactment.

164. S. 1874, 95th Cong., 2d Sess. §§ 3-5 (1978).

165. 431 U.S. at 746. The Court extended a similar invitation in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), which was accepted by Congress when it enacted the Hart-Scott-Rodino Act. See text accompanying note 132 *supra*.

166. Even then, if the bill were characterized as a congressional decision to remove the jurisdiction of the federal courts, it might be constitutional because Congress has exclusive power over the jurisdiction of the lower federal courts. *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). See also text accompanying notes 170-72 *infra*.

167. Of course, the same could be said of the result in *United States v. Klein*, 80 U.S. (13

of powers doctrine should, therefore, pose no threat to these provisions of S. 1874.

Another section of S. 1874, however, would make *Illinois Brick* and *Hanover Shoe* inapplicable to pending actions as well as future ones:

Sec. 4. The amendment made by this Act shall apply to any action commenced under sections 4, 4A, or 4C(a)(1), of the Clayton Act which was pending on June 9, 1977, or filed thereafter.<sup>168</sup>

While Congress may have the power to overrule *Illinois Brick* and *Hanover Shoe*, it certainly cannot do so retroactively. Section 4 allows Congress to invade the judicial function by attempting to prescribe a rule of decision for pending cases. Since *United States v. Klein*,<sup>169</sup> such an invasion has been held to violate the separation of powers doctrine.<sup>170</sup> The only way Congress can retroactively overrule a Supreme Court case is by withdrawing jurisdiction from the federal courts.<sup>171</sup> Unless S. 1874 is reshaped into a withdrawal of jurisdiction, its retroactivity provision will be unconstitutional.

Even if Congress redrafts S. 1874, it still may encounter some due

Wall.) 129 (1871), where the Court held that Congress could not pass an act which provided that presidential pardons were inadmissible as proof of loyalty in post-civil war actions by southern landowners, even though Congress has the constitutional power to abolish the lower federal courts entirely. See also *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850). But S. 1874 does not really involve the kind of judicial tinkering which was condemned in *Klein*. The question of offensive and defensive pass-on goes to the heart of antitrust policy and not to day-to-day matters of judicial functioning. Moreover, by impairing the effect of presidential pardons, the legislation in *Klein* raised an additional separation of powers conflict with the executive branch, a conflict not present in S. 1874.

168. S. 1874, 95th Cong., 2d Sess. § 4 (1978).

169. 80 U.S. (13 Wall.) 129 (1871).

170. *Klein* was an action under post-civil war legislation designed to give noncombatant southern landowners rights of action for the proceeds of land sold by agents of the Union during the war, but only if the landowner could prove his loyalty. Klein's decedent had received a presidential pardon, and he obtained recovery on the basis that this pardon was proof of loyalty, a proposition that the Supreme Court had previously adopted. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869). However, before the United States could appeal the judgment, Congress sought to overrule *Padelford* by passing an act which provided that pardons were inadmissible as proof of loyalty. Act of July 12, 1870, ch. 251, 16 Stat. 235. The Court held that the overruling statute was an unconstitutional infringement of the judicial power:

We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants . . . . Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department of the government in cases pending before it?

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

80 U.S. (13 Wall.) at 147-48.

171. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

process problems. Though Congress is free to withdraw the jurisdiction of the lower federal courts, the withdrawal itself must not violate due process.<sup>172</sup> At least one commentator has argued that section 4 of S. 1874 violates the due process clause of the fifth amendment by extinguishing the rights of direct-purchaser plaintiffs in pending actions to recover against defendants who have passed on overcharges.<sup>173</sup> The provision may similarly violate the due process rights of pending defendants because they would then be subject to suits by indirect purchasers.<sup>174</sup> These arguments assume that vested rights are involved,<sup>175</sup> yet it is unlikely that any court would consider the right to recover against a particular defendant a vested right. Theoretically, at least, S. 1874 does not take away any plaintiff's cause of action; rather it limits, in some circumstances, the plaintiff's choice of defendants. A similar analysis applies to defendants. The bill does not expose to suit any defendant who is not now subject to it. It merely expands the class of plaintiffs to whom a defendant may be liable. Because the retroactivity issue, as a due process question, is governed by general considerations of arbitrariness or unreasonableness,<sup>176</sup> section 4 will probably pass due process muster.<sup>177</sup>

The most disturbing nonconstitutional aspect of S. 1874 is that it simply sets the law of antitrust standing back to 1960 without any guidance on the question of proximity. Subsection 1 provides only that indirect purchasers shall not be barred by virtue of their indirect status, but it does not indicate how far down the supply chain liability extends. One of the few virtues of *Illinois Brick* was that it laid this difficult proximity question to rest. The passage of S. 1874 would re-ignite the controversy.

Assuming that some traditional proximity limitation will survive S.

172. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 256 (2d Cir. 1948) (construing the Portal-to-Portal Act of 1947, 28 U.S.C. §§ 251-62 (1976)):

[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law, or to take private property without just compensation. (footnotes omitted)

173. See S. REP. No. 866, 95th Cong., 2d Sess. 42 (1978) (memorandum of M. Handler).

174. *Id.*

175. See *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922).

176. See *United States v. New Jersey*, 431 U.S. 1 (1977).

177. Two more constitutional objections are clearly without merit. Though U.S. CONST. art. I, § 9, cl. 3 prohibits Congress from passing ex post facto laws, it applies only to retroactive criminal legislation. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789). And the contracts clause, U.S. CONST. art. I, § 10, cl. 1, only prohibits states from impairing contractual obligations. *Sinking Fund Cases*, 99 U.S. 700 (1878).



1874, ultimate consumers will not only be *permitted* to sue remote violators, they will be *forced* to do so because the pass-on defense will protect direct sellers and middlemen. This might have an adverse effect on private enforcement because consumers would be faced with the difficult task of tracing overcharges through the supply chain. A fundamental premise of *Hanover Shoe* was that plaintiffs should have the option of suing their direct buyers instead of being forced to deal with complex questions of economic structure.

In short, private enforcement stands to lose ground in S. 1874's proposed trade-off between *Hanover Shoe* and *Illinois Brick*. Though the bill creates a large class of potential plaintiffs, it saddles those plaintiffs with the burden of proving indirect losses and prohibits them from suing the very people with whom they deal and with whom they are most familiar.<sup>178</sup>

## V. CONCLUSION

Perhaps *Illinois Brick* is just another act in the institutional play—part of the continuing process by which the two branches are distributing their antitrust power. Unfortunately, Justice White's opinion indicates that the Court may have reached an antitrust watershed and that it intends to cut back drastically on the private enforcement mechanism, the intent of Congress notwithstanding. This would be a dangerous state of affairs, not only because the Court would be avoiding its constitutional responsibilities to Congress, but also because it would be ignoring three decades of development which the lower federal courts have contributed to the concept of proximity. That would be particularly unfortunate and ironic because it was the Court's own reluctance to enter the field which spawned much of this development.

Even more disturbing is the prospect of a congressional overreaction. With one blow S. 1874 would retroactively overrule three Supreme Court cases and in so doing would set the law of antitrust standing back eighteen years. To be sure, those eighteen years were full of confusion, but the confusion was born of necessity, and the same problems that faced the *Hanover Shoe* Court in 1960 are sure to reappear if S. 1874 passes unamended.

At the heart of both the judicial reaction and the congressional overreaction is the same unswerving belief that courts should apply offen-

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178. See S. REP. NO. 866, 95th Cong., 2d Sess. 3 (testimony of R. Posner).

sive and defensive passing-on symmetrically. Perhaps it is time to reexamine the notion that these two kinds of passing-on—which are so different in origin, purpose, and historical development—should somehow be applied equally. A look at what symmetry has wrought—first *Illinois Brick* and now S. 1874—should at least raise some doubts.