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Apple Inc. uses the iOS App Store as a retail space for smartphone application developers to sell their iPhone applications.[1] The application developers set their price and pay Apple Inc. a thirty-percent commission for each application that is sold on the platform.[2] In 2011, four iPhone users filed a putative antitrust class action complaint against Apple Inc. (hereafter, "Apple"), alleging that they paid uncompetitively high prices when purchasing iPhone Applications (hereafter, "apps").[3] In *Apple Inc. v. Pepper*,[4] the Supreme Court considered whether iPhone users who purchased apps through Apple's iOS App Store (hereafter "the App Store") are direct purchasers of Apple and are therefore proper plaintiffs to sue Apple for allegedly monopolizing the iPhone app market.[5]

Since the late nineteenth century, Congress has restricted monopolistic behavior, and the Supreme Court has contextualized the scope and limitations of those legislative restrictions.[6] The Sherman Antitrust Act prohibits monopolistic behavior,[7] and the Clayton Antitrust Act provides an avenue for injured persons to sue to

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1. Julia Alexander, *A Guide to Platform Fees*, THE VERGE (Sep. 22, 2020, 8:05 AM EDT), https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google.

2. *Id.*

3. In re Apple iPhone Antitrust Litig., No. 11-CV-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013), *rev'd and remanded*, 846 F.3d 313 (9th Cir. 2017), *aff'd sub nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

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

5. *Id.* at 1519-20.

6. *See* Section II.A-C.

7. Chapter 647, 51 Congress. 26 Stat. 209 (1890), codified at 15 U.SC. §§ 1-7.

recover injuries stemming from monopolistic behavior.[8] In 1976, the Supreme Court in *Illinois Brick Co. v. Illinois*[9] affirmed prior Court precedent that limited the scope of a proper plaintiff in antitrust suits to direct purchasers from alleged monopolists.[10] Pass-on theories of liability are not proper antitrust suits under *Illinois Brick*.[11] The majority in *Apple Inc. v. Pepper*[12] determined that the iPhone users are direct purchasers of Apple and may sue Apple for alleged antitrust violations.[13]

This comment argues that the Court in *Apple* ultimately erred in its application of *Illinois Brick* to the facts.[14] Further, the Court misapplied established precedential theories of proximate cause to antitrust standing.[15] Consequently, the Court failed to consider its design's reaching effect on the future of online retail markets.[16]

I. The Case

In *Apple Inc. v. Pepper*,[17] the Supreme Court addressed whether the Ninth Circuit properly determined that iPhone users have standing to sue Apple under the Clayton Antitrust Act.[18] In *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litigation)*,[19] four iPhone owners sued Apple in the United States District Court for the Northern District of California, alleging monopolistic practices.[20] As observed by the Ninth Circuit, the iPhone users alleged that Apple's practice of charging independent iPhone app developers a thirty-percent commission directly caused app developers to charge uncompetitively high prices for their apps.[21] Apple had moved to dismiss, arguing that iPhone owners were not direct consumers of Apple *vis*-à-*vis* their purchase of iPhone apps and thus lacked standing to sue Apple under the Clayton Antitrust Act.[22] Apple claimed that if its alleged monopolistic practices harm anyone,

8. Chapter 323, 63 Congress. 38 Stat. 730 (1914), enacted October 15, 1914, codified at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53.

9. 431 U.S. 720 (1977).

10. Ill. Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977).

11. In a pass-on theory, alleged illegal overcharges are passed along the chain of distribution to a third-party, who then sues for antitrust injury. *See Ill. Brick*, 431 U.S. at 726 ("In general a pass-on theory may not be used defensively" or "offensively by an indirect purchaser.").

12. 139 S. Ct. 1514 (2019).

13. *Apple Inc.*, 139 S. Ct. at 1519.

14. *See infra* Section IV.A.

15. *See infra* Section IV.B.

16. *See infra* Section IV.C.

17. 139 S. Ct. 1514 (2019).

18. *Id.* at 1519.

19. No. 11-CV-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013), *rev'd and remanded*, 846 F.3d 313 (9th Cir. 2017), *aff'd sub nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

20. *Id.*

21. *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.)*, 846 F.3d 313, 315 (9th Cir. 2017).

22. *Id.*

they harm the app developers, not the iPhone users, thereby limiting the scope of proper plaintiffs to only app developers, excluding app purchasers.[23] The district court agreed and granted Apple's motion to dismiss.[24]

The Ninth Circuit reversed the district court's decision, concluding that iPhone users are direct purchasers because the iPhone users purchase apps from Apple, which then pays the app developers (less the contracted commission price).[25] The Ninth Circuit relied on *Illinois Brick*,[26] where the Court held that a plaintiff must be a direct purchaser from an alleged antitrust violator to sue for damages under section four of the Clayton Act.[27] The Ninth Circuit considered whether the iPhone users purchased apps either directly from Apple, which operated the App Store, or the app developers, who set the price for and sell their apps in the App Store.[28] The Ninth Circuit identified Apple as a distributor of iPhone apps, selling them directly to purchasers through its App Store.[29] Accordingly, because Apple is a direct distributor under this interpretation, the Ninth Circuit concluded that the Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing the sale of iPhone apps.[30]

The United States Supreme Court granted *certiorari* to determine whether the consumers who brought suit were proper plaintiffs under the Clayton Antitrust Act.[31] In its decision, the Court focused specifically on whether they purchased iPhone apps directly from Apple. [32]

II. Legal Background

In response to the pervasive anticompetitive practices of major industrial corporations, Congress passed the Sherman Act[33] in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[34] In 1914, Congress passed two additional antitrust laws: the

23. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d at 323 (summarizing Apple's contention that it does not sell apps, but rather sells software distribution services to App developers, analogizing its position to a "shopping mall owner" that "leases physical spaces to various store").

24. No. 11-CV-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013).

25. *In re Apple iPhone Antitrust Litig.*, 846 F.3d at 320.

26. 431 U.S. 720 (1977).

27. 15 U.S.C. § 15 (allowing the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws").

28. *In re Apple iPhone Antitrust Litig.*, 846 F.3d at 315.

29. *Id.* at 322.

30. *Id.*

31. 139 S. Ct. at 1514.

32. *Apple Inc. v. Pepper*, 138 S. Ct. 2647 (2018).

33. Chapter 647, 51 Congress. 26 Stat. 209 (1890), codified at 15 U.S.C. §§ 1-7.

34. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

Federal Trade Commission Act[35] and the Clayton Act.[36] The addition of the Clayton Act to the United States antitrust law provides *inter alia* a pathway for persons injured by competitive practices to recover damages.[37] Over the subsequent decades, the Supreme Court has interpreted the Clayton Act's implications on varying classes of potential litigants seeking recovery for damages stemming from alleged anticompetitive behavior.[38] Section II.A describes the initial passing and scope of the Sherman Act.[39] Next, Section II.B describes the passing and scope of the Clayton Antitrust Act.[40] Finally, Section II.C examines key treatment of the antitrust laws by the Supreme Court regarding standing and damages.[41]

A. The Sherman Antitrust Act

Congress passed the Sherman Antitrust Act[42] in 1890, codifying restrictions on anticompetitive and anti-interstate commercial activities in the marketplace.[43] The Sherman Antitrust Act makes unlawful any practice determined to "monopolize, or attempt to monopolize any part of the trade or commerce among the several States, or with foreign nations."[44] Section One of the Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[45] Section Two of the Act makes a felony of the monopolization of interstate commercial activity.[46] For many activities, the Sherman Act prohibits only objectively unreasonable behavior.[47] The Act does, however, enumerate *per se* violations, including "plain arrangements among competing individuals" and "businesses to fix prices, divide markets, or rig bids."[48] The Sherman Antitrust Act's passing was unprecedented legislation that provided civil (and limited criminal)

35. The Federal Trade Commission Act, 15 U.S.C. § 45 (2021).

36. 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

37. 15 U.S.C. § 15.

38. *See infra* Section II.C.

39. *See infra* Section II.A.

40. *See infra* Section II.B.

41. *See infra* Section II.C.

42. 15 U.S.C. §§ 1-7.

43. *See generally id.*

44. 15 U.S.C. § 2 (2021).

45. 15 U.S.C. § 1 (2021).

46. 15 U.S.C. § 2.

47. 15 U.S.C. § 6a.

48. *The Antitrust Laws,* Fed. Trade Comm'n, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 26, 2021).

enforcement against certain free-market enterprises deemed harmful to specific consumers.[49]

B. The Clayton Act

In 1914, Congress supplemented previous antitrust legislation with the passing of the Clayton Antitrust Act.[50] The Clayton Act's passing addressed monopolistic activities not regulated in the Sherman Antitrust Act, such as mergers and interlocking directorates.[51] The Act outlines "treble damages" for injuries caused by activities in violation of the statute, meaning actual damages that are equivalent to three times the amount of injury that the injured party has suffered.[52] The Act clarified the type of injury for which people may sue for an antitrust violation as "[t]he diminishment of a person's property by a payment of money wrongfully induced."[53] Generally, when a court determines damages are due and owed for an injury stemming from anticompetitive activity, courts will triple the difference between the price paid and the market price.[54]

C. Key Treatment of Antitrust Law by the Supreme Court

In *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*,[55] the Supreme Court addressed whether plaintiffs "passing on damages" sustained by paying uncompetitive prices by collecting that amount from their customers prevented their recovering damages.[56] The Court applied the longstanding jurisprudential theory of proximate cause to suits where parties are injured by antitrust violations, noting the "general tendency of the law, in regard to damages at least, is not to go beyond the first step."[57] *Southern Pacific* set off a wave of Supreme Court cases establishing an apparent super-precedent restricting antitrust cases to only those where damages are not passed-on to Plaintiffs.[58]

In *Hanover Shoe v. United Machinery Corp*.,[59] the Supreme Court reaffirmed and defined the rule of proximate cause as applied to those injured by antitrust

49. *Id.*

50. 15 U.S.C. §§ 12-27.

51. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 26, 2021) (explaining that interlocking directorates means the same person making business decisions for competing companies).

52. 15 U.S.C § 15.

53. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 (1906).

54. *See id.* at 396.

55. 245 U.S. 531 (1918).

56. S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918).

57. *Id.*

58. *See infra* notes 59-70 and accompanying text.

59. 392 U.S. 481 (1968).

violations.[60] In *Hanover Shoe*, the Plaintiff, a manufacturer of shoes, brought a treble damage antitrust action alleging injury from the Defendant's monopolistic shoe machinery market.[61] The Court agreed with the Defendant's assertion that the Plaintiff, having "passed-on" the alleged illegal overcharge as reflected in its own conflated shoe prices, suffered no cognizable injury.[62] The Court's ruling went on to prohibit antitrust violators from using a "pass-on theory" *defensively*.[63] The Court reasoned that permitting pass-on theories in calculating damages would "involv[e] massive evidence and complicated theories," unduly and unnecessarily burdening the judicial system.[64]

Ten years later, in *Illinois Brick*,[65] the Supreme Court applied a similar rule to antitrust *plaintiffs*, declining to "permit offensive use of a pass-on theory against an alleged violator."[66] The Court described the similar complication that would arise in calculating damages as recognized previously in *Hanover Shoe*.[67] Further, allowing pass-on theories would allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen, to ultimate consumers."[68] Permitting pass-on theories in this way requires courts to determine the amount of monopolized charges that were absorbed by intermediary purchasers and how much those purchasers were able to pass on to customers down the distribution chain *ad infinitum*.[69] To mitigate these potential complications, the Court established the bright-line rule of antitrust standing, where only direct purchasers from an alleged antitrust violator may sue under Section Four of the Clayton Act.[70]

60. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 490 (1968).

61. *Id.* at 483.

62. *See id.* at 487-89 (holding that only where a buyer claiming injury under antitrust law, "in the face of the overcharge . . . does nothing ad absorbs the loss, he [is] entitled to treble damages").

63. *Id.* at 513.

64. *Id.* at 493.

65. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

66. *Id.* at 735 (emphasis added).

67. *See id.* at 725 (rejecting indirect purchasers as proper plaintiffs due to "an unwillingness to complicate treble-damage actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would behave differently without the overcharge").

68. *Id.* at 737.

69. *Id.* at 757.

70. *Id.* at 726.

III. The Court's Reasoning

Writing for the majority in *Apple Inc. v. Pepper*,[71] Justice Kavanaugh upheld the Ninth Circuit's ruling, holding that the iPhone owners are direct consumers of Apple and therefore have standing to bring an antitrust suit.[72] Relying on the language in the antitrust legislation and Supreme Court precedent, the Court reasoned that the iPhone users purchased the apps directly from Apple.[73] Accordingly, under *Illinois Brick*,[74] the iPhone users were direct consumers who may sue Apple for alleged monopolization.[75] Ultimately, Justice Kavanaugh relied on the specific and direct contractual relationship between the two parties, reading *Illinois Brick* to permit a plaintiff that maintains a direct purchaser relationship with a retailer to sue that retailer for antitrust damages.[76]

The majority opinion first relied on the relevant statutory text:[77] Section 2 of the Sherman Antitrust Act, which prohibits monopolization,[78] and Section 4 of the Clayton Antitrust Act, which provides judicial remedy for persons injured by an antitrust violator.[79] Applying Section 4 of the Clayton Act to the Court's decision in *Illinois Brick*, immediate buyers from alleged antitrust violators may sue, and indirect buyers may not sue.[80] Justice Kavanaugh reasoned that where no intermediary stands in the distribution chain between Apple and the app purchaser, who pays Apple directly, the purchasers are direct consumers under *Illinois Brick*.[81] The dispositive question for the majority was whether or not a direct contract exists between the parties.[82] According to the majority, such a contract exists in this case.[83]

71. 139 S. Ct. 1514 (2019).

72. *Apple Inc.*, 139 S. Ct. at 1525.

73. *Id.* at 1520.

74. 431 U.S. 720 (1977).

75. *Apple Inc.*, 139 S. Ct. at 1520.

76. *Id.* at 1525 (2019) (recasting *Illinois Brick* as a rule forbidding only suits where the Plaintiff lacks contractual privity with the defendant, regardless of who sets the price).

77. *Id.* at 1520.

78. 15 U.S.C. § 2 (2004) makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

79. 15 U.S.C § 15(a) (2017) states that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

80. *Apple Inc.*, 139 S. Ct. at 1521.

81. *Id.*

82. *Id.*

83. *Id.* at 1523.

The Court then outlined three problems with Apple's argument that *Illinois Brick* only allows consumers to sue the party who sets the retail price.[84] First, the "who sets the price" theory contradicts legislative intent.[85] According to Justice Kavanaugh, the Sherman Act was intended to be read broadly to accomplish the goal of countering antitrust violations, and the Court should therefore apply that goal broadly in its interpretation of *Illinois Brick*.[86] The legal technicalities Apple raises, he argued, should not interfere with this goal.[87] Second, Apple's theory draws arbitrary lines among retailers and manufacturers based on particular financial arrangements on price setting.[88] Third, the implications of adopting Apple's theory directs corporations to structure their contracts in such a way to make sure they are not setting the prices and thereby avoiding the reach of antitrust law on a technicality.[89]

The four-Justice dissent, written by Justice Gorsuch, considered the majority opinion to misapply *Illinois Brick*'s[90] rejection of pass-on theories of liability.[91] Given that the plaintiffs purchased the apps from third-party app developers, the developers are the parties directly injured by any alleged monopolization.[92] The iPhone users are only harmed if the app developers choose to *pass-on* the overcharge to the app purchasers.[93] The dissent additionally considers the majority rule as overcomplicating the calculation of damages,[94] a problem specifically addressed in the reasoning in *Illinois Brick*.[95] Suppose it is said, as the majority does, that the dispositive question is whether or not a direct contract exists. In that case, Apple can structure its relationship with iPhone users so the app purchasers are outside of direct contract with Apple.[96] Apple could easily develop a system wherein app purchasers pay money directly to the developer, who then pays Apple its thirty-percent

84. *See id.* (stating that Apple's "who sets the price theory" relies on an interpretation of *Illinois Brick* as allowing consumers to sue only the party who sets the retail price, whether or not that party sells the goods or services directly to the complaining party, rather than the party who merely provides a retail space and charges a commission for the sellers).

85. *Id.*

86. *Apple Inc.*, 139 S. Ct. at 1521.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Apple Inc.*, 139 S. Ct. at 1525 (Gorsuch, J., Dissenting).

91. *Id.* at 1528.

92. *Id.* at 1529.

93. *Id.* at 1525.

94. *Id.* at 1529.

95. *Id.*

96. *Apple Inc.*, 139 S. Ct. at 1530 (Gorsuch, J., Dissenting).

commission.[97] Ultimately, the dissent implies that the majority opinion injudiciously rejects cogent and established jurisprudential theories of proximate cause.[98]

IV. Analysis

In *Apple Inc. v. Pepper*,[99] the Supreme Court held that consumers who purchase goods or services at higher-than-competitive prices in an allegedly monopolistic retailer's store may sue the retailer under antitrust law.[100] Specifically, the Court held that the plaintiff iPhone owners, who purchased apps through Apple's App Store, are direct purchasers under *Illinois Brick* and may thus sue Apple.[101] The Court's judgment was incorrectly decided because the holding misapplied the precedential reasoning of *Illinois Brick*, which sought to prohibit the very type of suit presented in this case.[102] In addition to misapplying precedent, the Court engaged in circular reasoning in its effort to assert an overly broad statutory interpretation, effectuating incalculable damages for this case and future like-cases.[103] Finally, the Court's decision ignores the direction of technological process of software-based retail spaces and creates overly complicated, repetitive, and ineffectual procedures for an injured party to obtain damages.[104]

A. The Court's Holding is Incorrect Because it Misapplied Precedent Established in Illinois Brick

The majority opinion in *Apple Inc. v. Pepper*[105] interpreted its 1977 ruling in *Illinois Brick* to prohibit suits only where a plaintiff does not contract directly with the defendant.[106] Because the iPhone users in this case did have contractual privity with Apple through the App Store, the majority held that *Illinois Brick* makes the iPhone users proper plaintiffs to sue Apple for antitrust violations. The critical holding in *Illinois Brick* was the Court's rejection of "pass-on" theories of damages—the notion that an antitrust plaintiff cannot sue a defendant for

97. *Id.*

98. *Apple Inc.*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting) (noting that "under ancient rules of proximate causation, the 'general tendency of the law, in regard to damages at least, is not to go beyond the first step'" (quoting *Hanover Shoe*, 392 U. S. at 490), and concluding that app purchasers are separated from Apple by the app developers).

99. 139 S. Ct. 1514 (2019).

100. *Id.* at 1525.

101. *Id.*

102. *See infra* Section IV.A.

103. *See infra* Section IV.B.

104. *See infra* Section IV.C.

105. 139 S. Ct. 1514 (2019).

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

overcharging *someone else* who might have passed on some amount of overcharge to them.

The case at hand is precisely the type of "pass-on" damages case that *Illinois Brick* prohibits.[107] The Plaintiffs in this case purchased apps from third-party app developers in Apple's retail store.[108] The app prices are set by the app developers, who then pay Apple a thirty-percent commission for every app sold.[109] The first tier of damages from alleged monopolistic behavior is, therefore, suffered by the app developers, who may choose, or not choose, to pass on the monopolistic overcharge to the iPhone users.[110] According to *Illinois Brick*, only purchasers connected by a *single* link in the distribution chain may sue.[111] The Court's ruling rested on the undue burden and overcomplication caused by permitting parties not directly connected on the chain of distribution to sue non-proximate distributors. Permitting consumers to sue retailers for damages passed-on to consumers requires "determining how much of the manufacturer's monopoly rent was absorbed by an intermediary… and how much they were able and chose to pass on to their customers."[112] Further, calculating passed-on damages requires "complicated theories" about "how the relevant market variables would have behaved had there been no overcharge."[113] Such a calculation is not only incredibly complex, requiring massive evidence and calculation, but in many cases, nearly impossible.[114]

Apple requires the price of all apps in the App Store to end in ninety-nine cents, and the vast majority of apps in the App Store are *only* ninety-nine cents.[115] As the dissent notes, a developer charging ninety-nine cents cannot raise its price in line with the thirty-cent commission it owes to Apple..[116] So to recover any purported losses, App developers would have to increase their apps' price by over one-hundred

107. *Ill. Brick*, 431 U.S. at 750 (holding that a consumer separated from a manufacturer in a distribution chain by a third-party may not engage in an antitrust suit where the third-party passes on higher-than-competitive prices to the consumer); *Apple Inc.*, 139 S. Ct. at 1526 (holding that iPhone app purchasers may sue Apple, despite being separated in the chain of distribution by app developers, who allegedly pass on higher-than-competitive prices to consumers).

108. *See supra notes* 124-125 and accompanying text.

109. Julia Alexander, *A Guide to Platform Fees*, The Verge (Sep. 22, 2020, 8:05 AM EDT), https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google.

110. *Apple Inc.*, 139 S. Ct. at 1522.

111. *Id.*

112. *Ill. Brick Co.*, 431 U.S. at 735.

113. *Id.* at 741-43.

114. *See supra* note 110 and accompanying text.

115. *Apple Inc.*, 139 S. Ct. at 1528 (Gorsuch, J., dissenting).

116. *Id.*

percent to recover the thirty percent owed to Apple.[117] This illustration serves to demonstrate the complexities of calculating passed-on damages, being the very reason the Court in *Illinois Brick* forbade them.[118] The majority opinion claims that there is no intermediary between Apple and the iPhone users and that the absence of an intermediary is dispositive[119]—a misapprehension of the actual chain of distribution.[120] Apple and the app purchasers are separated in the distribution chain by the app developers who set their own prices.[121] The majority goes on, claiming to not "understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer."[122] The relevance the majority seeks stems directly from *Illinois Brick*'s clear stance on such market structures.[123] If by nothing more than precedent, being "two or more" steps removed, a downstream consumer cannot retain a proper antitrust suit against an upstream retailer.[124] In this case, the app purchasers are two steps removed from Apple. The intermediary is the app developers who may either absorb or pass-on any due or undue expenses imposed by Apple.[125]

B. The Court Applied Circular Reasoning in its Statutory Interpretation of Proximate Cause in Antitrust Law

Apple pushed a "price-setting theory"—one that interprets Illinois Brick as allowing consumers to sue only the party that sets the retail price, regardless of whether that party operates the retail space where the goods are sold.[126] The majority purports that Apple's theory provides a "roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers. "[127] The majority considers a system of standing based on price setting as problematic because Apple, knowing this, is fully incentivized to alter its contracts

117. *Id.* ("[A] developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales.").

118. *Ill. Brick Co.*, 431 U.S. at 732 (noting 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 . . . [to] pass-on theories . . . .").

119. *Apple Inc.*, 139 S. Ct. at 1521.

120. *See supra* note 110 and accompanying text (explaining that the dispositive intermediary is the app developers).

121. *See supra* note 110 and accompanying text.

122. *Apple Inc.*, 139 S. Ct. at 1523.

123. *See generally Ill. Brick Co.*, 431 U.S. 720 (explicitly forbidding downstream consumers from suing an alleged monopolistic retailer upstream the distribution chain).

124. *Ill. Brick Co.*, 431 U.S. at 732.

125. *Apple Inc.*, 139 S. Ct. at 1523.

126. *Id.*

127. *Id.*

in such a way as to evade antitrust laws—namely, have the funds from an app purchase go first to the developer, who then pays Apple its thirty percent commission, rather than vice versa, as is the current system.[128]

While relevant, this concern does not actually support the conclusion of the majority and, in fact, results in the exact outcome the Court rejects.[129] For the majority, Illinois Brick prioritizes contractual privity relationships between the parties as a basis for antitrust standing.[130] The decision here gives just as much direction to retailers like Apple to structure their relationships in such a way as to avoid antitrust laws.[131] For example, Apple now is incentivized, and arguably instructed, to structure its relationship with app purchasers so the direct contractual privity is first between the app developers and the app purchasers, who then remit the thirty percent back to Apple.[132] This technical contractual shift effectively removes retailers from antitrust liability.[133]

The outcome in this case therefore fails to incentivize online console retailers to alter any allegedly monopolistic behavior at all, but rather to merely alter their contractual relationships.[134] The majority's concern is tautological in that both an affirmation or reversal of the Court of Appeals ruling provides direction to alleged monopolists to restructure their contractual privity to appear to comply with the Court's ruling while actually evading antitrust liability.[135]

Further, the hypothetical offered by the Court in contention with the "who sets the price theory" has little basis in reality.[136] Consider the following hypothetical offered by Justice Kavanaugh:[137]

> *In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer,*

128. *Id.* at 1523-24.

129. *See infra* notes 130-134 and accompanying text.

130. *Apple Inc.*, 139 S. Ct. at 1521-23.

131. *See infra* note 133 and accompanying text.

132. *See infra* note 133 and accompanying text.

133. As the majority opinion in *Apple Inc.* rests antitrust standing on contractual privity, retailers like Apple now know to structure their business relationships with app purchasers in such a way that mitigates contractual privity.

134. *See supra* note 133 and accompanying text.

135. *See supra* notes 129-132 and accompanying text.

136. *See infra* notes 139-42 and accompanying text.

137. *Apple Inc.*, 139 S. Ct. at 1522.

> *and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.*[138]

While it is true that the end result is the same, in each case the actual actor is in fact different.[139] If the retailer setting the ten-dollar price is a monopolist, then they are the party committing the legal violation.[140] In reality, a practice where a manufacturer sets the price, while at the same time the retailer is acting with monopolistic power, is practically non-existent.[141] Consider a hypothetical where there is a monopolistic retailer that has to take from the manufacturer the price that it is going to sell at in the open market. This situation is so tenuously related to actual business practice, that the hypothetical itself is at most purely academic.[142] This tenuous connection serves to strengthen the notion that the price setter is the party who may or may not act monopolistically, because those situations are commonplace in real business relationships.[143] In this case, and in many antitrust cases, the plaintiffs claim injury stemming from paying uncompetitively high prices.[144] The nature of the contract between the iPhone users and Apple is nowhere presented by the plaintiffs as the basis for the alleged uncompetitively high prices.[145] Therefore, the price-setter is the most direct link to the plaintiffs' damages, and antitrust standing ought to be recognized only in a suit against the price-setter.[146]

Consider two popular online retailers: the Epic Game Store, which takes a twelve-percent commission on games sold, and Steam, which takes a thirty-percent cut on the PC marketplace.[147] Some developers have moved their games over to the Epic Game Store and have sold at the same retail price that they sold on Steam, suggesting that removing that commission will not affect the prices set by the developers.[148]

138. *Id.*

139. *See infra* note 145 and accompanying text.

140. *Id.*

141. *See supra* Section II.C (providing key treatment of antitrust standing cases, in each case limiting standing to the price setter).

142. *Id.*

143. *See infra* note 145 and accompanying text.

144. *Id.*

145. *See generally* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019) (noting that the plaintiffs claimed injuries stem from allegedly paying uncompetitively high prices for Apps); *Apple Inc.*, 139 S. Ct. at 1528 (Gorsuch, J., dissenting) (noting that developers set the price of their apps, not Apple).

146. *Id.*

147. JONATHAN BORCK ET AL., APPLE'S APP STORE AND OTHER DIGITAL MARKETPLACES 6 (2020), https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf.

148. Kyle Orland, *Should PC Games Cost Less On Epic's Game Store?*, ARSTECHNICA (Jan. 29, 2019, 3:49 PM), https://arstechnica.com/gaming/2019/01/should-pc-games-cost-less-on-epics-games-store/ (noting the first

After all, developers understand the supply and demand curves for their products better than retail store owners.[149] By this example, the developers model their prices individually, and do not model their prices based on the particular retail space they are selling.[150] Notably, Apple's thirty-percent commission generally coincides with the market value for other predominant online retailers.[151]

A system where a retailer sets the price for a manufacturer cuts against the notion that the manufacturer is a monopolistic actor at all.[152] A retailer's monopolistic power stems directly from its ability to set a price.[153] A system that limits the scope of a "direct purchaser" to one with contractual privity incentivizes manufacturers to restructure their contracts to avoid antitrust laws.[154] Further, restricting the price setter from antitrust liability ignores actual market practice, in particular, the effective enforcement of antitrust laws.[155]

C. The Court's Decision Obfuscates Antitrust Standing in the Growing Field of Console Retail Stores

The impact of the Court's decision in this case has far-reaching implication on the expanding market of software-based console retailers,[156] most notably with online gaming stores.[157] The effect of the Court's decision limits the ability of a developer of a piece of software to set the prices of its own software because of the risk of antitrust accusations of direct contractual privity. Platforms like Apple's App store are growing exponentially in popularity.[158] Software-based online applications that operate as retail stores for smartphone and computer apps like Steam and Epic Games

case of a reduced price following a commission reduction, suggesting the price for the majority of games sold on Steam and Epic Games are relatively similar).

149. *Id.*

150. *Id.* (inferring how developers model prices from the disparate commission models between Steam and Epic Games, while game prices are similar on both platforms).

151. Borck, *supra* note 147.

152. *See supra* notes 142; 145.

153. Section 4 of the Clayton Act's broad text stipulates recovery of damages by consumers who purchase goods or services at *higher-than-competitive prices*. *See infra* note 8. It follows that the party who sets the price has the power to set that price at a rate higher than free-market forces permit.

154. *See supra* note 133.

155. *See supra* notes 145-149.

156. Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps*, The Verge, (May 14, 2019, 4:04pm EDT), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast.

157. *Id*.

158. *The Global Gaming Industry Takes Centre Stage*, Morgan Stanley (Aug. 26, 2020), https://www.morganstanley.com.au/ideas/the-global-gaming-industry.

are just two examples of the growing market, both of which charge commission to software game developers to sell on their platforms.[159]

The Court's ruling now incentives the large retailers, concerned that granting price-setting freedom to developers exposes it to unnecessary liability, to restrict the ability of a software developer to price control access to that software, effectively reducing the market power of the developers.[160] The effect of an exacerbated power-imbalance has the potential to decrease competitiveness in the software-based gaming space, as power is taken from smaller, more vulnerable developers, and accumulated by the owners of the retail space, like Apple.[161] This is a counterintuitive consequence of an apparent *anti*trust case.[162] The Court's ruling now exposes these types of retailers to unintended liability—as multiple parties along the distribution chain, the developers *and* the gamers, now have ostensible standing to sue if they find that commission access unreasonable.[163]

V. Conclusion

In Apple Inc. v. Pepper,[164] the Supreme Court held that under Illinois Brick, iPhone users who purchased apps in the Apple App Store, with prices set by third-party developers, are direct purchasers of Apple and thus proper plaintiffs to bring an antitrust suit against Apple.[165] The Court erred in its interpretation of the precedent established in Illinois Brick because Apple and iPhone users are separated in the chain of distribution by app developers.[166] In finding iPhone users and Apple to be directly linked in the chain of distribution, the Court ignored theories of proximate

159. Michael Andonico, *You Don't Need a PS5 or Xbox Series X Right Now—Here's Why*, CNN, (Dec. 9, 2020, 3:12 PM EST), https://www.cnn.com/2020/12/09/cnn-underscored/alternatives-ps5-xbox-series-x/index.html.

160. Adi Robertson, How Apple's Supreme Court Loss Could Change the Way You Buy Apps, THE VERGE, (May 14, 2019, 4:04pm EDT), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast.

161. Apple retains hegemonic status in the power balance it maintains with app developers and is incentivized to restrict app developers' ability to price control, given that now all antitrust liability is concentrated with Apple. *See* John Swartz, App*le vs. Epic: Why Cloud Gaming Became a Hot Topic at Landmark Antitrust Trial*, MARKETWATCH, (May 8, 2021, 10:54a.m. ET), https://www.marketwatch.com/story/apple-epic-trial-epics-claim-of-stifled-competition-on-cloud-gaming-offers-compelling-bookend-to-price-gouging-charges-11620327152.

162. *See supra* note 161 and accompanying text. In an attempt to expose a large tech corporation to antitrust liability, the Court has incentivized a contractual relationship that limits the competitiveness of the alleged antitrust victims.

163. Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps*, THE VERGE, (May 14, 2019, 4:04pm EDT), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast.

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

165. *Id.* at 1520.

166. *See supra* Section IV.A.

cause within congressionally ratified antitrust legislation.[167] As the market for online console applications grows, the Court's decision creates long term complications and injustices for software developers and retailers alike.[168]

167. *See supra* Section IV.B.

168. See *supra* Section IV.C.