was abundant evidence to support it. Hence the existence of power on the part of members of the combination to fix prices was but a conclusion from the finding that the buying programs caused or contributed to the rise and stability of prices.

As to knowledge or acquiescence of officers of the Federal government little need be said. The fact that Congress through utilization of the precise methods here employed could seek to reach the same objectives sought by respondents does not mean that respondents or any other group may do so without specific Congressional authority. Admittedly no approval of the buying programs was obtained under the National Industrial Recovery Act prior to its termination on June 16, 1935, (§2(c)) which would give immunity to respondents from prosecution under the Sherman Act. Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained. . . . Accordingly we conclude that the Circuit Court of Appeals erred in reversing the judgments on this ground.[43]

209. (a) What is *Socony*'s rule?

(b) Does its famous footnote 59 indicate that power over price is presumed to exist, or that it is irrelevant?[44] To assess the latter question, consider the situation in which all local producers agree to sell at a fixed price but the market is national and the local producers are but a modest fraction of the market. Illegal under *Socony*? Must effects be demonstrated? Would power be a sufficient basis to presume effects? What do you suppose is the purpose or intent of these producers? Should the law presume power or effect from intent?

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the central nervous system of the economy. *See* Handler, *Federal Anti-Trust Laws — A Symposium* (1931), pp. 91 et seq.

The existence or exertion of power to accomplish the desired objective (*United States Steel*; United States v. International Harvester Co., 274 U.S. 693, 708, 709) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of §2 of the Act. An intent and a power to produce the result which the law condemns are then necessary. As stated in Swift & Co. v. United States, 196 U.S. 375, 396, ". . . when that intent and the consequent dangerous probability exists, this statute, like many others, and like the common law in some cases, directs itself against dangerous probability as well as against the completed result." But the crime under §1 is legally distinct from that under §2 (United States v. MacAndrews & Forbes Co., 149 F. 836; United States v. Buchalter, 88 F.2d 625) though the two sections overlap in the sense that a monopoly under §2 is a species of restraint of trade under §1. *Standard Oil*; Patterson v. United States, [222 F. at] 620. Only a confusion between the nature of the offenses under those two sections (*see* United States v. Nelson, 52 F. 646; United States v. Patterson, 55 F. 605; Chesapeake & O. Fuel Co. v. United States, 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under §1. *Cf.* State v. Eastern Coal Co., 29 R.I. 254; State v. Scollard, 126 Wash. 335.

43. Roberts and McReynolds, JJ., dissented. Hughes, C.J., and Murphy, J., did not participate.

44. Some economists have argued that the buying programs in *Socony* could not have fixed the price of gasoline. *See* D. Johnson, *Property Rights to Cartel Rents: The Socony-Vacuum Story*, 34 J.L. & Econ. 177 (1991).

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(c) Is the arrangement in this case a more clear-cut instance of price fixing than that in *Appalachian Coals?*[45] Than that in *Chicago Board?* Does the Court effectively distinguish those cases?[46]

(d) Compare the vision of the economy and market forces expressed in this case with that expressed in *Appalachian Coals.*

210. At a recent class reunion, the managing partner in the law firm of Billings & Prophet was complaining to classmates about the outrageously high salaries paid to associates these days and the inevitable increases to follow in the upcoming year. Alan Alum, a big partner in another leading firm in the same city, suggested that they all simply agree not to increase associates' salaries for the next few years. These conversations continued with partners at the other large firms in their city over the next few weeks, resulting in an agreement to cap associates' salaries, passing some of the savings on to clients through lower billing rates.

(a) Illegal under *Socony?* Is it a defense that prices are lower and thus necessarily more reasonable?[47]

(b) Suppose instead that the firms reach an agreement on billings alone, such that each will charge no more than $300 per hour for a first-year associate. Is this price maximum legal?[48]

211. There is one local smelter of a rare metal that is made in small quantities from huge amounts of ore mined by a large number of local companies. The smelter faces competition in the national market from smelters located elsewhere, but it is too costly for local mines to ship their ore to any firm but the local smelter. The local smelter takes advantage of the situation by offering lower than competitive prices for ore. In response to this exploitation, the local mines form a joint sales agency so that they can bargain with the smelter as a unified group.

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45. Is the agreement in this case definite enough to be a contract in the usual sense? For purposes of Sherman Act §1? These issues are explored further in Ch. 2C.

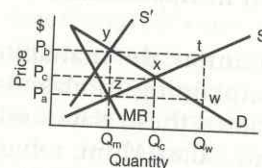
46. Only Justice Stone was in the majority in both *Appalachian Coals* and *Socony*. Of the other two justices involved in both, Justice Roberts went from the majority in the first to the dissenting group in *Socony*, and, interestingly enough, Justice McReynolds — the only dissenter in *Appalachian Coals* — also dissented in *Socony*. Two of the justices in *Trenton Potteries*, including Justice Stone, who wrote that opinion, were also in the majority in *Appalachian Coals*, while only one remaining justice from the *Trenton Potteries* majority dissented in the latter case.

47. This is the case of monopsony, which is the mirror image of monopoly: A single buyer depresses price and purchases a smaller quantity than is the case with competition on the buyers' side of the market. This is developed further in a more complex context in note 49. *See* Reid Bros. Logging Co. v. Ketchikan Pulp Co., 1981 Trade Cas. ¶64228 (W.D. Wash.), aff'd, 692 F.2d 1292 (9th Cir.), cert. denied, 464 U.S. 916 (1983) (violation where defendants artificially depressed prices by agreeing not to compete against each other in bidding to purchase timber and logs). *Compare* Ch. 2B, note 23 (cases upholding arrangements where an insurance company acts as a single buyer on behalf of insureds). For further analysis of monopsony, *see* R. Blair & J. Harrison, *Public Policy: Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 Nw. U.L. Rev. 331 (1992); J. Jacobson & G. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 Antitr. Bull. 1 (1991).

48. Maximum price fixing is addressed in *Maricopa*, Ch. 2B, which also contains a discussion of the earlier Supreme Court case on the subject, *Kiefer-Stewart*.

(a) Is this combination desirable?[49]

49. Some of the economic implications of this situation are portrayed in the following diagram.



Curve *D* represents the smelter's demand for ore (and is, of course, a function of the demand for the product it sells in a highly competitive market). It slopes downward to indicate the usual fact that smelters will want more of the product at lower prices. Curve *MR* describes the miners' marginal revenue and indicates how their aggregate revenue responds to increasing sales to the smelters. *See* ¶112, note 29. Curve *S* is the supply curve for ore, indicating the amount of ore that competitive miners would find it profitable to supply at each price. It slopes upward to indicate the usual fact that higher prices are needed to induce a larger supply. Viewing the suppliers collectively, it is the local mining marginal cost curve. (The sense in which this is true is that at any given price, each mine will produce until its marginal cost rises to equal that price; if we add up the quantities that each mine produces, we get the aggregate quantity supplied by the industry, so that at any level of aggregate supply, the marginal cost of each firm contributing to that supply can be read off of curve *S*.) Curve *S'* is derived from it and indicates the incremental sums that the smelter will have to pay for ore as it increases its demand for ore; it is the marginal ore cost to the smelter (as compared with *S*, which represents the marginal cost to the miners of devoting additional resources to the production of ore). To reduce clutter in the diagram, the curves have been drawn such that Q_m describes both the *S'-D* and the *S-MR* intersections. These intersections need not occur at a single quantity, however, because the *D* and *MR* curves are entirely independent of the *S* and *S'* curves.

(1) When both smelters and miners are acting competitively, the *D-S* intersection at point *x* governs and indicates output Q_c and price P_c.

(2) When miners are competitive but there is only one buyer or a buying cartel, production will occur where the buyer's marginal cost (indicated by *S'*) equals the value of the ore (indicated by *D*). This is referred to as the monopsony result. *See* note 47. The *S'-D* intersection at point *y* indicates quantity Q_m, which competing miners are willing to supply at price P_a (indicated by the *S-*Q_m intersection at point *z*). Note that buyers acting individually would demand the larger quantity of ore Q_w when the ore price is P_a (indicated by the *D-*P_a intersection at point *w*). But that supply would not be forthcoming at the monopsony price P_a.

(3) When the buying side of the market is competitive but miners sell through a price-fixing cartel, the miners will produce up to the point where incremental revenue just equals incremental cost. This happens to occur at output Q_m (indicated by the *S-MR* intersection at point *z*). Competing buyers would pay price P_b for that quantity (indicated by the *D-*Q_m intersection at point *y*). At that price, miners acting individually would want to supply Q_w (indicated by the *S-*P_b intersection at point *t*). To maintain the cartel selling price, the miners must apportion sales quotas among themselves. This is the standard cartel case.

(4) Where both a miners' selling cartel and a producer's monopsony or buying cartel lack alternative outlets or sources, the buyer and seller groups will bargain with each other. They will find it in their mutual interest to agree upon the quantity of ore that maximizes their joint profits, which is quantity Q_c. Their disagreement would focus on the division of the bargaining surplus. Of course, if bargaining is imperfect (due, say, to each party's uncertainty about the marginal value of ore to the other party), the result may not be as desirable.

(5) It may be the case that a countervailing power cartel would reduce competition in other markets. For example, the cartel of mining companies might create monopsony power in the local labor market or, in other instances, a buying cartel may create monopoly power in the market in which the buyers sell. *See* ¶201h & note 25.

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(b) Is it lawful?

(c) If the local smelter were instead a cartel of local smelters or an illegally created monopoly, should "self-defense" be recognized?

212. Per se rules. (a) *Rationale.* You have already seen that price fixing among competitors has been declared to be unlawful per se. The rationale for so hostile a legal approach has also been developed. To review it, reconsider the sorts of questions raised in ¶201i. (1) Is price fixing ever beneficial? (2) Are some pernicious effects likely to be found in all or most manifestations of price fixing? (3) If price fixing is permitted in at least some cases, is any follow-up regulation required? Are the available institutions enforcing antitrust laws suitable for that purpose? (4) Are those enforcement agencies likely to be able to make reliable judgments in particular cases about the benefits of price fixing, the degree of harm, or the continuing adjustments necessary if ill effects are not to get out of hand? (5) Is an absolute prohibition particularly useful here to dissuade potential price fixers, either by the clarity of the prohibition or by the severe sanctions that accompany a categorical prohibition?

(b) *Meaning: scope of inquiry.* What does it mean to say that a particular practice, such as price fixing, is unlawful per se? Does it mean that illegality does not depend on the proof of anticompetitive effects in the particular case or proof of power to bring about such effects or proof of an intent to do so? Does it rather mean — or does it also mean — that no exculpatory justification will ever be considered?

(c) *Meaning: coverage of category.* Whenever *X* is declared to be unlawful per se in any of the senses just noted, one must often determine whether conduct challenged in a particular case falls within the *X* category. Difficulties are at least three. First, the initial definition of *X* may be uncertain, vague, or potentially all-embracing. Second, although apparently clear, at least at its core, the definition of any *X* may be difficult to apply to the particular conduct before the tribunal. Third, the conduct challenged in some instances will appear to fit within the *X* per se pigeonhole, which implies that the conduct is unlawful. The court will hesitate to reach this result, however, with respect to activities that have not yet been analyzed by any court and determined to be harmful in the generality of cases. This is particularly true when it is apparent, at least prima facie, that there may be some good reason to permit the practice. In such a situation, the court will feel a strong impulse (1) to believe that the particular conduct before it is not really *X* at all or (2) to create an exception if the legal classification seems ordained by linguistic analysis.

The issues raised in the latter two subparagraphs have in fact provided the impetus for much of the post-*Socony* development of many branches of antitrust law. The material in the following section — as well as that in Chapter 2E on concerted refusals to deal — will address these issues further in the context of Sherman Act §1.[50]

50. Per se rules will also be addressed in other contexts, most notably tying. *See* Ch. 4B.

2B. DETERMINING WHICH RESTRAINTS ARE REASONABLE

213. Introduction. After the broad pronouncement in *Socony,* one might have thought that any agreement among competitors having any effect on price would be prohibited. Yet it was clear from the earliest Sherman Act cases examined in Chapter 2A that some restraints having such an effect—for example, agreements not to compete among partners or by one selling a business—were permitted. Neither *Trenton Potteries* nor *Socony* purported to reverse *Standard Oil*'s rule of reason. Many of the cases in the remainder of this chapter and elsewhere in the book focus on whether a particular set of practices is to be prohibited per se or governed under a more open-ended, case-by-case rule of reason approach and what such an approach should entail. This section explores more recent "price-fixing" cases in which the desirability of per se prohibition in a particular situation was called into question, but in a manner not necessarily inconsistent with a general prohibition of pure cartel behavior.

In reading the following cases, bear in mind three kinds of questions. First, should the challenged conduct be condemned out of hand and without further inquiry because it fixes prices? Is there a reasonable likelihood that conduct of this kind can benefit the economy? Are pernicious effects likely to accompany most concrete manifestations of this kind of conduct? If not, is it likely that any harm that does occur will be significant? If significant can its concrete manifestations be detected fairly readily? If pernicious effects are likely to be frequent, an absolute prohibition might be justifiable whenever benefits are infrequent or benefits likely to occur most frequently are relatively small. If any significant benefits that do occur are readily detectable, they might be considered as a limited exception to a general prohibition. Are the dangers attending this kind of conduct so great and the temptations to engage in it so strong that the public must be protected by an absolute rule discouraging this conduct both by the clarity of its prohibition and by the severe sanctions with which we comfortably enforce clear rules? Does toleration of the conduct imply a burden of continuing supervision? Is there any agency readily available to carry that burden?

Second, if further inquiry is to be made in the particular case, who should bear the burdens of proof and persuasion? (1) When harm is unknown, conceivable but speculative, not improbable, probable but small, or very likely to occur and be serious? (2) When benefits are not claimed, are claimed but speculative and small, or are probable and significant? (3) When socially desirable objectives might conceivably be achieved by means substantially less dangerous to competition but where those less restrictive alternatives are not mentioned or explored in the record, might be substantially more burdensome to the parties, or are proved to be much more burdensome? Moreover, if the general rule is a per se prohibition, justified in significant part by the desire to avoid complex, costly, and time-consuming inquiry, what showing should be required before a court should feel compelled to consider further information?

Third, how should we decide the actual case, having regard both to the general characteristics of the type of behavior involved and also to its immediate manifestation? And how should the rule be formulated for future cases?

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214. Cartel variations. As already illustrated by cases such as *Socony,* agreements limiting competition among members do not always involve the direct fixing of a group price. Because doubts concerning an across-the-board prohibition have often arisen in cases involving other sorts of restrictions, a few of the most important variations—some the subject of the cases to follow—will be explored briefly at the outset.

(a) *Allocating markets.* Simple price fixing allows each competitor to sell at the monopoly price without the fear that others will undercut that price, thereby taking away one's customers. Territorial agreements and other forms of specialization sometimes permit the same result. If landscaping companies divide a region into exclusive territories, each would face no competition as to the customers it serves and thus would be free to charge the monopoly price.

In some instances, a division of product or geographic markets among competitors might permit more efficient production or marketing. Competitors may agree to abandon some products or areas and concentrate on others in order to achieve economies of scale and specialization. Greater efficiency through the more rational organization of production is a favorite argument in defense of cartels. But an agreement typically would be unnecessary to achieve such efficiencies; profitable specialization, for example, will usually be pursued by each firm without agreeing with its rivals.[1] Speaking generally, the courts have usually subjected horizontal market division agreements to the same rules as price-fixing agreements.[2]

(b) *Other limits on price competition.* As we have seen, competitors might agree on minimum or maximum prices, buying or selling prices, limitation of their own output, or removal from the market of "excess" supply in the hands of others. Competitors also have been known to avoid competitive bidding[3] or to agree on formulae for the allocation of business or the determination of price. They might agree to rotate bids (where they take turns submitting low bids); circulate price lists;[4] charge published prices[5] or at least begin bargaining from list prices;[6] fix trade-in allowances,[7] discounts,[8] or mark-ups; or set the price spread between premium and lesser products. And although there are important differences, price-fixing effects

1. *Cf.* ¶¶201d-h.
2. Related problems will be addressed in Ch. 4A.
3. Illustrations include *Engineers,* later in this section, and *Reid Bros. Logging Co.,* Ch. 2A, note 47.
4. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (county bar association fixed prices unlawfully by suggesting fees with intimation that undercutting would be grounds for discipline).
5. United States v. American Linseed Oil Co., 262 U.S. 371 (1923).
6. Plymouth Dealers Assn. v. United States, 279 F.2d 128 (9th Cir. 1960).
7. *Id.*
8. Catalano v. Target Sales, 446 U.S. 643, 648 (1980) (reversing, per curiam, decision failing to find that an agreement to eliminate short-term trade credit was per se illegal price fixing; "interest-free credit for a period of time is equivalent to giving a discount" on price).

may be implicit in the use of joint buying or selling agents[9] and other forms of joint ventures considered later in this section.

UNITED STATES v. TOPCO ASSOCIATES
405 U.S. 596 (1972)

Justice MARSHALL. [The United States sued to enjoin Topco Associates, Inc. (Topco) from violating §1 of the Sherman Act. Topco is a cooperative association of approximately 25 small to medium sized regional supermarket chains that operate in 33 states. It was founded in the 1940s by a group of small, local chains, which desired to cooperate to obtain high quality merchandise under private labels in order to compete more effectively with larger national and regional chains.[10] By 1967, sales of Topco members exceeded $2.3 billion; only A & P, Safeway, and Kroger boasted larger figures. In their respective areas, member chains had market shares ranging from 1.5 to 16 percent, with 6 percent being average. Although relevant figures for the national chains were unavailable, Topco members were frequently in as strong a competitive position. This strength was due, in some measure, to the success of Topco brand products.

The agreement among member chains limited each to selling Topco products in a designated territory. Most licenses were exclusive, and even those allowing some overlap generally resulted in de facto exclusivity. The district court concluded that, even though this agreement prevented competition in Topco brand products, the increased ability of Topco members to compete with others outweighed any anticompetitive effect.]

III . . .

It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act. . . . One of the classic examples of a per se violation of §1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, e.g., manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." White Motor Co. v. United States, 372 U.S. 253, 263 (1963). Such limitations are per se violations of the Sherman Act. *See Addyston Pipe,* United States v. National Lead Co., 332

9. Recall *Appalachian Coals,* ¶208.

10. The founding members thought that part of their difficulty was attributable to the ability of large chains to develop private label programs. Private label products, unlike standard brand name products, are generally identified by and sold only in particular stores. Using private label products, it was thought that large chains achieved cost economies in purchasing, transportation, warehousing, promotion, and advertising as well as enabling them to bargain more favorably with national brand manufacturers. — EDS.

U.S. 319 (1947); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); *Northern Pacific;* Citizen Publishing v. United States, 394 U.S. 131 (1969); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 390 (1967) (Stewart, J., concurring in part and dissenting in part); Serta Associates Inc. v. United States, 393 U.S. 534 (1969), aff'g, 296 F. Supp. 1121, 1128 (N.D. Ill. 1968).

We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a per se violation of §1. . . .

If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision-making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data which would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required. . . .

* * *

[Justice Blackmun, concurring in the result, expressed dissatisfaction with the likely consequences of the Court's decision but felt that the per se rule was "so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation."

Chief Justice Burger, in dissent, rejected the notion that the per se rule was so entrenched, primarily because this case did not involve price fixing as part of the allegations. In contrast, many prior horizontal market division cases typically involved price fixing as well, and restraints were designed solely to suppress competition rather than being ancillary, as here, to the creation of the new private label product line that aided Topco members in competing with large grocery chains. Given his view that the Court was "establishing a new per se rule," he thought it necessary to consider the situation in the case. The restraints should be permitted because "the invalidation of the restraints here at issue 'would not increase competition in Topco private label brands.' Indeed, the District Court seemed to believe that it would, on the contrary, lead to the likely demise of those brands in time." He referred to the fact that "[t]here was no such thing as a Topco line of products until this cooperative was formed" and that the endeavor was necessary to make economically feasible quality control, purchasing large quantities at bulk prices, and the like.][11]

11. On remand, the district court entered a decree permitting Topco to designate areas of prime responsibility for each member, designate the locations for which trademark licenses are issued, determine the warehouse locations to which Topco will ship, and make arrangements for reasonable compensation for the goodwill developed by one member when another member sells Topco products in its area. The government objected and appealed, but the Supreme Court affirmed. United States v. Topco Assoc., 1973 WL 805 (N.D. Ill.), aff'd mem., 414 U.S. 801 (1973).

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reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." The court recognized that "antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market." But, the court found that "reverse payment settlements of patent litigation presen[t] atypical cases because one of the parties owns a patent." Patent holders have a "lawful right to exclude others from the market"; thus a patent "conveys the right to cripple competition." The court recognized that, if the parties to this sort of case do not settle, a court might declare the patent invalid. But, in light of the public policy favoring settlement of disputes (among other considerations) it held that the courts could not require the parties to continue to litigate in order to avoid antitrust liability. . . .

II

A

. . . The patent here may or may not be valid, and may or may not be infringed. . . . [A valid patent] may permit the patent owner to charge a higher-than-competitive price for the patented product. But an *invalidated* patent carries with it no such right. And even a valid patent confers no right to exclude products or processes that do not actually infringe. The paragraph IV litigation in this case put the patent's validity at issue, as well as its actual preclusive scope. The parties' settlement ended that litigation. The FTC alleges that in substance, the plaintiff agreed to pay the defendants many millions of dollars to stay out of its market, even though the defendants did not have any claim that the plaintiff was liable to them for damages. That form of settlement is unusual. And, for reasons discussed in Part II–B, *infra*, there is reason for concern that settlements taking this form tend to have significant adverse effects on competition.

Given these factors, it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well. And indeed, contrary to the Circuit's view that the only pertinent question is whether "the settlement agreement . . . fall[s] within" the legitimate "scope" of the patent's "exclusionary potential," this Court has indicated that patent and antitrust policies are both relevant in determining the "scope of the patent monopoly"—and consequently antitrust law immunity—that is conferred by a patent.

Thus, the Court in *Line Material* explained that "the improper use of [a patent] monopoly," is "invalid" under the antitrust laws and resolved the antitrust question in that case by seeking an accommodation "between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act." 333 U.S., at 310. To strike that balance, the Court asked questions such as whether "the patent statute specifically gives a right" to restrain competition in the manner challenged; and whether "competition is impeded to a greater degree" by the restraint at issue than other restraints previously approved as reasonable. *See also United States v. United States Gypsum Co.*, 333 U.S. 364, 390–391, 68 S.Ct. 525, 92 L.Ed. 746 (1948) (courts must "balance the privileges of [the patent holder] and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize"); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) ("[E]nforcement of a patent procured by fraud" may violate the Sherman Act). In short, rather than measure the length or amount of a restriction solely against the length of the patent's term or its earning potential, as the Court of Appeals apparently did here, this Court answered the antitrust question by considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents. *See* Part II–B, *infra*. Whether a particular restraint lies "beyond the limits of the patent monopoly" is a *conclusion* that flows from that analysis and not, as THE CHIEF JUSTICE suggests [in his dissenting opinion], its starting point.

For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. In *United States v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963), for example, two sewing machine companies possessed competing patent claims; a third company sought a patent under circumstances where doing so might lead to the disclosure of information that would invalidate the other two firms' patents. All three firms settled their patent-related disagreements while assigning the broadest claims to the firm best able to enforce the patent against yet other potential competitors. The Court did not examine whether, on the assumption that all three patents were valid, patent law would have allowed the patents' holders to do the same. Rather, emphasizing that the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage," it held that the agreements, although settling patent disputes, violated the antitrust laws. And that, in important part, was because "the public interest in granting patent monopolies" exists only to the extent that "the public is given a novel and useful invention" in "consideration for its grant.". . .

Thus, contrary to the dissent's suggestion, there is nothing novel about our approach. What *does* appear novel are the dissent's suggestions that a patent holder may simply "pa[y] a competitor to respect its patent" and quit its patent invalidity or noninfringement claim without any antitrust scrutiny whatever, and that "such settlements . . . are a well-known feature of intellectual property litigation." Closer examination casts doubt on these claims . . . the authorities cited for this proposition (none from this Court, and none an antitrust case) are not on point. Some of them say that when Company A sues Company B for patent infringement and demands, say, $100 million in damages, it is not uncommon for *B* (the defendant) to pay *A* (the plaintiff) some amount less than the full demand as part of the settlement—$40 million, for example. *See* Schildkraut, *Patent–Splitting Settlements and the Reverse Payment Fallacy*, 71 Antitrust L.J. 1033, 1046 (2004) (suggesting that this hypothetical settlement includes "an implicit net payment" from *A* to *B* of $60 million—*i.e.*, the amount of the settlement discount). The cited authorities also indicate that if *B* has a counterclaim for

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damages against *A*, the original infringement plaintiff, A might end up paying *B* to settle *B's* counterclaim. Insofar as the dissent urges that settlements taking these commonplace forms have not been thought for that reason alone subject to antitrust liability, we agree, and do not intend to alter that understanding. But the dissent appears also to suggest that reverse payment settlements—*e.g.,* in which *A*, the plaintiff, pays money to defendant *B* purely so *B* will give up the patent fight—should be viewed for antitrust purposes in the same light as these familiar settlement forms. We cannot agree. In the traditional examples cited above, a party with a claim (or counterclaim) for damages receives a sum equal to or less than the value of its claim. In reverse payment settlements, in contrast, a party with no claim for damages (something that is usually true of a paragraph IV litigation defendant) walks away with money simply so it will stay away from the patentee's market. That, we think, is something quite different. *Cf. Trinko* ("[C]ollusion" is "the supreme evil of antitrust"). . . .

B

The Eleventh Circuit's conclusion finds some degree of support in a general legal policy favoring the settlement of disputes. The Circuit's related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement. . . .

We recognize the value of settlements and the patent litigation problem. But we nonetheless conclude that this patent-related factor should not determine the result here. Rather, five sets of considerations lead us to conclude that the FTC should have been given the opportunity to prove its antitrust claim.

First, the specific restraint at issue has the "potential for genuine adverse effects on competition." *Indiana Federation of Dentists,* 476 U.S., at 460–461 (citing 7 Areeda ¶1511, at 429 (1986)). The payment in effect amounts to a purchase by the patentee of the exclusive right to sell its product, a right it already claims but would lose if the patent litigation were to continue and the patent were held invalid or not infringed by the generic product. . . . Continued litigation, if it results in patent invalidation or a finding of non-infringement, could cost the patentee [a substantial sum], a sum that then would flow in large part to consumers in the form of lower prices.

We concede that settlement on terms permitting the patent challenger to enter the market before the patent expires would also bring about competition, again to the consumer's benefit. But settlement on the terms said by the FTC to be at issue here—payment in return for staying out of the market—simply keeps prices at patentee-set levels . . . while dividing that return between the challenged patentee and the patent challenger. The patentee and the challenger gain; the consumer loses. Indeed, there are indications that patentees sometimes pay a generic challenger a sum even larger than what the generic would gain in profits if it won the paragraph IV litigation and entered the market. *See* Hemphill, 81 N.Y.U.L.Rev., at 1581. *See*

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also Brief for 118 Law, Economics, and Business Professors et al. as *Amici Curiae* 25 (estimating that this is true of the settlement challenged here). The rationale behind a payment of this size cannot in every case be supported by traditional settlement considerations. The payment may instead provide strong evidence that the patentee seeks to induce the generic challenger to abandon its claim with a share of its monopoly profits that would otherwise be lost in the competitive market. . . .

But, one might ask, as a practical matter would the parties be able to enter into such an anticompetitive agreement? Would not a high reverse payment signal to other potential challengers that the patentee lacks confidence in its patent, thereby provoking additional challenges, perhaps too many for the patentee to "buy off?" Two special features of Hatch–Waxman mean that the answer to this question is "not necessarily so." First, under Hatch–Waxman only the first challenger gains the special advantage of 180 days of an exclusive right to sell a generic version of the brand-name product. *See* Part I-A, *supra.* And as noted, that right has proved valuable—indeed, it can be worth several hundred million dollars. *See* Hemphill, *supra,* at 1579; Brief for Petitioner 6. Subsequent challengers cannot secure that exclusivity period, and thus stand to win significantly less than the first if they bring a successful paragraph IV challenge. That is, if subsequent litigation results in invalidation of the patent, or a ruling that the patent is not infringed, that litigation victory will free not just the challenger to compete, but all other potential competitors too (once they obtain FDA approval). The potential reward available to a subsequent challenger being significantly less, the patentee's payment to the initial challenger (in return for not pressing the patent challenge) will not necessarily provoke subsequent challenges. Second, a generic that files a paragraph IV after learning that the first filer has settled will (if sued by the brand-name) have to wait out a stay period of (roughly) 30 months before the FDA may approve its application, just as the first filer did. *See* 21 U.S.C. §355(j)(5)(B)(iii). These features together mean that a reverse payment settlement with the first filer (or, as in this case, *all* of the initial filers) "removes from consideration the most motivated challenger, and the one closest to introducing competition." Hemphill, *supra,* at 1586. The dissent may doubt these provisions matter, *post,* at 15–17, but scholars in the field tell us that "where only one party owns a patent, it is virtually unheard of outside of pharmaceuticals for that party to pay an accused infringer to settle the lawsuit." 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, *IP and Antitrust* §15.3, p. 15–45, n. 161 (2d ed. Supp.2011). It may well be that Hatch–Waxman's unique regulatory framework, including the special advantage that the 180-day exclusivity period gives to first filers, does much to explain why in this context, but not others, the patentee's ordinary incentives to resist paying off challengers (i.e., the fear of provoking myriad other challengers) appear to be more frequently overcome. *See* 12 Areeda ¶2046, at 341 (3d ed.2010) (noting that these provisions, no doubt unintentionally, have created special incentives for collusion).

Second, these anticompetitive consequences will at least sometimes prove unjustified. . . . Where a reverse payment reflects traditional settlement

considerations, such as avoided litigation costs or fair value for services, there is not the same concern that a patentee is using its monopoly profits to avoid the risk of patent invalidation or a finding of noninfringement. In such cases, the parties may have provided for a reverse payment without having sought or brought about the anticompetitive consequences we mentioned above. But that possibility does not justify dismissing the FTC's complaint. An antitrust defendant may show in the antitrust proceeding that legitimate justifications are present, thereby explaining the presence of the challenged term and showing the lawfulness of that term under the rule of reason.

Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. At least, the "size of the payment from a branded drug manufacturer to a prospective generic is itself a strong indicator of power"—namely, the power to charge prices higher than the competitive level. An important patent itself helps to assure such power. Neither is a firm without that power likely to pay "large sums" to induce "others to stay out of its market." In any event, the Commission has referred to studies showing that reverse payment agreements are associated with the presence of higher-than-competitive profits—a strong indication of market power.

Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. The Circuit's holding does avoid the need to litigate the patent's validity (and also, any question of infringement). But to do so, it throws the baby out with the bath water. . . An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in turn, suggests that the payment's objective is to maintain supracompetitive prices to be shared among the patentee and the challenger rather than face what might have been a competitive market—the very anticompetitive consequence that underlies the claim of antitrust unlawfulness. The owner of a particularly valuable patent might contend, of course, that even a small risk of invalidity justifies a large payment. But, be that as it may, the payment (if otherwise unexplained) likely seeks to prevent the risk of competition. And, as we have said, that consequence constitutes the relevant anticompetitive harm. In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself.

Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuit. They may, as in other industries, settle in other ways, for example, by allowing the generic manufacturer to enter the patentee's market prior to the patent's expiration, without the patentee paying the challenger to stay out prior to that point. Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: What are those reasons? If the basic reason is a desire to maintain and to share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well

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possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments. In our view, these considerations, taken together, outweigh the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements.

III

The FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts reviewing such agreements should proceed via a "quick look" approach, rather than applying a "rule of reason." *See California Dental,* 526 U.S., at 775, n. 12 ("Quick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); We decline to do so. In *California Dental,* we held (unanimously) that abandonment of the "rule of reason" in favor of presumptive rules (or a "quick-look" approach) is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." 526 U.S., at 770; *id.,* at 781 (Breyer, J., concurring in part and dissenting in part). We do not believe that reverse payment settlements, in the context we here discuss, meet this criterion.

That is because the likelihood of a reverse payment bringing about anticompetitive effects depends upon its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification. The existence and degree of any anticompetitive consequence may also vary as among industries. These complexities lead us to conclude that the FTC must prove its case as in other rule-of-reason cases.

To say this is not to require the courts to insist, contrary to what we have said, that the Commission need litigate the patent's validity, empirically demonstrate the virtues or vices of the patent system, present every possible supporting fact or refute every possible pro-defense theory. As a leading antitrust scholar has pointed out, "'[t]here is always something of a sliding scale in appraising reasonableness,'" and as such "'the quality of proof required should vary with the circumstances.'" *California Dental, supra,* at 780 (quoting with approval 7 Areeda ¶1507, at 402 (1986)).

As in other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences. We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation. We reverse the judgment of the Eleventh Circuit. And we remand the case for further proceedings consistent with this opinion.

* * *

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. . . .

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. The lower courts largely have adopted this approach.[10] . . .

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.

> [Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe*. . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction . . . [Citing] Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641 (C.A. 7 1935), aff'd, 299 U.S. 3 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution. *Fortner I*, 394 U.S., at 514 n.9 (White, J., dissenting).

. . . 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 injury to consumers does not depend on whether the seller chooses to charge a supercompetitive price, or charges a competitive price but insists that consumers also buy a product that they do not want.

10. The examination of the economic advantages of tying may properly be conducted as part of the rule-of-reason analysis, rather than at the threshold of the tying inquiry. This approach is consistent with this Court's occasional references to the problem. . . . These cases indicate that consideration of whether a buyer might prefer to purchase one component without the other is one of the factors in tying analysis and, more generally, that economic analysis rather than mere conventional separability into different markets should determine whether one or two products are involved in the alleged tie.

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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,

which has little anticompetitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.[13] 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

[Justice O'Connor also analyzed the contract between the hospital and Roux as an exclusive dealing arrangement under the rule of reason. "Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal" (citing *Standard Stations*). This was not seen as an unreasonable restraint because "[a] firm of four anesthesiologists represents only a very small fraction of the total number of anesthesiologists whose services are available for hire by other hospitals, and East Jefferson is one among numerous hospitals buying such services."]

440. (a) What ground does the *Jefferson Parish* concurrence offer for eliminating the per se rule? Do you agree that the "Court has *on occasion* applied a per se rule" to tying? How would application of the rule of reason change the Court's approach? (Consider the extent to which the disagreements between the two opinions can be traced to the difference in rules.)[68]

(b) What do each of the opinions suggest to be the harms of tying?[69]

(c) Was there sufficient market power in *Jefferson Parish* to give rise to the harms in ¶b? How much market power in the tying product is deemed necessary by the majority?[70] The concurrence notes that such arrangements are practiced by many (most?) hospitals. What implication, if any, does this have for the market power issue?

(d) The Court states that the seller must use 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. Suppose that in *Jerrold* customers had been free to purchase service from other providers but Jerrold only offered to take $1 off the package price and few customers took this option. Under the *Jefferson Parrish* forcing test, are buyers "forced"? What principle would you use to determine whether the discount for procuring service elsewhere was large enough that the deal is not equivalent to forcing?[71]

(e) How does each opinion decide the "two product" issue? Which test do you find most persuasive? Would the result be different if all the anesthesiologists were the Hospital's full-time employees?[72]

(f) What were the redeeming virtues of the practice? Is majority footnote 42 or concurrence footnote 13 more convincing? What was the relationship between the exclusivity of the arrangement and the alleged virtues?

(g) Why do you suppose East Jefferson adopted this arrangement? Was it trying to gain monopoly power in the market for anesthesiologists? To control the quality of doctors practicing on its premises (and thus avoid malpractice suits)? Was it giving in to hidden channels of pressure by some groups of doctors who may, at least in part, dictate hospital policy in their self-interest? What would be the implications of each purpose for the legality of the practice? Did either opinion think it necessary to determine the most plausible explanation? (*See* majority footnote 41.)

13. The Court of Appeals disregarded the benefits of the tie because it found that there were less restrictive means of achieving them. In the absence of an adequate basis to expect any harm to competition from the tie-in, this objection is simply irrelevant.

68. As to the necessity to prove market power under the rule of reason, *compare* PSI Repair Servs. v. Honeywell, 104 F.3d 811, 815 n.2 (6th Cir.), cert. denied, 520 U.S. 1265 (1997) (requiring market power in the tying product under both per se and rule of reason analysis), *with* Brokerage Concepts v. U.S. Healthcare, 140 F.3d 494, 511 (3d Cir. 1998) (recognizing plaintiff's ability to proceed under rule of reason where appreciable tying power cannot be shown).

69. Some lower courts have interpreted *Jefferson Parish* as requiring a further threshold to per se illegality: that the plaintiff prove a substantial danger that the seller will acquire market power in the tied product as a result of the tie. *Carl Sandburg*, note 49; Smith Mach. Co. v. Hesston Corp., 1987 Trade Cas. ¶67563 (D.N.M.). For a criticism of the Court's taking an excessively narrow approach to the ways in which competition can be adversely affected, *see* W. D. Slawson, *A New Concept of Competition: Reanalyzing Tie-in Doctrine After Hyde*, 30 Antitr. Bull. 257 (1985).

70. *Compare* Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), cert. denied, 473 U.S. 908 (1985) (finding adequate market power under *Jefferson Parish* where defendant's operating system software was tied to purchases of central processing units of its computer system; copyright of software created presumption of market power, and evidence showed that many customers were "locked in" to defendant's operating system through substantial subsequent investments in applications software), *with* A.I. Root Co. v. Computer/Dynamics, 806 F.2d 673 (6th Cir. 1986) (rejecting presumption of market power from copyright, and finding no evidence that operating system involved was particularly unique or desirable). Courts routinely reject tying claims because they think the market share is too small in the tying market to harm competition. *See* Grappone v. Subaru of New England, 858 F.2d 792, 796 (1st Cir. 1988) (Subaru's 5.6 percent share of local automobile market was insufficient and that "*significant* market power—more than the mere ability to raise price only slightly, or only on occasion, or only to a few of a seller's many customers" is required); *Brokerage Concepts*, note 68 (holding HMO's 25 percent share insufficient); Allen Myland v. International Bus. Machs. Corp., 33 F.3d 194 (3d Cir.), cert. denied, 513 U.S. 1066 (1994) (share of 34.4 percent of mainframe market would be too low to impose liability); Western Power Sports v. Polaris Indus. Partners, 744 F. Supp. 226 (D. Idaho 1990) (31 percent of retail snowmobile sales insufficient as a matter of law), rev'd mem. on other grounds, 951 F.2d 365 (9th Cir. 1991), cert. denied, 506 U.S. 821 (1992). Note, however, that "[t]he primary function of requiring power over the tying product is to identify situations with the potential for unjustifiably harming competition. That office becomes superfluous once we know that the restraint in question has a detrimental impact on competition and is not adequately redeemed by legitimate functions." Areeda & Hovenkamp, note 1, at ¶1734b4.

71. *See* LePage's v. 3M, 324 F.3d 141 (3d Cir. 2003).

72. McMorris v. Williamsport Hosp., 597 F. Supp. 899 (N.D. Pa. 1984) (hospital's nuclear medicine department closed to outsiders, its full-time employee having exclusive control; defendant's summary judgment motion denied, but two-product question is stated to be closer than in *Jefferson Parish*).

EASTMAN KODAK CO. v. IMAGE TECHNICAL SERVICES

504 U.S. 451 (1992)

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

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., 457 U.S. 242, 255 (1986); *Matsushita.* Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims. *See Maricopa.*

Kodak manufactures and sells complex business machines—as relevant here, high-volume photocopier and micrographics 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 (OEMs). 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 1980s, ISOs 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. ISOs provide service at a price

substantially lower than Kodak does. Some customers found that the ISO service was of higher quality.

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

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.

As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts. Kodak and the OEMs agreed that the OEMs 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 ISOs. In addition, Kodak took steps to restrict the availability of used machines.

Kodak intended, through these policies, to make it more difficult for ISOs 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 ISOs 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.

As to the §1 claim, the court found that respondents had provided no evidence of a tying arrangement between Kodak equipment and service or parts. The court, however, did not address respondents' §1 claim that is at issue here. Respondents allege a tying arrangement not between Kodak *equipment* and service, but between Kodak *parts* and service. As to the §2 claim, the District Court concluded that although Kodak had a "natural monopoly over the market for parts it sells under its name," a unilateral refusal to sell those parts to ISOs did not violate §2.

The Court of Appeals for the Ninth Circuit, by a divided vote, reversed. With respect to the §1 claim, the court first found that whether service and parts were distinct markets, and whether a tying arrangement existed between them were disputed issues of fact. Having found that a tying arrangement might exist, the Court of Appeals considered a question not decided by the District Court: was there "an issue of material fact as to whether Kodak has sufficient economic power in the tying product market

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[parts] to restrain competition appreciably in the tied product market [service]." The court agreed with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refused to uphold the District Court's grant of summary judgment "on this theoretical basis" because "market imperfections can keep economic theories about how consumers will act from mirroring reality." Noting that the District Court had not considered the market power issue, and that the record was not fully developed through discovery, the court declined to require respondents to conduct market analysis or to pinpoint specific imperfections in order to withstand summary judgment. . . .

As to the §2 claim, the Court of Appeals concluded that sufficient evidence existed to support a finding that Kodak's implementation of its parts policy was "anticompetitive" and "exclusionary" and "involved a specific intent to monopolize." It held that the ISOs had come forward with sufficient evidence, for summary judgment purposes, to disprove Kodak's business justifications. . . .

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*. 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 the 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*. 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. Indeed, the development of the entire high-technology service industry is evidence of the efficiency of a separate market 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 this logic, we would be forced to conclude that there can never be separate

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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*.

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 ISOs.[8]

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*. It has been defined as "the ability of a single seller to raise price and restrict output." *Fortner*, *Cellophane*. The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. *Jefferson Parish*; Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611-613 (1953).

Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases [in] 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 ISOs, pressured Kodak equipment owners and independent parts distributors to deny ISOs 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 ISOs 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.

8. In a footnote, Kodak contends that this practice is only a unilateral refusal to deal, which does not violate the antitrust laws. Assuming, arguendo, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not.