

United States v. Aluminum Co. of America

148 F.2d 416 (1945)

L. HAND, Circuit Judge: This appeal comes to us by virtue of a certificate of the Supreme Court, under the amendment of 1944 to § 29 of 15 U.S.C.A. The action was brought under § 4 of that title, praying the district court to adjudge that the defendant, Aluminum Company of America, was monopolizing interstate and foreign commerce, particularly in the manufacture and sale of “virgin” aluminum ingot, and that it be dissolved. *** The action came to trial on June 1, 1938, and proceeded without much interruption until August 14, 1940, when the case was closed after more than 40,000 pages of testimony had been taken. The judge took time to consider the evidence, and delivered an oral opinion which occupied him from September 30, to October 9, 1941. Again he took time to prepare findings of fact and conclusions of law which he filed on July 14, 1942; and he entered final judgment dismissing the complaint on July 23rd, of that year. The petition for an appeal, and assignments of error, were filed on September 14, 1942, and the petition was allowed on the next day. On June 12, 1944, the Supreme Court, declaring that a quorum of six justices qualified to hear the case was wanting, referred the appeal to this court under § 29 of Title 15, already mentioned. ***

I.

“Alcoa” is a corporation, organized under the laws of Pennsylvania on September 18, 1888. *** It has always been engaged in the production and sale of “ingot” aluminum, and since 1895 also in the fabrication of the metal into many finished and semi-finished articles. It has proliferated into a great number of subsidiaries, created at various times between the years 1900 and 1929, as the business expanded. Aluminum is a chemical element; it is never found in a free state, being always in chemical combination with oxygen. One form of this combination is known as alumina; and for practical purposes the most available material from which alumina can be extracted is an ore, called, “bauxite.” Aluminum was isolated as a metal more than a century ago, but not until about 1886 did it become commercially practicable to eliminate the oxygen, so that it could be exploited industrially. One, Hall, discovered a process by which this could be done in that year, and got a patent on April 2, 1889, which he assigned to “Alcoa,” which thus secured a legal monopoly of the manufacture of the pure aluminum until on April 2, 1906, when this patent expired. Meanwhile Bradley had invented a process by which the smelting could be carried on without the use of external heat, as had theretofore been thought necessary; and for this improvement he too got a patent on February 2, 1892. Bradley’s improvement resulted in great economy in manufacture, so that, although after April 2, 1906, anyone could manufacture aluminum by the Hall process, for practical purposes no one could compete with Bradley or with his licensees until February 2, 1909, when Bradley’s patent also expired. On October 31, 1903, “Alcoa” and the assignee of the Bradley patent entered into a contract by which “Alcoa” was granted an exclusive license under that patent, in exchange for “Alcoa’s” promise to sell to the assignee a stated amount of aluminum at a discount of ten per cent below “Alcoa’s” published list price, and always to sell at a discount of five per cent greater than that which “Alcoa” gave to any other jobber. Thus until February 2, 1909, “Alcoa” had either, a monopoly of the manufacture of “virgin” aluminum ingot, or the monopoly of a process which eliminated all competition.

The extraction of aluminum from alumina requires a very large amount of electrical energy, which is ordinarily, though not always, most cheaply obtained from water power. Beginning at least as early as 1895, “Alcoa” secured such power from several companies by contracts, containing in at least three

instances, covenants binding the power companies not to sell or let power to anyone else for the manufacture of aluminum. “Alcoa”—either itself or by a subsidiary—also entered into four successive “cartels” with foreign manufacturers of aluminum by which, in exchange for certain limitations upon its import into foreign countries, it secured covenants from the foreign producers, either not to import into the United States at all, or to do so under restrictions, which in some cases involved the fixing of prices. These “cartels” and restrictive covenants and certain other practices were the subject of a suit filed by the United States against “Alcoa” on May 16, 1912, in which a decree was entered by consent on June 7, 1912, declaring several of these covenants unlawful and enjoining their performance; and also declaring invalid other restrictive covenants obtained before 1903 relating to the sale of alumina. (“Alcoa” failed at this time to inform the United States of several restrictive covenants in water-power contracts; its justification—which the judge accepted—being that they had been forgotten.) “Alcoa” did not begin to manufacture alumina on its own behalf until the expiration of a dominant patent in 1903. In that year it built a very large alumina plant at East St. Louis, where all of its alumina was made until 1939, when it opened another plant in Mobile, Alabama.

None of the foregoing facts are in dispute, and the most important question in the case is whether the monopoly in “Alcoa’s” production of “virgin” ingot, secured by the two patents until 1909, and in part perpetuated between 1909 and 1912 by the unlawful practices, forbidden by the decree of 1912, continued for the ensuing twenty-eight years; and whether, if it did, it was unlawful under § 2 of the Sherman Act, 15 U.S.C.A. § 2. It is undisputed that throughout this period “Alcoa” continued to be the single producer of “virgin” ingot in the United States; and the plaintiff argues that this without more was enough to make it an unlawful monopoly. *** We shall first consider the amount and character of this competition; next, how far it established a monopoly; and finally, if it did, whether that monopoly was unlawful under § 2 of the Act.

From 1902 onward until 1928 “Alcoa” was making ingot in Canada through a wholly owned subsidiary; so much of this as it imported into the United States it is proper to include with what it produced here. In the year 1912 the sum of these two items represented nearly ninety-one per cent of the total amount of “virgin” ingot available for sale in this country. This percentage varied year by year up to and including 1938: in 1913 it was about seventy-two per cent; in 1921 about sixty-eight per cent; in 1922 about seventy-two; with these exceptions it was always over eighty per cent of the total and for the last five years 1934-1938 inclusive it averaged over ninety per cent. The effect of such a proportion of the production upon the market we reserve for the time being, for it will be necessary first to consider the nature and uses of “secondary” ingot, the name by which the industry knows ingot made from aluminum scrap. ***

There are various ways of computing “Alcoa’s” control of the aluminum market—as distinct from its production—depending upon what one regards as competing in that market. The judge figured its share—during the years 1929-1938, inclusive—as only about thirty-three percent; to do so he included “secondary,” and excluded that part of “Alcoa’s” own production which it fabricated and did not therefore sell as ingot. If, on the other hand, “Alcoa’s” total production, fabricated and sold, be included, and balanced against the sum of imported “virgin” and “secondary,” its share of the market was in the neighborhood of sixty-four per cent for that period. The percentage we have already mentioned—over ninety—results only if we both include all “Alcoa’s” production and exclude “secondary”. That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not. Hence it is necessary to settle what he shall treat as competing in the ingot market. That part of its production which “Alcoa” itself

fabricates, does not of course ever reach the market as ingot; and we recognize that it is only when a restriction of production either inevitably affects prices, or is intended to do so, that it violates § 1 of the Act. *Apex Hosiery Co. v. Leader*, [310 U.S. 469, 501](#). However, even though we were to assume that a monopoly is unlawful under Sec. 2 only in case it controls prices, the ingot fabricated by “Alcoa,” necessarily had a direct effect upon the ingot market. All ingot—with trifling exceptions—is used to fabricate intermediate or end, products; and therefore all intermediate, or end, products which “Alcoa” fabricates and sell, pro tanto reduce the demand for ingot itself. *** We cannot therefore agree that the computation of the percentage of “Alcoa’s” control over the ingot market should not include the whole of its ingot production.

As to “secondary,” as we have said, for certain purposes the industry will not accept it at all; but for those for which it will, the difference in price is ordinarily not very great; the judge found that it was between one and two cents a pound, hardly enough margin on which to base a monopoly. *** At any given moment therefore “secondary” competes with “virgin” in the ingot market; further, it can, and probably does, set a limit or “ceiling” beyond which the price of “virgin” cannot go, for the cost of its production will in the end depend only upon the expense of scavenging and reconditioning. It might seem for this reason that in estimating “Alcoa’s” control over the ingot market, we ought to include the supply of “secondary,” as the judge did. Indeed, it may be thought a paradox to say that anyone has the monopoly of a market in which at all times he must meet a competition that limits his price. We shall show that it is not.

In the case of a monopoly of any commodity which does not disappear in use and which can be salvaged, the supply seeking sale at any moment will be made up of two components: (1) the part which the putative monopolist can immediately produce and sell; and (2) the part which has been, or can be, reclaimed out of what he has produced and sold in the past. By hypothesis he presently controls the first of these components; the second he has controlled in the past, although he no longer does. During the period when he did control the second, if he was aware of his interest, he was guided, not alone by its effect at that time upon the market, but by his knowledge that some part of it was likely to be reclaimed and seek the future market. That consideration will to some extent always affect his production until he decides to abandon the business, or for some other reason ceases to be concerned with the future market. Thus, in the case at bar “Alcoa” always knew that the future supply of ingot would be made up in part of what it produced at the time, and, if it was as far-sighted as it proclaims itself, that consideration must have had its share in determining how much to produce. How accurately it could forecast the effect of present production upon the future market is another matter. Experience, no doubt, would help; but it makes no difference that it had to guess; it is enough that it had an inducement to make the best guess it could, and that it would regulate that part of the future supply, so far as it should turn out to have guessed right. The competition of “secondary” must therefore be disregarded, as soon as we consider the position of “Alcoa” over a period of years; it was as much within “Alcoa’s” control as was the production of the “virgin” from which it had been derived. ***

We conclude therefore that “Alcoa’s” control over the ingot market must be reckoned at over ninety per cent; that being the proportion which its production bears to imported “virgin” ingot. If the fraction which it did not supply were the produce of domestic manufacture there could be no doubt that this percentage gave it a monopoly—lawful or unlawful, as the case might be. The producer of so large a proportion of the supply has complete control within certain limits. ***

The case at bar is however different, because, for aught that appears there may well have been a practically unlimited supply of imports as the price of ingot rose. Assuming that there was no agree-

ment between “Alcoa” and foreign producers not to import, they sold what could bear the handicap of the tariff and the cost of transportation. For the period of eighteen years—1920-1937—they sold at times a little above “Alcoa’s” prices, at times a little under; but there was substantially no gross difference between what they received and what they would have received, had they sold uniformly at “Alcoa’s” prices. While the record is silent, we may therefore assume—the plaintiff having the burden—that, had “Alcoa” raised its prices, more ingot would have been imported. Thus there is a distinction between domestic and foreign competition: the first is limited in quantity, and can increase only by an increase in plant and personnel; the second is of producers who, we must assume, produce much more than they import, and whom a rise in price will presumably induce immediately to divert to the American market what they have been selling elsewhere. It is entirely consistent with the evidence that it was the threat of greater foreign imports which kept “Alcoa’s” prices where they were, and prevented it from exploiting its advantage as sole domestic producer; indeed, it is hard to resist the conclusion that potential imports did put a “ceiling” upon those prices. Nevertheless, within the limits afforded by the tariff and the cost of transportation, “Alcoa” was free to raise its prices as it chose, since it was free from domestic competition, save as it drew other metals into the market as substitutes. Was this a monopoly within the meaning of § 2? The judge found that, over the whole half century of its existence, “Alcoa’s” profits upon capital invested, after payment of income taxes, had been only about ten per cent, and, although the plaintiff puts this figure a little higher, the difference is negligible. The plaintiff does indeed challenge the propriety of computing profits upon a capital base which included past earnings that have been allowed to remain in the business; but as to that it is plainly wrong. An argument is indeed often made in the case of a public utility, that the “rate-base” should not include earnings re-invested which were greater than a fair profit upon the actual investment outstanding at the time. That argument depends, however, upon the premise that at common law—even in the absence of any commission or other authority empowered to enforce a “reasonable” rate—it is the duty of a public utility to charge no more than such a rate, and that any excess is unlawfully collected. Perhaps one might use the same argument in the case of a monopolist; but it would be a condition that one should show what part of the past earning were extortionate, for not all that even a monopolist may earn is *caput lupinum*. The plaintiff made no such attempt, and its distinction between capital, “contributed by consumers” and capital, “contributed by shareholders,” has no basis in law. “Alcoa’s” earnings belonged to its shareholders, they were free to withdraw them and spend them, or to leave them in the business. If they chose to leave them, it was no different from contributing new capital out of their pockets. This assumed, it would be hard to say that “Alcoa” had made exorbitant profits on ingot, if it is proper to allocate the profit upon the whole business proportionately among all its products—ingot, and fabrications from ingot. A profit of ten per cent in such an industry, dependent, in part at any rate, upon continued tariff protection, and subject to the vicissitudes of new demands, to the obsolescence of plant and process—which can never be accurately gauged in advance—to the chance that substitutes may at any moment be discovered which will reduce the demand, and to the other hazards which attend all industry; a profit of ten per cent, so conditioned, could hardly be considered extortionate.

There are however, two answers to any such excuse; and the first is that the profit on ingot was not necessarily the same as the profit of the business as a whole, and that we have no means of allocating its proper share to ingot. It is true that the mill cost appears; but obviously it would be unfair to “Alcoa” to take, as the measure of its profit on ingot, the difference between selling price and mill cost; and yet we have nothing else. It may be retorted that it was for the plaintiff to prove what was the

profit upon ingot in accordance with the general burden of proof. We think not. Having proved that “Alcoa” had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that “Alcoa” had not abused its power, it lay upon “Alcoa” to prove that it had not. But the whole issue is irrelevant anyway, for it is no excuse for “monopolizing” a market that the monopoly has not been used to extract from the consumer more than a “fair” profit. The Act has wider purposes. Indeed, even though we disregard all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them. In any event the mere fact that a producer, having command of the domestic market, has not been able to make more than a “fair” profit, is no evidence that a “fair” profit could not have been made at lower prices. True, it might have been thought adequate to condemn only those monopolies which could not show that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, stimulated every possible demand. No doubt, that would be one way of dealing with the matter, although it would imply constant scrutiny and constant supervision, such as courts are unable to provide. Be that as it may, that was not the way that Congress chose; it did not condone “good trusts” and condemn “bad” ones; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

It is settled, at least as to § 1, that there are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden. *** Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.

But we are not left to deductive reasoning. Although in many settings it may be proper to weigh the extent and effect of restrictions in a contract against its industrial or commercial advantages, this is never to be done when the contract is made with intent to set up a monopoly. *** That concerned a combination of dressmakers who set up a boycott against all retailers who should deal in dresses copied—“pirated”—from the dressmakers’ designs. Before the Commission the dressmakers had offered to prove that “the practices of FOGA were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against devastating evils growing from the pirating of original designs and

had in fact benefitted all four.” (312 U.S. at page 467). All such evidence the Commission refused to hear, raising as sharply as possible the issue whether the combination could excuse itself as “reasonable” because of the benefits it conferred upon the industry. The court sustained the Commission because “the purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition”, [312 U.S. 457 at page 467](#). Moreover, the Clayton Act itself, §§ 14 and 18, shows that practices harmless in themselves will not be tolerated when they “tend to create a monopoly.” Perhaps, it has been idle to labor the point at length; there can be no doubt that the vice of restrictive contracts and of monopoly is really one, it is the denial to commerce of the supposed protection of competition. To repeat, if the earlier stages are proscribed, when they are parts of a plan, the mere projecting of which condemns them unconditionally, the realization of the plan itself must also be proscribed.

We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself *** showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. *** Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. We hold that “Alcoa’s” monopoly of ingot was of the kind covered by § 2.

It does not follow because “Alcoa” had such a monopoly, that it “monopolized” the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. If it had been a combination of existing smelters which united the whole industry and controlled the production of all aluminum ingot, it would certainly have “monopolized” the market. In several decisions the Supreme Court has decreed the dissolution of such combinations, although they had engaged in no unlawful trade practices. *** We may start therefore with the premise that to have combined ninety per cent of the producers of ingot would have been to “monopolize” the ingot market; and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. The Clayton Act itself speaks in that alternative: “to injure, destroy, or prevent competition.” § 13(a) 15. Nevertheless, it is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; and for this they had warrant in some of the congressional debates which accompanied the passage of the Act. This notion has usually been expressed by saying that size does not determine guilt; that there must be some “exclusion” of competitors; that the growth must be something else than “natural” or “normal”; that there must be a “wrongful intent,” or some other specific intent; or that some “unduly” coercive means must be used. At times there has been emphasis upon the use of the active verb, “monopolize,” as the judge noted in the case at bar. What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes “monopolizing” a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances. A market may, for example, be so limited that it is impossible to produce at all and meet the cost of

production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins. *** “Alcoa’s” size was “magnified” to make it a “monopoly”; indeed, it has never been anything else; and its size, not only offered it an “opportunity for abuse,” but it “utilized” its size for “abuse,” as can easily be shown.

It would completely misconstrue “Alcoa’s” position in 1940 to hold that it was the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces. Already in 1909, when its last lawful monopoly ended, it sought to strengthen its position by unlawful practices, and these concededly continued until 1912. In that year it had two plants in New York, at which it produced less than 42 million pounds of ingot; in 1934 it had five plants (the original two, enlarged; one in Tennessee; one in North Carolina; one in Washington), and its production had risen to about 327 million pounds, an increase of almost eight-fold. Meanwhile not a pound of ingot had been produced by anyone else in the United States. This increase and this continued and undisturbed control did not fall undesigned into “Alcoa’s” lap; obviously it could not have done so. It could only have resulted, as it did result, from a persistent determination to maintain the control, with which it found itself vested in 1912. There were at least one or two abortive attempts to enter the industry, but “Alcoa” effectively anticipated and forestalled all competition, and succeeded in holding the field alone. True, it stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked. There is no dispute as to this; “Alcoa” avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. We need charge it with no moral derelictions after 1912; we may assume that all it claims for itself is true. The only question is whether it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement. It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret “exclusion” as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not “exclusionary.” So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent. ***

We disregard any question of “intent.” Relatively early in the history of the Act—1905—Holmes, J., in *Swift & Co. v. United States*, [196 U.S. 375, 396](#), explained this aspect of the Act in a passage often quoted. Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so,

the plaintiff must prove what in the criminal law is known as a “specific intent”; an intent which goes beyond the mere intent to do the act. By far the greatest part of the fabulous record piled up in the case at bar, was concerned with proving such an intent. The plaintiff was seeking to show that many transactions, neutral on their face, were not in fact necessary to the development of “Alcoa’s” business, and had no motive except to exclude others and perpetuate its hold upon the ingot market. Upon that effort success depended in case the plaintiff failed to satisfy the court that it was unnecessary under § 2 to convict “Alcoa” of practices unlawful of themselves. The plaintiff has so satisfied us, and the issue of intent ceases to have any importance; no intent is relevant except that which is relevant to any liability, criminal or civil: i.e. an intent to bring about the forbidden act. *** So here, “Alcoa” meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to “monopolize” that market, however innocently it otherwise proceeded. So far as the judgment held that it was not within § 2, it must be reversed.

IV. The Remedies.

Nearly five years have passed since the evidence was closed; during that time the aluminum industry, like most other industries, has been revolutionized by the nation’s efforts in a great crisis. That alone would make it impossible to dispose of the action upon the basis of the record as we have it; and so both sides agree; both appeal to us to take “judicial notice” of what has taken place meanwhile, though they differ as to what should be the result. The plaintiff wishes us to enter a judgment that “Alcoa” shall be dissolved, and that we shall direct it presently to submit a plan, whose execution, however, is to be deferred until after the war. *** On the other hand, “Alcoa” argues that, when we look at the changes that have taken place—particularly the enormous capacity of plaintiff’s aluminum plants—it appears that, even though we should conclude that it had “monopolized” the ingot industry up to 1941, the plaintiff now has in its hands the means to prevent any possible “monopolization” of the industry after the war, which it may use as it will; and that the occasion has therefore passed forever which might call for, or justify, a dissolution: the litigation has become moot. *** We do not agree with either side; but, before giving our reasons, we must determine for what purposes we may look outside the record. ***

We may, and we do, accept the figures of aluminum production in the report of the so-called “Truman Committee” as of March, 1944, which showed that the annual production of “Alcoa’s” plants was about 828 million pounds; that the production of plants owned by the plaintiff which it had leased to “Alcoa,” was about 1293 million pounds; and that the production of the Reynolds and Olin plants was together, 202 million pounds: a total of about 2300 million pounds. *** Even though we took “notice” of these, the report would not be conclusive, or more than evidence. We could not constitutionally substitute it for the findings of a court after a trial: facts which a court may judicially “notice” do not for that reason become indisputable. *** For these reasons we refuse to take “notice” of facts relevant to the correctness of the findings; but we do take “notice” of those relevant to remedies.

After doing so, it is impossible to say what will be “Alcoa’s” position in the industry after the war. The plaintiff has leased to it all its new plants and the leases do not expire until 1947 and 1948, though they may be surrendered earlier. No one can now forecast in the remotest way what will be the form of the industry after the plaintiff has disposed of these plants, upon their surrender. It may be able to transfer all of them to persons who can effectively compete with “Alcoa”; it may be able to transfer some; conceivably, it may be unable to dispose of any. The measure of its success will be at

least one condition upon the propriety of dissolution, and upon the form which it should take, if there is to be any. It is as idle for the plaintiff to assume that dissolution will be proper, as it is for "Alcoa" to assume that it will not be; and it would be particularly fatuous to prepare a plan now, even if we could be sure that eventually some form of dissolution is not a penalty but a remedy; if the industry will not need it for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency. The need for such a remedy will be for the district court in the first instance, and there is a peculiar propriety in our saying nothing to control its decision, because the appeal from any judgment which it may enter, will perhaps be justiciable only by the Supreme Court, if there are then six justices qualified to sit. ***

Jefferson Parish Hospital District No. 2 v. Hyde

466 U.S. 2 (1984)

Justice STEVENS delivered the opinion of the Court: At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a *per se* violation of § 1 of the Sherman Act because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital staff. After trial, the District Court denied relief, finding that the anticompetitive consequences of the Roux contract were minimal and outweighed by benefits in the form of improved patient care. The Court of Appeals reversed because it was persuaded that the contract was illegal "*per se*." We granted certiorari, and now reverse.

I

In February 1971, shortly before East Jefferson Hospital opened, it entered into an "Anesthesiology Agreement" with Roux & Associates ("Roux"), a firm that had recently been organized by Dr. Kermit Roux. The contract provided that any anesthesiologist designated by Roux would be admitted to the hospital's medical staff. The hospital agreed to provide the space, equipment, maintenance, and other supporting services necessary to operate the anesthesiology department. It also agreed to purchase all necessary drugs and other supplies. All nursing personnel required by the anesthesia department were to be supplied by the hospital, but Roux had the right to approve their selection and retention.³ The hospital agreed to "restrict the use of its anesthesia department to Roux & Associates and [that] no other persons, parties or entities shall perform such services within the Hospital for the term of this contract." App. 19.⁴

The fees for anesthesiological services are billed separately to the patients by the hospital. They cover the hospital's costs and the professional services provided by Roux. After a deduction of eight per cent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.

The 1971 contract provided for a one-year term automatically renewable for successive one-year periods unless either party elected to terminate. In 1976, a second written contract was executed containing most of the provisions of the 1971 agreement. Its term was five years and the clause excluding

³ The contract required all of the physicians employed by Roux to confine their practice of anesthesiology to East Jefferson.

⁴ Originally Roux agreed to provide at least two full time anesthesiologists acceptable to the hospital's credentials committee. Roux agreed to furnish additional anesthesiologists as necessary. The contract also provided that Roux would designate one of its qualified anesthesiologists to serve as the head of the hospital's department of anesthesia.

other anesthesiologists from the hospital was deleted;⁵ the hospital nevertheless continued to regard itself as committed to a closed anesthesiology department. Only Roux was permitted to practice anesthesiology at the hospital. At the time of trial the department included four anesthesiologists. The hospital usually employed 13 or 14 certified registered nurse anesthetists.

The exclusive contract had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services. Any consumer of medical services who elects to have an operation performed at East Jefferson Hospital may not employ any anesthesiologist not associated with Roux. No anesthesiologists except those employed by Roux may practice at East Jefferson.

There are at least 20 hospitals in the New Orleans metropolitan area and about 70 per cent of the patients living in Jefferson Parish go to hospitals other than East Jefferson. Because it regarded the entire New Orleans metropolitan area as the relevant geographic market in which hospitals compete, this evidence convinced the District Court that East Jefferson does not possess any significant “market power”; therefore it concluded that petitioners could not use the Roux contract to anticompetitive ends.⁷ The same evidence led the Court of Appeals to draw a different conclusion. Noting that 30 percent of the residents of the Parish go to East Jefferson Hospital, and that in fact “patients tend to choose hospitals by location rather than price or quality,” the Court of Appeals concluded that the relevant geographic market was the East Bank of Jefferson Parish. The conclusion that East Jefferson Hospital possessed market power in that area was buttressed by the facts that the prevalence of health insurance eliminates a patient’s incentive to compare costs, that the patient is not sufficiently informed to compare quality, and that family convenience tends to magnify the importance of location.

The Court of Appeals held that the case involves a “tying arrangement” because the “users of the hospital’s operating rooms (the tying product) are also compelled to purchase the hospital’s chosen anesthesia service (the tied product).” 686 F.2d, at 289. Having defined the relevant geographic market for the tying product as the East Bank of Jefferson Parish, the court held that the hospital possessed “sufficient market power in the tying market to coerce purchasers of the tied product.” 686 F.2d, at 291. Since the purchase of the tied product constituted a “not insubstantial amount of interstate commerce,” under the Court of Appeals’ reading of our decision in *Northern Pac. R. Co. v. United States*, [356 U.S. 1, 11](#) (1957), the tying arrangement was therefore illegal “*per se*.”

II

Certain types of contractual arrangements are deemed unreasonable as a matter of law. The character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found. A price fixing agreement between competitors is the classic example of such an arrangement.

⁵ “Roux testified that he requested the omission of the exclusive language in his 1976 contract because he believes a surgeon or patient is entitled to the services of the anesthesiologist of his choice. He admitted that he and others in his group did work outside East Jefferson following the 1976 contract but felt he was not in violation of the contract in light of the changes made in it.” 513 F.Supp., at 537.

⁷ The District Court found: “The impact on commerce resulting from the East Jefferson contract is minimal. The contract is restricted in effect to one hospital in an area containing at least twenty others providing the same surgical services. It would be a different situation if Dr. Roux had exclusive contracts in several hospitals in the relevant market. As pointed out by plaintiff, the majority of surgeons have privileges at more than one hospital in the area. They have the option of admitting their patients to another hospital where they can select the anesthesiologist of their choice. Similarly a patient can go to another hospital if he is not satisfied with the physicians available at East Jefferson.” 513 F.Supp., at 541.

It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable “*per se*.” The rule was first enunciated in *International Salt Co. v. United States*, [332 U.S. 392, 396](#) (1947), and has been endorsed by this Court many times since. The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, 15 U.S.C. § 14, Congress expressed great concern about the anticompetitive character of tying arrangements. See H.R. Rep. No. 63-627, 63d Cong., 2d Sess., 10-13 (1914); Sen. Rep. No. 63-698, 63rd Cong., 2d Sess., 6-9 (1914). While this case does not arise under the Clayton Act, the congressional finding made therein concerning the competitive consequences of tying is illuminating, and must be respected.

It is clear, however, that every refusal to sell two products separately cannot be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller’s decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. For example, we have written that “if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition if its competitors were ready and able to sell flour by itself.” *Northern Pac. R. Co. v. United States*, [356 U.S. 1, 7](#) (1958). Buyers often find package sales attractive; a seller’s decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act.

Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such “forcing” is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

*** Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called “market power”—to force a purchaser to do something that he would not do in a competitive market. See *United States Steel Corp. v. Fortner Enterprises (Fortner II)*, [429 U.S. 610, 620](#) (1977). When “forcing” occurs, our cases have found the tying arrangement to be unlawful.

Thus, the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller’s power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie. And from the standpoint of the consumer—whose interests the statute was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package. In sum, to permit restraint of competition on the merits through tying arrangements would be, as we observed in *Fortner II*, to condone “the existence of power that a free market would not tolerate.” [429 U.S., at 617](#). (footnote omitted).

Per se condemnation—condemnation without inquiry into actual market conditions—is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were “forced” with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. Similarly, when a purchaser is “forced” to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Once this threshold is surmounted, *per se* prohibition is appropriate if anticompetitive forcing is likely. For example, if the government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful.

The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller’s share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. *** When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital’s sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

III

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations.²⁷ At East Jefferson Hospital the package includes the services of the anesthesiologist.²⁸ Petitioners argue that the package does not involve a tying arrangement

²⁷ The physical facilities include the operating room, the recovery room, and the hospital room where the patient stays before and after the operation. The services include those provided by staff physicians, such as radiologists or pathologists, and interns, nurses, dietitians, pharmacists and laboratory technicians.

²⁸ It is essential to differentiate between the Roux contract and the legality of the contract between the hospital and its patients. The Roux contract is nothing more than an arrangement whereby Roux supplies all of the hospital’s needs for

at all—that they are merely providing a functionally integrated package of services. Therefore, petitioners contend that it is inappropriate to apply principles concerning tying arrangements to this case.

Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. In *Times-Picayune Publishing Co. v. United States*, [345 U.S. 594](#) (1953), the Court held that a tying arrangement was not present because the arrangement did not link two distinct markets for products that were distinguishable in the eyes of buyers. In *Fortner I*, the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's perspective, was a tying arrangement. These cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.

The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule. The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying—that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item. Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.

Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient's doctors if the hospital did not insist on including anesthesiological services in the package it offers to its customers. As a matter of actual practice, anesthesiological services are billed separately from the hospital services petitioners provide. There was ample and uncontroverted testimony that patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology.³⁶ The District Court found that “[t]he provision of anesthesia services is a medical service separate from the other services provided by the hospital.” 513 F.Supp., at 540. The Court of Appeals agreed with this finding, and went on to observe that “an anesthesiologist is normally selected by the surgeon, rather than the patient, based on familiarity gained through a working relationship. Obviously, the surgeons who practice at East Jefferson Hospital do not gain familiarity with any anesthesiologists other than Roux and Associates.” 686 F.2d, at 291. The record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by petitioners.

Thus, the hospital's requirement that its patients obtain necessary anesthesiological services from Roux combined the purchase of two distinguishable services in a single transaction. Nevertheless, the fact that this case involves a required purchase of two services that would otherwise be purchased sep-

anesthesiological services. That contract raises only an exclusive dealing question. The issue here is whether the hospital's insistence that its patients purchase anesthesiological services from Roux creates a tying arrangement.

³⁶ Testimony that patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists, was provided by Dr. Roux, Tr. 17, 20 (May 15, 1980, afternoon session), Dr. Hyde, Tr. 68-69, 72-74 (May 16, 1980), and other anesthesiologists as well, see Tr. 64, 87-88 (May 15, 1980) (testimony of Dr. Charles Eckert); Tr. at 25-30, 33-34 (May 16, 1980) (testimony of Dr. John Adriani).

rately does not make the Roux contract illegal. As noted above, there is nothing inherently anticompetitive about packaged sales. Only if patients are forced to purchase Roux's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of Roux. The fact that petitioners' patients are required to purchase two separate items is only the beginning of the appropriate inquiry.

IV

The question remains whether this arrangement involves the use of market power to force patients to buy services they would not otherwise purchase. Respondent's only basis for invoking the *per se* rule against tying and thereby avoiding analysis of actual market conditions is by relying on the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital. A preference of this kind, however, is not necessarily probative of significant market power.

Seventy per cent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. 513 F.Supp., at 539. Thus East Jefferson's "dominance" over persons residing in Jefferson Parish is far from overwhelming. The fact that a substantial majority of the parish's residents elect not to enter East Jefferson means that the geographic data does not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions. The Court of Appeals acknowledged as much; it recognized that East Jefferson's market share alone was insufficient as a basis to infer market power, and buttressed its conclusion by relying on "market imperfections" that permit petitioners to charge noncompetitive prices for hospital services: the prevalence of third party payment for health care costs reduces price competition, and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals. 686 F.2d, at 290. While these factors may generate "market power" in some abstract sense,⁴⁶ they do not generate the kind of market power that justifies condemnation of tying.

Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality competition does not create this type of forcing. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want—their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement—such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."

Thus, neither of the "market imperfections" relied upon by the Court of Appeals forces consumers to take anesthesiological services they would not select in the absence of a tie. It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least this record contains no evidence that the hospital "forced" any such services on unwilling patients. The record therefore does not provide a basis for applying the *per se* rule against tying to this arrangement.

⁴⁶ As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.

V

In order to prevail in the absence of *per se* liability, respondent has the burden of proving that the Roux contract violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists. This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract and might be statewide or merely local. There is, however, insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist. The evidence indicates that some surgeons and patients preferred respondent's services to those of Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.

In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges. Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges. If respondent is admitted to the staff of East Jefferson, the range of choice will be enlarged from four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain. Without a showing of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made.

VI

Petitioners' closed policy may raise questions of medical ethics, and may have inconvenienced some patients who would prefer to have their anesthesia administered by someone other than a member of Roux & Associates, but it does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful. There is no evidence that the price, the quality, or the supply or demand for either the "tying product" or the "tied product" involved in this case has been adversely affected by the exclusive contract between Roux and the hospital. It may well be true that the contract made it necessary for Dr. Hyde and others to practice elsewhere, rather than at East Jefferson. But there has been no showing that the market as a whole has been affected at all by the contract. Indeed, as we previously noted, the record tells us very little about the market for the services of anesthesiologists. Yet that is the market in which the exclusive contract has had its principal impact. There is simply no showing here of the kind of restraint on competition that is prohibited by the Sherman Act. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice O'CONNOR, with whom Chief Justice BURGER, Justice POWELL, and Justice REHNQUIST join, concurring in the judgment: *** I concur in the Court's decision to reverse but write separately to explain why I believe the Hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the Hospital and certain anesthesiologists, is properly analyzed under the Rule of Reason.

I

Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the tying product, sugar as the tied product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of general hospital services and operating room facilities (the tying service) to the sale of anesthesiologists' services (the tied services). The Court has on occasion applied a *per se* rule of illegality in actions alleging tying in violation of § 1 of the Sherman Act. *International Salt Co. v. United States*, [332 U.S. 392](#) (1947).

Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anti-competitive effect. See, e.g., *Northern Pacific R. Co. v. United States*, [356 U.S. 1, 5](#) (1958). ***

Some of our earlier cases did indeed declare that tying arrangements serve “hardly any purpose beyond the suppression of competition.” *Standard Oil Co. of California v. United States*, [337 U.S. 293, 305-306](#) (1949) (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have “sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product....” *Northern Pacific R. Co.*, *supra*, [356 U.S.](#), at 6. Without “control or dominance over the tying product,” the seller could not use the tying product as “an effectual weapon to pressure buyers into taking the tied item,” so that any restraint of trade would be “insignificant.” *Ibid.* The Court has never been willing to say of tying arrangements, as it has of price-fixing, division of markets and other agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect.

The “*per se*” doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement. As a result, tying doctrine incurs the costs of a rule of reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion than coherent law because it appears to invite lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.

The time has therefore come to abandon the “*per se*” label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever. This change will rationalize rather than abandon tie-in doctrine as it is already applied.

II

Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied product market, or that abet the harmful exercise of market power that the seller possesses in the tying product market. Under the rule of reason tying arrangements should be disapproved only in such instances.

*** The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the tying product. A seller with a monopoly on flour, for example,

cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour. Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted. See, e.g., R. Bork, *The Antitrust Paradox* 372-374 (1978).

Tying may be economically harmful primarily in the rare cases where power in the market for the tying product is used to create additional market power in the market for the tied product. The anti-trust law is properly concerned with tying when, for example, the flour monopolist threatens to use its market power to acquire additional power in the sugar market, perhaps by driving out competing sellers of sugar, or by making it more difficult for new sellers to enter the sugar market. But such extension of market power is unlikely, or poses no threat of economic harm, unless the two markets in question and the nature of the two products tied satisfy three threshold criteria.

In a regulated industry a firm with market power may be unable to extract a super-competitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.

Tying may also help the seller engage in price discrimination by “metering” the buyer’s use of the tying product. Price discrimination may be independently unlawful, see 15 U.S.C. § 13. Price discrimination may, however, decrease rather than increase the economic costs of a seller’s market power. *** But there is no need in this case to address the problem of price discrimination facilitated by tying. The discussion herein is aimed only at tying arrangements as to which no price discrimination is alleged.

First, the seller must have power in the tying product market. Absent such power tying cannot conceivably have any adverse impact in the tied-product market, and can be only pro-competitive in the tying product market. If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well.

*** Second, there must be a substantial threat that the tying seller will acquire market power in the tied-product market. No such threat exists if the tied-product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied product market are low. If, for example, there is an active and vibrant market for sugar—one with numerous sellers and buyers who do not deal in flour—the flour monopolist’s tying of sugar to flour need not be declared unlawful. If, on the other hand, the tying arrangement is likely to erect significant barriers to entry into the tied-product market, the tie remains suspect.

Third, there must be a coherent economic basis for treating the tying and tied products as distinct. All but the simplest products can be broken down into two or more components that are “tied together” in the final sale. Unless it is to be illegal to sell cars with engines or cameras with lenses, this analysis must be guided by some limiting principle. For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately without also purchasing the tying product. When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no additional market power by selling the two products together. If sugar is useless to consumers except when used with flour, the flour seller’s market power is projected into the sugar market whether or not the two products are actually sold together; the flour seller can exploit what market power it has over flour with or without the tie. The flour seller will therefore have little incentive to monopolize the sugar market unless it can produce and distribute sugar more cheaply than other sugar sellers. And in this unusual case, where flour is monopolized and sugar is useful only when used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.

Even when the tied product does have a use separate from the tying product, it makes little sense to label a package as two products without also considering the economic justifications for the sale of the package as a unit. When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry.

These three conditions—market power in the tying product, a substantial threat of market power in the tied product, and a coherent economic basis for treating the products as distinct—are only threshold requirements. Under the Rule of Reason a tie-in may prove acceptable even when all three are met. Tie-ins may entail economic benefits as well as economic harms, and if the threshold requirements are met these benefits should enter the Rule of Reason balance.

*** The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to “force” the buyer to purchase the tied product. For when the seller exerts market power only in the tying product market, it makes no difference to him or his customers whether he exploits that power by raising the price of the tying product or by “forcing” customers to buy a tied product. On the other hand, tying may make the provision of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.

III

Application of these criteria to the case at hand is straightforward.

Although the issue is in doubt, we may assume that the Hospital does have market power in the provision of hospital services in its area. The District Court found to the contrary, but the Court of Appeals determined that the Hospital does possess market power in an appropriately defined market. While appellate courts should normally defer to the District Court’s findings on such fact-bound questions, I shall assume for the purposes of this discussion that the Court of Appeals’ determination that the Hospital does have some power in the provision of hospital services in its local market is accepted.

Second, in light of the Hospital’s presumed market power, we may also assume that there is a substantial threat that East Jefferson will acquire market power over the provision of anesthesiological services in its market. By tying the sale of anesthesia to the sale of other hospital services the Hospital can drive out other sellers of those services who might otherwise operate in the local market. The Hospital may thus gain local market power in the provision of anesthesiology: anesthesiological services offered in the Hospital’s market, narrowly defined, will be purchased only from Roux, under the Hospital’s auspices.

But the third threshold condition for giving closer scrutiny to a tying arrangement is not satisfied here: there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the Hospital can acquire no additional market power by selling the two services together. Accordingly, the link between the Hospital’s services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the Hospital’s patients. In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.

Even if they are, the tying should not be considered a violation of § 1 of the Sherman Act because tying here cannot increase the seller’s already absolute power over the volume of production of the tied

product, which is an inevitable consequence of the fact that very few patients will choose to undergo surgery without receiving anesthesia. The Hospital-Roux contract therefore has little potential to harm the patients. On the other side of the balance, the District Court found, and the Court of Appeals did not dispute, that the tie-in conferred significant benefits upon the hospital and the patients that it served.

The tie-in improves patient care and permits more efficient hospital operation in a number of ways. From the viewpoint of hospital management, the tie-in ensures 24 hour anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively to monitor the quality of anesthesiological services. Further, the tying arrangement is advantageous to patients because, as the District Court found, the closed anesthesiology department places upon the hospital, rather than the individual patient, responsibility to select the physician who is to provide anesthesiological services. The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient. In assuming these responsibilities—responsibilities that a seriously ill patient frequently may be unable to discharge—the hospital provides a valuable service to its patients. And there is no indication that patients were dissatisfied with the quality of anesthesiology that was provided at the hospital or that patients wished to enjoy the services of anesthesiologists other than those that the hospital employed. Given this evidence of the advantages and effectiveness of the closed anesthesiology department, it is not surprising that, as the District Court found, such arrangements are accepted practice in the majority of hospitals of New Orleans and in the health care industry generally. Such an arrangement, that has little anti-competitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn. This conclusion reaffirms our threshold determination that the joint provision of hospital services and anesthesiology should not be viewed as involving a tie between distinct products, and therefore should require no additional scrutiny under the antitrust law.

IV

*** For these reasons I conclude that the Hospital-Roux contract does not violate § 1 of the Sherman Act. Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the Hospital may possess. The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the Hospital's decision to tie the two types of service. ***

Eastman Kodak Company v. Image Technical Services, Inc.

504 U.S. 451 (1992)

Justice BLACKMUN delivered the opinion of the Court: This is yet another case that concerns the standard for summary judgment in an antitrust controversy. The principal issue here is whether a defendant's lack of market power in the primary equipment market precludes—as a matter of law—the possibility of market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. Respondents are 18 independ-

ent service organizations (ISO's) that in the early 1980's began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability of parts to ISO's and to make it more difficult for ISO's to compete with Kodak in servicing Kodak equipment.

Respondents instituted this action in the United States District Court for the Northern District of California, alleging that Kodak's policies were unlawful under both § 1 and § 2 of the Sherman Act. After truncated discovery, the District Court granted summary judgment for Kodak. The Court of Appeals for the Ninth Circuit reversed. The appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets. It rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market. ***

I

A

Because this case comes to us on petitioner Kodak's motion for summary judgment, "[t]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 255](#) (1986).

Kodak manufactures and sells complex business machines—as relevant here, high-volume photocopiers and micrographic equipment. Kodak equipment is unique; micrographic software programs that operate on Kodak machines, for example, are not compatible with competitors' machines. Kodak parts are not compatible with other manufacturers' equipment, and vice versa. Kodak equipment, although expensive when new, has little resale value.

Kodak provides service and parts for its machines to its customers. It produces some of the parts itself; the rest are made to order for Kodak by independent original-equipment manufacturers (OEM's). Kodak does not sell a complete system of original equipment, lifetime service, and lifetime parts for a single price. Instead, Kodak provides service after the initial warranty period either through annual service contracts, which include all necessary parts, or on a per-call basis. It charges, through negotiations and bidding, different prices for equipment, service, and parts for different customers. Kodak provides 80% to 95% of the service for Kodak machines.

Beginning in the early 1980's, ISO's began repairing and servicing Kodak equipment. They also sold parts and reconditioned and sold used Kodak equipment. Their customers were federal, state, and local government agencies, banks, insurance companies, industrial enterprises, and providers of specialized copy and microfilming services. ISO's provide service at a price substantially lower than Kodak does. Some customers found that the ISO service was of higher quality.

Some ISO customers purchase their own parts and hire ISO's only for service. Others choose ISO's to supply both service and parts. ISO's keep an inventory of parts, purchased from Kodak or other sources, primarily the OEM's.²

In 1985 and 1986, Kodak implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines.

² In addition to the OEM's, other sources of Kodak parts include (1) brokers who would buy parts from Kodak, or strip used Kodak equipment to obtain the useful parts and resell them, (2) customers who buy parts from Kodak and make them available to ISO's, and (3) used equipment to be stripped for parts.

As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts. Kodak and the OEM's agreed that the OEM's would not sell parts that fit Kodak equipment to anyone other than Kodak. Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's. In addition, Kodak took steps to restrict the availability of used machines.

Kodak intended, through these policies, to make it more difficult for ISO's to sell service for Kodak machines. It succeeded. ISOs were unable to obtain parts from reliable sources, and many were forced out of business, while others lost substantial revenue. Customers were forced to switch to Kodak service even though they preferred ISO service.

B

In 1987, the ISO's filed the present action in the District Court, alleging, inter alia, that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of § 1 of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of § 2 of that Act.

Kodak filed a motion for summary judgment before respondents had initiated discovery. The District Court permitted respondents to file one set of interrogatories and one set of requests for production of documents and to take six depositions. Without a hearing, the District Court granted summary judgment in favor of Kodak. ***

II

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6 (1958). Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, [394 U.S. 495, 503](#) (1969).

Kodak did not dispute that its arrangement affects a substantial volume of interstate commerce. It, however, did challenge whether its activities constituted a "tying arrangement" and whether Kodak exercised "appreciable economic power" in the tying market. We consider these issues in turn.

A

For respondents to defeat a motion for summary judgment on their claim of a tying arrangement, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.

For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, [466 U.S. 2, 21-22](#) (1984). Evidence in the record indicates that service and parts have been sold separately in the past and still are sold separately to self-service equipment owners.⁵ Indeed, the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service.

⁵ The Court of Appeals found: "Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service."

Kodak insists that because there is no demand for parts separate from service, there cannot be separate markets for service and parts. By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. “We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices.” *Jefferson Parish*, [466 U.S., at 19, n. 30](#).

Kodak’s assertion also appears to be incorrect as a factual matter. At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service. Enough doubt is cast on Kodak’s claim of a unified market that it should be resolved by the trier of fact.

Finally, respondents have presented sufficient evidence of a tie between service and parts. The record indicates that Kodak would sell parts to third parties only if they agreed not to buy service from ISO’s.

B

Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. Market power is the power “to force a purchaser to do something that he would not do in a competitive market.” *Jefferson Parish*, [466 U.S., at 14](#). It has been defined as “the ability of a single seller to raise price and restrict output.” *Fortner*, [394 U.S., at 503](#). The existence of such power ordinarily is inferred from the seller’s possession of a predominant share of the market. *Jefferson Parish*, [466 U.S., at 17](#).

1

Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases of the tied market, service. Respondents provide evidence that certain parts are available exclusively through Kodak. Respondents also assert that Kodak has control over the availability of parts it does not manufacture. According to respondents’ evidence, Kodak has prohibited independent manufacturers from selling Kodak parts to ISO’s, pressured Kodak equipment owners and independent parts distributors to deny ISO’s the purchase of Kodak parts, and taken steps to restrict the availability of used machines.

Respondents also allege that Kodak’s control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISO’s were driven out of business by Kodak’s policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.

2

Kodak counters that even if it concedes monopoly share of the relevant parts market, it cannot actually exercise the necessary market power for a Sherman Act violation. This is so, according to Kodak, because competition exists in the equipment market. Kodak argues that it could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

In the Court of Appeals, however, respondents did not contest Kodak's assertion that its market shares indicated a competitive equipment market. *** Because respondents failed to bring their objections to the premise underlying the questions presented to our attention in their opposition to the petition for certiorari, we decide those questions based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market.

Kodak does not present any actual data on the equipment, service, or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any material fact" on the market power issue.

*** Kodak contends that there is no need to examine the facts when the issue is market power in the aftermarkets. A legal presumption against a finding of market power is warranted in this situation, according to Kodak, because the existence of market power in the service and parts markets absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive behavior.

*** Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable. To determine whether Kodak has met that burden, we must unravel the factual assumptions underlying its proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets.

The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, i.e., the "cross-elasticity of demand." See *Du Pont*, 351 U.S., at 400. Kodak's proposed rule rests on a factual assumption about the cross-elasticity of demand in the equipment and aftermarkets: "If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests." Kodak argues that the Court should accept, as a matter of law, this "basic economic realit[y]," *id.*, at 24, that competition in the equipment market necessarily prevents market power in the aftermarkets.

Even if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets. The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales. Kodak's claim that charging more for service and parts would be "a short-run game," is based on the false dichotomy that there are only two prices that can be charged—a competitive price or a ruinous one. But there could easily be a middle, optimum price at which the increased revenues from the higher priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales. The fact that the equipment market imposes a restraint on prices in the aftermarkets by no means disproves the existence of power in those markets. Thus, contrary to Kodak's assertion, there is no immutable physical law—no "basic economic reality"—insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

We next consider the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that respondents' assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable?

To review Kodak's theory, it contends that higher service prices will lead to a disastrous drop in equipment sales. Presumably, the theory's corollary is to the effect that low service prices lead to a dramatic increase in equipment sales. According to the theory, one would have expected Kodak to take advantage of lower priced ISO service as an opportunity to expand equipment sales. Instead, Kodak adopted a restrictive sales policy consciously designed to eliminate the lower priced ISO service, an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory. Yet, according to the record, it has done neither. Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.

Kodak and the United States attempt to reconcile Kodak's theory with the contrary actual results by describing a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment." Brief for United States as *Amicus Curiae* 18. In other words, Kodak could charge subcompetitive prices for equipment and make up the difference with supra-competitive prices for service, resulting in an overall competitive price. This pricing strategy would provide an explanation for the theory's descriptive failings—if Kodak in fact had adopted it. But Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service. Instead, it claims that it prices its equipment comparably to its competitors and intends that both its equipment sales and service divisions be profitable.

Moreover, this hypothetical pricing strategy is inconsistent with Kodak's policy toward its self-service customers. If Kodak were underpricing its equipment, hoping to lock in customers and recover its losses in the service market, it could not afford to sell customers parts without service. In sum, Kodak's theory does not explain the actual market behavior revealed in the record.

Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create a less responsive connection between service and parts prices and equipment sales.

For the service-market price to affect equipment demand, consumers must inform themselves of the total cost of the "package"—equipment, service, and parts—at the time of purchase; that is, consumers must engage in accurate lifecycle pricing. Lifecycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime," and losses incurred from downtime.

Much of this information is difficult—some of it impossible—to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a decreased need for repair, or new warranties. In addition, the information is likely to be customer-specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of down-time.

Kodak acknowledges the cost of information, but suggests, again without evidentiary support, that customer information needs will be satisfied by competitors in the equipment markets. It is a question of fact, however, whether competitors would provide the necessary information. A competitor in the equipment market may not have reliable information about the lifecycle costs of complex equipment it does not service or the needs of customers it does not serve. Even if competitors had the relevant

information, it is not clear that their interests would be advanced by providing such information to consumers.

Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to compile the information. Similarly, some consumers, such as the Federal Government, have purchasing systems that make it difficult to consider the complete cost of the “package” at the time of purchase. State and local governments often treat service as an operating expense and equipment as a capital expense, delegating each to a different department. These governmental entities do not lifecycle price, but rather choose the lowest price in each market.

As Kodak notes, there likely will be some large-volume, sophisticated purchasers who will undertake the comparative studies and insist, in return for their patronage, that Kodak charge them competitive lifecycle prices. Kodak contends that these knowledgeable customers will hold down the package price for all other customers. There are reasons, however, to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too. As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by supracompetitive pricing in the service market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed. A seller could easily price discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.

Given the potentially high cost of information and the possibility that a seller may be able to price discriminate between knowledgeable and unsophisticated consumers, it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.

Indeed, respondents have presented evidence that Kodak practices price discrimination by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party service companies. Companies that have their own service staff are likely to be high-volume users, the same companies for whom it is most likely to be economically worthwhile to acquire the complex information needed for comparative lifecycle pricing.

A second factor undermining Kodak’s claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product. If the cost of switching is high, consumers who already have purchased the equipment, and are thus “locked in,” will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers.

Moreover, if the seller can price discriminate between its locked-in customers and potential new customers, this strategy is even more likely to prove profitable. The seller could simply charge new customers below-marginal cost on the equipment and recoup the charges in service, or offer packages with lifetime warranties or long-term service agreements that are not available to locked-in customers.

Respondents have offered evidence that the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, makes switching costs very high for existing Kodak customers. And Kodak's own evidence confirms that it varies the package price of equipment/parts/service for different customers.

In sum, there is a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another.

We conclude, then, that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so. It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any long-term loss. Viewing the evidence in the light most favorable to respondents, their allegations of market power "mak[e] ... economic sense." Cf. *Matsushita*, [475 U.S. at 587](#).

Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of deterring procompetitive conduct. Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." *Id.*, at 594. Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly" and would "chill the very conduct the antitrust laws are designed to protect." *Ibid.* But the facts in this case are just the opposite. The alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.

Kodak contends that, despite the appearance of anti-competitiveness, its behavior actually favors competition because its ability to pursue innovative marketing plans will allow it to compete more effectively in the equipment market. A pricing strategy based on lower equipment prices and higher aftermarket prices could enhance equipment sales by making it easier for the buyer to finance the initial purchase. It is undisputed that competition is enhanced when a firm is able to offer various marketing options, including bundling of support and maintenance service with the sale of equipment. Nor do such actions run afoul of the antitrust laws. But the procompetitive effect of the specific conduct challenged here, eliminating all consumer parts and service options, is far less clear.

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment.

For the foregoing reasons, we hold that Kodak has not met the requirements of Federal Rule of Civil Procedure 56(c). We therefore affirm the denial of summary judgment on respondents' § 1 claim.

III

Respondents also claim that they have presented genuine issues for trial as to whether Kodak has monopolized, or attempted to monopolize, the service and parts markets in violation of § 2 of the Sher-

man Act. “The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, [384 U.S., at 570-571](#).

A

The existence of the first element, possession of monopoly power, is easily resolved. As has been noted, respondents have presented a triable claim that service and parts are separate markets, and that Kodak has the “power to control prices or exclude competition” in service and parts. *Du Pont*, [351 U.S., at 391](#). Monopoly power under § 2 requires, of course, something greater than market power under § 1. Respondents’ evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2.

Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. Because service and parts for Kodak equipment are not interchangeable with other manufacturers’ service and parts, the relevant market from the Kodak equipment owner’s perspective is composed of only those companies that service Kodak machines. This Court’s prior cases support the proposition that in some instances one brand of a product can constitute a separate market. The proper market definition in this case can be determined only after a factual inquiry into the “commercial realities” faced by consumers. *United States v. Grinnell Corp.*, [384 U.S., at 572](#).

B

The second element of a § 2 claim is the use of monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” *United States v. Griffith*, [334 U.S. 100, 107](#) (1948). If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2.³²

As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether “valid business reasons” can explain Kodak’s actions. *Id.*, at 605. Kodak contends that it has three valid business justifications for its actions: “(1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak’s inventory costs; and (3) to prevent ISOs from free-riding on Kodak’s capital investment in equipment, parts and service.” Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

Kodak first asserts that by preventing customers from using ISO’s, “it [can] best maintain high quality service for its sophisticated equipment” and avoid being “blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO.” *Id.*, at 6-7.

³² It is true that as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.

Respondents have offered evidence that ISO's provide quality service and are preferred by some Kodak equipment owners. This is sufficient to raise a genuine issue of fact.

Moreover, there are other reasons to question Kodak's proffered motive of commitment to quality service; its quality justification appears inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price, and its self-service policy. Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from inferior ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other. In addition, because self-service customers are just as likely as others to blame Kodak equipment for breakdowns resulting from (their own) inferior service, Kodak's willingness to allow self-service casts doubt on its quality claim. In sum, we agree with the Court of Appeals that respondents "have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pre-textual." [903 F.2d, at 618](#).

There is also a triable issue of fact on Kodak's second justification—controlling inventory costs. As respondents argue, Kodak's actions appear inconsistent with any need to control inventory costs. Presumably, the inventory of parts needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISO's perform the repair. More importantly, the justification fails to explain respondents' evidence that Kodak forced OEM's, equipment owners, and parts brokers not to sell parts to ISO's, actions that would have no effect on Kodak's inventory costs.

Nor does Kodak's final justification entitle it to summary judgment on respondents' § 2 claim. Kodak claims that its policies prevent ISO's from "exploit[ing] the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues." Brief for Petitioner 7-8. Kodak does not dispute that respondents invest substantially in the service market, with training of repair workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law. To the contrary, as the Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously.

None of Kodak's asserted business justifications, then, are sufficient to prove that Kodak is "entitled to a judgment as a matter of law" on respondents' § 2 claim. Fed. Rule Civ. Proc. 56(c).

IV

In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anti-competitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice O'CONNOR and Justice THOMAS join, dissenting: This is not, as the Court describes it, just "another case that concerns the standard for summary judgment in an antitrust controversy." Rather, the case presents a very narrow—but extremely important—

question of substantive antitrust law: whether, for purposes of applying our *per se* rule condemning “ties,” and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer’s conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of “market,” or even “monopoly,” power in wholly derivative aftermarket for that equipment. In my view, the Court supplies an erroneous answer to this question, and I dissent.

*** The Court today finds in the typical manufacturer’s inherent power over its own brand of equipment—over the sale of distinctive repair parts for that equipment, for example—the sort of “monopoly power” sufficient to bring the sledgehammer of § 2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products “market power” sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court’s opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition. ***

II

*** A

We must assume, for purposes of deciding this case, that petitioner is without market, much less monopoly, power in the interbrand markets for its micrographic and photocopying equipment.

Had Kodak—from the date of its entry into the micrographic and photocopying equipment markets—included a lifetime parts and service warranty with all original equipment, or required consumers to purchase a lifetime parts and service contract with each machine, that bundling of equipment, parts, and service would no doubt constitute a tie under the tests enunciated in *Jefferson Parish*. Nevertheless, it would be immune from *per se* scrutiny under the antitrust laws because the tying product would be equipment, a market in which (we assume) Kodak has no power to influence price or quantity. The same result would obtain, I think, had Kodak—from the date of its market entry—consistently pursued an announced policy of limiting parts sales in the manner alleged in this case, so that customers bought with the knowledge that aftermarket support could be obtained only from Kodak. The foreclosure of respondents from the business of servicing Kodak’s micrographic and photocopying machines in these illustrations would be undeniably complete—as complete as the foreclosure described in respondents’ complaint. Nonetheless, we would inquire no further than to ask whether Kodak’s market power in the equipment market effectively forced consumers to purchase Kodak micrographic or photocopying machines subject to the company’s restrictive aftermarket practices. If not, that would end the case insofar as the *per se* rule was concerned. The evils against which the tying prohibition is directed would simply not be presented. Interbrand competition would render Kodak powerless to gain economic power over an additional class of consumers, to price discriminate by charging each customer a “system” price equal to the system’s economic value to that customer, or to raise barriers to entry in the interbrand equipment markets. ***

As to Kodak copiers, Kodak’s restrictive parts policy had a broader foundation: Considered in the light most favorable to respondents, the record suggests that, from its inception, the policy was applied to new and existing copier customers alike. But at least all post-1985 purchasers of micrographic

equipment, like all post-1985 purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) squarely within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known. Thus, under the Court's approach the existence vel non of such evidence is determinative of the legal standard (the per se rule versus the rule of reason) under which the alleged tie is examined. In my judgment, this makes no sense. It is quite simply anomalous that a manufacturer functioning in a competitive equipment market should be exempt from the per se rule when it bundles equipment with parts and service, but not when it bundles parts with service. This vast difference in the treatment of what will ordinarily be economically similar phenomena is alone enough to call today's decision into question.

B

In the Court of Appeals, respondents sought to sidestep the impediment posed by interbrand competition to their invocation of the per se tying rule by zeroing in on the parts and service "aftermarkets" for Kodak equipment. By alleging a tie of parts to service, rather than of equipment to parts and service, they identified a tying product in which Kodak unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines. The Court today holds that such a facial showing of market share in a single-brand aftermarket is sufficient to invoke the per se rule. The existence of even vibrant interbrand competition is no defense.

I find this a curious form of market power on which to premise the application of a per se proscription. It is enjoyed by virtually every manufacturer of durable goods requiring aftermarket support with unique, or relatively unique, goods. *** A tying arrangement "forced" through the exercise of such power no more implicates the leveraging and price discrimination concerns behind the per se tying prohibition than does a tie of the foremarket brand to its aftermarket derivatives, which—as I have explained—would not be subject to per se condemnation. ***

In the absence of interbrand power, a seller's predominant or monopoly share of its single-brand derivative markets does not connote the power to raise derivative market prices generally by reducing quantity. As Kodak and its principal *amicus*, the United States, point out, a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support. ***

The Court attempts to counter this theoretical point with a theory of its own. It says that there are "information costs"—the costs and inconvenience to the consumer of acquiring and processing life-cycle pricing data for Kodak machines—that "could create a less responsive connection between service and parts prices and equipment sales." But this truism about the functioning of markets for sophisticated equipment cannot create "market power" of concern to the antitrust laws where otherwise there is none. "Information costs," or, more accurately, gaps in the availability and quality of consumer information, pervade real-world markets; and because consumers generally make do with "rough cut" judgments about price in such circumstances, in virtually any market there are zones within which otherwise competitive suppliers may overprice their products without losing appreciable market share. We have never suggested that the principal players in a market with such commonplace informational deficiencies (and, thus, bands of apparent consumer pricing indifference) exercise market power in any sense relevant to the antitrust laws. ***

I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie's actual anticompetitive effect in the tied product market, together with its potential economic

benefits, can be fully captured in the analysis. Disposition of this case does not require such an examination, however, as respondents apparently waived any rule-of-reason claim they may have had in the District Court. I would thus reverse the Ninth Circuit's judgment on the tying claim outright.

III

These considerations apply equally to respondents' § 2 claims. An antitrust defendant lacking relevant "market power" sufficient to permit invocation of the per se prohibition against tying a fortiori lacks the monopoly power that warrants heightened scrutiny of his allegedly exclusionary behavior. Without even so much as asking whether the purposes of § 2 are implicated here, the Court points to Kodak's control of "100% of the parts market and 80% to 95% of the service market," markets with "no readily available substitutes," and finds that the proffer of such statistics is sufficient to fend off summary judgment. But this showing could easily be made, as I have explained, with respect to virtually any manufacturer of differentiated products requiring aftermarket support. By permitting antitrust plaintiffs to invoke § 2 simply upon the unexceptional demonstration that a manufacturer controls the supplies of its single-branded merchandise, the Court transforms § 2 from a specialized mechanism for responding to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts.

In my view, if the interbrand market is vibrant, it is simply not necessary to enlist § 2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers. Because this case comes to us on the assumption that Kodak is without such interbrand power, I believe we are compelled to reverse the judgment of the Court of Appeals. I respectfully dissent.
